

# Criminology and Political Theory

**Anthony Amatrudo**



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For John Charvet

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# 1

## THE NATURE OF THE STATE

Political power is, of course, always coercive power backed by the state's machinery for enforcing its laws. But in a constitutional regime political power is also power of equal citizens as a collective body: it is regularly imposed on citizens as individuals, some of whom may not accept the reasons widely believed to justify the general structure of political authority (the constitution); or when they do accept that structure, they may not regard as well grounded many of the laws enacted by the legislature to which they are subject.

John Rawls, 2001<sup>1</sup>

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### Introduction

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The nature of the state is a topic which divides criminologists. There are those who see it as a neutral instrument which upholds civic order or which supports citizens through a system of benefits and support and there are those who see the state as either having interests of its own or advancing the interests of a specific class of persons, in whose interests it governs. The idea of justice as fairness rests upon the idea that the state is a neutral entity and it is fair to say that the liberal tradition within Criminology has tended either to neglect the state or to rely, wholesale, upon liberal political theorists, such as John Rawls and his conception of 'social cooperation among equals for mutual advantage'.<sup>2</sup> The Marxist and Feminist traditions within Criminology have a far richer body of writing about the state and more generally about state control and social regulation. This chapter will set out the main ideas used in contemporary Criminology, either explicitly or implicitly, concerning the nature of the state.

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### The State

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The state is, arguably, the most contested term in political theory and it may refer to a great many different things, such as a philosophical or ideological category, an institution, a territorial power or a functional organising principle. It is a topic covered extensively in the writings of political philosophers since classical times,

and certainly Plato, Aquinas, Machiavelli, Hobbes, Locke and Marx are only a few of the writers who have tackled the subject of the state. In Criminology different traditions have grown up which attribute varying motivations to the state. In order to make progress, let us outline four basic and interrelated features of a state. First, the state must have a working political organisational structure. In other words, it must have a set of institutions which allow it to operate, such as the courts, a civil service and a police force. Secondly, for a state to be a working entity it has to persist in time and space, i.e. it must control a set territory and survive changes in its basic organisation, as would be the case if an election altered the government. Thirdly, it must be able to support a single political form of public order and therefore it must have agency. It must be sovereign and be able to claim a monopoly of political authority, law-making and power, and it must be autonomous. Fourthly, but closely linked to the idea of the state as a single political form of public order, it must have the allegiance of its members (citizens, subjects), who are subject to its laws and who have an obligation to obey it. The political theorist John Chavet has noted that: 'For Locke, as well as for Hobbes and Rousseau, entry into political society from the state of nature is possible only if individuals surrender their natural right of private judgement to the public judgement of the community or its agent.'<sup>3</sup>

The two most important features for criminologists are the first and third features. The first feature, that the state is a particular form of political organisation, is the dominant notion at work in contemporary Criminology. It is the view of Karl Marx, who wrote in *The German Ideology* that: 'Through the emancipation of private property from the community, the State has become a separate entity, beside and outside civil society; but it is nothing more than the form of organisation which the bourgeois necessarily adopts both for internal and external purposes, for mutual guarantee of their property and interests.'<sup>4</sup> In contemporary legal theory, Joseph Raz has also argued that the state is a form of political organisation, but he has usefully delineated the state from law and government: 'The state ... is the political organisation of a society, its government, the agent through which it acts, and the law, the vehicle through which much of its power is exercised.'<sup>5</sup> Raz has further argued that: 'A state is the political organisation of a society, it is a subsystem of a more comprehensive social system.'<sup>6</sup> This position echoes John Rawls' idea, expressed in *Political Liberalism*, that: 'a society's main political, social, and economic institutions, and how they fit together into one unified system of social cooperation from one generation to the next'.<sup>7</sup> It should be noted here that the political and social basis of the state are not very clearly delineated.<sup>8</sup>

The third feature, that the state is a political form of public order with a monopoly of political authority, law-making and power, was underscored by Thomas Hobbes and John Locke, who defined the state as that form of political power which has the sole right to make laws and to punish those who fail to follow them, and it has obvious connections to the study of crime. Hobbes, in the *Leviathan*, wrote: 'I Authorise and give up my Right of Government myselfe, to this Man, or his Assembly of men, on this condition, that thou give up thy Right

to him, and Authority all his Actions in like manner.'<sup>9</sup> Hobbes saw the state as being that thing which preserves men from the state of nature. Hobbes' conception is set out in the *Leviathan*, where he writes: 'The state of nature is simply the condition of men without a sovereign power to compel order. Just as we may never have a perfect vacuum, perhaps we can never have a situation where there are no vestiges of the restraints that sovereignty provides, but inasmuch as sovereignty is absent, to that extent men will begin to exhibit behaviour typical of the state of nature.'<sup>10</sup> In Hobbes, we get the idea that it is not natural for men and women to subordinate themselves for the greater good. Rather, we are presented with a view that social community, and freedom from the state of nature, can only be established through the exercise of political power. Our human society is the outcome of agreements and conventions that men and women make themselves.<sup>11</sup> John Locke, following Hobbes, saw the state as that political institution which maintains order. Locke details his notion of the main function of a state in his description of the Law of Nature: 'For the Law of Nature would, as other Laws that concern men in this world, be in vain, if there were no body that in the state of nature, had a power to execute the Law and thereby preserve the innocent and restrain offenders.'<sup>12</sup> In this passage we note both his understanding that all law requires enforcement and concern for deterrence in punishment.<sup>13</sup> In contemporary liberal political theory, both Chavet and Raz follow the tradition of understanding the state as that thing that maintains law and order and thereby allows persons to live their lives unhindered by the dangers inherent in a state of nature; indeed, it is the standard view.<sup>14</sup> It is important to note that in liberal theory the state is the outcome of a voluntary agreement made by individuals who realise that only a social contract will save them from the dangers of the state of nature. The liberal state is always a protective neutral entity which represents all the people fairly for the common good of all. This conception of a neutral state that safeguards its citizens equally from the state of nature is what Marxism and Feminism take issue with.

### Marxism and the State

The classic statement within Marxist Criminology on the state, as that thing which frames laws which uphold sectional class interests, was given us by Bill Chambliss when he wrote: '... without doubt the single most important force behind criminal law creation is doubtless the economic interest and political power of those social classes which either (1) own or control the resources of the society, or (2) occupy positions of authority in state bureaucracies.'<sup>15</sup> Marx himself gave two different accounts of the state. The account Marx gives in his introduction to *Critique of Hegel's Philosophy of Right* is an unfinished work and is a critique of Hegel, rather than a systematic view of his own thinking. The first view Marx outlined for himself was given in the 1848 *The Communist Manifesto*, where he wrote: '... executive of the modern State is but a committee for managing

the affairs of the whole bourgeoisie'.<sup>16</sup> In *The Communist Manifesto*, the state simply coordinates the interests of dominant class. We are presented with a straightforward binary opposition between the bourgeoisie and the proletariat. However, Marx also advanced a second view, notably in two other works, the *Class Struggles in France*, written in 1850, and *The Eighteenth Brumaire of Louis Bonaparte*, written in 1852. In these works, he outlines a plurality of classes and details how the state is far more than just a simple coordinator of the interests of the dominant class. Marx also argued, in this second view, that the state itself has some autonomy. This second view of the state has become the dominant view in contemporary Marxist scholarship and Carnoy has written that: 'The State is not regarded simply as an instrument of the ruling class. ... Who rules the State is an important issue, but few, if any, current writers claim that the ruling class controls the State directly'.<sup>17</sup> However, we must not lose sight of the fact that Marx did not furnish a systematic theory of the state and his ideas are often inconsistent or not fully formed, though this is in part due to the fact that he was far more concerned with Political Economy, rather than Political Theory.<sup>18</sup> Marx also tends to underplay the ability of individuals to either act or calculate independently of their economic situation. Because Marx failed to provide a thoroughgoing or clear conception of the state, his followers have had to interpret his writings and this has spawned a variety of latter-day Marxist theories.<sup>19</sup> Nevertheless, the Marxist state is always essentially economic in its character. As Pashukanis said of legal forms, they 'form a united whole with the material relations of which they are the expression'.<sup>20</sup> This position is found in Marx's *Preface to a Critique of Political Economy*:

My investigations led to the result that legal relations as well as forms of state are to be grasped neither from themselves nor from the so-called general development of the human mind, but rather have their roots in the material conditions of life. ... The sum total of these relations of production constitutes the economic structures of society, the real foundation, on which rises a legal and political superstructure. ... The mode of production of material life conditions the social, political and intellectual life process in general. It is not the consciousness of men that determines their being, but on the contrary, their social being determines their consciousness.<sup>21</sup>

Among contemporary Marxist criminologists Dario Melossi has, perhaps, done most to uncover the original intention of Marx's writing on the state and punishment, though Marx's writings resist a *definitive* definition.<sup>22</sup> Nonetheless, it is possible to argue that there are two main schools within Marxist writing on law, punishment and the state. On the one hand, Melossi and Rusche and Kirchheimer stress the first view given in *The Communist Manifesto* and play up the economic elements in Marx's analysis and the role of state coordination.<sup>23</sup> On the other hand, Hall, Hay, Ignatieff and Sumner tend to favour the second view given in *The Eighteenth Brumaire of Louis Bonaparte* and understand the state as having a deal of autonomy.<sup>24</sup> Hall, Hay, Ignatieff and Sumner all stress the importance of ideology and broader issues of legitimacy. Hay, for example, reasoned that the criminal justice system in eighteenth-century England was essentially ideological in

nature, rather than straightforwardly judicial. The proliferation of offences for which people could be executed was, he argued, part of an elaborate system of execution and mercy. The deeper point Hay makes is that state punishment was secondary to its ideological function, which was the preservation of the property rights of a tiny minority of the population. State punishment was actually more concerned with ensuring a compliant citizenry than giving criminals their deserved sentences. Hay wrote: 'Loyalties do not grow simply in complex societies—they are twisted, invoked and often consciously created'.<sup>25</sup>

#### Gramsci

Of all Marxist theorists, Antonio Gramsci has arguably had the greatest influence upon Criminology, notably through the work of Stuart Hall and Colin Sumner. Gramsci, above all else, wanted to stress human subjectivity in his writing. Gramsci rejected the economic determinism of *The Communist Manifesto* and the *Preface to a Critique of Political Economy* in favour of a type of Marxist theorising which gave primacy to the autonomy of the state and which had an enlarged role for ideology in ordering civil society. Prior to Gramsci, Marxists had, typically, followed Marx and Engel's *German Ideology* in arguing that the capitalist class were, in the same instance, the dominant intellectual class.<sup>26</sup> Gramsci's novelty was to give a much greater weight to the centrality of the ideological superstructures and the autonomy of the state than had Marx, and he advanced a case for the role of consent in running civil society, rather than the brute force of the state. Gramsci maintained that human consciousness is independent and that political life can be separated from the economic base, in which case the masses can be co-opted into the capitalist project through ideological means. He argued that hegemony subtly dominates the culture and thinking of ordinary people and that this is how a capitalist state maintains itself. The hegemony of the capitalist state can maintain dominance without the use of force by moulding the ideas and values of ordinary people, undermining class conflict and providing a backdrop of mutual agreement on those issues which are allowed to be tackled by political action, as happens, Gramsci argues, in capitalist democratic systems.<sup>27</sup>

Gramsci assigned an important role to intellectuals. He understood that no organisation could work properly without intellectuals and no class-based politics could be successful without intellectuals. He therefore stressed the coherence of the intellectuals and the people in developing progressive politics.<sup>28</sup> He saw intellectuals as having an educative function in combating the ideas generated by capitalist hegemonic power, though how the intellectuals obtain the capacity to think outside capitalist hegemony, and to what extent, remains a mystery.

Gramsci's theory of the state is one which is linked to notions of class but his originality is in seeing the superstructure itself rooted in class relations. For Gramsci, therefore, legal and political systems are always 'rooted in class struggle', as Carnoy notes.<sup>29</sup> Gramsci differs from Marx in noting that the state has only a

limited engagement with the executive, law and police because he does not see the state as functioning through class rule in the same way that Marx had. Gramsci argued: 'the state is conceived as a continuous process of formation and superseding of unstable equilibria ... between oppositional forces of the fundamental group and those of subordinate groups - equilibria in which the interests of the dominant group prevail, but only up to a certain point'.<sup>30</sup> Colin Sumner echoes this reasoning when he writes:

The criminal justice system is one of the regulatory institutions of modern society charged with the tasks of pacifying, rephrasing, defining, defusing and treating the products of social tension. ... But ruling groups' ideological perception of what is peace, safety, health and order dominate the public articulation of legal and moral censures, and the specification of target populations for those censures. In return, subordinate forces continually contest consciously, or threaten unconsciously, the validity, purpose and morality of hegemonic censures. Such dominance and contestation are vital features of the normal legal procedure and practical pattern of criminal justice systems.<sup>31</sup>

Gramsci saw the state as a 'complex of practical and theoretical activities with which the ruling class not only justifies and maintains its dominance, but manages to win the active consent of those over whom it rules'.<sup>32</sup> This thinking is indebted to Hegel's *The Philosophy of Right*, which saw civil society as the outcome of complex capitalist relationship between groups, such as trades unions. In Hegel, it is civil society which gives rise to the state.<sup>33</sup> Gramsci, like Hegel, tends to identify the state with civil society. Moreover, Gramsci's view that the state is not made up of physical institutions but rather of a dominant set of ideas is also first found in Hegel.<sup>34</sup>

The main elements of Gramsci's analysis of the state are: (1) that the state is not simply a repressive mechanism to do down the working class; (2) that class domination is a very subtle affair; (3) that the state is receptive to ideas and arguments; (4) that Marx had not addressed seriously enough the possibility that the state could be taken by intellectual means rather than by violent revolution; and (5) that control of the state was part of the proletariat's own hegemonic aspiration and it could be advanced through intellectual struggle.<sup>35</sup> However, the attention paid to ideology by Marxists, of the Gramscian-type, has been harshly criticised. The conservative political theorist Michael Cakeshott puts the case well when he writes:

... the larger enterprise of exploring the possibility of demonstrative political discourse based upon an 'ideology' composed of categorically informative propositions about human beings and the course of events. It is interesting in itself, but for us its main interest is that the obstructions which frustrated it are, in principle, obstructions which must frustrate every undertaking of this sort. Explanatory 'laws' of social change cannot generate political deliberation capable of reaching 'correct' political decisions, or political discourse capable of proving decisions to be 'correct' or 'incorrect'. The disappointment of the hope of achieving demonstrative political deliberation with the aid of an 'ideology' composed of explanatory 'laws' of social change or development is one of the great traumatic experiences of the early twentieth century.<sup>36</sup>

### Altusser and Poulantzas: Structuralism

Structuralism, which is situated within Marxism, runs counter to the work of Gramsci. It stresses the underlying economic structures rather than the agency of individual subjects. Louis Althusser and Nicos Poulantzas are the leading proponents of this approach. They focus upon Marx's *Capital* and emphasise the historico-economic structures which frame the world of ideas, as opposed to the role of human subjectivity. Althusser's rejection of Gramsci is made clear in his most famous work, *For Marx*. Althusser argues: '... ideology is an objective social reality; the ideological struggle is an organic part of class struggle. On the other hand, I criticized the theoretical effects of ideology, which are always a threat or a hindrance to scientific knowledge'.<sup>37</sup> He stresses that the knowledge individuals have is merely 'material activities inserted into material practices governed by material rituals which are themselves defined by the material ideological apparatus from which derive the ideas of the subject'.<sup>38</sup> Later in *For Marx*, he stresses, in a famous passage, that our knowledge of ideology is only a partial knowledge about 'the conditions of its necessity'.<sup>39</sup> In other words, that we understand the state best in terms of the base economic structures that Marx had written about in *Capital*.

Nicos Poulantzas dealt with the question of the state head-on in two books, *Political Power and Social Class* and *State, Power and Socialism*. In *Political Power and Social Class* (1973) he argues for the relative autonomy of the state (though, as Milton Fisk has argued: 'This restriction undercuts autonomy and leaves us with an economic reduction ... the state's activity in organising the dominant class for political power is only made to seem autonomous by considering it in isolation from the rigid claim that the state, at least in the last instance, must reproduce the economy'.)<sup>40</sup> Poulantzas argued that capitalism shifts the struggle from the economic concerns to the political domain. This, he argues, is part of a process of undermining class struggle through the individuation of persons and 'to mask and obscure class relations (the capitalist State never presents itself as a class State) but also plays an active part in the division and isolation of the popular masses'.<sup>41</sup> Poulantzas has a similar view of the role of law as individualising issues and supporting the reproduction of the capitalist economic system.<sup>42</sup> The capitalist state, through politics and the law, is actively preventing the emergence of class consciousness. In *State Power and Socialism* he maintains that '[t]he State apparatuses organise and unify the dominant power bloc by permanently disorganising - dividing the dominated classes'.<sup>43</sup>

### Problems with Marxism

The problem of Marxism is well illustrated by considering the work of Gramsci, Althusser and Poulantzas. There is no agreed position within Marxism. The problems raised in the original Marx have led to a number of theoretical and practical issues, such as the extent to which the economy dictates the form of the state, the

role and extent of ideology and the role of law. Marxism is withering as a potent political force and it is now a marginal force in contemporary Criminology. It is not incidental to note that the heyday of Marxist Criminology was in the 1960s, 1970s and 1980s. Yet the Marxist intuitions that the economy, to a greater or lesser extent, dictates the form of the state, that the state seeks to maintain itself and that the state is self-interested all seem plausible ideas. However, the notion that the state organises, or manages, moral panic through its treatment of crime in order to deflect attention away from the central issue of capitalist social and economic relations, and simultaneously thereby increases the power of the state over the citizen, seems increasingly unconvincing as an explanation of how the state works. Yet this is exactly what *Policing the Crisis* (a Gramsci-inspired text) argued when it conceived the treatment of mugging in the London of the 1970s as largely reducible to the state re-legitimising itself through a concentration upon mugging:

... a governing class which can assure the people that a political demonstration will end in a mob riot against life and property has a good deal going for it – including popular support for 'tough measures'. Hence the 'criminalisation' of political and economic conflicts is a central aspect of the exercise of social control.<sup>44</sup>

Building upon this analysis, Sumner has stated that: 'The definition of deviance and the organisation of crime control are fundamentally and profoundly political questions. Deviance, criminality and policing, in the times and societies we know, have never escaped their basic ideological role in the everyday, practical politics of domination by one class, gender and race over others.'<sup>45</sup> Such an analysis seems at best, partial, at worst reductive. Indeed, McLaughlin has suggested that the set of issues that *Policing the Crisis* dealt with were themselves linked to a unique set of socio-political and politico-historical circumstances, rather than being proof of any Gramscian conception of the state and its activities.<sup>46</sup>

The issues thrown up by the concept of collective class politics and the uses and abuses of ideology seem insurmountable. Since Marx died there has been little agreement, among Marxists, as to what the corollary of his writings is. Moreover, in practice, the Marxist state has usually proven despotic, as Leszek Kolakowski, the eminent scholar of Marxism, has argued:

On the assumption that violence is the midwife of progress, one should naturally expect that the ultimate liberation of humanity would consist in the coercive reduction of individuals to inert tools of the State, thereby robbing them of their personality, and their status as active subjects. This is what in fact all the regimes that base their legitimacy on Marxist ideology try to do; they are incapable in principle, not as a result of temporary deficiencies, of accepting the idea of human rights, for human rights would indeed demolish their very foundation.<sup>47</sup>

## Feminism

In many ways feminism might be said to share some features in common with Marxism: (1) an understanding that the world is made up of relations of

domination and subjugation; (2) that the state is skewed in favour of particular interests; (3) that it is a basic function of the law that it is used to both confuse and oppress those who threaten its legitimacy and dominant economic mode of production; and (4) that it is a position characterised by internal divisions. By and large, feminist criminologists have neglected the state and concentrated upon more sociological types of issue, such as the development of feminist research methodology, victimisation, and developments in social policy. The state is often implied as the thing that ultimately legitimises relations of patriarchy, through law and the preservation of gendered social practices. Feminism has increasingly stressed the particularities of women's lives. Some feminists have taken over Marxist terminology wholesale (e.g. hegemony, ideology and the mode of production). However, other feminists, such as MacKinnon, reject the old Marxist terminology and argue that it needs to be replaced with a new terminology which better reflects the nature of patriarchy.<sup>48</sup> Dobash and Dobash have similarly argued that 'it is impossible to use the law and legal apparatus to confront patriarchal domination and oppression when the language and procedures of these social processes and institutions are saturated with patriarchal beliefs and structures'.<sup>49</sup>

In liberal political theory, feminists have addressed the state, notably the work of Thomas Hobbes. They have critiqued the social contract theory he outlined in *Leviathan*.<sup>50</sup> Coole and Pateman are typical of feminists who have criticised the Hobbesian social contract treatment and its conception of the state.<sup>51</sup> Hobbes had argued that men and women leave the state of nature and contract to live under a sovereign for their own protection and to secure their freedom. Hobbes had argued for the formal equality of men and women and in the text of *Leviathan* there seems to be sexual equality. However, Hobbes also reasoned that there were families in the state of nature where patriarchy exists and Coole has shown how, when considering patriarchal family structures, his 'formal account is at odds with unexpurgated ideological and historical assumptions'.<sup>52</sup>

If we look at *Leviathan*, we get what is technically called a concept of *negative freedom*, i.e. a view of liberty that, in Hobbes' words, consists of 'an absence of external impediments'.<sup>53</sup> However, the feminist political theorist Anne Phillips has made the following point: 'If freedom were simply a matter of non-interference, we might have to say that a slave left alone by a lazy master enjoyed full liberty; or that a wife cherished by her accommodating husband was as free as a bird, even when the laws of her society denied her any independent status. ... Servitude is servitude even when the master is accommodating. The only free people are those who govern themselves.'<sup>54</sup> Phillips' point is that the liberal ideas of freedom and equality do not respect women in practice.

