CHAPTER 3

TYPES OF CRIMINAL PROCEDURE

Succinctly defined, a criminal justice process is that series of procedures through which the substantive criminal law is enforced. The principles underlying different criminal justice systems vary according to history, culture and underlying ideology. Among the criminal justice systems existing in different countries two main types of criminal procedures can be identified on the basis of their underlying principles: accusatorial and inquisitorial. A mixed system adopting selected features of both these systems can also be identified as a third type.

The common law countries including England, India, Australia, Canada and the United States follow an adversarial system inspired by accusatorial tradition. The civil law countries, such as France, Germany and Italy pose a system based on inquisitorial principles as a major alternative to adversarial system. Both systems have their origin in Europe.

Until 1215 criminal proceedings in England and on the European continent were more or less the same. Victims were the movers of the accusation and conducted prosecutions. Several forms of trial including the oath ex officio, the trial by ordeal, and the trial by battle existed. In 1215 two events occurred that caused a divergence in the systems of England and Europe. One was the signing of Magna Charta in England. It guaranteed among other safeguards the right to trial by one’s peers. The other, in Rome,

1 Yale Kamisar, Wayne R. LaFave and Jerold H. Israel, 'Modern Criminal Procedure', 8th edn, p.1.
the Fourth Lateran Council\(^6\) prohibited clergy from officiating at trials by ordeal. As a result of these two events, England developed the jury system as well as what has now evolved into the adversary-accusatorial system, while Europe developed a system of official inquiry or inquisitorial system.\(^7\)

3.1. Accusatorial system

Criminal process consists of two important steps, namely the investigation and the judicial process. Someone is to make an investigation in order to formulate a charge and someone is to exercise the judicial function in deciding whether the charge is

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\(^6\) Bouvier's Law Dictionary: A Concise Encyclopedia of the Law, Rawle's Revision-Third Revision, 1914, vol-II, St. Paul Minn, West Publishing Company, pp. 1873-74: Lateran Councils. The general name given to the numerous councils held in the Lateran Church at Rome. The first of these was convened A.D. 649 to consider the doctrine of the Monothelites. This council held five sessions, during which the writing of the leading advocates of the theory were examined and condemned, and all persons anathematized who did not confess their belief in the existence of both the divine and the human will in the person of Jesus Christ. The second of the councils, held in the years 1105, 1112, 1116 and 1123, settled the controversy between the pope and the emperor as to the investiture of bishops, prescribed the methods of ordinations and elections, by which, although the pope apparently made large concessions to the emperor, he was, in fact, able to practically control the elections, and passed additional decrees to enforce the celibacy of the clergy. The fourth council (1179) decreed that the election of the popes should be confined to the college of Cardinals, two-thirds of the votes of which should be requisite for an election, instead of a majority, as had previously been necessary. It condemned the Albigeneses and the Waldenses the fifth council convened in the year 1215. It is usually called the fourth Lateran and was the most important as marking the summit of the Papal power. It decreed that the doctrine of transubstantiation be one of the articles of faith, required all persons who had reached the age of discretion to confess once a year, arranged for the place of assembly and the time for the next crusade, and anathematized all heretics whose belief was opposed to the faith, decreeing that after their condemnation they should be handed over to the secular authorities, excommunicating all who received, protected, or maintained them, and threatening all bishops with deposition who did not use their utmost endeavours to clear their dioceses of them. The sixth council (1512-17) abolished the Pragmatic Sanction and substituted a concordat agreed upon by Leo X and Francis I in which the liberties of the Church were greatly restricted. Some authorities recognize five only, omitting the first above stated and numbering the others from one to five.

