

## CHAPTER ONE

# Introduction: The Punishment Response

Punishment is the universal response to crime and deviance in all societies. As such, it takes various forms. Criminal sanctions like imprisonment and death sentences are allocated and dispensed by state authorities. Other formal punishments involve civil lawsuits and administrative decrees to either reconcile or restore relations among the parties, compensate for personal injuries, and/or prevent further wrongful conduct through restrictions of ongoing practices. Punishment may also involve various types of informal sanctions by family, peers, and extralegal groups like vigilante committees and paramilitary organizations to promote their own interests.

Different types of punishments are used for different purposes. Criminal sanctions serve to reinforce cherished values and beliefs, incapacitate and deter those who may be considering criminal misconduct, and often function to maintain power relations in a society and to eliminate threats to the prevailing social order. The regulation and maintenance of social order is also an important function of civil and administrative sanctions. Both formal and informal punishments may further serve to dramatize the evil of particular conduct in a society, enhance communal solidarity against external threats, and provide the means for social engineering efforts directed at improving the quality of life.

Even a cursory look at punishments, however, reveals that they vary widely over time and place. Formal sanctions by the state or other “official” bodies were largely unknown in earlier agrarian societies, whereas social order in modern industrial societies is possible in many cases only by an elaborate system of formal sanctions. Variation also occurs in the use of particular sanctions within countries over time. A comparative historical approach

offers a valuable way to more fully understand this variation in punishment over time and place.

An investigation of punishments from a comparative historical perspective becomes even more important within the current context of global economies, world systems, and multinational penetration. Within this increasingly smaller and interconnected world system, a comparative historical approach challenges our ethnocentric beliefs of “good” and “bad” practices based on our particular cultural and national experiences. The potential discovery of punishment responses and principles that transcend boundaries of time and space provides an empirical basis for improving our understanding of criminal sanctions and punishments in Western and non-Western societies alike.

The purpose of this book is to explore punishments from a comparative historical perspective. We describe the purposes and types of punishments over time and place. By exploring the use of lethal and nonlethal punishments across different historical periods in particular countries, we illustrate the similarities and differences in punishment responses across contexts. We anticipate doing so will demonstrate the value of a comparative historical perspective for studying crime, deviance, and punishment.

### **PUNISHMENT AND TYPES OF SANCTIONS**

All societies and social groups develop ways to control behavior that violates norms. Socialization is a basic type of social control that seeks conformity through learning processes and the subsequent internalization of group norms as personal preferences. Social control is also achieved directly through external sources that compel individuals to conform through the threat of societal reaction. Regardless of whether conformity results from personal desires or external compulsion, conformity is ultimately achieved through the use and threat of sanctions.

As an instrument of social control, sanctions vary in their nature and source. Positive sanctions are rewards meant to encourage conformity to norms, whereas negative sanctions are punishments to discourage norm violations.<sup>1</sup> Based on their source, sanctions are considered “formal” when they are imposed by the state or by other organizations that have the legitimate authority to do so (e.g., churches, educational institutions, business

**TABLE 1.1: Types of Sanctions (examples)**

	<b>Positive (rewards)</b>	<b>Negative (punishments)</b>
Formal	Promotions Bonuses Awards/medals Honorary titles	Fines/forfeitures Probation/revocations Incarceration Torture/death penalty
Informal	Kiss/hugs Praise Respect Trust	Gossip Ridicule Ostracism "Street justice"

Source: Adapted from Clinard and Meier (1985)

organizations). In contrast, informal sanctions are unofficial actions by groups and individuals. These include sanctions imposed by family, friends, and quasi-legal bodies such as vigilante groups, paramilitary forces, and local "regulators."

Sanctions also vary according to their magnitude and form (see Table 1.1). As punishments designed to inflict pain, negative sanctions can vary in intensity from minor inconveniences (e.g., small fines) to death (i.e., capital punishment). The form of these sanctions may also differ, involving economic costs, physical restraints, and/or corporal punishment. For example, parents may choose to discipline their children through the denial of their allowance (an economic sanction), "grounding" them to their home (an incapacitative sanction), or by spanking them (corporal punishment). Governments may assign criminal penalties that also include monetary fines, imprisonment, and death sentences.

Positive sanctions also vary in their magnitude. The continuum for positive sanctions may range from a pat on the back and word of praise, to large monetary raises and promotions for high work performance, to the awarding of multimillion-dollar mergers and acquisitions. It is more difficult to view forms of incapacitation and corporal punishment as positive sanctions, unless one considers criminal penalties like suspended jail sentences, the earning of "good time" credits while in prison, pardons of death sentences, and/or the reduction in the number of lashes with a whip as a "reward."