The theorist who has done most to develop this is Carole Pateman, who is regularly cited by criminologists.<sup>55</sup> Pateman's most important works are *The Sexual Contract* (1988) and the essay 'God Hath Ordained to Man a Helper: Hobbes, Patriarchy and Conjugal Rights' (1991), both which detail the liberal social contract model, but concentrate upon Hobbes. She is taken with the issue of why women, who are equal in the state of nature according to Hobbes, consent to subordination in civil society. She argues that once the social contract is in place

the sovereign enforces all contracts, including the marriage contract. She argues that the marriage contract is the basis of women's subordination.<sup>56</sup> In other words, once the social contract is in place, men come to control women and their sexuality, through the marriage contract and this is what undermines women's freedom. This is done through the concept of the 'property of the person', which posits that we own both our abilities and our freedom and that because of this we can give them up. Indeed, it is what Hobbes argues we do when leaving the state of nature and making the social contract. Richardson argues that Hobbes' concept of the 'property of the person', when understood in relation to marriage, is a mechanism for women to exchange their freedom for subordination in such a way as to emphasise consent.<sup>57</sup> The marriage contract facilitates subordination through contract and though historical change has altered the pattern of sexual contract, it nonetheless has established modes of thought that persist, notably the subordinate role of women. Indeed, Pateman has criticised Rawlsian political methodology for never even considering the issue of how women come to occupy a subordinate position society.<sup>58</sup> Pateman is important because her analysis does not assume the nature or position of women in society. Moreover, she asks important questions about how women became established in a subordinate role in society.

Therefore, although feminist criminologists have tended to undertake research unrelated to issues of the state, the work of feminist theorists, such as Coole and Pateman, nonetheless supports their work. Smith and Natalier have stated:

How does the law and criminal justice system reflect patriarchal realities? In other words, how do they work to exclude and regulate women? How are they informed by underlying masculine assumptions and prejudices about women? Central to this agenda are themes relating to the regulation of sexuality and the idea of the 'social contract' is really a patriarchal social contract. Such analyses might look at either sexist legal statutes or specific contexts. Rape provides a good example of this. Feminist research on rape demonstrates the patriarchal nature of legal and popular definitions of rape and the ways that these impact upon criminal justice process, such as judicial reasoning or police discretion.<sup>59</sup>

## Main Summary Points

- The basic four features of the state are: (1) the state must have a working political organisational structure with functioning courts, a civil service and a police force; (2) to be a working entity the state must have control over territory and be strong enough to survive; (3) the state must be sovereign and be able to claim a monopoly of political authority, law-making and power, and it must be autonomous; and (4) the state must command the allegiance of its members (citizens, subjects), who are subject to its laws and who have an obligation to obey it.

- In liberal theory the state is the outcome of a voluntary agreement made by individuals who realise that only a social contract will save them from the dangers of the state of nature. The liberal state is always a protective neutral entity which represents all the people fairly for the common good of all. This conception of a neutral state that safeguards its citizens equally from the state of nature is what Marxism and Feminism take issue with.
- The Marxist state is always essentially economic in its character.
- The Marxist theorist Antonio Gramsci argued that hegemony of the capitalist state maintains dominance over the people without the use of force by moulding the ideas and values of ordinary people and that this undermines class conflict and provides a backdrop of mutual agreement on those issues which are allowed to be tackled by political action, such as the way society is organised.
- Feminists have argued that the state is often implied as the thing that ultimately legitimises relations of patriarchy, through law and the preservation of gendered social practices.

## Questions

1. How are feminist writers developing the idea of the state?
2. What features would a Marxist theory of the state have?
3. Is the state essential to the preservation of our personal freedom and safety?

## Suggested Further Reading

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## 2

### ECONOMICS AND CRIMINAL ACTIVITY

The history of risk distribution shows that, like wealth, risks adhere to the class pattern only inversely: wealth accumulates at the top, risks at the bottom. To that extent, risks seem to strengthen, not to abolish the class society. Poverty attracts an unfortunate abundance of risks. By contrast, the wealthy (in income, power or education) can purchase safety and freedom from risk.

Ulrich Beck, 1992<sup>1</sup>

#### Introduction

It is taken as read that there is a clear link between crime and the economy. Some scholars have made more of economic factors than others, but nobody rejects the idea that there is some connection between them. If we look over the history of Criminology, we note the moral statisticians such as Quetelet, the Chicago School, strain theory, control theory, and latterly criminologists such as Steve Box, Chris Hale and Jock Young, all focus on the relationship between crime and the economy. Economics itself is a broad subject area, as the leading theorist of an economic approach to law, Judge Richard Posner, has argued.<sup>2</sup> This chapter will concentrate upon the classic positions that criminologists have adopted regarding economics and criminal activity. It also covers the economics of crime and punishment in terms of contemporary Economics.

#### Quetelet<sup>3</sup>

The Belgium astronomer and mathematician Adolphe Quetelet (1796-1874) looked at the location and instances of crime, and undertook crime mapping for the French government. While employed as a statistician, Quetelet had the task of providing some of the information which the French state required in order to plan and develop a coherent social policy. His work focused upon government statistics and it aimed at scientific rigour. Quetelet was a positivist in that he saw human behaviour as governed by scientifically verifiable laws. His methodology was derived

from the natural sciences, in which he had been trained. His observation that crime rates seemed to obey the same 'law-like' regularities that govern the natural world mark him out as a man of his time. Quetelet was engaged in work which had definite economic aspects to it, for example, measuring costs to the state.<sup>4</sup>

The French state under Napoleon wanted to *normalise* the 'dangerous classes' through moral rehabilitation, but this was seen as a failure by both politicians and the people. Theft and public order offences almost doubled between 1813 and 1820. There were huge numbers of poor people (*les misérables*) in the cities, notably Paris, who resorted to crime to make ends meet and who routinely rioted over the dreadful social conditions they had to endure. The initial response to this failure of rehabilitation policy was for the French state to commission a number of detailed studies and to build up a statistical picture of who made up the dangerous classes and why they were committing crimes against their fellow citizens. This apparent failure to *normalise* the dangerous classes through the Napoleonic system led directly to the so-called *scientific* route of managing the dangerous classes through the application of statistical techniques in the fields of crime control and prison policy. This entailed analysing such matters as parish records for births, baptisms, marriages and deaths as well as looking at data on poor relief, taxation, fire and general insurance claims and information concerning public health, especially rates of venereal disease, held at the local, regional and national level. The detailed records of the army on the background and general health of soldiers, along with court records and the files of the gendarmerie, were scrutinised in enormous detail. The population was analysed as never before and particular note was made of mortality, age, occupation, disease and levels of intelligence. For the first time the prisons were analysed by a variety of researchers, including those outside the government service, such as religious groups, who looked not only at prison incarceration rates but also such variables as diet and prison type. In the spirit of the time, no variable was excluded and no question ruled out. Indeed, the question of whether prison was itself a factor in recidivism, since it could lead to the moral degradation of prisoners, was also examined. In 1827 the first ever French national statistical tables on crime, *Le Compte général de l'administration de la justice criminelle en France*, were published. The *Compte* itself was restricted to the analysis of the various courts in the French system, with the addition of information on age, sex, occupation and educational attainment level, although this information was systematically added to in subsequent years. The *Compte*, as Piers Beirne has argued, was a decisive factor in the development of a positivistic criminology.<sup>5</sup>

This work led Quetelet to construe certain *faits sociaux* (social facts) that pertain to the aggregated nature of human conduct. From this work he derived his *homme moyen* (average man), which illustrated the utility and accuracy of the hypothesised average value over the larger number of empirical observations. The construction of the average man allowed for detailed comparison in predictive statistical work. Quetelet's first sustained work on criminal statistics was in an 1827 essay, which elaborated the relationship between crime and the severity of its punishment.<sup>6</sup>



Queetelet did not naively or uncritically go about his work and he was concerned

with the limitations of the data he worked with, which was often not standardised or collected in a scientific way. He was especially taken with the total population question; put simply, understanding the actual number of offences and their ratio *vis-à-vis* the sum of recorded crimes. Queetelet discerned a constant relationship between notified crimes and their prosecution, based on the *Compte* data for 1833-39, and from that analysis and his statistical work, based additionally on a range of other judicial and official data, he inferred a constancy between the total population of crime and recorded crime. Queetelet was struck by the recurring constancy of the data on crime, from the number of murders per year to the number of property crimes to the numbers of accused failing to appear in court. All of this suggested to Queetelet that, contrary to what had been assumed, and allowing for the vagaries of individual conduct, criminal behaviour, in an aggregate sense, was constant and seemed to obey certain general patterns, or laws.

Queetelet had a definite view of human nature and he assumed that crime was dependent upon an individual's willingness to commit it. Hitherto certain groups, such as the poor, young men, the unemployed and the ill-educated, were said to commit a disproportionate number of crimes. However, Queetelet showed that the correlation did not hold true and that some of the poorest regions of France were the ones with the lowest crime rates. Far more important was the inequality of wealth: distributed between persons and the propensity of individuals to commit crime, which was related to issues concerning instruction and opportunity. This analysis increasingly pushed Queetelet towards the determination of crime causation, something he had been initially reluctant to study. He came up with a tripartite typology of causation which included *accidental causation*, *variable causation*, and *constant causation*. Queetelet believed that the last category was the most important factor in determining causation. However, these three categories all relate to Queetelet's conception of the average man, and not to any sociology of causation. Moreover, Queetelet ascribed a fixed level of determination to all three types of causation which, especially when combined with the overwhelming influence of age, sex, occupation and religion, ensured constancy to crime rates.

The *homme moyen* (average man) is also the moderate man who tends to the mean in statistical terms. The average man's moderate life owes more to Aristotle than any notion of a person found in modern philosophical or political thought. Moreover, the notion of the average man, who always chooses the moderate path and who always avoids excess, would appear to be a rare anthropological creature in the era of late capitalism. The average man was also contrasted to other groups, such as gypsies, who, Queetelet argued, had an increased propensity to commit crime (and here Queetelet fails to escape the racism of his age). Queetelet was, from the 1840s onwards, increasingly drawn to biological metaphors, notably around the supposed 'contagion of crime'. He even anticipated Lombroso by factoring in such variables as head measurements in his analysis. Queetelet made explicit reference to the fact that the scientifically measured proportions of the body related to crime rates and that both were social facts. In

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this way Queetelet was increasingly drawn into using the concept of deviation, though, as Colin Sumner has pointed out, this is a statistical deviation and not the sociological deviation which Durkheim originated and which came to prominence in the twentieth century.<sup>7</sup>

Queetelet went beyond the narrow parameters of statistical analysis in his recommendations for government. He argued that the state should rigorously apply the criminal code and focus police attention towards known criminal minorities, and this included consistent sentencing. He also argued that the state should focus upon the higher moral, intellectual and scientific elements of modern civilisation and promote social stability. He understood that crime was a constant feature of all societies, but he also realised that the state could both exacerbate and ameliorate the conditions which gave rise to it. This social understanding of crime was a major departure from the notions of a freely acting and wicked criminal, which pervaded public discourse in France.

Queetelet was soon overtaken by the giant figures of Durkheim, Marx and Weber, but his contribution is immense nonetheless. His work suggested that crime was the result of social factors, not moral or evil, and in identifying regularities in the statistical record he opened up the possibility of a modern sociological explanation of crime. In these ways his work was progressive. However, Emile Durkheim, who praised Queetelet's focus upon the existence of certain regularities and observable statistical features of the social world, also criticised his use of the average man on the grounds that merely to point to a phenomenon is not to understand that phenomenon. Durkheim specifically cited the phenomenon of suicide, as a case where a given suicide rate does not presuppose that persons, in general, are exposed to the likelihood of committing suicide, and that to argue otherwise is fallacious. Durkheim also took issue with Queetelet's conception of 'normal'. The sociologist Durkheim understood that what was normal always related to a given social institution and a given level of development, whereas Queetelet derived what was normal from the abstraction of statistical analysis and the development of the average man. Queetelet resisted the pathologising of individuals and instead pointed towards the social causes of crime. He was the first in a long line of people who understood crime in terms of its economic costs. Crime saps the productive power of the economy, costs the state in terms of policing and prison provision, and undermines social solidarity.

### The Chicago School

The Chicago School looked at the relationship between crime and its location. It is an ecological theory which seeks to establish the links between different areas of a city, social disorganisation and criminal activity. Chris Hale has summed up the Chicago School's work by highlighting the underlying economic issues at play: 'Where unemployment is high or economic prospects are poor it will be difficult to muster the necessary resources to combat social disorganization and

maintain informal social control. Hence ... deteriorating economic conditions will lead to increasing levels of crime.<sup>8</sup> Chris Hale is surely right to stress the essentially economic basis of the Chicago School's work.

The first Department of Sociology was established at the University of Chicago in 1892. Chicago had grown spectacularly from being a modest town of under 5,000 people in the 1830s to being a city of over 2 million people before the First World War. By 1930 Chicago's population had exceeded 3 million people. Not only had Chicago grown in scale but it was a very diverse city, even by American standards, and contained a great range of immigrant groups (notably Irish, Italian and Polish populations, as well as Jews from all over Eastern Europe fleeing persecution in Tsarist Russia, notably in Ukraine, and the Austro-Hungarian Empire<sup>9</sup>) as well as an influx of African-Americans who left the southern states, which had been part of the Confederacy, in large numbers from the 1870s onwards. Chicago was also a city characterised by a great deal of deprivation, crime and social disorganisation. Little wonder that the sociologists of the University of Chicago would make their city, and the sociological dynamics of the crime within it, the objects of their study. The Chicagoans would focus upon the concept of social disorganisation, undertake fieldwork and map the city in terms of its development and the distribution of crimes across its geography. The work of sociologists such as Robert Park, Ernest Burgess, Clifford Shaw and Henry McKay, working at the University of Chicago, mainly in the period from the 1920s to the early 1940s, constituted what has become known as the Chicago School, and their work has had an enormous influence upon Criminology, and Social Policy more generally.

The Chicagoans knew of the work of Quetelet, and they certainly used official statistics in their work, but they were influenced far more by the work of the French sociologist Emile Durkheim (1858–1917). Durkheim's work on social solidarity highlighted the fact that whenever family and community bonds are weak, then crime tends to be higher.<sup>10</sup> Durkheim had conceived two forms of society: one form of society based upon *mechanical solidarity*, which exhibited a strong sense of homogeneity and which was small-scale, possessed repressive laws, was religiously based and had an expanded role for the family and the collective conscience of the community; and another form of society, *organic solidarity*, which was marked by heterogeneity and which was large-scale, had restitutive laws, was secular, tended towards anomie and had an elaborated division of labour.<sup>11</sup> The Chicagoans emphasised the social nature of crime, rather than understanding crime in terms of a person's life history or personal psychology. They saw the Chicago of their time as exhibiting many of the problems typical of a society based upon organic solidarity, simpler societies based upon mechanical solidarity. As sociologists they linked crime to broader social issues, specifically the level of social disorganisation. The Chicagoans analysed the modern city as expanding outwards in concentric circles from an inner-city business district. Next to the inner-city business district is the zone of transition, which is the place in the city where new immigrants, or new arrivals from other parts of America, settle because it is both inexpensive and close to where they work – the inner-city business district. Beyond the zone of transition

are more settled and homogeneous working-class communities, middle-class neighbourhoods and, at the outer edge, the richer suburbs. The zone of transition, then, is the poorest area economically. The culture of the zone of transition arose out of its location. It was rundown and poor. The Chicagoans saw a pattern emerging whereby new arrivals to Chicago would initially move in to the zone of transition and then move out to a better neighbourhood in due course, which approximates to the American Dream of self-betterment. However, the pathological nature of the zone of transition was established by the Chicago School. The zone of transition is a place which tends to have all sorts of social problems associated with it in terms of having a poor record in health, housing, education and high crime rates. The zone of transition lacks the proper set of relationships necessary for community life to flourish, due to the fragmented nature of the people who live there. The people who live in the zone of transition have nothing much in common with each other and no shared history or common social values. It is a place where traditional norms and values are lost or forgotten.

The Chicagoans saw the heterogeneous population that lived in the zone of transition as giving rise to an impersonal environment marked by a lack of shared norms about how to live, which in turn facilitated criminal behaviour. It attracted little inward investment and was generally unattractive, possessing few facilities. The Chicagoans saw this as pointing to the fact that delinquency and crime were not located in individuals or racial groups, but rather were understood as the outcomes of the zone of transition itself, which they understood as intrinsically criminogenic. Crime is related to environmental factors that are external to individuals, although the social disorganisation of the zone of transition further allows delinquent behaviour to flourish, as criminal conventions are transmitted by young people to each other through gangs, in lieu of the positive integrative bonds of the more affluent or socially stable neighbourhoods. So whereas, for example, the *shetl* (the Yiddish word for a Jewish village in Eastern Europe<sup>12</sup>) had been poor, it was nonetheless socially integrated through strong bonds of family, religion, tradition and work. The zone of transition, on the other hand, had few of these bonds of attachment, was socially disorganised and was characterised by high crime rates.

The Chicago School undoubtedly made a huge contribution to the development of sociological and criminological theory as well as to the development of an innovative fieldwork methodology. However, by overwhelmingly concentrating upon the ecology of the city, they also made several errors. In emphasising ecology, they had a tendency in their work to see the relationship between crime and the physical organisation of the city as a *natural* one and they failed to note deeper issues related to class and the distribution of resources. This implied naturalism has been termed the 'ecological fallacy', i.e. the idea that individual criminal behaviour can be entirely explained by environmental, or contextual, factors. The notion that crime and delinquency are themselves socially constructed was missed entirely by the Chicagoans. The fact that both the statistics on crime and the attribution of what counts as criminal or delinquent is largely a matter of convention was never properly acknowledged in the work of the Chicago School. Victims were almost entirely neglected. Moreover, the concentration upon

the zone of transition as the criminogenic part of the city tended to overemphasise the criminality of the working class and reinforce negative stereotypes about the poor, immigrants and those living in the most economically deprived areas of the city. Amazingly, the Chicago School undertook no research into organised crime, although Al Capone and his mob were located in Chicago. More worryingly, the work of the Chicago School has fed into long-term political, economic and social policy responses to crime, which have tended, to this day, to ally crime with designated areas. Middle-class crimes, such as mortgage fraud, domestic violence and institutional corruption, still feature less in policing and social policy discussions than social disorganisation. Political discussions about crime are still dominated by talk of social inclusion and designing out crime.<sup>13</sup> Our political deliberations about the nature of contemporary crime still largely flow from an analysis about the nature of the inner city, which the Chicagoans of the 1920s and 1940s would recognise.

