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New penology and new policies

SUMMARY

This chapter focuses on key questions in penal policy. It also considers the principal factors which shape the development of penal policy, notably political imperatives, economic influences, penological and criminological principles, and the influence of public opinion. We review developments over the last two decades to highlight significant trends and problems. We conclude the chapter by focusing on the **governance** of sex offenders.



1.1 Introduction

1.1.1 Our approach

Our approach is to identify what counts as ‘justice’ in the context of sentencing and punishment, and why. We will therefore examine the ways in which Parliament, judges, and magistrates and criminal justice professionals seek to justify, impose and implement policies which convey particular answers to these fundamental questions about sentencing and punishment. So we are not concerned only with what ‘the law’ says about sentencing and punishment, but why the law has developed and whether it can be justified on the philosophical principles underpinning punishment. We are also concerned with what happens when the sentencing outcomes are put into practice: what is the experience of punishment like, what issues do these various penalties raise, do they achieve their intended results?

To understand how the state punishes, we will consider the relevant sentencing law, the policy guidelines, professional guidance, including national standards, and what we know about their implementation. Our interest lies not simply in ‘how much’ punishment, but also in wider questions about the range and types of punishment. In scrutinising why we punish we will discuss the ‘answers’ in two ways: first by analysing the political, policy, and pragmatic reasons and second, by focusing on penology—the study of the reasons and justifications underpinning the practice of state punishment. These two questions, the how and why, are linked. The policy reasons or penological justifications for state punishment may determine how the offender is treated. For this reason, each chapter in this book will integrate discussion of policy and theory with analysis of sentencing law or punishment practice.

This chapter will begin this project by reviewing key questions and concepts in penal policy and the major factors which influence its development. Chapter 1 will also look at the emergence, at the end of the twentieth century, of the ‘**New Penology**’ in criminology and of a rights-based jurisprudence in law, and will



explore some of the issues this raises in relation to recent sex offender legislation. At the end of this chapter, we will include a sentencing exercise, the aim of which is to encourage reflection on the practical outcomes which flow from adherence to one or other justification. Chapter 1 will look only briefly at penological theories; Chapters 2 and 3 will consider in more detail one of the classical justifications for punishment, **retributivism**, whilst Chapters 4, 5 and 12 will focus on **deterrence**, risk management and rehabilitation which reflect the other main justification of punishment, namely **utilitarianism**. Chapter 6 will focus on the more recent thinking in relation to **restorative justice**.



1.1.2 What is punishment?

We first need to consider what is meant by punishment. Punishment can be distinguished from other forms of pain or suffering such as a painful treatment for a medical condition where the harm is not an expression of moral condemnation, and not a response to our misdeeds. Punishment rests on moral reasons, the expression of moral condemnation, in response to rule infringements. Indeed, Feinberg (1994) refers to **censure** or condemnation as the defining feature of punishment. What distinguishes punishment, says Feinberg, is its expressive function: 'punishment is a conventional device for the expression of attitudes of resentment and indignation, ... Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties' (Feinberg 1994: 73). A penalty in football is not comparable to imprisonment in terms of public reprobation. Punishment is 'a symbolic way of getting back at the criminal, of expressing a kind of vindictive resentment' (ibid: 76). Condemnation or denunciation, he says, conjoins resentment and reprobation.



The criminal law distinguishes between regulating and punitive statutes, often imposing strict liability in the former case. But in practice the line between regulation and punishment may not be so clear-cut which can cause problems. For example, in the United States there are constitutional safeguards for those facing punishment which are not available if the measure is construed as a regulatory activity. So if a repressive act is defined as non-punitive, then the individual will be in a worse position. Feinberg gives the example of the case of *Flemming v Nestor* (1960). Here an old-age pensioner was deported and then deprived of his social security benefits, because of his membership of the Communist Party for four years during the 1930s, yet the US Supreme Court held that the loss of benefits was not punitive, but simply incidental to the regulation of an activity. In European Convention jurisprudence there are similar arguments about what constitutes punishment in relation to Article 7 of the Convention. In *Gough v Chief Constable of Derbyshire* (2001), for example, the Court held that a football banning order was not a penalty for the purposes of Article 7. Similarly, the European Commission of Human Rights held that the sex offenders' registration scheme did not constitute a penalty in *Ibbotson v UK* (1999). A similar approach was taken by the House of Lords in relation to anti-social behaviour orders (ASBOs) in *R (McCann) [2003]* where their Lordships held that an application for an ASBO was a civil and not a criminal matter as they are designed to prevent behaviour rather than to punish, do not appear on criminal records and do not immediately entail imprisonment.

A key feature of punishment is that it rests on a moral foundation, expressing a moral judgement. It is reflective and based on reasons. A further distinguishing feature of punishment is that it stems from an authoritative source, usually the state. Suffering consequent upon misdeeds is not punishment unless those who inflict it have authority over the offender. If we imagine that a murderer chased by the police crashes his car and dies before he can be tried, he has not suffered punishment but escaped it. Even if we conceive of misfortune befalling a person who commits a bad deed, as 'God's punishment', we are still conceiving of punishment as derived from authority.

Although our focus in this book will be on state punishment, of course punishment may also be informal in so far as it is imposed outside the formal criminal justice system. Informal justice developed as an alternative to state-centred methods of dispute resolution as the parties sought to recapture conflicts from professionals (see Christie 1977; Abel 1982; Matthews 1988; and Chapter 6). An extreme form of informal justice would be vigilantism and state punishment is usually seen as a necessary means of avoiding the excesses of unrestrained popular justice, by satisfying the public's demands for punishment.

1.2 Understanding penal policy

1.2.1 Key questions

The question of why some acts are criminalised and not others, and why society deals harshly with some wrong-doing but lightly with others, is much debated in criminology. But when we consider this in relation to penal policy, a fundamental issue is why punishment is seen as an appropriate response to a specific event or mode of behaviour. This entails asking three questions:

- first: what particular response is made and why?
- second: if the response is penal, which particular penal option is selected?
- third: what is the particular level of penal response?

These three dimensions of penal policy, what to punish, how to punish, and how much to punish, will shape policy outcomes and while this book will focus principally on the last two, the first is still important as it sets the scene for the latter two elements.

In looking at the first question, we might ask why the response is punitive, rather than taking some other form, such as social assistance or a medical response. The offender might be seen as a wicked person who should be punished, or as a sick person requiring treatment, or as an inadequate individual whose criminality is the result of social deprivation and who needs social welfare policies to address that problem, as well as appropriate crime-prevention strategies. So, in some societies, such as Stalinist Russia or modern China, wrong-doing may be met with a medical response, using medical incarceration for political dissidents. Or, currently, the unruly behaviour of children might be controlled through drugs such as Ritalin which is popular in America and the UK. Experiments have also been conducted using vitamin supplements on young offenders at Aylesbury Young Offenders'

Institution in England, with positive results on behaviour in that the group receiving vitamins committed fewer disciplinary offences than the group given placebos (see Gesch *et al.* 2002).

So the punitive response is only one of several possibilities and each response will rest on a particular model of human behaviour. In practice we may find a combination of policies and strategies, depending on the type of offence and offender and on the political climate. Political pressures may also shift the reaction to crime and disorder from a penal response to a military response. Examples of this approach would be the use of troops to deal with sectarian conflict and disorder in Northern Ireland and in response to strikes in the UK and of course, in recent years, military responses have dominated the United States' fight against terrorist crime. However, it is conceivable that, in other contexts, pressures on governments might engender a move away from penal and punitive responses to a welfarist response, to address problems in communities by supporting disadvantaged groups and promoting social inclusion. So we may find a variety of strategies depending in part on pressures on governments.

Secondly, in terms of the particular type of response made through penal policy, a number of options may be available, from educational programmes, such as driver education or anger management, through to extreme punishments such as execution. Thirdly, in reviewing penal policy, we should consider the level of response via penal policy, in other words, how long is the sentence of imprisonment, how heavy is the fine, and how firmly is the response enforced.

1.2.2 Equality, fairness and justice

Understanding penal policy also requires a focus on equality and fairness, particularly if some groups are selected for harsher punishment or if apparently neutral policies have differential impact. The concern with equality of impact in the late 1980s and the 1990s focused on disparities in sentencing (see Chapter 10), as well as on direct and indirect discrimination. This was also reflected in changes in the criminal law itself; for example, the Criminal Justice Act (CJA) 1991 made racial motivation an aggravating factor in assaults, and s 95 of the same Act imposes a duty on the Secretary of State to publish information considered expedient to enable those involved in the administration of criminal justice to avoid discriminating against any person on the ground of race, sex, or any other improper ground (see Chapters 10 and 11). The principle of equality has also entered penal policy debates on the impact of apparently equal punishments imposed on individuals who are not equal. Examples of potentially unjust punishments would include fines which are unrelated to means, or the impact of punishment on people with particular medical conditions, for example those offenders who are mentally disordered (see Chapter 7, section 7.4). Policies may also indirectly discriminate against certain groups, such as women with children, or directly discriminate if there are problems of bias in the imposition of punishment (see Chapters 10 and 11).

Injustice may, then, operate at each of the three levels we have identified, in terms of what is punished, how an offender is punished, and how much an offender or offence is punished. Hudson's experience of sitting in courts in the 1980s and early 1990s gives a picture of disparity and variability in offences leading to imprisonment, but consistency in vulnerability to custody of the homeless, the mentally ill,

and the unemployed. Using the examples of burglary and racial harassment, she argues that ‘sentencing patterns reveal a vast difference between serious crimes and crimes taken seriously’ (Hudson 1993: 77). For Hudson, contemporary penal practice does not satisfy standards of social justice and fails to deliver criminal justice as fairness and equity to offenders: we should treat like offences similarly and should not penalise people for what/who they are but only for what they have done. Moreover, the selective use of community punishments may increase inequalities. She argues that ‘penal policy has its ultimate justification that it contributes to social justice’ (1993: 12) but acknowledges that ‘commensurate punishment is not always the “just” solution; there are occasions when not to punish might be just’ (1993: 13). Significantly, she sees penal policy—actions taken by political actors concerning selection of goals and means to achieve them—and social policy—usually referring to the provision of welfare goods and services—as linked. In practice they deal with the same client groups and are influenced by the same ideological movements and the same socio-economic contexts and there are similarities between policies towards offenders and the mentally ill. Examples would be the deinstitutionalisation of the mentally ill into community care, the transcarceration from hospitals to prisons, the falling numbers in mental hospitals and the criminalisation of mental disorder, the increasing use of imprisonment, the declining influence of psychiatry, the rise of the market, and the decline of welfare support.

Of course the notion of justice is not clear-cut: like ‘rights’, justice is a slippery concept which has been used by both right and left to embody aspirations and to legitimise policies. Justice was stressed by the Woolf Report (Woolf and Tumim 1991) as one of the key principles which should govern the treatment of prisoners (see Chapter 9). A sense of injustice, it argued, was an important contributory factor in the prison riots of 1990. ‘Justice’ has also been a key strand of New Labour policy, expressed in the White Paper *Justice for All* (Home Office 2002a), which said the government’s aim was to ‘narrow the justice gap’ by which it means reducing the gap between the number of crimes reported to the police and the number of offenders brought to justice. *Rebalancing the Criminal Justice System in Favour of the Law-Abiding Majority* (Home Office 2006a) stressed that people want to see the system ‘delivering justice—with fairer sentencing and fewer occasions when the system seems to let the offender off the hook’ (ibid: para 2.2). In a recent strategy document the Home Office also describes its role as ‘supporting the efficient and effective delivery of justice’ (Home Office 2008: 2).

