

DAVID GARLAND

PUNISHMENT AND MODERN SOCIETY

A STUDY IN SOCIAL THEORY



THE UNIVERSITY OF CHICAGO PRESS

The Sociology of Punishment and Punishment Today

1. THE PROBLEM OF PUNISHMENT TODAY

The aim of this book is simple. It sets out to provide a rounded sociological account of punishment in modern society, showing—at least in outline—how penal processes come to exist in their present form and with what kinds of consequences. To this end it employs the interpretative tools of social theory and the information and insights produced by historical studies, together with materials which are more properly penological.¹

Such a straightforward project inevitably entails some presumptions which are not quite so straightforward. Most importantly, it presumes that juridical punishment is not the transparent and rather self-evident institution of crime control that it is commonly taken to be. Were this the case, a study of this kind would be rather unnecessary, there being little need to restate the obvious. But in fact punishment's role in modern society is not at all obvious or well known. Punishment today is a deeply problematic and barely understood aspect of social life, the rationale for which is by no means clear. That it is not always perceived as such is a consequence of the obscuring and reassuring effect of established institutions, rather than the transparent rationality of penal practices themselves.

Like all habitual patterns of social action, the structures of modern punishment have created a sense of their own inevitability and of the necessary rightness of the status quo. Our taken-for-granted ways of punishing have relieved us of the need for thinking deeply about punishment and what little thinking we are left to do is guided along certain narrowly formulated channels.² Thus we are led to discuss penal policy in ways which assume the current institutional framework, rather than question it—as when we consider how best to run prisons, organize probation, or enforce fines, rather than question why these measures are used in the first place. The institutions of punishment conveniently provide us with ready-made answers for the questions which crime in society would otherwise evoke. They tell us what criminality is and how it will be sanctioned, how much punishment is appropriate and what emotions can be expressed, who is entitled to punish and wherein lies their authority to do so. In consequence, these difficult and troublesome questions no longer arise. They are authoritatively settled, at least in principle, and only matters of detail

¹ My analyses draw primarily upon materials concerning Britain, the USA, and Canada. I do not, however, mean to imply that specific penal developments can always be explained in the same way in these different places, or that precisely the same penal policies and patterns of deployment are common to all of them.

² On the question how institutions guide our thinking, see M. Douglas, *How Institutions Think* (Syracuse, NY, 1986), p. 69.

need to be concluded—details which can be left to experts and administrators in specialist institutions set aside for that purpose.

Once a complex field of problems, needs, and conflicts is built over by an institutional framework in this way, these problematic and often unstable foundations disappear from view. In their place all that is immediately visible are the categories and forms of action which the established institution holds out to us. Through repeated use and respect for their authority, these instituted ways of doing things create their own 'regime of truth' which simultaneously shores up the institutional structure and closes off any fundamental questions which might undermine it. The penal system's very existence helps us to forget that other answers to these problems are possible: that institutions are based upon convention rather than nature. For all these reasons, and for most of the twentieth century, the institutions of punishment have normally been surrounded by a sense of their own appropriateness and transparency. Questions about punishment became a matter for penologists—technical experts whose frame of reference was given by this institutional structure.

But institutions and their regimes are not unshakeable nor beyond challenge, particularly where they fail to serve needs, contain conflicts, or answer troublesome questions in a way that is perceived as satisfactory. And, despite their institutional girding and a historical entrenchment stretching back to the early nineteenth century, a growing sense of doubt, dissatisfaction, and sheer puzzlement has now begun to emerge around our modern penal practices. The contemporary period is one in which penological optimism has given way to a persistent scepticism about the rationality and efficacy of modern penal institutions.³ This shift of attitude began to emerge towards the end of the 1960s when rising crime rates, growing prison unrest, and a collapse of faith in the rehabilitative ideal combined to undermine confidence in 'penal progress' and the inevitability of 'penal reform'. The new era has been one of continuing crisis and disruption in a penal system which no longer takes seriously the rehabilitative values and ideologies upon which it was originally based. Within this context it is becoming the conventional wisdom of criminologists, penologists, and social scientists that contemporary methods—particularly that of imprisonment—appear increasingly to be 'irrational', 'dysfunctional', and downright counter-productive. Like the crime it is supposed to deal with, punishment is nowadays seen as a chronic social problem. It has become one of the most perplexing and perpetual 'crises' of modern social life, replete with intractable difficulties and disturbing results, and currently lacking any clear programme which could facilitate its reform.

The most celebrated discussion of punishment's 'failure' is to be found in the

³ Perhaps what is most in need of explanation is the persistence, since the Enlightenment, of the belief that punishment can work as a positive force for the good of the offender and for society, despite the recurring disappointments and sobering experiences of practitioners throughout this whole period. I will return to this question in ch. 8.

work of Michel Foucault, who argued that penological failure has been a persistent—and indeed a ‘functional’—characteristic of the modern prison ever since its inception. But the same presumption of failure appears in numerous other less avant-garde texts, including the work of the historian Lawrence Stone, one of Foucault’s sternest critics. Stone takes it as simply uncontroversial to characterize twentieth-century prisons as ‘vestigial institutions’ which are ‘even less useful for system maintenance than an appendix in an individual’. According to this view, which is shared by many, twentieth-century prisons survive ‘simply because they have taken on a quasi-independent life of their own, which enables them to survive the overwhelming evidence of their social dysfunction’.⁴ And it is not just the prison that is problematic: the contemporary intuition that ‘nothing works’ extends with only slightly less force to probation, fines, and community corrections.