### Strain Theory

Robert K. Merton's 'strain theory' followed the Chicago School in arguing that the reason for urban crime being concentrated among members of certain groups was not because the human beings comprising them are compounded of distinctive biological tendencies but because they are responding normally to the social situation in which they find themselves.<sup>14</sup> He emphasised the relationship between *culture* and social structure far more than anyone had done previously. Merton's primary aim was to discover how social structures exert a definite pressure on individuals to engage in non-conforming, rather than conforming, conduct. He drew a distinction between culturally defined goals, which he saw as desirable, and the legitimate means of achieving those goals. Whenever goals and means are harmoniously integrated the result is a well-regulated society. 'Strain' is said to occur where there is a disjunction between culturally defined goals and the institutionalised means of obtaining them. American society, argued Merton, overemphasised the goal of monetary success, relative to other goals. Following Durkheim, he argued that the relationship between culturally defined goals and the legitimate means of achieving them led to anomie because the American economic system had built-in instability, in terms of the material aspirations it raised.<sup>15</sup> In other words, anomie occurs within the social structure itself and is, in turn, a measure of the gap between goals and means in society. Strain theory, in this regard, is a theory with definite economic overtones. Before developing Merton's ideas it is useful to set out his table, which clearly demonstrates his ideas concerning modes of adaptation in relation to the anomie which arises in the social structure. Merton saw individuals as adopting these five strategies in relation to their social and economic circumstances, though he did not properly elaborate why individuals favour one mode of adaptation over another.

**Table 2.1** Merton's Typology of Modes of Individual Adaptation

Modes of adaptation	Cultural goals	Institutional means
Conformity	+	+
Innovation	+	-
Ritualism	-	+
Retreatism	-	-
Rebellion	+/-	+/-

(+) = acceptance  
(-) = rejection  
(+/-) = substitution of new values

**Conformity**  
This is what happens in a stable society when all cultural goals and the institutionalised means of achieving them are in harmony.

**Innovation**  
This is what happens when individuals have internalised the cultural goal but lack the institutionalised means of achieving it. This is especially the case in a system which emphasises economically based goals. Innovators are people who substitute their own values in order to achieve their cultural goal.<sup>16</sup>

**Ritualism**  
This is what happens when individuals reduce the scale of their cultural goals in order to make achieving them more realistic. The example Merton gave was of the person who gives up the goal of obtaining a house or new car but who nonetheless goes to work every day and acts out striving for economic success, such as with the lower middle classes.<sup>17</sup>

**Retreatism**  
This is what happens when individuals reject both cultural goals and institutionalised means. It is associated with tramps, alcoholics, drug addicts and psychotics.<sup>18</sup> It is noteworthy that Merton did not see drug addiction and life on the streets as causing anomie, but rather being a result of it.

**Rebellion**  
This is what happens when individuals outside the social structure devise their own social structure and attendant cultural goals and institutionalised means, and it presupposes a rejection of the cultural goals and institutionalised means that apply in a typical liberal society.<sup>19</sup>

Merton did not attempt a general theory of all crime: what his strain theory amounts to is an elaborated theory of anomie, based upon observations drawn from his experience of life in America in the 1930s and 1940s. Durkheim had argued that rapid social change loosens the social bonds that regulate people and that this may lead to the listlessness and dissatisfaction which causes suicide and other social problems, such as crime.<sup>20</sup> Merton followed Durkheim but switched his focus from the moral regulation of individuals to the demoralisation that necessarily follows when individuals seek personal affirmation in material success. Where Durkheim had focused upon rapid social change, Merton focused upon the strains of succeeding in a materialist culture. Merton, unfortunately, follows the Chicago School in as much as his typology of modes of adaptation tends to suggest that crime is associated with poorer people, since they

have fewer institutional means to achieve their cultural goals. Merton understands criminality as a response to variable and external structural conditions and in this way he also follows the Chicago School.

Merton's work has had an enormous influence upon generations of policy-makers who took the solution to the problem of crime to be the establishment of anti-poverty programmes and legislation to increase the equality of opportunity, notably in the Kennedy and Johnson administrations in the USA and the Wilson and Callaghan administrations in the UK. His work is still acknowledged by contemporary criminologists, notably, Lea and Young<sup>21</sup> and Messner and Rosenfeld, who have revisited Merton's structural themes. Messner and Rosenfeld have stated that '[a]nomie theory comes closest ... to providing a compelling account of the American crime problem'.<sup>22</sup> However, it is fair to say that Merton has been less influential since the great onslaught represented by the New *Criminology* in the 1970s, which characterised his work as being too wedded to social democratic themes.<sup>23</sup> He has been criticised by feminists, such as Eileen Leonard, who have argued that strain theory is a theory about male crime and neglects female socialisation, which has historically been oriented to the family rather than to the wider material culture.<sup>24</sup> Albert Cohen criticised Merton's approach, which looks at individuals and neglects the wider process of social control and the interactions between control agents, such as the police, and 'deviants'.<sup>25</sup> Sumner argued that Merton was 'taking the cause, motive and effect for granted as scripted moments in the historic defeat of Evil by the forces of Good'.<sup>26</sup> Yet for all the criticisms levelled against Merton's strain theory, the issues thrown up by the role of culture, the need to attain material success and the impact of structural forces upon individuals remain with us as perennial themes in Criminology.

### Control Theory

Control theory gives us an explanatory model which places its emphasis upon the 'control' of individuals rather than upon the structural forces which bear upon individuals. The main proponent of control theory is Travis Hirschi, who wrote the classic *Causes of Delinquency* in 1969.<sup>27</sup> The aim of control theory is to show how institutions like the family, school and participation in community activities can prevent criminal behaviour. Again, note should be made of the debt to Emile Durkheim's work, notably in *The Division of Labour in Society* (1933), which stressed the importance of social integration and solidarity to individuals in curtailing criminal behaviour and deviance. Bob Roshier set out Hirschi's four bonds:

He proposes four bonds: attachment (the extent to which individuals have close emotional ties to other people); commitment (the extent to which they see conventional behaviour, for example at school, as offering immediate or long-term rewards); involvement (the extent to which their time is taken up with conventional activities); belief (the extent to which their beliefs about what is permissible or not coincide with conventional ones).<sup>28</sup>

This four-part scheme was derived from Hirschi's empirical self-report study, and while it aims at scientific neutrality, it actually fails to incorporate an economic aspect. As Chris Hale, when citing Box, has noted:

... economic recession and unemployment might be expected to weaken social bonds and hence lead to increased levels of crime. ... Unemployment and increasing inequality are not likely to improve family relationships. Rather they will produce increased tension, anger and sullenness against society that may be transferred onto the family leading to its breakdown. ... With more unemployment, shorter working hours and more part-time work, people will have less involvement in conventional activity and social bond theory would suggest crime would increase.<sup>29</sup>

Once again, therefore, we note that the real world of economics creates the reality which criminologists observe. It is not possible to do Criminology and ignore the economic context of criminal activity.<sup>30</sup>

### The Legacy of Steve Box

The late Steve Box is one of the most important British criminologists of the post-war era. A Marxist himself, he established a structural relationship with capitalist economies and criminality, notably in times of economic recession, using advanced statistical techniques. Box's influence upon British Criminology cannot be underestimated, and after the publication of his *Recession, Crime and Punishment* in 1987 it was increasingly seen as necessary to link any theoretical criminological analysis with both a rigorous basis in the statistical record and an analysis of the economic and political context of crime. In other words, after *Recession, Crime and Punishment*, British Criminology is characterised by the marriage of empirical and theoretical analysis.

In theoretical terms, Box elaborated how crime should be seen as an inevitable consequence of the internal contradictions of any capitalist economy. In *Power, Crime and Mystification* he writes: '... the pursuit of fair profit, the generator of wealth and employment, the backbone on which social welfare is possible – can be viewed ... as the primary ethics for and of an industrial society and conformity to this neutralizes any obedience to the law merely because it happens to be "the law"'.<sup>31</sup> Box was also one of the few criminologists in the 1980s who understood that white-collar crime was also implicated in the relationship between economic downturn. He wrote: '... financial performance was found to be associated with illegal behaviour ... firms in depressed industries as well as relatively poorly performing firms in all industries tend to violate the law to greater degrees'.<sup>32</sup>

However, Box is best known for his work on the relationship between the rate of crime and the level of unemployment, the U–C relationship. Box's analysis in *Recession, Crime and Punishment* reviewed 50 advanced econometric studies, of which 32 were cross-sectional and looked for a connection between the rate of crime and the level of unemployment at different times and in different places,

and 18 were traditional time-series studies that sought to measure the rate of crime and the level of unemployment, over a number of years, though only one used victimisation data. He found that 64 per cent of these studies showed a link between the rate of crime and the level of unemployment and the remaining studies did not. This was not considered *strong* evidence that the rate of crime and the level of unemployment are straightforwardly linked, especially since 36 per cent of the studies Box analysed showed no correlation at all.<sup>33</sup> However, Box was alive to the flaws in the way data was collected and he noted the statistically problematic nature of comparing studies which relied on such different bases as officially recorded crime, arrest rates and conviction rates and unemployment, since each of these may give a different overall figure. Nonetheless, he concluded that there was a link between the rate of crime and the level of unemployment, though it was a weak one. (Of course, unemployment is now measured differently from how it was in the 1980s, and criminologists and statisticians are more aware of the complexities of it as a lagging indicator, i.e. they note a lapse between the onset of unemployment and its negative consequences.) Box did note that in one major study he reviewed, young people did not cite unemployment as important in their pattern of offending.<sup>34</sup> More significant though was Box's finding that there was a much stronger link between income inequality and the level of crime.<sup>35</sup>

Chris Hale, who wrote extensively with Steve Box and was his colleague at the University of Kent, is among the group of British criminologists who have carried on Box's analysis of data with an eye on the economic data and political conditions of the day. Hale has been at the forefront of a broader analysis of the labour market by criminologists, who have noted long-run changes in the British economy since 1946. These changes include a diminution of the manufacturing base of the economy and a move towards the service sector, an increased feminisation of the workplace and an increase in part-time, casual and temporary working.<sup>36</sup> Hale notes a dual labour market in operation in England and Wales. There are those workers in the primary economy who are highly skilled, enjoy full employment rights and good levels of remuneration and, on the other hand, there are those workers in the secondary economy who are low skilled, in insecure employment, enjoy few employment rights and receive low levels of remuneration. What Hale notes is a relationship between youth crime and the quality and quantity of work available to young people.<sup>37</sup> Subsequent studies have borne this out.<sup>38</sup> According to Hale:

Wage inequality in the UK reached record highs for the twentieth century at the beginning of the 1990s. A key factor in this increased inequality was the rapid deterioration in the labour market position of less skilled workers at the bottom end of the wage distribution. The economic model of crime argues that individuals will choose between legal and illegal work on the basis of relative rewards. Many individuals find that, whilst in work, their jobs are insecure, low-paid, and low-skilled. Often they are in part-time or temporary work and they are on the economic and social margins. Many of the theoretical arguments ... for why unemployment and crime might be related apply equally well to low-wage, low-skill employment.<sup>39</sup>

It should be noted that Hale offers both an empirically based critique and a politically and economically savvy account of inequality. Latterly, Hills and Stewart have underscored Hale's analysis that inequality remains endemic to the British economy.<sup>40</sup>

It is important to link the contemporary work of criminologists, such as Steve Box and Chris Hale, with earlier criminological writers, such as Merton. When we do that we note that the economic data does, in fact, support a link between unemployment, relative deprivation, insecure employment and crime. It might be as Reiner has suggested: 'The downplaying of economic "strain" factors in criminal justice policy discourse since the 1970s was due to shifts in dominant political and intellectual perspectives, not evidence that there are no significant correlates.'<sup>41</sup> In other words, strain theory is still a useful and important tool in the criminologist's box.

### Rationality and Economics

We can think of crime as a rational, choice and economic modellers as well as criminologists do this. Police departments, local government and the Home Office utilise rational choice theory, particularly when setting out policies on crime prevention. Rational choice theory initially started out in Economics and Political Science departments, but when it is applied to crime it has some interesting conclusions. Jock Young has called it 'administrative criminology'. In other words, he argues that it represents a form of criminology that concerns itself with crime prevention but not the deeper political, social and economic causes of crime.<sup>42</sup> Cultural criminologists, such as Mike Presdee and Jeff Ferrell, have argued for a form of criminological explanation which prioritises the celebratory nature of crime, transgression and the irrational aspects of law-breaking in contrast to the measured, choice-making individual chooser provided by rational choice theory.<sup>43</sup> Rational choice theory always starts from the assumption that people are rational and self-interested. So in the case of criminal activity, it argues that individuals are concerned to maximise their income so may choose work or crime depending on their ability to be successful in the labour market. It argues that individuals also weigh up their chances of getting caught. It is therefore interested in where crime is committed, since location will affect the likelihood of detection. Criminals are said to act as though they are assessing the marginal benefits of committing crime, taking into consideration the possible punishment. We can see immediately that this would appear to be more plausible when applied to premeditated crimes but less plausible when applied to spontaneous crimes.<sup>44</sup>

It is possible to treat crime mathematically and dispense with traditional criminological analysis, as Cooter and Ulen do.<sup>45</sup> For example, taking Cooter and Ulen's equations, if we used  $x$  to denote the seriousness of crime and  $y$  to denote the likely reward to the criminal, then we could assume that the reward is an increasing function of the seriousness of a crime:

$$y = y(x)$$

Then if the punishment is  $f$  for committing a crime of seriousness  $x$ , we could express that as:

$$f = f(x)$$

If we then expressed the probability  $p$  of being punished for committing a serious crime  $x$  as the function:

$$p = p(x)$$

we can then note that the expected punishment equals the product of the amount of punishment and its probability:

$$p(x)f(x)$$

Finally, we could conclude that rational criminals choose the seriousness of crime  $x$  to increase their reward, which is equal to the reward  $y(x)$ , minus the punishment expected:

$$\max y(x) - p(x)f(x)$$

This simple set of equations presents us with a clearly mapped out model of criminal activity. These and other rational choice equations miss out a lot of what criminologists may think is essential to understanding the problems of crime and criminalisation, i.e. culture, class, social structure, gender, age, etc. However, though rational choice theory is not a complete theory of criminality, it nonetheless has been influential in developing a modelling culture among contemporary criminologists, and it has been widely used not only by the police and local and national government agencies but also by town planners and retailers.<sup>46</sup> It is essentially an account focused on the development of practical crime prevention programmes.

### Main Summary Points

- Adolphe Quetelet understood crime systematically in terms of its economic costs. He saw that crime saps the productive power of the economy, costs the state in terms of policing and prison provision, and undermines social solidarity.
- The Chicago School showed how high unemployment or times of economic hardship for poorer people make combating social disorganisation and crime more difficult.
- Robert Merton's strain theory emphasises the relationship between culture and social structure. He draws a distinction between culturally defined goals, which he saw as desirable, and the legitimate means of achieving those goals. Whenever goals and means are harmoniously integrated the result is a well-regulated

society. 'Strain' is said to occur where there is a disjuncture between culturally defined goals and the institutionalised means of obtaining them. Strain theory, in this regard, is a theory with definite economic overtones.

- Rational choice theory works with the assumption that people are rational and self-interested. Therefore, in the case of criminal activity, it argues that individuals are concerned to maximise their income so may choose work or crime depending on their ability to be successful in the labour market. It argues that individuals rationally work out their chances of getting caught.

### Questions

1. Does strain theory still offer the criminologist a way of understanding crime?
2. What connects the work of Quetelet and the work of modern criminologists?
3. Are Hirschi's bonds of attachment tied to the economic conditions alone?

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# 3

## RIGHTS AND OBLIGATIONS

Those who consent to the authority of reasonably just governments or respect their laws are subject to their authority and have an obligation to obey their laws.

Joseph Raz, 1988<sup>1</sup>

### Introduction

Rights are the things that frame the relationships that exist between the individuals, corporations, such as companies or organisations, and the state. Our modern political lives increasingly focus upon our relationships to the political conduct of government, the activities of the police and the courts and our entitlements to health care. All of these relationships are governed by rights. We use the language of entitlement, which is derived from the concept of rights. Our rights usually imply a duty to the prevailing authority of the state in terms of obeying its laws, technically termed 'obligation'. Obligations are the moral and legal duties that individuals are obliged to undertake in support of the state, and each other. Obligations are often seen as natural in that they follow the pattern of the way we typically view our relations of personal obligation to family and friends.

It is useful to view rights as limits upon the encroachment of the state in the affairs of individuals, and this view has been expressed recently in terms of the debate concerning the length of time suspects can remain in police custody without being charged. In other words, how far can the state encroach on an individual's personal liberty? Rights, therefore, guarantee an agreed level of personal liberty in any given society. The legal theorist H. L. A. Hart argued that rights protect our personal choices and allow persons to be self-realised.<sup>2</sup> More recently, the political theorist John Charvet has written how rights may be understood as the absence of obligation and as a measure of our freedom.<sup>3</sup> Through participation in political society, an individual signals his or her 'acceptance of the system, creating expectations of compliance in his (or her) fellow participants'.<sup>4</sup> Liberal societies may be said to operate with a balance of rights and obligations, and it is fair to say that a lot of practical politics relates to the extension of rights – such as recent moves to allow civil partnerships – and the

### • • • Rights and Obligations • • •

level of obligation the state demands of individuals, e.g. in relation to military conscription and the level of taxation.

Importantly for criminologists, rights also relate to such issues as the conduct of police activity in relation to citizens, arrest, detention, fair trials and treatment in custody, and a range of other civil liberties issues which include the legal and political discourse but, increasingly, contemporary criminologists have begun to discuss rights, of different sorts, too. Notably, Stan Cohen, Rod Morgan, Kevin Stenson, Philip Smith, Kristin Natalier and others have begun to make the discussion of rights, and to a lesser extent obligation, part of the *litte-  
ra* *franca* of Criminology. Of these authors, Stan Cohen stands out. He has been responsible for a complete rethink of the concerns of criminological writing, pointing out that the crimes of the state (i.e. crimes which violate human rights) have been almost entirely neglected.<sup>5</sup>

### The Basic Arguments: Rights and Obligations

Rights are usually associated with individuals and technically the definition of rights relates to not only to the authority for an individual to act in a given manner but also to the universalised capacity to act, in the same fashion, possessed by all persons, in the same legal system. Put another way, rights are the entitlement to act, or to have others act, in a certain way. Legal rights are always related to judicial principles, laws or rules obtaining in a given legal system. Moral rights relate to the specific roles, or relationships, that exist in a given society, or the promises or expectations that persons may generate outside the statutory legal framework. The classic definition of a moral right, as opposed to a legal one, was given by the political theorist Richard Brandt: 'We can say, roughly, that to have a moral right to something is for someone else to be morally obligated (in the objective sense) to act or refrain from acting in some way in respect to the thing to which I am said to have the right, if I want him to.'<sup>6</sup>

There is general support for rights in political discourse on the progressive left through to the traditional right, though who should possess these rights, and the extent of them, can be more contentious, such as in the case of asylum seekers, people suffering from AIDS, prisoners and the mentally ill. In all of these cases there has been heated political debate, but it is still the case that it is difficult for asylum seekers to obtain work, prisoners and the mentally ill do not enjoy the same ability to vote in elections as the rest of the community and people suffering from AIDS continue to experience discrimination, as in the case of obtaining some forms of insurance. Our legal rights are established in law and are therefore ultimately secured by the courts. These rights are immensely important to the type of society we live in, such as the freedom of speech, the freedom to travel and the freedom to worship. These rights, which we often take for granted, are absent or curtailed in many countries. Burma, for example, prohibits the freedom of speech, China restricts the freedom of worship and Russia



curtals freedom of movement. It is easy to see from these examples how, when a right is restricted, the criminal law is, usually, extended. It is a crime, for example, in Russia to move around the country without the necessary official documentation to do so, and many Russians are incarcerated precisely because they left the town or village they live in without the accompanying permissions. We can see that these important legal rights, which are technically called 'positive' rights by political theorists, are vital to the lives that people live and the scope of the criminal law in the lives of men and women. These positive rights are important and are always upheld but may be the site of contestation, as in the issue of rape within marriage. Until 1992 it was not possible for a wife to bring a charge of rape against a husband because under the law, before 1992, the husband had the right to sex with his wife, with or without her consent. Women have had their rights extended. Similarly, the treatment of children and animals has altered as their rights have been extended.

