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The aims and values of 'criminal justice'

Key issues:

- The structure of the criminal justice system
- Blurring civil and criminal boundaries
- Proving guilt and innocence: burden and standard of proof
- Adversarial and inquisitorial approaches
- Recent trends in crime and criminal justice
- Packer's 'due process' and 'crime control' models
- Police legitimacy and procedural justice
- The human rights approach to criminal justice
- Where do victims fit into these approaches?
- The managerial approach to criminal justice and austerity justice
- A unifying perspective: freedom and 'core values'

1.1 The nature and structure of 'criminal justice'

A book with a title as vague as 'criminal justice' should begin by saying what it is about. In thinking about criminal justice we all have our own images and assumptions. In this chapter we spell out our own assumptions. We also explain the theoretical framework within which we think criminal justice in England and Wales can most usefully be understood, criticised and reformed.

We see the criminal justice system as a complex social institution[1] that regulates potential, alleged and actual criminal activity within limits designed to protect people from wrongful treatment and wrongful conviction. In earlier editions of this book we focussed mainly on police, prosecution and court powers and procedures in respect of *alleged* crime, resulting in either 'diversion' out of the system (e.g., through the imposition of a police or prosecution caution) or court proceedings. Recent years have witnessed some reconfiguration of criminal law and criminal justice in favour of crime pre-emption through risk management techniques,[2] alongside more diversion. It follows that while the determination of guilt and innocence is still hugely important, this must now be considered alongside the control of *potential* criminal activity through risk management devices such as dispersal and Anti-social Behaviour Injunctions (ABIs). As we discuss in section 1.9, the increased use of diversion is also part of an agenda that introduced management techniques to encourage maximum efficiency in the criminal process. For those whose behaviour leads them into formal criminal justice processes, we see a reduction in their ability to exercise their rights. That reduction is fuelled by relentless budget cuts across all of the agencies of criminal justice, as well as an economically driven desire to increase digital working practices.

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[1] See further Garland D, *Punishment and Modern Society* (Oxford: Clarendon Press, 1990) p 282

[2] Ashworth A and Zedner L, *Preventive Justice* (Oxford: OUP, 2014). The extent to which this is merely a pendulum-like swing back to a risk management approach is debatable. See, for example, Bonner D, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Aldershot: Ashgate, 2007).

In this section we introduce some of the key issues and tensions inherent in this reconfiguration of 'criminal justice' and also discuss the key terms 'criminal' and 'justice'. First we outline the structure and core terminology of the traditional English[3] criminal process for readers unfamiliar with this jurisdiction, and explain how this relates to the organisation of this book.

1.1.1 **The English criminal process**

Anyone who thinks a crime may have been committed may (but need not)[4] report this to a law enforcement body. There are many enforcement bodies. First, there are 43 'local' police forces, roughly corresponding with local authority areas. Second, there are also some national police bodies such as the National Crime Agency and the British Transport Police. Third, many types of crime that would be called 'administrative offences' in some other countries – e.g. health and safety violations, pollution, tax evasion – are dealt with by specialist agencies such as the Health and Safety Executive and the Environment Agency. Fourth, some charities are able to bring prosecutions, such as the Royal Society for the Prevention of Cruelty to Animals. In addition, a lot of 'policing' is done by private security firms, which, like ordinary witnesses and victims, generally call in the police if they detect suspected crimes and want further action taken. The police may seek to find evidence of guilt through the use of powers such as stop-search (see chapter 2), arrest (chapter 3), detention & interrogation (chapters 4-5) and a variety of non-interrogative means including electronic surveillance and infiltatration (chapter 6). Enforcement bodies are not obliged to prosecute even if they have overwhelming evidence of guilt. If the police do wish to prosecute, they pass the case onto the Crown Prosecution Service (CPS), except in low level traffic offences, which can be prosecuted by police court presentation officers. The CPS mostly decides whether to take matters further, and – if so – will prosecute, sometimes hiring specialist lawyers (barristers) for very serious cases. Also, individual victims may prosecute in their own right.[5]

All prosecuted cases start in the lowest level of (magistrates') courts – or, where the defendant is under 18, the youth courts.[6] In this lowest tier of the criminal courts, most cases are decided by a bench of three lay magistrates supported by a legal advisor, though increasingly professional judges (once referred to as stipendiary magistrates, but now known as District Judges) decide cases alone. Very serious cases are quickly transferred out of the magistrates' court to the Crown court. Here proceedings are more formal, and there is a professional judge (and, in contested cases, a jury). The Courts are overseen by the Ministry of Justice, while the police are overseen by the Home Office.

The division of business between the magistrates' courts and the Crown court is determined by the initial legal classification of an offence as either 'summary' (triable in the magistrates'

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[3] By 'English' we actually refer to England and Wales. Scotland is somewhat different, but increasingly less so as the two systems are converging.

[4] There are exceptions to this general principle. For example, section 117 of the Anti-Terrorism, Crime and Security Act 2001 (inserting s.38B into the Terrorism Act 2000) created the offence of failing to disclose to the police information thought to be of material assistance either in preventing an act of terrorism or in the apprehension, prosecution or conviction of a person for an offence involving the instigation, preparation or commission of an act of terrorism (now see the Prevention of Terrorism Act 2005). Several road traffic regulations also impose positive duties of disclosure and create offences for failure to comply.

[5] A private prosecution was launched by the parents of Stephen Lawrence, whose case has fundamentally shaped criminal procedure (see ch 2 and 12), after a public prosecution was discontinued in 1993. The private prosecution failed after identification evidence was deemed inadmissible. The defendants were eventually publicly prosecuted and convicted in 2012.

[6] Space precludes a detailed discussion of youth courts, but see further Aubrey-Johnson, K. et al *Youth Justice Law and Practice* (Legal Acton Group, 2019). For a critical analysis of youth justice, see Case, S *Youth Justice: A critical introduction* (Routledge, 2018)

courts only), 'either-way' (triable in either the magistrates' courts or the Crown court) or 'triable on indictment only' (triable only in the Crown court). The latter two types of offence are sometimes lumped together under the label 'indictable offences'. Regardless of this classification, most prosecuted cases are uncontested, because the defendant pleads guilty.

People who are convicted of crimes may appeal to a higher court: from the magistrates/youth courts to the Crown court (where a completely new hearing of the matter takes place) and/or the Court of Appeal; and from the Crown court to the Court of Appeal. Exceptionally, a further appeal is sometimes allowed to the Supreme Court (formerly the House of Lords). Appeals to courts other than the Crown court are generally restricted to points of law, although fresh evidence is sometimes admitted. A person wishing to appeal a point of law from the magistrates' court may do so by way of 'case stated' to the Queen's Bench Division of the High Court.[7] Once normal appeal rights are exhausted the final avenue open to the convicted defendant is to persuade an administrative body, the Criminal Cases Review Commission (CCRC), that there is some fresh evidence or argument that, if put before an appeal court, would give rise to a real possibility of the conviction being overturned. If, following investigation, the CCRC accepts that there is such a possibility the case will be referred to an appellate court for determination.

The Court of Appeal will allow an appeal where the judges think the conviction is 'unsafe'. If an appeal is lodged 'out of time', there is a further hurdle that must be passed, and that is to show that the failure to allow an appeal to be heard would amount to a 'substantial injustice'. Convictions can be 'quashed' by the Court of Appeal if a defendant is found to have been denied a fair trial, as in cases where the police fail to disclose evidence that undermined the prosecution case. Such malpractice, if adjudged severe enough, is said to render the conviction 'unsafe', and to amount to a 'miscarriage of justice', although such breaches of due process do not necessarily mean that the defendants concerned are factually innocent of the crime in question.[8] This means that there are two main types of 'wrongful conviction' (which often overlap). One is where the defendant (whether actually guilty or not) is convicted unfairly; in most of these cases, the lack of fair trial makes it impossible to judge whether the defendant is guilty or not. The other is where an innocent defendant is convicted (whether fairly or not). The conviction through unfair means of those perceived or known to be actually innocent is the type of miscarriage of justice that gives rise to most public concern.

Public concern can also be aroused by the acquittal of those perceived to be guilty, and some have argued that such acquittals amount to a different kind of miscarriage of justice.[9] The CPS is sometimes allowed to appeal against acquittals, especially when there is an alleged error of law, such as a refusal to let a jury hear prosecution evidence because the trial judge considers that the police lacked the legal power to secure that evidence. In rare cases, where new and compelling evidence of guilt emerges and the Director of Public Prosecutions (DPP)[10] agrees, entirely fresh proceedings can be brought against someone previously acquitted.[11] The best

[7] See sections 111 to 114 of the Magistrates' Courts Act 1980 and Part 35 of the Criminal Procedure Rules
[8] See Naughton M, *The Innocent and the Criminal Justice System: A sociological analysis of miscarriages of justice* (Basingstoke: Palgrave Macmillan, 2013).
[9] Then Prime Minister Tony Blair argued that: 'It is perhaps the biggest miscarriage of justice in today's system when the guilty walk away unpunished' (cited and critiqued in Naughton, 2007, 21).
[10] The Director of Public Prosecutions is the most senior public prosecutor and head of the CPS.
[11] Criminal Justice Act 2003, part 10.

known example of this occurred in relation to the 2012 retrial of Gary Dobson for the 1993 murder of Stephen Lawrence.[12] Dobson was eventually convicted of the murder.

By virtue of the doctrine of precedent, the decisions of the higher appeal courts apply to all future cases with similar circumstances. In this way, the 'common law' is in a continual process of evolution.[13] Another way in which common law is created in the criminal justice area is through challenges to the decisions of state agencies ('judicial review'). For example, a victim of a crime can ask a court (usually the High Court, making this a civil, not a criminal, case) to rule on the lawfulness of a decision by the CPS not to prosecute.[14] Again, such decisions set 'precedents' that not only guide the decisions of courts, but also of enforcement agencies. Judicial review is one of a number of mechanisms that regulate the operation and policies of the criminal justice system. Others include government inspectorates and the Independent Office for Police Conduct, discussed in chapter 11.

An element of criminal justice which is often forgotten is criminal defence. Anyone arrested and taken to a police station is entitled to receive free legal advice from an accredited advisor (who is not necessarily a fully qualified lawyer) either over the telephone or in person. The state also provides funding for free legal representation in the magistrates' courts and the Crown court, subject to a means test and a merits test. The former test means that middle class defendants (a relatively small proportion of the whole, leaving motoring offences aside) generally pay for their own defence or represent themselves. The latter test means that rich and poor alike must demonstrate that there is public interest in being represented at State expense. In the Crown court, the overwhelming majority of defendants are relatively poor and face serious charges, and so are usually represented by solicitors and barristers at the State's expense. These issues are discussed throughout this book.

1.1.2 Civil and Criminal Boundary

It is difficult to provide a clear definition of the difference between 'civil' and 'criminal' matters. In general the former are dealt with in civil courts (District courts, County courts and the High Court), and are for individuals to pursue rather than the State. Many 'wrongs', such as torts (e.g. negligence) and breach of contract, are civil matters. It is not possible to prosecute or seek the state punishment of the wrongdoer, but the wronged person (the plaintiff) can sue with a view to obtaining a civil remedy, such as compensatory damages.

However the boundaries between the civil and criminal spheres are increasingly blurred. First, some matters involving civil and criminal elements are most effectively dealt with at one time. Domestic violence, in particular, may involve a crime (assault) which merits punishment but also an ongoing threat to safety necessitating a civil injunction requiring the aggressor to keep away from the family home. The shift towards crime pre-emption encourages and reinforces this blending of civil and criminal justice. Second, while criminal courts normally punish for

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[12] *R v Dobson* [2011] EWCA Crim 1255. A more recent example is the case of Russell Bishop, who was convicted of murder in 2018 following an acquittal in 1987.

[13] Britain has no criminal code. Legislation has been built up piecemeal, so courts have to fill in the gaps more than in 'civil law' systems, thus creating case law (often known as 'the common law'). Moreover Britain has no constitution to guide how gaps should be filled. This also means that case law is subordinate to legislation. Even if legislation contravenes the European Convention on Human Rights, which was enshrined in the law in 1998 (see section 1.6) it is simply declared 'incompatible' rather than being rendered invalid.

[14] An example is *R (on the application of F) v The Director of Public Prosecutions and "A"* [2013] EWHC 945 (Admin), when the claimant successfully applied to the High Court to review the CPS decision not to prosecute her husband in relation to an allegation of rape. See further examples in ch 12.

crimes, leaving civil courts to compensate for loss,[15] at the sentencing stage criminal courts frequently order defendants to compensate victims. However, victims are reliant upon the prosecution to seek this on their behalf and are not able to participate in criminal proceedings in the way that they can in a civil claim. Third, the actions (and inactions) of the criminal justice agencies such as the police and CPS can be scrutinised in the civil justice system through judicial review (as noted above), or an action for professional negligence or breach of the Human Rights Act 1998.

Finally, there are important new hybrid laws. Under the Proceeds of Crime Act 2002 (consolidated by the Serious Crime Act 2007) civil courts may allow enforcement agencies to seize or retain property that is more likely than not to have been obtained criminally without having to prove anyone guilty of a crime.[16] Then there are 'civil behavioural orders' (also known as Civil Preventive Measures (CPM)) that embody civil evidential standards, but impose restrictions on behaviour that are akin to the type of punishments imposed in criminal courts. One example of this is the ABI, which replaced the Anti-Social Behaviour Order (ASBO) as part of an overhaul of quasi criminal orders under the Anti-social Behaviour, Crime and Policing Act 2014. These differ from Criminal Behaviour Orders (a post-conviction measure aimed at preventing future offending) in that the procedure involved is civil, not criminal.[17] This means that hearsay evidence is admissible,[18] and a lower standard of proof is required. Hendry and King have questioned the validity of such measures given that they 'illegitimately circumvent criminal law procedural protections'.[19] ABIs are intended to prevent further 'anti-social' acts by the defendant, and can include prohibitions such as curfews, or commands to avoid certain places or individuals. As Pratt notes, 'the pattern of risk controls has coalesced around more specific and limited areas: the presence or behaviour of certain individuals or groups thought likely to put at risk community cohesion and the quality of life of its citizens'.[20]

The replacement of the ASBO (which differed from the ABI in that breach of any condition was a crime that carried the risk of five years' imprisonment) is welcome. But the breadth of provisions that may form part of the injunction lead Duff and Marshall to the view that the prohibitions/requirements imposed on the person subject to the injunction can in fact be punitive in themselves.[21] Further, breach of the ABI is a civil contempt of court, which carries the risk of two years' imprisonment and an unlimited fine.[22]

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[15] Although, to muddy the waters further, civil courts sometimes award punitive damages.
[16] Millington T and Williams S, *The Proceeds of Crime* (Oxford: OUP, 2007).
17 *R (on the application of McCann) v Manchester Crown court* [2002] 4 All ER 593.
18 The rule against hearsay evidence in criminal proceedings is designed to prevent a party using evidence of an out-of-court statement for the purpose of proving the truth of any fact asserted in that statement. It ensures that direct evidence is given by those with personal knowledge of the relevant matters, thus allowing cross-examination to take place, demeanour to be assessed, and so forth. See Dennis, I *The Law of Evidence* (London: Sweet and Maxwell, 2017) part 4.
[19] J. Hendry and C. King, 'Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids' (2017) 11 *Criminal Law and Philosophy* 733-757, 734. See also, Pratt, J 'Risk Control, Rights and Legitimacy in the Limited Liability State' 57 *British Journal of Criminology* (2017) 1322-1339 and Demetriou, Stavros (2019) *From the ASBO to the injunction: a qualitative review of the anti-social behaviour legislation post-2014.* Public Law (April). pp. 343-361.
[20] Pratt, J 'Risk Control, Rights and Legitimacy in the Limited Liability State' 57 *British Journal of Criminology* (2017) 1322-1339; 1323
[21] A. Duff and S. Marshall, 'How Offensive Can You Get?' in A. von Hirsch and A. Simester (eds), *Incivilities: Regulating Offensive Behaviour* (Oxford: Hart Publishing, 2006) 80-81.
[22] Home Office, *Anti-social Behaviour, Crime and Policing Act 2014: Reform of Anti-social Behaviour Powers – Statutory Guidance for Frontline Professionals* (London: Home Office, 2017) 26

The ABI is only one of a number of CPMs created under the Anti-social Behaviour, Crime and Policing Act 2014, which also empowers the courts to make community protection notices, public spaces protection orders, orders for the closure of premises associated with nuisance or disorder, sexual risk orders and violent offender orders. Other legislation has introduced different forms of CPM, including the Terrorism Prevention and Investigation Measures Order under the Terrorism Prevention and Investigation Measures Act 2011. There are also post-conviction preventative orders, such as the Serious Crime Prevention Order and the Sexual Harm Prevention Order. Additionally, one of the first types of CPM, the Restraining Order, can be made against a person either without or upon conviction. The proliferation of these quasi criminal orders is representative of a governmental desire to regulate 'undesirable' behaviour, often targeting already marginalised sections of society while simultaneously creating 'low hanging fruit' that helps police to meet targets set in a system emphasising actuarial justice (section 1.9).

1.1.3 **Criminal law and criminal behaviour**

What is defined as criminal varies from society to society and across time, and some of the implications of this are discussed further in chapter 10. English criminal law in the 21st Century is generally thought of as proscribing people and corporate bodies from culpably (i.e., intentionally or recklessly) acting in particularly harmful or socially undesirable ways. However, much of such behaviour is not criminalised (invasions of privacy, police abuse of suspects' rights, and the wasteful misuse of the earth's resources are examples) and many feel that much of what is criminalised should not be (examples might be smoking cannabis, and swearing by football fans). Moreover, the law criminalises many forms of behaviour where the actor has acted negligently or even, in the case of some strict liability offences, where every care was taken to avoid harm. Decisions concerning which acts are to be criminalised are sometimes based on coherently expressed principles supported by an informed consensus, but more often they are the products of historical accident, political and administrative expedience, and shifting, incoherent ideological notions of the appropriate reach of the criminal law.[23]

Thus the recent lurch towards crime pre-emption is reflected in the 'general tendency to expand the boundaries of criminal liability'.[24] The Labour government of 1997-2010, with its 'tough on crime, tough on the causes of crime' stance, created a disproportionate number of new criminal offences; nearly one for every day of its first 10 years in power. While many are either trivial or brought old laws up to date, many others criminalised previously lawful behaviour.[25] New Labour also introduced 34 statutes that had a significant impact on criminal justice and procedure, compared to only six criminal justice statutes between 1925 and 1985.[26] Most remain in force today. Since 2010 there has been a shift in the nature of new legislation, with several statutes devoted to restructuring in the criminal justice process such as the Criminal Justice and Courts Act 2015, Crime and Courts Act 2013 and the Legal Aid, Sentencing and

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23 See further Hillyard P, Pantazis C, Tombs S and Gordon D (eds) *Beyond Criminology: Taking Harm Seriously* (London: Pluto Press, 2004).

24 Virgo G, 'Terrorism: Possession of Articles' (2008) Cambridge Law J 236.

25 Young R, 'Street Policing after PACE' in Cape E and Young R (eds) *Regulating Policing* (Oxford: Hart, 2008).

26 Baillie QC, A. 'Can England and Wales Afford Both Justice and the Ministry of Justice?' (Open Lecture Series University of Kent 7 December 2011). Baillie also draws attention to parliamentary debates that describe the Government's approach to criminal justice as 'legislative hyperactivity syndrome'.

Punishment of Offenders Act 2012. This shift is likely to have been fuelled by the austerity agenda adopted between 2010 and 2020 (section 1.9.1).[27]

Similar observations might be made about the way in which (potentially) harmful behaviours are in practice identified as criminal and responded to as such. For example, it may be that rowdy behaviour by unemployed scruffy youths will be interpreted in quite a different way to that engaged in by university students following their final examinations. One person's public disorder is another's youthful high spirits. Since the late 1800s, the people responsible for developing criminal justice policy have been drawn from a socially and educationally closed elite, with little empathy or affinity with most defendants.[28] These kinds of interpretative decisions are also influenced by shifts in ideology. Thus, for example, feminist writers and activists have raised public awareness of domestic violence to the point where many more victims and police officers now interpret what takes place within the 'private' sphere of the home as criminal.[29] And the Labour Government's focus on 'anti-social behaviour' probably increased intolerance and formal reporting to the police, of people and acts previously seen as merely irritating or unconventional.[30]

Since criminal laws and perceptions of criminality are social constructs it is not surprising that much criminal justice activity reflects the interests of powerful groups and actors. There are many more criminal laws and regulatory resources aimed at harmful behaviour by individuals (particularly young people) than at harmful corporate activity, for example. And, as we shall see, benefit fraud is prosecuted (by the Department of Work and Pensions) far more frequently than is tax fraud. Much criminal justice activity supports widely held social values while at the same time compounding wider social divisions and making no concessions for the social causes of crime.[31] For example, theft laws protect poor people as well as wealthy people, but the prosecution and punishment of shoplifting has a greater impact on the poor than the wealthy, and upholds the value of private property whilst ignoring (or even reinforcing) poverty.

In summary, the enforcement of the criminal law upholds social order ostensibly for the benefit of all, but in reality reinforces a hierarchical social order that benefits some while disadvantaging others. In an unequal society, this is bound to be morally problematic. Consensus and conflict are thus intrinsic in all attempts at 'maintaining order' and controlling crime.

1.2 **Guilt and innocence**

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[27] In 2019, the Chancellor declared the end of austerity, though the Shadow Chancellor expressed scepticism about that declaration. See Dearbail J. 'Chancellor Sajid Javid declares end of austerity' BBC News, 4 Sept 2019. There were some (pre-COVID-19) signals that austerity was being relaxed in the form of extra investment for the police and CPS, detailed later in this chapter.