\(^7\) Survey of the Major Criminal Justice Systems in the World, 549. There is a bit more different version: In the 12\(^{th}\) and 13\(^{th}\) Centuries, the English Common Law procedure was *accusatorial* - the parties came before the court on an equal footing; the court gave help to neither; and the one party formulated his grievance while the other party denied it. The mode of trial was some type of ordeal, which was *judicium dei*: the judgment was that of God, not that of the president of the court. This did not find favour with the church. A trusted person was thus sent to inquire into the allegations. And this founded the inquisitorial system of trial-the judge was to find out for himself what had happened by examining all persons, including the accused or suspected person. See A.R. Biswas, 'B.B. Mitra on Code of Criminal Procedure, 1973', 15\(^{th}\) edn vol I, p.4
substantiated. There is this division of function and the judicial process is called accusatorial.⁸

The system has essentially two leading features. Firstly, there is a sham fight between two combatants and it contains the primitive idea of penal action. The parties come before the court on an equal footing. The court gives help to neither. The one party formulates his grievance while the other party denies it. Secondly, the judge ends the contest by deciding against one or other of the parties. The system is a mixture of two proceedings, civil and criminal. The mode of trial is some type of ordeal.⁹

The Crown is the prosecutor in all cases and this means that the case against the accused is presented by one party, called the prosecutor or prosecution, and met by the other party called the accused. The task of investigation, preparation and presentation of the case is upon the prosecutor and not upon the judge or the magistrate. A tribunal simply tries the issue between the two contesting parties. And the defence is no more than a demonstration that the prosecution has failed to prove its case beyond a reasonable doubt.

The adversary principle that it is for the prosecution to bring a case to court and prove guilt is an important characteristic of an accusatory system.¹⁰ The trial is essentially a party process. It involves a two sided contest, between prosecution and defendant, in a judicial arena. The parties are in an equal position. The judge does not have any initiative either in taking jurisdiction or in collecting evidence and obtaining proof. The judge acts as an impartial moderator evaluating the evidence produced by the parties, ensuring that the proceedings are conducted with procedural propriety, and

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announcing a decision at the conclusion of the case.\textsuperscript{11} The collection of evidence is exclusively in the hands of the parties, chiefly with the prosecution. The judge is bound by the evidence, which survived the exclusionary rules. Furthermore, 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.\textsuperscript{12} The proceedings are oral, open to the public and the evidence is mainly tendered by direct examination of witnesses with a right of cross examination by the opposite party. Historically the accusatory system was tied to the popular juries which gave unreasoned verdicts.\textsuperscript{13}

The adversary model recognises a more significant role for the accused and the defence in criminal justice administration, for this system is based on an adversary ideology. Its rationale is that if two parties assume contrary and opposite positions on the issues (prosecution and defence) and carry on competitive debate, complemented by the introduction of supporting evidence, the court as an impartial third party is thereby placed in a better position to analyse and evaluate the respective contentions and arrive at a correct finding about the issue in dispute. It prefers means to result and emphasizes process over goals.\textsuperscript{14}

The accusatorial system is more sensitive to the liberty of the citizen.\textsuperscript{15} It avoids recourse to brute force.\textsuperscript{16} It imposes greater restriction on its public agents. It holds the integrity of the process and its means at a higher value than effective results. There is a high degree of constitutional review of criminal justice administration

\textsuperscript{12} Andrew Sanders and Richard Young, ‘Criminal Justice’, 1994, p.7.
\textsuperscript{15} Ibid.
practices. It embodies party evidence, elaborate exclusionary rules and other rules of evidence and is characterised as a system tending to procedural truth. It seeks truth as the product of collaboration between the parties through legal proof.  

In the system the law rigidly determines the evidence to be admitted and the weight it must be given. The system of legal proof with its mechanical standards was the product of an age which it was considered dangerous to subject an accused to a judiciary, which was not independent from other powers of the state nor, in many cases, legally trained.

3.2. Inquisitorial system

There are two basic features to an inquisitorial system. The judge in an inquisitorial system is both judge and prosecutor. Thus several functions concentrate in the judge. Secondly, collection of evidence is in the control of the judge. It places more emphasis on ensuring the punishment of a guilty party. It does not have much concern or considerations for basic and fundamental rights of the citizens. It is clear that a zealous pursuit of the inquisitorial approach would erode the freedom of the citizen.