Justice embodies notions of fairness to all members of the community, including victims and offenders, and striking a balance between their competing interests is the cornerstone of current criminal justice policy. But it also assumes a consensus on what constitutes justice, and achieving justice in terms of improving conviction rates, for example, may create injustice for particular individuals or groups. What is construed as fair treatment means different things in different theories of social justice,¹ but its construction also depends on how punishment is rationalised in the different theories of punishment which moral philosophers,

¹ For discussions of notions of justice see, for example, the following texts: Campbell (2001) and Rawls (1971) for a liberal concept of justice; Rhode (1989) and Heidensohn (2006) for feminist standpoints; Nozick (1974), for an individualist approach.



penologists, and criminologists have developed, notably the classical theories of retributivism and utilitarianism. By retributivism is meant the approach which links punishment according to the desert or **culpability** of the individual and which matches the severity of the punishment to the seriousness of the crime and the culpability of the offender. By utilitarianism is meant the approach which sees individuals as motivated by the pursuit of pleasure and avoidance of pain and uses this to devise social and penal policies to promote the greatest happiness of the greatest number. Punishment, on this approach, is used to prevent offending and reoffending through deterrence, **incapacitation**, and rehabilitation.



Consequently, determining what constitutes the justice of a particular punishment requires a decision on the theory of punishment to be deployed: just punishment from a retributivist standpoint might seem unjust from a utilitarian perspective and vice versa. As we shall see later, preventive detention may be justifiable if the interests of the wider society are given priority over individual rights but this raises problems for retributivism.

The dominant concept of justice may be only one of a number of key factors to consider in identifying the influences on modern penal policies: others might be ideologies, such as *laissez-faire* liberalism, which is essentially individualistic and construes society as a collection of egoistic individuals in which the state's role in economic and other spheres is minimal, and communitarianism, its opposite, which focuses on interdependence between citizens within the social framework, mutual obligations, trust and group loyalty (Etzioni 1993). Other influences on penal policy which may be significant are political and economic factors and the role of public opinion. So a recurring theme in the following discussions will be the justice and injustice of punishment in the political and economic context in which decisions are made and policies formulated.

1.2.3 Human rights

Human rights have implications for both the theory and practice of punishment in justifying specific punishments, in assessing the justice of punishments, and in improving standards in penal institutions. Human rights instruments are, then, a key mechanism for achieving just punishment and rights are themselves an important element of many theories of punishment. For example, natural rights are a significant dimension of retributivist theory, which recognises the right of the offender to be treated with respect as an autonomous human being. Rights have therefore provided a way of criticising the penal system in the UK which has been strongly influenced by utilitarianism, an approach which has been criticised for its failure to acknowledge the rights of the offender and for sacrificing the individual's rights for the wider public interest (see Chapter 4, section 4.4.3). Rights also have implications for issues such as the interviewing and detention of suspects before trial, the treatment of remand prisoners and the granting of bail, the defendant's right to a fair trial, the right to be presumed innocent, the treatment of witnesses, preventive detention, the right to be released when one's sentence is served, and the right not to be subject to unfair or discriminatory treatment. These principles may act as a control on judicial **discretion** and inhibit disparities in sentencing. Rights also extend to victims of crime and help shape policy on their role in the criminal process, on their entitlement to redress. These issues will be considered



further in subsequent chapters in relation to the principal justifications of punishment and to sentencing policy and practice.

Rights have an important function in protecting prisoners from the excessive zeal of their keepers and, if prisoners retain fundamental rights as human beings while serving their sentences, this will help to ensure that they are treated with dignity. A system of punishment which respects human rights will have more legitimacy than one which rides roughshod over them, particularly as utilitarian arguments have failed to protect prisoners. Rights are therefore crucial to penal theory and practice and, while rights may be limited when rights are infringed, the state's justifications for doing so need to be interrogated. A rights standpoint is an important critical tool for assessing systems of punishment, providing a check on powerful regimes, and on **populist punitiveness**. The term 'populist punitiveness', coined by Bottoms (1995), refers to the increased punitiveness of governments which they believe will appeal to the public and which has been used to justify increases in sentence severity.

For penal reformers, rights are seen as a way of achieving reform, although not all radical reformers share a commitment to a rights approach. Some Marxist theorists of law, who believe the rule of law may mask social injustice, are suspicious of rights because they are essentially individualist rather than collectivist, abstracting the individual from the historical and social context, and because they fail to deliver substantive justice (Easton 2008a).

There are, of course, problems of defining rights in jurisprudence. There is a huge body of literature with disagreement over what rights mean and what they entail, what should be included within their scope, and who possesses them. For Dworkin (1977), the right to equal concern and respect is paramount, while others have broadened their concern to include social rights (Marshall 1950, Titmuss 1968, Burca and de Witte 2005), and some see rights as a means of satisfying human needs (Campbell 1983). But they share a conception of fundamental rights as existing beyond positive law, that is, formal, black letter law in cases and statutes. Rights are entrenched and occupy a privileged position, protecting the individual from the state and protecting the weakest individuals from the majority. For Dworkin (1977, 1986), rights trump utility and, whilst rights may be limited if they conflict with competing rights, the circumstances in which this may occur are carefully drawn and more narrowly defined than on classical utilitarian models. Rights theorists argue that rights apply to all equally: even the worst offenders, such as war criminals, have procedural rights, for example, to take part in their trial, and, when convicted, to non-degrading punishment. Because rights are universal they have a crucial role to play in the practice of punishment and apply to all offenders and ex-offenders: the mark of a civilised society is to respect the rights of all.

Rights have implications across the criminal justice system and at all stages of the criminal justice process, but we will be particularly concerned with the impact of a rights jurisprudence on the experience of custody. Due process and substantive rights have implications for the treatment of prisoners. For example, they can achieve fairer treatment in the context of disciplinary procedures and decision making over issues such as segregation and transfers, but also in terms of substantive rights to food, exercise, and time unlocked. The European Convention on Human Rights had a considerable impact in improving prisoners' lives in the UK long before the Human Rights Act 1998 was passed. Following key decisions the

UK has had to change secondary legislation, including the Prison Rules as well as Prison Service Orders, to comply with the European Court of Human Rights' judgments and English judges have followed, for the most part, the recommendations of the Strasbourg court. These issues will be considered in relation to imprisonment and prison policy in Chapter 9, section 9.6.

1.3 Influences on penal policy

What is seen as an appropriate response to crime—the type and level of response—may reflect political and ideological principles. Ideologies are chains of interrelated ideas, the principles underpinning penal policies. For example, laissez-faire liberal ideology, which was in the ascendant during the Thatcher period, has had an enduring resonance and is reflected in **New Managerialist** approaches to the criminal justice system, including the **privatisation** of prisons and a concern with efficiency and economy of punishment, while welfarist ideologies have declined since the 1980s, although New Labour has tried to chart a path, or 'Third Way', between them (see Giddens 1998, 2000).



1.3.1 Political imperatives

The political dimension raises questions about power; how much power a government has to implement policy. With a large majority in the House of Commons when it first came to power, the New Labour administration was in a strong position to enact its legislative programme although it subsequently met opposition from the House of Lords on issues such as fox hunting and jury trial. A weaker government may have to rely on the support of opposition parties or powerful interest groups to gain acceptance for a particular policy.

Currently, however, there is a large measure of consensus between the main political parties on law and order policies, and it is unlikely that a party would adopt a 'soft' policy on crime because of the perception that public opinion would be hostile (see section 1.3.3). Underpinning the apparent public desire for tougher criminal justice policies is a mistaken public belief that offending is on the increase. In the 2002 British Crime Survey (BCS), the numbers who believed crime was getting worse rose from 56 per cent in 2001 to 71 per cent in 2002; similarly, three-quarters of those questioned by the BCS in 1996 thought crime had increased, as did 59 per cent in 1998 and 67 per cent in 2000. Yet crime rates actually fell by one-third and violent offences by 36 per cent in the period 1995–2001, with a further fall of 9 per cent in 2002, and the latest figures from the British Crime Survey (Nicholas *et al.* 2007: 15) show that, since peaking in 1995, overall crime has fallen by 42 per cent, violent crime by 41 per cent, and domestic burglary and thefts by more than a half (59 and 61 per cent respectively). Recorded crime figures showed a similar trend. Comparing 2005/6 with 2006/7, the BCS found an increase of 10 per cent in vandalism, but violent crime was stable, while recorded crime figures showed a 1 per cent fall in violence, a 7 per cent fall in sexual offences and a 3 per cent increase in robbery (*ibid.*: 16). Of course, rates of victimisation are not uniform with some groups, individuals and residents of particular postcode areas

being at greater risk than others. The Carter Report (Carter 2007) refers to polls showing that 65 per cent of the public think that crime is increasing, 79 per cent think sentence lengths should not be shortened, and 57 per cent think that the number of people sent to prison should not be reduced (*ibid*: 6).

The entrenched belief that the public is punitive makes it difficult for governments to win support for reductionist policies. The government's awareness of this became clear in the debate in the winter of 2002 when the Court of Appeal in *R v McInerney, R v Keating* (2002) issued new guidelines for domestic burglars, under which a domestic burglar who previously would have been sent to prison for 18 months or less should in future receive a community sentence (see Chapter 3). The Court acknowledged the need to promote public confidence in the criminal justice system, the costs of different sentences and their relative effectiveness in preventing reoffending, prison overcrowding, and the limits on what the Prison Service could achieve in rehabilitating a prisoner during a short sentence, in comparison with positive evidence of results achieved by punishment in the community. For a low-level first-time burglar and some second-time burglars, a community sentence was deemed appropriate, provided action could be offered to address the underlying criminal behaviour and other problems such as drug addiction.

However, this guidance, supported by Lord Irvine, the Lord Chancellor, who agreed that prison should be a last resort, led to criticism in Parliament and in the press. It was criticised by the then Home Secretary David Blunkett and also by the then Metropolitan Police Commissioner (Sir John Stevens) as well as by the Police Federation who expressed fears that the guidelines would give a green light to burglars who had not yet finished their Christmas shopping! Lord Woolf later said that he had been misrepresented and the charge in the press that the Government was 'going soft on burglars' was vehemently denied by the Prime Minister,² who stressed that imprisonment should be given for repeat offenders regardless of the problems of prison overcrowding.