Although both positive and negative sanctions are important for understanding social control in societies, our focus on punishments necessitates

an emphasis on negative sanctions. Within the area of negative sanctions, we also focus primarily on state-sponsored sanctions (e.g., criminal penalties, civil litigation judgments) and the actions of various quasi-governmental groups that impose extralegal sanctions. By focusing on these punishment responses in different times and places, we hope to learn about convergent and divergent aspects of societal reaction to deviance in various comparative historical contexts.

### THE FUNCTIONS OF PUNISHMENT

The functions of criminal and civil punishments in any society depend largely on the prevailing social, economic, and political conditions in that society. In small, undifferentiated societies characterized by value consensus, sanctions are used to preserve social order by maintaining the status quo and regulating and controlling social relations. In contrast, criminal and civil sanctions in more diversified societies are often viewed as both sources of order maintenance and instruments for the protection of special interests.

Across different times and places, criminal sanctions have been designed to serve multiple purposes. These purposes include the reinforcement of collective values, the protection of the community through the physical incapacitation of convicted offenders, the rehabilitation of the offender, the deterrence of individuals from repeat offending (known as specific deterrence), and serving as an example to deter others from committing crime (known as general deterrence). Some criminal and civil sanctions (e.g., monetary fines, victim compensation) are designed for restorative purposes. In addition, sanctions administered in public places often provide important symbolic functions by either dramatizing the evil of particular conduct or illustrating the fairness of legal proceedings.

According to the conflict perspective on law and society, the primary function of legal sanctions is to preserve and protect the interests of those in power. This is done in various ways through the development and application of civil and criminal laws. For example, it has long been argued that the criminal law is designed to criminalize the greedy actions of the powerless and to legitimize the same activities by the powerful.<sup>2</sup> Machiavelli's comment in

Criminal punishments are used to reinforce collective values, physically incapacitate and rehabilitate offenders, deter misconduct, provide restoration or compensation, and eliminate threats to the prevailing social order.

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the seventeenth century that “who steals a handkerchief goes to jail; who steals a country becomes a duke” conveys the same idea.<sup>3</sup> More generally, social control is a major purpose of the law for conflict theorists, both as a mechanism of gaining control over goods or services and as a means of controlling dissent.

The use of legal sanctions to maintain one’s cumulative advantage is reflected in a wide range of civil, administrative, regulatory, and criminal laws. For example, the American Medical Association (AMA) in the United States has long been opposed to alternative medical providers (e.g., chiropractors, herbalists) to maintain their financial interests from the monopolistic control of medical treatment and practice. Primary opponents of legalizing marijuana are often groups like the tobacco and distillers industries that desire to preserve their control over the legal drug market. Oil companies are usually the major opposition to mass transit for similar economic reasons. The widespread use of licensing, external auditors and inspectors, building codes and ordinances, and other regulatory activities serves a manifest function of providing some protection to the public, but these same activities are often proposed and developed to preserve a particular group’s cumulative advantage.

The primary ways in which legal sanctions serve to control dissent are through various selection processes, civil actions, and the application of criminal sanctions. Access to political power in most countries is limited by money and contacts, and individuals or groups who pose a threat to the prevailing regime may be controlled through adverse publicity, denial of material benefits (e.g., student dissent is controlled by cutting back of student aid programs), civil commitments to mental institutions and rehabilitation centers, and imprisonment for criminal offenses. Federal agencies like the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), and the Internal Revenue Service (IRS) provide a largely covert but equally effective method of controlling dissent in the United States. The use of secret police organizations and death squads are coercive social control responses to dissent in other countries.

Criminal and civil sanctions also function as a tool for social engineering, or “purposive, planned, and directed social change initiated, guided, and supported by the law.”<sup>4</sup> However, the ultimate goal of social engineering varies across theoretical perspectives. Achieving maximum harmony for the

greatest good and social integration are the goals of social engineering within a functionalist perspective that emphasizes stability, collective solidarity, and interdependency among the units and institutions within social systems. Social integration is important in conflict theories of social order only when efforts at social engineering result in maintaining one's position. To conflict theorists, the control of dissent and those who pose a serious threat to prevailing interest groups is the role of the social engineering function of both criminal and civil sanctions.