In an Inquisitorial system, the dominant role in conducting a criminal inquiry is played, at least in theory, by the court, 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)

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18 Ibid.
19 Ibid.
20 Ibid.
by an examining magistrate (*juge d'instruction*) with wide investigative powers, but more frequently this preparatory task is carried out by the prosecutor and police.²¹

The judge initiates investigation and collects all of the evidence. The investigation is thus a part of judicial proceeding. The judge has full control all over the proceedings. The calling and examination of witnesses and the employment of experts are the concern of the judge. Instead it is not the concern of the parties. The proceedings are (usually) written and secret (although the defendant or his attorney can be present at most of the proceedings). There is no cross-examination (although the parties may submit written questions to the examining judge requesting that they be put to the witness.

The trial consists of open proceedings. Theoretically, the trial is characterised by orality and immediacy, but in practice it has degenerated into a mere formal reception of the written summaries of the evidence collected in the previous instruction phase, (by examining judge) rather than retaking the evidence orally in open court. Therefore, in practice, the criminal process consists of a cumulative series of activities all of which are utilized by the trial judge in making the final decision. This rule gets varied in certain exceptional circumstances.

**Facts adducement**

The civil law system strives to ensure a complete and factual judicial inquiry. It places the pursuit of truth in the control of a judge who has the initiative in collecting all the material he needs to decide the matter, and thus is not bound by the evidence tendered to him by the parties. Therefore, evidence damaging to the accused is not only brought

²¹ There are considerable differences between systems, which are labeled 'inquisitorial'. See eg. the review by L.H. Leigh and L. Zender, *A Report on the Administration of Criminal Justice in the Pre-trial phase in England and Germany* (Royal Commission on Criminal Justice, Research Study no1) (HMSO, 1992).
forward by the prosecution but also by the judge; and, similarly, evidence favouring the
culprit not only come from the defendant, but also from the judge.

Admission and evaluation of evidence

The operative principle with regard to the admission and evaluation of
evidence in criminal trials is the free evaluation of evidence or, 'free proof'. This means
that the evidence may be weighed by the judge freely in accordance with the prudent
judgment. The principle of free evaluation of evidence has its origin in the French
Revolution which exploited the institution of the jury. Traditionally the jury gave an
unreasoned verdict reached on the basis of an “intimate conviction” of the facts
presented to it. The principle of free evaluation of evidence developed from the
principle of “intimate conviction” but is different from its forerunner because the
decision, being the result of the free evaluation of evidence must be supported by a
recent judgment.

The principle of free evaluation of evidence is seen to constitute not only a
freedom in favour of the judge, namely, the freedom to apply his prudent judgment to
the facts of the case at hand, but also as an advantage operating in favour of the accused
who will know that the judge will not be restricted in his evaluation of the facts and can
decide the case having regard to the accused’s own circumstances.

The principle of free evaluation of evidence confers full and uncontrolled
power to the judge over evidence. This principle justifies the judge in probing into any
sort of evidence, even to the point that the judges ignore any exclusionary rules
contained in the (Code of Criminal Procedure) law. Taking the principle of free
evaluation to its logical but extreme conclusion the judges contend that even if the
collection of certain evidence does not comply with certain procedures or other requirements prescribed by the law (Code of Criminal Procedure), the court may nonetheless utilise the evidence and evaluate and convince itself of its probative value.

The principle of free evaluation means in substance: First, full freedom to admit evidence even if it is specifically excluded by some Code provision; Second, the right to inquire into atypical forms of evidence, that is to say forms of evidence not considered by the law as desirable, and Third, the free evaluation of all evidence.

3.3. Packer’s two models of criminal process

Herbert L. Packer, a celebrated American jurist has developed two theoretical models of the criminal process: due process and crime control, by means of which we can explore the value choices underlying the details of the criminal process.22 The models make us perceive the normative antinomy at the heart of the criminal law. They are not the only way of thinking about criminal justice, but they are widely recognised as useful tools of analysis.23 They represent an attempt to abstract two separate value systems that compete for priority in the operation of the criminal process. Packer has presented them as neither corresponding to reality nor representing the ideal to the exclusion of the other.24 Since they are distortions of reality and normative in character no one shall see one or other as good or bad.25