This episode also highlights the difficulties facing the government when the political need to pursue policies and practices deemed by the public as legitimate conflicts with economic imperatives. Which priority 'wins' may depend on whether the policy would be implemented early or late in the government's term of office. Public opinion is a crucial pressure on the government at election time as parties try to capture floating voters, but may also be a significant force between elections at party conferences and in the constituencies. So political expediency may lead to the decision that it is not worth implementing an unpopular policy even if it saves money or, conversely, may implement a popular policy which imposes huge financial costs. An example of the latter would be the strong commitment of the governments of the 1990s to prison building and expansionist programmes, which were very expensive, but were intended to show to the public that they were taking their concerns on crime seriously. On the other hand, the government may negotiate these conflicts by trying to formulate policies which appear to protect the public while reducing costs: an example would be risk management which can reduce costs by focusing on those posing the highest risk of serious harm to the public. Certainly, since 1990 the key policy aim of public protection has been reflected

² In Prime Minister's Questions, House of Commons, 8 January 2003.

in the CJA 1991 and in subsequent legislation and developments, including the establishment of Multi-Agency Public Protection Arrangements (MAPPAs). There is a legal requirement on the police, probation, and prison service in each of the 42 areas of England and Wales, to establish arrangements to assess and manage risks posed by sexual and violent offenders, to review and monitor these arrangements, and to publish annual reports.³

Another policy scenario is that a government may find it is unable to relinquish a policy because it is so popular. For example, in the United States it may be politically damaging to retreat from the death penalty, when a large majority of the population support it and candidates try to exceed each other in their zealous commitment to it. Governor George Ryan of Illinois waited until he was retiring from office in January 2003 before commuting the death sentence for all 167 prisoners on death row in the state at that time. In the UK Home Secretaries have been heckled in the past at party conferences if perceived to be weak on law and order, and crime has been a recurring key election issue in party manifestos. Powerful interest groups may also affect policy regardless of which government is in power, and in the UK the Police Federation exerts a strong influence, competing with those working with offenders such as NACRO and the Prison Reform Trust. When the Government is pursuing a policy of 'rebalancing' the criminal justice system in favour of the law-abiding, then the relative power of groups representing the public may be an important factor in policy initiatives.

Negotiating public opinion may be particularly hazardous for the government when it is difficult to gauge public opinion. During a period of anxiety over prison escapes and security in the mid-1990s when the Conservative government was under strong pressure to deal firmly with prison security, a press report of a woman shackled during childbirth led to public outrage: the government misjudged the mood of the public and was forced to modify the policy.

One particular policy technique is that of diverting attention by blaming individuals for crime or targeting and demonising particular groups such as sex offenders (section 1.6) in order to defuse hostility to the government over crime and disorder. There are also examples from the recent past of how dysfunctional and anti-social families, juveniles, single-parent families, and truants have been selected as criminogenic categories (see Day Sclater and Piper 2000). Professional failures, for example of social workers and teachers, have also been highlighted for criticism.

1.3.2 The costs of punishment: economic influences

Penal policy can be seen as the result of a negotiation between the desire to sanction a moral code and the problem of limited resources to do so. Economic factors may be much more influential than penological theories and there may be conflicts between the Treasury and the Home Office over penal policy. The option which may best satisfy the public, namely imprisonment, is also the most expensive in terms of staffing and capital costs. The view that 'Prison Works' famously expounded by Michael Howard, the former Conservative Home Secretary, is very costly to implement. So a society has to negotiate both the amount of censure and

³ See Wood and Kemshall (2007) for a review of the workings of these arrangements.

the amount of punishment it can afford to incorporate into its penal policy. Some popular policies have proved massively expensive, as in the case of the 'Three Strikes' legislation found in many states in the USA including California and Washington. These are mandatory minimum sentencing schemes aimed at repeat offenders, where the third sentence mandates 25 years to life in prison.

Crime and punishment are costly in financial terms, to individuals who pay increased insurance premiums and to the public whose funds are used to finance law enforcement and punishment. As this is a substantial economic burden, inevitably costs are a significant influence on penal policy. Financial concerns became increasingly important in the 1990s, not just because of the ascendancy of New Right ideologies, but because increased punitiveness was reflected in prison expansion which led to substantial cost increases. When the Royal Commission on Criminal Justice was set up in 1993 to examine the effectiveness of the criminal justice system in England and Wales in securing convictions of those guilty of criminal offences and acquittals of the innocent, its remit included having regard to the efficient use of resources (RCCJ 1993). These economic pressures posed real problems for governments in the 1990s—and now again at a time of threatened recession—with the need to respond to the public's demand to reduce crime and to make society safe, but also to cut taxes.

The cost of processing offenders is potentially enormous if expensive penal options such as custody are freely used, so one way of negotiating this conflict has been to represent community penalties as punitive in order to win public support for them. Cost effectiveness, or Value for Money, the allocation of scarce resources in the most efficient way, has become an increasingly important criterion for evaluating penal policy in recent years and we find in the Halliday Report (2001) an emphasis on assessing the costs and benefits of specific measures. Although the origins here are in New Right theory, as reflected in the Citizen's Charter, the quest for economic efficiency was adopted by New Labour and has permeated the public management of a wide range of institutions. All public sector institutions and agencies have to justify their spending with transparent and comparable measurable results. The focus on value for money is a key feature of the New Managerialist approach, reflected in the New Public Management. This approach applies methods from the private sector to the public sector, incorporating a concern with the efficient use of resources, the use of Key Performance Indicators, transparency, a move towards performance-related pay, a stress on competition and **contestability**, that is opening up the market to new providers of goods and services, and the use of incentives regardless of the type of organisation, targets, and league tables comparing levels of efficiency. New Managerialist policies have been applied to Probation, the Police, and the Prison Service, to ensure the best use of resources. Further measures to cut costs include a policy of privatisation of entire prisons or selected services within prisons or in the context of community punishment, and making greater use of voluntary organisations where appropriate.

When deciding *what to punish* some offences may be uneconomic to punish, such as minor infringements or minor drugs offences which may exist on the statute book but not be enforced. Other offences, such as counterfeiting of notes, may need strong sanctions because they will destabilise the economy. Although the criminal law incorporates a moral code, that is, value judgements about expectations of behaviour, there will always be grey areas, particularly in relation

to issues such as sexual behaviour and recreational drug use. In terms of *how to punish*, clearly a community sentence is cheaper than a custodial sentence, while the death penalty may also be cheaper than life imprisonment, although of course this would depend on how the calculation is made; for example, whether collateral costs of appeals and reviews are included within the calculation.

In terms of *how much to punish*, a heavier sentence is more expensive than a lighter sentence, although it may offer more opportunities for rehabilitation which may, in the long term, cut the costs of crime. So when we talk of the 'prison crisis', it is not only a question of physical conditions or overcrowding or disorder, but also a fiscal crisis, with the burden of prison building falling on taxpayers, diverting funds from other essential public services. As it is a labour-intensive mode of punishment, the largest running cost of imprisonment is labour, although prison officers are not a very highly paid group. These costs escalated in the 1990s as the prison population increased dramatically, from 45,636 in 1990 to 64,600 in 2000. By 2000 the annual cost was in excess of £16 million. In 2006–7 the average cost per prison place was £28,734 and the average cost per prisoner was £26,737 so with a prison population in excess of 80,000 this represents a cost of over £22 million (HM Prison Service 2007a). In addition to running costs, there are capital costs of building prisons and indirect costs, such as welfare support for dependants affected by the imprisonment of the breadwinner, and costs to the economy with the loss of productive labour and associated revenues.

1.3.3 The influence of public opinion on penal policy: a known unknown?

Public opinion is a key variable in shaping the response to crime and disorder. Indeed, many would argue that public opinion on law and order has been the major influence on penal policy and particularly on levels of punishment since the 1990s. Public opinion may be expressed through electoral choice, public opinion polls, focus groups, or sometimes by direct pressure on sentencers. Judges regularly receive letters from disgruntled members of the public complaining about sentences, mostly because they are seen as too short. Magistrates who undertake the bulk of sentencing see themselves as dispensing popular justice, as representatives of the public, and believe that they should respond to public opinion (Brown 1991), although many members of the public complain that judges and magistrates are out of touch with what the public want.

Public opinion can be orchestrated to win support for policies, and public opinion and **moral panics** about particular crimes can be fanned by the media. Since the late 1980s the public mood in Britain has been more favourable to punishment as the main response to criminal behaviour. New Labour and past Conservative governments have both responded to and, arguably, encouraged the punitiveness of the public. However, Johnstone (2000) argues that what is distinctive about New Labour's approach is that it has imposed a duty on the public to actively participate in crime reduction but, by denying genuine participation in penal policy decision making, has made an emotional and vengeful reaction by the public more likely.

As we saw in relation to political imperatives, public opinion is important in the sense that, for a criminal justice system to be effective, it must have legitimacy in the eyes of the public. This creates a conflict for professionals in a number of

areas of the criminal justice system in that agencies such as the police have to be accountable to the public, yet may feel frustrated by the conflicting pressures to control crime while following rules and procedures designed to safeguard civil liberties. This conflict is reflected in efforts to strike a balance between civil liberties and crime control in the Police and Criminal Evidence Act (PACE) 1984, in the Report of the Royal Commission on Criminal Procedure (RCCP, 1981) which preceded it, and was recognised by the Royal Commission on Criminal Justice in its Report (RCCJ 1993). These tensions may also be reflected in 'noble cause corruption' as the police search for ways to neutralise the constraining effects of PACE. It may also be difficult to retain public support when the avowed aims of penal institutions and the criminal justice system are not fulfilled, if crime increases and the system of punishment seems to be ineffective. The Government's current emphasis, expressed in the document *Rebalancing the criminal justice system in favour of the law-abiding majority: cutting crime, reducing reoffending and protecting the public* (Home Office 2006a), is to strike the right balance between the needs of the law-abiding majority, including victims and witnesses, and avoiding privileging the offender over the victim (ibid: para 2.9).

The government's populist punitiveness is problematic because it reinforces the view that crime can be controlled through punishment and leads to problems when harsher punishment does not succeed in controlling crime, as Brownlee notes (1998a). Once the government pursues the punitive route it may find that the public is never satisfied and that the demand for punishment exceeds the supply of punishment.

Moreover, by reacting strongly to the perceived public concerns over crime, governments may, ironically, increase the public's punitiveness. In any case, it is arguable that measures to control crime will not work without attacking deeper social causes and hence the problem of social exclusion needs to be addressed (see Young 1999, Byrne 2005).

The Labour governments have been very concerned to promote public confidence in the criminal justice system, to stress the need to evaluate the cost effectiveness of different sentences, to achieve more consistency in sentencing, and to introduce stronger punishments for repeat offenders. Section 80 of the Crime and Disorder Act 1998 required the Court of Appeal to consider producing sentencing guidelines where there are none, and to review existing guidelines, and this initiative was taken further in the CJA 2003 (see Chapter 2). As we saw earlier, in relation to new guidelines for burglary, this has led to conflict with, and splits within, the judiciary over the desirability of custodial sentences.

One problem already alluded to is how to identify accurately the public's opinion on issues of crime and punishment. We cannot infer it just from the headlines of the popular press, for the media may shape public opinion as well as simply reflect it. Most of our knowledge of public opinion comes from the British Crime Survey (BCS) and similar social scientific research. Identifying attitudes to sentencing may also be problematic in so far as reports of attitudes to sentencing may reflect the methodologies used, as Hutton (2005) has argued. If more information is given in the scenarios presented to respondents, then a more lenient response may be elicited. The BCS confirms a high level of fear of crime, although this does not necessarily correlate with the actual risk of victimisation. The public also want strong penalties for violent crimes, but may be willing to accept the decreased use

of imprisonment for some crimes and do not object to community punishment for lesser crimes.

Public opinion does impact on legislation but while it may reflect genuinely deeply felt anxieties, it might also be based on inaccurate views and information. Using data from the 1996 British Crime Survey which involved 16,348 respondents, Hough and Roberts (1998) found that the public in England and Wales displayed widespread ignorance about crime levels, overestimating crime levels, particularly for violent crime—especially in relation to mugging, rape, and burglary—and underestimating the severity of the criminal justice system in dealing with crime. They also found that the British public are not necessarily excessively punitive, but are often ill-informed about sentencing and, once aware of the levels of sentencing, are more willing to accept them and the public seem unaware of the increased use of imprisonment in recent years. Hough and Roberts found that the most ill-informed members of the public were readers of the popular press.