[28] McConville, M and Marsh, L *The Myth of Judicial Independence* (OUP, 2020). They further demonstrate that every single Lord Chief Justice has been a white male, and the vast majority have been Oxbridge educated. The implications of this are discussed further in chapter 10.

29 See further, Wells C, 'The Impact of Feminist Thinking on Criminal Law and Justice: Contradiction, Complexity, Conviction and Connection' [2004] Crim LR 503.

[30] Tonry M, *Punishment and Politics: Evidence and Emulation in the making of English crime control policy* (Cullompton: Willan, 2004) 57.

31 Thus, measures to tackle 'anti-social' behaviour are mostly punitive, not supportive, and are generally targeted on the most disadvantaged communities: Brown A, 'Anti-Social Behaviour, Crime Control and Social Control' (2004) 43 *Howard Journal of Criminal Justice* 203; Koffmann L, 'Holding Parents to Account: Tough on Children, Tough on the Causes of Children' (2008) 35(1) *J Law and Society* 113. See, more generally, Cook D, *Criminal and Social Justice* (London, Sage, 2006).

In a democracy, state punishment can be legitimately inflicted only on those found guilty of crime. The criminal justice system insists on proof of guilt, rather than simply taking the word of the victim or the police. But proving guilt is not straightforward. If accused persons are truly criminal they will often be concerned to hide the truth. So should we always disbelieve them? Of course not – the police or prosecution witnesses may be mistaken, or they may be correct about some of the facts (for example, whether the accused punched someone) but simply not know other important details (for example, whether the punch was in self-defence). Occasionally prosecution witnesses themselves hide the truth, or even lie. Some years ago, Carl Beech accused numerous politicians of paedophile offences. The police investigation cost well over £1m. But Carl Beech had lied, and in 2019 he was jailed for 18 years.[32]

It follows that when accused persons dispute guilt it is as likely that they are innocent as guilty, unless there is evidence pointing one way or the other. And it is rare for that evidence to prove *conclusively* that someone is guilty, in the way we (often naively) expect scientific and medical tests to provide conclusive truth. The only way to completely prevent the conviction of the factually innocent would be to insist on incontrovertible proof, which would lead to very few convictions. This was recognised by the Court of Appeal in *Ward*[33] when it said that criminal justice:

> ". . . should be developed so as to reduce the risk of conviction of the innocent to an absolute minimum. At the same time we are very much alive to the fact that, although the avoidance of the conviction of the innocent must unquestionably be the primary consideration, the public interest would not be served by a multiplicity of rules which merely impede effective law enforcement" (at 52).

This judgment, however, fudges two key issues. No-one in their right mind would advocate a multiplicity of rules which 'merely' impeded effective law enforcement. Rules protecting suspects from wrongful conviction, harsh treatment or invasions of privacy often do impede 'effective' law enforcement, but, in a democracy, this price is seen as worth paying in order to protect the liberty and dignity of the individual suspect, and to ensure a just outcome that is beneficial to the victim and legitimacy of the process. Second, the Court of Appeal's assertion that conviction of the innocent should be kept to an absolute minimum suggests that perhaps a vast number of guilty persons should go free if necessary to achieve that goal.

Let us leave aside such rhetorical flourishes and ask to what extent is the acquittal of the innocent defendant a priority of English criminal justice in fact? The main theoretical safeguard offered to suspects in the English system of criminal justice (and also under the European Convention on Human Rights) is the presumption of innocence. This presumption finds expression in the principle that guilt must be proved beyond reasonable doubt. There are two aspects to this principle; firstly it places the burden of proof on the prosecution; and, secondly, it stipulates a high standard of proof.

1.2.1 **The burden of proof**

Viscount Sankey LC described the burden of proof in *Woolmington v DPP*[34] as the 'golden thread' which ran throughout criminal law: 'No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of

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[32] https://www.theguardian.com/uk-news/2019/jul/26/carl-beech-vip-paedophile-ring-accuser-jailed-for-18-years. For another case, see Gillan, A 'Stone trial main witness admits he is habitual liar' The Guardian, 20 September 2001. https://www.theguardian.com/uk/2001/sep/20/audreygillan

[33] (1993) 96 Cr App Rep 1

34 *Woolmington v DPP* [1935] AC 462 at 481-2.

England and no attempt to whittle it down can be entertained'. In recognition of Parliamentary supremacy over the courts, Lord Sankey noted, however, that this common law principle was subject to statutory exceptions. These are numerous; in the mid-1990s, Ashworth and Blake calculated that 219 out of the 540 indictable offences in common use involved a shifting from the prosecution to the defence of the burden of proof in relation to some elements of the offence. For example there are many prosecutions under s.5 of the Public Order Act 1986 for using threatening, abusive or insulting words or behaviour within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby. All the prosecution need prove is that defendants did as alleged (not that any alarm, etc. was caused). Accused persons then escape liability only if they can prove, on the balance of probabilities, that their conduct was reasonable.

Shifts in the burden of proof, sometimes referred to as a reverse onus, never require the defendant to prove something 'beyond reasonable doubt' but only, at most, 'on the balance of probabilities'. Nonetheless, this means that a court can convict in cases where the defendant's story is as likely to be true as false. This might appear to be contrary to the European Convention on Human Rights (ECHR), Art 6(2) which states that: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.' But, following a European Court of Human Rights (ECtHR) ruling that reverse onuses did not necessarily violate the Convention,[35] the House of Lords in *Lambert*[36] stated that Art 6(2) permits a statute to place a burden of proof on a defendant, if that burden is proportionate to the aim being pursued, which must itself be legitimate. In determining these issues, a court must take account of such factors as the gravity of the conduct dealt with by the offence in question, the justification for placing a burden on the defendant, and the degree of difficulty in discharging that burden. It follows that the courts will have to proceed on a case-by-case basis, deciding for each offence whether a shift in burden is proportionate or not.[37]

Parliament has responded to the human rights era supposedly ushered in by the Human Rights Act 1998 (which made ECHR rights enforceable within the domestic court system) by stipulating that some of the more serious statutory offences which appear on their face to require the defendant to prove some matter should be read as only imposing a burden to adduce sufficient evidence to make the issue a live one. For example, when the main terrorism offences were consolidated in the Terrorism Act 2000 the opportunity was taken (in s.57(2)) to recast the offence created by s.82 of the Criminal Justice and Public Order Act 1994 (possessing an article for suspected terrorist purposes) in precisely this way. Now, if a defendant adduces evidence sufficient to raise the issue that she or he had an item in their possession for a non-terrorist purpose then an acquittal must follow unless the prosecution proves beyond reasonable doubt that no such purpose existed. On the other hand a number of terrorist offences were re-enacted with a shift in burden still in place. It is possible some of these reverse onus provisions will be successfully challenged, but many are undoubtedly here to stay.[38]

1.2.2 **The standard of proof**

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[35] *Salabiaku v France* (1988) EHRR 379

36 *Lambert* [2001] 2 Cr App R 511. See also *Attorney General's Reference No. 4 of 2002; Sheldrake v DPP* [2004] UKHL 43.

[37] See *Johnstone* [2003] UKHL 28, *Makuwa* [2006] EWCA Crim 175 and *Williams* [2012] EWCA Crim 2162. In each case, a reverse onus was upheld when the maximum penalty that could be imposed was 10 years imprisonment.

38 See further, Dennis I, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' [2005] Crim LR 901.

If a court was allowed to find a person guilty on the balance of probabilities (the standard of proof generally applied in civil cases) then many more factually guilty persons could be successfully prosecuted, but so too could many more who were factually innocent. If, on the other hand, it was required that guilt be proven beyond any doubt at all, whether reasonable or not, then few successful prosecutions could be brought. This would protect people who were actually innocent, but would allow the vast majority of guilty suspects to escape conviction. The standard of proof required (guilt beyond reasonable doubt) amounts to a compromise between two potentially conflicting aims: to convict the guilty and acquit the innocent. The particular standard chosen expresses a preference for erroneous acquittals over erroneous convictions.[39]

The insistence that a crime or anti-social behaviour be proven 'beyond reasonable doubt' by the prosecution does little to protect defendants if that crime or behaviour is so vague or commonplace that almost anything could come within the definition. Thus s.57 of the Terrorism Act 2000 makes it an offence if the accused 'possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.' There is no requirement to prove that possession *was* for such a purpose but only that there is a reasonable suspicion that this is so. As we shall see in chapter 2, reasonable suspicion is an elastic concept that requires little by way of hard, objective evidence consistent with guilt. Note also that the terms 'article' and 'connected with' could hardly be broader.[40] Some might argue that breadth and elasticity is needed to enable the early disruption of activity that, if not pre-empted, might wreak large-scale death and destruction. But such pre-emptive thinking can also be seen in the definition of low-level crime and disorder. To take the ABI example again, neither the behaviour that prompts the making of the order, nor the behaviour in breach of that order need be criminal in and of itself (although sometimes it is). These problems also apply to 'behaviour liable to cause a breach of the peace' and some unambiguously criminal offences such as behaviour 'likely to cause alarm or distress'.[41] Police officers can 'prove' beyond reasonable doubt that something was 'likely' or 'liable' by stating that they believed it was likely or liable – no other witnesses are needed.

The lesson to be drawn from this section is that, rather than be taken in by oratorical claims concerning supposedly fundamental principles, one must consider in detail the actual rules and their operation. We must, in other words, be alive to the possibility that the rhetorical goals of criminal justice are not necessarily the same as the goals that are actually pursued. In particular, we have seen that the recent shift towards preventive orders means that proof of guilt is not always a pre-condition of intrusive control by the agents of criminal justice.

1.3 **Adversarial and inquisitorial theories of criminal justice**

Evidence relating to guilt and innocence has to be gathered, put in some coherent order and then presented. This is done in accordance with rules, principles and policies of criminal procedure and evidence. There are two broad approaches to criminal justice fact-finding – the

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[39] For a lengthy discussion and critique see Keane A and McKeown P, 'Time to Abandon "Beyond Reasonable Doubt" and "Sure"' [2019] Crim LR 505.

[40] The courts have ruled that paper and electronic documents and records fall within the definition of an 'article': *Rowe* [2007] QB 975, but that, in the interests of legal certainty, there must be some direct connection between possession of the article and its use for terrorism: *Zafar* [2008] 2 WLR 1013. See also the preceding sub-section for an explanation of how the defendant can place a much heavier burden on the prosecution of proving that no non-terrorist purpose existed.

41 Public Order Act 1986, s.5 (the defendant must have intended or been aware that his or her behaviour was threatening, abusive, insulting or disorderly).

adversarial and the inquisitorial.[42] The Secret Barrister summed up what immediately springs to mind for most of us who are used to the adversarial system: "*adversarial* being a loose term for the model pitting the state against the accused in a lawyer-driven skirmish for victory played out before an impartial body of assessors … And plenty of wigs."[43] The adversarial principle that it is for the prosecution to bring a case to court and prove guilt is a characteristic of the English system and of other common law systems such as Australia, Canada and the USA. Civil law systems, such as France or Germany, are generally said to be based on inquisitorial principles. It is also important to acknowledge that each system will also be influenced by other elements of criminal process, such as political aims and contextual factors such as the prevailing socio-political conditions, as we shall discuss in section 1.9.

In an inquisitorial system the dominant role in conducting a criminal inquiry is supposed to be played by the court.[44] A dossier is prepared to enable the judge taking the case to master its details. The judge then makes decisions about which witnesses to call and examines them in person, with the prosecution and defence lawyers consigned to a subsidiary role. In some inquisitorial systems the dossier is prepared (in serious cases) by an examining magistrate (juge d'instruction), with wide investigative powers, but more frequently this is done by the prosecutor and police.

In the 'pure' adversarial system, by contrast, the burden of preparing the case for court falls on the parties themselves. The judge (sometimes with a jury) acts as an umpire, listening to the evidence produced by the parties, ensuring that the proceedings are conducted with procedural propriety, and announcing a decision at the conclusion of the case. If the parties choose not to call a certain witness, then however relevant that person's evidence might have been, there is nothing the court can do about it. The adversarial contest in court thus resembles a game in which truth might appear to be the loser.[45] Indeed, it is sometimes said that adversarial systems focus on proof, and inquisitorial systems on truth.[46] But this is too simplistic. Both systems are concerned with establishing the facts to the required degree of certainty,[47] but they differ on the best way of achieving that end.

Adversarial theory holds that 'truth is best discovered by powerful statements on both sides of the question'[48] which are then evaluated by a passive and impartial adjudicator. This recognises that the events leading up to a criminal offence, and the intentions or knowledge of the parties involved, are always open to interpretation and dispute. The danger in an inquisitorial system is that whoever conducts the investigation (whether the police, a prosecutor or an examining

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[42] 'Popular' or 'informal' justice, as found, for example, in African tribal systems, arguably represents a third broad approach. See further Vogler R, *A World View of Criminal Justice* (Aldershot: Ashgate, 2005).

[43] The Secret Barrister (2018) *Stories of the Law and How It's Broken* Macmillan

[44] Our discussion here is of an 'ideal type' for in practice there are considerable differences between systems which are labelled 'inquisitorial': Damaska M, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 U Penn LR 506. See further Amalia D. Kessler, 'Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial', 90 *Cornell L. Rev*. 1181 (2005); Hodgson J, *The Metamorphosis of Criminal Justice* (OUP, 2020), ch 1.

45 See Frankel M, 'The Search for the Truth: An Umpireal View' (1975) 123 U Penn LR 1031.

46 See the critique of the adversarial system by a (then) Chief Constable, Pollard C, 'Public Safety, Accountability and the Courts' [1996] Crim LR 152, and the reply by Ashworth A, 'Crime, Community and Creeping Consequentialism' [1996] Crim LR 220.

[47] It is in this sense that 'truth' must be understood in the discussion that follows. In reality, a criminal trial focuses on whether the evidence of guilt presented meets the 'beyond reasonable doubt' test. If it does not then that is the end of the matter, and the question of whether somebody else might have committed the offence will not be examined further.

48 *Ex p Lloyd* (1822) Mont 70, 72 n.

magistrate) will come to favour one particular view of the matter, and that this will influence the construction of the dossier. Material helpful to the accused may be excluded. There is also the danger that a trial judge, having formed an initial view of the case based on a reading of the dossier, will give too much weight to evidence adduced at the trial that is consistent with the pre-existing theory, and too little to that which conflicts with it. In one study, two groups of professional judges were compared. They heard identical cases, but one group read the file beforehand and the other did not. All of those who read the file beforehand convicted the defendant. Only twenty-seven per cent of the others did so. The prosecutor's opinion and the documents supporting it strongly influenced prior expectations.[49]

In dossier-based systems the spoken word is so distrusted that once something is memorialised in the dossier it is hard to dislodge that later in, for example, a trial.[50] Far better, according to the adversarial theory, that the judge remain impartial throughout and allow the parties to put forward their interpretations of the facts and law in the way most favourable to them. By opening up a range of possible views, it is more likely that the 'real truth' will emerge. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances.[51]

So, while inquisitorial systems are rightly portrayed as involving a pre-eminent commitment to search for the truth, the way in which that search is conducted can shape the 'truth' that is proclaimed in court. Adversarial systems, by contrast, with their emphasis on the parties proving their case, can lose sight of the truth for different reasons: one or both of the parties might deliberately suppress relevant evidence for tactical reasons, or engage in aggressive cross-examination designed to so humiliate or confuse a witness that their evidence will be perceived as unreliable.[52] Or one party (almost invariably the defendant) might lack adequate access to the resources or expertise needed to counterbalance the arguments of their opponent.[53] In practice, there is no reliable evidence on which system is better at getting at the truth, nor is such evidence likely to be obtainable.[54]

Adversarial and inquisitorial models express different conceptions of how power should be allocated in society.[55] These differences result in the adversarial model attaching less weight to the goal of reliable fact-finding than the inquisitorial model, not because that goal is seen as unimportant, but rather because of an acknowledgement that the pursuit of other important aims necessarily implies a reduced relative weighting for 'truth-discovery'.[56] The adversarial

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49 McEwan J, 'The Adversarial and Inquisitorial Models of Criminal Trial' in Duff A, Farmer L, Marshall S and Tadros V (eds) *The Trial on Trial* (Oxford: Hart, 2004) at p 64. More recently, Zuckerman discusses the problem of cognitive bias in inquisitorial systems. Such bias may shape the way investigations are conducted (Zuckerman, A *No Justice Without Lawyers—The Myth of an Inquisitorial Solution* (2014) 33 CJQ 355)

50 Hodgson J, 'Hierarchy, Bureaucracy and Ideology in French Criminal Justice' (2002) 29 *Jo Law and Society* 227.

51 Fuller L, 'The Forms and Limits of Adjudication' (1978) 92 Harv LR 353 at p 383. For an accessible exploration of this point see Jackson J and Doran S, *Judge without Jury* (Oxford: OUP, 1995) ch 3.

52 This has been a particular problem in rape trials, where the adversarial model has come under particular attack. See for example Smith O, *Rape Trials in England and Wales* (London: Palgrave, 2018); and ch 12.

53 See generally McEwan (2004).

54 Redmayne M, *Expert Evidence and Criminal Justice* (Oxford: OUP, 2001) p 213, n 92.

55 See Damaska M, *The Faces of Justice and State Authority* (New Haven: Yale, 1986) and the accessible discussion by Jackson J, 'Evidence: Legal Perspective' in Bull R and Carson D (eds), *Handbook of Psychology in Legal Contexts* (Chichester: Wiley, 1995).

56 Damaska M, 'Evidentiary barriers to conviction and two models of criminal procedure: a comparative study' (1973) 121 U Penn LR 506 at 579–80, n 197.

model assumes that the state is committed to proving cases against individual citizens in order to fulfil its duty of enforcing the criminal law. In order to guard against the state abusing its powerful position, safeguards must be provided. One such safeguard is an expression of the constitutional doctrine of the separation of powers: the state provides a forum in which one branch of government (the judicial, i.e. the criminal courts) considers the case built and presented by another (the executive, i.e. the police and the prosecution). The passivity of magistrates and judges required by adversarial theory can also be seen as an expression of this mistrust of official power, as can the use of lay people (juries and most magistrates) to deliver verdicts on guilt or innocence. These devices all seek, amongst other things, to guarantee the impartiality of adjudication.

The adversarial model is also sensitive to the need to ensure that prosecution evidence is collected by fair and lawful means. Adversarial systems are trial centred, in that preparation of a case for trial is a principle objective of investigation and evidence gathering. Thus, for example, defence lawyers are meant to play an active part at the investigative stage of a criminal case (advising the suspect, applying for bail, and so forth) and there are limits on the length of time suspects can be held by the police for questioning. The importance attached in an adversarial system to the integrity of the procedures followed in collecting evidence and proving guilt can also be seen in the development of rules of evidence aimed at promoting both the fairness and reliability of verdicts pronounced by a court.[57]

In inquisitorial systems, by contrast, the underlying assumption is that the state can be (largely) trusted to conduct a neutral investigation into the truth. Therefore safeguards such as passive adjudicators, a strict separation of investigative and adjudicative powers, rules of evidence and defence lawyers are seen as less important. Concerns have long been raised about the length of pre-trial detention in France.[58] Leigh and Zedner have noted that 'while nothing in French law requires the over-use of detention, a tendency to do so seems deeply ingrained in the legal culture and doubtless derives from a desire not to release a suspect until the truth has been ascertained'.[59] All too often the supposed safeguards against oppressive police practices offered by judicial or prosecution control of the investigation process is a chimera. Defence lawyers are discouraged from active defence during police interrogation.[60]According to the author of the most in-depth empirical study of the French system, judicial supervision does not involve a careful and impartial pursuit of alternative theories and lines of enquiry. Rather:

> "The guilt of the suspect is presumed and denials are rejected. Evidence of violence committed on the suspect by the police was ignored and left for the defence to raise at court; the word of the victim or of the police was consistently preferred over that of the suspect; serious cases meant an almost automatic request for a remand in custody, even where the evidence was thin. At trial, the most serious charge which the evidence might support was preferred: the public interest demanded that nothing should risk going unpunished."[61]

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57 See generally Roberts and Zuckerman (2004).

58 Fair Trials International *Pre Trial Detention in France* (2013) https://www.fairtrials.org/wp-content/uploads/Fair_Trials_International_France_PTD_Communiqu%C3%A9_EN.pdf

59 Leigh L and Zedner L, A Report on the Administration of Criminal Justice in the Pre-Trial phase in England and Germany (Royal Commission on Criminal Justice, Research Study no 1) (London: HMSO, 1992) p 53.

60 Blackstock, J, Cape, E, Hodgson, J, Ogorodova, A and Spronken, T (2014) *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Antwerp: Intersentia),

61 Hodgson J, 'The police, the prosecutor and the juge d'instruction' (2001) 41 B J Crim 342 at 357. For full length treatment see Hodgson J, *French Criminal Justice* (Oxford: Hart, 2005).

The problem of abuse in the inquisitorial system, and doubts about the effectiveness of the juge d'instruction, led to the abolition of this role in Germany in 1975. Corruption amongst investigative judges led to abolition in Italy in 1988, and substantial reforms to the French system were made in 1993 and 2000. Whether adequate safeguards for suspects in France were put in place as a result of these changes seems doubtful, but attempts to abolish the system in France in 2010 were unsuccessful. Reforms to institutional arrangements are unlikely to achieve much so long as the prevailing legal culture assumes the guilt of suspects and prioritises the 'community interest' in the efficient conviction of the guilty.[62]

In order to avoid giving the impression that everything in the English adversarial garden is rosy, in the next section we supplement our account of the theoretical underpinnings of English criminal justice with a short account of its own weed-ridden history.