25 H.L. Packer, loc. Cit, A legal paradox inspires him to develop these normative models. He expresses it as it at p. 150: “We are faced with an interesting paradox: the more we learn about the Is of the criminal process, the more we are instructed about its Ought and the greater the gulf between Is and Ought appears to become.” However these models are not labeled Is and Ought, nor are they to be taken in that sense. Rather, they represent an attempt to abstract two separate value systems that complete for priority in the operation of the criminal process, at p. 153.
26 Id at p. 153
The models describe two normative positions at opposite ends of a spectrum. They merely afford a convenient way to talk about the operation of a process whose day-to-day functioning involves a constant series of minute adjustments between the competing demands of two value systems and whose normative future likewise involves a series of resolutions of the tensions between competing claims.

3.4. Values Underlying Two Models

It is possible to identify two competing systems of values in the development of the criminal process. Law makers, judges, police, prosecutors and defence lawyers are the actors in the criminal justice at different stages in action. They do not often pose to articulate the values that underlie the positions that they take on any given issue. It is not feasible to ascribe a coherent and consistent set of values to any of these actors. The models are polarities, and so are the schemes of value that underlie them. No one can subscribe all of the values underlying one model to the exclusion of all of the values underlying the other. These values are presented as an aid to analysis, not as a program for action.

The polarity of the two models is however not absolute. There are certain assumptions about the criminal process that are widely shared by both models. They are viewed as common ground for the operation of any model of criminal process. First, there is the assumption, implicit in the right against ex post facto Law guaranteed by the Constitution in every criminal justice system whereby the function of defining conduct that may be treated as criminal is separate from and prior to the process of identifying

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27 Andrew Sanders & Richard Young, Criminal Justice, 1994, p.13.
28 H.L. Packer, loc. cit.; the author however cautions that there is a risk in an enterprise of this sort that is latent in any attempt to polarise. It is simply, that values are too various to be pinned down to yes-or-no answers. The models are distorsious of reality. And, since they are normative in character, there is a danger of seeing one or the other as good or bad.
and dealing with persons as criminals. There is a related assumption 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 there is a reasonable prospect of apprehending and convicting its perpetrator. They are expected to act how the legislature has demanded. This assumption may be viewed as the other side of the ex post facto coin. Next, there is the assumption that there are limits to the powers of government to investigate and apprehend person suspected of committing crimes. Thus a degree of scrutiny and control must be exercised with respect to the activities of law enforcement officers, that the security and privacy of the individual may not be invaded at will.

Finally, there is a complex of assumptions embraced by terms such as 'the adversary system', 'procedural due process', 'notice and opportunity to be heard', and 'day in court'. Common to them all is the notion that the alleged criminal is not merely an object to be acted upon but an independent entity in the process. He may, if he so desires, force the operators of the process to demonstrate to an independent authority (judge and jury) that he is guilty of the charges against him. This assumption speaks in

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30 H.L. Packer, *op. cit.*, p.155. How wide or narrow the definition of criminal conduct must be is an important question of policy that yields highly variable results depending on the values held by those making the relevant decisions. But that there must be a means of definition that is in some sense separate from and prior to the operation of the process is clear. If this were not so, the efforts to deal with the phenomenon of organized crime would appear ludicrous indeed.

31 *Ibid*; Although police and prosecutors are allowed broad discretion for deciding not to invoke the criminal process, it is commonly agreed that these officials have no general power. If the legislature has decided that certain conduct is to be treated as criminal, the decision-makers at every level of the criminal process are expected to accept that basic decision as a premise for action.

32 *Ibid*; Packer explains that just as conduct that is not proscribed as criminal may not be dealt with in the criminal process, so conduct that been denominated as criminal must be treated as such by the participants in the criminal process acting within their respective competence.

