criminal justice

an introduction to philosophies, theories and practice
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Ian Marsh
with John Cochrane and Gaynor Melville

Preface

The intention of this book is to provide students (and tutors) with an introduction to the study of criminal justice. Its central aim is to encourage students to develop a deeper understanding of the context and current workings of the criminal justice system.

Content

The book is divided into two main sections. Part I provides an examination of the philosophical, theoretical and historical contexts of criminal justice and Part II focuses on the major agencies of the contemporary criminal justice system in England and Wales.

In Part I, Chapter 1 considers the basic question 'Why should offenders be punished?' It does this by looking at the justifications for punishment and the philosophies that lie behind them. There are various plausible justifications for punishment and there are different ways of categorising them. Here these justifications are examined under three main headings: deterrence, retribution and rehabilitation. The contradictions and tensions between the different philosophies of punishment are highlighted through examples of different forms of punishment at different periods of history. Chapter 2 focuses on explanations for punishment and, in particular, addresses the question 'What have social theorists said about the role of punishment in society?' The main theoretical approaches that are examined are Durkheim's argument that punishment produces social solidarity; the Marxist tradition that punishment is part of a class-based process of economic and social regulation; and the more recent theorising of Foucault emphasising the interrelationship between punishment, power and regulation. Chapter 3, written by John Cochrane, relates and applies these and other theoretical approaches to the history of the policies and practices of crime and justice. Essentially it tries to understand this history in terms of the nature of the particular governments and societies responsible for introducing these policies and practices. Chapter 4, written by Gaynor Melville, shifts the focus to an examination of the role of the victim within the criminal justice system. It charts the emergence of the discipline of victimology and considers the main theoretical positions within it. In doing this, it distinguishes between victims of different forms of criminal behaviour, with a particular focus on victims of domestic violence (private crime) and of corporate crime (public crime).

The three chapters in Part II examine the major different elements and agencies of the contemporary criminal justice system. Chapter 5 looks at police and policing, setting the context for an examination of police culture through a consideration of how historical changes, and especially those of the post-1960 period, have shaped the current form and style of policing. Chapter 6 turns to the courtroom and examines issues around the trial and sentencing of offenders, in particular issues of impartiality, focusing on gender,

ethnicity and class bias. After this, it looks at those who sentence offenders – the magistrates and the judges – considering their backgrounds, appointment and ideologies. Chapter 7 looks at prison, the most severe penalty available in our criminal justice system; it provides data that enable a consideration to be made of the extent to which the current prison system is in 'crisis', and looks at some of the issues facing the prison service – including overcrowding, security and the different needs of long-term and other prisoners. The chapter concludes by examining the background to and success of community sentences. Issues of inequality – in particular in terms of gender, ethnicity and class – are raised and discussed in relation to each of the main agencies of the criminal justice system that are examined in Chapters 5, 6 and 7.

Features

Criminal Justice: An Introduction to Philosophies, Theories and Practice adopts an interactive approach that aims to actively engage the reader with the material being examined, so as to encourage reaction to and reflection on it. There are question breaks throughout the text that offer opportunities for reflection. These question breaks might encourage students to consider a particular case study or example of writing and respond to questions on it; or in some cases are just short stop-and-think type questions. The text makes use of extracts from academic sources and the contemporary press to encourage students to read a range of original sources. At the end of each chapter there are suggestions for further reading and research, including key texts on the particular area and, where appropriate, useful Web sites.

This book has been a collaborative venture, and the authors would like to thank James McNally and his colleagues at Routledge and the various anonymous reviewers who have commented on it.

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January 2004

Acknowledgements

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Part I

History and theories of crime and punishment

1 Why punish? Philosophies of punishment

Introduction: studying punishment

The basic question that this chapter will be considering is 'Why should offenders be punished?' In addressing this question it will look at the aims and justifications for punishment and at the philosophies that lie behind them. Before it does this, and by way of an introduction, some general points about the sociological study of punishment will be raised.