1.4 **Recent trends in criminal justice and crime**

In 1981, the Royal Commission on Criminal Procedure (the Philips Commission), originally set up because of the wrongful conviction of three youths for the murder of Maxwell Confait,[63] published its blueprint for a 'fair, open, workable and efficient' system.[64] It recommended that there should be a 'fundamental balance' in criminal justice between the rights of suspects and the powers of the police.[65] Although not all of its proposals were accepted, its report led to the Police and Criminal Evidence Act 1984 (PACE) and the Prosecution of Offences Act 1985. PACE, together with its associated Codes of Practice, provided, for the first time, a detailed legislative framework for the operation of police powers and suspects' rights. The 1985 Act created the Crown Prosecution Service to take over the prosecution function from the police. The aim was, in part, to try to ensure that the defects in criminal procedure exposed by the 'Confait Affair' – such as undue pressure on suspects to confess, the lack of legal advice for suspects in police stations, and the absence of an independent check on police decisions – would be eliminated, thereby reducing the risk of further miscarriages of justice.

However, in the years following these Acts of Parliament, a string of both pre- and post- PACE similar cases came to light including the 'Guildford Four', the 'Maguires', the 'Birmingham Six', Stefan Kiszko, Judith Ward, the 'Cardiff Three', the 'Tottenham Three', the Taylor sisters, and the 'Bridgewater Four'. Long terms of imprisonment were served by nearly all of the defendants in these cases. The causes of the miscarriages of justice varied from case to case, but common features were the suppression by the police and prosecution agencies of evidence helpful to the defence –which has remained a live issue[66] - incriminating evidence (including false confessions) secured from suspects by the police use of psychological pressure and tricks, deficiencies in the production and interpretation of expert evidence, and the distortion,

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62 On the legal culture in France see Hodgson J, 'Codified Criminal Procedure and Human Rights: Some Observations on the French Experience' [2003] Crim LR 165. For a detailed analysis of change in Britain and France in particular, see Hodgson J, *The Metamorphosis of Criminal Justice* (OUP, 2020), ch 1.

63 See the official inquiry into what became known as the 'Confait Affair': Report of an Inquiry into the Circumstances leading to the Trial of Three Persons on Charges arising out of the Death of Maxwell Confait and the Fire at 27 Doggett Road, London SE6 (HCP 90) (London: HMSO, 1977).

64 Royal Commission on Criminal Procedure (RCCP), Report (Cmnd 8092) (London: HMSO, 1981) para 10.1.

65 RCCP (1981) paras 1.11 to 1.35.

66 Criminal Justice Joint Inspection *Making it Fair: The Disclosure of Unused Material in Volume Crown court Cases* (2017) Available at https://www.justiceinspectorates.gov.uk/cjji/inspections/making-it-fair-the-disclosure-of-unused-material-in-volume-crown-court-cases/. Disclosure scandals came to a head in 2017 when the trial of Liam Allan, a student accused of rape, collapsed because telephone evidence had not been properly disclosed (Owen Bowcott 'Solicitor for student in rape case criticises police and CPS' The Guardian (London 30 Jan 2018) and again in the Post Office 'false accounting' debacle of 2020. See chapter 7.

manipulation and occasional fabrication of prosecution evidence (again, including confession evidence).[67] By implication, a further cause was the inadequate resources available to the defence to guard against or uncover these defects prior to conviction, which is again a matter of contemporary concern.[68] For all these reasons, the adversarial truth-discovery mechanism of hearing powerful arguments on both sides of the question had been undermined. Juries had understandably convicted on the basis of what had seemed in court to be overwhelming prosecution cases.

Some of the people involved in these cases were tried before the changes in the law ushered in by the Philips Commission,[69] but others (such as the 'Cardiff Three', where three young men were wrongly convicted of offences connected with murder of a prostitute)[70] were convicted under the new regime. Also, by July 1993, the convictions of 14 people had been quashed because of irregularities by one particular group of police officers (the West Midlands Serious Crime Squad), most of these being post-PACE cases.[71] The pressure created by these spectacular miscarriages led to the establishment of the Royal Commission on Criminal Justice (the Runciman Commission), which reported in 1993.[72] Yet the Runciman Commission advocated few major changes to the criminal process, arguing that there was no reason to believe that the 'great majority' of verdicts were 'not correct'.[73] Moreover, its recommendations taken overall favoured the interests of the police and prosecution agencies more than those of suspects.[74]

An obvious question raised by this sequence of events is whether the Runciman Commission was right to think that the framework established by PACE and the Prosecution of Offences Act 1985 was basically sound. One view is that something more than mere tinkering was needed if suspects were to be adequately protected, as indicated by continuing patterns of police malpractice and wrongful convictions.[75] An opposite view is that the mid–1980s legislation

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67 For useful accounts of some of the main cases see Rozenberg J, 'Miscarriages of Justice' in Stockdale E and Casale S (eds), *Criminal Justice under Stress* (London: Blackstone, 1992), and Robins, J *Guilty Until Proven Innocent* (2018, Backbite Publishing).

68 See, for example, Smith, T. and Cape, Ed 'The rise and decline of criminal legal aid in England and Wales.' In: Flynn, A. and Hodgson, J., eds. (2017) *Access to Justice and* Legal Aid*: Comparative Perspectives on Unmet Legal Need*. Hart Publishing; Newman, D (2013) *Legal Aid Lawyers and the Quest for Justice* Hart Publishing; Welsh, Lucy (2017) 'The effects of changes to legal aid on lawyers' professional identity and behaviour in summary criminal cases: a case study.' *Journal of Law and Society*, 44 (4). pp. 559-585.

69 Those tried before the introduction of PACE include the 'Guildford Four', the 'Maguires', the 'Birmingham Six', Stefan Kiszko, Judith Ward and the 'Bridgewater Four'

70 The real murderer was convicted in 2003, 11 years after their convictions were quashed. Three witnesses, who were bullied into giving false evidence against them, were jailed in 2008. 13 serving and former police officers faced charges of conspiracy to pervert the course of justice but were acquitted as a result of disclosure failings. A public inquiry into the collapse of the trial concluded, in 2017, that the trial in relation to one of the worst miscarriages of justice in English history collapsed as a result of human errors and called for revision of disclosure guidelines: *The Guardian* 17 July 2017.

71 Many of these cases are discussed in Kaye T, 'Unsafe and Unsatisfactory?' Report of the Independent Inquiry into the working practices of the West Midlands Police Serious Crime Squad (London: Civil Liberties Trust, 1991).

72 Royal Commission on Criminal Justice (RCCJ), Report (Cm 2263) (London: HMSO, 1993).

73 RCCJ (1993) para 23.

74 For critiques see Young R and Sanders A, 'The Royal Commission on Criminal Justice: A Confidence Trick?' (1994) 15 OJLS 435; McConville M and Bridges L (eds), *Criminal Justice in Crisis* (Aldershot: Edward Elgar, 1994) and Field S and Thomas P (eds), *Justice and Efficiency? The Royal Commission on Criminal Justice* (London: Blackwell, 1994) (also published as (1994) 21 JLS no 1).

75 For evidence of police and prosecution malpractice of a kind likely to contribute to miscarriages of justice see chapters 2–7. For accounts of the most notorious miscarriages of justice uncovered in recent times, go to https://innocent.org.uk/miscarriage-of-justice-cases/ (accessed 28 February 2018).

had already swung the pendulum so far in favour of safeguards for suspects that the ability of the police to bring criminals to justice had been unduly hampered, the occasional dramatic miscarriage or corruption case notwithstanding.

The latter view prevailed under the Conservative Government in the years immediately following the publication of the Runciman Commission's report. Taken together, the Criminal Justice and Public Order Act 1994, the Criminal Procedure and Investigations Act 1996, and the Police Act 1997 provided the police and prosecution with important new powers and significantly reduced the rights of, and safeguards for, suspects. The Labour government in power between 1997 and 2010 dismantled suspects' rights and increased police powers at an even greater rate, such as by extending stop and search powers, amending powers to grant bail, altering disclosure provisions and creating gateways for the admissibility of evidence previously presumed inadmissible (such as that of previous convictions), all under the Criminal Justice Act 2003. The torrent of legislation on the subject includes the Crime and Disorder Act 1998, the Youth Justice and Criminal Evidence Act 1999, the Regulation of Investigatory Powers Act 2000, the Police Reform Act 2002, the Criminal Justice Act 2003, the Domestic Violence, Crime and Victims Act 2004, the Serious Organised Crime and Police Act 2005, the Violent Crime Reduction Act 2006, the Serious Crime Act 2007, the Criminal Justice and Immigration Act 2008 and numerous anti-terrorism Acts. When former Prime Minister Blair said that 'the rules of the game are changing' he was not exaggerating.

While the pace of change has slowed with more recent governments, we have continued to see concerted efforts at restructuring criminal justice and creating new offences, such as in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Recently, new offences of assaulting emergency service workers have been created under the Assaults on Emergency Workers (Offences) Act 2018. Such offences were previously prosecuted under existing laws regarding offences against the person, with the aggravating sentencing factor of the assault occurring against an emergency service worker (in the course of their lawful work). The governments that have followed Labour have, through the creation of such offences, responded to public concerns[76] about offenders and offending by encouraging more severe punishments for specific offences. The inclination to give priority to public protection 'reverses the post-war emphasis on protecting the criminal justice rights of individuals', and undermined ethical concerns about the state's excessive powers over its individual citizens.[77] The trend to introducing narrowly construed, very particular offences was further exemplified by the introduction of the offences of stalking under the Protection of Freedoms Act 2012 and of controlling or coercive behaviour in an intimate or family relationship under the Serious Crime Act 2015. Measures which show that governments are committed to responding to concerns about earlier failures in the way offending in domestic contexts was policed and prosecuted are both overdue and welcome. But they also demonstrate that governments have continued a tendency to reactively produce voluminous amounts of criminal justice legislation. They also reveal governments' continuing commitment to punishment as deterrent as opposed to non-criminal justice responses such as education programmes. We can now add the Coronavirus Act 2020 to this list.[78]

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[76] Whether public concerns about such behaviour are founded in evidence that suggests offending behaviour has in fact increased is contestable in light of crime rates that fell consistently until 2017. See, for example, Tonry, M (2014) 'Why Crime Rates Are Falling throughout the Western World' *Crime and Justice* 43(1).

[77] Pratt, J 'Risk Control, Rights and Legitimacy in the Limited Lability State' (2017) 57 *British Journal of Criminology* 1322-1339; 1332

[78] The new offences that were created under the Coronavirus Act 2020 are niche and will need further research to understand their impact, though there was some early indication that the public and legal experts felt the police were exercising their

Trends in crime are measured in two main ways. In addition to collating the crimes recorded by the police, the government also interviews large representative samples of adult householders about their experiences of victimisation in the last year to estimate roughly how many crimes are not recorded by the police (largely because many victims do not report crimes to the police). Both sets of data are published in what is now known as the Crime Survey for England and Wales (CSEW). Crime levels have tended to fall in most years since 1995, and by 2010 were around their 1981 level. Ordinarily we might expect to have seen crime rates rise as the economic recession that began in 2008 took hold. Figures for the last three months of 2008 were ambiguous, demonstrating that most 'official' crime continued to fall, apart from burglary, which rose by 4%. The 'unofficial' crime total remained stable, but personal thefts rose sharply (unlike burglary, which remained stable).[79]

Until 2017, crime rates had generally continued to fall. The police, however, recorded rises in high harm violent offending and rises were noted in some acquisitive crimes, such as burglary and vehicle-related theft. In mid-2018 violent crime, largely between young ethnic minority men in large cities such as London, had reached epidemic proportions with growing concerns about what can be done. Overall, however, 8 in 10 surveyed adults did not report being the victim of any crime surveyed.[80] The crime problem, then, while always a matter of concern, provides no more reason now than it did several years ago to strengthen police powers and reduce the rights of suspects. Much the same can be said of terrorism. England and Wales has for centuries experienced occasional acts of terrorism as well as more concerted terrorist campaigns and it is arguable that the threat posed by Al-Qaeda, Islamic State and other fundamentalist groups is not qualitatively different from that, say, posed in the 1970s and 1980s by the provisional Irish Republican Army (IRA).[81] To the extent that the threat is novel (for example, the use of suicide bombers and vehicles as weapons), most of the laws passed to counter it seem unlikely to be effective, particularly given their breadth and reliance on nebulous concepts such as 'reasonableness' (see section 1.2.2). The avalanche of anti-terrorist laws passed over the last 20 years cannot be justified by the facts, however brute some of those facts are.[82]

More fundamentally, decisions about how much power to give the police and prosecution agencies can never be factually determined but rather express value choices about the appropriate goals of criminal justice, the order in which they should be prioritised, and the appropriate means to achieve them. Is there any way of clarifying the implications of such choices and thus provide us with the normative material we need in order to come to a more rational decision about the appropriate means and ends of criminal justice?

These were the kinds of problem that, now over 50 years ago, an American writer, Herbert Packer, tackled when he developed his two models of the criminal process: due process and

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new powers in an excessive manner. See, for example, Henley, C 'Heavy-handed police are enforcing restrictions that do not exist in law' *The Times*, 16 April 2020.

[79] Home Office (2009c) *Crime in England and Wales: Quarterly Update to December 2008* (London: Home Office Statistical Bulletin 06/09).

[80] Office for National Statistics (2018) Crime in England and Wales: year ending September 2017 (https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingseptember2017) accessed 28 February 2018

[81] See Feldman D, 'Human rights, terrorism and risk: the roles of politicians and judges' (2006) Public Law 364 at 367-70; Bonner (2007: 8-10). For a contrary view see Greer, S 'Human rights and the struggle against terrorism in the United Kingdom' (2008) 2 *European Human Rights Law Review* 163.

[82] For a measured analysis see Greer (2008).

crime control.[83] These models have been used by many commentators on criminal justice as tools of analysis.[84] They have also been subjected to much criticism. In the next section we explain the models, and comment on their strengths and weaknesses.

1.5 **Crime control and due process**

Packer developed his models to illuminate what he saw as the two conflicting value systems that competed for priority in the operation of the criminal process. Neither purported to describe any specific system, and neither was to be taken as the ideal. Rather, they represented extremes on a spectrum of possible ways of doing criminal justice. Use of the models enables one to plot the position of current criminal justice practices at each stage of the criminal process, as well as to highlight overall trends.

1.5.1 **Crime control**

In this model the repression of criminal conduct is viewed as by far the most important function to be performed by the criminal process. In the absence of such repression, a general disregard for the criminal law would develop and citizens would live in constant fear. In order to uphold social freedom, the model must achieve a high rate of detection and conviction. But because crime levels are high and resources are limited the model depends for success on speed and on minimising the opportunities for challenge. Formal fact-finding through examination and cross-examination in court is slow and wasteful. Speed can best be achieved by allowing the police to establish the facts through interrogation. To further guarantee speed, procedures must be uniform and routine, so that the model as a whole resembles a conveyor belt in its operation.

The quality control in this system is entrusted in large measure to the police. By the application of their expertise the probably innocent are quickly screened out of the process while the probably guilty are passed quickly through the remaining stages of the process. Indeed, the model goes further in claiming that pre-trial administrative processes are more likely to produce reliable evidence of guilt than formal court procedures. The ideal mechanisms for truncating these procedures are guilty pleas. They eliminate lengthy and expensive trials. The police will thus seek to extract confessions from those whom they presume to be guilty as this makes it very difficult for the suspect to do other than admit guilt at court. For as Packer concludes of the crime control model, ‘when reduced to its barest essentials and operating at its most successful pitch, it offers two possibilities: an administrative fact-finding process leading (1) to exoneration of the suspect or (2) to the entry of a plea of guilty.’ [85]

The crime control model accepts that some (but not many) mistakes will be made in identifying the probably guilty and the probably innocent, and considers this a price worth paying for the efficient repression of crime. On the other hand, if too many guilty people escaped liability, or the system was perceived to be generally unreliable (as would be the case if it was shown that innocent people were being prosecuted on a large scale) then the deterrent efficacy of the criminal law would be weakened. Limited safeguards against miscarriages of justice, including an appellate system, are therefore accepted as necessary, but primarily in order to promote

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83 Packer H, *The Limits of the Criminal Sanction* (Stanford: Stanford UP, 1968) ch 8.

84 See, for example, McConville M and Baldwin J, *Courts, Prosecution, and Conviction* (Oxford: Clarendon, 1981) pp 3–7; Vogler R, *A World View of Criminal Justice* (Oxford: Routledge, 2016) and the first edition of this book. For refinements and other approaches see, for example, Bottoms A and McClean J, *Defendants in the Criminal Process* (London: Routledge, 1976) pp 226–232; King M, *The Framework of Criminal Justice* (London: Croom Helm, 1981) ch 2; Roach K, ‘Four models of the Criminal Process’ (1999a) 89 *J Crim Law and Criminology* 671 and the rest of this book.

85 Packer (1968: 162–3).

confidence in the system. Confidence is promoted in part by displaying confidence in itself, so cases are regarded as closed following verdicts in all but the most compelling circumstances.

While the crime control model can tolerate rules forbidding illegal arrests or coercive interrogations (since such rules might promote reliability) those rules should not be enforced through the exclusion, in court, of illegally obtained evidence, or the quashing of convictions simply because the rules have been breached. To let the guilty go free on such technicalities undermines crime control to an unacceptable extent.

1.5.2 **Due process**

The due process model lacks confidence in informal pre-trial fact-finding processes. Many factors may contribute to a mistaken belief in guilt resulting in the production of unreliable evidence against the suspect. For example, witnesses to disturbing events tend to make errors in recollecting details, or may be animated by a bias that the police either encourage or will not seek to discover. Similarly, confessions by suspects in police custody are as likely to signify psychological coercion by officers convinced they have apprehended the right suspect as they are to demonstrate guilt.[86] Due process therefore insists on formal, adjudicative, adversary fact-finding processes in which the case against the accused is tested before a public and impartial court. Because of this concern with error, the due process model also rejects the crime control desire for finality. There must always be a possibility of a case being reopened to take account of some new fact that has come to light since the last public hearing. Unlike crime control, the due process model insists on the prevention and elimination of miscarriages of justice as an end in itself: 'The aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty'.[87]

Other values upheld by the due process model include the primacy of the individual citizen, and thus the complementary need for limits on official power. Controls are needed to prevent state officials exercising coercive powers in an oppressive manner even if this impairs the efficiency of the system. In certain situations, concern with abuse of power in the due process model takes precedence over reliability. Suppose, for example, that the police had illegally obtained evidence that established that a suspect had almost certainly committed a murder. The due process model would insist that the evidence be excluded at trial; if there was no other evidence of guilt, the suspect would walk free because of the procedural irregularity. It is only by demonstrating to officials that there is nothing to be gained by abusing power and breaking rules that adherence to them can be guaranteed. The due process model is also concerned with the upholding of moral standards as a matter of principle. In the belief that an important way to encourage and affirm law-abiding behaviour is by example, unlawfully obtained evidence has to be excluded.[88] To do otherwise would be to undermine the moral condemnation conveyed by a finding of guilt.[89]

The due process model also upholds the ideal of equality: that everyone should be in the same position as regards the resources at their disposal to defend against a criminal charge. Thus,

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[86] There is a wealth of literature on this issue. See, for example, Henkel, L and Coffman, J 'Memory Distortions in Coerced False Confessions: A Source Monitoring Framework Analysis' *Appl. Cognit. Psychol*. 18 (2004) 567–588

87 Packer (1968: 165).

88 *Ibid*: 231–2

89 In his 'reconstruction' of Packer's models, Aranella (1996: 21), points out that: 'A public trial, if fairly conducted, sends its own message about dignity, fairness, and justice that contributes to the moral force of the criminal sanction.'

whenever the system affords a theoretical right for a lawyer to advise or represent a client, the due process model insists that those who cannot afford a lawyer should be provided with one for free. Lawyers play a central part in this model since they should bring into play the remedies and sanctions which due process offers as checks against the operation of the system.

Finally, the due process model is sceptical about the morality of the criminal sanction. It notes that in practice this sanction is used primarily against the psychologically and economically impaired. To seek to condemn and deter these people for their supposedly free-will decision to breach the criminal law smacks of cruel hypocrisy, particularly when there is little attempt to rehabilitate offenders. As Packer puts it, 'doubts about the ends for which power is being exercised create pressure to limit the discretion with which that power is exercised.'[90]

At the risk of over-simplification, one can summarise the main conflict in values between the two models in the following way. Crime control values prioritise the conviction of the guilty, even at the risk of the conviction of some (fewer) innocents, and with the cost of infringing the liberties of suspects to achieve its goals. Due process values prioritise the acquittal of the innocent, even if risking the frequent acquittal of the guilty, and giving high priority to the protection of civil liberties as an end in itself. Further, whereas due process seeks to maximise adversarialism by introducing obstacles and hurdles for the prosecution to surmount at every stage, crime control seeks ways of ensuring that the adversarial contest never gets beyond the encounter between the police and the suspect in the police station. Due process and adversarial ideology thus can work harmoniously together, whereas crime control values tend to subvert adversarial procedures. Indeed, with its emphasis on trusting the police and prosecution to get at the truth in a reliable manner, the crime control model expresses some of the ideological elements which underpin the inquisitorial model. Both models employ powerful arguments and Packer himself suggested that anyone who supported one model to the complete exclusion of the other 'would be rightly viewed as a fanatic'.[91]

1.5.3 **What are the goals of Crime Control and Due Process?**

Some criticisms of Packer's analytical framework (and how it has been used) derive from a misunderstanding about the goals and values each model encompasses.[92] Campbell, Ashworth and Redmayne, for example, suggest that the models should be reconstructed so that Crime Control would be the purpose of the system, but that pursuit of this purpose should be qualified out of respect to Due Process.[93] Similarly Smith argues that 'the Crime Control Model is concerned with the fundamental goal of the criminal justice system, whereas the Due Process Model is concerned with setting limits to the pursuit of that goal. Due Process is not a goal in itself.'[94] These criticisms place too much weight on the labels Packer applied to his models. In particular, it is mistaken to regard the due process model as merely a negative model in which the only aim is to protect suspects. The two models share much common ground including the assumptions that the 'criminal process ordinarily ought to be invoked by those charged with the responsibility for doing so when it appears that a crime has been committed' and that 'a degree of scrutiny and control must be exercised with respect to the activities of law enforcement officers,. . . the security and privacy of the individual may not be invaded at

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[90] Packer (1968: 171)
[91] Packer (1968: 154)
[92] For fuller discussion of abuse of Packer's models see Roberts P, 'Comparative Criminal Justice Goes Global' (2008) 28 *Ox J of Legal Studies* 369 at 378-9, and the third edition of this work at 22-25.
93 Campbell L, Ashworth A and Redmayne M, *The Criminal Process* 5th edn (Oxford: OUP, 2019).
94 Smith D, 'Case Construction and the Goals of Criminal Process' (1997a) 37 BJ Crim 319 at 335. See, to similar effect, Aranella (1996: 19), and Damaska (1973: 575).

will'.[95] It thus follows that both models incorporate the belief that law enforcement is socially desirable[96] (because of its crime preventive effects) and both incorporate the belief that there must be some limits to the power of the government to pursue this underlying aim. The difference between the models, put simply, is about what those limits should be.