Mattinson and Mirrlees-Black (2000) found similar attitudes expressed by respondents in the 1998 British Crime Survey: 8 out of 10 thought sentences were too lenient, as in 1996, and 59 per cent of the sample thought recorded crime had risen between 1995 and 1997 whereas it had actually fallen by 10 per cent. They found that there was still a tendency to overestimate the amount of violent crime and underestimate the use of custody for the serious offences of burglary and rape. Yet, whilst they wanted custodial sentences for persistent offenders, respondents did not necessarily support more prison building: they wanted to punish some offenders in ways which were cheaper than prison but tougher than probation. Interestingly, when the respondents were given a sentencing exercise to undertake, they were more lenient than the sentencing guidelines and there was no evidence that being a recent victim increased the punitiveness of their sentencing. This accords with earlier research which suggests that victims are no more punitive than the average person, and may want redress or compensation rather than harsh punishment (see Kelly and Erez 1997). They also found little change in public confidence in the criminal justice system since 1996.

A key objective of current government policy is to reduce crime and fear of crime and thereby to promote confidence in the rule of law. But the public's views on sentencing come in part from the media and the media tends to focus on erratic sentencing rather than dull sensible sentencing, and on grisly violent crimes rather than routine everyday crimes. American and English crime and police television series tend to concentrate primarily on violent crime rather than crimes like 'tweeking' (taking a vehicle without the owner's consent), even though such crimes are far more significant in terms of numbers. The press have also highlighted those cases where dangerous offenders have been released without appropriate supervision and have reoffended, heightening public anxieties. For example, Anthony Rice was convicted of murdering Naomi Bryant in 2005 while released on licence. A subsequent report was very critical of cumulative failings which meant that the risk of harm was not properly assessed or dealt with (HM Inspectorate of Probation 2006a). It is important that information made available to the public is accurate as the public's views on sentencing are shaped partly by the information available.

Recent British Crime Survey findings suggest a continuing fear of crime but again the fear of crime did not correlate with actual risk of victimisation or levels of

crime. Since the mid-1990s the risk of victimisation and the crime rate have fallen (Nicholas *et al.* 2007: 15). The BCS for 2006/7 found that a relatively high proportion of people believe that crime has risen both nationally and in their local area (*ibid.*: 110) and that women, older people, members of ethnic minority groups, and readers of the tabloid press, were most likely to believe that there were high levels of crime (*ibid.*: 15). However, it is clear that whether justified or not the public are experiencing a fear of crime and that the public do display both punitiveness and at the same time a willingness in some cases to consider alternative approaches. Research by Hough and Roberts (2005) on public attitudes to young offenders found a number of misperceptions but at the same time a willingness to consider non-custodial options where there had been 'restorative steps', for example where offenders had made efforts to apologise to victims.

Any reductionist policy on the part of governments has to address the issue of communicating to the public the effectiveness of alternatives to custody, the economic and social costs of custody, and also the actual levels of sentencing in cases of serious offences to assuage public concerns and to enhance confidence in the sentencing system. These issues have been addressed in some recent policy documents including the Carter Report (Carter 2003), the Consultation Paper, *Making Sentencing Clearer* (Home Secretary *et al.* 2006) and *Rebalancing the Criminal Justice System* (Home Office 2006a).

1.3.4 Policy effects: prison expansion

The prison population has increased since 1993 for a number of reasons, including the actual number of cases going through the courts and the increase in the custody rate. The number of cases processed was affected by demographic factors, namely an increase in numbers in the crime-prone age groups, and by the impact of drug-related crime. The custody rate in the Crown Court, that is the proportion of the total number sentenced who received a custodial sentence, rose in the period 1992–2005, from 44 to 60 per cent (Home Office 2007a: 14) and the average custodial sentence length (ACSL) for adults in the Crown Court increased from 20.8 in 1995 to 25.9 months in 2005 (*ibid.*). Offenders convicted for relatively serious crimes were given longer sentences and tariffs for particular crimes also increased. The largest growth was in the proportion of inmates who are serial recidivists, that is, offenders who have several previous convictions. Imprisoning offenders who in the past would have received community punishment and giving longer sentences to those who would previously have gone to prison have added to the prison population. There has been an increase in the numbers of prisoners defined as 'serious' and as presenting a risk to the public, and a new sentence of Imprisonment for Public Protection (IPP), which have inflated the prison population. Also, some offences now carry longer sentences as a result of changes in sentencing law and guidance. For example, Schedule 28 of the Criminal Justice Act 2003 raises the maximum penalties for drug-related offences, in some cases from 5 to 14 years. The CJA 2003 has also raised numbers further as magistrates' powers of sentencing have increased to 12 months.

In 1995 the prison population passed 50,000 for the first time (Home Office 1996b); by 2002 it had passed the 70,000 total; by the end of 2006 it had reached 80,000 and it stayed over 80,000 during 2007, reaching a record high of 82,180

on 29 February 2008.⁴ On 6 June 2008 it was 82,791. The latest prison population projections for 2014, based on current sentencing trends, published in 2007, indicate that the lowest figure will be 88,800 and the highest figure 101,900, so the current high levels are clearly expected to prevail for some time, despite attempts to curb the population (Da Silva *et al.* 2007).

The expansion has also arisen during a period in which more emphasis has been placed on retributivism yet, as we shall see in Chapter 3, in some other societies retributivist-based sentencing systems have prevented excessive punishment.

The expansion of the prison population may be affected by legislative changes, increases in crime detection, using techniques such as DNA, an actual increase in the numbers of police, and the new National Standards for enforcement of breaches of community penalties whereby Probation Officers are now required to start breach proceedings after a second failure rather than the third specified under the 1995 Standards (see Home Office *et al.* 2000). One factor contributing to the growth in the prison population over the past ten years is the 'greater number of offenders recalled to prison for breaking the condition of their licence, reflecting legislative changes in 1998 and 2003' (Da Silva *et al.* 2007: 4; see also HM Inspectorate of Prisons 2005b). The release rate of the Parole Board also declined in 2006/7 and the numbers released on home detention curfew fell, suggesting a more 'risk-averse' approach (Parole Board 2007).

Recent changes, for example in relation to the discount for a guilty plea, as well as changes in sentencing guidelines may also further inflate the figures in future. Although it is difficult to make firm predictions because there are a number of variables involved, it seems very unlikely that the current high levels of the prison population will decrease significantly in the near future.

A number of explanations have been given for the increased use of custody in recent years, including the increasing importance of allowing public opinion, and specifically the perceived punitiveness of the public, to play a greater role in penal policy, which has been reflected in a number of specific sentencing provisions. More weight has been given to persistence in offending so that repeat offending has been treated more severely, more weight has been given to 'seriousness' in offending with a corresponding reflection in punishment and more emphasis has been given to protecting the public from violent offenders and sexual offenders with a corresponding increase in the number of prisoners serving indeterminate sentences. As well as the increase in the number of prisoners returning to prison for breaching the terms of their licence, we have a much wider range of orders, both civil and criminal, breaches of which are punishable by imprisonment. Breaches of civil orders, and particularly anti-social behaviour orders, have become such a significant factor in the increasing use of custody that the Sentencing Advisory Panel (SAP) has now issued a consultation paper on this issue (SAP 2007a).

The combination of these factors means that more pressure is exerted on the prison population and that more offenders are returning to prison following a period in the community. The implications of this expansion on the prison regime and the problems generated by overcrowding will be considered in Chapter 9. Already, the expansion has meant that increasingly police cells have been used

⁴ All figures from HM Prison Service Prison Population Statistics.

to house prisoners as well as, on occasion, courtroom cells and, for a period, a prison ship, *HMP Weare* was moored off Portland in Dorset. *HMP Weare* was sold in 2005 but it is possible that a prison ship could be used again if a suitable vessel is found.

In July 2006 the then Home Secretary, John Reid, announced plans for 8,000 new prison places as part of a package of measures 'to protect the public and further rebalance the criminal justice system in favour of the law-abiding majority' (Home Office 2006b). Almost a year later, on 19 June 2007 he announced that an additional 1,500 places would be provided and two more prisons would be built. A new prison, HMP Kennett, opened in February 2008 on Merseyside. In addition there are building programmes under way to expand the available accommodation within many existing prisons. The Government also plans to build three 'Titan' prisons.

The UK now has one of the highest incarceration rates within Western Europe at 148 per 100,000 of population, compared with 85 in France and 93 in Germany (ICPS 2007). This is surprising in so far as the UK has a far wider range of non-custodial options than most other Western European societies. Sentencing levels are also higher in the UK than in some other European societies, as evidenced, for example, by a comparative study of sentencing of burglars in England and Wales and Finland (see Davis *et al.* 2004).

These rising figures for incarceration were fuelled by increases in both short and long prison sentences in the 1990s. The message of the Halliday Report and of the government in 2001 was that persistent offenders should get harsher sentences and that breaches of community orders should be punished with custodial sanctions. So the expansion of custody cannot therefore be attributed solely to sentencers: the sentencing framework within which they operate is, we shall argue, potentially more punitive and the Guidance is more prescriptive (see Piper and Easton 2006/7). The implications of these specific changes in sentencing law will be considered below in Chapters 3 and 5.

The problem is how to 'sell' to the public a reductionist policy, that is, one committed to the aim of reducing the use and extent of imprisonment. A modest decarceration programme or expanded use of alternatives needs to take seriously the public's fears of crime and to contest the public view of the courts as 'soft'. To do this the public need accurate information about crime levels and sentencing decisions and policies. For this purpose, Halliday (2001) proposed putting sentencing guidelines online for the public to access and this has now been implemented. The public also have to be convinced that alternatives to custody will be effective and to be aware that the greater use of imprisonment will only marginally affect crime rates: a 25 per cent increase in custody may lead only to a 1 per cent fall in the crime rate (see Tarling 1993: 154). However, when asked to undertake sentencing exercises, the public may be less punitive than sentencers (see Mattinson and Mirrlees-Black 2000 and also section 1.3.3 above). So the government needs an accurate measure of public opinion otherwise it may overstate the public's punitiveness when the public is selectively punitive on some crimes but not others.

Hough *et al.* (2003) argue that it is necessary to widen the awareness of those who sentence as well as the public, particularly in relation to the advantages of using non-custodial penalties, including fines. But changes in sentencing law and practice and changing public attitudes to crime and punishment will not succeed

in reducing prison numbers without the political will and commitment to a reductionist policy. The relationship between political and economic factors is therefore complex, fluid, and indeterminate. While they may sometimes bolster each other, they may also conflict.

1.4 The influence of theory on penal law and practice

1.4.1 Principles from criminology and penology

Penological principles also shape the development of penal policies. These principles are the justifications of punishment and include retribution, deterrence, rehabilitation, social protection, and, more recently, the restoration of social harmony, which will be discussed in Chapters 2–6 and 12 below. Together they constitute the store of knowledge regarding what is, theoretically, the best response in dealing with offenders. Because theorists from opposing traditions may agree that punishment is necessary, but differ in their views of what is the best response, the type of punishment may depend on which theory, which purpose of punishment, is implicit or explicit in policy. It may also depend on which philosophical ideas underpin the chosen punishment, for example whether individuals are seen as autonomous or possessing free will, or whether their actions are determined by the surrounding environment or genetic make-up.