The sociological study of punishment examines the relationship between crime, punishment and society. It looks at punishment as a social phenomenon and, in particular, the role of punishment in social life. While punishment occurs in a variety of different contexts – in the home, at school and at work, for instance – the focus here is on the legal punishment of offenders. This legal punishment is a complex process that involves the making of laws, the trial, conviction and sentencing of offenders, and the administration of particular penalties. Given this complexity, it is not surprising that legal punishment can have various aims. However, it is likely that a majority of people would see the reduction or containment of crime as the major purpose of punishment, with punishment seen as a means to an end – that of controlling crime. Although crimes still occur, and in ever-increasing numbers, it would perhaps be unfair to say that punishment has therefore 'failed'; rather, it is arguably an unrealistic aim and expectation of punishment that it control rates of crime.

Until comparatively modern times there was little attempt to use punishment to reform wrongdoers and there was little pity wasted on law-breakers, with punishments tending to be quick, harsh and public. The history of crime and punishment (examined in detail in Chapter 3) demonstrates that there have been attempts to reform criminals but they have not detracted from the general motif of punishment as needing to be severe and exemplary. Reform and rehabilitation as 'aims of punishment' gained perhaps their widest support in the late 1950s and 1960s, providing a different sense of purpose for punishment and leading to a general optimism about the possibilities of punishment. This was

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reflected in various new methods of punishment introduced in Britain and elsewhere in this period, including parole, suspended sentences, community service orders and day training centres. The optimism of the 1960s soon gave way to a more sceptical perspective: rising crime rates and high rates of reoffending led to criticisms of the new methods of punishment as being too soft. The emphasis moved away from reform, with senior politicians advocating a hardline approach to punishment that was reflected in 'short, sharp shock' sentences being introduced in the early 1980s, and more recently the introduction into Britain of policies based on American 'boot camps' and 'three strikes and out' policies.

However, these newer, harsher initiatives have similarly had little effect on the size of the prison population or on rates of recidivism. Without going into great detail, some overall figures will help illustrate the pressures on the prison system in Britain and provide a context for considering the different philosophies of punishment. The prison population in Britain has continued to rise pretty steadily over the past few decades, with over 71,000 people in Prison Service establishments in 2002 (Home Office data, *Social Trends* 33, 2003). The number of people given immediate custodial sentences in 1999 was over 105,000 compared to just under 80,000 four years previously (Home Office data, *Annual Abstract of Statistics*, 2002). (The reason that the number of people sent to prison each year is greater than the prison population is that most prisoners are sentenced to short sentences of less than one year and so not all would be in prison when the annual figure is calculated.) As regards repeat offenders, it would seem that a relatively small number of offenders are responsible for a large proportion of offences. Of the 97,800 males who entered prison in 1999, almost 68 per cent had had previous convictions for 'standard list offences' (which include all indictable offences plus some of the more serious summary offences), with 46 per cent having had three or more previous convictions (Home Office data, *Annual Abstract of Statistics*, 2002).

These kinds of figures and the obvious concerns they highlight about justice and punishment raise questions about the aims and philosophies of punishment, which we will now turn to.

QUESTION BREAK: 'HARD' AND 'SOFT' APPROACHES

In the introduction to the chapter, reference was made to the support for 'hardline' approaches to punishment in response to criticisms of reformative approaches to punishment as being too 'soft'. The terms 'hard' and 'soft' are routinely used to indicate polarised positions in the debate about punishment.

Former Home Secretary (and, in 2003, leader of the Conservative Party) Michael Howard has been a strong advocate of the 'hard position', and is particularly renowned for his 'prison works' comments: 'Prison works ... it makes many who are tempted to commit crime think twice. ... This may mean that more people will go to prison. I do not flinch from that' (at the Conservative Party Conference, 1993).