Choongh criticises Packer from an empirical standpoint, arguing that neither of his models adequately explains the experiences of a significant minority of those who are arrested and detained at the police station. For these detainees there is never any intention by the police to invoke the criminal process:

> "Arrest and detention is not, for this group of individuals, the stepping stone onto Packer's conveyor belt or the first stage of an obstacle course. It represents instead a self-contained policing system which makes use of a legal canopy to subordinate sections of society viewed as anti-police and innately criminal."[97]

He argues that the police are here operating a 'social disciplinary' model, which encompasses the belief that:

> "an acceptable and efficient way to police society is to identify classes of people who in various ways reject prevailing norms because it is amongst these classes that the threat of crime is at its most intense . . . the police are then justified in subjecting them to surveillance and subjugation, regardless of whether the individuals selected for this treatment are violating the criminal law at any given moment."[98]

Choongh's analysis will be familiar to criminologists who have highlighted political tendencies to 'other' and 'demonise' 'undesirable' sections of society, thereby justifying intensive surveillance and control of such groups[99] (such as through the civil preventive orders discussed above). However, Packer was constructing ideal–type models of the criminal process, not of policing; it is not surprising that 'social disciplining' was not central in his analysis, nor that empirical evidence might reveal flaws. Policing encompasses many activities: maintaining surveillance over public space, quelling disorder, finding missing persons, directing traffic and so on. Only some of these are associated with controlling crime and even fewer are necessarily related to the formal criminal process. What Choongh's work usefully does is highlight the way in which the police sometimes use resources provided by the criminal process (such as interrogation powers) to pursue some part of the broader police mission. Nonetheless, Packer was too astute an observer to have overlooked that police powers could be used to subject whole classes of people to surveillance and subordination.[100] Thus he noted that the crime control model rejected the due process idea that arrest should only be allowed when there was reason to believe that a specific individual had committed a specific crime.[101] Rather, 'people who are known to the police as previous offenders should be subject to arrest at any time for

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95 Packer (1968: 155–6).

96 Note the comment by Packer (1968: 163) that the due process model 'does not rest on the idea that it is not socially desirable to repress crime, although critics of its application have been known to claim so.' See also Duff P, 'Crime Control, Due Process and "The Case for the Prosecution" ' (1998) 38 *BJ Crim* 611.

97 Choongh S, 'Policing the Dross: A Social Disciplinary Model of Policing' (1998) 38 *BJ Crim* 623 at p 625.

98 Choongh (1998: 627). See also Choongh S, *Policing as Social Discipline* (Oxford: Clarendon, 1997).

99 See, for example, Wacquant, L *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Durham, Duke University Press, 2009). These issues are discussed further at 1.9.4.

100 Packer (1968: 178), also noted that the criminal law itself might be so vaguely defined (e.g., vagrancy and disorderly conduct laws) as to make 'social disciplining' lawful.

101 Packer (1968: 176).

the limited purpose of determining whether they have been engaging in anti-social activities . . .'.[102] Secondly:

> "anyone who behaves in a manner suggesting that he may be up to no good should be subject to arrest for investigation: it may turn out that he has committed an offence, but more importantly, the very fact of stopping him for questioning, either on the street or at the station house, may prevent the commission of a crime. As a third instance, those who make a living out of criminal activity should be made to realise that their presence in the community is unwanted if they persist in their criminal occupations; periodic checks of their activity, whether or not this involves an arrest, will help to bring that attitude home to them."[103]

Packer clearly linked these forms of 'social disciplining' to the ultimate goal of controlling crime. So does Choongh, albeit unwittingly.[104] The type of 'social disciplining' documented in Choongh's work highlights an important strand of crime control ideology. But it does not justify the construction of a new model of the criminal process. We will see that this element of crime control philosophy has increased since neoliberal political ideology was adopted by successive governments since the late 1970s.

We have now clarified what adherents to crime control and due process models see as the purpose of criminal justice. Whether one believes the system is (or should be) governed predominantly by due process or crime control values, the purpose of the system would (or should) remain the same: to control crime, but with some protections for suspects. Where one locates an actual criminal process on the spectrum of possibilities represented by the two models depends largely on the nature and extent of those protections.

1.5.4 **English criminal justice: Due Process or Crime Control?**

The English criminal system, like the American, has typically been characterised as one which emphasises adversarial procedures and due process safeguards. In terms of the formal structure we can observe these safeguards intensifying as a person's liberty is progressively constrained.[105] The least constraining exercise of police power is simple questioning of someone who is merely a citizen, not a suspect. Since the questions are not aimed at incriminating the individual no due process protections are needed, but no compulsion can be exercised either. The police are here in an information-gathering or inquisitorial mode.

As soon as the police have any reason to suspect the individual an 'adversarial' relationship is formed; the citizen becomes also a suspect. The police now have the task of collecting evidence of what they believe the suspect has done so that this can be proven to the satisfaction of the courts. To assist them in this task the law provides them with various powers and, in order to guard against the misuse of these powers, due process protections begin. In general, only if there is 'reasonable suspicion' can coercive powers be exercised to search or to arrest a suspect.[106] On arrest the suspect is usually taken to a police station and detained. This requires

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102 Packer (1968: 177). Compare with Choongh (1998: 628): 'Having arrested individuals once, this in itself becomes reason for keeping them under surveillance . . . an individual becomes permanently suspect rather than a suspect for a particular offence.'

103 Packer (1968: 177).

104 See Choongh (1998: 629, 632) for example.

105 All the points made in this sub-section are discussed in later chapters, at which point supporting references are provided.

106 Citizens can also be asked to attend police stations to be interviewed voluntarily, and the police have made greater use of voluntary attendance requests in recent years. The status of voluntary attendees is somewhat of a grey area, although many would be arrested and formally become suspects if they refused to attend voluntarily. This issue is discussed further in ch.3

further due process justification because civil liberties are further eroded by detention and its associated procedures such as interrogation and strip-searches. Only if detention is adjudged to be 'necessary' (i.e., in a broad sense of furthering the investigation) can it be authorised. If detention is authorised, further forms of due process protection come into play, such as the right to legal advice. In order to charge and prosecute a detainee, more evidence is required and further protections are provided – vetting of the case by the Crown Prosecution Service and a grant of legal aid to prepare a defence. In order to convict there must be yet more evidence (proof beyond a reasonable doubt). The increasingly stringent nature of these protections is in accordance with Packer's portrayal of due process as an obstacle course with each successive stage presenting impediments to carrying the citizen any further along the process. This should mean that few factually innocent persons are found legally guilty, or are carried too far down the course, but it will also mean that many factually guilty persons will be ejected from the system for lack of the required standard of evidence.

If we look at the way the system actually operates, however, it displays many features characteristic of a crime control model. Decisions to arrest and stop-search are often made on police instinct rather than reasonable suspicion,[107] and detention to obtain a confession is habitually and uniformly authorised. Perhaps most telling is the fact that the majority (approximately 70% in Crown courts,[108] and 76% in magistrates courts[109]) of defendants who are prosecuted plead guilty and forego their right to an adversarial battle. The prosecution evidence is not tested, and 'proof' beyond reasonable doubt is constituted by the plea itself. The probability in such a system is that many more factually innocent persons will be found legally guilty, and that many more factually guilty persons will be convicted, than if the system actually operated in the formal manner described earlier. In Packer's imagery, the system operates as a conveyor belt, moving suspects through a series of routinised procedures that lead, in the vast majority of those cases that reach court, to conviction.

Packer's conclusion[110] in the American context was that the actual operation of the criminal process conformed closely to crime control, but that the law governing that process (as developed, in particular, by the Supreme Court) expressed due process ideology. He identified a gap, in other words, between the law in books and the law in action. But as Packer himself pointed out, it was perfectly possible for the Supreme Court to change tack and develop case law that expressed crime control values, as we later address in the English context. Weisselberg argues that such a change of tack has effectively occurred in America as the Supreme Court has encouraged police practices undermining safeguards afforded to suspects.[111] If the rules themselves were in harmony with the crime control model, then there would be no need for the police to break them in order to achieve their central goal (if such it is) of repressing crime efficiently. The only gap that would then exist would be between the law in books and due process ideology.

The question of where on the spectrum between crime control and due process English criminal justice is today to be located must, therefore, take account of both the formal law as laid down

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[107] For a thorough discussion of policing culture that highlights these issues, see Bowling B, Reiner, R and Sheptycki J *The Politics of the Police* 5th edn (Oxford; OUP, 2019).

[108] Ministry of Justice *Criminal court statistics (quarterly): July to September 2017* https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-july-to-september-2017

[109] Soubise, L 'Prosecuting in the magistrates' courts in a time of austerity'(2017) *Criminal Law Review* 847

110 Packer (1968: 239–40).

[111] Weisselberg, C 'Mourning Miranda' (2008) 96 *California Law Review* 1519

in statutes and case law, and the actual operation of the system by officials operating within that legal framework. The first edition of this book, published in 1994, attempted to do this and concluded that the criminal process was far more oriented towards the crime control model than surface appearances might suggest, that there was a historical drift towards the crime control model, but that due process inspired safeguards remained, and would continue to remain, important. Subsequent events have confirmed that assessment, although the drift towards crime control has accelerated. For example, we shall see that some stop-search powers can be used lawfully even without reasonable suspicion. We will also see greater restrictions on due process rights, such as reduced access to legal aid to secure representation that can further undermine other due process rights, such as the right to silence.

Packer's models are the most enduring theoretical framework of criminal justice.[112] However, Packer's models do not identify all the major interests in the criminal process, nor all the major conflicts between them. Although still valuable, these models constitute an inadequate framework for the analysis of criminal justice. The most influential alternative is the human rights approach.

1.6 **The fundamental (human) rights approach**

The human rights approach starts from the position that citizens are rational, rights-bearing subjects. State power must therefore be subject to limits that respect the dignity of the individual. It follows that 'balancing' conflicting criminal justice aims and interests should not be driven by consequentialist calculations of which set of arrangements would produce the most overall benefit to society. Rather, individual rights must be assigned some special weight in the balancing process. The goal of bringing cases to effective trial in the service of crime control is authoritatively constrained by human rights principles instead of (as in Packer's models) merely compromised to a varying extent by conflicting due process principles. This philosophical position has been translated into positive law through the United Nations Declaration of Human Rights (1948) and various regional human rights instruments. For the UK, human rights law derives from the European Convention on Human Rights (ECHR).

The UK has been bound at the international level by the ECHR since 1953.[113] For over forty years thereafter, breaches of the rights set out in the Convention could only be challenged directly before the European Court of Human Rights (ECtHR) in Strasbourg. If the Court ruled that a breach had occurred the UK was obliged to amend the offending law or practice. The recognition that this procedure was cumbersome, slow, and embarrassing to domestic political and judicial elites eventually led to the passing of the Human Rights Act 1998.[114] This requires British courts to take account of the Convention and the decisions of the European Court. If a common law precedent is found to be inconsistent with the Convention, the latter must be followed. The position with statutes is different, reflecting a concern to maintain the supremacy of Parliament over the courts. Thus, statutory provisions should be interpreted so far as is possible in accordance with the ECHR, and the Supreme Court (and its predecessor, the House

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[112] Roach K, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999b).

113 In addition, much UK criminal justice is subject to European Community law and, therefore, to judicial supervision from the European Court of Justice. See, e.g., Baker E, 'Taking European Criminal Law Seriously' [1998] Crim LR 361, though this is unlikely to survive Brexit from January 2021.

114 Young J, 'The Politics of the Human Rights Act' (1999) 26(1) JLS 27. Recent Conservative governments have toyed with the idea of repealing the Human Rights Act 1998 and reverting to the historical position of removing direct access to the ECtHR.

of Lords) has repeatedly emphasised the radical and expansive nature of this interpretive obligation.[115] But if a court finds that a UK statute cannot be interpreted in accordance with the Convention, the court may make a 'declaration of incompatibility'. This does not invalidate the offending legislation. A 'fast-track' procedure allows (but does not require) Parliament to amend the incompatible legislation.[116]

If, post Brexit, the Human Rights Act 1998 is repealed, as some exit campaigners hoped, the English courts will still be bound by the principles of the ECHR, as they were between 1953 and 1998. But it will be more difficult for citizens to enforce their rights under the ECHR than it is now. The full implications of Brexit on human rights are uncertain and difficult to predict. There is likely to be a significant impact on police and judicial co-operation in relation to cross border crime,[117] and data sharing.[118] The relationship between criminal law and human rights in the post Brexit landscape will be constitutionally complex, with competing issues of sovereignty, and the benefits of cross border co-operation at stake.[119] Nevertheless, the rights enshrined in the ECHR and elaborated through decisions of the ECtHR will still provide criteria to evaluate our criminal justice system.[120] There are a number of problems with using them in this way though.

1.6.1 **Vagueness and inconsistency**

Many ECHR rights are vague in the sense that their scope is uncertain. Take, for example, the Art 3 prohibition of inhuman or degrading treatment. Is it degrading to be arrested in public, or to have saliva scraped from inside one's mouth, for example? This vagueness is, of course, a quality of all legal rules, since they are inevitably 'open-textured' to a greater or lesser degree.[121] Rules always require interpretation and consideration of how they are to be applied in any given situation. But, like most international treaties, ECHR rights are particularly vague (and modest in scope), reflecting the need to achieve consensus amongst states with radically different legal traditions. One consequence of this is that no-one can simply ask the ECtHR (or a domestic court) to review the compatibility of national laws with the Convention in the abstract. Rather, specific individuals have to make a case that their human rights were infringed on a specific occasion.[122] This means that judgments are sensitive to the facts of their particular cases and may not provide definitive or indicative answers to the question of whether a law or legal practice in itself might be in breach of the Convention (in other factual circumstances or all circumstances). Even under ideal conditions it would take much litigation before the parameters of human rights requirements become reasonably clear. But the ECtHR is overloaded and lacks the capacity to adjudicate most applications it receives in the way it would

115 E.g., *A (No 2)* [2001] UKHL 25, [2002] 1 AC 45; *Ghaidan v Godin-Mendoza* [2004] UKHL 30.
116 A useful introduction to the Act and its reception is provided by Wadham et al, *Blackstone's Guide to the Human Rights Act 1998* 4th edn (Oxford: OUP, 2007).
117 Historically the UK has resisted calls for more integration of policing expertise, and that resistance may strengthen after Brexit with negative effects on the effective policing of crime (Weyembergh, A (2017) Consequences of Brexit for European Union Criminal Law *New Journal of European Criminal Law* Vol 8(3) 284-299)
118 Garside, R. Grimshaw, R. Ford, M and Mills H (2019) *UK Justice Policy Review* Vol 8 Centre for Crime and Justice Studies
119 Mitsilegas, V 'European Criminal Law After Brexit' *Criminal Law Forum* (2017) 28:219–250
120 For a full explanation of the interaction between human rights and criminal justice, see Emmerson, B. Ashworth, A. Macdonald, A and Summers, M (2012) *Human Rights and Criminal Justice* Sweet and Maxwell
121 Hart H, *The Concept of Law* (Oxford: Clarendon, 1961). A good example is the 'fair trial' right (Art 6): see for example, *Al-Khawaja v UK* (2012) 54 EHRR 23 discussed in Hoyano L, 'What is balanced on the Scales of Justice? In search of the Essence of the Right to a Fair Trial' [2014] Crim LR 4. This is discussed further in ch. 9.
122 See Munday R, 'Inferences from Silence and European Human Rights Law' [1996] Crim LR 370.

need to in order to shape the law coherently and consistently with its earlier decisions.[123] Moreover, the Human Rights Act merely requires domestic courts to take account of (rather than regard themselves as bound by) decisions of the ECtHR. Even were this not so, the particularly open-textured nature of the Convention rights and the fact they often conflict with each other and with other important interests leaves an enormous amount of discretion to judicial elites in determining 'our human rights' and judges will naturally differ in their determinations of such issues. Uncertainty of scope, inconsistency and incoherence are thus key features of Convention rights, notwithstanding the large degree of consensus around some issues (e.g., use of physical violence to extract a confession is impermissible).

1.6.2 **Human rights can be 'qualified'**

While the term 'human rights' might be thought of as connoting something inviolable, this is not true of most Convention rights. The exceptions are the rights to life (Art 2) and not to be subjected to torture or inhuman or degrading treatment or punishment (Art 3). These are 'absolute' in the sense that they cannot be legitimately traded off against other rights or interests, or derogated from during times of national emergency. There is, however, a high threshold to be reached before the police will be in breach of Art 2 obligations to prevent death as a result of their negligence.[124] At the other extreme are 'qualified' rights, such as freedom of association (Art 11) and privacy (Art 8). For example, no invasion of Art 8 is allowed unless it is:

> "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

It is difficult to think of a law infringing a qualified right that could not be defensibly linked to the furtherance of the many 'interests' and goals of 'protection' listed here,[125] so the real question tends to be whether such an infringement is 'necessary in a democratic society'. This 'proportionality test' requires that infringements with rights must be limited and proportionate to the aim sought to be secured. Thus, a major infringement of a Convention right to secure some marginal increase in crime control should always fail this test. Whether the proportionality test is difficult for the State to satisfy in practice is debatable, however, as we shall see throughout this book. For example, in chapter 6 we show that the human rights era has made little difference to the ability of the police to invade people's privacy through the use of electronic surveillance ('bugging') devices.

1.6.3 **Human rights can be 'derogated' from**

Most Convention rights come somewhere between 'qualified' and 'absolute' rights. These 'strong' rights include the right to liberty and security of the person (Art 5) and the right to a fair trial (Art 6). Art 15 of the ECHR provides that, at a time of 'public emergency threatening

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123 Greer S, 'Protocol 14 and the Future of the European Court of Human Rights' [2005] Public Law 83; Greer S, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006). Also see Amos M, 'The Impact of the Human Rights Act on the United Kingdom's performance before the European Court of Human Rights' (2007) Public Law 655 at 657 & 671.

124 *Hertfordshire Police v Van Colle* [2008] UKHL 50; *Michael and Others v South Wales Police and Another* [2012] EWCA Civ 981. In the latter case, the Court of Appeal dismissed the negligence claim but upheld the Art 2 claim which would allow the Michael family to proceed to trial on that issue. Both decisions were appealed to the Supreme Court, which upheld the decision that the Art 2 claim should be allowed to proceed to trial in Strasbourg (*Michael* [2015] UKSC 2). As of April 2019 the case had not yet reached the ECtHR.

125 '... there is hardly a case in which either the domestic courts or Strasbourg has found the state to be acting for an illegitimate aim, so broad are the specified categories': Phillipson G 'Bills of rights as a threat to human rights: the alleged "Crisis of Legalism"' (2007) *Public Law* 217 at 220.

the life of the nation' the state can take measures derogating from (i.e., in breach of) these 'strong' rights. Such measures must be 'strictly required by the exigencies of the situation'. These tests are far more easily satisfied than one might imagine given the drastic imagery they embody. Thus, in the 1970s, the UK entered a derogation in respect of the 'emergency' legislation prompted by the situation in Northern Ireland and its related breaches of the Art 5 criteria governing the legality of arrest and extended detention. The derogation was adjudged valid by the European Court on successive occasions.[126] This derogation was finally withdrawn on 19 February 2001. You might think that there would be a change in political and legal culture when the Labour government 'brought rights home' through the passing of the Human Rights Act 1998. But no: the government registered a new derogation from the Convention for its new legislation soon after (see section 3.3.3 for discussion).

The scope for derogation makes the human rights framework unstable. Several States derogated from the ECHR in order to address the COVID-19 pandemic.[127] However, even without a formal derogation, the ECtHR is still able to take into consideration the context and the provisions of international humanitarian law when interpreting and applying the provisions of the ECHR, meaning that lack of a formal derogation does not necessarily make breach of the provisions unlawful.[128]As different levels of court may differ on this question, and the conditions of the 'emergency' are bound to shift over time, this creates yet more uncertainty and inconsistency, rendering attempts to evaluate criminal justice in accordance with human right standards a speculative exercise.

1.6.4 **Human rights offer little more than a minimalist safety net**

Domestic courts usually interpret the ECHR in minimalist ways that do not interfere with domestic criminal justice laws and practices. Since they do not show a similar reluctance to interfere in some other areas of social policy,[129] it is difficult to attribute this minimalism to a concern with upholding Parliamentary supremacy or as demonstrating deference to the supposedly specialised knowledge and skills of the Executive (although no doubt these factors play a part too). Rather, the judges' assessments of when the community interest in law enforcement outweighs human rights usually express crime control values.[130] As Ewing and Tham observe: '... the standard at which the level of rights' violations is set is now so low that even serious restraints on liberty can cross the hurdle of legality with relative ease.'[131] The Government's own Department for Constitutional Affairs noted in 2006 that 'the Human Rights Act has not seriously impeded the achievement of the Government's objectives on crime, terrorism or immigration' and added that arguments 'that the Human Rights Act has

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126 *Ireland v UK* (1978) 2 EHRR 25; *Marshall v United Kingdom* (app. no. 41571/98, Judgment of Court 10 July 2001). See generally Marks S, 'Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights' (1995) 15 OJLS 68.

