

Part A

**Sentencing Principles
and Policies**



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New penology and new policies

SUMMARY

In this chapter we consider key questions in penal policy and the principal factors which shape the development of penal policy, including political imperatives, economic influences, penological and criminological principles, and the influence of public opinion. We focus on the 1990s and more recent developments to highlight significant trends and conflicts. We conclude the chapter by focusing on the governance of sex offenders.

1.1 Introduction

1.1.1 The scope of the book

This book is about how and why the state sentences and punishes as it does. It examines the ways in which Parliament, judges, and magistrates and criminal justice professionals have sought to justify, impose, and implement policies which convey particular answers to these fundamental questions about sentencing and punishment. It is, then, not just concerned with what ‘the law’ says about sentencing and punishment, but why such law has been developed and how it can — or cannot — be justified philosophically. Furthermore, it is 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 the anticipated results materialise?

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 secondly, 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

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penal policy and the major factors which influence its development. It 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 10 will focus on the other main justification, utilitarianism, considering deterrence, risk-management and rehabilitation. Chapter 6 will focus on the more recent thinking in relation to restorative justice. Chapter 1 will, instead, 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.

1.1.2 What is punishment?

It is very easy to take words for granted in this area of study. One way to approach the question is to focus on the various definitions of punishment which have been offered, but this may simply raise further questions. It may be more useful to distinguish punishment 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 and this may 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 law 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 held that the sex offenders' registration scheme did not constitute a penalty in *Ibbotson v UK* (1999).

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 criminalized 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, wrongdoing 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

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rest on particular models 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 the response is 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 8), 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 makes racial motivation an aggravating factor in assaults (see Chapter 3, section 3.3.2) and section 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 Chapter 12, section 12.1). 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 8, section 8.3). 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 8 and 12).

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, con-

temporary 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—24;— 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 social 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 criminalization of mental disorder, the increasing use of imprisonment, the declining influence of psychiatry, the rise of the market, and the decline of welfare.

But the notion of justice is not clear cut: like 'rights', justice is a slippery concept which has been used by right and left to embody aspirations and to legitimate policies. 'Justice' has been a key strand of current policy, expressed in the White Paper *Justice for All* (Home Office 2002a), which says the government's aim is 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. The Home Office regularly describes its purpose as building a safe, just, and tolerant society and justice was also stressed by the Woolf Report (Woolf and Tumim 1991) as one of the key principles which should govern the treatment of prisoners (see Chapter 11). A sense of injustice, it argued, was an important contributory factor in the prison riots of 1990.

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, 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

¹ For discussions of notions of justice see, for example, the following texts: Campbell, T., *Justice*, 2nd edn. (London: Macmillan, 2001); Rawls, J., *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971) for a liberal concept of justice; Rhode, D., *Gender and Justice* (Cambridge, Mass: Harvard University Press, 1989) for a feminist standpoint; Nozick, R., *Anarchy, State and Utopia* (Oxford: Blackwell, 1974), for an individualist approach.

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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, which 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, mutual obligations, and trust and group loyalty.

As well as the influence of particular justifications of punishment, other influences 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 on 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 protective function, protecting prisoners from the excessive zeal of their keepers, and prisoners retain fundamental rights as human

beings while serving their sentences, ensuring treatment with dignity. A system of punishment which respects human rights will have more legitimacy than one which rides roughshod over them. 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, while utilitarian arguments have failed to protect prisoners, although not all radical reformers share a commitment to a rights approach. Marxist and other conflict theorists of law, who believe the rule of law may mask social injustice, are suspicious of rights because they are seen as essentially individualist rather than collectivist, abstracting the individual from the historical and social context, and the focus on legal justice may be antithetical to 'real' substantive justice.

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), 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 effect 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' judgements 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 11, section 11.6.

1.3 Influences on penal policy

What is seen as an appropriate response to crime — the type and level of response-24;— may reflect political and ideological principles. Ideologies are chains of inter-related 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 communitarian ideologies have declined since the 1980s.

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, the New Labour administration was in a strong position to enact its legislative programme although it 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 1.3.5). Underpinning the apparent public desire for tougher criminal justice policies is a 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. There was a further fall of 9 per cent in 2002, which included car crime, burglary, violent crime and street robbery, although drug offences increased sharply. Of course, rates of victimisation are not uniform with some groups, individuals and residents of particular postcode areas being at greater risk than others.