As explanations of punishment, Foucault’s latent-functions approach and Stone’s dead-weight-of-history suggestion raise more problems than they solve—as I will try to show in the chapters which follow. But the point of mentioning them here is to indicate the growing conviction among social scientists that the methods of modern punishment are neither obvious nor self-evidently rational; that, on the contrary, they stand in serious need of explication. Where once penal institutions appeared to offer a self-evident rationale, in the late twentieth century they increasingly come to seem less obviously appropriate. Their ‘fit’ with the social world and their grounding in the natural order of things begin to appear less and less convincing. It used to be that most criticism of punishment’s failures and irrationalities was aimed at the past or at the soon-to-disappear present. Each critique was also, in its hope for penal reform, a kind of hymn to the future. Nowadays, punishment appears to lack a future—or at least a vision of one which might be different and preferable to that which currently prevails.⁵

Part of the problem is what Stone calls ‘the overwhelming evidence of . . . social dysfunction’—the by now well-known catalogue of punishment’s inefficiencies (the failure of fines, probation, community corrections, and custodial measures alike substantially to reduce crime rates, the tendency of prison to create recidivists, the high social costs of penologically ineffective measures) and all the apparent irrationalities which seem to be the stock-in-trade of criminal justice. But these ‘failures’ can only partly explain why punishment seems increasingly problematic. In normal circumstances an established institution can finesse its failures. It can explain them away in terms which do not call into question the foundations of the organization—such as the need for more resources, minor reforms, better staff, more co-operation from other

⁴ L. Stone, *The Past and the Present Revisited* (London, 1987), p. 10. On the ‘failure’ of punishments, see also S. Cohen, *Visions of Social Control* (Cambridge, 1985), p. 254, and D. Rothman, ‘Prisons: The Failure Model’, *Nation* (21 Dec. 1974), p. 647.

⁵ On the crisis of penal ideology, see A. E. Bottoms and R. H. Preston (eds.), *The Coming Penal Crisis* (Edinburgh, 1980), and F. Allen, *The Decline of the Rehabilitative Ideal* (New Haven, 1981).

agencies, and so on. Most importantly, it can normally point to a future programme in which these problems will be better managed and the institution will reform itself. All social institutions have a margin of failure or ineffectiveness, but in normal circumstances this will be more or less tolerated without calling the institution itself into question. If the institution is meeting normal expectations and if its overall direction and basic legitimacy are unchallenged, then such failures are of no great consequence.

But in the case of modern punishments—whether custodial or non-custodial—a self-confidence in the established principles and an ability to redefine problems in institutional terms are currently lacking. Throughout the 1970s and 1980s the penal institutions of the United Kingdom, the United States of America, and many other Western nations have experienced a crisis of self-definition. In normal circumstances the administrators and employees of any penal system understand and justify their own actions within an established ideological framework—a working ideology. This official ideology is the set of categories, signs, and symbols through which punishment represents itself to itself and to others. Usually this ideology provides a highly developed rhetorical resource which can be used to give names, justifications, and a measure of coherence to the vast jumble of things that are done in the name of penal policy. Not the least of its uses is to supply the means to explain (or explain away) failures and to indicate the strategies which will, it is hoped, prevent their recurrence. For much of the present century, the term 'rehabilitation' was a key element of official ideology and institutional rhetoric. This all-inclusive sign provided a sense of purpose and justification for penal practice and made punishment appear meaningful for its various audiences. Today, however, this unifying and uplifting term is no longer the talismanic reference-point it once was. Following a sustained critique, the notion of rehabilitation has come to seem problematic at best, dangerous and unworkable at worst. In many jurisdictions the term—and the framework which it implies—has been struck from the official vocabulary. Elsewhere it is used cautiously and without confidence, in the absence of any effective substitute. Penal institutions have thus been deprived of the idiom, and indeed the mythology, around which modern punishment had anchored its self-definition.⁶ For nearly two decades now those employed in prisons, probation, and penal administration have been engaged in an unsuccessful search to find a 'new philosophy' or a new 'rationale' for punishment. They have been forced to rethink what it is they do, and to reopen foundational questions about the justifications and purposes of penal sanctions, without so far having found a suitable set of terms upon which to rebuild an institutional identity.⁷

⁶ It is worth adding that the normalizing apparatus of enquiry, individualization, and classification which was developed in the treatment era has not been dismantled along with the abandonment of the ideal. On this, see Cohen, *Visions of Social Control*.

⁷ Numerous proposals for a new penal policy framework have emerged during the last two

If this were merely a matter of official rhetoric, or of the precise form which penal objectives should take, then we might expect a solution to be more readily available. Penal policy is, after all, a rich and flexible tradition which has always contained within itself a number of competing themes and elements, principles and counter-principles. Thus, over the last century and a half, its key terms have been developing and fluid rather than fixed, producing a series of descriptions—'moral reform', 'training', 'treatment', 'correction', 'rehabilitation', 'deterrence', 'incapacitation'—for what it is that penal sanctions do. But what seems to have come into question now, after the acknowledged failure of the most developed form of correctionalism, and in a period when Enlightenment social engineering has become deeply unfashionable, is a basic principle of modern punishment—namely the presumption that crime and deviance are social problems for which there can be a technical institutional solution. Indeed it is highly significant that the slogan which most marked this crisis of penal confidence was the phrase 'Nothing Works'—a statement which clearly conveys the instrumental means-to-an-end conception of punishment which marks the modern era.⁸ Ever since the development of prisons in the early nineteenth century, and particularly since the emergence of a penological profession later in that century, there has been an implicit claim—and eventually a public expectation—that the task of punishing and controlling deviants could be handled in a positive way by a technical apparatus. It seems to me that this basic claim has now been put in question.

The question that arises today is not one of institutional adjustment and reform. It is a more basic question which asks whether the social processes and ramifications of punishment can be contained within specialist institutions of any kind. This is, in a sense, a crisis of penological modernism. It is a scepticism about a penal project that is as old as the Enlightenment with its vision of punishment as one more means of engineering the good society, of organizing institutions so as to perfect mankind. After more than two centuries

decades, the most important of them being the 'justice model' of sentencing, the 'humane containment' conception of imprisonment, and a conception of probation and community supervision as 'help' and 'support' rather than treatment. See N. Morris, *The Future of Imprisonment* (Chicago, 1974); A. von Hirsch, *Doing Justice* (New York, 1976); R. King and R. Morgan, *The Future of the Prison System* (Aldershot, 1980); and A. E. Bottoms and W. McWilliams, 'A Non-Treatment Paradigm for Probation Practice', *British Journal of Social Work*, 9 (1979), 159–202. Other proposals include 'selective incapacitation', a modified version of rehabilitation, and a 'minimalist' or even 'abolitionist' approach to criminal justice. See P. Greenwood, *Selective Incapacitation* (Santa Monica, 1982); F. T. Cullen and K. E. Gilbert, *Re-affirming Rehabilitation* (Cincinnati, 1982); N. Christie, *Limits to Pain* (Oxford, 1982), and H. Bianchi and R. van Swaaningen (eds.), *Abolitionism: Towards a Non-Repressive Approach to Crime* (Amsterdam, 1986).