127 Natasha Holcroft-Emmess, "Coronavirus: States Derogating to Suspend Human Rights Obligations", (OxHRH Blog, 27 March, 2020), <http://ohrh.law.ox.ac.uk/coronavirus-states-derogating-to-suspend-human-rights-obligations/>, 27 March 2020. See also European Court of Human Rights *Factsheet – Derogation in time of emergency* March 2020 Available: https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf. At the time of writing, it is unclear whether the powers in the Coronavirus Act 2020 will require a derogation to be lodged.

128 *Hassan v*. The *United Kingdom*. (Application no. 29750/09) (2014)

129 See recent analysis of the judiciary in McConville, M and Marsh, L *The Myth of Judicial Independence* (OUP, 2020). For brief discussion of how the judges are more willing to protect rights of a cultural nature than those which challenge political or economic arrangements, see Lustgarten L, 'Human Rights: Where Do We Go From Here?' (2006) 69(5) MLR 843 at 848.

130 For an early analysis see Ashworth A, 'Criminal Proceedings After the Human Rights Act: The First Year' [2001] Crim LR 855. See also the critique of *Brown v Stott* [2001] 2 WLR 817 by Ashworth and Redmayne (2005: 41) which, they say, set 'the tone for many of the subsequent decisions under the Human Rights Act.'

131 Ewing K and Tham J-C, 'The continuing futility of the Human Rights Act' (2008) *Public Law* 668 at 682.

significantly altered the constitutional balance between Parliament, the Executive and the Judiciary have been considerably exaggerated.'[132] As you read through this book, note where, when and why the ECtHR and domestic courts use the ECHR and HRA to limit government legislation, and make your own minds up.

Admittedly, the courts, Parliament, and all other public authorities must now incorporate the human rights framework into their decision-making.[133] But even this brief discussion of governmental and judicial decision making shows that the ECHR leaves a huge amount of room for manoeuvre. This should not be taken as implying that human rights are unimportant. They provide a legal safety-net, preventing the state from creating the kind of harsh and repressive criminal justice typical of totalitarian states. The influence of the ECHR should be seen as much in what the state has not done in the criminal justice arena as in what it has done. But while the ECHR 'safety net' must be welcomed, we must also recognise that it has little influence beyond that.

1.6.5 **Human rights coverage is patchy**

A further problem with using human rights as evaluative criteria is that they provide no guidance on numerous important and controversial questions such as should interrogation be judicially controlled, should juries or other lay elements always have a role in trials, and should decisions to prosecute be made by law enforcers or lawyers? Even supporters of the ECHR recognise that in many respects the protection it offers to human rights is deficient.[134] For example, it makes virtually no special provision for the rights of vulnerable groups of suspects, such as juveniles or the mentally disordered, nor is there any explicit reference to the interests of victims or witnesses. The ECtHR has made the deficiency good to some extent by stating that the Art 6 right to a fair trial applies to victims and witnesses as well as the accused (see section 1.7 and ch 12). The ability of the human rights approach to take this kind of issue into account is a major advance on the Packer models, where the Accused v State spectrum has little place for victim considerations. But how far should it go? Guidance issued by the ECtHR indicates that Art 6 does not explicitly require courts to take the interests of witnesses into consideration, but that signatories' criminal proceedings should be organised in such a way that the interests of victims and witnesses are not unjustifiably impaired.[135] This seems to require some sort of case sensitive balancing act by the domestic courts, who we already know are given wide discretion and tend to uphold Crime Control values. While the Council of Europe has issued various Recommendations about the rights of victims,[136] we shall see that the scope and substance of victims' rights remains elusive.

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[132] Department for Constitutional Affairs, Review of the Implementation of the Human Rights Act (2006a), http://www.justice.gov.uk/docs/full_review.pdf p.4, (accessed 5 January 2010), also cited by Ewing and Tham (2008: 691).

133 Various mechanisms have been put in place to achieve this e.g. a Parliamentary Joint Committee on Human Rights that assesses the implications for human rights of proposed legislation; s.19 of the Human Rights Act 1998 requires Ministers in charge of a Bill to state their view as to whether the measure is compatible with Convention rights; and some of the most controversial anti-terrorist legislation is kept under a variety of forms of extra-governmental review.

134 See, for example, Campbell, Ashworth and Redmayne (2019).

[135] ECtHR (2018) *Guide on Article 6 of the European Convention on Human Rights* https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf

[136] See Recommendation No. R (83) 7, discussed in McBride, J "The case law of the European Court of Human Rights on victims' rights in criminal proceedings" Council of Europe https://rm.coe.int/council-of-europe-georgia-european-court-of-human-rights-case-study-vi/16807823c4, which acknowledges that coverage of the rights of victims is anything but comprehensive. See further McBride, J *Human rights and criminal procedure: the case law of the European Court of Human Rights* (Council of Europe, 2018).

1.6.6 **The maximalist (legalistic) alternative and the margin of appreciation**

All of this will be disappointing to those academics, practitioners and pressure groups who would like to see human rights play a much greater part in criminal justice. These 'maximalists' attempt to solve the 'no more than a safety net' and the 'patchy coverage' problems by seeking (through doctrinal argument and test-cases that draw on those arguments) to elaborate and extend the scope of the rights enshrined in the ECHR and thus (through the HRA 1998) in English law. In an unusually powerful cross-fertilisation of ideas between academic and practising lawyers, many specific legislative and common law rules in almost every area of criminal justice have been tested against the ECHR, and some detailed laws have been 'read off' from it. Cases have been decided by the ECtHR and by English Courts under the HRA on, to take just a few examples, the reverse onus, drawing inferences of guilt from silence, and legislative presumptions against bail for very serious crimes.[137] Yet, as we shall see, few of these legal challenges are successful. This is because in deciding between 'maximalist' and 'minimalist' positions, the ECtHR, through its 'margin of appreciation' doctrine, subjects a state's assessment of the need to invade rights to a relatively undemanding standard of judicial review. In recent decisions, the ECtHR has emphasised that the general duty of the court to uphold the right to a fair trial will depend on the circumstances of the case, leaving domestic courts much room for manoeuvre on the basis of particular facts.[138] Even when States derogate from the ECHR the ECtHR rarely interferes, again judging that states are best placed to judge when invasions of rights are 'needed' in order to deal with an 'emergency'. Thus:

> "On one level, it is impossible to regard Strasbourg rulings otherwise than as pronouncements of the very minimum protection to be afforded . . . The margin of appreciation afforded to all States in all aspects of the Convention is well established . . ."[139]

When policy-makers draft legislation and guidance they intend it to be 'human rights compliant' in this minimalist sense. Gearty says of those elements of the Terrorism Act 2000 that did not require derogation:

> "It is noteworthy that none of these concessions to human rights law involved the bald elimination (as opposed to mere procedural elaboration) of powers desired by the executive; right from the start the human rights standard set by the Act [the HRA] … has been a relatively low one, with the consequence that only a rather undemanding jump by the executive brings its repressive practices within the zone of human rights compliance."[140]

UK courts are usually (though not always) are similarly minimalist.[141] By contrast, 'maximalists' want as much criminal justice law and policy as possible to be 'read off' from the ECHR. They rightly see the 'human rights compliance' approach of the policy makers as giving them almost as much room to manoeuvre as they had before the HRA, allowing a drift towards the crime control end of the spectrum. We characterise 'maximalists' as 'legalistic' because, whenever the ECHR is open to interpretation, they attempt to argue that the law *is*

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[137] On the reverse onus see section 1.2.1. The other examples are dealt with in chapters 5 and 8 respectively.

[138] See *Ibrahim and others v UK* [2016] ECHR 750

139 Ormerod D, 'ECHR and the Exclusion of Evidence: Trial Remedies for Article 8 Breaches' [2003] Crim LR 61 at 65.

[140] Gearty C '11 September 2001, Counter-terrorism, and the Human Rights Act' (2005) 32 *Jo Law and Society* 18 at 21-22.

[141] 'It is of course open to member states to provide for rights more generous than those guaranteed by the Convention but such provision should not be the product of interpretation of the Convention by national courts... The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time...' per Lord Bingham in *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323 at [20]. For critique see Lewis J, 'The European Ceiling on Human Rights' (2007) *Public Law* 720.

what they (and, often, we) *want* it to be. But we will see throughout this book that neither courts nor governments are taken in by this.[142] Thus maximalism is unlikely to reverse the crime control trend.[143]

1.6.7 **Conflicts between rights and with the priorities of the state**

In its purest form a human rights framework would simply establish inviolable rights to every category of person and in every type of situation where significant freedom is threatened. This would ignore two major problems. First, the more rights there are, the more scope there is for some rights to conflict with others. Second, a real criminal justice system has to be reasonably effective in bringing cases to trial and convicting when there is strong legally obtained evidence.

Both problems are tackled in part via the hierarchy of 'absolute', 'strong' and 'qualified' rights discussed earlier. If a case involved a conflict between the right to a fair trial (strong) and to privacy (qualified) the former would trump the latter. And effectiveness can be balanced against 'qualified' rights and used to justify derogation from 'strong' rights. But what about when rights in the same position in the hierarchy clash? The classic example is when the rights of complainants to a fair trial clash with those of defendants. This first arose in the domestic courts in *A*, which concerned the prohibition of the use of sexual history evidence in rape cases: a vital element in the right of complainants to a fair trial, but arguably undermining of the defendant's right to a fair trial.[144] Although the impact of the Victims' Code created by the Domestic Violence, Crime and Victims Act 2004 on human rights appears to be negligible (section 1.7 and ch 12), the more rights are assigned to victims and witnesses (and maximalists, remember, seek to assign more and more rights to deserving parties) the more clashes like this there will be.

The way human rights advocates deal with the demands of effectiveness is illustrated in Ashworth's discussion of why the principle that the innocent should be protected against wrongful conviction should not be regarded as absolute.[145] First, he acknowledges that attempts to introduce ever-more elaborate safeguards against wrongful conviction could only be achieved by diverting resources from other important social needs, such as education, health, and social security (which could themselves be described in the language of human rights). To put it bluntly, how many hospitals are we prepared to sacrifice for the sake of achieving some marginal (and unquantifiable) increase in the protection of innocent people against wrongful conviction? Second, the more elaborate safeguards against wrongful conviction became, the

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[142] See, again, Lord Bingham in *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323 [20].

[143] This is one reason why some people argue that human rights policies, and the laws that stem from them, should be argued for at the political level rather than in the courts. See, for example, Gearty C, *Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2006); Campbell T, (2006) *Rights: A Critical Introduction* (London: Routledge, 2006); Munro V, 'Of rights and rhetoric: discourses of degradation and exploitation in the context of sex trafficking' (2008) 35 JLS 240.

[144] [2001] 2 Cr App R 351. The decision predictably provoked controversy amongst academics. Nicol D, 'Law and Politics after the Human Rights Act' (2006) *Public Law* 722 at 739, for example, saw the House of Lords as 'blinded by its zeal for the rights of male defendants' showing scant regard for the rights of women, 'the underprivileged majority of the population'. Hickman T, 'The courts and politics after the Human Rights Act: a comment' (2008) *Public Law* 84 at 93, responded by arguing that the House 'came down fearlessly in favour of the vulnerable minority with the most immediate call on the courts for protection; namely accused persons...': Among the many later cases on the point are *W* [2005] Crim LR 965 and *Gjoni* [2014] EWCA Crim 691. See also G [2008] UKHL 37 for an example of a clash of Art. 8 rights held by a complainant and an accused in relation to the offence of rape of a child under 13. All further discussed in ch 10.

145 Ashworth A, *The Criminal Process*, 2nd edn (Oxford: OUP, 1998) pp 50–52.

more difficult it might be to convict the actually guilty. Ashworth's conclusion is that the criminal process should be organised in such a way as to render the risk of wrongful conviction 'acceptably low', and that this objective necessitates research both into the sources of error and the consequences of erecting safeguards against them.[146] This leaves open the questions of what is to count as 'acceptably low', how much we are prepared to spend on achieving this, how much we are prepared to infringe the rights of victims in erecting such safeguards, and how we are to know when the actually guilty have been acquitted (and the innocent protected).

Overall, the hierarchy in the ECHR provides inadequate answers to the problems of conflicts of rights and with state priorities. As Pratt argues, there is scope for human rights to be '*redefined* according to the new framework of knowledge in which they are situated'.[147] The more maximalist the approach, the greater will be these problems. But the more minimalist the approach, the more gaps that will need to be filled. Beyond a fairly basic 'safety net' there will remain considerable room for debate over the specific content of most laws and policies, allowing a vast amount of permissible space between the crime control and due process ends of Packer's spectrum, not to mention much leeway concerning the rights of victims. We are therefore still left with the question of how to evaluate the criminal justice system.

1.6.8 **Individualistic rights and legalistic remedies**

A final problem is that the ECHR offers highly individualistic remedies to abuses of power. Its core method of enforcement relies on somebody pursuing a complaint about the treatment they have suffered.[148] This may not be appropriate where abuses of power are taking place against a disorganised and marginalised community as a whole, particularly where members of that community have no faith in law, lawyers or legal institutions. For in such a situation, no-one may be prepared to complain about what is happening, at least not until some considerable time has elapsed. Even then, an infringement might take years to establish; in the meantime, members of a whole community may continue to have their rights abused. Also, it is unrealistic to expect the courts, in their limited and time-pressured role of deciding individual cases, to develop research-based, principled and satisfactory guidelines for, for example, law enforcement bodies on what might constitute an abusive policing method.[149] Another way of guarding against abuse is excluding from trial evidence obtained in breach of the ECHR. But much of the ECtHR's case-law on remedies is 'confusing and unconvincing'[150] and UK courts do not exclude evidence that is obtained in breach of 'qualified' rights. Rights without adequate remedies are largely meaningless.

In addition to legalistic remedies such as are offered under the ECHR, we need proactive methods of guarding against systemic abuses eg the committee established under the 1989

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[146] Ashworth (1998a: 51).

[147] Pratt, J 'Risk Control, Rights and Legitimacy in the Limited Lability State' (2017) 57 *British Journal of Criminology* 1322-1339; 1324

148 Under s.7 of the Human Rights Act 1998 those who can invoke Convention rights in legal proceedings are restricted to 'victims' of unlawful acts. This means that campaigning groups, such as Liberty do not have standing in their own right to bring proceedings. Instead, they seek to identify suitable emergent 'test cases' where they can either act on behalf of the 'victim' or intervene in the case as an interested 'third party': Maiman R, '"We've had to raise our game": Liberty's Litigation Strategy under the Human Rights Act 1998' in Halliday S and Schmidt P (eds), *Human Rights Brought Home* (Oxford: Hart, 2004).

149 See Ashworth A, 'Re-drawing the Boundaries of Entrapment' [2002] Crim LR 161, especially at pp 178–9. In the non-crime field see *HL v UK* 45008/99 (5 October 2004) discussed by Clements L, 'Winners and Losers' (2005) 32(1) *J Law and Society* 34 at p 35.

150 A judgment made by Ashworth in the context of ECtHR cases on the implications of breaches of Convention rights on the fairness of any subsequent trial. See his commentary on *PG and JH v United Kingdom* [2002] Crim LR 308 at 310.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The committee may visit the prisons and police stations of any member country and report on conditions that may be in breach of Art 3 of the European Convention on Human Rights. Thus, prisoners in England and Wales, a marginalised group if ever there was one, were found to be on the receiving end of practices that breached this Article.[151] In 2016, the committee made numerous recommendations to UK authorities regarding inadequate safeguards in English prisons.[152] But this does not cover all the rights supposedly protected by the European Convention. In some fields of social life regulatory agencies have been created to encourage, monitor and, more exceptionally, enforce (or assist individuals in enforcing) compliance with legal norms – for example, the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission, now brought together under the Equality Act 2006 as the Equality and Human Rights Commission (EHRC).[153] In the field of criminal justice such generic institutions are supplemented by more focussed regulatory bodies such as government inspectorates and the Independent Office for Police Conduct (see ch 11).

Regulatory bodies have grown substantially in power and importance over the last 20 years or so. As Lustgarten observes, 'human rights scholars have focussed far too much on courts and the judiciary. ... [T]he primary mechanism for securing what legal rights try to achieve is the harnessing of the power of state administrative institutions, not recourse to the courts to stop abuses or to goad resisting governments into taking faltering steps.'[154] Thus, in evaluating the operation of criminal justice, and in thinking about how to protect the interests embodied in human rights[155] we need to look at how regulatory bodies might most effectively encourage the police and prosecution agencies to respect rights (and what might make the latter choose to do so anyway). But we need to be realistic about this. Governments can undermine the power of regulatory bodies by starving them of resources,[156] or can control their activities by determining both their agendas and those of the agencies they are supposed to regulate. Despite these constraints, government inspectorates in the criminal justice field have uncovered problems that have led to progressive change, and some of our critique of criminal justice in subsequent chapters draws on their reports.[157] But the agenda set by successive governments does not prioritise human rights, and Prime Minister Johnson has not (yet) shown any commitment to the ECHR.[158]

1.7 **Victims**

151 See further Evans M and Morgan R, 'The European Convention for the Prevention of Torture: Operational Practice' (1992) 41 ICLQ 590.

[152] *Council of Europe* (2017) https://www.coe.int/en/web/cpt/-/cpt-publishes-report-on-its-uk-visit-criticism-levelled-at-spiralling-violence-and-lack-of-safety-in-prisons-and-inadequate-safeguards-to-protect-pati?desktop=true . The UK response can be accessed on the same site.

[153] The Equality Act 2010 further consolidated anti-discrimination legislation.

[154] Lustgarten (2006: 854).

155 For valuable essays on this theme see Galligan D and Sandler D, 'Implementing Human Rights' in Halliday and Schmidt (2004); Douzinas C 'Left or Rights?' (2007) 34 *Jo Law and Society* 617.

156 Parliament created a Human Rights Commission for Northern Ireland under the Northern Ireland Act 1998. It has not been particularly successful, in part because the legal and financial resources provided to it by the Government have proved inadequate: Livingstone S and Murray R, 'The Effectiveness of National Human Rights Institutions' in Halliday and Schmidt (2004). And non-police enforcement agencies have been especially badly hit by 'austerity' (see ch 7).

[157] Look in the bibliography for reports by, for example, HM CPS Inspectorate. In the field of penal policy the HM Prisons Inspectorate has played a vital role in keeping the values of humanity and decency alive.

[158] Stone, J 'Boris Johnson refuses to commit to keeping UK in human rights convention' *The Independent*, 5 March 2020.

We have noted that the human rights model has only occasionally and briefly dealt with the role of victims, and the due process and crime control models have little to say about them. At the time Packer was writing in the late 1960s, few criminologists gave much thought to victims. But surveys in the 1980s demonstrated their importance in reporting crime to the police, providing information on likely suspects, and acting as witnesses in prosecutions.[159] They also revealed that victims became increasingly dissatisfied with the criminal process over time.[160] Failures to keep them informed about the progress of 'their' case were felt particularly keenly. This is important from an instrumental standpoint as research also suggests that where victims perceive that the values and goals of the criminal process are insensitive to their interests, they are correspondingly less likely to come forward and participate in criminal justice.[161] This realisation led to calls for reform in police practices, pre-trial procedures and in sentencing.

Criminal justice changed slowly. The Victim's Charter, first published in 1990, was symbolically significant in setting out the services a victim could expect from various criminal justice agencies. As we shall see, the Charter and more recent developments, such as the Victims Code, make a lot of promises, but stop short of bestowing enforceable rights on victims.[162] But these 'service rights' do make a concrete contribution to the well-being of victims without undermining the rights of suspects and defendants. We shall also see that victims have also become more involved in decisions about 'their' cases. These 'procedural rights' are far more controversial. Like 'service rights' they are not generally enforceable. This is partly because the adversarial system envisages a contest between the state, representing the public interest, and the individual suspect. This structure does not easily accommodate a third party input such as that of the victim.

Are victims better served by a due process or crime control model of adversarial justice? At first sight the crime control model appears to embody a greater concern for the victim, except where it is distorted by managerialist targets. It offers the prospect of a higher rate of conviction and, by disposing of cases expeditiously through encouraging defendants to plead guilty, reduces the need for victims to come to court and give evidence. This is particularly important in cases involving violence, children, sexual offences and other forms of assault, where giving evidence in public, particularly in cross-examination, may prove highly distressing. A clear example is rape, where the previous sexual history of the victim was in the past often treated by the courts as relevant in some general sense to the issue of consent. There have been major changes over the last 20 years, discussed further in ch 10 and 12. However, problems remain, as illustrated in, for example, the Ched Evans case.[163] Police failures in relation to victims of sexual offences have recently been highlighted again by the Supreme Court judgment in the case of *DSD and NBV*, which found that the police had breached human rights provisions in failing take seriously and properly investigate two allegations made against black cab rapist John Worboys.[164] This illustrates one problem with the 'crime control' model – it leaves the

159 See, for example, Hough M and Mayhew P, Taking Account of Crime (Home Office Research Study no 111) (London: HMSO, 1985).
160 Shapland et al, *Victims in the Criminal Justice System* (Aldershot: Gower, 1985). Rock, P 'Victims' Rights' in Vanfraechem, I. Pemberton, A and Mukwiza Ndahinda, F *Justice for Victims: Perspectives on rights, transition and reconciliation* (2014) Routledge
161 See van Dijk J, 'Implications of the International Crime Victims Survey for a Victim Perspective' in Crawford A and Goodey J (eds), *Integrating a Victim Perspective within Criminal Justice* (Aldershot: Ashgate, 2000).
162 Davies, Pamela (2015) Victims: continuing to carry the burden of justice. *British Society of Criminology Newsletter*, 76 (Summer)
163 *R v Ched Evans (Chedwyn Evans)* [2016] EWCA Crim 452
164 *Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents)* [2018] UKSC 11. Discussed further in ch 7.

police to decide what are the most important crimes in which to invest time and money, and their judgements are sometimes out of step with those of the rest of us.

