This section gives you a general idea of the main punishment theories. Once you have learnt these theories, you need to apply them to today’s sentencing procedures, as Magistrates and judges do every day. You will learn how these punishment theories (e.g. ‘Deterrence’ or ‘Rehabilitation’) translate into Criminal Justice policy and thereafter into Criminal Justice statutes, and how the criminal process reflects such theories.

Though some of the theories presented here might initially be quite wordy, they are worth learning. Therefore, pay particular attention to the Tips! features in this section; they will help you memorise some of the new and possibly unfamiliar terms in this context of study. There are now vast ranges of sentencing options available to the courts, particularly in the form of the new and generic ‘Community Sentence’ which came into force in April 2005 under the Criminal Justice Act 2003.
Core areas: **Punishment theories and sentencing paradigms**  
Retribution and ‘just deserts’  
Deterrence  
Rehabilitation  
Incapacitation  
Restorative justice  
Sentencing practice in the courts

**Learning outcomes**

By the end of this section you should be able to:

- Distinguish between legal and moral approaches to punishment
- Define and understand the range of punishment theories
- Establish the link between punishment theories and practical sentencing decision-making in the criminal courts
- Define major punishment theories in Criminal Justice legislation.

**Running themes**

- Punishment
- Human rights
- Criminalisation
- Victims of crime (Victimology)
- Inequality
- Globalisation

**Punishment theories and sentencing paradigms**

There are a number of different theories of punishment. They all have different aims and purposes and are the basis for sentencing provisions.
in the criminal courts today. Justices have to bear these punishment concepts firmly in mind when they sentence a convicted criminal. They ought to be aware of society’s need for a humane system of Criminal Justice in the Human Rights Act 1998 (e.g. ‘right to a fair trial’ or ‘freedom from inhumane and degrading treatment’).

Many philosophers (e.g. Immanuel Kant) have defined the meaning of ‘punishment’:

i) It must involve unpleasantness

ii) It must be for an offence

iii) It must be for an offender

iv) It must be the work of a criminal justice agency

v) It must be imposed by an authority.

Theorists like John Rawls have distinguished between ‘formal justice’ (the law) and ‘material justice’ (morality and politics); they have argued that these two concepts are overlapping. Criminologists like David Garland (1990) have also described ‘social justice’ as dealing with the ‘goodies’ and the ‘baddies’ in our society and how they ought to be punished. A notable distinction is usually drawn between social (distributive) justice, and retributive justice. Retributive justice (see Retribution on p. 47) believes that the guilty should be punished simply because they have done wrong.

Key thinkers

- **Immanuel Kant** (1724–1804) – Born in Königsberg, East Prussia (Germany), Kant never travelled more than 50km outside his home. Kant is one of the most influential philosophers. His most influential work is *Kritik der reinen Vernunft* (1781) (*The Critique of Pure Reason*) where Kant’s work addresses the question ‘What can we know?’ – the advancement of knowledge, including reflections on crime and punishment, which he treated as ‘freedom of the mind’ (to commit crimes). Kant argued that ‘criminal man’ has to take the consequences of his actions and expect punishment for his wrong-doing as an indispensable practical function.

- **John Rawls** (1921–2002) – Born in Baltimore, Maryland, USA, Rawls developed the concept of justice and the ‘difference principle’, which asserts the notion of inequality and the (unfair) distribution of scarce goods in society
(power, money, access to healthcare, etc). A Theory of Justice (1971) is very theoretical text, but essentially the book is about Rawls' theory of 'justice as fairness', which rests on three principles: (1) the principle of equal liberty – each person is to have an equal right to the most extensive system of equal basic liberties compatible with a similar system of liberty for all; (2) the principle of equality of fair opportunity in that positions are to be open to all, under conditions in which persons of similar abilities have equal access to office; (3) the difference principle – this requires social and economic institutions to be arranged so as to benefit maximally the worst-off.

- **Jeremy Bentham** (1748–1832) – Born in Houndsditch, London, Bentham was known as a leading radical in Anglo-American philosophy of law. He is the founder of utilitarianism which evaluates human actions based on the philosophy of 'happiness for all'. The utilitarian school believed that all punishment is evil, insofar as it adversely affects human happiness. Bentham’s utilitarian theory of punishment is often cited in the context of Deterrence (see Bentham’s Introduction to the Principles of Morals and Legislation, 1789). He is famous for the ‘model prison’ the Panopticon (see section 2.9 ‘Prisons’), where all prisoners would be observable by (unseen) guards at all times, a project which he had hoped would interest the Czarina Catherine the Great. By the late 1790s, Bentham had considerable influence on continental penology and advised on vast prison building programmes. He was made an honorary citizen of the new French Republic in 1792.