⁸ The slogan refers to the celebrated article by Martinson which surveyed the treatment research literature and reached a largely negative conclusion about the general efficacy of treatment programmes in penal settings. See R. Martinson, 'What Works?—Questions and Answers about Prison Reform', *The Public Interest*, 35 (1974). For a similarly negative evaluation of the British evidence, see S. R. Brody, 'The Effectiveness of Sentencing', *Home Office Research Unit Study*, 35 (London, 1976).

of rational optimism, even our 'experts' have begun to recognize the limits of social engineering and the dark side of social order. Our engineered world is facing its imperfections and is less optimistic, less confident. In the penal debates of the 1980s, we hear again, for the first time in almost two centuries, the re-emergence of basic moral and organizational questions. Lacking a new vocabulary, and dissatisfied with the modern institution's own terms, much of this discussion has looked back to the period immediately before the modern penal era. Contemporary proponents of 'the justice model' or of 'general deterrence' have revived the liberal discourse of eighteenth-century jurisprudence, raising basic questions about the right to punish, the limits on state power, the responsibility and dignity of the offender, the nature of criminality, the depiction of human nature, and so on. There have also been important attempts to reintroduce questions which had previously been silenced by institutional operations, such as the role of the victim, or the responsibilities of the community in causing and preventing criminality. Notably too, there has been a re-emergence of moral arguments that claim that punitive (as opposed to correctional) measures can be a proper and defensible form of reaction to crime, a form of thinking which has been markedly absent from most twentieth-century penal discourse.

These newly revived forms of thinking about punishment are significant, not because they represent solutions to the current malaise, but because they indicate the extent of it. In returning to the consideration of basic moral and political questions, these discussions indicate the fading of our penal institutions' ability to naturalize their practices and depict the world in their terms. Questions about the meaning of punishment do not, these days, get immediately translated into the established terms of an institutional ideology. They are instead perceived as troublesome and unsettled. And of course in these circumstances, such questions begin to emerge with more and more frequency.

It is not, then, only social scientists who are nowadays led to doubt the grounding and rationale of modern modes of punishment. The very staff of the criminal justice institutions are themselves increasingly perplexed as to what they are about. Consequently, it is not an idle or an 'academic' question that is being pursued when we seek to understand the foundations, forms, and effects of penal measures as they exist today. It is, on the contrary, a pressing practical issue.

Like all books, then, this one is a product of its times and circumstances. The past two decades have been years in which we seem to have come up against the limits of a certain way of thinking and acting in the field of punishment. Like many others, I have been led to reflect upon the roots of penal policy, and its social ramifications, instead of getting on with the job of improving and refining it. Indeed, at a time when penology was marked by sadly diminishing returns, this reflection upon fundamentals has been the abiding fascination of an otherwise narrow and unsettling field of study. The last 10 years or so have seen a sudden take-off in the number of studies in the history and sociology of

punishment, no doubt because these forms of research are strongly drawn towards areas which appear currently to be problematic or undergoing transition. Indeed this new work on the foundations of punishment is in marked contrast to what went on before. In the mid-1950s, at the height of the correctional era in the USA, Donald Cressey asked why the sociology of punishment was such a neglected area of study—particularly, he might have added, given the landmark contributions of earlier writers such as Montesquieu, De Tocqueville and Durkheim.⁹ Thirty years later and with the benefit of hindsight we can answer that in these years a technical penology, working within the institutions, was able to dominate the field and to limit the range of questions which appeared appropriate or worth while. It was a period of 'normal science', operating in circumstances where the axioms and problems had been authoritatively stated, and all that remained was to work out the details and fine-tune the institutional machinery. Now, however, when penologists have lost faith in the institutional project and have become critical and self-reflective, they are beginning once again to reassess the axioms upon which punishment is based. In this task, social theory and history prove more useful than penology, and increasingly these are the forms of enquiry which are being brought to bear.

Faced with the kinds of problems which I have described, one response would be to turn once again to the issue of justification and re-examine the normative arguments supplied by the philosophy of punishment. This, indeed, has been the course adopted by many writers in this field who feel that a careful reading of moral philosophy—usually of a liberal variety—can somehow supply the guidelines for a new and more acceptable programme of penal policy.¹⁰ But in my view, there are reasons why such a project is both premature and misdirected. It seems to me that at present we lack a detailed appreciation of the nature of punishment, of its character as a social institution, and of its role in social life. The philosophies of punishment, at least in their traditional form, are based upon a rather idealized and one-dimensional image of punishment: an image which poses the problem of punishment as a variant of the classic liberal conundrum of how the state should relate to the individual.¹¹ But if, as I suspect, this image is an impoverished one, and fails to capture the full dimensions and complexities of punishment, then the solutions offered by philosophy are unlikely to match up to the problems of the institution. What is needed now is really a preliminary to philosophy—a descriptive prolegomenon which sets out the social foundations of punishment, its characteristic modern forms, and its social significance. Only on this basis

⁹ D. R. Cressey, 'Hypotheses in the Sociology of Punishment', *Sociology and Social Research*, 39 (1955), 394–400.

¹⁰ See e.g. von Hirsch, *Doing Justice* (New York, 1976) and P. Bean, *Punishment* (Oxford, 1981).

¹¹ On the connections between the philosophy of punishment and the political philosophy of liberalism, see N. Lacey, *State Punishment* (London, 1988). On the deficiencies of the current philosophical approaches to punishment, see D. Garland, 'Philosophical Argument and Ideological Effect', *Contemporary Crises*, 7 (1983), 79–85.

can philosophies be developed which adequately address the normative problems of this complex institution. Quite simply, we need to know what punishment is in order to think what it can and should be.