Understandably, some victims want to have 'their day in court' and some defendants – some of whom are innocent – refuse to plead guilty. Pressure to make the trial experience less of an ordeal for victims has thus mounted. Monitoring of the reasons for ineffective hearings was introduced in the criminal courts following a critical report by the National Audit Office in 1999.[165] This monitoring revealed that an estimated 22,000 cases failed in 2002/3 due to non-attendance of the victim or other witness. As a result the government set up the *No Witness, No Justice* project which involved the police and CPS supporting witnesses more closely through the prosecution process, including arranging pre-trial familiarisation visits to the courts, and helping with travel and child-care. The project was judged a success in reducing witness non-attendance and increasing guilty pleas,[166] but the courtroom is still a scary place for witnesses.[167]

The initiative is also one-sided. The idea that a defence witness might need help with travel or care arrangements or that their presence at court would serve the interests of justice is overlooked by both the initiative and the report. 'No witness, no justice' can thus be deconstructed as meaning 'no prosecution witness, no conviction'. Also it is not self-evident that satisfaction with the criminal justice system will be increased by using witnesses as a means to the end of extracting guilty pleas from defendants. Sometimes inroads have been made into the due process rights of the defendant in order better to protect the vulnerable victim. For example, the law now allows the admission of documentary (which includes videotaped) evidence in some cases, including where the statement is made to a police officer and the maker does not give oral evidence through fear.[168] And some victims are now allowed to give their evidence behind screens, or outside the actual trial in its entirety.[169] But, like a see-saw, as trial procedures become more just or bearable for victims, the defendant's ability to contest the prosecution case may become increasingly undermined. These special measures 'inevitably carry the risk of creating the impression that the defendant is too terrifying to be faced directly.'[170] Moreover, when evidence is admitted solely in documentary form the defence is given no opportunity to cross-examine the maker of the statement concerning its contents. This makes it less likely that defendants can win in court, and thus less likely that they will contest the matter in the first place.

Such measures have been held to be compatible with the Art 6 right to a fair trial so long as the rights of the defence are curtailed as little as possible.[171] That rider notwithstanding, it is evident that crime control and concern for victims can be made to walk hand in hand. The

165 National Audit Office (1999).
166 PA Consulting, No Witness, No Justice – National Victim and Witness Care Project: Interim Evaluation Report (December 2004) p 4.
167 See Jacobsen, J., Hunter, G and Kirby, A (2016) *Inside Crown court.* Bristol; Policy Press, and ch 12 of this edition.
168 See ss.23–26 of the Criminal Justice Act 1988.
169 Section 28 Youth Justice and Criminal Evidence Act 1999; Munro, Vanessa (2018) *The impact of the use of pre-recorded evidence on juror decision-making: an evidence review.* Edinburgh: Scottish Government. (Crime and Justice); and see ch 12.
170 McEwan (2004: 61).
171 For example, the ECtHR has made clear that evidence not subject to cross-examination *should not* be the sole or main evidence on which a conviction is founded, though if a conviction is based solely or decisively on hearsay evidence, this is not automatically a breach of Art. 6. See further *Al-Khawaja and Tahery v UK* (App. No. 26766/05 and 22228/06); *Riat* [2012] EWCA Crim 1509

rhetoric of victims' rights has proved a powerful criminal justice policy making tool, so much so that it has been argued by some that victims' rights are harnessed for crime control. Roach for example argues that a punitive model of victims' rights has emerged replicating some of the assumptions of crime control, He states: 'Victims rights have become the new rights bearing face of crime control'.[172] The rights of victims are pitted against the due process claims of defendants as if a conflict between the two were inevitable.[173]

The benefits that the due process model offers victims are more subtle than those tendered by crime control. Typical crime control techniques employed to secure guilty pleas are offers of reduced charges or reduced sentences. To take the example of rape again, charge bargaining may result in victims learning to their horror that the legal process has labelled the act in question as some lesser wrong such as indecent assault. Similarly, sentence discounts for pleas of guilty may result in convicted offenders receiving a more lenient penalty than victims consider just.[174] Due process, by contrast, opposes such strategies, making it likely that, where there are convictions, the offences proved and the sentences imposed will more accurately reflect victims' suffering – and also giving victims the opportunity to give an account to the court. Some vulnerable victims are more concerned that their story be heard and that they be taken seriously than that they be protected from the rough and tumble of an adversarial trial. Many learning disabled victims, for instance, want to make their public accusation even if the poor memory or communication skills that are a result of their disability reduce the chances of conviction.[175]

More fundamentally, with the due process model's insistence on proof of (rather than belief in) guilt, it offers superior protection to that achieved by crime control against miscarriages of justice. A wrongful conviction represents an injury to the victim (and to wider society), as well as to the defendant, because it means that the offender has not been correctly identified and convicted. When Stefan Kiszko was cleared in 1992 of the murder of Lesley Molseed after spending 16 years in prison, her father summed up the family's feelings, 'For us, it is just like Lesley had been murdered last week'. As counsel for Mr Kiszko put it: 'We acknowledge their pain in having to listen to some of the details surrounding their daughter's death and the new pain of learning that her killer has not, after all, been caught.'[176] In addition, the lengthy campaigns usually needed to bring miscarriages of justice to light must make it nigh impossible for those victimised to put their experiences behind them. And once a conviction has been quashed, reopening and solving a long-closed case is far from easy. Lesley Molseed's actual killer was finally convicted in November 2007, 32 years after her murder.

But while systems in which crime control values predominate may convict more factually innocent persons than would due process-based systems, the former model would also convict far more factually guilty persons. Overall, more victims will be able to see 'their' offenders brought to justice, albeit of a flawed kind, in a crime control-oriented system. Thus, the

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[172] Roach (1999b) 31-32.

[173] Sanders, A and Jones, I ' The Victim in Court' in Walklate, S (ed) Handbook of Victims and Victimology' (2012) Willan Publishing 282-309

174 Manikis, M 'Recognizing Victims' Role and Rights during Plea Bargaining: A Fair Deal for Victims of Crime' (2012) 58 *Criminal Law Quarterly* 411; Alge, D. *"Negotiated Plea Agreements in Cases of Serious and Complex Fraud in England and Wales: A New Conceptualisation of Plea Bargaining?"* (2013) 19(1) Web JCLI

175 Sanders et al, *Victims with Learning Disabilities* (Oxford: Oxford Centre for Criminology, 1997).

176 *The Guardian*, 18 February 1992. Similarly, when the three surviving members of the 'Bridgewater Four' had their convictions quashed after serving 19 years in prison, one of them observed: 'Not only have the police been devious and deceitful by getting innocent men in prison; far worse, after having a child killed the police have deceived Mr and Mrs Bridgewater': *The Guardian*, 22 February 1997.

dilemma that Packer highlighted through the use of his two models of criminal justice exists also in relation to arguments about the treatment of victims. The claims of victims must be weighed against the competing claims of efficiency, defendants, and the need to preserve the moral integrity of the criminal process. However, in weighing the social costs of 'wrongful' convictions and acquittals against each other, it is important to remember that the interests of victims do not fall solely onto one side of the scales.

It must also be recognised that people who report alleged crimes to the police are not always victims. Shop owners have been known to burn down their own premises in order to cash in on their insurance policies. Business people have sometimes staged robberies and burglaries for the same reason, or in order to cover up earlier asset losses through their own fraud or thieving. False allegations of rape are undoubtedly rare, but they happen.[177] Our natural sympathy for victims of crime should not blind us to the fact that one of the objects of the 'adversarial model' is to discover whether prosecution witnesses, including 'victims', are telling the truth or not. A system in which complainants were treated with kid gloves (as happened in Carl Beech's case, discussed in section 1.2), or were allowed to decide the fate of suspects and defendants, would be as indefensible as one which ritually humiliated them.

In earlier sections we saw that conventional theoretical frameworks (including those of human rights) see the main purpose of criminal justice as being to control crime with due process restraints operating to a greater or lesser extent in a subsidiary fashion. Both purposes – crime control and restraints on power – can, as we have seen, work against the interests of victims. Only a 'victim centred' model of criminal justice would prioritise the interests of victims. As Cavadino and Dignan have noted, such a model has been proposed but never implemented, even experimentally.[178] Victim-centred models argue for replacing adversarial justice in which the state prosecutes citizens in the name of the public interest with civil procedures that would be initiated by victims. Its obvious weakness 'is its failure to acknowledge that an offence may have broader social implications which go beyond the personal harm or loss experienced by the direct victim'.[179] For ourselves, we do not believe that the claims of victims, powerful though they are, should be allowed to over-ride all other considerations discussed in this chapter. At present, victim concerns are increasingly thrown into the pot indiscriminately, leading to an even more tangled web of irreconcilable demands and priorities than existed hitherto. The interests of victims do need to be taken into account but in a systematic fashion.

In reality, just as most people are victims of crime at least once in their adult life, so most people also offend at some time in their lives, many people do so many times, and many are accused of this by the police. One third of all men and 9% of women born in 1953 were convicted of at least one non-Road Traffic Act offence before the age of 46.[180] Just think how many committed offences and got away with them, as only a small minority of reported crimes end in conviction, and reported crimes are a tiny minority of the total number of crimes committed. And who are the victims of crime? Disproportionately young working class men and members of ethnic minorities – the groups who are also disproportionately represented

177 See discussion in Hail-Jares, K. Lowrey-Kinberg, B. Dunn, K & Gould, J. (2018) False Rape Allegations: Do they Lead to a Wrongful Conviction Following the Indictment of an Innocent Defendant? *Justice Quarterly*
178 Dignan J and Cavadino M, 'Towards a Framework for Conceptualising and Evaluating Models of Criminal Justice from a Victim's Perspective' (1996) 4 *Int R Victimology* 153 at p 165.
179 *Ibid*: 165
180 Prime et al, Criminal careers of those born between 1953 and 1978, Home Office Statistical Bulletin 4/01 (London: Home Office, 2001).

among convicted offenders.[181] The very people who, as victims, crime control adherents would protect are those people whose freedom would be sacrificed the next day when they are, or are suspected of, offending.

Sometimes the overlap in the two categories is complete. We refer throughout the book to the murder of Stephen Lawrence, a black teenager, in 1993. One aspect of this tragedy, and one of the reasons why the successful prosecution of the murderer took many years, was that when the police arrived they treated his friend, Duwayne Brooks, as a suspect and ignored his frantic pleas to look for the murderers in the direction he was pointing. He was later charged with numerous public disorder offences following a protest about the way the police conducted the investigation (but he was never convicted). The police eventually acknowledged his victim status, apologised for a catalogue of errors and paid £100,000 compensation. His solicitor commented 'Mr Brooks felt that because he was a young black man he was treated as a suspect and not a victim and witness.'[182] The idea that his freedom would be more or less valuable depending on which of these categories we eventually agreed he belonged to is ludicrous.

Much successful policing depends on information and co-operation from the community. Without community support the police would be even less effective than they are now. But support is not guaranteed, and most people have a deeply ingrained sense of 'fairness' and 'justice' which enables them to accept results they regard as wrong if they feel the process by which they were achieved was fair.[183] That is one reason why it is so important that the police respect the rule of law. If society divided neatly into offenders and the rest, the way offenders are treated by the police might not harm the way 'the rest' viewed the police, and their co-operation might not be jeopardised. But very large numbers of people are both occasional offenders (and even more are occasional suspects) and occasional victims. The overlap between suspect-communities and victim-communities means that if the police needs to keep the victim-community on its side, it also needs to do the same for the suspect-community. Treating suspects fairly is the best way to persuade them to respect, and thus cooperate with, the law in future. In other words, adherence to due process and the human rights of suspects and defendants can be of instrumental value in preventing and detecting crime as well as of value in itself.[184]

Over the last 10-15 years police authority has come to be thought of largely in terms of procedural justice and police legitimacy. In simple terms, police legitimacy is defined as the sense of obligation that citizens feel to obey the police and other legal authorities. However, it also more complex than this. Drawing on Beetham,[185] for example, numerous scholars have extended this understanding of police legitimacy to include more than simply an expressed consent to being policed by citizens. They also point to the importance of the normative justifiability of power, that is, whether the rules policing agents employ are premised on shared beliefs between them and policed populations. i.e. do the police and citizens have a shared sense of what is right and wrong. A growing body of empirical research has shown some important links between procedural justice – that is the quality of treatment (e.g. dignity and respect), quality of decision-making (e.g. in which citizens have a voice) and trustworthiness of police motivations (e.g. whether the police are seen as trying to do their best) - and police

181 Drake, D and Henley, A ''Victims' Versus 'Offenders' in British Political Discourse: The Construction of a False Dichotomy' (2014) 53 (2) The Howard Journal 141-157. These issues are discussed further in ch 10 and 12.
182 *The Guardian*, 10 March 2006.
183 Tyler T, *Why People Obey the Law* (New Haven: Yale University Press, 1990).
184 See further Young (2008).
185 Beetham, D *The Legitimation of Power (Issues in Political Theory)* (Palgrave Macmillan, 1991): 15-16

legitimacy. In particular, it has been repeatedly shown that the fairness of encounters is what matters most to public perceptions of police legitimacy. So procedurally just treatment of citizens by the police – involving the interlinked concepts of the quality of treatment, the quality of decision-making and perceived motivations of the police - is of greater importance to police legitimacy than other things, such as assessments of police effectiveness or the favourableness of outcomes to citizens or the risk of being caught. This is in turn significantly predicts the likelihood that someone will comply with the police both in the short- and long-term. However, there is also growing recognition that legality is an important, albeit non-constitutive, component of police legitimacy.[186] Beetham asserts that "power can be said to be legitimate in the first instance if it is acquired and exercised in accordance with established rules".[187]

1.8 **Promoting freedom: the overriding purpose**

In earlier editions of this book, it was argued that the point of protecting victims, offenders, and, indeed, anyone affected by crime and the justice system is primarily to protect and enhance freedom.[188] Why make it a crime to thieve or assault? Because the losses and hurts they cause are (among other things) losses of freedom – freedom to enjoy one's possessions, to walk the streets without fear, and so forth. We seek to convict thieves and violent offenders in the hope that the punishment or treatment consequent upon conviction will reduce their propensity to commit crime, and in the expectation that censuring their wrongdoing will reinforce everyone else's law-abiding instincts and behaviour. Either way the freedom of past and potential future victims should be enhanced through having their fear of crime reduced. In the same way, what is the point of protecting suspects and defendants, innocent or guilty? Again, protection is not a goal in itself, but a means to the end of promoting their freedom. And why do we insist that the police must obey the rule of law? Because their failure to do so undermines our sense that we live in a free society, where state officials cannot invade our lives in an arbitrary manner.

We are similarly committed to protecting human rights as set out in the ECHR, although we remain sceptical about maximalist attempts to elaborate and extend these rights. But we have seen that this is really a safety net approach. Like criminalising and punishing, and the protection of suspects and victims, human rights are not goals in themselves. In other words, maximising freedom requires the protection given by basic human rights, along with other rights and the suppression of crime. To put this another way, to maximise human freedom, we must value justice and fairness.

We approach the enhancement of freedom through criminal justice by arguing that it be achieved by methods that take account of the real circumstances in which they operate. Due process mechanisms and crime control powers need to be sensitive to the context within which they operate. Searches of suspected drug-dealers that are carried out in such an oppressive, arbitrary and discriminatory way that they provoke widespread rioting and long-term alienation of whole neighbourhoods from the police do not enlarge freedom but undermine it. The lawful

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[186] See Tankebe, J., Reisig, M. D., & Wang, X. (2016). A Multidimensional Model Of Police Legitimacy: A Cross-Cultural Assessment. *Law and Human Behavior, 40* 11-22; Bottoms, A, Tankebe, B (2012) Beyond procedural justice: A dialogic approach to legitimacy in criminal justice. *Journal of Criminal Law and Criminology* 102(1): 119–170; Jackson, J. Huq, Aziz Z., Bradford, B and Tyler, T. (2013) Monopolizing force?: police legitimacy and public attitudes towards the acceptability of violence. *Psychology, public policy and law*: 13-14

[187] Op. Cit. n205; 16

188 Note here the use of the word 'primarily'. We accept that other human values are important too (such as equality, welfare and so forth). We are well aware that freedom, like human rights, is a contestable concept and can take negative or positive forms.

use of arrest powers in a non-discriminatory manner that cannot be shown to detect or prevent a significant amount of crime does not enlarge freedom but undermines it. Due process mechanisms that do little to protect suspects, but cause humiliation to victims or impede the police from detecting serious crime, do not enlarge freedom but undermine it. Layers of bureaucracy that add nothing to due process protections and that divert criminal justice officials from achieving legitimate goals do not enlarge freedom but undermine it.

To summarise, a freedom approach starts with the understanding that criminal justice practices are inherently coercive or involve significant invasions of privacy. However, problems such as imperfect information, the pressures of time, and personal prejudices increasingly detract from professionals' ability to finely weigh up what maximises freedom in any given situation. While adherence to rules designed to enhance freedom is likely in the long-run to promote freedom more effectively than the act-consequentialist alternative,[189] austerity measures and efficiency drives tend to encroach on the ability of those we entrust to weigh up the best interests of all the parties at any given time.

Balancing freedoms is obviously difficult, particularly as freedom is so hard to measure.[190] But it can be done. We develop this idea further at the end of the chapter, and throughout the book.

1.9 Neoliberalism: managerialism, the rise of actuarial justice and austerity

The main elements of criminal justice - the police, Crown Prosecution Service, and the courts, and (though not covered in this book) the probation, prisons and Youth Justice services - are part of the public sector, financed predominantly by public revenue. The vast bulk of defence work is similarly paid for out of the public purse in the form of legal aid. Like the rest of the public sector, criminal justice has been much influenced by the 'new public management' promoted by successive governments from the early 1980s onwards.[191] The main motivating force for this programme was an ideological preference for the disciplines of the market to achieve value-for-money and control public expenditure.[192] Efficiency, effectiveness and economy became the trinity (the 'Three E's') that public sector officials were required to worship. Among the main mechanisms borrowed from the private sector in this programme were the fostering of 'consumer' power, the introduction of competition in the provision of services to those 'consumers', the setting of clear objectives which would allow each service provider to be audited on their performance and (in theory) greater autonomy for local 'managers' and service-providers to enable them to be more responsive to consumer demand.

New public management has impacted on all criminal justice agencies. On coming to power in 1997 the Labour Government reshaped the agenda of managerialism by promoting a wide range of programmes and devices designed above all to prevent crime and manage risk. The Crime and Disorder Act 1998 created a long list of civil preventive measures to manage risk

189 These ideas are worked out in more detail in the context of prosecutor behaviour in Young R and Sanders A, 'The Ethics of Prosecution Lawyers' (2005) 7(2) *Legal Ethics* 190.

190 But it is arguably possible to measure freedom empirically: Carter I, *A Measure of Freedom* (Oxford: OUP, 1999).

191 The phrase 'new public management' was coined by Christopher Hood, in 'A Public Management for all Seasons?' (1991) *Public Administration* 69(1) 3-19 to explain how public sector reforms in many English-speaking countries since the early 1980s emphasised explicit performance measures, outputs, and competitive private sector management styles. See further McLaughlin E and Murji K, 'The end of public policing? Police reform and "the new managerialism" ' in Noaks et al (eds), *Contemporary Issues in Criminology* (Cardiff: University of Wales Press, 1995).

192 See the discussion by Savage S and Charman S, 'Managing Change', in Leishman et al (eds), *Core Issues in Policing* (Harlow: Longman, 1996).

(discussed above) but also, more generally, it required local authorities and the police to work together in formulating and implementing local strategies to reduce crime and disorder. Other bodies, such as probation services, health authorities and police authorities, were also required to cooperate in this endeavour. Performance targets were established to measure the extent to which local strategic objectives were achieved.

To take the police as one example, from the mid-1980s onwards chief police officers and now Police and Crime Commissioners have been obliged to formulate objectives and priorities for their force which reflect the wishes and needs of local citizens. Through their inspection work, Her Majesty's Inspectors of Constabulary Fire and Rescue Services (HMICFRS) (formerly HMIC) are required to report on how effectively chief police officers identify and respond to policing problems. Since 2015, HMICFRS has conducted annual assessments of the effectiveness, efficiency and legitimacy of police forces, known as PEEL assessments.

Many theorists have seen in such developments further evidence of the rise of what they refer to (variously) as 'the new penology', 'actuarial justice', 'the new regulatory state', the 'risk society' or 'neoliberalism'.[193] In basic terms, Stedman-Jones defines neoliberalism as "a free market ideology based on individual liberty and limited government", which connects "human freedom to the actions of rational, self-interested actors in a competitive market place".[194] He defines neoliberalism as meaning less state, more personal responsibility and stress on the significance of free markets, and he connects these ideas to University of Chicago economists of the 1950s, such as Milton Friedman.