#### THE NATURE OF PUNISHMENT AND SOCIETAL COMPLEXITY

It is a widely held belief among sociolegal scholars that criminal and civil sanctions are developed and shaped by the prevailing social conditions in a society. This link between punishments and the structure of society is reflected in Emile Durkheim's views about punishment and types of solidarity in societies; Philippe Nonet and Philip Selnick's analysis of transitional legal systems and the movement from repressive to responsive law; Donald Black's work on the behavior of law; Michel Foucault's treatise on changes over time in the state's power to control the body, mind, and "souls" of its subjects; and Norbert Elias's argument about the growth of "civilized sensibilities" in modern society that shape how punishment is dispensed.<sup>5</sup> Although these authors vary in their focus on particular elements, there is a general agreement that the nature of punishment changes through the historical transition from primitive or early tribal law to the development of modern legal systems.

Early tribal law or what is also called "primitive" legal systems is linked to small, homogeneous, and undifferentiated societies. Social order is maintained through informal sanctions that are connected to shared customs, norms, and traditions. Laws reflect and protect these most cherished values and beliefs. Although punishment is often viewed as a simple, automatic response to deviance, Durkheim contends that punishments under certain conditions also serve as social rituals to bring together community members and provide a forum for reaffirming and intensifying their commitment to these shared values and a common identity.<sup>6</sup> Repressive justice is often administered in these homogeneous societies characterized by what Durkheim calls mechanical solidarity, with diffuse forms of ritual punishments being used to reaffirm collective values and denounce "evil."<sup>7</sup>

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The demise of early tribal societies is often associated with the social forces of increased population, increased heterogeneity, urbanization, industrialization, and modernization. During the transitional stage of societal evolution, new forms of social organization develop to regulate and coordinate activities and to maintain order. This transitional period is often associated with the development of the state as the primary institution in society, the enforcement of laws according to geography or jurisdiction rather than kinship, and the definition of crime or deviance as a public rather than private harm (e.g., the state is the “victim” of crime in modern societies). Both law and social order are precarious in this temporary, transitional stage of societal development.

The basic problem of integration in highly diverse societies is often considered the major catalyst for the emergence of a formally codified legal system. Modern societies are typically so complex and diverse that it is problematic to assume that informal sanctions (like interpersonal agreements, social customs, or moral precepts) alone are capable of regulating and maintaining social order. Instead, societal integration in this context necessitates a legal system that is comprehensive, responsive to changing political and economic conditions, and is generally accepted as the legitimate authority. Whether formal codified legal systems are successful in achieving their multiple functions is the key question that underlies much of the current theory and research in the sociological study of law.

It is widely assumed that the transition from simple to complex legal systems is also reflective of changes in the nature of social control and types of sanctions. Greater reliance on formal mechanisms of social control (like criminal sanctions, civil commitments, administrative and regulatory laws) is assumed to occur in modern societies because informal controls (like customs, traditions, ridicule, gossip, praise, or verbal criticism) are considered insufficient to maintain conformity in industrialized societies. Changes in sanctions often associated with increasing societal complexity involve the shift from repressive sanctions (e.g., punishments that serve to denounce, stigmatize, and degrade the offender) to restitutive sanctions (e.g., punishments that serve to restore or compensate for the disruptive relationship rather than stigmatizing the offender *per se*). John Braithwaite defines these types of restitutive sanctions as efforts at “reintegrative shaming.”<sup>8</sup>

An examination of punishment from a comparative historical perspective provides an opportunity to directly assess the accuracy of these ideas about the social structure of societies and punishment. For example, have punishments become more restitutive and less punitive over time? Have formal sanctions replaced informal sanctions as the primary glue that maintains social order in modern societies? Do these patterns differ across specific countries in the modern world? Answers to these fundamental sociological questions about punishment and society require a comparative historical approach.

#### EFFECTIVENESS OF CRIMINAL AND CIVIL SANCTIONS

The effectiveness of state-sponsored sanctions in maintaining social integration and fostering constructive social change has been widely addressed in a number of different areas. Civil litigation in the United States and most Western democracies has skyrocketed over the last two decades, characterized as an “explosion” by some legal scholars.<sup>9</sup> An increasing number of citizens have turned to civil litigation to resolve interpersonal disputes (e.g., divorce, child custody, landlord–tenant disputes, prohibited employment practices). Most states and all federal agencies in the United States now provide civil remedies and other legal protections against retaliatory punishment of employees who file reports to external agencies about fraud, waste, and abuse in their workplace.<sup>10</sup> Criminal sanctions such as monetary fines, suspended jail sentences and probation, and imprisonment are widely imposed on convicted criminals across countries.