2. THE SOCIOLOGY OF PUNISHMENT

The present study is thus conceived as a work in the sociology of punishment or, more precisely, in the sociology of criminal law, criminal justice, and penal sanctioning.¹² Moving from the premiss that penal phenomena in modern society are problematic and badly understood, it seeks to explore the penal realm in all its different aspects, reopening basic questions about punishment's social foundations, seeking to chart its functions and its effects. Its ultimate aim is to uncover the structures of social action and the webs of cultural meaning within which modern punishment actually operates, thereby providing a proper descriptive basis for normative judgments about penal policy.

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punição* } I take the sociology of punishment, broadly conceived, to be that body of thought which explores the relations between punishment and society, its purpose being to understand punishment as a social phenomenon and thus trace its role in social life. Being concerned with punishment and penal institutions, it shares its central subject-matter with 'penology', but is distinguishable from the latter by virtue of its wider parameters of study. Whereas penology situates itself within penal institutions and seeks to attain a knowledge of their internal 'penological' functioning (throughout the nineteenth century 'penology' was a synonym for 'penitentiary science'), the sociology of punishment views the institutions from the outside, as it were, and seeks to understand their role as one distinctive set of social processes situated within a wider social network.

Writings which take this latter, sociological, form have existed since at least the mid-eighteenth century—emerging then, as now, at a time when the established institutions of punishment were coming under critical attack. In *The Spirit of the Laws*, Montesquieu pointed to the connections of structure and of belief which tied forms of punishing to forms of governing in a distinctive and revealing way: 'It would be an easy matter', he wrote, 'to prove that in all, or almost all, of the governments of Europe, punishments have increased or diminished in proportion as these governments favoured or discouraged liberty.'¹³ From there he went on to sketch in outline the political and

¹² Unfortunately we currently lack any widely used generic term which usefully describes the whole process of criminalizing and penalizing with which I intend to deal. In previous works I have adopted the term 'penality' to refer to the complex of laws, processes, discourses, and institutions which are involved in this sphere, and I will use it throughout the present study as a synonym for legal punishment in this broad sense. In some contemporary literature, the term 'social control' has come to be used in a similar way, see Cohen, *Visions of Social Control*, p. 3. I have, however, avoided this usage because 'social control' usually refers to a much wider range of practices, and also because, as we will see, I wish to argue that 'punishment' should not be thought of purely in terms of 'control'.

¹³ Baron de Montesquieu, *The Spirit of the Laws* (Edinburgh, 1762), p. 88.

psychological dynamics which produce these connections, thus giving a sociological as well as a normative quality to his conclusion that 'the severity of punishment is fitter for despotic governments, whose principle is terror, than for a monarchy or republic, whose spring is honour and virtue'.¹⁴ Almost a century later, Alexis de Tocqueville continued in this vein, though his study of the American penitentiary system suggested a more complex and ironic link between political liberalism and penal discipline. Pointing to an irony which would be rediscovered by subsequent writers such as Rothman and Foucault, he wrote in the 1830s that 'while society in the United States gives the example of the most extended liberty, the prisons of the same country offer the spectacle of the most complete despotism'.¹⁵ In his subsequent study of *Democracy in America*, de Tocqueville would build upon this social insight afforded by punishment to show the subtle dialectic of freedom and restraint which operated within American society as a whole. These connecting insights, showing how punishment forms part of a wider culture, shaping and being shaped by it, have been the continuing hallmark of work of this kind. Indeed the issues posed by Montesquieu and de Tocqueville continue to be discussed and researched today.¹⁶

Despite these suggestive early works, however, the sociology of punishment has not become a well-developed area of social thought. With the partial exception of institutional studies of imprisonment, where a strong sociological research tradition has been founded,¹⁷ the corpus of works is disparate and uneven in quality, and lacks any settled research agenda which can command widespread assent and promote a sense of collective endeavour. Instead what one finds is a series of disjointed and unconnected studies, emanating from a diverse range of projects and intellectual traditions, and adopting quite different angles of approach to the study of punishment. Within this series of studies there are works of the highest intellectual calibre—like those of Émile Durkheim, Michel Foucault, or George Herbert Mead—and also other important studies by authors such as Rusche and Kirchheimer, Michael Ignatieff and Douglas Hay, all of which have provoked follow-up studies, criticism, and a fairly large secondary literature. But despite the fact that these studies all take punishment as their object and offer sociological explanations and characterizations of penal phenomena, they do not by any means form a coherent body of research. On the contrary, the sociology of punishment is presently constituted by a diverse variety of 'perspectives', each of which tends

¹⁴ Ibid.

¹⁵ G. de Beaumont and A. de Tocqueville, *On the Penitentiary System in the United States* (Philadelphia, 1833), p. 47.

¹⁶ See e.g. T. L. Dunn, *Democracy and Punishment: Disciplinary Origins of the United States* (Madison, 1987).

¹⁷ See D. Clemmer, *The Prison Community* (New York, 1940); R. Cloward et al., *Theoretical Studies in Social Organisation of the Prison* (New York, 1960); G. Sykes, *The Society of Captives* (Princeton, 1958); T. Morris and P. Morris, *Pentonville* (London, 1963); J. B. Jacobs, *Stateville: The Penitentiary in Mass Society* (Chicago, 1977); E. Goffman, *Asylums* (Garden City, NY, 1961).

to develop its researches in virtual disregard of other ways of proceeding. In effect, the sociology of punishment is reinvented with each subsequent study, so that on each occasion we are presented with a new conception of the phenomena to be studied and the proper questions to be posed.

To some extent this clash of perspectives and absence of a settled paradigm is an endemic characteristic of all sociology, and has to do with the incorrigibly 'interpreted' nature of its object. But there are also a number of reasons why this situation seems particularly aggravated in the sociology of punishment. In the first place, punishment—unlike other areas of social life such as religion, industry, or the family—has not been the site of intensive sociological enquiry, and has not been subjected to the rationalizing processes of discipline formation that modern scholarship normally entails. There are as yet no established textbooks or course descriptions which pattern the conduct of study in this field, or situate particular studies within an overarching discipline. Related to this is the fact that many of the leading studies in this area have been undertaken as aspects of a larger and different intellectual project, rather than as contributions to the sociology of punishment itself. For both Durkheim and Foucault, for example, punishment serves as a key with which to unlock a larger cultural text such as the nature of social solidarity or the disciplinary character of Western reason. Their concern has not been to help develop a comprehensive understanding of punishment—and although they do in fact contribute to such an understanding, this has been a by-product of their work rather than its central purpose. Few of the major authors in this field have conceived of themselves as partaking in a joint project or sharing a basic set of concerns and so there is little attempt to promote integration or synthesis. There has also been a tendency for different perspectives to be viewed—or to view themselves—as being in complete conflict with one another. This sense of incompatibility most often emerges where specific analyses of punishment are derived from global social theories—such as Marxism, or Durkheimian functionalism—which are, quite properly, viewed as being competing meta-conceptions of society and its dynamics. Moreover, in the clash between one perspective and another, analytical differences often take on an ideological inflection as well—making communication between perspectives that much less likely.