In terms of understanding the idea of *obligation*, the legal theorist H. L. A. Hart made a distinction between *being obliged* to do something, which implies legal coercion (as in the case of taxation or obeying the criminal laws of the land), and *having an obligation*, which only presupposes a moral obligation or duty.<sup>7</sup> Hart's distinction between those obligations which are enforceable through the courts and are obeyed, at least partly, because of the fear of punishment if you do not and those obligations which are obeyed only because the obligation is considered morally right is a useful one. Our obligations to the state are more likely to be backed by force in the last resort. It is useful, though, to see obligations as the reverse side of the coin to rights – one requiring and supporting the other.<sup>8</sup> In terms of political theory, the social contract theories of political philosophers, such as Hobbes, Locke, Rousseau and latterly John Rawls, all suppose a contract between individuals, and between the state and individuals, that secures the authority of state, which in turn secures the safety and well-being of citizens. It is a rather circular justification. Obligation is, in different ways, shown as being essential to the maintenance of the state and the enjoyment of rights. Although the form of the rights and obligation that different theorists outline differ, they all follow this simple binary format. What is certain is that there is no place for criminality in social contract theory. The criminal is the person that violates his or her obligations to the community and/or the state and therefore deserves a forfeiture of their rights.<sup>9</sup>

## Hohfeld

The legal theorist, Andrew Halpin, has critically analysed the work of Wesley Hohfeld, the most important theorist of positive rights.<sup>10</sup> Hohfeld considered four types of legal rights: (1) the so-called *liberty rights*, which allow something but do not necessarily oblige the bearer of the right to undertake it, such as the right to ramble or swim in the sea; (2) the so-called *claim-rights*, which entail one

person refraining from an action and a relationship of corresponding duties between persons, and this may be the case in terms of assaulting or shouting at each other; (3) there are legal entitlements, or *powers*, such as the right to vote in elections; (4) there are sanctioned *immunities*, which allow certain persons to not be subject to the power of the others, including the state. The example here might be the way we do not expect older people to be part of the workforce after a certain age. However, it can be related to private law where it outlaws the unilateral alteration of a contract.<sup>11</sup> Whether you are critical of Hohfeld, like Halpin, or not, Hohfeld's four-part scheme usefully sets out the issues thrown up by positive rights.

## Kant: Duties and Rights and their Relationship with Crime Control

The eighteenth-century German philosopher Immanuel Kant has been enormously influential to both retributive theorists and anti-utilitarian rights theorists. John Rawls, the doyen of liberal theorists, largely took over Kant's ideas in his *A Theory of Justice* (1973), and this entailed adopting Kant's view of rights and the rule of law. In criminological theory, Andrew von Hirsch, the main proponent of Just Desert theory, has acknowledged Kant's influence in his *Past or Future Crimes* (1986). He writes: 'an individual's rights ought not be sacrificed solely to serve another person's interests'. According to von Hirsch, 'Kant ... had a general moral theory, of which this imperative is part, stressing the idea of respecting the value and integrity of persons. ... This theory, with its emphasis on individual rights ... has been so influential in modern ethical thinking.'<sup>12</sup> It is worth setting out Kant's ideas in more detail.

In the *Metaphysical Elements of Justice*, Kant tells us that when a creditor claims the right to demand repayment of a debt, this means that the use of coercion to make anyone do this is compatible with freedom: 'Thus right (or justice) and authorisation to use coercion mean the same thing.'<sup>13</sup> In another passage on property, Kant relates that the notion of an object of property (i.e. legal property) entails a notion of an external obligation on others to refrain from using that object. He claims that such obligations can only be guaranteed through a system of coercive laws. Kant states that 'the condition of being subject to general external (that is, public) legislation that is backed by power is the civil society. Accordingly, a thing can be externally yours or mine only in a civil society.'<sup>14</sup> Kant's view of a legal system is one with a role for rights. He sets out laws that define rights and duties and which, in turn, are backed by the threat of judicial punishment. The legal system is concerned with external duties that can be coerced through a system of negative incentives, punishment. Allen Rosen, when discussing Kant, states: 'We can expect that whenever rights may correspond to duties of justice, there should be narrow, enforceable rights and whatever rights may correspond to ethical duties should be wide, unenforceable rights.'<sup>15</sup> In the *Grundgesetze*, Kant himself wrote: 'To every duty there corresponds

one right in the sense of a moral title (*facultas moralis generatim*); but only a particular kind of duty, juridical duty, implies corresponding rights of other people to exercise compulsion (*facultas iuridica*).<sup>16</sup>

Kant had argued that the laws of a just state are the laws that would be chosen by a rational person to govern all social relationships in a position of initial free choice. Kant is not asking us to believe that there ever was such a position of original choice-making by individuals. Rather, he is asking us to develop a just society by hypothesising a set of laws and social arrangements that a rational and impartial person would choose to adopt if setting up a society from first principles. In Kant's scheme, law is important. Without laws some persons may benefit more than under a system with laws, but this will not be true for all people; and since in Kant's position of original rational choosing nobody could know what person they would occupy, it makes sense that all men and women agree to live under a system of laws which would aim at securing everyone's well-being. This system of laws would bring benefits to all men and women and therefore everyone owes obedience to the law as a debt to all other persons who, by their self-restraint, maintain the laws.<sup>17</sup> If a person chooses not to obey the laws, then he or she has to pay a debt by punishment, in which case it is essential that those persons who break the law are punished otherwise they would obtain an unfair advantage over their fellow citizens. In the Kantian scheme, punishment is important – it is simply paid as a debt to be settled with the law-abiding citizens. However, once it is paid, then there is free and easy access back to the community for the law-breaker, on the same basis as everyone else. This form of punishment is classically termed retributive punishment, and it is only possible in a theory which prioritises law, rights and obligation. Of course, the Kantian system rests upon the certainty of fair laws. Laws must be framed as in the case of an objective rational person choosing them in an impartial setting. If the system of laws does not meet this criterion, then it is not worthy to be the basis of a Kantian scheme. The retributive punishment that Kant advocates is only possible in the context of just laws.

## Utilitarianism

Utilitarianism is often criticised for not being able to consider rights *themselves* as ends in themselves. Bentham famously termed natural rights 'rhetorical nonsense – sense on stilts',<sup>18</sup> and along with Marxists (who have often argued that rights are merely code for institutionalising capitalist relations of inequality, and that it is nonsense to apply rights equally to the structurally unequal, notably in the case of property and private ownership) utilitarians are most often cited as the anti-rights lobby.<sup>19</sup> Bentham was far more taken with the welfare of the poor and women than their rights. He wrote: 'There is no right which, when established, is advantageous to society, should not be abolished.'<sup>20</sup> Contemporary legal theorists, notably Ronald Dworkin in *Taking Rights Seriously*, have

that since rights are best understood as taking precedence over appeals to utility, this means therefore that utilitarianism cannot always respect rights because their model subordinates rights to broader considerations of overall utility and general welfare.<sup>72</sup> Yet some have argued that rights and welfare are much more intertwined than the simple rhetoric of rights or welfare alone suggests:

Human well-being depends overwhelmingly on social institutions providing favourable conditions for human enterprise in the broadest sense. ... These all-important conditions are created and maintained principally by enforced social rules. The resulting framework of legal rights and obligations makes normal human functioning possible and abundance achievable. Moreover, to maximise well-being, the framework must secure a realm of equal freedom and personal inviolability to all.<sup>22</sup>

It is usually said to be the case that if we analyse the language of utilitarians, it appears to be against rights – because they are said to be of no utility. John Stuart Mill, writing in the nineteenth century, argued: ‘It is proper to forego any advantage which could be desired to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions’.<sup>23</sup> Mill feels that there is nothing in the content of rights which alters the fact that, for him, all political and moral judgements should be understood in relation to the utilitarian notion of increased utility and the measure should be how an action alters that. The problem rights theorists have with this is that if utilitarianism always judges the merit of an action by looking at consequences it has, then nothing seems to be ruled out as necessarily wrong. In other words, in theory at least, nothing seems to be ruled out. Of course, we are now living in the century following the excesses of the Third Reich, China, Stalin’s USSR and Pol Pot’s Cambodia. Though none of these was based on utilitarian principles, our era is one which has seen rights and an increased sensitivity concerning the rights of individuals and against the state. We have this concern for rights, partly because of aspects of twentieth-century history, which would be alien to people such as the earliest utilitarian thinkers, like Jeremy Bentham, the important consideration is that of increasing overall welfare; terms, rights theorists argue that in certain important respects, people rights regardless of the utility that has to the utilitarians, on the other hand, are less convinced by utilitarian arguments. In terms of the consequences they have. This said, John Stuart Mill wrote his book *Utilitarianism*, written in 1861. In his book, entitled ‘On the Connection between Justice and Utility’, he argues that rights are a place for moral rights, though he argues moral rights are not absolute. For Mill, all rights are judged in terms of the claims they make on a whole, in which case this is what he understands to be the claim is always being made against the general good. It is

useful to see what Mill had in mind by looking at a passage from *Utilitarianism* which neatly encapsulates his view of rights and justice:

While I dispute the pretensions of any theory which sets up an imaginary standard of justice not grounded in utility, I account the justice which is grounded on utility to be the chief part, and incomparably the most binding part, of all morality. Justice is the name of certain classes of moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life, and the notion which we have found to be of the essence of the idea of justice, that of a right residing in an individual, implies and testifies to this more binding obligation. The moral rules which forbid mankind to hurt one another ... are more vital to human well-being than maxims, however important.<sup>26</sup>

This is a clear statement: Mill is simply stating that rights are always or related to the improvement of overall human well-being, i.e. the improvement in general utility.

### Human Rights

Human rights increasingly dominant the theoretical discussions of the way we live, legally, morally, politically, socially and increasingly this is matched by the everyday practice of our lives in relation to the way we relate to each other, to institutions, to the state and to the common law. Human rights are a difficult thing to define, however, technically and in law. At the most basic level they signify a set of rights which relate to persons because they are human, and as such they relate to all persons equally and at all times. No human can be denied these rights – they are fundamental. The problem arises in relation to the expansion of this definition to include such criteria as dignity, health and basic income. In terms of the treatment of human rights in criminological writing, this has been related primarily to the fairness of laws and the treatment of citizens. Policing Studies has been especially taken with human rights, following the Human Rights Act 1998, which altered the way the police go about their business, notably in relation to their investigatory powers and the provision required for suspects in criminal cases.<sup>27</sup>

### Human Rights under Attack

Recently there have been increased calls in the UK for greater use of indeterminate, exemplary and preventive sentencing, notably in relation to sexual offences, violent crime, anti-social behaviour and terrorism, since the bombing of the World Trade Center on 11 September 2001. The effect of this has been to loosen the Kantian imperative to treat persons as *ends in themselves* and increasingly to see persons, with regard to criminal sentencing, as a *means to another end*, which has,

in turn, undermined the relationship between human rights and criminal justice. A new and censorious language of public safety, risk and security has been developed to trump the language of civil liberties and human rights, with its implicit anti-majoritarian bias and concern for the protection of the individual against the state. This has been reflected recently in the call by the pressure group Migrationwatch to change human rights laws to stop encouraging terrorists.<sup>28</sup> In America, Justice Robert Jackson has argued that a doctrinaire approach to human rights might 'convert the Bill of Rights into a suicide pact'.<sup>29</sup> It is to be noted, at this point, that the European Convention on Human Rights and Fundamental Freedoms, and its five subsequent protocols, enshrine protections which hitherto have been part of the *lingua franca* of western European jurisprudence, notably Article 3, which outlaws torture or inhuman or degrading treatment, Article 5, which ensures liberty and security of the person, except lawful arrest upon reasonable suspicion, Article 6, which secures both a fair trial and special rights for criminal proceedings for individuals, and Article 8, which notes a respect for private life. These four articles may be seen to have been threatened recently, especially in relation to sexual offences, violent crime, anti-social behaviour and terrorism. Moreover, the machinery of government has intervened in this process by broadening the usual investigatory powers of the police and other agencies and by altering the arrangements for criminal trials. This process has been further exacerbated by another set of processes which have sought to realign the relationship between criminal law and sentencing by moving numerous cases normally within the domain of criminal law to civil law, as has happened with anti-social behaviour orders.<sup>30</sup>

Increasingly, the prosecuting authorities have used the issue of *serious crime* to advance a diminution of the usual restraints upon themselves in relation to individual *suspects*. This has been observed in relation to fraud, organised crime, drugs cases, sexual abuse, and terrorism cases. A utilitarian argument has been employed that has argued that *seriousness* is reason enough to overturn the finely balanced protections afforded to suspects. The argument concerning seriousness has become routinely employed by politicians, and it is now the default response in drugs and terrorism cases. In addition to this change in the prosecutory and criminal justice climate, we have witnessed a much more extensive use of surveillance powers, such as eavesdropping devices, internet surveillance, and CCTV, all of which might be said to be in a tense relationship to Article 8. The proponents of wider surveillance have even sought to portray a commitment to human rights as an obstacle to the proper operation of civil society.<sup>31</sup> By stealth, the authorities in the UK, and to a differing extent right across the western world, have extended the admissibility of rules on evidence, though this often conflicts with Article 8, which respects private life, and also with Article 6, which ensures a fair trial.<sup>32</sup> It is difficult to justify the move away from the Anglo-American principle that a defendant does not come to a criminal court to answer for his entire past life,<sup>33</sup> although the English courts have recently upheld the increased use of hearsay evidence in criminal cases (brought about by the Criminal Justice Act 1988 and, even more so, by the Criminal Justice Act 2003).<sup>34</sup>

Even with statutory safeguards, it leaves too much discretion in the hands of the trial judge to influence the final outcome of the case by deciding at a trial-within-a-trial what the jury can hear and what it cannot hear. At common law (and for very good reasons) only the power to include or to exclude confession evidence was so wide-ranging. This power is particularly dangerous in a system (such as the English system) where the judge sits alone, in the absence of the jury, without fellow judges or assessors. Moreover, the same issues of public safety, risk and security have been advanced to obtain longer periods of detention without charge.<sup>35</sup>

The past few years have also witnessed a reversal of the usual burden of proof rules, notably in the case of *Salabiaku v. France*,<sup>36</sup> which sent out ripples throughout European legal circles. Legislation too has often had a *reverse burden* flavour to it, notably, in the UK, the Regulation of Investigatory Powers Act 2000. All this has been advanced at a time when the whole presumption of innocence in criminal cases has been increasingly called into question both by politicians and the media. The drift has been away from the language of human rights and towards the language of *risk* and *seriousness*. Accordingly, sentencing tariffs have risen dramatically, terms of imprisonment have lengthened and criminal charges broadened. However, perhaps the most interesting development is concerned with the increased use of the civil law by the adoption of measures to curtail a person's behaviour. In this regard, the ASBO (anti-social behaviour order) in the UK has become notorious, with a breach leading to a possible five-year term of imprisonment. These ASBOs have become notorious because of the fashion in which they have undermined the regular criminal procedures associated with the normal prosecution process.<sup>37</sup> ASBOs are also indicative of another recent development that has undermined the safeguards built into the criminal justice system. They are essentially civil orders, deriving from a civil court, which place restrictions upon a person's actions. In two conjoined cases, the Judicial Committee of the House of Lords held that applications to a Magistrates' Court for an ASBO were civil proceedings in nature, not criminal proceedings.<sup>38</sup> However, the Judicial Committee held that the facts supporting such an application had to be proved to the criminal standard (proof beyond reasonable doubt). Nevertheless, the free reception of hearsay evidence was approved, and has been allowed in English civil cases since 1995.

It may be argued that this in itself is part of another development – the extension of regulatory procedures and processes. These regulatory procedures relate to such diverse issues as financial services, health and safety legislation, and environmental management. What unites these regulatory areas is the status of the defendant. The rights of defendants are not clear; they relate to the basis of the prosecution. This, of course, has major implications for proportionality and desert criteria and, more broadly, for social justice and human rights. Prevention orders have become a much more important element in the criminal justice system than hitherto, and they are now a routine feature of legislation.<sup>39</sup> They have been applied in serious cases, as with sexual offenders, but also routinely in a range of banning orders relating to football hooliganism or other

public order cases. It has also become routine to confiscate assets<sup>40</sup> and to register certain classes of offenders for life.<sup>41</sup> Prevention orders have also been used to stop association, as has the Terrorism Bill 2006, which broadens the legal notion of 'assistance'.<sup>42</sup>

A case may be advanced that the entire future of the human rights tradition in the UK, and more broadly across Europe, is under threat by numerous encroachments upon the safeguards hitherto built into the criminal justice system.

### Rights: Some Limitations in the Criminal Justice System

In an important essay, 'Reaffirming rehabilitation', Francis Cullen and Karen Gilbert stressed the limited role of rights in the criminal justice system in assisting rehabilitation. They wrote:

The promise of the rights perspective is based on the shaky assumption that more benevolence will occur if the relationship of the state to its deviants is fully adversarial and purged of its paternalistic dimensions. Instead of the government being entrusted to reform its charges through care, now offenders will have the comfort of being equipped with 'rights' – that will serve them well in their battle against the state for a humane and just administered correctional system. The rights perspective is a two-edged sword. While rights ideally bind the state to abide by standards insuring a certain level of due process protection and acceptable penal living conditions, rights also establish the limits of the good that the state can be expected or obligated to provide.<sup>43</sup>

This is point is often neglected. Rights only ever offer a minimal guarantee. They do not aspire to the highest ideals of care possible. Rights may give material improvement to persons in the criminal justice system but they only ever secure minimal conditions and standards; beyond that improvements are not secured by a narrow rights-based agenda alone. Moreover, in the case of prisoners, for example, the rights they enjoy may be inadequate to ensure rehabilitation, and conditions that go beyond the bare provision of what is entailed by individual rights, such as sports facilities or family visits, may be curtailed according to a rights-based argument.

Rights also have the problem associated with them that in order to exercise their rights individuals have to be aware of them in the first place. Rights imply a system of education or awareness-raising. Individuals may not be aware of their rights and so fail to exercise them. In the case of taking legal proceedings to court, it may be that one side is more aware of its rights than the other. Alternatively, there may be an imbalance of power which results in an imbalance in the exercise of rights. Nicola Lacey has noted how, in the case of evidence, the defendant has fewer effective rights over admissibility than the prosecution, and how the court makes presumptions about defendants, which both may run

counter to an impartial 'rights model'.<sup>44</sup> We should recall some of the miscarriages of justice that resulted from the treatment of evidence, notably the Maguire Seven case. The defendants were working-class Irishmen and at the height of the IRA bombing campaigns in mainland UK were treated less favourably than English men would have been. Moreover, the Forensic Science Service withheld evidence from the defendants in the case and this resulted in their wrongful conviction, although it was also the main reason for their eventual release. The Maguire Seven case demonstrates how, in a practical way, the institution of rights does not necessarily result in a fair outcome. Rights have their limitations and, as in the case of admissibility of evidence and presumption of character, they fail to always address the great power (and resources) imbalance between defendants and the state prosecution authorities and their agents, such as the police and Forensic Science Service.

Legal procedures and rights do assist in fair prosecutions but, as Sanders and Young have demonstrated, the legal system often fails to operate properly due to a number of systematic issues in the criminal justice system, that are unlikely to ever be completely remedied.<sup>45</sup> Discretion, or at least the decision of whether to take action, operates at all levels within the prosecution process, from the decisions of police officers on the street to the Crown Prosecution Service (e.g. whether to stop and search a 'suspect', deciding whether to arrest someone, deciding upon what charges to bring, deciding on whether or not to grant bail, deciding on the scope of an investigation or the amount of time and funds to allocate to it, deciding whether to prosecute due to costs – the list is seemingly endless). Yet even if procedural systems are well managed and procedural rights respected, this does not result in substantive justice.<sup>46</sup> Moreover, established patterns of bias abound in British society in terms of the differential treatment of certain ethnic minorities and the working class.<sup>47</sup> Rights cannot, by themselves, alter the brute inequalities within society.

Barbara Hudson has argued that rights tend to assume a flat uniformity between persons and their individual experiences and that this indirectly discriminates against bearers of difference, such as women and black people:

Impartiality and objectivity are primary virtues for this 'justice as fairness'. Philosophical expulsion of difference is reflected in law's model of the abstract subject of law, with all legal subjects constructed as equal in their possession of agency and free will. This assumption of sameness has been the focus of critique by postmodernists, for whom the abstract universal turns out to be the characteristics associated with the white, western citizen of the Enlightenment, and feminists, who point out that the so-called universal norm is in fact predicated on the middle-aged, middle-class male. ... Law based on this logic of identity is castigated for its lack of appreciation of alternative standpoints, and for its failure to recognize that what it presumes to be universal is in fact very partial.<sup>48</sup>

In this passage, Hudson clearly demonstrates the difference between the theoretical aspiration of fairness and the practical reality of everyday lived experience.