Retributivism punishes according to **just deserts** which assumes a free choice by a rational person who chooses how to act, while a utilitarian approach may use rewards and punishments to channel behaviour into desirable ends and adjusts the social context to change the individual's behaviour, using treatments and therapies to rehabilitate the offender. Another perspective which has strongly influenced penal policy since 1990 is the New Penology which draws on New Managerialist and actuarial techniques to manage the risk of offending and reoffending.

Compared to political and economic factors, the influence of penology and criminology is limited. However, the economic climate may favour the rise of a particular justification of punishment and particular criminological theories may also be appropriated by governments to legitimise a particular policy. For example, 'left realist' criminology, which developed in the 1980s, has been used subsequently to legitimise strong law and order policies and to justify increased punitiveness in the interests of public protection. This theory takes crime seriously, while linking crime to class inequality, and focuses on both crime and the social reaction to crime (see Lea and Young 1984). It recognises crime as a serious social problem, in particular for working-class communities, and demands action accordingly. These criminological ideas have now been incorporated into mainstream government thinking on crime and New Labour has used left realist criminology to justify actuarial criminal justice policies.

1.4.2 The New Penology and risk management

Actuarial justice uses technology and statistical calculations to enhance the risk management of high-risk groups. This approach has been described by Feeley and

Simon (1992) as the New Penology and it embraces both a theory and practice of punishment. In the New Penology, crime is seen as normal and the best we can hope for is to control crime and risk through actuarial policies and technocratic forms of knowledge, internally generated by the penal system (Simon, 1998).

This approach focuses on categories of potential and actual offenders rather than on individuals, and on managerial aims rather than rehabilitation or transformation of the offender. It can be seen as a reaction to the decline of rehabilitation and to the 'nothing works' pessimism of the 1980s. Risk—the core concept of the New Penology—is no longer calculated on personal knowledge of particular individuals or by in-depth clinical judgements: risk is seen as distributed unevenly across categories of offender (see Chapter 5). A biographical study such as Clifford Shaw's *The Jack-Roller* (Shaw 1930) in which the offender's detailed life-history is given in his own words, supplemented by reports from his probation officer, is therefore far removed from the experience of modern probation practice.

While there is a *potential* conflict between the New Penology (which treats crime as a normal fact of life to be managed, using technological tools) and populist punitiveness (which sees crime as abnormal, to be eliminated, through for example, zero tolerance), the two may converge in a common focus on incapacitation as a way of managing risk and removing persistent offenders from society. In the New Penology approach, prison is used to warehouse offenders at high risk of reoffending and, because managerial cost concerns are crucial, prison will be reserved for the highest risk categories. Actuarial justice provides a means of selecting the target population to be incarcerated. However, its cost-cutting impetus may also come into conflict with the populist demands for an expansion of punishment.

The New Penology has been a significant recent influence on penal policy both here and in the United States. It is both an influence on current policy and also itself a policy approach. A concern with risk management has diffused through the key agencies of the criminal justice system and has been a significant feature of public concern, particularly in relation to dangerous offenders. However, the implementation of New Penology has been uneven across the criminal justice system, meeting with resistance from probation officers at the point of working with clients while being well-established at the central level of policy making and at the Home Office. Managing risk in the community and on release from a custodial sentence has been a major challenge for criminal justice professionals and this has been increasingly seen as a joint enterprise involving cooperation between agencies, as we shall see, in relation to sex offenders and dangerous offenders.

1.4.3 Classical theories of punishment

The principal justifications of punishment are closely associated with distinct philosophical traditions or schools. Both retributivist and utilitarian theories have a long history. Retributivism was influential in late eighteenth- and early nineteenth-century philosophy, and was revived in the 1970s and 1980s in the United Kingdom and the United States (see Chapter 2). It is strongly associated with the

German idealist tradition, particularly the work of Kant and Hegel, which focuses on the role of ideas in the construction of reality and sees reality as mediated through consciousness.⁵ The rival tradition is utilitarianism which includes the justifications of deterrence, social protection or incapacitation and rehabilitation associated with the English philosophers Bentham (1789) and Mill (1861) but also derived from the work of Beccaria (1767).

Retributivist and utilitarian theorists both accept that punishment may be justly inflicted but differ in their views of what constitutes the justice of a particular punishment. Both seek to limit the use of discretion in sentencing in favour of a more rigorous principled approach and both address the issue of proportionality but from quite different standpoints. Consequently both see a link between punishment and the seriousness of the offence by upholding the idea that custody should be reserved for the most serious offences. However, the utilitarian does so because it is hoped this will prevent the commission in the future of those offences which are most harmful to the public. So it is important to find the optimal level of punishment, to prevent offenders from reoffending, to deter the general public, and to protect the public from future offending by incapacitating individuals who threaten society. So there is scope on this theory for preventive sentencing. However, the aim in devising punishments is to prevent future offences with minimal expense, so utilitarians would not favour excessive or harsh punishment unless there are clear social benefits which result from that punishment. Punishment can also be used to rehabilitate the offender so that he can make a useful contribution within the prison community and on his return to the wider society.

Neither approach can be seen as purely theoretical as each has had a strong impact on penal policy in recent years. What is interesting is that although these theories are strongly opposed to each other in certain key assumptions, in practice they may both be incorporated in the same piece of legislation. The main provisions of the Criminal Justice Act 1991, for example, were based on a version of retributivist philosophy, but parts of that Act and subsequent legislation reflect utilitarian principles. Similarly, individuals may hold, for example, strongly retributivist views on violent crimes but take a more utilitarian approach in relation to lesser offences.

On the retributivist approach, just deserts equates to determining a sentence which is proportional to culpability so that offenders receive what they deserve for what they have done. There is no concern with the future effects of the sentence but rather with a just response to wrongdoing. On retributivist theory, justice demands that the perpetrator of the offence suffers punishment, regardless of the effects the individual's suffering may have on himself or others. Justice is served only if the offender is made to suffer. Using the metaphor of balancing scales, justice is satisfied when the scales are evenly balanced, between the offender's actions and the level of punishment. In completing the term of punishment, the offender pays and cancels his debt to society. Chapters 2 and 4 will explore in more detail the foundational writings of the retributivist and utilitarian approaches and the problems they raise, and we have inserted at the end of this chapter an exercise which you might wish to do. It makes very clear the difference that the application

⁵ For further reading on German idealism, see, for example, Lukács (1975) and Armstrong Kelly (1969).

of principles makes to sentencing outcomes. Next, however, we will focus on just deserts.

1.4.4 The influence of 'just deserts'

One major influence on penal and sentencing policy has been a particular retributivist idea of 'just deserts'. Prior to 1991 its influence was not clear. The CJA 1991 was a piece of legislation which was heralded as marking 'a sea change in the philosophy and practice of sentencing' in the UK (Henham 1995: 221) because it imposed a new constraint on the courts' discretion—that of a presumptive sentencing rationale. In the 1990 White Paper the Government announced its intention to establish 'a new and more coherent statutory framework for sentencing' (Home Office 1990a: para 1.5): 'The aim of the government's proposals is better justice through a more consistent approach to sentencing so that convicted criminals get their "just deserts". The severity of the sentence of the court should be directly related to the seriousness of the offence' (ibid: para 1.6). A general aim of sentencing on retributivist principles was not, however, invented in 1991. The Streatfeild Committee in 1961 said that 'sentencing used to be a comparatively simple matter. The primary objective was to fix a sentence proportionate to the offender's culpability', the assumption being that practice had changed with the increased use of rehabilitative, community-based measures.

In the period before 1991 sentencers could freely choose to sentence on one or more principles or mix retributivist and utilitarian reasons in any particular case (Sargeant 1974). Nevertheless there emerged a 'tariff system' under which sentencers could use a normal range of sentences and choose what was proportionate to a particular level of offence gravity (see Cross 1981: 167–73) but they could also choose not to impose a tariff-based sentence but, rather, one based on the needs of the offender. The latter decision was referred to as the primary decision and if individualised measures were chosen rather than the tariff, the assessment was of the offender's suitability for a form of treatment (see Henham 1995: 221–2).

The significance of the provisions in the CJA 1991 was, then, that they statutorily imposed on judges and magistrates 'just deserts' as the presumptive rationale. The 1991 Act imposed levels of seriousness as 'hurdles' to the three main levels of punishment. Consequently, the sentencing decision-making process had to focus first on basic elements of a just deserts approach—the calculation of seriousness and the consideration of a sentence proportionate to it (see Chapter 2). This is not to say that all sentencing provisions in the 1990s were consistent with this rationale, given the existence of the provisions in the 1991 Act justifying custodial sentences on the basis of protecting the public, and the form of cumulative mandatory sentences added by the Crime (Sentences) Act 1997 (see section 2.3.3 below) which were explicitly excluded from the just deserts approach (Powers of Criminal Courts (Sentencing) Act (PCCSA) 2000, ss 79(1)(b), 34(a), and 127). A similar shift occurred earlier in the 1980s in the United States, when there was a shift from an emphasis on rehabilitation towards retribution. This persisted in the 1990s but came under threat from the increasing focus on incapacitation (see Chapter 5, section 5.2.3).

This basic question of sentencing rationale—with its long history in classical theory—is still currently high on the policy agenda and the subject of academic

critique. In particular the recent changes have raised the fundamental question of ‘why punish?’: to impose the burden of punishment on offenders there needs to be a good reason. Section 142(1) of the CJA 2003, despite the continuance elsewhere in that Act of retributivist criteria for the use of different levels of sentence (see Chapter 3), imposes a varied—and potentially inconsistent—list of ‘purposes of sentencing’ to which the courts must ‘have regard’: the punishment of offenders, the reduction of crime (including its reduction by deterrence), the reform and rehabilitation of offenders, the protection of the public, and the making of reparation by offenders to persons affected by their offences.

Justifications are central to sentencing and they are also central to the legitimacy of policy. As we have noted, if sentencing policies are to be justifiable to the electorate they must be capable of being supported by reasons, to justify the actions—or failure to act—of sentencers and the costs of punishment imposed on society.

1.5 Penal policy: conflicts and ambiguities

We have identified a number of key influences on penal policy which we will now consider in relation to the development of penal policy in the UK in the late twentieth and early twenty-first century, and, more specifically, in relation to the governance of sex offenders. The present government is committed to substantial reform of the criminal justice system, to remove inconsistency in sentencing and to target persistent offending and to improve cooperation between different agencies. The government has already moved towards its aim of a centralised criminal justice system by unifying the separate probation services into a National Probation Service for England and Wales under provisions in the Criminal Justice and Court Services Act 2000, and by conjoining the Prison and Probation Services into the National Offender Management Service in 2004.