To some extent these different approaches do indeed represent serious and unbridgeable disagreements about the character of the social world and the place of punishment within it. No amount of scholarly co-operation will efface the fact that sociology's objects are essentially contested and open to competing interpretations. But as things stand in the sociology of punishment, it is not at all clear where the key disagreements lie, or indeed to what extent different perspectives are in fact complementary rather than being in competition, at least at some levels of analysis. Two points are worth making in this respect—one about the nature of theory, and the other about levels of analysis.

It is, at present, possible to point to at least four distinctive theoretical

perspectives within the sociology of punishment, three of them already established, and a fourth which is in the process of emerging. The Durkheimian tradition stresses punishment's moral and social-psychological roots as well as its putative solidarity-producing effects. Marxist studies highlight punishment's role in what it takes to be class-based processes of social and economic regulation. Michel Foucault's work has argued that disciplinary punishments operate as power-knowledge mechanisms within wider strategies of domination and subjectification, while the work of Norbert Elias has prompted writers such as Spierenburg to situate punishment within an analysis of changing sensibilities and cultural mentalities. None of these interpretative perspectives is absurd or without merit. They each make serious claims for our attention because they each have something important to say about their object of study. Moreover, as even this brief characterization suggests, they are each concerned to bring into view different aspects of what turns out to be a rather complex set of penal phenomena. Each of them has a capacity to make visible particular aspects of a possibly complicated and many-sided reality and connect these aspects to wider social processes. Each mode of enquiry sets up a particular image of punishment, defining it in a particular way, highlighting some of the aspects, while inevitably obscuring or neglecting others.

If we treat these interpretations as representing a variety of perspectives—each one employing a different angle of approach and a shifting focus of attention—then there is no in-principle reason why they should not be brought together to help us understand a complex object in its various aspects and relations. However it is all too common for questions of interpretation—which are capable of multiple answers—to be understood as questions of ontology or of causal priority, in which case only a singular response will suffice. Once this occurs, and we assume that all theories are attempts to answer the questions 'what is the essential nature of punishment?' or 'what is the cause of punishment?' then we are always forced to choose between one or the other theoretical account. The result is an approach which tends to be needlessly reductionist and one-dimensional in its understanding.¹⁸

My point is simply that if we avoid this philosophical essentialism, then it is not clear that such choices are always necessary. Theories are conceptual means of interpreting and explicating information. They come into competition only when they offer alternative and incompatible explanations for the same data. Since one theory effectively supersedes another only when it explains the same range of data and problems more plausibly, it is by no means clear how the various theories of punishment stand in relation to each other. Indeed, in the sociology of punishment, theories have not been superseded so much as passed over in preference for other lines of questioning.

¹⁸ As William Gass puts it, 'when we try to think philosophically about any human activity, we tend to single out one aspect as the explanatory center, crown it, and make every other element into a courtier, mistress, or servant'. W. Gass, 'Painting as an Art', *New York Review of Books*, 35: 15 (13 Oct. 1988), p. 48.

The point I wish to make about levels of analysis is rather similar. It is certainly the case that grand social theories such as those developed by Marx, Durkheim, or Elias give incompatible accounts of the central dynamics of social life. (Foucault's work is incompatible for the different reason that it denies the validity of theories pitched at this global level.) If it were the case that the analyses of punishment which derive from these various traditions were no more than miniaturizations of the larger global theories then all the incompatibilities would be reproduced at this more detailed level. But this in fact is not the case. Specific analyses which are launched from within a certain set of axioms will tend to ask distinctive questions, and focus upon particular aspects of the phenomenon under study, in accordance with the dictates of the general theory. But the findings produced in this way will not be mere reproductions of the global social theory—unless, of course, we are dealing with deductive dogmatics, in which case the theory is not being 'applied' but merely repeated.

Concrete spheres of social life, such as punishment are never exact microcosms of the social structures depicted by general theory. Outside Leibnizian philosophy—in which every monadic element is an essential expression of the whole—each particular sector of society can be assumed to display its own peculiar mechanisms and dynamics. And so, in any process of theoretical interpretation which is open to empirical information, the concrete character of the phenomenon should help determine the analytical results as much as the set of axioms which launched the enquiry. This being the case, the specific findings of any theory brought to bear upon punishment may or may not be compatible with others produced from within a different interpretative perspective. The question of their relationship is always an empirical one, and is not settled in advance. Thus, for example, Marxist analyses may discover ways in which penal practice reinforces class divisions and ruling-class dominance, and Durkheimian studies may point to other elements of the penal process which appear to express sentiments or reinforce solidarities which are not class based. Unless one assumes that penal practice is all of a piece, with a single, unitary meaning—that it is all a matter of class, or all a matter of cross-class solidarity—there is no reason to reject either analysis out of hand. Instead what is required is a more subtle, in-depth analysis which examines how these two aspects seem to coexist within the complex set of practices which make up the penal realm. In the pages which follow, I will attempt to explore such issues and see to what extent a more comprehensive sociology can be constructed out of the specific interpretations which currently exist.