**Retribution and ‘just deserts’**

*Retribution* or *Retributivism* is one theory of punishment. It involves a fair allocation of Criminal Justice – known as the ‘just deserts’ theory. The concept of retribution implies that a criminal merits his just punishment, since he has done something morally, socially or criminally wrong. An aspect of retribution implies that the punishment should be related to the harm done by the crime, rather than to the moral guilt of the criminal: the punishment must fit the crime, i.e. the sentence for the convicted criminal must be commensurate with his offence/s.

The Criminal Justice Act (CJA) 1991 has been regarded as one of the most positive legislative frameworks, reflecting the retributive punishment theory in the form of its sentencing structure that is available to justices. Its underlying aim was to ensure that sentences are proportionate to the seriousness of the offence of which the offender stands convicted (punishment must fit the crime). Some of these positive forms of sentencing have now been overturned by the CJA 2003.

How then is retribution translated into sentencing practice by the courts today? Justices (Magistrates or Crown Court Judges) have to ask themselves: Is the punishment we are about to give in the form of a
sentence, appropriate and a just response to the crime committed? Does the punishment fit the crime? (e.g. in the form of a community sentence). Will the convicted criminal get his just deserts? Sentencers then look at past offending (antecedents) and the defendant’s past offending behaviour patterns.

**Deterrence**

Although simple in conception, *deterrence* theory can be extremely complicated in sentence practice. It often reflects a penal policy where the government attempts to control the behaviour of other actors by the use of threats. The ‘deterrer’ (the state) then tries to convince the ‘deterree’ (the criminal) that the costs of undertaking the actions that the deterrer wishes to prevent will be substantially higher than any gain that the deterree might anticipate making from the action.

*Deterrance means:* 
- Punishment aimed at deterring the criminal from repeat offending
- Preventing future crimes; or
- Reducing the likelihood of a similar offence being committed in future
- Fear of punishment (anticipation penalty)
- ‘Unpleasant’ sentences (e.g. prison)
- Encouraging the public to be law-abiding citizens
- Offender should ‘stop and think’ about consequences of their actions (‘If I rob this bank, will I be caught and punished?’)
- Justified sentencing to prevent greater harm to society
- Deterring others from committing similar acts
- Addressing the criminal’s future offending behaviour in its sentencing
- Harsher (longer or more punitive) sentences on repeat offenders (recidivists).

The deterrence-type sentence becomes weaker and more ineffective, the more an individual is punished. Research has established the more deeply a person becomes involved in criminal activity, the harder it will be to reform them. This is particularly the case with habitual, life-long criminals, persistent (young) offenders, generally known as recidivists. Deterrence in Criminal Justice policies has meant that longer and harsher sentences were introduced, as well as tariffs and mandatory sentences for certain offences (CJA 1993 for murder and rape). The ‘short,
sharp, shock-treatment’ was reflected in CJAs 1982 and 1988, and managed to have some success rate with first-time criminals. However, this specific approach had little meaningful effect on reconviction rates.

When writing about deterrence theory, you may wish to point out certain problems with this theory, in that this type of philosophy assumes that once the criminal has been punished, he will never commit another crime, making often long and very harsh sentences rather too punitive and unrealistic.

Rehabilitation

The sentencing formula of rehabilitation focuses on the rehabilitation of the offender (e.g. Rehabilitation of Offenders Act 1974). Here sentencers make every effort to change the offender’s future behaviour, so that he can lead a ‘useful and crime-free life’ after being in custody or having served a community sentence. It is believed by rehabilitative theorists that the offender needs professional support to achieve this (e.g. the Probation Service). Most rehabilitative sentencing today involves alternatives to custody, in the form of the generic ‘Community Sentence’.

The term decarceration is often used in this context. This involves the process of removing people from institutions (such as prisons or mental hospitals) and sentencing the offender to a programme of community care.

Rehabilitation means

- Non-custodial punishment
- Community Sentence or community care (Probation)
- Drug or alcohol treatment orders
- Sex Offender Treatment programmes
- Anger management programmes
- Home Detention Curfew (electronic tagging).

Incapacitation

Incapacitative theories identify particular groups of offenders (e.g. burglars) who do serious harm to society. Incapacitation theorists believe that certain criminals need to be removed from society for a long time. Incapacitation was used by Mayor Rudolph Giuliani in his ‘zero tolerance’ policy in New York during the mid-1990s; thereafter adopted by
the first Labour Home Secretary, Jack Straw in 1997, as a basis for the *Crime and Disorder Act 1998*. The result was longer sentences for serious
offences (including repeat burglary; street robbery; and sexual offences).