1.5.1 Policy trends in the late twentieth century

If we consider the broad shifts in penal policy in England and Wales in the period after the Second World War, we can identify a number of important trends, a major thread being the changing fortunes of the **rehabilitative ideal** with its optimism that the offender could be reformed. As we shall see (Chapter 12), the rehabilitative ideal was reflected in the development of community penalties to operate as alternatives to custody and the treatment approach had gained ascendancy by the 1960s, with a further order, the community service order, introduced in England and Wales in 1972 (see Powers of Criminal Courts Act 1973, s 14, as amended by CJA 1991, s 10, then governed by PCCSA 2000, s 46). However, the increase in crime and evidence of recidivism in the 1970s and early 1980s cast doubt on the validity of this approach and its use declined in the 1980s and 1990s (see Chapter 12). Yet, while much is made of the decline of the rehabilitative ideal, it has in recent years received further support, albeit prompted primarily by pragmatic cost considerations. It survives in the Probation Service and in offending behaviour programmes (see Chapter 12); it is also found in the Halliday Report (2001) and of course has



remained a major influence on penal policies in some other European societies, including the Netherlands (see Downes 1988, Tak 2003).

In contrast to the focus on rehabilitation, the 1990s were marked by an increased use of punishment and incapacitation, with both the Conservative and Labour administrations tending to focus on punishment rather than crime. Priority was given, by the CJA 1991, to the retributivist principle of just deserts as the primary principle of sentencing, whereby the focus is on proportionate punishment rather than treatment or deterrence *per se*. The increased concern with incapacitation became evident in the electronic monitoring and curfew provisions in the Crime and Disorder Act (CDA) 1998 (now consolidated in ss 37 and 38 of the PCCSA 2000; see also CJA 2003, ss 204 and 215) and through prison expansion, whilst a trend of making alternatives to custody more punitive—or at least appear so—developed. Policies in the 1990s also revealed a continuing acceptance of managerialism, increased concern with safety and justice for victims, and a commitment to speed up the criminal justice process, to shorten the period between arrest and trial.

Despite the New Labour rhetoric of being tough on crime, tough on the causes of crime in the 1997 election, punishment and the reduction of opportunities to commit crime received considerably more attention than the causes of crime. So we find a continuity between the previous Conservative administration and the following Labour government reflected in similar approaches to increasing punishment. The continuing focus on punishment is reflected in legislation such as the Crime (Sentences) Act 1997 ss 2–4 (consolidated in the PCCSA 2000, ss 109–111) which was enacted by the outgoing Conservative government but retained by New Labour. These provisions empower the courts to pass a life sentence for those convicted of a second serious offence (now repeated), seven years for a third Class A drug trafficking offence, and three years for a third domestic burglary, unless the court is of the opinion that it is unjust to do so. New Labour then, is committed to the view that crime can be controlled through punishment and this was a strong theme in both the 1997 and 2001 general elections.

There is now a substantial quantity of new legislation on sentencing and punishment, including the CDA 1998 which introduced new penalties for young offenders and new measures such as curfews, anti-social behaviour orders and sex offender orders. A wide range of new criminal offences was created by the Sexual Offences Act 2003. In the 2005 general election the Labour Party's emphasis was on dealing with anti-social behaviour, promoting the Respect Agenda, using the criminal justice system to protect the public and focusing on crime in local communities. Similarly, the Conservative Party manifesto focused on tackling anti-social behaviour, restoring respect and discipline, and making communities safer, but also promised an increase in police numbers and 'honesty in sentencing', ensuring that offenders serve the full custodial period of their sentences. The Liberal Democratic Party also favoured more police recruitment, dealing with anti-social behaviour, and preventing reoffending but also more emphasis on tougher community punishments as an alternative to prison. The differences in approach are clearer on the issue of terrorism. At the election, three months before the bombings on 7 July 2007, terrorism was a less prominent issue than it is now and the Labour manifesto just briefly referred to tackling terrorism and finding ways to move forward in the fight against terrorism and its causes. For the Conservatives the fight against terrorism was a high priority with

an emphasis on a coordinated response, robust anti-terrorist laws and the appointment of a Minister for Homeland Security, while the Liberal Democrats' approach in contrast emphasised the need to repeal the Prevention of Terrorism Act and to bring anti-terrorism law within the ambit of the ordinary criminal law and its procedures. The party was also strongly opposed to identity cards and expressed concern at using the fight against terror to justify the undermining of civil liberties. Since then there has been greater emphasis on strengthening counter-terrorist measures and a number of new powers to deal with this issue, including a new Counter-Terrorism Bill introduced in the 2007–8 Parliament. There have been over 50 law and order measures since Labour came to power and their enthusiasm for new law and order measures remains undimmed. In the 2007–8 Parliamentary session there are bills in progress on Serious Organised Crime, and the Criminal Justice and Immigration Act 2008 which covers a wide range of offences and sentencing issues received Royal Assent in May 2008. The new Act reflects the increasing overlap between issues of immigration and crime as the Government responds to criticism over its handling of the issue of crimes committed by foreign nationals. The Government is also reviewing the Police and Criminal Evidence Act and further modifications are possible here.

Labour has effectively 'stolen' the law and order issue from the Conservatives, seeking to make Labour the party of law and order, while also accepting the need to control public spending and to make the penal system efficient and accountable. The concern with law and order and the importance of punishment as a political issue increased substantially in the 1990s and since, compared to the 1980s: even in the Thatcher era there were significant advances in the protection of the accused's due process rights, principally in PACE.

When the government uses 'punitive rhetoric' to win support for its policies it is a double-edged sword because, if the public then favours punitive and expressive custodial measures, it imposes substantial economic burdens yet, as we have noted, the government is under pressure to cut costs. One government technique is to shift the burden for crime prevention to the individual by giving the message that we are all stakeholders in society: the individual and community should take responsibility for safeguarding their homes and property, through better security, neighbourhood watch schemes, by not inviting crime, and by reporting crime. The same messages have been given in relation to 'youth' crime in the Audit Commission's reports, *Misspent Youth* (Audit Commission 1996, 1998) which focused on the effective use of resources, and in the White Paper, *No More Excuses* (Home Office 1997a), which was explicit in placing responsibility on parents and the young offender (see Chapter 8).

The current concern with economic issues may also reflect the continuing influence of New Right ideology, despite a change of regime, and the New Public Management intermeshes ideologies with economics, but this may also generate conflicts as the ideology itself contains tensions. For example, New Right ideology prioritises law and order as a legitimate governmental function but is also committed to minimise costs as part of its economic individualism. In the Thatcher/Reagan era of the 1980s and 1990s, as working-class support for welfare dramatically declined, this created a climate in which increased punitiveness could flourish and collectivist welfarist solutions to social problems were abandoned. At the same time, this punitiveness was also a genuine response to fear of crime and an expression of individualism applied to law breaking rather than simply manufactured by the media.

Trends in the past 20 years, then, have seen the emergence of law and order as a key political issue and an increase in punitiveness on the part of both governments and the public. In the 1990s these shifts were reflected in a commitment to the expansion of prison building and tougher community punishments. We also saw the development of a bifurcated policy in the distinction between ordinary petty and serious persistent offenders, with a focus on community punishments and restorative justice for the former, and increased use of custody for the latter, although in practice the lines have not been drawn so clearly. This distinction between minor and serious offenders which was embodied in the 1991 Criminal Justice Act has been a continuing feature of penal policy since the early 1990s and extended by the 2003 Criminal Justice Act which sought to ensure that community sentences aimed at rehabilitation were used for the majority of offenders with long custodial sentences for serious offenders. Current policies also distinguish sharply between ‘normal’ offenders and high-risk offenders (see Chapter 5).

Concern with value for money has loomed large since the late 1980s and encouraged the introduction of privatisation and New Managerialism within the state sector. On the other hand, there was much more concern with the rights and needs of the victim, and the Woolf Report in 1991 led to a substantial improvement in the physical conditions and quality of life in prisons (see Chapter 11, section 11.4.2). With the incorporation of the European Convention on Human Rights in 1998 human rights issues have also assumed increasing significance in penal policy (see Chapter 9, section 9.6).

1.5.2 Policy documents 2000–2003

The new century saw the publication of several major policy documents relevant to our focus on sentencing and punishment which provide evidence of the continuing importance in policy of the factors outlined above. First, the White Paper, *Criminal Justice: The Way Ahead*, published in February 2001, affirmed the Government’s commitment to funding another 2,660 prison places and committed an extra £689 million for the Prison Service over the next 3 years, £21 million of which was to be used to prevent reoffending. The White Paper aimed to reduce both crime and fear of crime, and so also reduce the social and economic costs of crime. It argued that the criminal justice system has to be effective in preventing offending and reoffending and efficient in the way it deals with cases, to be responsive to victims and the community and to dispense justice fairly and efficiently, promoting confidence in the rule of law.

Similarly, the Halliday Report, *Making Punishments Work*, published in July 2001, referred to the need to increase public confidence and reduce crime. It advocated more research on the costs and benefits of particular sentences and proposed a duty on the Secretary of State to disseminate information about the effectiveness of sentencing as well as its costs. However, the Halliday Report was more specific about the aims of sentencing, arguing that they should cover crime reduction, reparation, and punishment. This has echoes of the policy floated in the Green Paper of 1988—but not incorporated in the CJA 1991—which stated that every community penalty should have three elements: the deprivation of liberty, action to reduce offending, and recompense to the victim or community (Home Office 1988a: para 1.5). The Halliday Report (2001) argues that to do this

we need to clarify what is effective, particularly in relation to short sentences, we need clear guidelines to achieve sentence consistency and for previous convictions to be reflected in sentence severity for persistent offenders. It advocates a statutory Penal Code and guidelines on seriousness of the offence, aggravating and mitigating grounds, and the impact of previous convictions. It also recommends closer collaboration between sentencers and other criminal justice agencies to achieve 'seamless sentencing', with the utilitarian aim of informing sentencers about what works in reducing reoffending and making them aware of the availability of different programmes and their suitability for different types of offenders.

Both the above policy documents also reflect the rise of actuarial justice: the acceptance that crime will not be eliminated and all we can do is manage the risk, limit the impact of crime, and promote efficient, cheap methods of crime management and diversion. The White Paper, *Criminal Justice: The Way Ahead* focused on finding cost-effective measures, while the Halliday Report (2001) emphasised assessing the costs and benefits of particular punishments and using risk-assessment criteria when selecting appropriate custodial and non-custodial sentences. It also recognised the need to improve public confidence in sentencing practice and to involve the public in that process by inviting them to comment on sentencing guidelines and increasing Parliamentary control of sentencing.

The Government also commissioned a major review of the criminal courts published in September 2001. The stated aim of the Auld Review was to ensure that the courts 'deliver justice fairly, by streamlining all their processes, increasing their efficiency and strengthening the effectiveness of their relationships with others across the whole of the criminal justice system, and having regard to the interests of all parties including victims and witnesses, thereby promoting public confidence in the rule of law' (Auld LJ 2001). This clearly embodies a particular view of what promotes justice. Although most of the recommendations relate to the law of evidence, the Report also made recommendations on sentencing, including advance indication of sentencing for defendants pleading guilty (para 114). It also advocated codification of the law of sentencing which, it argued, should be the responsibility of a standing body under the general oversight of the Criminal Justice Council (para 198). It emphasised the need for honesty and simplicity in sentencing (para 199) and practical measures, such as the use of information technology to support judicial sentencing, providing an information service for all judges (para 210).

A further proposal in the Review (2001: Summary, para 4)—that of moving from a two-tier court system to a unified Criminal Court, with three divisions comprising Magistrates', District, and Crown (on the lines of the Family Justice System)—met with considerable criticism, particularly from the magistracy and the supporters of jury trial.