Wacquant goes deeper, defining neoliberalism as a "transnational political project" which has four "institutional logics": "(1) economic deregulation"; (2) "welfare state devolution, retraction, and recomposition"; (3) "the cultural trope of individual responsibility"; (4) "an expansive, intrusive, and proactive penal apparatus".[195] That is to say there is not so much deregulation as re-regulation of economic action,[196] as well as state intervention in other areas of society, especially in relation to punishment. So rather than the state playing less of a role in citizens' lives, the state is regarded as governing 'better' through new sites and modes of governance, such as through the welfare system, crime,[197] the penal state,[198] cheap credit and debt[199] and insecurity and surveillance.[200] Harvey also emphasises the ideological quality of neoliberalism, which embeds ideas about the centrality of the market into everything we do,

193 There is an enormous literature associated with these terms. Accessible entry points include Braithwaite J, 'The New Regulatory State and the Transformation of Criminology' (2000) 40 (2) BJ Crim 222; Garland D, ' "Governmentality" and the Problem of Crime' in Smandych R (ed), *Governable Places: Readings on governmentality and crime control* (Aldershot: Ashgate, 1999), Ericson R and Haggerty K, 'Governing the Young', in the same collection; and Feeley M and Simon J, 'Actuarial Justice: The Emerging New Criminal Law' in Nelken D (ed), *The Futures of Criminology* (London: Sage, 1994).

194 Stedman Jones, D *Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics* (2012, Princeton University Press): 2

195 Wacquant, L *Punishing the Poor. The Neoliberal Government of Social Insecurity* (2009, Duke University Press): 306-307

196 Harcourt, B. Neoliberal Penality: A Brief Genealogy, (2010) *Theoretical Criminology*, vol. 14, p. 74: 87

197 Simon, J *Governing Through Crime* (2007, OUP); 4-5

198 Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2001); 203-4

199 Campbell, J. L. (2010). Neoliberalism's penal and debtor states: A rejoinder to Loïc Wacquant. *Theoretical Criminology*, *14*(1), 59–73

200 Lea, J. and Hallsworth, S. (2013) 'Bringing the state back in: Understanding neoliberal security', in P. Squires and J. Lea (eds), *Criminalisation and advanced marginality: Critically exploring the wok of Loic Wacquant* (Policy Press)

such that it "becomes incorporated into the common-sense way many of us interpret, live in, and understand the world".[201]

There has been a growing emphasis on deterring and preventing crime through the monitoring, manipulation and control of situations and populations deemed, in the aggregate, criminogenic. Garland also notes that recent crime control policies tend to be directed towards the exclusion, rather than re-integration, of those who appear to threaten the status quo in contemporary societies.[202] Private security guards, CCTV, improved car and home security devices, better street lighting, the closer regulation of 'deviant' or threatening groups (unlicensed traders, the homeless, disorderly youth, 'neighbours from hell', 'bogus' asylum seekers and so forth) all provide evidence of this pre-emptive trend. As Garland puts it: 'Whereas older strategies sought to govern crime directly, through the specialist apparatus of criminal justice, this new approach entails a more indirect form of government-at-a-distance, involving "interagency" cooperation and the responsibilization of private individuals and organizations.'[203] As ours is a textbook about the 'specialist apparatus of criminal justice' rather than about crime control in general, we will confine discussion of these new strategies to their impact on that apparatus – for instance, encouraging a crime-preventive mentality in public policing, and affecting the way in which the police use their powers ostensibly aimed at detecting individual offenders.[204]

In accordance with s.77 Police Reform and Social Responsibility Act 2011, chief constables and the then newly created (and elected) Police and Crime Commissioners (PCCs) are now required to balance local and national police priorities via the Strategic Policing Requirement.[205] The requirement for chief constables and PCCs to determine local policing priorities aimed to ensure that police forces were better equipped to deal with local need but within an overall Home Office governance framework. Funding is partially contingent on such priorities being met, which is consistent with governmental demands for efficiency that require 'higher levels of performance from public sector workers on the basis of target driven objectives'.[206] Consequently, success was redefined 'by creating performance indicators which are not concerned with the reduction of crime but the internal assessment of the performance of the organisation.'[207] By focusing on value for money, political debate about what constitutes value in specific circumstances is increasingly ignored.[208] Criticisms of the criminal justice system were not based on 'any actual deterioration in the performance of the criminal justice system, but higher expectations of what it can or should achieve.'[209] Despite this, successive governments have placed efficient case progression at the core of their cost reduction strategy. Stenson and Edwards argue that governmental preference for management techniques has

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[201] Harvey, D *A Brief History of Neoliberalism* (2005, OUP); 3

[202] Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2001).

203 Garland (1991: 21).

204 Indeed what Choongh sees as the 'social disciplining' by the police of problem populations (see above) might be better understood in terms of actuarial risk management.

[205] That Requirement was updated in 2015 in order to prioritise contemporary concerns about threats from cyber- and organised crime. See Home Office (2015) *The Strategic Policing Requirement* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/417116/The_Strategic_Policing_Requirement.pdf

[206] Rawnsley A, *The End of the Party* (Penguin 2010).

[207] Young J, 'Searching for a New Criminology of Everyday Life: A Review of the 'Culture of Control' by David Garland' (2002)(42) *British Journal of Criminology* 228; 238

[208] Lacey N, 'Government as Manager, Citizen as Consumer: The Case of the Criminal Justice Act 1991' (1994) 57 *Modern Law Review* 534.

[209] Faulkner D and Burnett R, *Where Next for Criminal Justice?* (The Policy Press 2012).

diverted attention from approaches to criminal justice that emphasise welfare rights.[210] The altered approach views crime as a technical problem requiring resolution though administrative and apolitical means.

Criminal courts have not escaped this scrutiny, where a system of funding based on efficiency was introduced.[211] This is in line with Garland's comment that managerialism had become 'all pervasive,'[212] affecting 'every aspect of criminal justice…performance indicators and management measures have narrowed professional discretion and tightly regulated working practice.'[213] In 2001, former senior presiding judge, Sir Robin Auld conducted a review of procedures within the criminal courts.[214] His review concluded that criminal court processes were inefficient, wasteful[215] and in need of streamlining. Bell and Dadomo noted that Auld appeared to be 'mesmerised by the idea of 'efficiency' and an increased rate of conviction',[216] reflecting a desire to both reduce cost and increase crime control measures. However, schemes that focus primarily on target driven performance create conflict between the requirements of managerialism and of justice.[217]

1.9.1 **Austerity Justice**

The last decade of government in the UK, following the economic downturn in 2008, has been characterised by the language of austerity measures and cost cutting to reduce public spending deficits across public services. Access to basic social welfare entitlements has been hugely reduced.[218] The Coalition government that succeeded Labour in 2010 inherited a criminal justice system in which reoffending rates were high and prisons were severely overcrowded. Despite this, the government still required the institutions of criminal justice to make cuts of between 25 and 33% across 4 years.[219]

The Coalition government initially appeared to regard rehabilitation of offenders as a form of risk management.[220] That government stated that it viewed crime as not just about numbers but also about social justice. This was, however, set against a desire to control state expenditure.[221] The 2010 business plan for the criminal justice system continued to assert that the system

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[210] Stenson, K and Edwards, A, 'Policy Transfer in Local Crime Control: Beyond naïve emulation' in Newburn, T and Sparks, R (ed), *Criminal Justice and Political Cultures* (Willan Publishing 2004).
[211] Bell B and Dadomo C, 'Magistrates' Courts and the 2003 Reforms of the Criminal Justice System' (2006) 14(4) *European Journal of Crime, Criminal Law and Criminal Justice* 339
[212] Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press 2001); 18
[213] *Ibid*
[214] Auld, R. 'Review of the Criminal Courts of England and Wales: Executive Summary' (2001) <http://www.criminal-courts-review.org.uk/auldconts.htm> accessed on 05 October 2008.
[215] Zander M, *Cases and Materials on the English Legal System* (Oxford University Press 2007).
[216] Sanders A, 'Core Values, the Magistracy, and the Auld Report' (2002) 29(2) *Journal of Law and Society* 324; 341
[217] Bell B and Dadomo C, 'Magistrates' Courts and the 2003 Reforms of the Criminal Justice System' (2006) 14(4) *European Journal of Crime, Criminal Law and Criminal Justice* 339
[218] Cooper, V and Whyte, D *The Violence of Austerity* (Pluto Press 2017)
[219] Faulkner, D 'Criminal justice and government at a time of austerity' *Criminal Justice Alliance Discussion Paper* (2010) http://criminaljusticealliance.org/wp-content/uploads/2015/02/cjausterity3.pdf Accessed 16 March 2018.
[220] Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (The Stationary Office, 2010)
[221] Silvestri, A. (ed) *Critical Reflections: Social and Criminal Justice in the First Year of Coalition Government* (Centre for Crime and Justice Studies, 2012)

should be simplified and made more efficient.[222] Despite Law Society concerns that, by placing emphasis on speed, the courts risk increasing the likelihood of miscarriages of justice,[223] the government pursued its desire to increase the speed at which allegations are processed in order to reduce cost. The Institute of Fiscal Studies reported that Ministry of Justice budgets fell by 29% and Home Office budgets fell by 19% between 2010 and 2015,[224] while Roberts reports an 18% decline in law and order spending between 2010 and 2014.[225] Against this background, Ward argues that neoliberalism has resulted in transformations to criminal justice that can be celebrated for modernisation and efficiency, but also criticised for reducing the delivery of criminal justice to its bare bones.[226] We can situate austerity in criminal justice through three trends: budget cuts, digitalisation and how defendants are situated in this discourse.

1.9.2 **Budget cuts**

The Coalition government elected in 2010 began a trend of dismantling and disinvestment in the institutions of criminal justice. Large sections of criminal justice services have been outsourced to the private security market. Although not addressed in this book, the privatisation of prisons was a major start point for this trend, when it was agreed in 1997 that all newly built prisons would be privately run.[227] By 2014, 15% of the prison population was housed in privately run prisons.[228] The pace of prison privatisation increased, parts of the Probation Service were privatised in 2014 as a result of outsourcing probation work for less serious offences to locally based Community Rehabilitation Companies, and the government run Forensic Science Service (used at the investigative stage of the process) was dismantled in 2012. Police custody and other core policing functions have also been partially civilianised and outsourced. Roles that were formerly performed by warranted police officers are now performed by non-warranted civilians with more limited police powers, including detention officers in police custody, police community support officers engaged in neighbourhood policing and civilian investigators.[229] In some cases, the staffing, management and ownership

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[222] Office for Criminal Justice Reform, 'Working Together to Cut Crime and Deliver Justice: Criminal Justice System Business Plan 2009-2010' (2007). The Ministry of Justice also introduced the Stop Delaying Justice! policy in 2012

[223] Baksi C, 'Speeding up cases 'risks miscarriages'' (2012) (29 November) Law Society Gazette 3.

[224] Institute of Fiscal Studies 'IFS Green Budget 2015' (2015) https://www.ifs.org.uk/publications/7530 Accessed 16 March 2018

[225] Roberts, R 'Criminal justice in times of austerity' (2015) https://www.crimeandjustice.org.uk/resources/criminal-justice-times-austerity *Centre for Crime and Justice Studies* Accessed 16 March 2018

[226] Ward, J 'Transforming 'Summary Justice' Through Police-led Prosecution and 'Virtual Courts' (2015) 55 *British Journal of Criminology* 341

[227] See, for example, Jones, T and Newburn, T 'The Convergence of US and UK Crime Control Policy: Exploring Substance and Process' in Newburn T and Sparks, R (Eds) *Criminal Justice and Political Cultures* (2012) Willan Publishing

[228] As Robbins notes, there are significant concerns with the quality of care and rehabilitation services provided in privately run prisons, but less power to hold the prisons to account than if they were run by the state (Robbins, I (2006) 'Privatization of Corrections: A Violation of U.S. Domestic Law, International Human Rights, and Good Sense' *Human Rights Brief* 13 (3): 12-16)

[229] Skinns, L. (2011) Police custody: governance, legitimacy and reform in the criminal justice process. Cullompt on: Willan; Rice, L. (2019) Junior partners or equal partners? Civilian investigators and the blurred boundaries of police detective work *Policing and Society,* DOI: 10.1080/10439463.2019.1632310.

of police custody areas,[230] as well as other police functions, such as police control rooms and police station front counters, have been almost entirely outsourced to the private sector.[231]

The fragility of global markets, followed by the global economic crash in 2007-8 and the ensuing recession, together with neoliberal ideological fervour has prompted governmental cuts to police budgets and 'efficiency savings' in a bid to create a smaller, leaner and less costly public sector. The Comprehensive Spending Review (CSR) in 2010 announced a cut of central government funding for policing of £1.9 billion between 2010/11-2014/15: a 20 per cent cut in police budgets. This was even though neither the National Audit Office nor HMIC were confident, at the time, that all police forces would be able to make the necessary cuts within the necessary time frame.[232] Between 1961 and 1991, the police workforce (including civilian staff) doubled from 100,000 to 200,000, eventually peaking at 300,000 in 2010 By 2013, the police workforce had dropped by 37,000 (13%).[233] Police Community Support Officers, who perform an important function in reassuring local communities, were seen as a particularly easy target, their numbers dropping fast.[234] Since September 2019 plans have been in place to recruit 20,000 new police officers, but this will still not increase the police workforce to pre-austerity levels.

Another easy target for budget cuts have been criminal defence service providers. Although operating as privately run firms (or sets of chambers of self-employed barristers), the vast majority of criminal defence services are beholden to fluctuations in government spending via the contracts that allow them to perform legally aided work. In order to be able to conduct state funded defence work, criminal defence lawyers must perform according to business models dictated by their contracts with the Ministry of Justice. Government policy towards publicly funded defence representation has long focused on reducing cost, and budget control has been a significant feature of legal aid policy since the 1990s.[235] This means that defence lawyers have long been paid on a fixed fee per case basis dependent on what stage a case reaches in court (guilty plea or trial).[236] However, recent austerity measures have exacerbated those problems. In 2010, the Ministry of Justice sought to reduce the legal aid budget by £220m by 2018. The decline of legal aid accelerated still further following the 2015 election of a Conservative government.[237] The fees that firms can claim for conducting work in the

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[230] Skinns, L., Sprawson, A., Sorsby, A., Smith, R. and Wooff, A. (2017) Police custody delivery in the twenty-first century in England and Wales: Current arrangements and their implications for patterns of policing, *Europe an Journal of Policing Studies*, 4 (3), 325-349

[231] White, A. Post-crisis Policing and Public–Private Partnerships: The Case of Lincolnshire Police and G4S, *The British Journal of Criminology*, Volume 54, Issue 6, (2014) 1002–1022,

[232] HMIC 'Adapting to Austerity' (2011) https://www.justiceinspectorates.gov.uk/hmicfrs/media/adapting-to-austerity-20110721.pdf; 23

[233] Cribb, J. Disney, R and Sibieta, L (2014) *The public sector workforce: past, present and future* IFS Briefing Note BN145. Institute for Fiscal Studies

[234] Hargreaves, J. Cooper, J. Woods, E and McKee, C *Police Workforce, England and Wales, 31 March 2016* Home Office Statistical Bulletin 05/16
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/544849/hosb0516-police-workforce.pdf

[235] Goriely T, 'The Development of Criminal Legal Aid in England and Wales' in Young, R and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996)

[236] There is a wealth of evidence suggesting that such payment regimes damage lawyer/client relationships. See, for example, Newman, D (2013) *Legal Aid Lawyers and the Quest for Justice* Hart Publishing;
Welsh, Lucy (2017) 'The effects of changes to legal aid on lawyers' professional identity and behaviour in summary criminal cases: a case study.' *Journal of Law and Society*, 44 (4). pp. 559-585.

[237] Smith, T. and Cape, Ed (2017) 'The rise and decline of criminal legal aid in England and Wales'. In: Flynn, A. and Hodgson, J., eds. (2017) *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need.* Hart Publishing.

magistrates' courts were reduced by 8.75% in 2014.[238] Similarly the Ministry of Justice acknowledged that fees for junior barristers working in criminal legal aid decreased by 8% between 2012 and 2016.[239] The reach of payment by fixed fee was extended to include work conducted at police stations, which had previously been paid on the basis of hourly rates. The real term decline in income is likely to be much greater than 8.75% given that there had been no increase in fee rates for 10 years preceding 2014, meaning that firms' profit margins are extremely thin. As a result, morale among defence lawyers is low.[240] They are increasingly required to pit the due process interests of their clients against the economic needs of their firms.[241]

Both issues lead defence lawyers to take more risks about conducting work not knowing whether they will be paid, which has the potential to mean that only a base level of service is provided to suspects and defendants. The Justice Committee reported that reductions in legal aid were hindering the ability of defence lawyers to conduct proper reviews of material disclosed by the CPS, raising concerns about increased potential for miscarriages of justice.[242] Service provision problems are exacerbated by dwindling recruitment into the profession: newly qualified lawyers are reluctant to take up publicly funded criminal defence work as a result of relatively low income generation and the perceived low status of the work.[243] The effects of reductions in available funding for defence lawyers include lower levels of representation, increased uncertainty about payment and consequent concerns about reduced professionalism and fragmented access to services.[244] Cape and Smith suggest that rationalisation of criminal legal aid policy, fuelled by the 2008 financial crisis, reflects the state's antipathy towards procedural justice,[245] due process and fair trial rights.[246] Against this background, the Ministry of Justice agreed, in late 2018, to conduct a review of criminal legal aid, and produced an accelerated package of proposals in early 2020,[247] about which consultation was sought. Social and public media reaction to those proposals suggest that they would do little to address crises faced by the criminal defence professions.[248]

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[238] A further 8.75% fee cut was later abandoned in 2016 after members of The Law Society launched judicial review proceedings against the Ministry of Justice.

[239] Smith, T. and Cape, Ed (2017) 'The rise and decline of criminal legal aid in England and Wales'. In: Flynn, A. and Hodgson, J., eds. (2017) *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need.* Hart Publishing.

[240] Newman, D and Welsh, L The Practices of Modern Criminal Defence Lawyers: Alienation and its implications for access to justice (2019) *Common Law World Review*; Thornton, J 'Is Publicly Funded Criminal Defence Sustainable? Legal Aid Cuts, Morale, Recruitment and Retention in the English Criminal Law Professions' (2020) Legal Studies https://doi.org/10.107/lst.2019.31

[241] Welsh, L (2017) 'The effects of changes to legal aid on lawyers' professional identity and behaviour in summary criminal cases: a case study.' *Journal of Law and Society*, 44 (4). pp. 559-585. See ch 8.

[242] Garside, R. Grimshaw, R. Ford, M and Mills H (2019) *UK Justice Policy Review* Vol 8 Centre for Crime and Justice Studies

[243] The Law Society (2019) Criminal Justice System in Crisis *Parliamentary Briefing*

[244] Welsh, L (2017) 'The effects of changes to legal aid on lawyers' professional identity and behaviour in summary criminal cases: a case study.' *Journal of Law and Society*, 44 (4). pp. 559-585.

[245]Procedural justice considerations apply across the criminal process, and incorporate the ability to effectively participate in proceedings, transparency, impartiality, confidence in consistent decision making, being treated with dignity and respect and trust in authority.

[246] Smith, T. and Cape, Ed (2017) 'The rise and decline of criminal legal aid in England and Wales'. In: Flynn, A. and Hodgson, J., eds. (2017) *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need.* Hart Publishing.

[247] Ministry of Justice, Criminal Legal Aid Review: An accelerated package of measures amending the criminal legal aid fee schemes (2020) https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/supporting_documents/criminallegalaidconsultationdocument.pdf

[248] Fouzder, M 'Legal aid fees: MoJ offer to receive resounding 'no'' Law Society Gazette, 20 March 2020; Atkinson, R 'The new legal aid settlement is an insult' The Times, 5 March 2020

CPS budgets, and therefore its staff, have also been steadily reduced - by 23% between 2010 and 2015.[249] Soubise demonstrated that a significant proportion of CPS work has (therefore) been delegated to less qualified members of staff, and prosecutors are offering lesser charges and plea bargains increasingly to discourage defendants from taking cases to trial.[250] This has the potential effect of persuading innocent defendants to plead guilty and is hurtful to victims who feel that their cases have not been treated with sufficient seriousness (see section 7.9). Soubise also points out that processes of prosecution have become increasingly fragmented into a series of narrowly defined routine tasks, resulting in weak oversight of cases. Cases that are not based on robust prosecution 'are based on a partial account of the facts and could potentially lead to miscarriages of justice'.[251] One consequence is recent disclosure failings that have led to cases being abandoned and reviewed over miscarriage of justice fears (see section 7.3.3.5).[252] As these issues, alongside violent crime rates, increasingly became a cause for public concern, an investment of £85m was given to the CPS in 2019 (the defence were offered an extra £50m in the accelerated criminal legal aid review).[253] It remains to be seen whether this investment will alleviate some of the problems that we have discussed, or whether it will be funnelled towards a programme of 'modernisation'.

1.9.3 **Digitalisation**

The use of digital working practices to increase efficiency and reduce cost across the entire criminal justice system has been encouraged since 2012. The Ministry of Justice now has a designated Digital Director for Her Majesty's Courts and Tribunals Service. The CPS and defence have both been encouraged to use digital case management systems, in which relevant papers are exchanged using secure email systems, to make paperless working possible. Defendants can enter guilty pleas online for less serious offences so that their cases can be processed in a more automated fashion (see chapter 8). Digitalisation enables flexible working and speedy updates to files,[254] but CPS lawyers sometimes feel hindered by it.[255] It is also unclear how unrepresented, and often vulnerable, defendants are being enabled to participate in digital justice processes.[256] How confident can we be that most defendants in this situation can properly assess whether what they did really was criminal, or that they are able to fill in the online documents appropriately?

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[249] Bowcott, O 'Crown Prosecution Service chief inspector signals concern over funding' *The Guardian* 23rd September 2015 https://www.theguardian.com/law/2015/sep/23/cps-chief-inspector-kevin-mcginty-cuts-can-leave-agencies-unable-to-function Accessed 16 March 2018

[250] Soubise, L 'Prosecuting in the magistrates' courts in a time of austerity'(2017) *Criminal Law Review* 847.