In general, civil and criminal sanctions are considered an effective instrument of social integration and change when they accomplish two goals.<sup>11</sup> First, sanctions should be based on clearly articulated standards of expected behavior that include established norms and provisions for the violation. Second, these patterns of expected behavior must be internalized by citizens and followed as personal preferences (i.e., things that people want to do) rather than just because they are legally required. Of course, it is possible to have effective sanctions without either of these conditions (e.g., by using the coercive power of the state to control criminal dissent or regulate contractual arrangements). However, exclusively coercive methods of social control are often thought to have only a limited lifespan. The rapid rise and fall of prevailing political regimes that rely exclusively on force to maintain



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conformity are a general testament to the long-term ineffectiveness of this method of social control.

The effectiveness of criminal sanctions is often judged within the context of deterrence. Numerous studies have examined whether specific criminal sanctions deter convicted offenders from repeating criminal behavior or serve to deter others from committing criminal acts. Although the specific and general deterrent value of specific punishments is subject to much debate, criminal sanctions are usually considered to be most effective for instrumental crimes (i.e., planned crimes done for some future goals) by persons with low commitment to crime as a way of life.<sup>12</sup>

The study of the death penalty and other criminal sanctions affords the opportunity to examine several aspects about the effectiveness of law as an instrument of social change. First, we will explore how the death penalty has been used throughout history as a method for controlling dissent and threats to prevailing interests (e.g., the increased use in capital punishment in China in the past decade as a response to rising economic crimes). Second, as a general deterrent, capital punishment and extrajudicial executions in particular countries at particular times (e.g., post-Mao China; lynchings during the postbellum South) should be especially effective because the means in which death sentences were administered in these contexts (i.e., swift, certain, severe punishments in a public setting) should maximize their deterrent value. Through the historical and comparative analysis of lethal and nonlethal punishments, the current investigation will also provide evidence of the effectiveness of criminal sanctions in various historical and cultural contexts.

### DISPARITIES IN CRIMINAL AND CIVIL SANCTIONS

An extensive literature exists on the issue of disparities or differential treatment in the access and application of criminal and civil law. This literature includes studies of differential access to civil remedies by disadvantaged groups (e.g., the poor, ethnic and racial minorities); the differential success of individual plaintiffs and corporations in civil disputes; and the nature and magnitude of gender, race, and class disparities in the imposition of criminal sanctions.<sup>13</sup>

Within the area of the criminal justice system, the question of differential treatment focuses on whether group differences exist in charging and

sentencing decisions after adjustments are made for a wide variety of legal factors (e.g., seriousness of the charge, defendant's prior record) that should influence these decisions. Both gender and race differences are often found in research on court practices in the United States, with males and African Americans the groups most disadvantaged by differential treatment. These social differences are found in studies that focus on the death penalty as well as research on other types of criminal sanctions.<sup>14</sup>

Donald Black's theory of the behavior of law offers an interesting basis for examining differential treatment in the imposition of criminal sanctions. According to Black, the quantity of law (e.g., the frequency of its application) and its style (e.g., penal, compensatory, therapeutic, or conciliatory) vary by particular aspects of social life.<sup>15</sup> For example, law has a penal style when it is directed toward people of low rank stratification, but it is compensatory when applied upward (e.g., a higher ranking person kills a person from a lower social position). Among people of equal rank, law has a conciliatory style. The comparative analysis of criminal sanctions provides a clear forum for evaluating Black's theory of differential legal treatment across different social and political contexts.

#### THE VALUE OF A COMPARATIVE HISTORICAL APPROACH

Although crime and punishment are universal features of contemporary societies, it would be a serious mistake to view punishment as an automatic or uniform response to particular types of misconduct. In fact, how acts are defined and their legal treatment reflect the prevailing social, political, economic, and historical conditions of a society at any given point in time. In some contexts particular criminal acts (e.g., adultery, rape, drug use, political corruption) may be considered normatively acceptable in some cultures and in other contexts vile acts deserving of the most severe punishment. Even within the same country over time, the legal acceptance of particular punishments for particular criminal offenses is context-specific. Drug offenses, for example, are capital crimes in some historical periods in the United States, England, and China, but not in other time periods.

The strength of a comparative historical analysis lies in its ability to identify patterns that are robust across time and space, transcending both