Her point does not undermine the case for rights, but merely shows up some of their shortfalls.

#### Feminist Critique: Carol Gilligan

The point made by Barbara Hudson about difference was originally made by Carol Gilligan in her influential 1982 book *In a Different Voice*.<sup>49</sup> It distinguished between an ethics based on rights, which is understood as masculine, and an ethics of care, which she understood as feminine. Her argument is derived from empirical work undertaken with children. She noted that there appeared to be a systematic difference between boys and girls in their attitudes to the enforcement of the rules of games. Boys, she noted, tend to enforce rules harshly, whereas girls tend to evaluate rule infractions in the context of broader considerations of relationships, and tend to be more empathetic. Gilligan did not find that girls were more lenient than boys in terms of rule infractions, rather that they pay more attention to the impact of enforcing rules maintaining social harmony than to sticking doggedly to hard-and-fast rules.<sup>50</sup> From this research Gilligan developed a gendered typology which noted boys have a rules-based ethical approach, whereas girls have an ethics of care.

By extension, Gilligan argues, in a male-dominated world, where men control the criminal justice system, men have traditionally dominated the rules and ethical standards we all live by, especially in the context of legal rule-setting. This description, which Gilligan offers of the way rules operate in the criminal justice system, has been widely criticised as a parody of the way the law operates in practice and in theory. As Judge Richard Posner has argued:

...if we want to emphasize not the epistemological virtues of case-specific legal reasoning but instead sympathy for the underdog (one aspect of the ethics of care), then we have only to list the many male judges who have worn that sympathy on their sleeve. Even the emphasis on maintaining ongoing relationships is not special to feminism; it is the stock in trade of those legal scholars, most of them male, who emphasize the 'relational' aspects of long-term contracts.<sup>51</sup>

Moreover, Gilligan did not properly consider class and ethnicity in her work, which would tend to undermine its validity, as Smith and Natalier have noted.<sup>52</sup> The deeper point against Gilligan's work was made by fellow feminist writers, who have argued that it seems to imply a form of gender stereotyping itself. In any case, the attributes Gilligan ascribes to women – even if we were to accept Gilligan's findings wholesale – are only ever *average* tendencies and do not relate to real women's lives or personal attitudes.<sup>53</sup> And as the feminist writer Catherine MacKinnon has stated, Gilligan seems to offer us an analysis which seems to reinforce notions that women are better suited to caring for children and for a domestic role generally rather than make their contribution to how our society is rule-governed.<sup>54</sup>

### Marxist Criticism of Rights-based Approaches

Marxists have been some of the strongest contemporary critics of rights-based arguments and this has brought them into sharp contrast with liberal thinking. It is, perhaps, most useful to note the Marxist objection in relation to Kant and the Kantian scheme of retributive punishment, since our focus is upon law and criminological understanding. Kant had argued that the laws of a just state are the laws that would be chosen by a rational person to govern all social relationships in a position of initial free choice. Marx took issue with this reasoning. First, he objected that before persons could make proper choices they would need information about the human nature and the relationship between men and women that was fair and impartial. Marx argued that this was impossible since ideas come out of the material conditions of life, not the material conditions of life after ideas. In other words, any information that a rational person would have would be based upon a bourgeois science derived from capitalist social relations and that inevitably, using Kantian a methodology, we end up with another bourgeois theory of justice. The classic statement of this was given by Jeffery Murphy in his essay 'Marxism and Retribution'.<sup>55</sup> Murphy elegantly sets out the case against Kant's theory of justice by stating that in a capitalist society not only do persons not enjoy the same level of rights, but also that the abstract character of Kant's writing is implausible as a basis for a theory of justice. It is worth quoting Murphy at length:

There is something perverse in applying principles that presuppose a sense of community in a society which is structured to destroy genuine community ... the whole allocation of benefits in contemporary society ... presupposes what might be called a 'gentleman's club' picture of the relation between man and society – i.e. men are viewed as being part of a community of shared values and rules. The rules benefit all concerned and, as a kind of debt for the benefits derived, each man owes obedience to the rules. In the absence of such obedience, he deserves punishment in the sense that he owes payment for the benefits. For, as a rational man, he can see that the rules benefit everyone (himself included) and that he would have selected them in the original position of choice. Now this may not be too far off for certain kinds of criminals – e.g. business executives guilty of tax fraud [though even here we might regard their motives of greed to be a function of societal reinforcement]. But to think that it applies to the typical criminal, from the poorer classes, is to live in a world of social and political fantasy. Criminals typically are not members of a shared community of values with their jailers: they suffer from what Marx calls alienation. And they certainly would be hard-pressed to name the benefits for which they are supposed to owe obedience. If justice, as both Kant and Rawls suggest, is based on reciprocity, it is hard to see what those persons are supposed to reciprocate for. Bonger addressed this point ... 'The oppressed resort to means they would otherwise scorn. ... The basis of social feelings is reciprocity. As soon as this is trodden under foot by the ruling class, the social sentiments of the oppressed become weak towards them.' ... It does, then, seem as if there may be some truth in Marx's claim that the retributive theory, though formally correct, is materially inadequate. At root, retributive theory fails to acknowledge that criminality is, to a large extent, a phenomenon of economic

class. To acknowledge this is to challenge the empirical presupposition of the retributive theory – the presupposition that all men, including criminals, are voluntary participants in a reciprocal system of benefits and that the justice of this arrangement can be derived from some eternal and a historical concept of rationality.<sup>56</sup>

Marx had written against the abstract rights advocated by Kant and Hegel in a famous article against capital punishment, published in the *New York Daily Tribune* in 1853. Marx wrote: 'Is it not a delusion to substitute for the individual with his real motives, with multifarious circumstances pressing down upon him, the abstraction of free will.'<sup>57</sup> It is important to note how practical Marx is when compared to the abstract and speculative thinking of Kant and Rawls.

Marx also thought that rights are far too individualistic and even undermine social solidarity. In his essay 'On the Jewish Question' he writes: 'Thus none of the so-called rights of man goes beyond egoistic man, man as he is in civil society, namely an individual withdrawn behind his private interests and whims and separated from the community.'<sup>58</sup> What Marx is drawing attention to is how rights usually protect the self-interested desires of materially acquisitive individuals (consumers in a capitalist economy), as opposed to the rights of citizens *per se*, and they also seem to presuppose a conflict between persons and the society outside them, which constrains their freedom and action. Marx makes this clear in 'On the Jewish Question', where he argues that rights are a 'framework exterior to individuals, a limitation of their original self-sufficiency'.<sup>59</sup>

### Main Summary Points

- Rights are usually associated with individuals and technically the definition of rights relates not only to the authority for an individual to act in a given manner but also to the universalised capacity to act, in the same fashion, possessed by all persons, in the same legal system. Rights are the entitlement to act, or to have others act, in a certain way.
- Legal rights are always related to judicial principles, laws or rules obtaining in a given legal system.
- Moral rights relate to the specific roles, or relationships, that exist in a given society, or the promises or expectations which persons may generate outside the statutory legal framework.
- Criminals may be understood as people who violate their obligations to the community and/or the state and therefore deserve a forfeiture of their rights.
- Kant's work on punishment utilises a rights and obligation methodology. Punishment is simply paid as a debt to be settled with the law-abiding citizens. Once it is paid there is free and easy access back to the community for the law-breaker, on the same basis as everyone else. This form of punishment is classically termed retributive punishment, and it is only possible in a theory which prioritises law, rights and obligations.

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- Utilitarians are less convinced by this as they believe that any moral rules and arrangements we have seem to be determined solely in terms of the consequences they have.
- Human rights signify a set of rights that relate to the persons because they are human and, as such, they relate to all persons equally and at all times. No human can be denied these rights – they are fundamental.
- Some feminists have noted how rights-talk is skewed to a masculine mindset. Men tend to enforce rules harshly whereas women tend to evaluate rule infractions in the context of broader considerations of relationships, and tend to be more empathetic. Therefore rights tend to ignore empathetic relationships in favour of legal ones.
- Marxists have noted that rights are far too individualistic and even undermine social solidarity.

Questions

1. Are we losing or gaining human rights?
2. What was Marx's main problem with rights?
3. Was Mill right about the relationship of rights to utility?

Suggested Further Reading

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  29. *Tenninello v. Chicago* 337 US 1 (1949) – a case of how to interpret Justice Holmes's 'clear and present danger' test for limitations on freedom of expression.
  30. Crime and Disorder Act, 1998, Anti Social Behaviour Act, 2003.
  31. *Kopp v. Switzerland*, PG and JH v. *United Kingdom*, cf. Grant (2005) Crim. LR 955.
  32. *Ludi v. Switzerland*, Kian v. *UK*, PG and JH v. *UK*; cf. dissenting judgments of Loucaides and of Tulkens and Art. 3 and A v. *Home Secretary* (2005) UKHL 71, *Teixeira de Castro v. Portugal* 25829/94 (1998) ECHR 52 (9 June 1998).
  33. The Criminal Justice Act 2003 allows evidence of previous criminal convictions to be used against a defendant to a far greater extent than the rules of common law relating to 'similar fact evidence'.

34. R v. Al-Khawaja (2006) 1 All ER 543 (Court of Appeal, Criminal Division) – hearsay evidence of a deceased witness; R v. Xhabri (2006) 1 All ER 776 (Court of Appeal Criminal Division) – hearsay evidence of a witness who was nevertheless available for cross-examination.
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## 4

### POLICE AND POLICING

... the political neutrality or independence of the police cannot withstand serious consideration. It rests on an untenably narrow conception of 'the political', restricting it to partisan conflict. In a broader sense, all relationships, which have a power dimension, are political. Policing is inherently and inescapably political in that sense.

Robert Reiner, 2000<sup>1</sup>

#### Introduction

For most people the sight of police officers on the streets is the most obvious evidence of the criminal justice system at work in their community. Historically, at least, the police have always been seen as a reassuring presence on the streets. Yet, as McLaughlin has recently noted:

The police constable [also] occupies a complicated position in Britain's highly stratified social structure. He is supposed to be from as well as of the community but there is also a constitutional requirement of police officers to have an arm's length relationship with the community. As an officer of the Crown he is not allowed to engage in politics or over-identify with any particular group or sectional interest.<sup>2</sup>

The police are of us and also not of us: we and they live with that duality. Police officers occupy a complex array of roles and the politics of policing is often an attempt to stress one or other of these roles to the detriment of one or other roles. Should there be more police on the streets? Should police uphold the law in all cases? Should the police have more powers or less powers? Modern policing is about much more than just a reassuring presence on the streets and neither is it reducible to the work of individual police officers. Moreover, modern policing often has a totalising aspect to it. In an important book, *Crime in an Insecure World*, Richard Ericson has stated: '...policing is integral to every institution and relations among institutions, and it has no obvious limits. It entails a perpetual and infinite thirst for knowledge of potential harms as a capacity to overcome uncertainties and underpin security.'<sup>3</sup> Ericson argues that policing in



the modern world is all about the management and science of risk and that 'police power is perfected when it results in self-policing among members of the population. The liberal social imaginary of the "house of certainty" is a house of discipline and self-policing.<sup>4</sup> Ericson's work is indebted to the political theorist Charles Taylor, who emphasises the fact that the sheer complexity of modern societies militates against their governability.<sup>5</sup> Ericson's work attempts to demonstrate how modern policing may have reached the limits of its capacity for public reassurance and crime control. 'The politics of uncertainty, conducted through the sciences of risk and in law, expresses increasing doubt about the capacity of liberal governments to govern the future and provide security. Indeed, in many quarters there is radical doubt, radical uncertainty, suggesting the ungovernability of modern societies.'<sup>6</sup>

It is very interesting to note how Richard Ericson, one of the world's leading criminologists, has both moved away from traditional narratives of policing and towards an analysis deeply indebted to political theory and a broader, and richer, understanding of social processes. The work of McLaughlin and Ericson is a refreshing challenge to more normative understandings of the police, which by comparison seem slightly dated and tinged by positivism, at least to the extent that they see the problems of policing as solvable and straightforward. The older narrative is giving way to the new. For example, Waddington asserts that policing is 'the exercise of the authority of state over the civil population. That authority is based on the monopoly of legitimate coercion – cops, usually ask or command people to do something and those people normally comply; but if they do not, then the cops will *force* them into compliance.'<sup>7</sup> McLaughlin's notions of the complexity of 'multi-social' policing and Ericson's ideas about living with uncertainty and risk seem to be truer representations of the world of policing than the simple subject-object relationship offered by Waddington.<sup>8</sup>

Building on Ericson and McLaughlin, this chapter will set out three main types of underlying political supposition used to support contemporary writing about the police. These are what I shall term the conservative impulse, the Marxist critique and the community management strategy. Broadly speaking, these underlying suppositions derive from, or were originally developed in, political, as opposed to criminological, theory. This chapter will set out the basis of these three suppositions and link them to forms in existing criminological explanation. What is interesting is how each of these three underlying political suppositions conceives the relationship between the individual and the police and between the individual and the state.

### The Conservative Impulse

In the many volumes that have been written by criminologists about policing, little scholarship has been given over to understanding the basic functions of policing in terms of its support in conservative political theory, i.e. in terms of its *raison d'être* for preserving order, maintaining the *status quo* and defending

private property, all of which are dealt with extensively by conservative political writers. Rarely is conservative theory set out in contemporary criminological literature in regard to the basic defence of the state either. When criminologists have attempted an understanding of conservative thinking the tendency has usually been to reduce conservatism to a rather naive and unhelpful set of social attitudes.<sup>9</sup> Not only can it easily be argued that all the basic functions of the police are necessarily conservative, but the political left and right largely agree that they are, and the debate concerns whether this is a good thing in its extent and the rightness of what it preserves. Roger Scruton, a leading conservative philosopher, has argued:

The law is the will of the state, and the domestic expression of its power. And since state and civil society are interdependent, the legitimate sphere of law will be all that matters to social continuity, all that can be taken as standing in need of state protection. The law must cover all activity through which the bonds of trust and allegiance are cemented or broken. Obvious instances – the upholding of contract, the outlawing of gratuitous violence, the common essence of civil and criminal law – follow from this view.<sup>10</sup>

Conservative political theory upholds the values of traditional forms of social and political organisation. It sees knowledge and wisdom as being passed on through tradition. In doing this, it acknowledges that any society is more than the sum of its parts, and that issues of justice always have an intergenerational aspect. Society is understood by conservatives as functioning through a delicate mechanism of mutual adjustments which arises out of practical lived experience. In such a way, it is argued, individuals come to see the way things are done and understood. It is a tacit and intuited understanding of how society should be, which always looks backwards in time for its justification and its arguments are always historically situated. Conservative political theory posits that any understanding of how individuals ought to operate in society is learned through the day-to-day practice of living within a particular society and is always informed by historical practice.<sup>11</sup> Tradition and traditional ways of doing things are esteemed, as are the structures which maintain existing forms of civic life. The conception that there is value in tradition necessarily privileges a particular historical perspective, i.e. continuity is prized over change.<sup>12</sup>

### A classical legacy

The state, in conservative thought, is the ultimate facilitator of civic order. The state's institutions are understood as allowing the functioning of civil society through the establishment of order, legal codes and a minimal level of welfare. The most important function of any conservative state is the resolution of conflict and this necessitates that the state always has sovereignty over all citizens and associations, though this sovereignty can only be secured by proper (i.e. authentic) political representation and an independent legal system and a legitimate policing

function.<sup>13</sup> An example of this is given by the conservative political theorist, Leo Strauss, who derived his ideas from his reading of how the Greek *polis* functioned.<sup>14</sup> In his book, *Natural Right and History*, he argued: 'The best regime will then be a republic in which landed gentry, which is at the same time the urban patriciate, well-bred and public spirited, obeying laws and completing them, ruling and being ruled in turn predominates and gives society its character.'<sup>15</sup> In advocating this, Strauss follows the Greek philosopher Plato, in upholding a moral hierarchy built on natural law and which establishes the primacy, and co-identity, of philosophical knowledge and political order.<sup>16</sup> The notion that a stratified society is the proper natural outcome of human history as well as the underpinning of political life is not only a political dogma but also a moral evaluation. This form of reasoning Strauss derived from Plato, but it may also be found in the work of the Roman statesman, lawyer and political theorist, Cicero, and the thirteenth-century Christian theologian and philosopher, St Thomas Aquinas.<sup>17</sup> Persons are not equal in conservative thought though they enjoy a technical equality before the law.<sup>18</sup> An ordered political society under law and policed through consent is the precondition of civic life and private property. What Rowe has argued about Plato's *Republic* might too be said of all conservative ideas concerning the role of law, and law enforcement, in the affairs of men and women:

What Plato wants is ultimately the improvement of humanity at large; and the majority of us will require more than exhortation to push us in the right direction. The tools which lie to hand are the laws and institutions of society, by which – to a degree – our behaviour is normally controlled. Plato's political proposals consist essentially in the extension and transformation of those laws and institutions for the effective production of virtue.<sup>19</sup>

The defence of private property is essential to contemporary conservative political theory but its origin is in the classical period. As Cicero had argued in *De Officiis* (*On Duties*):

...although it was by nature's guidance that men were drawn together in communities [*congregantur homines*], it was in the hope of safeguarding their possessions [*rerum suarum*] that they sought protection of cities [*urbium*]<sup>20</sup> ... the chief purpose in the establishment of states and constitutional orders [*res publicae civitatesque constitutae*] was that individual property rights might be secured [*sua tenerentur*] ... it is the peculiar function of state and city [*civitas atque urbs*] to guarantee to every man the free and undisturbed control of his own particular property [*suae rei*].<sup>21</sup>

Here Cicero is giving a justification for *tutela*, which means guardianship or trust. *Tutela* is best understood as an aspect of Roman Law that, in its original formulation, is concerned with the relationship between individuals, private property and the state and which sought to defend property, especially family property. Moreover, Cicero advocates the use, if necessary, of state sanctioned violence to defend public order and private property, though he is generally antithetical to the use of force.<sup>22</sup>

The Romans had an elaborated conception of private property which covered its acquisition, transmission and defence in law. The role of the state was to

defend private property by upholding the laws which protected it. Cicero, as a practising lawyer, made sure that the defence of private property was at the heart of his political theory.

### Private property

Roger Scruton has argued that:

The first thing to be said is that ownership is the primary relation through which man and nature come together. It is therefore the first stage in the socializing of objects, and the condition of all institutions. It is not necessarily a product of greed or exploitation but it is necessarily a part of the process whereby man frees himself from the power of things, transforming resistant nature into compliant image. Through property man imbues his world with will, and begins to discover himself as a social being.<sup>23</sup>

This rather Hegelian view sees private property as the basis of all social relations, the site of self-realisation and the justification for the state, i.e. as the ultimate protector of private property and social relations. In defending private property the conservative does not so much defend wealth accumulation but the self-realisation of the individual and civil society, both of which are assured by it in turn. The state alone can defend this conception through civil and criminal legal codes, though the law is itself secured by our own personal relation to it under a system of private property. The state and the law are things that individuals can have a direct relationship with through political life. The state on this view is a personality, a corporate personality in the terms set out in conservative thought by von Gierke and Maitland.<sup>24</sup> It follows from this that the most basic function of the police is to uphold the prevailing system of private property relations and, in so doing, uphold the state.