Nevertheless, public opinion generally is believed to be punitive. This faces the government with politically damaging problems of legitimacy for its policies if it cannot win support for them within the party or among the voters. The government's awareness of this became clear in the debate in the winter of 2002 over reducing the use of prison sentences for burglars, when the Court of Appeal in *R v McInerney, R v Keating* (2002) issued new guidelines for domestic burglars, replacing those in *R v Brewster* (1998) (see Chapter 3). Under the new guidelines, a domestic burglar who previously would have been sent to prison for 18 months or less should in future receive a community sentence. The Lord Chief Justice, Lord

Woolf, based his guidance on advice from the Sentencing Advisory Panel, which took account of research into public attitudes towards sentencing. The Court also acknowledged the need to promote public confidence in the Criminal Justice System, the costs of different sentences and their relative effectiveness in preventing re-offending, 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 Metropolitan Police Commissioner (Sir John Stevens) and 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 for the public to accept policies and practices 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 during its term of office 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 (see also discussion of unit fines in Chapter 8, section 8.2). An example of the latter would be the strong commitment of the governments in 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 in the CJA 1991 and in subsequent 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.

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

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

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 manifestoes. 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.

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 and 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 1.5) in order to defuse hostility to the government over crime and disorder. There are also examples from the recent past of how dysfunctional families, juveniles, and single-parent families have been selected as criminogenic categories (see Day Sclater and Piper 2000) or of the targeting of professional failures, for example, when social workers and teachers have been highlighted for criticism (see Hall *et al.* 1978).

1.3.2 The costs of punishment: economic influences

Crime and punishment are costly, to individuals who pay increased insurance premiums and to the public whose money is 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 with the need to maintain a strong commitment to law and order to satisfy public opinion, to deal with the public's demand to reduce crime and to make society safe, but also to cut taxes.

The cost of punishment as a significant constraint on penal policy may well inhibit a government's desire to enforce morality. 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 maintain. So a society has to negotiate both the amount of censure and 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.

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 (Halliday 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 has been 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 throughout the public sector, 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 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.

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 — value judgements about expectations of behaviour — there will always be grey areas, particularly in relation to issues such as sexuality 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 just 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 public services. As it is a labour-intensive industry, the largest running cost of imprisonment is labour, although prison officers are not very highly paid. These costs escalated in the 1990s as the prison population increased

dramatically, from 45,636 in 1990 to 64,600 in 2000. So, at the 2000 price of approximately £25,000 per place, the total cost was in excess of £16 million. With a prison population of 70,000, this would amount to £17.5 million. In addition to running costs, there are capital costs of building prisons and indirect costs, such as welfare support for dependents affected by the imprisonment of the breadwinner, and costs to the economy with the loss of productive labour and associated revenues. In 2003–04 the average cost per prison place was £27,320 (HM Prison Service 2004).

The prison population has increased since 1993 for a number of reasons, reflecting 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 1992–2002 from 44 per cent to 64 per cent and the average sentence length for adults increased from 21 months to 27 months. 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, they 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.

The result has been that in 1995 the prison population passed 50,000 for the first time (Home Office 1996b); in 2000 it was 64,600, in 2001 it was 66,300 and by May 2002 it was 70,894, of which 4,150 were women and 66,744 were men.

By 10 October 2003 this had increased further to 73,835 and on 8 October 2004 it was 74,730. On 7 Jan 2005, it was 73,085. It is possible that this recent decrease will continue. However, the prison population was projected to reach 70,200 in 2008, on the basis of national statistics for 2000, 'if custody rates and sentence lengths remain at 2000 levels' (Gray and Elkins 2001). These Home Office projections did not take account of the effect of the Criminal Justice Act (CJA) 2003. Taking possible sentencing changes into account, the most pessimistic forecast is 109,600 by June 2009 (Counsell and Simes 2002). 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, Department of Health and Welsh Office 2000).

Whilst, then, it is not clear whether the current prison population will increase and at what rate, it is unlikely to decrease significantly in the near future. Extra funding is being earmarked to deal with prison overcrowding, to provide for 2,300 extra prison places and it is reported that the Prison Service is looking for another 'convict' ship. The UK now ranks the highest in Western Europe in the number of people it imprisons as measured by incarceration rates (Home Office 2003f). The CJA 2003 is expected to raise numbers further as magistrates' powers of sentencing are increased to 12 months.

The Powers of Criminal Courts (Sentencing) use of both short and long prison sentences increased in the 1990s. The use of longer sentences has also

increased steadily since 1991 albeit less. The prison population will be reduced only if sentencing severity is reduced overall, but this is unlikely in the current political climate: the Halliday Report and the government want harsher sentences for persistent offenders and Schedule 3 of the Powers of Criminal Courts (Sentencing) PCCSA (2000), as amended by Criminal Justice and Court Services Act 2000, has increased the punitive custodial sanctions for breaches of community orders.

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 only lead 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 Martinson and Mirrlees-Black 2000 and also section 1.3.5 below). 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 both sentencers, and the public's awareness of non-custodial penalties, including fines, and their advantages. 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.

1.3.3 Principles from penology and criminology

Penological principles also shape the development of penal policies. These 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 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.

Compared to political and economic factors, the influence of penology and criminology is limited. However, the economic climate may also favour the rise of a particular justification of punishment. It may also be the case that particular criminological theories are appropriated by governments to legitimise a particular policy. For example 'left realist' criminology, which developed in the 1980s, has been used subsequently to legitimate 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.