Research on 'consumer' views of the work of the magistrates' courts fed into this review. In particular, Morgan's research for the Home Office revealed the extent of public ignorance of the lower courts and a resulting lack of public confidence, finding that only 29 per cent of the population think magistrates are doing a good job (Morgan 2000: 61 and 72). Sanders found that 61 per cent of the population think magistrates are 'out of touch' (Sanders 2001: 1; also Morgan 2000: vii). Morgan estimated that in the magistrates' courts 91 per cent of cases are currently dealt with

by lay magistrates and the rest by district judges (formerly stipendiaries) although the public is not aware of that fact (ibid: 2) and the lawyers and clerks who use the courts on a regular basis appear to prefer district judges (ibid: 65). These research studies highlighted the issue of the role, status, and qualifications of the sentencer: whether that person should be legally trained or whether there are other branches of expertise or knowledge (such as penology, social work or criminology) which are more relevant to the exercise. The existence of the lay magistracy is justified by their lack of expert knowledge: that they bring 'common sense' and a knowledge of 'ordinary' everyday life to the question of deciding guilt or innocence and selecting the 'right' punishment, a knowledge possible because they are not full-time judges. The staffing of the courts raises questions about the nature of the sentencing exercise as well as matters of cost and efficiency.

The Government issued a White Paper in July 2002, *Justice for All*, its response to the Halliday and Auld Reports. It stressed the need to 'rebalance the system in favour of victims, witnesses and communities', to give paramount importance to protecting the public, to restore public confidence in the criminal justice system, and to improve the coherence of the system by closer integration of the police, prosecution, courts and Probation Service (Home Office 2002a). To achieve this it proposed legislation on administrative matters as well as sentencing law. In relation to sentencing it proposed to set out the principles of sentencing in legislation and proposed a Sentencing Guidelines Council to formulate consistent guidelines. The White Paper also put forward plans for new sentences: customised community sentences to allow courts to choose between a range of options for individual offenders; custody minus, a new suspended sentence, which would include the same options as the customised community sentence; custody plus, a sentence of up to 12 months which would comprise a maximum of three months' custody, followed by compulsory supervision in the community; and intermittent custody, which allows offenders to serve their sentence on a part-time basis. A new special sentence for violent/sexual offenders to ensure they remain in custody until their risks are manageable within the community was proposed and also a national strategy for restorative justice.

Justice for All accepted the Auld Report's proposals for a new national Criminal Justice Board responsible for overall delivery of the criminal justice system and made specific proposals regarding the lower courts, including an increase in magistrates' sentencing powers to 12 months and the abolition of magistrates' powers to commit cases for sentencing to the Crown Court. It aimed to encourage early guilty pleas with a formalisation of plea bargaining, by means of a clearer tariff of sentence discounts and it expressed concern at failures to bring offenders to justice, delays in trial, and the problem of wrongful acquittals (although no evidence was offered in support of the last point). It promised more support for victims, including a Code of Practice and a new Commissioner for victims and witnesses, and said that victims of mentally disordered offenders would be entitled to information about their release.

It further proposed to introduce several controversial reforms to pre-trial procedures and rules of evidence. It accepted some of Lord Justice Auld's recommendations but dropped others and rejected multi-ethnic juries in race cases and the proposed middle tier court. It also favoured relaxing the double jeopardy rule in serious cases and proposed changes in the rules of evidence, including a relaxation

of the hearsay rule, but it did not favour routine admission of previous misconduct, arguing that it should be up to the judge to reveal it to the jury if it has clear probative value, even if previous allegations led to acquittal.

1.5.3 The Criminal Justice Act 2003

In the Queen's Speech in November 2002 the Government announced six criminal justice bills, including bills to modernise sexual offences law and to increase penalties for sex offenders, and to provide more protection of the public from dangerous offenders. The CJA 2003 is a major piece of legislation with 339 sections and 38 schedules, which embodies many of the proposals in *Criminal Justice: The Way Ahead* and *Justice for All* and reforms criminal procedure, evidence and sentencing. Because it is so massive there is concern that there was insufficient time to consider it fully, and that only the most controversial clauses were subjected to full scrutiny.

The aim of the Act, in line with *Justice for All*, is to rebalance the criminal justice system, by which the government means to increase rights of victims, even if this means fewer rights for defendants. The way this is constructed using a 'zero-sum' view of power, where one side must lose if the other gains, is misleading: increasing the rights of victims does not of itself necessarily mean reducing the rights of defendants. For example, the Youth Justice and Criminal Evidence Act 1999—which seeks to provide greater protection for vulnerable witnesses—also contains complementary provisions to avoid any prejudice to the defendant.

The CJA 2003 incorporates wide-ranging provisions on evidence, procedure and sentencing, including making the defendant's previous convictions admissible, amending the law on double jeopardy, increasing the time limits for detention under PACE, removing the right to jury trial in complex fraud cases, and reforming the rules on the disclosure of evidence and on hearsay evidence. It aimed to introduce the custody plus scheme, and increased magistrates' sentencing powers to 12 months. The custody plus penalty involves intensive supervision at the end of the sentence and requires more probation officers to undertake the supervision. The Government is providing extra funding to the Probation Service for community penalties, which include a new generic sentence with a wide range of components (see Chapter 12, section 12.1.1). However, custody plus has not yet been implemented and intermittent custody, which was intended to be phased in gradually because of resource implications, has been shelved indefinitely.

1.5.4 Policy documents 2004–2008

The Government's plans to reduce reoffending are set out in its National Reducing Reoffending Action Plan published in July 2004. We have also seen a continued focus on 'rebalancing the criminal justice in favour of the law-abiding majority', and on protecting the public from dangerous offenders and from a range of anti-social behaviours, and particularly from unruly young offenders. The policy paper *Rebalancing the Criminal Justice System in Favour of the Law-abiding Majority* (Home Office 2006a) emphasises the need to enhance public confidence in the fairness of the system to law-abiding people and communities. It refers to the fact

that 80 per cent of the public believe the criminal justice system is fair to the offender but only 36 per cent think it meets the needs of victims (ibid: para 1.20). It recommends a range of measures to assist victims and witnesses and stresses that this rebalancing programme will be supported by stronger enforcement.

At the same time it is pursuing the use of restorative justice methods and outcomes for juvenile and adult offenders, although most of the initiatives are being introduced on an experimental basis (see Chapter 6).

A further key policy initiative was the government's 'Respect Agenda' aimed at combating anti-social behaviour which it has defined as the most visible sign of disrespect. A Respect Task Force was set up in 2005. The Respect Agenda has a number of dimensions including supporting families and communities, developing parenting services, improving school attendance, intervening in families, homes and schools to promote respect, and extending powers to the community to deal with anti-social behaviour and using civil measures. It has implications for penal policy, and particularly for youth justice policy, as one element of it is improving the way the criminal justice system deals with anti-social behaviour, providing visible and constructive punishment for offenders and improving enforcement (see Chapters 8 and 13).

The consultation paper *Making Sentencing Clearer* (Home Secretary *et al.* 2006) is intended to be part of the rebalancing process. Its aim is to make sentencing clearer for all parties involved, victims, witnesses and defendants, it wants to give judges more discretion and flexibility in reducing the sentence discounts for a guilty plea. It also proposes greater use of fines, stronger community sentences as an alternative to custody, and better protection from dangerous offenders through the use of indeterminate sentences.

1.5.5 Organisational changes

In addition to the sentencing initiatives discussed above, there have been a number of organisational changes, including the establishment of the National Offender Management Service (NOMS) which was set up in June 2004, following the recommendations of the Carter Report (Carter 2003). Although the Government accepted most of the Carter recommendations, including contestability in public service provision, not all of these recommendations have yet been implemented (Home Office 2004b).

NOMS takes over responsibility for the overall management of offenders. It aims to reduce reoffending by 10 per cent by 2010 through improving the way offenders are managed. Strategies used will include improving family links, education and skills in both custody and the community. However, its top priority is public protection, which has implications for the sharing of information between agencies, regular risk assessments and reassessments, and effective supervision and closer cooperation between the prisons and probation service in the process of offender management. It also plays a key role in commissioning services from the private, voluntary and community sectors in relation to the punishment, support and reform of offenders. It will also be working on ways of improving fine enforcement. The Government is also changing the arrangements for the provision of probation services. The new organisational framework is set out in the Offender Management Act 2007 (see Chapter 12, section 12.3.5).

A further major organisational change was the creation of the Ministry of Justice in 2007. The National Offender Management Service and the Prison and Probation Services are now the responsibility of the Secretary of State for Justice and the Ministry of Justice.

So the last few years have seen major shifts, with the Home Office losing responsibility for prisons, probation and sentencing to the new Ministry of Justice. These changes followed a protracted period of criticism of the Home Office during 2006 and 2007, including the revelation that during the period 1999–2006 over 1,000 foreign national prisoners had been released without being considered for deportation. New procedures were introduced to address this issue but when it was revealed that the problem had persisted, the Home Secretary Charles Clarke was sacked in May 2006. Further criticism of the failings over deportation of foreign prisoners led the new Home Secretary, John Reid, to denounce it as ‘not fit for purpose’ and it was subsequently subject to major reorganisation with several of its key areas of responsibility, including sentencing, moving to the Ministry of Justice. However, these changes did not silence criticism. The burgeoning prison population led to further pressures on the system and public concern over threats to the public from released sex offenders led to demands for John Reid to resign, which he resisted until he retired when Gordon Brown took over from Tony Blair in June 2007.

1.5.6 Current policy criticisms

The Government’s reforms have been criticised by criminal lawyers for a variety of reasons. It has been argued that the Government should have waited until the Sentencing Guidelines Council was fully operational and the new sentencing framework in place before superimposing further changes. LAG, Liberty, the Bar Council, and the Criminal Bar Association issued a joint statement criticising the politicisation of the criminal justice debate, and the way the Government has made political capital out of issues in the debate. But this seems to overlook the fact that debates on crime have dominated British politics since the 1970s. Moreover, in a deeper sense the crime question is inherently political in that questions of crime, law, and order raise fundamental questions about the relationship between the state and the citizen, and the problem of how society can be held together, in the face of internal social divisions and the fragmentation of individuals’ self-interest,⁶ as well as issues regarding how far the state may intervene to protect citizens from each other and from external threats.

There are also concerns over the potential injustice of the increased risk of convicting the innocent by allowing evidence of previous convictions for the same offences. The 2003 Criminal Justice Act was also criticised by the Home Affairs Committee for shifting the balance too far in favour of the state. The increasing range of controls over individuals’ movements, in control orders and other civil orders, particularly if based on the prospect of future rather than past offences, has also led to extensive criticisms of the Government (see Liberty 2006, 2007).

⁶ This problem is at the heart of social contract theory: see T. Hobbes’ *Leviathan* (1651) and J.-J. Rousseau’s *The Social Contract* (1743).

1.6 The governance of sex offenders: a case study

Some of these issues which we have discussed in relation to the formulation of penal policy will now be considered by focusing on the governance of sex offenders in England and Wales, because it raises concerns about the protection of the public, the impact of populist punitiveness, just deserts, human rights, and the influence of risk management and actuarial justice.