If, then, we are committed to a comprehensive examination of the structures and meanings of punishment in modern society, there appears to be no ready-to-hand general framework within the sociology of punishment which will allow us to pursue this enquiry. Instead we find a range of interpretative traditions, each one projecting a slightly different image of punishment and its connection with the rest of the social world, and each one bearing an as-yet-

indeterminate relationship to the others. Given this situation, the best strategy appears to be one which is inclusive and open to synthesis, at least in the first instance. My intention is therefore to work through each of the existing theoretical traditions in turn, treating each tradition not as a rigid model or comprehensive account, but as a source of specific perspectives and partial interpretations. My method will be to identify and pursue the distinctive questions that each one poses and to examine what they have to say about the foundations, functions, and effects of punishment, and how this helps us understand punishment today. This will go beyond mere exposition, not least because much of the theory of punishment lies buried within detailed historical narratives, or else exists in a rudimentary form which needs to be worked up and refined. Moreover, I will frequently press arguments and lines of analysis beyond their original scope and sketch out new modes of interpretation wherever the established theories appear inadequate. The aim of this approach is to bring to light as many facets of punishment as possible, and also to bring the different interpretations into conversation with one another, so that their differences can be precisely specified and their complementary aspects can be shown as such. The outcome, it is hoped, will be a balanced synopsis of what the sociology of punishment has to offer, and a suggestion of how these ideas help us to understand the nature of punishment today.

The sociological accounts of punishment that we currently possess have each isolated and abstracted a particular aspect or facet of punishment and have provided powerful analyses based upon this. But although such interpretations can often be brilliantly illuminating and insightful, they are also prone to be partial and somewhat one-sided. One symptom of this is the tendency of historians of punishment, seeking to convey a rounded sense of the institution as it is operated at a particular time and place, to write *against* such theories, showing their monolithic interpretations to be incomplete at best, and completely untenable at worst. But the real point of their complaint is not that historians do not need theory. It is that theories which are too narrow in compass simply act as an obstacle to understanding and need to be replaced by better theories which will be more adequate to their task. A measure of abstraction is a necessary first step in the analysis of any complex phenomenon, and it is not unusual for a field of knowledge in its early stages of development to be characterized by competing abstractions and monocausal forms of explanation. But the ultimate objective of research must be to return to the concrete, to integrate and synthesize different abstractions in a way that simulates the overdetermination of real-world objects and approximates their complex wholeness. It seems to me that the sociology of punishment is now reaching that stage of maturity where it should be striving for integrated, pluralistic interpretations—interpretations which can come closer to accounting for the complexity and variegated detail which both historians and contemporary penologists repeatedly encounter.¹⁹

¹⁹ Such an endeavour will not settle, once and for all, interpretative disputes, but it ought to

The present project then, is an attempt to extend and synthesize the range of interpretative material that currently forms the sociology of punishment, and to build up a more complete picture of how punishment might be understood in modern society. The writings of Foucault, Marx, Durkheim, or Elias excel in the tenacious, dogged pursuit of an explanatory theme—making a wilful attempt to drive a mode of thinking as far as it will go. As a means of discovery, or a way of producing new interpretative insight, this method can hardly be bettered, though, as we have seen, a kind of peripheral, contextual blindness is sometimes the price of this intensely focused vision. In the present study, however, different methods and values come to the fore. Its concern is to be balanced and perspicacious, synthesizing and comprehensive, and in so doing it will necessarily qualify the claims of these theorists, and suggest the limitations of their accounts. But it should perhaps be stressed that this book is not about the limitations of other theorists. It is about the constructive enterprise that their single-minded theorizing has made possible.

3. PUNISHMENT AS AN OBJECT OF STUDY

Having discussed the various interpretative stances adopted towards punishment, it is perhaps time to say something about punishment itself. The first point to note here is that 'punishment', despite this singular generic noun, is not a singular kind of entity. Indeed it seems likely that some of the variation of interpretative results which one finds in the sociology of punishment has to do with the nature of the thing analysed, rather than with the analytical process brought to bear upon it. We need to remind ourselves, again and again, that the phenomenon which we refer to, too simply, as 'punishment', is in fact a complex set of interlinked processes and institutions, rather than a uniform object or event. On close inspection, it becomes apparent that the different interpretative perspectives have tended to focus in upon quite different aspects or stages of this multifaceted process. Thus when Pashukanis discusses the ideological forms of the criminal law, Durkheim focuses upon condemnatory rituals, Foucault shifts attention to institutional routines, and Spierenburg points to the sensibilities involved, each of them is, in effect, moving back and forth between different phases of the penal process, rather than producing different interpretations of the same thing. Unfortunately though, such differences of focus have often been disguised by a lack of analytical specificity and by the failure of individual theorists to place their own work in the context of other interpretations. Given the synthesizing concerns of this study, it is important that it begins by discussing this question in some detail, and that in subsequent

focus them more precisely and make them more productive. As Clifford Geertz says of cultural anthropology, it 'is a science whose progress is marked less by a perfection of consensus than by a refinement of debate. What gets better is the precision with which we vex each other.' C. Geertz, 'Thick Description: Toward an Interpretive Theory of Culture', in id. *The Interpretation of Cultures* (New York, 1973), p. 29.

analyses it avoids this tendency to discuss 'punishment' as if it were all of a piece.

An observation made by Friedrich Nietzsche can serve to orient our discussion.

I would say that in a very late culture such as our present-day European culture the notion 'punishment' has not one but a great many meanings. The whole history of punishment and of its adaptation to the most various uses has finally crystallized into a kind of complex which it is difficult to break down and quite impossible to define. ... All terms which semiotically condense a whole process elude definition; only that which has no history can be defined.²⁰

Punishment, then, is not reducible to a single meaning or a single purpose. It is not susceptible to a logical or formulaic definition (as some philosophers of punishment would have it) because it is a social institution embodying and 'condensing' a range of purposes and a stored-up depth of historical meaning. To understand 'punishment' at a particular time, as Nietzsche says, one has to explore its many dynamics and forces and build up a complex picture of the circuits of meaning and action within which it currently functions. This is precisely what the present study aims to do. But if such an investigation is to be undertaken, then clearly some parameters or co-ordinates of study have to be outlined—not as a substitute for empirical enquiry but as a guide to it. It is in this sense, and with this purpose, that I offer the following identification of my object of study.