1.3.4 The New Penology



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.

The essential features of the New Penology, according to Simon (1998), are a focus on risk-management and using technocratic forms of knowledge internally generated by the penal system. The focus in the New Penology is on categories of potential and actual offenders rather than on individuals and on managerial aims rather than rehabilitation or transformation of the offender. This approach 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 offenders (see Chapter 5). A biographical study such as Clifford Shaw's *The Jack-Roller* 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 (Shaw 1930).

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 re-offending and, because managerial cost concerns are crucial, prison will be reserved for the highest risk categories. However, its cost-cutting impetus, of targetting scarce resources on highest risk categories, may also come into conflict with the populist demands for an expansion of punishment.

The New Penology has been a significant recent influence on current penal policy

both here and in the US. It is both an influence on current policy but also itself a policy approach. 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.

1.3.5 The influence of public opinion on penal policy

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. It 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 Labour 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. 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).

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 66 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 is 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 and similar social scientific research. 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 may 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 under-estimating 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 are 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 to thereby 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 'twocking' (taking a vehicle without the owner's consent), even though such crimes are far more significant in terms of numbers. 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.

1.4 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 of the UK in the 1980s and 1990s and, more specifically, in relation to sex offenders.

1.4.1 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 10), 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 10). 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 10); 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, 7 years for a third Class A drug trafficking offence, and 3 years for a third domestic burglary, unless the court is of the opinion that exceptional circumstances apply in the case.

New Labour is, then, 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. In the last election manifesto, the government promised to convict 100,000 more criminals a year by the next election, a target it seems unlikely to reach on current progress. 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. 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 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 custodial measures, it imposes substantial economic burdens yet, as we have noted, the government is under pressure to cut costs while managing crime and reducing the risks of crime. One government technique is to shift the burden to the individual for crime prevention 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 7).

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 have, then, 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 bifurcatory policy in the distinction between ordinary petty and serious persistent offenders. 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 11, section 11.6).

1.4.2 Policy documents 2000–2002

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 re-offending. 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 re-offending 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 re-offending 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 noncustodial 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 (2000: 61 and 72). Sanders found that 61 per cent of 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 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.

Finally, 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 will include the same options as the customised community sentence; custody plus, a sentence of up to 12 months which will comprise a maximum of three months custody, followed by compulsory supervision in the community; 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 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.

1.4.3 The Criminal Justice Act 2003

As the above official policy documents make clear, 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 by 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.

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 re-balance 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 introduces the custody plus scheme, and increases magistrates' sentencing powers to 12 months. The custody plus penalty will be phased in gradually because of the high cost of intensive supervision required at the end of the sentence and the need for more probation officers to undertake the supervision. The government is also providing extra funding to the Probation Service for community penalties. It includes a new generic sentence with a wide range of components (see Chapter 10, section 10.1.1). It also includes intermittent custody which will be phased in gradually because of resource implications.

The most recent high profile policy issue is the focus on using 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).

1.4.4 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.³

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 Act was also criticised by the Home Affairs Committee for shifting the balance too far in favour of the state.

1.5 The governance of sex offenders: legislation and risk management

Some of these issues 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

³ This problem is at the heart of social contract theory: see T. Hobbes' *Leviathan* (1651) and J. J. Rousseau's *The Social Contract* (1743).

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.

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 1997 Act provided for the creation of a register recording all persons convicted or cautioned of a sexual offence. Although popularly referred to as the 'Paedophile Register', it also included those who commit 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.

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 has acted, since his conviction or caution, in such a way as to give reasonable cause to believe that an order under the section is necessary to protect the public from serious harm. It was not necessary for a particular victim to be identified or 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 5 years. Once an order was made under s 2 of the CDA 1998, the individual to whom the Order applies 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 of 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. This is also 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 5 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 5 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 arrangements.

The 2003 Act also introduced foreign travel orders which enables the magis-

trates' courts 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 the defendant's behaviour since the relevant conviction for a sexual offence, 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 6 months. Although these are also civil orders, breach constitutes a criminal offence punishable by a maximum of 5 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 2 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 5 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, rather than searching 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 2004). 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.

1.6 Conclusion

1.6.1 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 in since 1990, including the changes in the Criminal Justice Act 2003. 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 reflect on these influences in relation to a specific penal policy.

1.6.2 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.

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 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 on the companion **web site**, and the following references might be useful.

Cobley, C. 'Keeping track of sex offenders — Part 1 of the Sex Offenders Act 1997' (1997) *MLR* 60–69.

Shute, S. 'The Sexual Offences Act 2003 (4) New Civil Preventative Orders: Sexual Offences Prevention Orders, Foreign Travel Orders, Risk of Sexual Harm Orders' (2004) *Crim LR* 419.
Ibbotson v UK [1999] 1 EHRLR 218.

Jones v Greater Manchester Police Authority [2001] EWHC Admin 189.