You may wish to point to the difficulty with this theory. Incapacitation means sentencing criminals with future objectives in mind – e.g. the longer you keep a burglar in custody, the fewer burglaries will be committed during that time, and insurance claims will go down. Given this theory, some criminals will therefore never be released from prisons (for example, violent paedophiles or serial killers will be kept in prison under a natural life sentence).

**Restorative justice**

The *restorative justice* (RJ) theory concentrates on **victims of crime**. RJ demonstrates the need for the offender to ‘make good’ to the victim in the form of reparation or compensation (rather than to society). This model is closest to the rehabilitative theory. One form of RJ is victim-offender mediation, thought to change the offender’s future way of thinking. Under the *Crime and Disorder Act 1998*, the Probation Service offers face-to-face contact with victims of crime as well as with their offenders (if so requested). The *Powers of Criminal Courts [Sentencing] Act 2000* and the *Criminal Justice Act 2003* substantially increased the sentencing powers of Magistrates in this area. RJ has been successfully and widely applied in youth justice and sentencing in the Youth Courts (*Youth Justice and Criminal Evidence Act 1999*).

**Restorative justice (RJ) involves:**

- Victim-offender mediation
- Reparation and compensation to victims of crime
- Offenders taking responsibility for their actions
- Offenders making amends to their victims and communities
- Victims being consulted and informed about offender’s release from prison
- Addressing future behaviour of the offender.

**How do courts decide on a sentence?**

- They must consider an appropriate level of sentence where the punishment must fit the crime
- The level of punishment (sentence) must be based on the seriousness of the offence (low, medium or high risk offence?)
• Is a fine appropriate? If so, size of fine?
• Is a Community Sentence appropriate? If so, how many hours of unpaid work?
• Will only custody suffice? If so, how long for a prison sentence?
• Is a discharge sentence appropriate? If so, absolute or conditional?

The European Convention on Human Rights and Fundamental Freedoms (The Convention – ECHR 1950) as incorporated into UK law by the Human Rights Act 1998 on 2 October 2000, forbids the use of ‘inhumane or degrading’ treatment (i.e. punishment) and Art. 7 ECHR sets out the prohibition on the use of arbitrary punishment.

"Compare and contrast ‘retribution’ and ‘restorative justice’ with relation to sentencing legislation."

You need to address theories of punishment here and specifically define the meaning of the two given terms. Firstly, retribution, defined as ‘an eye for an eye’ – where society imposes punishment by pain and humiliation upon the criminal, regardless of his crime. Retribution is one theory of punishment and the content of criminal law in western societies is based on this theory. Some of the most obvious and important of these conditions include respect for basic human rights, such as the rights not to be intentionally killed or physically harmed by anyone.

With restorative justice (RJ), crime is treated as an inescapable part of society, including the global aspects of crime (e.g. economic deprivation; cost of city living; expected effect of social chaos etc).

Retribution tells us little about what a particular defendant’s sentence ought to be, or even how to define a range of acceptable punishments for a given crime. Courts then make sentencing choices about fairness and proportionality whereby the punishment should fit the crime within the global pattern of possible sentences. You should focus on (and give examples of) sentences for specific offenders (e.g. burglary or assault) and the necessary sentencing involvement by justices and given reasons for their decisions.

"The death penalty should be introduced for people who kill police officers’ – Former Chief Constable of West Yorkshire (1993–98), Keith Hellawell told BBC News on the evening of 27 December 2003, after Police Officer Ian Broadhurst was shot in a quiet street in Leeds.

Discuss, with reference to punishment theories surrounding imprisonment."
The death penalty is a controversial topic and has been for a number of years. Capital punishment was abolished in the UK in 1965, but still exists in a number of countries (e.g. it was reinstated in the United States during the 1970s in a number of states such as California and Texas). Whenever the word ‘death penalty’ comes up, you will find that extremists from both sides of the spectrum begin to express their opinions; especially on the Internet. One side says deterrence, the other side says there is the potential of executing an innocent person. You need to address both sides of the argument in a learned and scholarly fashion.

Look up David Garland’s (1990) *Punishment and Modern Society: a study in social theory*. David Garland is an eminent academic in punishment theories; this is an approachable reader and gives you an insight into modern ways of public attitudes to punishment and theoretical thought.

**Textbook guide**