Punishment is taken here to be the legal process whereby violators of the criminal law are condemned and sanctioned in accordance with specified legal categories and procedures. This process is itself complex and differentiated, being composed of the interlinked processes of law-making, conviction, sentencing, and the administration of penalties. It involves discursive frameworks of authority and condemnation, ritual procedures of imposing punishment, a repertoire of penal sanctions, institutions and agencies for the enforcement of sanctions and a rhetoric of symbols, figures, and images by means of which the penal process is represented to its various audiences. Two things should follow from this fact of internal differentiation. The first is that discussions of 'punishment' can have a whole range of possible referents which are all properly part of this institutional complex. The second is that the penal process is likely to exhibit internal conflicts and ambiguities, stemming from its fragmented character. As noted above, I have tried to capture this sense of internal complexity by proposing the generic term 'penality' to refer to the network of laws, processes, discourses, representations and institutions which make up the penal realm, and I will use this term as a more precise synonym for 'punishment' in its wider sense.

This focus upon the legal punishment of criminal law offenders means that although punishment also takes place outside the legal system—in schools,

convicts
punished

²⁰ F. Nietzsche, *The Genealogy of Morals* (New York, 1956), p. 212.

families, workplaces, military establishments, and so on—these forms of punitive practice will largely be left out of the present study. Punishment in some form or other is probably an intrinsic property of all settled forms of association and there is much to be learned from viewing punishment in these various social settings. Despite being derivative in a certain sense—in that all penal domains in modern society depend upon the delegation of authority from the sovereign legal order—these forms have their own specificity and are not mere imitations of state punishments. They will, however, be considered here only where their discussion can further our understanding of the legal order of punishment and not as a topic in themselves.²¹ Nor will this study concentrate upon the non-legal but often routine forms of punishment which occur in modern criminal justice—for example, the informal rituals of humiliation involved in some police work or the implicit penalties involved in the prosecution process—since my primary concern will be those punishments which are authorized by law.²² This may appear to be a serious exclusion, since the informal actions of police, prosecutors, and state officials clearly play a large role in crime-control and constitute an important aspect of state power. However, my concern here is to understand legal punishment and its social foundations, not to chart the repertoire of deterrents that are in use, nor to trace all of the forms in which state power is exercised through the criminal justice apparatus.

The location of state punishment within a specifically legal order gives punishment certain distinctive characteristics which are not a feature of punishments in other social settings. For example, the sovereign claims of the law give legal punishments an obligatory, imperative, and ultimate nature which are unmet with elsewhere. Similarly, the forms of law, its categories, and principles are important in shaping penal discourses and procedures—as we will see when we discuss the work of Pashukanis in Chapter 5—though it should be stressed that penal institutions such as the prison are sometimes legally authorized to adopt procedures which fall far short of the normal juridical standards, for example, on due process in disciplinary hearings. Location within a legal order, then, is one determinant of punishment's forms and functions, but is by no means the only determinant involved.

Although legal punishment is understood to have a variety of aims, its primary purpose is usually represented as being the instrumental one of reducing or containing rates of criminal behaviour. It is thus possible to conceive of punishment as being simply a means to a given end—to think of it as a legally approved method designed to facilitate the task of crime control. Nor is this an uncommon or particularly inadequate perception of punishment.

²¹ For an attempt to study punishment in a wider compass, looking at its use in areas other than the criminal law, see C. Harding and R. W. Ireland, *Punishment: Rhetoric, Rule and Practice* (London, 1989). Also A. Freiberg, 'Reconceptualizing Sanctions', *Criminology*, 25 (1987), 223–55.

²² See on this M. Feeley, *The Process is the Punishment* (Beverly Hills, 1979), and J. Skolnick, *Justice Without Trial* (New York, 1966).

Crime control is indeed a determinant of penal practice and this ends-means conception is widely adopted both by penologists and by philosophers of punishment. This instrumental, punishment-as-crime-control conception has, however, been unattractive to sociologists of punishment. These sociologists have usually perceived a sense in which punishment's significance or social function runs beyond the narrow realm of crime control, and they consider such an instrumentalist conception to be an unjustified narrowing of the field of study. Indeed, in some instances, certain theorists have gone so far as to deny punishment's crime-control function altogether, arguing that penalty is not well adapted to this particular end, and that therefore some other end must be posited to explain its character. The most celebrated instance of this is Émile Durkheim's declaration that 'if crime is not pathological then the purpose of punishment cannot be to cure it', but similar positions are adopted by writers such as Mead, Rusche and Kirchheimer, and, more recently, Michel Foucault. Each of these writers points to the 'failure' of punishment as a method of crime control and argues that it is badly adapted to this end, before going on to discuss alternative ways of understanding the phenomenon.

In a sense, this kind of approach is liberating for anyone who wishes to think about punishment, since it frees us from the need to think of punishment in 'penological' terms and opens up the question of penalty's other social functions. There are, however, serious problems with such a position, despite its obvious attractions. For one thing, it continues to think of punishment as a means to an end: if not now the end of 'crime control' then some alternative telos, such as social solidarity (Durkheim) or political domination (Foucault). But this 'purposive' or teleological conception of a social institution makes for bad sociology. Not only is it quite possible, as Nietzsche points out, for a single, historically developed institution to condense a whole series of separate ends and purposes within its sphere of operation. It is also the case that institutions are never fully explicable purely in terms of their 'purposes'. Institutions like the prison, or the fine, or the guillotine, are social artefacts, embodying and regenerating wider cultural categories as well as being means to serve particular penological ends. Punishment is not wholly explicable in terms of its purposes, because no social artefact can be explained in this way. Like architecture or diet or clothing or table manners, punishment has an instrumental purpose, but also a cultural style and an historical tradition, and a dependence upon 'institutional, technical and discursive conditions'.²³ If we are to understand such artefacts we have to think of them as social and cultural entities whose meanings can only be unravelled by careful analysis and detailed examination. As in all spheres of life, a specific need may call forth a technical response, but a

²³ The quotation is from P. Q. Hirst, *Law, Socialism and Democracy* (London, 1986), p. 152, where Hirst argues that '... means of punishment are *artefacts of social organization*, the products of definite institutional, technical and discursive conditions in the same way as other artefacts like technologies or built environments. Artefacts can be explained not by their individual "purpose" alone but by the ensemble of conditions under which such constructions or forms become possible.'

whole process of historical and cultural production goes into the shaping of that 'technique'.