### Hobbes

This form of conservative reasoning found its pre-eminent expression in the work of the seventeenth-century English political philosopher Thomas Hobbes, though it should be noted that Leo Strauss always understood Hobbes as a liberal contract theorist.<sup>25</sup> Modern conservative theorists, such as Hannah Arendt,<sup>26</sup> have always looked to Hobbes' work as a starting point for their own ideas. In Hobbes, the basic problem for individuals is how they are to be preserved from the state of nature, the war of all against all. Hobbes argued that this is achieved only by a strong sovereign (from which we may infer a state) which individuals both give rise to through deliberation and, in turn, are protected by. The sovereign (state) severely punishes all those who disobey the law and if the sovereign is successful, then no individual will feel threatened, as would be the case in the state of nature. The sovereign's function is to facilitate law-abiding behaviour and civil order. Hobbes suggests in *Leviathan* that there is a vertical relationship between the ruler and the people.<sup>27</sup> This has been termed a 'foundational' relationship,

though that is misleading because what is really being suggested is that there is a contract between an existing society and the ruler who is outside it.<sup>28</sup> The hypothetical nature of the original contract supports and justifies a rule of law which is already in place. What the conservative derives from this is the political rationale that one consents to be ruled. Roger Scruton has written how '[f]ree and open contract presupposes a sufficient order, not because it would otherwise be impossible to enforce contracts [although that is true], but because without social order the very notion of an individual committing himself, through a promise, would not arise'.<sup>29</sup>

### Hegel

Following Hobbes, the German philosopher Georg Wilhelm Frederick Hegel, writing in the early part of the nineteenth century, addressed the issue of wrong, which includes crime.<sup>30</sup> Crime is seen as an offence against the particular and general will. As with Hobbes, the issue of contract arises, but in Hegel it is more concerned with the way a person becomes individualised in society through private property. Contract is the realisation of personality in the sense that through contract and private property a person's rights become known and acknowledged by others. The criminal is the person who, through theft, denies the rights of another. Criminal punishment is therefore that which annuls crime, restores right and re-establishes the proper civic order. Again, as with Hobbes, the conservative defence of private property and civic order is to the fore. The law and its enforcement not only protect the individual but also underpin the whole idea of Man, as an abstract and universal idea. Hegel goes beyond the implied need for a force to uphold private property and civic order and gives an elaborated explanation of legal codes, courts and society's necessary policing function.<sup>31</sup> In Hegel, the system of law is matched to a notion of its enforcement. Hegel did not believe human societies could ever be self-regulating and saw an elaborated role for the public authority (police) in intervening in and regulating the relationships of citizens. Indeed, the public authority may even intervene in the lives of citizens even when individuals are not breaking the law if that prevents persons from imposing harm on others.<sup>32</sup> This is akin to the notion of the police as agents of social discipline that, among others, Lucia Zedner, following Choongh, has set out.<sup>33</sup>

It is relatively easy to infer that the issue of policing in conservative theory is a straightforward issue of upholding law and order, the existing authority and the institution of private property, and that it is a view which is largely uncritical of the *status quo*. However, it would be wrong to underplay the importance of the conservative impulse as a constituent in any rationale for policing. The idea that contract, order and private property should be upheld would appear to be universal features of all forms of modern liberal jurisprudence and political theory. The remaining issues are not so much with the notions that conservative thought works as with their extent (in theory and practice) and how critically,

or otherwise, the basis of authority is determined. What is certain about the conservative impulse is that it has a benign conception of the state and the public authorities. It is this basic feature of the conservative impulse that is disputed in the Marxist critique.

### The Marxist Critique

The Marxist critique is associated with a progressive political analysis. It has a view of policing which always asks questions of authority and existing sources of legitimacy and whereas the conservative impulse looks benignly upon the state as the upholder of law and order, authority and the institution of private property, the Marxist critique is sceptical of these. It is far more concerned with the rightness of how things ought to be rather than how they are and accordingly it sees no point in defending the *status quo* when it is determined as an illegitimate basis for addressing profound issues of justice or when the *status quo* itself is the outcome of a prior unfair settlement. The Marxist critique has been especially popular in England, where it has been developed by both theorists and empirical researchers, notably in relation to the policing of race, especially 'mugging' and industrial relations disputes, such as the 1984-85 Miner's Strike, which brought the organised working class into direct conflict with the Thatcher government and the police.<sup>34</sup> This may be, in part, because of the type of policing employed in England. As Reiner has pointed out, in contrast to most other nations: 'A characteristic of the English police tradition is the attempted unification in the same organisation of the "high policing" function of regulating explicit political dissidence with the "low policing" task of routine law enforcement and street-level order maintenance'.<sup>35</sup> In England, it is therefore easier to detect a basic continuity between what Reiner terms the high and low functions of policing and essentially this is what the Marxist critique does in upholding the self-interested nature of the capitalist state.

Marx is a towering figure and his writings have informed the work of numerous criminologists and social scientists, notably since the 1960s. Indeed, his influence has been so immense that many aspects of his political and economic analysis have found their way into a great deal of contemporary criminological scholarship that would not term itself Marxist, or Marxian. This is because many of his ideas have become orthodox, such as the notion that the 'capitalist' state is fundamentally skewed, in an unfair way, towards those groups, and their values, that already enjoy economic and political power. Marx's own voluminous writings are open to a wide variety of interpretations but this section will concentrate upon Marxist treatments of the state, its values, and its defence, all of which underscore policing policy. Marx himself wrote almost nothing about policing, and so those who follow in his footsteps have had to infer a position, based upon his general politico-economic position. He certainly saw criminals in a negative light. He thought people who broke the law should be punished.<sup>36</sup>

Marxist analysis, in all its forms, shares several of the key theoretical elements used in conservative thought, especially a concern for history and for the self-realisation of persons, though the understanding of them is radically different from the analysis offered by modern conservative thinkers, such as Leo Strauss or Roger Scruton. However, unlike in conservative thought, history, as related by Marx and his followers, is concerned with a dogmatic account of economic development, related to historical materialism, and the present alienation of persons.

The laws of the capitalist state are maintained by its agents, the police. The coercive power of the capitalist state is seen as its most important function because only through this coercive power can unfair property relations be protected and existing class divisions be maintained.<sup>37</sup> The state is seen not to serve all but to serve only the sectional interests of the capitalist class. It should be noted that Marxist analysis is rooted in a materialist philosophical scheme which has a far more elaborated conception of the economy than in conservative thought. As David Garland has stated when discussing Marxism:

... 'economy' - that sphere of activity which produces the material necessities of life - will always be the key locus of power in any society. Those groups which dominate in this realm will thus be able to impose their power - and the distinctive social relations which this economic power requires - on to the other spheres of social life. Consequently, the institutions of law, politics, morality, philosophy, religion and so on will tend to be forcibly adapted to fit the conditions of economic life, and will come to take on forms and values which are in keeping with the dominant mode of production.<sup>38</sup>

The big assumption here is that the dominant economic class, the capitalist class, will go on to maintain its economic dominance through the domination of non-economic arenas in the superstructure, such as law, culture, politics and education. Moreover, it will achieve this straightforwardly due to the overwhelming determining power of the economic base.<sup>39</sup> Since all things in the world are derived from the economic base, the police may be said to straightforwardly function as part of the apparatus that maintains the capitalist class in its structurally dominant position.<sup>40</sup>

### Marxist Criminology

In Criminology, Marxism had enjoyed some limited support in the early part of the twentieth century, especially with William Bonner,<sup>41</sup> but it was the 1970s that witnessed a resurgence of interest in Marxism from mainstream theorists like Bill Chambliss, Bob Fine, Colin Sumner and Ian Taylor.<sup>42</sup> The 1970s witnessed an unprecedented level of Marxist scholarship in social and political history, much of which focused on law and punishment, and which had an impact in sociological and criminological circles at the time.<sup>43</sup> It is also worth noting the work of Stuart Hall's Centre for Contemporary Cultural Studies at Birmingham University in the 1970s, which drew heavily upon the continental Marxist tradition. It emphasised Marxist thinkers, especially Antonio Gramsci, and utilised

the concept of hegemony. In the *German Ideology*, Marx had argued that the ideas of the ruling class were always the ruling ideas of the day and Gramsci developed his ideas in relation to a form of Marxist scholarship, indebted to Lenin, which rejected economic determinism and tried to understand the processes of capitalist ideological domination. Gramsci had been concerned with how the 'ruling class not only justifies and maintains its dominance, but manages to win the active consent of those over whom it rules'.<sup>44</sup> Later Marxist thinkers, using the concept of hegemony, sought to address the issues of how consensus is maintained in an unequal class society and how people become alienated from their true interests. Consequently, they tend to focus upon issues of culture, including the media. This emphasis upon the work of Gramsci is particularly pronounced in Criminology with Sumner's classic *Reading Ideologies*.<sup>45</sup> The publication of *The New Criminology* in 1973 witnessed a movement away from both 'orthodox' Criminology and Sociology.<sup>46</sup> It also broke with the 'orthodox' Marxist tradition of the time, which had aligned criminals with the lumpenproletariat and those persons sapping the revolutionary spirit from the working class. *The New Criminology* was prefigured in its revision of the way Marxist criminologists understood criminals by earlier work in political theory, notably by Draper and Hirst.<sup>47</sup> Before the 1970s, Marxism had given little attention to criminals. Marxism had always had a very moral tone in relation to crime and *The New Criminology*, in Sumner's words, made 'the central accusation ... that the creative, human, element in deviant behaviour had been neglected at the expense of economic determinism'.<sup>48</sup> This shift of focus within Marxist scholarship ushered in a new way to understand criminality and there was an explosion of work which emphasised the role of policing in repressing the working class. It also always had an eye on politicising the working class through its writings on the unfairness of policing and the oppressive nature of capitalist social relations: it is a shibboleth of Marxism that one cannot disentangle political action and scholarship, and that the one should seek to reinforce the other.<sup>49</sup>

This renewed interest in the work of Gramsci and the idea of hegemony at Birmingham found a ready reception in the sociological and criminological analysis of the time in Britain. Phil Cohen wrote *Policing and the Working Class City* from a Marxist perspective which is indebted to Gramsci.<sup>50</sup> Cohen argued that the British police force were part of a wider educational state system. The police were said to be arbiters of deviance and administrators of a juridical ideology of crime. In other words, the police have both expressive and repressive functions, derived from their place in the overall structure of the capitalist state.<sup>51</sup> The police are the organisation which has the task of 'imposing the elements of a properly capitalist urban discipline in the name of public propriety'.<sup>52</sup> In the same collection, Bob Fine summed up the issue thus: 'It is only when we view the connection between the form and the content of bourgeois law that its class character becomes apparent'.<sup>53</sup> This form of Marxist analysis sees the police as maintaining an unfair system of law and property relations. They are nothing less than agents of *capitalist* social control. The movement away from understanding criminals in terms of Marx and Engels' *The German Ideology*, i.e. emphasising the

non-revolutionary aspects of the lumpenproletariat (which contains the criminal classes) and towards an understanding of law and policing in terms of their hegemonic aspects, was transformative for Marxist criminological analysis. It allowed Marxist criminologists to ask broader questions relating to the structure of society and to contextualise, rather than merely censure, criminal activity and policing.

The Marxist critique is now an established theoretical stance within Criminology. Its emphasis on structural and economic inequality and the role of policing in maintaining it has spawned some of the most influential work in Criminology over the past 30 years. It has also had a huge effect upon policing practice and the way we understand policing.<sup>54</sup> However, to assent to its overall conclusions about crime and policing, and not merely to note some of the points that it makes, requires one to believe in a Marxist analysis of the economy and nature of social structures which many believe to have been largely discredited. Therefore just as some elements of the conservative impulse have become orthodox, such as the belief that private property needs to be defended, the Marxist critique has given us new orthodoxies, such as the notion that policing, at least in part, is about maintaining the *status quo*. It should be noted that elements of the Marxist critique have entered Feminist analysis and, latterly, Green Criminology. However, in the past 20 years a far more pragmatic notion has taken hold of Criminology, that of devising an effective *community management strategy* for the irreducible policing issues that are thrown up by all modern societies.

### Community Management Strategy

The community management strategy is not a straightforward focus upon real-world policing issues so much as an analysis informed by the implementation of communitarian ideas—within policy and criminological analysis. New forms of policing, including the use of wardens and PCSOs (Police Community Support Officers) who work with local people, may be seen as 'part of a wider move to engage ordinary people in running their own communities. This evolving process is predicated upon an active citizenry – it may be possible to manage and police public space without the active support of ordinary people but it is unlikely to be successful. The idea underpinning these developments in the management of public space is partnership.'<sup>55</sup> The concern for community relates, approximately to the post-*After Vi*,<sup>56</sup> concern, by political theorists, to frame 'the common good'.<sup>57</sup> It was a critique of the limited government liberalism that marked the Thatcher and Reagan era, which had tended to downplay the role of community contexts and stress the culpability of individuals in the criminalisation process. It focused upon the notion that communities have common social purposes and it displayed optimism about the ability of the police, working in collaboration with citizens, to have an impact upon crime levels – something

Bill Clinton made much of in his administration. However, some writers have claimed that it is unrealistic to ever assume high degrees of social and political homogeneity in terms of the values espoused in complex contemporary societies.<sup>58</sup> Communitarianism typically eschews grand narratives, like those found in Marxism, in favour of understanding the dynamics of specific communities and it focuses upon developments in practical policing which have an incremental impact upon crime levels. Alasdair MacIntyre has outlined exactly what Communitarianism aims to do when he writes in terms of 'an account of the good which is at once local and particular – located in and partially defined by the characteristics of the *polis* – and yet cosmic and universal'.<sup>59</sup> The communitarian account emphasises a community management strategy based on a partnership between community and police that relies on the public not only to report crime but also to work with the police to develop a 'sense of community' and thereby undermine crime formation.<sup>60</sup> It is based on a high sense of community engagement. Moreover, police success is evaluated in terms of its ability to respond to community values and priorities and not simply in terms of its ability to control crime. However, as McLaughlin has argued: 'Community policing approaches are [also] inherently undemocratic because the police define the parameters of the debate for other agencies and the community is conceptualised as just another resource to be used in the officially defined fight against crime.'<sup>61</sup>

It has also stressed the role of social control in late modernity as part of the policy package aimed at promoting the common good. As David Garland has noted:

...the development of late modernity reduced the extent and effectiveness of 'spontaneous' social control – which is to say, the learned, un-reflexive, habitual practices of mutual supervision, scolding, sanctioning, and shaming carried out, as a matter of course, by community members. The current wave of crime prevention behaviour tries to revive these dying habits, and more importantly, to supplement them with new crime control practices that are more deliberate, more focused, and more reflexive.<sup>62</sup>

Unlike the conservative impulse, or the Marxist critique, its main concern is with the day-to-day management of criminal activity and police effectiveness, gauged in terms of the common good. It also underscores the need for citizens to act with a high degree of social responsibility.<sup>63</sup> The notions that strong communities are the best basis for tackling social alienation and crime, and that the state should promote communal life, have infused policy discussions on both sides of the Atlantic for over two decades now. However, some criminologists, notably Gordon Hughes, have mistakenly taken the communitarian concern with past ways of organising communities, along with its positive view of social control, to be evidence of neo-conservatism. This is profoundly mistaken as neo-conservatism derives its inspiration from past ways of organising societies, whereas communitarians seek to develop new forms of social organisation.<sup>64</sup> Rather, Selznick makes the better point that, in practice, communitarian ideas

are usually blended with existing liberal values, in which case they 'treasure liberal values and institutions, but also take seriously the promise of community and the perils of ignoring the need for community'.<sup>65</sup> The overall aim that Selznick has in mind is the development of a political and social environment better able to address the profound issues affecting crime formation. However, David Downes has argued that the inability to properly fund the police and other agencies has often led to increased levels of juvenile crime and school exclusions.<sup>66</sup>

In Britain it has sometimes been allied with the 'new realism' in the Labour Party, beginning with Neil Kinnock and developing under Tony Blair.<sup>67</sup> The community management strategy, in policy terms, is built upon a collaborative approach to policing, which is reflected in legislation such as the Police and Magistrates' Courts Act 1994 and the Police Act 1996, both of which focus upon police authorities as part of the managerial accountability process. The political point here is that in using the term 'accountability', those who advocate the community management strategy are focusing upon the notion of the police as performing a public service for the common good. The spread of communitarian ideas coincided with a convergence in policy thinking between many in the senior ranks of the police and those at the top of the governing Labour Party, as Barry Sheerman MP has pointed out.<sup>68</sup> Nevertheless, this 'new realism' had support right across political parties in Britain. Who now could talk about policing without reference to communities and their values? Police and citizen are increasingly focused upon the same ends and engaged in similar practical defences of communal life.<sup>69</sup> The Crime and Disorder Act 1998 was allied to the Crime and Disorder Strategy, which set out local priorities, targets and performance measures. The task of crime fighting went local under the Blair government and the Crime and Disorder Act 1998 gave responsibility for crime and disorder to the local authorities, who were expected to work in collaboration with the police.<sup>70</sup> The Crime and Disorder Act 1998 emphasised the participation of communities and took seriously the issues faced by women and ethnic minorities, among others. The intellectual shift away from understanding policing as separate from the local community and towards a more collaborative and communitarian understanding of the relationship between citizens and police officers has established a more fluid relationship between the police and the policed. Moreover, as Bayley has noted,<sup>71</sup> the values and practices of the police in a communitarian model of policing always relate directly to the context of the given community, and the Crime and Disorder Act 1998 emphasised this in the British example. Beneath the Crime and Disorder Act 1998 lies a much deeper reorientation of the democratic principles that inform policing away from crime control alone to the broader embrace of community problems.<sup>72</sup> Following the Crime and Disorder Act 1998, the whole thrust of policing became premised upon community partnership and engagement. The necessity of an active citizenry has altered the face of policing practice a great deal. Indeed, as Zedner has pointed out: 'Private citizens also fulfil important policing duties as special constables, neighbourhood watch coordinators,

members of citizen's patrols, and as participants in community-based crime prevention programmes'.<sup>73</sup> However, Reiner has made the counter point: 'The police are becoming part of a more varied assortment of bodies with policing functions, and a more diffuse array of policing processes, within and between nation-states. Police officers can no longer be totems symbolizing a cohesive social order which no longer exists.'<sup>74</sup>

The community management strategy seeks to develop a positive relationship between the public and the police in order to tackle crime and build strong communities. However, political theorists, such as Gutmann and Wallach, have pointed to the dangers of its implicit majoritarianism, especially in a multicultural context.<sup>75</sup> It is easy to see that policing priorities and social values are contested and, by extension, to understand how certain groups, in the minority, could feel themselves excluded from the basis of policing in the community in which they live. Political liberals, notably Ronald Dworkin,<sup>76</sup> have attacked the 'communitarians' lack of any serious consideration of rights, especially for minorities. The leading political theorist John Charvet has made the point that 'communitarians affirm one general principle: each is to follow the norms of his society'.<sup>77</sup> Charvet's work underscores the might of the majority view and the inability of individuals to resist the general view of the community. The community management strategy is undoubtedly right to link effective policing with the development of partnerships between the community and the police, and yet a narrow appeal to 'community' settles nothing in a modern multicultural society. No modern multicultural society can ignore the development of shared values if it is to successfully organise itself. The problem for contemporary policing is that to be engaged in both crime-fighting functions and the development of positive community values, which foster the common good, is to be continually involved in a discussion about which of these two elements is the more important.

#### Jean Charles de Menezes: Assumptions behind a Blunder

We have seen how political theorists have tried to develop practical models of the world and how those models have, in turn, impacted upon policing theory and practice. However, the world, unlike the models, is a messy place where things do not always follow the paths predicted by theorists. Yet sometimes this messiness can result in light being thrown on the assumptions about the nature of policing that are ordinarily hidden from our view. On 22 July 2005 Jean Charles de Menezes, an innocent working man, was killed by police officers in Stockwell underground station. The police officers were involved in counter-terrorism work. The killing was a horrendous error and at one level could be treated as a regrettable operational blunder. However, at the time of the killing, the nation, especially in London, was at a heightened state of alert after a series



of terrorist outrages and Jean Charles de Menezes was mistaken for a terrorist suspect. He apparently looked like a Muslim from the Middle East, though he was actually Brazilian.<sup>78</sup> As McLaughlin has noted:

The clinical nature of the SAS-style killing and the police rationalization of the need to 'test' the new counter-terrorism protocol touched a raw nerve. ... Human rights groups warned that providing the police with SAS-style 'licence to kill' was adding to the climate of public fear rather than providing public reassurance.<sup>79</sup>

The de Menezes killing threw the relationship between the police and government and the news media under the spotlight.<sup>80</sup> It also highlighted, and accentuated, the distance of senior police personnel, who had become prominent public figures, from the general public, whom they serve.<sup>81</sup> Moreover, it demonstrated how the twenty-first century is one where policing is prioritised as the site of arguments over human rights, democratic values and the nature of cosmopolitan citizenship.<sup>82</sup> As Sivanandan has argued, after the bombings of 7 July 2005 the civil liberties of non-white citizens were compromised and the promise of multiculturalism gave way to the alienation and victimisation of large numbers of non-white British citizens.<sup>83</sup>

So what does the work of McLaughlin and Sivanandan teach us about the conservative impulse, the Marxist critique and the community management strategy? In terms of conservative political thought there is support, as we have seen, in Cicero for state sanctioned violence to maintain public order. After terrorist outrages this may be legitimate. In Hegel, the conservative can find support for the regulation of citizens because there is a limit to the ability of citizens to regulate themselves. A conservative position therefore could give support to the police tactics employed against terrorism, which resulted in the de Menezes killing. Marxists could feel vindicated that the killing demonstrates how a coercive capitalist state functions and how the operational deployment of police officers to Stockwell was evidence of both the state's monopoly of power and its willingness to use force. However, the community management strategy is challenged most by the de Menezes killing because the whole notion of defending a community was thrown wide open. What community? Whose values? The questions are not simple ones in a world-city like London. The de Menezes killing also highlighted the criticisms made about the police setting agendas. The managerialism of the police was exposed, with senior police officers seemingly unaware of life on the streets but rather concerned with their own policy directives and procedures. New Scotland Yard seemed removed from the practical community life it policed. Most of all, the criticisms made by Gutmann and Wallach about the neglect of minority points of view in a communitarian scheme seemed to ring true. After the terrorist outrages the police force did not consider the fact that racial profiling meant that not all citizens were policed equally. Jean Charles de Menezes looked Islamic (though actually Brazilian) and this highlighted for many Londoners that they too were potential victims of mistaken identity; that they were not equal citizens. A practical policing issue was really, at heart, a political consideration.