While Howard's predecessors as Home Secretary (including Kenneth Clarke, Kenneth Baker, David Waddington and Douglas Hurd), as well as key figures involved in running the criminal justice

system (including Lord Woolf, now Lord Chief Justice), have favoured a reduction in prison sentences, for minor offences at least, the hardline approach tends to be popular with the wider public and certain sections of the mass media. In contrast, any perceived 'softness' on crime tends to be seen as a sign of political weakness; and when we hear of horrific crimes occurring it is easy to see how a hardline, 'hang 'em high' approach will gain considerable sympathy and support.

It is not surprising, then, that the hardline approach has been regularly advocated by politicians. Former Prime Minister John Major, commenting on the supposedly lenient treatment of juvenile offenders, said that 'We should understand a little less and condemn a little more.' The Labour government that replaced his administration has promised to be 'tough on crime and tough on the causes of crime' and to give 'zero tolerance' to crime and criminals.

The 'debate' between the 'hard' and 'soft' positions can be illustrated by the comments made by the Lord Chief Justice, Lord Woolf, in December 2002 when he told judges and magistrates that burglars facing a sentence of up to 18 months should not go to prison but be given a non-custodial sentence, and even where a prison sentence was imposed it should be no longer than necessary. This 'soft' position led the leader of Britain's Chief Constables, Sir David Phillips, to say that such a move would undermine the morale of the police, who had successfully focused on burglary for a number of years – an attack on Lord Woolf's proposals that was supported by the Police Federation, which represents rank-and-file officers, who felt that such comments would only encourage burglars.

Question

Why do you think that (a) the reformative approach might be unpopular with the general public; and (b) a tough approach might be more popular?

The aims of punishment

While punishment and the institutions associated with it are generally accepted as being a necessary part of any orderly society, that does not mean punishment is unproblematic. As Garland (1999, p. 5) puts it:

> The modern institutions of punishment are especially prone to conflicts and tensions that tend to undermine their effectiveness and legitimacy as instruments of social policy. These conflicts – between condemnation and forgiveness, vengeance and mercy, the sanctity of the law and the humanity of compassion, social defense and individual rights, the urge to exclude and the dream of rehabilitation – set up complex, ambivalent sentiments that colour the day-to-day experience of those caught up in penal relations, whether as administrators and officers, inmates and clients, or as members of the public.

Given these and other tensions, it is little surprise that the history of punishing offenders has been one of 'reform and reaction, of false dawns and disappointed optimism' (Garland 1999). Garland also points to the ambitious expectations held for our modern criminal

justice system. It is viewed not just as being about 'doing justice' through law enforcement and punishing offenders, but also as having a wider remit to reduce crime through reforming offenders and deterring others from offending. And, as the expectations of reducing crime have not been met, so issues about the aims and success of punishment become a focus for public concern.

It is not surprising, then, that various different aims of punishment have been advocated or that different commentators adopt different ways of categorising these aims. Moreover, the philosophies that underpin the reasons for punishing offenders are an important area to consider, perhaps at the most basic level because punishment will involve some form of compulsion (forcing something on someone) which, typically, involves hardship. Decisions to punish inevitably raise fundamental issues of moral justification, of what are the reasons for doing it.

QUESTION BREAK: JUSTIFYING PUNISHMENT

Before we consider the major aims of punishment, the following exercise asks you to reflect on what you think the justification for punishment should be.

Read the two brief fictional case studies and then answer the question at the end.

Case 1

James has been found guilty of fraud. Over a number of years he embezzled funds from the city bank at which he worked; he opened false accounts and used them to finance a lifestyle way beyond what would have been possible on his regular salary. As well as a large country house in Britain, he owned a small villa in Spain and an apartment in New York. He justified his wealth to his colleagues by claiming he had been left money by a rich spinster aunt which he had invested successfully. The court heard that he stole over £2 million between 1977 and 1999.

Case 2

Paul has been found guilty of burglary. He broke into a house while the residents were at work and stole a VCR, a number of CDs and videos and cash – to the value of some £500 in all. He had one previous conviction for burglary, for which he had received a six-month probation order, which he had successfully completed.