The need to control crime in its various forms, and to respond to the depredations of law-breakers is thus only one of the factors which helps shape the institutions of penalty. It is, no doubt, an important one, and it would make little sense, for example, to analyse US penal policy without bearing in mind the levels of crime experienced in the USA, and the social and political consequences which follow from this. But even if one could disentangle 'real' crime rates from the processes of policing, criminalizing, and punishing (through which we generate most of our knowledge of crime—and at least some of its actuality), it is clear enough that criminal conduct does not determine the kind of penal action that a society adopts. For one thing, it is not 'crime' or even criminological knowledge about crime which most affects policy decisions, but rather the ways in which 'the crime problem' is officially perceived and the political positions to which these perceptions give rise. For another, the specific forms of policing, trial, and punishment, the severity of sanctions and the frequency of their use, institutional regimes, and frameworks of condemnation are all fixed by social convention and tradition rather than by the contours of criminality. Thus to the extent that penal systems adapt their practices to the problems of crime control, they do so in ways which are heavily mediated by independent considerations such as cultural conventions, economic resources, institutional dynamics, and political arguments.²⁴

Thinking of punishment as a social artefact serving a variety of purposes and premised upon an ensemble of social forces thus allows us to consider punishment in sociological terms without dismissing its penological purposes and effects. It avoids the absurdity of thinking about punishment as if it had nothing to do with crime, without falling into the trap of thinking of it solely in crime-control terms. We can thus accept that punishment is indeed oriented towards the control of crime—and so partly determined by that orientation—but insist that it has other determinants and other dynamics which have to be considered if punishment is to be fully understood.

Punishment, then, is a delimited legal process, but its existence and operation are dependent upon a wide array of other social forces and conditions. These conditioning circumstances take a variety of forms—some of which have been explicated by historical and sociological work in this field. Thus, for example, modern prisons presuppose definite architectural forms, security devices, disciplinary technologies, and developed regimes which organize time and space—as well as the social means to finance, construct, and administer such

²⁴ For a discussion of research attempts to isolate the impact of crime rates upon penal policies, see W. Young, 'Influences Upon the Use of Imprisonment: A Review of the Literature', *The Howard Journal*, 25 (1986), 125–36. D. Downes, in his comparative study of penal policies in The Netherlands and England and Wales, shows that in a period when both countries experienced rising crime rates, England and Wales resorted to a policy of increased imprisonment while The Netherlands effected a substantial decarceration. D. Downes, *Contrasts in Tolerance* (Oxford, 1988).

complex organizations.²⁵ And as recent work has shown, specific forms of punishment are also dependent for their support upon less obvious social and historical circumstances including political discourses and specific forms of knowledge,²⁶ legal, moral, and cultural categories,²⁷ and specific patterns of psychic organization or sensibility.²⁸ Punishment may be a legal institution, administered by state functionaries, but it is necessarily grounded in wider patterns of knowing, feeling, and acting, and it depends upon these social roots and supports for its continuing legitimacy and operation. It is also grounded in history, for, like all social institutions, modern punishment is a historical outcome which is only imperfectly adapted to its current situation. It is a product of tradition as much as present policy: hence the need for a developmental as well as a functional perspective in the understanding of penal institutions. It is only by viewing punishment against the background of these wider forms of life and their history that we can begin to understand the informal logic which underpins penal practice. In consequence, we should be prepared to find that this 'logic' is the social logic of a complex institution built upon an ensemble of conflicting and co-ordinating forces, rather than the purely instrumental logic of a technical means adapted to a given end.

The outline definition I have just provided, or something very like it, is the unstated point of departure for most sociological analyses of punishment. Different interpretative traditions take up different aspects of the phenomenon, and devote themselves to filling in the substantive content of one or other of the connections and relationships that I have sketched out in formal terms. My own discussion begins with the presumption that these various interpretations are not necessarily incompatible in every respect. Indeed, given the complexity of the social institution of penality, it is likely that what currently appear to be conflicts of interpretation may turn out to be more or less accurate characterizations of an institution which is itself 'conflicted'. By working through these various perspectives, measuring the worth of their arguments, and applying their interpretations to the contemporary scene, I intend to build up a more comprehensive and recognizable picture of the field of penality and its social supports. Wherever the existing interpretative perspectives fail to address aspects of punishment which I take to be important, I will endeavour to generate my own interpretations, drawing upon the work of other social theorists where necessary. Similarly, I will not feel constrained to discuss at length interpretative positions which appear in the literature but which I judge to be inadequate or inaccurate. My primary aim is to understand the

²⁵ See M. Foucault, *Discipline and Punish* (London, 1977); R. Evans, *The Fabrication of Virtue* (Cambridge, 1982); and G. Rusche and O. Kirchheimer, *Punishment and Social Structure* (New York, 1939, 1968).

²⁶ Foucault, *Discipline and Punish*; D. Garland, *Punishment and Welfare* (Aldershot, 1985).

²⁷ J. Langbein, *Torture and the Law of Proof* (Chicago, 1976); J. Bender, *Imagining the Penitentiary* (Chicago, 1987).

²⁸ P. Spierenburg, *The Spectacle of Suffering* (Cambridge, 1984); D. Garland, 'The Punitive Identity: Its Socio-Historical Development and Decline', *Contemporary Crises*, 10 (1986), 305-20.

reality of punishment, not to offer a full account of the literature which has grown up around it.

One final point should be made before embarking upon this enterprise. Much of the sociology of punishment proceeds as if the key questions always concerned the social and historical determinants of punishment, asking 'how are penal measures shaped by their social and historical context?' This, it seems to me, is only half the story. In the present book I will be concerned to emphasize the ways in which penalty shapes its social environment as much as the reverse. Penal sanctions or institutions are not simply dependent variables at the end of some finite line of social causation. Like all social institutions, punishment interacts with its environment, forming part of the mutually constructing configuration of elements which make up the social world. All the classic sociological writings—from Durkheim to Foucault—are clear about this, and this dialectic will be emphasized throughout the present work. This, indeed, is one of the reasons why the sociological study of punishment is so potentially valuable. It tells us how we react to disorderly persons and threats to the social order—but also, and more importantly, it can reveal some of the ways in which personal and social order come to be constructed in the first place.