A number of measures aimed at improving the control, detention, and arrest of sex offenders were introduced in the UK in the late 1990s. They include the registration scheme established by the Sex Offenders Act 1997 and sex offender orders created by the CDA 1998, a life sentence for a second serious sexual offence in the Crime (Sentences) Act 1997, and legislation dealing with stalkers in the Protection from Harassment Act 1997. New measures to deal with sex tourism were introduced in Part II of the Sex Offenders Act 1997, as amended by Schedule 5, paragraph 4 of the Criminal Justice and Court Services Act 2000, and to prevent the improper use of evidence relating to sexual offences in the Sexual Offences (Protected Material) Act 1997. Special measures to assist complainants of sexual offences were introduced by the Youth Justice and Criminal Evidence Act 1999.

Monitoring of persons working with children was strengthened by the Protection of Children Act 1999 and the Criminal Justice and Court Services Act 2000 and by the establishment of the Criminal Records Bureau. In addition, penalties for possession of indecent photographs of children were increased and the regime for inspecting residential homes was improved. Cooperation between agencies to manage the risk posed by sexual and serious offenders in the community was formalised and given a statutory basis in the Criminal Justice and Court Services Act 2000, re-enacted by the CJA 2003. The government also initiated a review of sexual offences, which aimed to strengthen further the protection of children and vulnerable adults from abuse, and a raft of new measures in the Sexual Offences Act 2003, which changed the law relating to the issue of consent in rape cases. The Act includes provisions on child sex offences, abuse of a position of trust, abuse of children through prostitution and pornography, and introduces new civil preventative orders designed to protect children. A new offence of possession of extreme pornography is also introduced by s 63 of the 2008 Criminal Justice and Immigration Act.

The new measures to control the movements of sex offenders in the Sex Offenders Act 1997 and the Crime and Disorder Act 1998 can be seen as reflecting the New Penology. The Sex Offenders Act 1997 provided for the creation of a register recording all persons convicted of or cautioned for a sexual offence. Although popularly referred to as the 'Paedophile Register', it also included those who committed sexual offences against adults. Part I imposed a requirement for convicted and cautioned sex offenders to notify the police of their name and address and inform them of any changes of residence, including holidays. How long the individual stayed subject to the notification requirements depended on the length of the sentence imposed for the offence. In 2005/6 there were 29,973 sex offenders on the Register. A further new development was the sex offender order which the Government introduced in s 2 of the Crime and Disorder Act 1998. These were civil orders which prohibited

the offender from engaging in conduct such as loitering near a school. The Chief Officer of Police could apply for an order if a person who is a convicted or cautioned sex offender had acted, since his conviction or caution, in such a way as to give reasonable cause to believe that an order under the section was necessary to protect the public from serious harm. It was not necessary for a particular victim to be identified nor to prove intent. The test of serious harm was death or serious physical or psychological injury, drawn from the CJA 1991. Once in place the order had effect for a minimum of five years. Once an order was made under s 2 of the CDA 1998, the individual to whom the order applied was also subject to the registration requirements of the Sex Offenders Act 1997. While the orders were civil restraining orders, if breached they incurred penalties of fines and/or imprisonment. The sex offender order was granted on the basis of risk calculations generated by present conduct, so its application was selective in contrast to the Sex Offenders Act 1997. Past convictions were a necessary but not a sufficient condition for granting an order and there had to be an evidential basis for granting an order.

The 2003 Sexual Offences Act repealed the 1997 Sex Offenders Act and also repealed ss 2, 2A, 2B and 3 of the Crime and Disorder Act. It replaced the sex offender order with the new sexual offences prevention order (SOPO). This also is a civil order whose aim is to protect the public from serious sexual harm, although, as before, its breach constitutes a criminal offence, punishable on conviction by a maximum of five years' imprisonment. The order applies to a wide range of sexual offences defined in Schedule 3 of the Act. An application may be made by a Chief Officer of Police and the court must be persuaded that the defendant's behaviour subsequent to the first relevant conviction makes the order necessary 'for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant' (s 104(1)(a)). It may prohibit the offender from carrying out any activities described in the order. It will last for a minimum of five years. Once an order is granted the offender becomes subject to the notification requirements of the 1997 Sex Offenders Act, which are now included in the 2003 Act. The order also brings the offender within the remit of the Multi Agency Public Protection Panel arrangements. There is a legal requirement on the police, and the probation and prison services, to organise arrangements to assess and manage the risks presented by violent and sexual offenders, to monitor these arrangements and to furnish annual reports.

The 2003 Act also introduced foreign travel orders which enable the magistrates' court to restrict the travel of those convicted in the UK or abroad of sexual offences against a child under 16, if the court is satisfied that the defendant's behaviour since the relevant conviction makes it necessary in order to protect children from serious sexual harm from the defendant. The orders may prevent travel to a specified country or from travelling to anywhere in the world for a maximum period of six months. Although these are also civil orders, their breach constitutes a criminal offence punishable by a maximum of five years' imprisonment. The Act also introduces a new risk of sexual harm order. This is more extensive, in so far as it is not necessary for the defendant to have been convicted of an offence, but only that on at least two previous occasions, the defendant has engaged in sexually explicit conduct or communication with a child, for example, sending pornographic material to a child over the internet. The order may prohibit the offender from doing anything described in the order which is necessary to

protect the child or children from harm from the defendant. The order will be for a minimum of two years but subject to procedures to renew or discharge the order and with a right of appeal. Breaches can be punished by a maximum of five years' imprisonment. Each of the orders in the Act is essentially based on an assessment of the risk of future offending and, as such, raises problems of prediction and justification, which will be discussed further in Chapter 5.

Simon (1998) sees a shift away from the traditional perception of the sex offender as mentally ill, which suggests the potential for diagnostic treatment and understanding in order to change the offender, towards the perception of an evil monster, with the implication that science is of limited value in understanding, or changing the offender. Although Simon is primarily concerned with the American penal system, we find a similar convergence between the New Penology and populist punitiveness in the UK, reflected in the demonisation of the sex offender in government policy and popular campaigns to remove sex offenders from the community. Sex offenders have now been absorbed into the discourse of risk management, and surveillance has extended beyond the prison into ordinary life. Risk assessment is part of this process of transcarceration and the move towards ever greater surveillance and acquisition of knowledge, charted by Foucault (1977), has found expression in the new legislation. There is now less public tolerance of sex offenders in the UK, less sympathy for medical models of individual pathology, and greater willingness to see sex offenders as bad rather than mad, to be removed from the community rather than being changed or cured through treatment. The dominant model in therapeutic programmes is the cognitive-behavioural model which accepts that it is more productive to focus on the development of reasoning skills and new ways of thinking, than to search for the underlying causes of deviant behaviour, which may be too time-consuming and ultimately unattainable.

However, for some sections of the public the measures to control sex offenders currently available are insufficiently punitive and should be supplemented by full disclosure and preventive detention. Attempts to categorise levels of risk of sex offenders for the purposes of the registration scheme may be problematic as the criteria for registration are unwieldy and do not distinguish between them in terms of individual risk but only impose a period of registration as defined formally by sentence length. The penalties imposed for breaches of sexual offender orders have also been variable (see Shute 2004a). The UK government's focus on risk management in response to the public's punitiveness, has also raised problems as it has come into conflict with the protection of human rights.

The move towards restricting the movement of sex offenders reflects a wider use of civil orders to reinforce the criminal law, while avoiding Convention challenges under Articles 6 and 7. As well as the range of measures directed against sex offenders, we have seen in recent years increased use of anti-social behaviour orders, and we now have a new order, similar in some respects to the SOPO and ASBO, the serious crime prevention order introduced by s 1 of the Serious Crime Act 2007, which aims to exert control over the movements and assets of those involved in serious crime. Although creating civil orders, these provisions create new criminal offences of failing to comply with these orders, which attract criminal penalties. The aim is to protect the public by preventing, restricting and disrupting involvement in serious crime. In addition, the courts have powers to impose extensive controls on individuals' movements through control orders

under s 1 of the Prevention of Terrorism Act 2005. There are also provisions to create youth rehabilitation orders (s 1) and violent offender orders (s 98) in the Criminal Justice and Immigration Act 2008. The aim of the violent offender order is to protect the public from serious harm by imposing further restrictions on violent offenders. However, it is likely that if the terms imposed are too restrictive the move towards increasing controls may raise future Convention challenges and arguments over whether they constitute retrospective punishments. Collectively we can see a shift towards controls within the community intended to protect the public by preventing possible future offending which, as we shall see in Chapters 2 and 3, raises problems for retributivism.

1.7 Conclusion

1.7.1 Key themes

As we have seen in the preceding discussion the state's response to crime formulated in specific penal policies reflects a number of key influences, the relative importance of which may change over time. We have identified the principal developments since 1990, including the changes in the Criminal Justice Act 2003, and we have noted some of the provisions of the new Criminal Justice and Immigration Act 2008. We have also highlighted issues of equality, fairness, and justice which we will discuss in greater detail in subsequent chapters. But here we offer a case study which invites you to think about these influences in relation to a specific penal policy.

1.7.2 Case study: Damian Cronus

Damian Cronus, aged 40, has a history of sexual offences against young children over the past 15 years, for which he has served custodial sentences. His favoured methods of gaining access to children include watching them in the school playground, following them home, approaching children in amusement arcades and befriending children playing on the seafront.

His last conviction was in 1998 and he is shortly to be released. On his release he plans to move back to his former home town of Brighton where he has many friends and hopes to find employment in the area. The police are concerned that he remains a threat to young children.

1.7.3 Questions

1. Consider what can be done to protect young children living in the area from this person.

In answering this question select from the range of measures now available to monitor the movements of offenders released into the community and ways of restricting their movements.

2. Consider the influence of the following factors on the introduction of the raft of new measures to deal with sex offenders in and since the 1990s.
 - (a) Political factors.
 - (b) Economic factors.
 - (c) Public opinion.
 - (d) Penological theories.
3. Consider the impact of these new measures on the sex offender released into the community. Do the measures you identify treat the sex offender with humanity and justice? Do they respect the ex-offender's human rights? Do they treat sex offenders as a special category and if so, is this special treatment justified?
4. Are you satisfied that the measures you have discussed are adequate to protect children in the local area? If not, what further measures might be introduced and what problems might they raise?

Guidance on approaching these questions is given in the Online Resource Centre, and the following references might also be useful:



- Cobley, C. (1997) 'Keeping Track of Sex Offenders—Part 1 of the Sex Offenders Act 1997' *Modern Law Review* 60–69.
- Knock, K. (2002) 'The Police Perspective on Sex Offender Orders: A Preliminary Review of Policy and Practice', Police Research Series Paper 155, London, Home Office.
- McAlinden, A.-M. (2007) *The Shaming of Sex Offenders: Risk, Retribution and Reintegration*, Oxford, Hart.
- Shute, S. (2004) 'The Sexual Offences Act 2003 (4) New Civil Preventative Orders: Sexual Offences Prevention Orders, Foreign Travel Orders, Risk of Sexual Harm Orders' *Criminal Law Review* 419.
- Thomas, D. (2006a) 'Sexual Offences Prevention Orders: Grounds for Making an Order', *Criminal Law Review* 364–7.
- Thomas, D. (2006b) 'The Sex Offenders Act 1997: Notification Requirements' *Criminal Law Review* 553–58.
- Thomas, D. (2006c) 'The Sexual Offences Act 2003: Notification Requirements' *Criminal Law Review* 1085–87.
- Ibbotson v UK* [1999] 1 EHRLR 218.
- Jones v Greater Manchester Police Authority* [2001] EWHC Admin 189.