## Main Summary Points

- Conservatives believe that an ordered political society, under law, which is policed through consent, is the precondition of civic life and private property. Accordingly, the most basic function of the police is to uphold the prevailing system of private property relations and, in so doing, uphold the state.
- The Marxist view of policing is sceptical about state authority and other existing sources of legitimacy, such as private property. Marxists see the capitalist state as fundamentally skewed, in an unfair way, towards those groups, and their values, that already enjoy economic and political power.
- Bob Fine has expressed a Marxist view of law: 'It is only when we view the connection between the form and the content of bourgeois law that its class character becomes apparent.' Marxist criminologists have stressed the class nature of policing.
- The Communitarian account of policing emphasises a community management strategy based on a partnership between community and police. It relies on the public to report crime and it measures police success in terms of its ability to respond to community values and priorities.

## Questions

1. What are the agreed functions of the police?
2. Should the police be more concerned with crime control or community values?
3. What can we learn about policing from the political theorists of the past?

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## 5

### THE AIMS OF PUNISHMENT

He asked a very simple question: 'Why, and by what right, do some people lock up, torment, exile, flog, and kill others, while they are themselves just like those they torment, flog and kill?' And in answer he got deliberations as to whether human beings had free will or not; whether or not signs of criminality could be detected by measuring the skull; what part heredity played in crime; whether immorality could be inherited; and what madness is, what degeneration is, and what temperament is, how climate, food, ignorance, irritativeness, hypnotism, or passion affect crime; what society is, what its duties are – and so on ...; but there was no answer on the chief point: 'By what right do some people punish others?'

L. Tolstoy, *Resurrection*<sup>1</sup>

#### Introduction

The issues thrown up by punishment are some of the oldest issues in political theory. It was dealt with extensively by Plato.<sup>2</sup> The problem was perhaps best framed by the politically and morally concerned nineteenth-century author, Count Lev Nikolaevich Tolstoy, in his 1899 novel *Resurrection*, quoted above.

In this quote, we can see that punishment is nothing less than the exercise of power over a person, or persons. Through punishment a community labels a person, or persons, 'criminal', and allows for coercive measures to be instituted. Punishment allows for a society to express its opinion as to what is, and what is not, acceptable behaviour.<sup>3</sup> The rule of law ensures that such decisions about punishment are always related back to agreed codes and standards in an open setting; and so the rule of law is itself subject to political consideration, not least, in the choice of rationales employed when sentencing criminals. A given judicial structure will always reflect its political context. The punishment of persons, and the sentencing rationales which inform that, are always political products.

A community imposes punishment (coercion) on persons who fail to abide by morally constructed bonds of cooperation that assist the proper functioning of society. Punishment may be understood as simply the necessary coercion

required to protect people and property from any person who rejects the commonly agreed morally constructed bonds of cooperation that assist the proper functioning of society. Crime may be understood, in political terms, as a rebellion against the rules which allow society to function by allowing persons to live freely and cooperatively and to own private property. Punishment is moral because it not only serves to uphold the morally constructed bonds of cooperation that assist the proper functioning of society, but also because it treats the criminal as a moral person, and so it also has an educative function in that it serves to inform the criminal what he did was wrong.<sup>4</sup> Durkheim offers an analysis, which is indebted to medieval Christian thinkers such as Augustine and Thomas Aquinas, that views punishment as a mechanism through which a social order based on commonly held views enforces a criminal law, which is religiously informed in its content, in order to preserve the 'collective conscience'.<sup>5</sup> Durkheim's position on punishment, in his own terms, seems to relate more readily to mechanical than to organic society, and is not generally advocated by contemporary theorists because of its avowedly religious overtones and notions of consensus, although Lacey has shown how punishment theory still operates with the background idea of notions of reinforcing both commitment to the law and the reinforcement of social solidarity.<sup>6</sup> In this regard the Durkheimian insight still forms a part of our political and sociological understanding of how a given community regulates itself. Durkheim does not offer us a full-blown political or sociological theory of punishment, but rather an insight into how punishment functions, a point elaborated by Garland.<sup>7</sup>

This chapter will show how different approaches to punishment, in the form of rationales to sentencing, reflect differing political conceptions of the world and the place of criminal law within it.

### Backward-looking and Forward-looking Justifications for Punishment

A classic way of thinking about punishment is to employ the distinction of forward-looking and backward-looking justifications for punishment. Backward-looking justifications are said to be retributive and are best exemplified by Kant and Hegel.<sup>8</sup> Andrew von Hirsch, the leading contemporary retributivist, is a neo-Kantian theorist of punishment, who employs a desert-based model, Just Deserts, which is based on considerations that are backward-looking. In the Just Deserts model, the actual crime and its seriousness are the overriding considerations for sentencers and not issues relating to the consequences following the crime, such as the rehabilitation of the criminal.<sup>9</sup> Forward-looking justifications are said to be utilitarian or consequentialist, and typically also give more weight to future states, such as deterring others from committing crime and the rehabilitation of offenders.<sup>10</sup> Those advocating mixed models, such as Michael Tonry,<sup>11</sup> use both sets of considerations.

### The Backward-looking Approach

The advocates of backward-looking considerations maintain that the most important issue in punishment is the crime itself, which always predates any punishment. This view is termed retributivist and it holds that it is proper to punish to the extent that the criminal deserves it. It is a necessarily moral view and in the Kantian and Hegelian schemes it entails the idea that criminals bring the punishment on themselves.<sup>12</sup> In other words, the maxim the criminals are said to act upon is a universal maxim and so they will their own punishment, i.e. in violating the freedom of others they accept that others will violate theirs. A crude version of this view is given in the *lex talionis* formulation, which states that a criminal ought to receive punishment that is the same as that which he inflicted on others.<sup>13</sup> This view is dealt with by Lacey,<sup>14</sup> but it is easily criticised on the grounds that it only works in one case, i.e. where a single murder has been committed.<sup>15</sup> The *lex talionis* is far too crude to use in modern societies, and it only serves to highlight the more complex backward-looking notions of desert and the fairness of punishments.<sup>16</sup> In their modern form, backward-looking theories employ a notion of desert which seeks to justify punishment in terms of the moral appropriateness of punishment. In this case the degree of punishment is always taken to be proportionate to the wrongdoing done.

#### Retribution and desert: the contemporary position

The term 'retribution' is often misunderstood as entailing severe or excessive punishment. This is not the case and the word itself derives from the Latin *retribuere*, which means to 'repay' or 'give back'. In simple terms, retribution sees punishment as the proper response to the criminal's behaviour. In other words, it seeks to give the criminal that which he deserves.<sup>17</sup> The contemporary re-emergence of retributivist thought goes back to the 1960s and 1970s. Robert Martinson undertook a series of studies in the 1970s, which concluded that the American criminal justice system, with its rehabilitative emphasis upon reform, was no better than that of any other type of criminal justice system when it came to rehabilitation. Indeed, it was not rehabilitating.<sup>18</sup> This research had a great impact on public opinion and gained political support in Congress and the Senate. In this way, it assisted the resurgence of interest in retributive ideas, by giving it empirical support. There was perceived to be a crisis in the underlying rationale for punishment, rehabilitation. Writers such as Fogel, Frankel, Kellogg, Morris and von Hirsch became disillusioned with the state of the American criminal justice system, notably in regard to its treatment of offenders.<sup>19</sup> These writers contributed most to the formation of Just Deserts theory. They came to see the lack of a properly worked out philosophical or moral justification for the then sentencing regime in the USA as leading to great inequity in the criminal justice system, with indeterminate sentencing and widespread use of a discretion,

notably in parole cases, operating against the backdrop of a criminal justice system, supposedly focused on the rehabilitation of offenders. The leading advocate of this group was Andrew von Hirsch, and it was he who wrote *Doing Justice: The Choice of Punishments* in 1976, which argued for a system grounded in theory. The main practical ideas behind Just Deserts were the development of a presumptive sentencing structure that might shape and also constrain judicial practice and ensure fair and proportionate punishment based on the severity of offences and the culpability of offenders. It advocated the increased use of fines and community-based sanctions, with imprisonment reserved only for the most serious offenders.

The upsurge in interest concerning retributivist ideas in the 1960s and 1970s was followed by a plethora of writing on the subject, much of which was influenced by Kantian ideas. The *raison d'être* for Just Deserts is avowedly neo-Kantian. This neo-Kantian thinking stressed the criminal's moral desert in the distribution of punishments and this ran counter to the then prevailing notion that rehabilitation or deterrence were the primary concerns in sentencing. The notion that the criminal is a free, autonomous and moral agent whose punishment is deserved is seen, especially in Kant's *Groundwork of the Metaphysics of Morals*, where the idea that it would be wrong not to punish the criminal is presented. In *The Metaphysics of Morals*, Kant advances the notion of a rebounding maxim in terms of the criminal bringing the punishment on himself through his own actions.<sup>20</sup> Moreover, following Kant, recent retributive thought seeks to emphasise the 'fairness' of punishments in terms of the relationship between the offender and the punishment rather than between the punishment and its consequence for society. The correspondence in terms of fairness is always between the gravity of a given offence and the required level of punishment deserved. In such a fashion the criminals are given their just deserts and the criminal justice system is forced to concentrate on issues of culpability, rather than wider social considerations. Kant's injunction that we should treat people as ends in themselves rather than as means to some other end is at the heart of his conception of respect for persons. This concern for persons is at the heart of the Just Deserts approach.

Frederic Kelllogg and Andrew von Hirsch started to develop a critique of consequentialist thinking in the criminal justice system, especially utilitarian treatments of sentencing. In doing so they relied on a justice as fairness approach and were indebted to the work of both the political theorist John Rawls and the philosopher W. D. Ross.<sup>21</sup> The need to resolve the issue of a lack of moral consensus in society led some philosophers and political theorists, notably John Rawls, to develop a theory based on some ideally objective deliberative context. This approach led Rawls to posit that nobody in an 'original position' would favour 'unfairness', since they would not know what place they would occupy in society. The deeper point for desert theorists is a determination to ensure that all persons are treated equally, the point being that desert-based theories are more likely to ensure equal treatment since offenders are sentenced in accordance with their own actions alone and broader social criteria are not of great

importance in determining the tariff. The main unfairness von Hirsch detected in utilitarian systems of punishment was the realisation that it could never be correct to place the punishment of any one person in any calculation which weighed the incidence of a single given punishment against the potential costs and benefits for unknown others.<sup>22</sup> Kelllogg and von Hirsch centred their work on three central issues: (1) devising a measure to rank the seriousness of offences; (2) devising a measure of criminal sanctions; and (3) the determination of a consistent match between criminal offences and sanctions. Following Kant, both Kelllogg and von Hirsch view civil society as the outcome of an agreement to live under a common authority, a primary feature of which is a consistent system of legal punishment. In this model, punishment is something designed both to secure civil society and to ensure external freedom. Just Deserts is a political theory of the individual and his or her relationship to the state.

Much of Just Deserts doctrine seems to cohere with our moral intuitions that there must be a clear relationship between some past act of offending and the person punished, and that any punishment should be proportionate to the guilt of the offender. It upholds that only the guilty should be punished. Just Deserts suggests a humane and rational mechanism for deciding who to punish, and how much to punish them. Unlike orthodox utilitarian justifications of punishment, which maintain that punishment is to be justified in terms of the consequences it has, such as deterrence, rehabilitation, incapacitation and the satisfaction of grievances, the Just Deserts model is tied to the concept of desert. This is the fundamental issue – is punishment to be advocated on desert criteria or the consequences that it has? The utilitarian account locates value in situations or states of affairs, and not in individual moral agents. Utilitarianism, therefore, fails to uphold the proper value of persons. Just Deserts doctrine came about largely as a corrective to the excesses of utilitarian ideas in the criminal justice system, especially in response to indeterminate sentencing and the fact that rehabilitative models did not seem to be rehabilitating. It gained widespread public support because it appeared to place the culpability of individuals above the ends of public policy at a time when people became more wary of the state and more focused upon the politics of the personal. Just Deserts came out of a broader, more political, concern for social justice. It raised important questions regarding public policy and the decline of utilitarian justifications for punishment by challenging the then dominant notion of rehabilitation.<sup>23</sup> In the USA, the idea that penal policy should alter people's characters, attitudes and behaviour seemed reasonable, but when allied to an increase in therapeutic intervention in the twentieth century its shortcomings were exposed. Around this time Noam Chomsky set out a critique of public policies based on human malleability, especially in relation to obtaining consent for government action.<sup>24</sup> Furthermore, it was felt reasonable to allow judges and other officials in the criminal justice system to have widespread discretion. While the therapeutic strategy was in the ascendant, questions about crime definition and guilt were largely overlooked. It was not until the 1960s that academics, lawyers, civil rights activists and the mass of ordinary people started to ask

questions about who were the subjects of all this therapy and why were people being given indeterminate sentences. Eventually, the rehabilitative mechanisms of the state came to be seen as part of a political policy of socially controlling the poor and the weak. The voices raised against rehabilitation grew louder, notably after the Civil Rights Movement, as people became wary of explanations of crime that failed to take on board its political dimension. The Watergate scandal and the excesses of the Nixon administration led to widespread public cynicism about the notion of an enabling state and the role of the state in assisting persons through penal measures such as rehabilitation. Likewise, widespread 'discretion' in sentencing was seen as arbitrary and something to be rid of. Just Deserts argued that the function of the criminal justice system was to punish culpable behaviour and that the severity of sanctions should be proportionate to the degree of culpability. In other words, the consequentialist calculus employed by those who advocated rehabilitation was rejected in favour of desert criteria. This was not new but in the post-Kennedy and Johnson era it chimed with an egalitarian ethos that wanted discretionary power curtailed and which demanded that rules apply equally to all persons, and that all people should be treated equally.

The distinctiveness of Just Deserts theory lies in the way it stresses the criminal's moral desert in the distribution of punishments and the way it conceives the criminal justice system as concentrating on issues of culpability and proportionality, rather than wider social considerations, notably in relation to criminal sentencing. It takes its inspiration from older versions of retributive writing, in particular the writings of Kant, and to political theorists such as Rawls, but it is essentially a practical approach which is underpinned by a commitment to a modern liberal political framework, as has been noted by Lacey.<sup>25</sup> Kantianism always assumes that the autonomy of moral life is the basis on which to found a political theory. Just Deserts theorists, especially von Hirsch, have made the case that sanctions must be both definite and apply equally to all persons; it is a liberal theory in that regard. In focusing on the role of desert the opposition to utilitarianism is clear. Utilitarianism sees desert as only, at best, an indirect means to achieve some future value. Desert theories are tied to claims about personal responsibility. A person must deserve something, in this case a punishment, which is contingent on a minimal level of voluntarism, in terms of any criminal act committed. This backward-looking element is vital for in placing the emphasis on what has been done, rather than on something which will be done, it is clear that the desert basis must be enacted before a person can properly deserve. Punishment and desert must relate to the individual's action and not some wider social goal or outcome. Desert is also a social concept because it is based on certain judgements about a person's blameworthiness, which are socially and politically constructed. The Just Deserts doctrine is a bold attempt to place the issues of desert, proportionality and justice, in the broadest sense, at the heart of sentencing theory and practice. The focus on the proper basis for treating individual persons is a useful antidote to theories

whose foundation is the neglect of the individual in the pursuit of the greater utility, or some other measure, for the many.

### The Forward-looking Approach: Bentham and Consequentialist Theory

#### Bentham's position

The most important political theorist to write on punishment from a forward-looking perspective is Jeremy Bentham, although Bentham was less concerned with the purpose of punishment than with the overall functioning of society, in terms of optimising utility. He thought of punishment as only one of the tools in the hands of the 'legislator', whose end is 'to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, everything that tends to subtract from happiness: in other words to exclude from mischief'.<sup>26</sup> Bentham viewed crime in the broader context of overall society and delineated between those situations in which punishment should be used and those when it should not.<sup>27</sup> He saw that the *mischief* of crime conflicted with happiness but also that the *mischief* of punishment may do so as well. Any punishment which serves to deter the criminal from repeating his crime is called, by Bentham, a 'particular prevention'. This may be achieved in three main ways: incapacitation, reformation and intimidation. Bentham's main writings relate to general prevention, in which case the prevention of crime by the example of the punishment suffered by criminals is seen as the aim of punishment, and its primary justification.

Bentham understood that punishment is only one of the measures that may be used against crime. However, given the general preventive end of punishment, it ought not to be used where it is (a) groundless, (b) inefficacious, (c) unprofitable, and (d) needless.<sup>28</sup> It has to be noted in the promotion of overall societal utility and not in giving the criminal that which he deserves. Bentham's general justification for punishment is not focused upon the criminal so much as the political justification to the general population, whose interest is simply in the best ordering of society.<sup>29</sup> This general approach to issues of punishment delineates utilitarian treatments of punishment from other theories of punishment. Utilitarians are committed to doing whatever, in any given situation, is likely to promote the happiness of the greatest number and, if it is not possible to promote happiness, then to that which will cause least unhappiness. In terms of punishment, the notion is that the sentence will only punish when, and only when, and in such a fashion and to the extent that there is likely to be less *mischief* than if he or she did not punish at all.

Bentham's utilitarian moral justification for the practice of punishment is often couched in terms of deterrent and reformatory terms. Bentham's utilitarian theory of morality ruled out retributivism a priori. Moreover, Bentham and

other utilitarians cannot see rational justification for inflicting suffering for its own sake, even though they accept the principle that criminal desert gives us the right to punish, as Flew noted in his classic essay.<sup>30</sup> The purpose of punishment, in Bentham, is only considered in its immediate use to the community, and this use is thought to be best served by deterring and/or reforming criminals. Deterrence is best understood as an account of the justification of punishment that looks to the future and the consequences which flow from criminal punishment. It may be juxtaposed with the retributivist position, which looks to the past for its justification of punishment. Deterrence, unlike reform or prevention, finds no justification for action in a past offence and its arguments depend entirely upon the consequences of punishment. The view that punishment is justified by the value of its consequences alone is compatible with an ethical theory, which allows meaning to be attached to moral judgements. Deterrence holds that the infliction of suffering is of no value or that it is of negative value and that it must therefore be justified by further considerations. Bentham states:

General prevention ought to be the chief end of punishment as it is its real justification. If we could consider an offence that has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would only be adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent but also to all those who may have the same motives and opportunities for entering upon it we perceive that punishment inflicted on the individual becomes a source of security to all.<sup>31</sup>

Yet Bentham further notes: 'All punishment is mischief; all punishment itself an evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.'<sup>32</sup>

Bentham's argument is that punishment is only a technique of social control that operates to reform the criminal, to prevent him or her from committing crime or it is to deter others from similar offences. However, elsewhere Bentham argues that if the damage to the offender outweighs the expected advantage to society, it loses its justification, for then it produces more *mischief* than it prevents. The calculus would also have to take into account the strength of the deterring effects upon others. So it seems that the strongest utilitarian case for punishment is that it serves to deter potential offenders by inflicting punishment on actual ones.