Question

As a judge, you have to punish the two offenders. For both James and Paul (separately) decide which of the following approaches would be your personal motivation in determining the appropriate punishment. (You can choose only one.)

1   The punishment must be unpleasant enough to discourage James/Paul from committing another crime.
2   The punishment must be in line with the punishment others would get for a similar crime and be of sufficient severity to match the crime.
3   The punishment must provide opportunities for James/Paul to make better choices in the future so that he is unlikely to want to commit another crime.

Discussion

Consider what your answer tells you about your 'philosophy of punishment' – did you lean to punishment as a deterrent (answer 1), or as retribution (2), or rehabilitation (3)?

Probably the requirement to choose only one answer restricted you. Often there will be more than one philosophy at play; and the philosophy that guides your own decisions may well change if you get to know more about the circumstances of the offence, the characteristics of the offender, and so on.

This exercise illustrates the point that there are various plausible justifications for punishment, and that difficulties can arise for sentencers because these justifications can and do conflict with one another. In particular, and as the comments from Garland illustrate, there is a basic tension between protecting the rights of offenders (not punishing them more than they deserve) and protecting the rights of the public not to be victims of crime.

In the rest of this chapter, we will examine the major aims of punishment. As mentioned earlier, there are different ways of listing and categorising these aims. Hudson (2003) suggests two basic groupings: aims concerned with preventing future crimes and those concerned with punishing crimes already committed. Those focused on future prevention could be seen as utilitarian, as having a certain degree of 'usefulness' for the wider society; thus if a punishment deters someone from reoffending or discourages others from offending or 'reforms' offenders so that they do not offend again, its utility is clear. These future-oriented aims of punishment have been called reductivist by some commentators, as their aim is to reduce crime (Cavadino and Dignan 2002). Past-oriented aims and approaches to punishment are known as retributivist in that their focus is on exacting retribution from offenders, the blame is placed squarely on the offender and the future conduct of that offender is not seen as the major issue – punishment is essentially about blame and repayment.

QUESTION BREAK: CRIMINAL RECORDS

There is clearly a conflict between these two broad aims of punishment. As Hudson (2003, p. 5) comments:

[I]f a person is assessed as likely to commit a further offence, should s/he be punished more severely than someone who commits the same offence but is not assessed as likely to reoffend? Conversely, should someone who commits an offence and has a record of previous offences be punished more severely than someone committing the same offence for the first time?

Question

What priority do you think should be given to someone's criminal record and what to the actual offence? Give reasons for your answer.

Deterrence

Deterrence is a future-oriented aim in that the intention behind it is to reduce crime. It could also be seen, therefore, to have a utilitarian rationale. As already mentioned, 'utility' would be apparent if a punishment deterred an offender from reoffending or if it discouraged others from offending in the first place. This comment indicates that there are two basic ways in which deterrence can work: either at an individual or at a general level (Cavadino and Dignan 2002). Individual or specific deterrence involves the punishment showing the offender that her/his action was undesirable because it brought her/him more pain than pleasure; so the fear of punishment would prevent the individual from repeating the offence. General deterrence works by showing others who may consider a criminal act that they will suffer painful consequences if they commit the offence.