[251] Ibid; 848

[252] Criminal Cases Review Commission *Annual Report and Accounts 2015/2016* (2016). See also Crown Prosecution Service *Rape and serious sexual offence prosecutions - Assessment of disclosure of unused material ahead of trial* (2018) https://www.cps.gov.uk/publication/rape-and-serious-sexual-offence-prosecutions-assessment-disclosure-unused-material

[253] BBC News 'Law and order: Extra £85m for CPS to tackle violent crime' 12 August 2019. In 2020, the CPS announced it would be hiring hundreds of lawyers, which could further imbalance between defence and prosecution services.

[254] Criminal Justice Joint Inspection *Delivering justice in a digital age* (2016) https://www.justiceinspectorates.gov.uk/cjji/inspections/delivering-justice-in-a-digital-age/

[255] Porter, A. (2018). Prosecuting Domestic Abuse in England and Wales: Crown Prosecution Service 'Working Practice' and New Public Managerialism. *Social & Legal Studies*.

[256]JUSTICE found that over 11 million adults in the UK lack basic digital skills (JUSTICE (2018) *Preventing Digital Exclusion from Online Justice* https://justice.org.uk/wp-content/uploads/2018/06/Preventing-Digital-Exclusion-from-Online-Justice.pdf

The courts have been encouraged to digitalise by making ever greater use of live link facilities, especially during the COVID-19 pandemic.[257] This means that defendants who have been remanded into custody awaiting their case will appear in court via a TV live link between the court and the prison or, in some cases, the police custody area, rather than being physically transported to the court building. This reduces prison and prisoner disruption and saves money. But defence lawyers face a dilemma about whether to be in court with the judge or outside the court with their client.[258] It is difficult to take instructions and build rapport with clients via video link,[259] but remaining at the police station or prison with clients reduces opportunities to negotiate with prosecutors at court. The small sample of former defendants who have been asked about their experiences of appearing via video link were concerned that they found it more difficult to communicate with their lawyers and properly participate in proceedings.[260] This undermines the right to effective participation under Art 6 ECHR.[261] It can also be difficult for lawyers to obtain case papers at short notice for video link hearings.[262] These problems 'point to issues of procedural due process rights and principles of 'open justice' being weakened in some domains',[263] particularly as no one has the right to refuse an appearance via video link.[264] Those appearing via virtual court were more likely to be sent to custody than other defendants,[265] although more serious charges are more likely to be dealt with via video link.[266]

The use of virtual court facilities was extended to encourage police officers to give evidence via live links so that they do not need to leave the police station to give evidence.[267] This means that, rather than waiting at court (which is obviously an inefficient use of time), they can work

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[257] The Coronavirus Act 2020 broadened the availability of virtual and audio link court hearings. For discussion of the threats to transparent justice, see Townend, J 'Covid-19, the UK's Coronavirus Act and emergency 'remote' court hearings: what does it mean for open justice?' The Justice Gap, 30 March 2020. At April 2020, the possibility of online jury trials being conducted during the pandemic was being mooted (See 'JUSTICE pilots first ever worldwide virtual mock jury trial' at https://justice.org.uk/wp-content/uploads/2020/04/JUSTICE-mock-virtual-trial-press-release.pdf; Mulcahy, L. Rowden, E and Teeder, W (2020) 'Exploring the case for Virtual Jury Trials during the COVID-19 crisis' https://justice.org.uk/wp-content/uploads/2020/04/Mulcahy-Rowden-Virtual-trials-final.pdf)

[258] Rowden, E. (2013). 'Virtual Courts and putting 'summary' back into 'summary justice': merely brief, or unjust?' In J. Simon, N. Temple & R. Tobe (Eds). *Architecture and Justice: Judicial Matters in the Public Realm*. Farnham, Surrey: Ashgate, pp.101–113.

[259] Ward, J 'Transforming 'Summary Justice' Through Police-led Prosecution and 'Virtual Courts' (2015) 55 *British Journal of Criminology* 341. See further Fielding, N., Braun, S. and Hieke, G. (2020) *Video Enabled Justice Evaluation*. Online at: http://spccweb.thco.co.uk/our-priorities/access-to-justice/video-enabled-justice-vej/video-enabled-justice-programme-university-of-surrey-independent-evaluation/

[260] Fielding, N., Braun, S. and Hieke, G. (2020) *Video Enabled Justice Evaluation*. Online at: http://spccweb.thco.co.uk/our-priorities/access-to-justice/video-enabled-justice-vej/video-enabled-justice-programme-university-of-surrey-independent-evaluation/

[261] Gibbs, P *Defendants on video – Conveyor belt justice or a revolution in access?* (2017) Transform Justice http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf

[262] Criminal Justice Joint Inspection *Delivering justice in a digital age* (2016) https://www.justiceinspectorates.gov.uk/cjji/inspections/delivering-justice-in-a-digital-age/

[263] Ward, J 'Transforming 'Summary Justice' Through Police-led Prosecution and 'Virtual Courts' (2015) 55 *British Journal of Criminology* 341; 350

[264] Crime and Disorder Act 1998 as amended by the Coroners and Justice Act 2009. The small sample of former defendants referred to above expressed the desire to have a choice about whether or not to appear in person (Fielding, N., Braun, S. and Hieke, G. (2020) *Video Enabled Justice Evaluation*. Online at: http://spccweb.thco.co.uk/our-priorities/access-to-justice/video-enabled-justice-vej/video-enabled-justice-programme-university-of-surrey-independent-evaluation/)

[265] Ward, J 'Transforming 'Summary Justice' Through Police-led Prosecution and 'Virtual Courts' (2015) 55 *British Journal of Criminology* 341. Fielding, N., Braun, S. and Hieke, G. (2020) *Video Enabled Justice Evaluation*. Online at: http://spccweb.thco.co.uk/our-priorities/access-to-justice/video-enabled-justice-vej/video-enabled-justice-programme-university-of-surrey-independent-evaluation/

[266]Conversely, judges involved in early virtual court hearings reported that it was more difficult to establish a sense of authority and that defendants took proceedings less seriously. See Terry, M., Johnson S., & Thompson, P. (2010). Virtual Court pilot Outcome evaluation, London: Ministry of Justice. file:///C:/Users/socl0413/Documents/Publications/Virtual%20trial/second%20report/virtualcourts-pilot-outcome-evaluation.pdf

[267] Section 51 of the Criminal Justice Act 2003, permits the court to allow a witness who is in the UK, but outside the court building, to give evidence by live link if the court is satisfied that that is in the interests of the efficient administration of justice.

in the police station. But then there is the risk of not giving the trial their full attention and for the corruption of evidence. For, while officers at court are kept in a form of sterile environment with little opportunity for collusion, there are limited safeguards available outside court. The absence of physical architectural cues about expected behaviour can affect participants' approache to virtual proceedings.[268] Using virtual court facilities also reduces costs: by late 2017, the court estate had shrunk to 350 courts from 605 in 2010, and further closures were planned (see further chapter 8).[269]

High levels of digital case transfer between parties does not necessarily mean that fewer staff are needed, because high levels of user input are required to make paper documents electronic, so costs are not reduced as much as anticipated.[270] It is, therefore, difficult to assess the true benefits of digitalisation, although virtual courts do speed cases along.[271] This appears, however, to be at the cost of fewer defendants receiving legal advice and representation (and diminished quality when it is received), and more custodial sentencing. Defendants' rights to active participation should not be sacrificed for the sake of speed, but unfairness to suspects and defendants is of little concern to a criminal justice process that increasingly marginalises due process rights.

1.9.4 **Social Justice and processes of exclusion**

When considering the use of criminal justice processes to combat crime we should also consider other social needs in relation to, for instance, housing, employment, education, health, and so forth. Given that many indices of poverty (such as housing and employment problems) are related to conventional crime,[272] tackling these social problems might be more cost-effective than using the coercive powers of the State anyway.

One way of ensuring that we do not see crime in isolation from other social problems, and of highlighting the importance of social crime prevention as well as individual crime control is to look at two divergent trends in social policy: those of social inclusion and social exclusion. The exclusionary approach is one whereby "Crime is to be prevented by efficiency of detection, certainty of conviction and severity of punishment . . . 'Criminals' are to be seen as an 'enemy' to be defeated and humiliated, in a 'war' in which the police are seen as the 'front line'".[273] In such discourse, the 'enemy' is also seen as causing unnecessary cost to the criminal justice system. Auld (2001) attacked "calculating defendants" for "wasting" resources, as did Leveson (2015), by asserting that defendants 'have no interest in improving the efficiency of the system or saving public money'.[274] Assertions of this nature further the othering of populations that are deemed criminogenic (see chapter 10), and fail to recognise that (particularly innocent) defendants are unlikely to want to increase the amount of time they must spend being processed by the system. They also provide another excuse for moving further away from due process towards more crime control measures.

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[268] Mulcahy, L. & Rowden, E. (2020). *The Democratic Courthouse: a modern history of design, due process and dignity*. Abingdon: Routledge.
[269] Garside, R. Grimshaw, R. Ford, M and Mills H (2019) *UK Justice Policy Review* Vol 8 Centre for Crime and Justice Studies
[270] Criminal Justice Joint Inspection *Delivering justice in a digital age* (2016) https://www.justiceinspectorates.gov.uk/cjji/inspections/delivering-justice-in-a-digital-age/
[271] Ward, J 'Transforming 'Summary Justice' Through Police-led Prosecution and 'Virtual Courts' (2015) 55 *British Journal of Criminology* 341
272 See, for example, Dorling, D. Gordon, D. Hillyard, P. Pantazis, C. Pemberton, S and Tombs, S *Criminal obsessions: Why harm matters more than crime* (2008) Centre for Crime and Justice Studies
[273] Faulkner, D (1996) *Darkness and Light: Justice, Crime and Management for Today* Howard League; 6
[274] McConville, M and Marsh, L *The Myth of Judicial Independence* (OUP, 2020).

As well as recasting the delivery of criminal justice processes, neoliberal governments have emphasised the importance of individual responsibility for citizens' position in society, which has created further social division and dislocation. Those who do not participate in society in accordance with a neoliberal agenda are pushed further towards the margins of society and 'othered'. While concern about victims' rights is welcome, the social dislocation caused by exclusionary discourse further polarises victims and defendants. These processes 'of de-citizenisation and ontological criminalisation provides….new discourses of nationality and citizenship'[275] because such groups are no longer seen 'as fellow 'welfare citizens' with legitimate needs.'[276] Suspects and defendants have therefore been recast as 'outside society' as a result of making 'rational' choices to behave in a criminal way. This can be used to both justify severe punishment and undermine due process rights. As Nash notes, 'increasingly, it appears as if almost any risk related to public safety is not to be tolerated, thus those who put others at greater risk are by default to blame.'[277] This encouraged the use of coercive measures which threatened punitive sanctions for non-compliance with orders that required, for example those dependent on drugs or alcohol, to 'take responsibility for their actions and accept the help offered.'[278] The focus on the responsibilisation of behaviour (whereby the defendant is the maker of his or her own misfortune and responsible for the consequences and for remedying the behaviour) justifies undermining due process protections that have the potential to make prosecution more difficult.

Furthermore, the government was keen to be seen as both tough on crime and to promote speedy summary case progression in the aftermath of the five day long 2011 city centre riots that erupted following the police shooting of Mark Duggan. As such, 'the ramping up of the penal wing of the state is a response to social insecurity, and not a reaction to crime trends.'[279] These measures have again prioritised 'efficient' working practices over traditional adversarial principles.[280] The result is that the powers of criminal justice agencies have been enlarged but vulnerable groups are left with little protection. This moves us further way from due process, and assists in promoting policies designed to encourage efficiency and save money. As criminals are increasingly viewed as undeserving of state assistance or protection from the disproportionate use of state force, protests about austerity measures undermining the right to fair trial are easily countered.

Faulkner contrasts the exclusionary rule with Locke's view that 'the end of law is not to abolish or restrain but to preserve and enlarge freedom'. On this inclusionary approach:

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[275] Lea J and Hallsworth S, 'Bringing the State Back In: Understanding Neoliberal Security' in Squires, P and Lea, J (eds), *Criminalisation and Advanced Marginality. Critically Exploring the Work of Loic Wacquant* (The Policy Press 2012); 23. In this way, "democracy might be characterised as tyrannical majoritarianism that allows oppression of minorities." (Sanders A, 'Reconciling the apparently different goals of criminal justice and regulation: the 'freedom' perspective' in Smith, G. Seddon, T and Quirk, H (eds), *Regulation and Criminal Justice: Innovations in Policy and Research* (Cambridge University Press 2010); 61

[276]Lea J and Hallsworth S, 'Bringing the State Back In: Understanding Neoliberal Security' in Squires, P and Lea, J (eds), *Criminalisation and Advanced Marginality. Critically Exploring the Work of Loic Wacquant* (The Policy Press 2012); 21

[277] Nash M, 'The Art of Deception - UK Public Protection Policy and the Criminal Justice 'Crisis' of 2006' (2010) 38(3) *International Journal of Law, Crime and Justice* 79.

[278] Bell E, *Criminal Justice and Neoliberalism* (Palgrave Macmillan 2011); 82

[279] Wacquant L, 'The wedding of workfare and prisonfare in the 21st century: responses to critics and commentators' in Squires, P and Lea, J (Eds), *Criminalisation and advanced marginality. Critically exploring the work of Loic Wacquant* (The Policy Press 2012); 245

[280] Cr.PR 3.2 explicitly states that the parties are expected to co-operate and assist the court (Ministry of Justice. 'Criminal Procedure Rules' (2011) < http://www.justice.gov.uk/courts/procedure-rules/criminal> accessed on 1 June 2012).

> "Authority will not be respected if it is simply imposed: it has to be accountable and it has to be legitimate in the sense that respect for it has to be earned and justified. Consideration for others and obedience to the law are learned by explanation, discussion, experience and example . . . Solutions to the problem of crime have to be sought by inclusion within the community itself – among parents, in schools, by providing opportunities and hope for young people – and not by exclusion from it."[281]

Overall, the dominant managerial impetus has been the pursuit of ever more effective, efficient and economic crime control legitimated by reference to the interests and views of the 'law abiding citizen'. However, this is at the expense of the protection of due process values and human rights, and 'target-driven' policing ends up focussing on the targets rather than the actual crime problems for which they are poor surrogates.[282] The way neoliberalism has spread 'management ideology has gradually altered the culture of criminal justice services, which have become increasingly concerned with narrowly-defined targets'.[283] An internal police inquiry into the mishandling of rape complaints provides a good example: '[police] management treated car crime as a higher priority than sex offences, because it was under pressure to meet targets for solving cases'.[284] Those who support this emphasis within managerialism would no doubt argue that targets can be tweaked to better guide performance, and that crime control and the protection of human rights are complementary. While this is theoretically possible it will not happen while the criminal process continues to operate in an exclusionary manner – failing to seek solutions from within the community, and failing to show adequate respect to individual citizens, whether in the roles of suspects, defendants, witnesses or victims. This exclusionary tendency has increased alongside the rise of 'austerity justice' in our increasingly neoliberal society.

1.10 **Conclusion**

In this chapter we have shown that criminal justice can have several different purposes, many of which conflict with each other (and with social goals in other spheres of life) some or all of the time. There are many different values and interests at stake in criminal justice. The most important are:

- convicting the guilty
- protecting the innocent from wrongful conviction
- protecting victims
- protecting everyone (innocent and guilty) from arbitrary or oppressive treatment by actors in the criminal process
- maintaining order
- securing public confidence in, and cooperation with, policing, prosecution and the courts
- pursuing these goals efficiently and effectively without disproportionate cost and consequent harm to other public services.

Criminal justice is controversial, not because this list of goals is controversial, but because people differ over which are most important and which are to be given low priority. The weight to be attached to the competing factors determining the exercise of coercive state force depends

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281 Faulkner D, *Darkness and Light: Justice, Crime and Management for Today* (London: Howard League, 1996) p 6.
282 Flanagan R, *The Review of Policing: Final Report* (London: HMIC, 2008).
283 Bell, E *Criminal Justice and Neoliberalism* (Palgrave Macmillan 2011)
284 *The Guardian* 17 March 2009. Also see *The Guardian* 16 March 2009.

partly upon the political and social outlook of the observer. Many people, especially politicians, like to pretend that all goals are equally achievable, but we have seen that this is misleading. One of the great virtues of Packer's models is that they show how hard it is to reconcile many of these purposes. However, we have seen that both models are incomplete (they do not cater for the interests of victims, in particular) and neither is normatively acceptable in itself (i.e. neither model represents an ideal to which we might aspire). We saw that the human rights perspective tries to overcome these two difficulties but that 'rights' perspectives are not the most fruitful or comprehensive ways to understand, critique or develop criminal justice.

While the conflicts that exist will never be eradicated, it is important to have a way of prioritising the different purposes of criminal justice – not just in an abstract way, but in relation to specific problems. Only then can we hope to get near achieving the best possible solutions, in terms of maximum benefits for minimum losses. Further, a rational system that applies consistent principles will be both fair and seen to be fair – which is a good thing in itself and has the added advantage of encouraging co-operation with the system and thus increasing the ability of criminal justice to control crime.

The value of the 'freedom perspective', outlined in section 8, is that enables us to reconcile the apparently irreconcilable. One of us has developed this further through the elaboration of three 'core values' that flow from 'freedom':

Justice: this is procedural (eg having regard to human rights) but also substantive (for example, taking into account unequal access to justice due to inequality of money and power). It applies to victims just as it does as to suspects.

Democracy: thankfully we do not vote judges into their positions. But criminal justice policy results in large part from political choices and so should be formulated democratically. This does not necessarily require election manifestos. But to take into account the experiences of those subject to, as well as those responsible for, law and policy, it does require public consultation and public accountability. Without this there will be no trust. As we said earlier, being seen to be fair is nearly as important as actually being fair.

Efficiency: the 'Three Es' (ie including Effectiveness and Economy) discussed in section 9. The adage that 'you can't put a price on justice' is naïve. The fact is that choices have to be made about resources, and the more there are for one public good, the less there are for others. So criminal justice policy and practices cannot be measured against a counsel of perfection as then they will always fail. Moreover, to do justice the system must be reasonably speedy (efficient) and effective (reaching truthful verdicts); and the more economically the prosecution or magistrate/jury system can work, for example, the more money there should be for legal aid. Not all budget cuts and modernisations are therefore wrong. The problem is pursuing them at the expense of justice and democracy.

As we shall see in subsequent chapters, this approach can be applied to all areas of criminal justice.[285] The rest of the book will both describe the system analytically – to assess what it is trying to do and what it succeeds in doing – and elaborate our normative position.

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[285] Sanders A, 'Core Values, the Magistracy, and the Auld Report' (2002) 29(2) *Journal of Law and Society* 324; 341, further developed in Sanders A (2010); Sanders A, 'Reconciling the Apparently Different Goals of Criminal Justice and Regulation: the Freedom Perspective' in Quirk H et al, eds *Regulation and Criminal Justice* (Cambridge: CUP, 2010)

That position, within which the freedom approach is situated, is that of an intersectionally 'inclusive' society and, within it, an inclusive way of operating criminal justice. Again, we are as concerned to see the extent to which criminal justice is, or is not, inclusive as we are to argue for inclusiveness. Here we shall see that our normative goal and the harsh reality are even farther away from each other. The social exclusionary tendencies of the criminal process reflect exclusionary tendencies within wider society that have been gathering pace over the last 40 years, from the Conservative administrations of 1979 to 1997 to the 1997 to 2010 Labour administrations (which employed inclusionary rhetoric but actually encouraged conventional paid work over inequality reduction).[286] Then, as austerity measures took hold in more recent years, the responsibility discourse was used to justify a reduction in resources given to criminal justice agencies. Suspects and defendants have become ever more excluded and designated as 'undeserving' of any protection from increasingly expansive coercive state control. The same austerity measures that increased demands for efficient case progression pushed suspects and defendants ever further away from being able to exercise their rights in meaningful ways. So, as we will see, exclusionary tactics have extended beyond the impositions of punishment for non-compliance and crept further into the actual process of criminal justice. This individualisation of social policy can also be seen in the criminal justice sphere, where the emphasis has been on remoralising or resocialising individual offenders so that they become responsible for 'reintegrating' themselves into 'law-abiding society'. Practical help and assistance to enable offenders to achieve this has been much less in evidence, as have the measures needed to tackle the conditions that generate conventional crime in the first place.[287] When offenders fail to take responsibility to stop their own offending, exclusionary measures such as tagging, curfews and prison remain the default option.[288]

It may be some time, then, before the inclusionary philosophy is applied in full to criminal justice. In the meantime, it is important to sketch out the potential of an inclusionary approach. Raising awareness of the issues at stake is a step along the road to rational reform. Packer's conclusion to his analysis of American criminal law and criminal process has received little subsequent attention. However, his final words[289] are as pertinent now as they were in the late 1960s: 'The criminal sanction is at once prime guarantor and prime threatener of human freedom. Used providently and humanely it is guarantor; used indiscriminately and coercively, it is threatener. The tensions that inhere in the criminal sanction can never be wholly resolved in favour of guaranty and against threat. But we can begin to try.' It is time we tried here too.

Further reading:

Bell, E *Criminal Justice and Neoliberalism* (London: Palgrave Macmillan, 2011)

Bonner D, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Aldershot: Ashgate, 2007)

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[286] See Levitas R, *The Inclusive Society?: Social Exclusion and New Labour*, 2nd edn, (Basingstoke: Palgrave Macmillan, 2005).
[287] See Clements (2005).
288 See Gray P, 'The politics of risk and young offenders' experiences of social exclusion and restorative justice' (2005) 45(6) BJ Crim 938; Wacquant L, 'The wedding of workfare and prisonfare in the 21st century: responses to critics and commentators' in Squires, P and Lea, J (Eds), *Criminalisation and advanced marginality. Critically exploring the work of Loic Wacquant* (The Policy Press 2012); 245
289 Packer (1968: 366).

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