### Deterrence

Deterrence theory builds on the understanding that people are rational beings who adjust their conduct in terms of the calculations they make as to the consequences of their behaviour, in this case with regard to the criminal law. This calculus, originated in its modern form by Bentham, has had wide appeal in economic circles where sentencing tariffs might be said to mirror an economic pricing model. The classic illustration of this is given by Posner, though, as is common

with this rationale, it has the effect of reducing crime to deliberative action.<sup>33</sup> The practical empirical issues seem insurmountable as Ashworth, reviewing the research evidence, has noted in relation to determining whether deterrence might be said to work in practice.<sup>34</sup> Perhaps, the most notable use of deterrence theory relates to the work of H. L. A. Hart, who advocated a mixed model of sentencing which used deterrence as the general justifying aim of punishment while ensuring desert criteria were used for the distribution of punishments.<sup>35</sup> Hart's view has been popular in public policy circles because it seems to cohere to our common-sense notions of what a criminal sentence should seek to achieve. The 2001 Halliday Report suggested that deterring persistent offenders should be the main focus of sentencing practice, and argued for more mandatory and minimum sentences to achieve this, within the overall framework of desert.<sup>36</sup> Yet, as Lacey has shown, the problems associated with mixing sentencing criteria, however appealing, result in a less than satisfactory philosophical outcome.<sup>37</sup>

Though Bentham gave us the modern form of deterrence theory it has an ancestry going back to references in both the Bible and the Koran, and was historically the dominant rationale employed by most jurisdictions, until comparatively recently.<sup>38</sup> One detects the underlying political premise of general deterrence to be the greater good for the greater number but it is compromised by what is technically referred to as the certainty and severity of punishments – in other words, the possibility of being caught. Therefore, whenever the risk of being caught is low, one would expect a countervailing tendency for high levels of severity. The classic example of this tendency was the so-called 'Bloody Code' of the eighteenth century, when detection rates were very low but where petty criminals could be executed for minor acts of theft.<sup>39</sup> It can be argued that this tendency may still be detected in the contemporary world, with large fines for smoking or fare-dodging on public transport, as Zedner has argued, or the three strikes and out model.<sup>40</sup>

Perhaps the strongest arguments against deterrence relate to (1) its institution in practice; (2) the possible human rights issues associated with using either utilitarian calculation or a simple rational choice economic model; and (3) the model it has of human agency. On the first point, Andrew von Hirsch has shown how deterrence needs to be understood in terms not only of its initial deterrent effects, but also of what he terms 'marginal deterrence' effects.<sup>41</sup> In other words, von Hirsch demonstrates that initial deterrence provides the theoretical justification for deterrence as a sentencing policy, and that it is the marginal effects that provide the justification in terms of the amount of punishment or the form it takes. In a famous 1999 study, von Hirsch et al. found a weak link between the certainty of punishment and offending rates, but they also found that the link was even weaker with regard to severity of punishment and offending, and that it was highly contextually dependent in any case.<sup>42</sup> Therefore, deterrence does not seem to be wholly convincing as a sentencing regime. On the second point, Lacey has argued (I think convincingly) that deterrence is open to the Kantian critique:

It is thus open to the objection generally aimed at utilitarian principles, that they treat individuals as 'means to end' rather than 'ends in themselves'. ... The state's role in punishing, on the general deterrence theory, is to reduce certain unwanted and economically reducible forms of behaviour: individuals may be sacrificed to this dominant purpose.<sup>43</sup>

On the third point, deterrence seems to be on shaky ground with regards to the model of human agency it employs. It can be argued that people do not always make rational choices as to their actions or assess risk in the way deterrence theory suggests. Less still might a rational choice model, whether classically utilitarian or economically determined, be employed by drug users, young people or vandals. It might well be the case that punishment itself causes crime as it brings with it, among other things, stigma from others, complications in the employment market and the disruption of normal life, to say nothing of the role of prison conditioning upon people.<sup>44</sup> Indeed, as cultural criminologists have noted, punishment may itself become a desired outcome for aspiring young criminals, who may see it as affirming a criminal identity or understand a completely different meaning to the punishment than that desired by the deterrence model – making a mockery of the theory of deterrence altogether.<sup>45</sup>

### Rehabilitation

Rehabilitative approaches, like other utilitarian treatments, exist to preserve the political and moral basis of society, though they may also have individuals as their focus. They also appear to be capable of empirical validation, as the myriad of studies carried out by criminologists and government agencies around the world attest. Yet, as Lacey and numerous others have argued, there is still no agreement on whether rehabilitative approaches actually work.<sup>46</sup> The history of rehabilitation, since its heyday in the nineteenth century, is marked by a focus upon individual social pathology and an interventionist social welfare policy, both of which came under attack from political and legal theorists after the Second World War, although most notably after the 1960s. Rehabilitation may be contrasted with deterrence, which sees persons as rational calculating actors, because it sees individuals as in need of help, support or treatment. It is therefore dependent upon an infrastructure of professionals, such as social workers, court officers and therapists, to advise on the form of the rehabilitation to be specified. All such professionals work within a framework that operates with a typology of offenders, which may rank persons in terms of their capacity for rehabilitation.<sup>47</sup> Of course, this may be problematic for in leaving the determination of sentence to a group of persons without clearly defined or agreed criteria one may well be treating persons as bundles of problems rather than individuals with rights and self-determination, to say nothing of the possibility for class, racial, gender and other bias. This stated, it would seem churlish not to view rehabilitation as a positive aspect of the criminal justice system, facilitating

persons to make a move back into a properly socialised life; and whatever shortcomings might be noted it would seem to be the mark of a properly functioning polity that it seeks to integrate persons.

But before we decide that rehabilitation is a humane and generously motivated system it should be noted that many of its claims are dubious, not least its inherent positivistic notion that causes of offending may be detected and that persons can respond *positively* to rehabilitative measures, when the economic conditions in which they exist may be either unaltered or made worse by the criminalisation process itself, for example by being disadvantaged in the job or housing market. Indeed, the rehabilitation process may be aimed wrongly at addressing a systemic issue when the criminal action that gave rise to the rehabilitation process may well be random and/or opportunistic or part of a short-lived episode, as in the case of teenage delinquency, or even being female and subject to patriarchal *assistance* or moral concern.<sup>48</sup> Or that crime may be the result of profound structural political and economic forces and not the result of a pathological tendency; and the whole of Critical Criminology posits as much.<sup>49</sup>

It is easy to see that rehabilitation has considerable political support both at a national and a local level as well as within the criminal justice system, including the Civil Service. Rehabilitation is also, through the state, a considerable employer of professional staff focused on rehabilitation and, moreover, of academics and statisticians who audit the success, or otherwise of rehabilitation.<sup>50</sup> Yet, rehabilitation is an amorphous thing covering an enormous range of persons, crimes and motivations – so how can success ever be a simple affair? Leaving aside the issues that re-offending rates necessarily only relate to those caught, prosecuted and processed by the criminal justice system and that the soundness of statistical data on rehabilitation rates may be doubted, there is the issue of the massive disparity between persons, similarly situated, in terms of the treatment or 'sentence' they receive under a regime of rehabilitation.<sup>51</sup>

The decisions persons make about the validity, or otherwise, of a rehabilitative regime are to a large extent based upon the emphasis they give to consistency, which implies the penal concept of proportionality, which, in turn, is a strong indication about their political conception of their ideal society, and about the role of censure in affirming societal consensus and its importance in it. Rehabilitation divides people along political lines. There are those who trust in the fair functioning of the criminal justice system and the potential of criminals to change, and there are those who do not. Typically, people see the potential benefits to individuals and the wider society as well as the potential pitfalls in a rehabilitative regime, and that is probably how it should be. A system of rehabilitation remains both a mark of a humane criminal justice system and a regime in need of expert management to contain the gross disparities of consistency and proportionality it may contain within it. What the existence of a rehabilitative regime cannot be is an indicator of 'a more human penal system' by itself.<sup>52</sup>



### Incapacitation

Incapacitation is typically very popular with the political right and many who champion victims in the criminal justice system.<sup>53</sup> Zimring and Hawkins (1991) have noted that incapacitation appears to have dominance by default in the criminal justice system, notably in the USA. This is partly due to less scrutiny on it as a rationale *vis-à-vis* other consequentialist approaches, such as rehabilitation and deterrence. It is also responsible for the explosion of prison building – a prison building programme focused upon protecting good citizens from the criminal intentions of bad men and women. However, unlike both rehabilitation or deterrence theory, it is not dependent upon a specific view of how persons act so much as a straightforward assessment of restraining criminals in custody in order to prevent them re-offending, at least for the period of incarceration. It may be accepted for serious crimes, such as murder or rape, but the argument begins in relation to how advocates of incapacitation assess risk in offenders where similar objections to it may be raised, as with deterrence, i.e. that it may grossly over-punish individuals for some desired future free from criminal harm.<sup>54</sup> It is in the risk assessment and prediction game, in which case the level of risk assessed will always be weighed against the norms of a given society, which may fluctuate wildly.

Moreover, the rights of individuals are compromised by incapacitation in terms of the prediction of future risk, which may be wrong, and there remains the major criticism directed at utilitarian treatments generally, i.e. that it weighs the interests of one against those of the many. The political philosopher Ted Honderich, writing on the conflict between desert and risk assessment under a system of incapacitation, has shown how attention to risk factors can, in itself, result in higher tariffs than those typically deserved.<sup>55</sup> One can see how attractive incapacitation is to politicians and sentencers because it offers certainty that no criminal will offend during the period of his incarceration.<sup>56</sup> The attraction of incapacitation is simply that it removes convicted persons from public space, unlike community-based measures. The problems, aside from the cost of incapacitation in terms of capital and running costs, and the disruption to family and work life likely to result from imprisonment, relate to the efficacy of breaching proportionality considerations and the trust one places in prediction. Ashworth has pithily noted that where 'there is a conflict between the rights of two people (albeit that one of them is merely a potential or predicted victim), it is the right of the convicted offender that should yield ... it is questionable whether it justifies the prolongation of incarceration in a prison, as distinct from some less harsh environment.'<sup>57</sup>

### Censure and penal communication

Censure may be conceived as an ideological form, as in the work of Colin Sumner,<sup>58</sup> but typically censure is said to be part of the response made by any

given political community in expressing proportionate disapproval of injustice and crime. In this way, censure allows persons collectively to determine what is blameworthy. It therefore has political and deliberative aspects. It is an element in the Just Deserts doctrine, and in what may be termed 'penal communication',<sup>59</sup> that demands that we all assess, and reassess, our ethical choices. Censure may offer grounds for justifying a non-utilitarian account of proportionality consistent with a consequentialist general justifying aim. The censuring of crime is something often taken for granted even where punishment is allocated in terms of crime prevention. The sanction of censure is directly related to how blameworthy, or otherwise, the crime is. If proportionality is not adhered to, then criminals are treated unfairly, as von Hirsch has indicated.<sup>60</sup>

It could be said that punishment's other defining characteristic, that of censure, is justified as the expression of a morality that holds persons responsible for their actions. It is this condemnatory element that explains why punishment should be proportionately allocated and why different crimes are blameworthy. Punishment expresses censure or blame and the pre-eminent theorist of censure remains Joel Feinberg. His classic 1970 book, *Doing and Deserving*, spawned increased interest in expressive theories of punishment. In 1974, the philosopher Peter Strawson wrote his groundbreaking book *Freedom and Resentment*, which elaborated a straightforward account of human action. It determined that our capacity to respond to wrongdoing by censure is simply part of the broader morality that holds persons responsible for their conduct. Moreover, Strawson argued that the capacity to respond to wrongdoing is essential to our life as moral beings. If one did not confront the criminal with censure, that would be the same as treating him as if he were not responsible and without a moral compass. If we apply Strawson's ideas to punishment, we are also assuming that criminal behaviour is *usually* wrong. This would seem a reasonable thing to do in our relationship to the criminal law. It is the case that crime affects others negatively and it may be freerider activity, in the sense that the *thief* does not earn his wage.

It is a generally held assumption that we share certain moral standards and a capacity to respond to criminal action in terms of the blameworthiness. Primoratz argues that censure can be seen as intrinsic to the process of preventing crime.<sup>61</sup> It provides a disincentive against criminal behaviour. In expressing disapproval or censure of this form of behaviour, it follows that the criminal sanction has two main features: first, imposing painful consequences and, secondly, public censuring. The blame visited by the penalty should therefore reflect just how blameworthy and serious criminal behaviour is deemed to be. The importance of censure in Just Deserts theory cannot be understated. At its most basic level a censure theory will hold that punishment, in the form of hard treatment, is justified because it is the appropriate mode of censure for certain crimes. However, criminal law addresses not only the moral accountability of individuals, as Strawson details, but also third parties.<sup>62</sup> The fact that third parties are addressed matters, for in this case the censure ought to be understood as proportionate to the punishment. Andrew von Hirsch has noted:



The normative message expressed in penal statutes is not reducible, as penal utilitarians might suppose, to a mere inducement to compliance – one utilized because the citizenry could be more responsive to moral appeals than bare threats. If persons are called upon to desist because the conduct is wrong, there ought to be good reasons for supposing that it is wrong; and the message expressed through the penalty about the degree of wrongfulness ought to reflect how reprehensible the conduct indeed is.<sup>63</sup>

Moreover, since the censure and the hard treatment are intertwined, any increase, or decrease, in the severity ranking of a given punishment will alter how much censure is expressed and will, therefore, have to be justified by reference to the seriousness of the crime. Alternatively, any increase, or decrease, in the censure will require reference to the severity ranking of a given punishment. Of course, any alteration to the rank ordering of offences is a political activity, as is arguing for the *status quo*.

### Restorative justice

Unlike the other aims of punishment outlined, restorative justice (RJ) has a different focus altogether. It makes the mending of social relationships and the acknowledgment of the harm done (to victims, offenders and the community) the main issues under consideration. It has as its central tenet the aim of making the community come together by recognising harm in a way which looks to a better future state. However, in giving primacy to the harm done the issue of offender culpability may be compromised.<sup>64</sup> It has an expanded role for the victim in its workings, which is a major difference from other treatments of punishment that tend to ignore victims in the pursuit of 'impartial justice' and concentrate upon the offender. The impact of victims in the sentencing process has long been noted by academics as a positive development.<sup>65</sup> Restorative justice is not, however, a unified theory as much as a general approach which is critical of conventional justifications of punishment, notably retribution.<sup>66</sup> It has never been applied wholesale in modern western criminal justice systems but it has had considerable impact, particularly in the youth justice arena, where it has enjoyed some success. The model being employed in RJ is the social reintegration of persons, especially youth offenders, and John Braithwaite has set out the principles of this in his *Crime, Shame and Reintegration*.<sup>67</sup> This, though, may be witness to the fact that RJ has never seriously challenged the current legal arrangements for criminal justice in the generality of cases. It is merely used for certain cases deemed to be particularly suitable to it, and where the level of seriousness is minimal. RJ is a highly political position for it is often the case in RJ that the state, or the law, should not automatically dictate punishments from a list of tariffs. It sees a determination of sentence coming out of a process entered into by several parties, including victims and offenders themselves. These parties will agree an outcome on punishment but the main issue is the process whereby decisions are made with the maximum amount of participation in order to facilitate social reintegration.

RJ does have several drawbacks. It works best with crimes that involve single victims. In cases where there are numerous victims, especially when they do not agree on their response to the crime, or where there the crime is against a corporate body, such as a company, the whole enterprise of RJ is compromised. The sentence tariff too leaves open a raft of problems. For example, what does it mean for a criminal to make amends for their crime? If a criminal's making amends is determined, then the issue of consistent sentencing, the primary function of the judge, still remains. The mediation sessions that RJ advocates doubtless have great success when the level of seriousness is fairly low, but how can the tortured man be expected to react to his torturer in a reasonable way? And if the tortured man had to suggest a punishment, what would it be?<sup>68</sup> The history of the legal process is one of removing emotion from the courtroom in an effort to concentrate upon the 'facts' of the case. RJ opens up the possibility of irrationality, raw emotion and compromise being introduced into the treatment of criminals, as opposed to reasoned argument concerning the facts of the case. Moreover, the public nature of crime is overlooked entirely in a process which prioritises the immediate parties of a crime and which also might be said to 'privatise' the situation.<sup>69</sup> A process which may even make victims feel worse, as Braithwaite, the leading exponent of RJ, concedes.<sup>70</sup> To conclude, RJ is undoubtedly motivated by the highest ideals of social integration. It offers, arguably, a more personal and humane treatment for victims of crime and it allows communities to express an opinion about crime, but it is, of its nature, a less formal and a more organic process than that advocated by other justifications for punishment; and that is its strength as well as its weakness.

### Practical Considerations

The entire reason for having aims of punishment is so that judicial punishment is undertaken in accordance with the highest ideals drawn from our legal, political and social theories of ethics and moral conduct. When our legal system advances aims of punishment, it is moving beyond raw vengeance and linking the treatment of criminals to wider considerations: it is upholding the fact that criminals have human rights too. This means that when we look at the aims of punishment we see far more than a list of tariffs for various offences. Rather, we witness a tangible expression of the highest ideals a society wishes to uphold.

It is important to see the policy context of sentencing and to be aware that, in practice, a criminal sentence will include elements drawn from differing theoretical bases, within any given tariff. In practice, the policy and practice of criminal sentencing relates to a hierarchy of elements within a sentence: so that a judge may pass a sentence which includes elements of censure, deterrence and incapacitation, for example. At differing times the stress put on any element will alter with the sentiment of the nation, as expressed in law, at any time. For example, where there is a popular view that there are too many persons

in prison we can expect less emphasis upon incapacitation. We should always be aware that the laws of the land are derived from Parliament and therefore the form of the laws, specifically the rationales being advanced in sentencing, bear the mark of political fashion, to some extent. At times prison is favoured and at other times community sentences; sometimes strict proportionality is overridden in favour of restorative justice. Judges can only pass sentences in accordance with the existing law and in line with existing judicial practice. The sentencing of the courts must always reflect the rationales of laws passed in Parliament. However, the Criminal Justice Act 2003 did address this issue by setting out five key purposes of sentencing: (1) punishment; (2) crime reduction; (3) rehabilitation; (4) protection of the public; and (5) the making of reparation by offenders (which may be R). The Criminal Justice Act 2003 also had regard to the level of seriousness of an offence. However, proportionality, in other words, the proper relationship between the offence and the severity of its punishment, was the key principle advanced. No punishment should be unduly harsh or lenient.

In conclusion, it is necessary to understand the proper theoretical basis of punishment and of criminal sentencing, and to understand how these considerations operate in the real world. A modest understanding of legal history will show how the aims of punishment always closely match what are believed to be the highest ideals drawn from the legal, political, and social theories of ethics and moral conduct of the day. The alterations we find in the practice of judicial sentencing are always related to far deeper issues found in political and legal reasoning. The aims of punishment that a society chooses say as much about that society's view of itself as of the individual instance of punishment.

### Main Summary Points

- Punishment labels a person, or persons, 'criminal', and allows for coercive measures to be instituted. Punishment allows for a society to express its opinion as to what is, and what is not, acceptable behaviour.
- Backward-looking considerations maintain that the most important issue in punishment is the crime itself, which predates any punishment. This view is termed retributivist and it maintains that it is proper to punish to the extent that the criminal deserves it.
- Desert theory seeks to justify punishment in terms of the moral appropriateness of punishment, in which case the degree of punishment is always taken to be proportionate to the wrongdoing done. This theory is especially associated with Andrew von Hirsch. It sees culpability and proportionality as more important than wider social considerations.
- Utilitarian theorists look at the consequences of punishment and therefore seek to use punishment as a means of reforming the criminal, to prevent him or her from committing crime in the future or to deter others from committing similar offences.

- Punishment censures criminals and thereby allows persons collectively to determine what is blameworthy. The sanction of censure is always directly related to how blameworthy, or otherwise, the crime is.
- Restorative justice makes the mending of social relationships and the acknowledgement of the harm done to victims, offenders and the community the main issues under consideration. It uses meetings and conferences in its decision-making as it sees the involvement of many people as leading to the social reintegration of criminals and victims.

### Questions

1. Why does Bentham advocate forward-looking justifications for punishment?
2. Is retribution a sufficient reason for punishment?
3. How is restorative justice a punishment at all?

### Suggested Further Reading

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### Notes

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