Before we try to assess the effectiveness of deterrence as a basis for punishment, it would be useful to explore the relationship between the utilitarian philosophy that underpins deterrence and punishment. While utilitarian approaches to punishment are not exactly synonymous with reductivist approaches, recent theories of punishment that focus on crime reduction are clearly linked with the theorising of the Enlightenment thinkers Cesare Beccaria (1738–1794) and Jeremy Bentham (1748–1832), the classic exponents of utilitarian theory. Essentially, the utilitarian argument is that actions are moral if they are useful, and so punishment can be morally justified only if the harm and suffering it prevents is greater than the harm it inflicts on offenders; and unless punishment reduces future crime then it would add to rather than reduce the sum of human suffering. When Beccaria published *An Essay on Crimes and Punishments* in 1764 he advocated a system of justice and punishment as much as an explanation of crime and, in similar vein to the British philosopher Bentham, proposed that punishment should be used to achieve some greater good for society – with a reduction in crime being a clear example of such a good. Beccaria proposed that a graduated system of penalties with the particular punishment appropriate to the crime would work as a deterrent. Prior to the move to democratic, constitutional governments (as opposed to monarchies) in Europe in the eighteenth and nineteenth centuries, punishment was often arbitrary and down to the whims of the nobility and monarchy. Bentham developed what has become known as the 'classicist' penal code based on the classic ideas of the Enlightenment. He stressed the importance of human reason rather than notions such as the divine right of monarchs as a means of governing. As regards punishment, he argued that this should be rationally based. Bentham saw the criminal as an individual with free choice who could therefore be deterred by the threat of future punishment. He also argued for a strict link between crime and punishment: once a crime was committed it should be punished accordingly, with no room for mitigating circumstances to be taken into account. For both theorists, then, the crime issue was basically the punishment issue; and punishment should be rational, fair and just. They argued that excessive and violent punishments were barbaric and not worthy of civilised nations, and that each particular form of punishment must impose just enough pain and suffering to outweigh the pleasure that may come from committing the specific crime.

In summarising Bentham's approach, Hudson (2003) highlights three ways in which he suggests an individual can be deterred from reoffending: first, through taking away the

individual's ability and power to offend; second, by taking away the individual's desire to offend; and third, by making the individual afraid to offend. The first of these would involve some form on incapacitation; the second refers to a reformist or rehabilitative approach, which we will consider later; while the third, deterring someone through fear of the potential punishment, is the meaning that is conventionally attached to deterrence.

Now an obvious way in which deterrence might work would be to have very draconian punishments that were so severe that people would be bound to be put off committing crimes. This sort of approach could not be called utilitarian, in that there is no attempt to limit the amount of pain as there would be no limit on the severity of punishment. While life imprisonment for driving over the speed limit or for shoplifting might lead to a dramatic reduction in those offences, and while 'get tough', 'hard' approaches to punishment may be attractive to politicians because of their appeal to the wider public, the notion of very severe punishment for any but very serious crimes would be held by most to be unacceptable from a human rights point of view. A compromise position is the notion of passing 'exemplary sentences' – sentences that are more severe than would usually be given for a particular offence because they aim to get over a message that such behaviour is being taken especially seriously. The notion of such 'exemplary' penalties raises the interesting point that for punishment to work as a general deterrent it is not necessary that only guilty people are punished. While the punishing of innocent people would, hopefully, be rejected by all ethical systems, there may be some justification, in terms of general deterrence, for punishing people for something they have not yet done but may be likely to do in the future.

The focus of the deterrence philosophy is, essentially, on frightening people into not offending; and it is, therefore, generally associated with severer penalties such as long prison sentences. One problem with this notion is that what one person may feel to be severe might be viewed by another as mild. Another is that for general deterrence to be effective, the punishment has to be severe, and painful, enough to outweigh the potential pleasure that the particular offence might give the offender – a difficult assessment to make. It is also necessary that there is adequate publicity so that would-be offenders are aware of the particular punishments meted out. Indeed, any publicity that leads to an increased awareness that many crimes are not being solved or that highlights an increase in what are seen as lenient punishments can work against the effectiveness of deterrent punishments.

It seems fair to say that there is little evidence that deterrence 'works', and we will conclude this section with a brief assessment of the effectiveness of deterrence as a justification for punishing offenders.

It might seem reasonable to suppose that offenders who had received a harsh punishment would be less likely to reoffend than offenders who had received a less severe punishment. However, there is little evidence that this is the case – the figures on repeat offenders that were given at the start of the chapter certainly raise questions about the deterrent effect of punishment, while young offenders who served custodial sentences