33 *Id*, at p.156; Packer points out that it is possible to imagine a society in which even lip service is not paid to this assumption. Nazi Germany approached but never quite reached this position. But no one in our society would maintain that any individual may be taken into custody at any time and held without any limitation of time during the process of investigating his possible commission of crimes, or would argue that there should be no form of redress for violation of at least some standards for official investigative conduct. Although this assumption may not appear to much in the way of positive conduct, its absence would render moot some of our most hotly controverted problems.
terms of 'may' rather than 'must'. It permits but does not require the accused, acting by himself or through his own agent, to play an active role in the process. By virtue of that fact the process becomes or has the capacity to become a contest between, if not equals, at least independent actors. Much of the space between the two models is occupied by stronger or weaker notions of how this contest is arranged, in what cases it is to be played, and by what rules. The crime control model tends to de-emphasize this adversary aspect of the process, while the due process model tends to make it central. 34

3.5. Crime control values

The value system that underlies the crime control model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process. The failure of law enforcement to bring criminal conduct under tight control leads to the breakdown of public order and thence to the disappearance of an important condition of human freedom. If the laws go unenforced a general disregard for legal controls tends to develop. The law-abiding citizen then becomes the victim of all sorts of unjustifiable invasions of his interests. His security of person and property is sharply diminished, and, therefore, so is his liberty to function as a member of society. Ultimately, the criminal process is a positive guarantor of social freedom.

Efficiency

In order to achieve this high purpose, the crime control model requires that primary attention be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime. 35 By 'efficiency' the model means the system's capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders whose

34 Id, at p.157.
35 Id, at p.158.
offences become known. The model, in order to operate successfully must produce a high rate of apprehension and conviction, in a context where the number of people being dealt with is very large and the resources for dealing with them are very limited. There must be a premium on speed and finality. Speed, in turn, depends on informality and on uniformity. Finality depends on minimising the occasions for challenge. The process must not be cluttered up with ceremonious rituals that do not advance the progress of a case. Facts can be established more quickly through interrogation in a police station than through the formal process of examination and cross-examination in a court. Thus extra-judicial processes should be preferred to judicial processes, informal operations to formal ones. But informality alone is not enough. There must also be uniformity. Routine, stereotyped procedures are essential if large numbers are being handled. In theory the crime control model can tolerate rules that forbid illegal arrests, unreasonable searches, coercive interrogations and the like. It cannot tolerate vindication of those rules demanding exclusion of the illegally obtained evidence or through the reversal of convictions in cases where criminal process has breached the rules laid down for its observance.

36 Ibid; Packer makes it clear that in a society in which only the grossest forms of antisocial behaviour were made criminal process might require the devotion of many more man-hours of police, prosecutorial, and judicial time per case than ours does, and still operate with tolerable efficiency. A society that was prepared to increase even further the resources devoted to the suppression of crime might cope with a rising crime rate without sacrifice of efficiency while continuing to maintain an elaborate and time-consuming set of criminal process. However, neither of these possible characteristics corresponds with social reality in this country. The economy to increase very drastically the quantity, much less the quality, of the resources devoted to the suppression of criminal activity through the operation of the criminal process has an important bearing on the criteria of efficiency, and therefore on the nature of the crime control model.

37 Id, at p.159; Packer explains through illustration that the model that will operate successfully on these presuppositions must be an administrative, almost a managerial, model. The image that comes to mind is an assembly-line conveyor belt down which moves an end-less stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and who perform on each case as it comes by the same small but essential operation that brings it one step closer to being a finished product, or, to exchange the metaphor for the reality, a closed file. The criminal process, in this model, is seen as a screening process in which each successive stage- pre-arrest investigation, arrest, post-arrest investigation, preparation for trial, trial or entry of plea, conviction, disposition- involves a series of routinised operations whose success is gauged primarily their tendency to pass the case along to a successful conclusion.

38 Id, at p.168.
Presumption of Guilt

By the application of administrative expertness primarily that of the police and prosecutors, an early determination of probable innocence or guilt emerges. Those who are probably innocent are screened out; those who are probably guilty are passed quickly through the remaining stages of the process. The key to the operation of the model regarding those who are not screened out is presumption of guilt. This key makes the system capable to deal efficiently with large numbers. The supposition is that the screening processes operated by police and prosecutors are reliable indicators of probable guilt.

The presumption of guilt not, of course, a thing. Nor is it even a rule of law in the usual sense. It simply is the consequence of a complex of attitudes, a mood. If there is confidence in the reliability of informal administrative fact-finding activities that take place early stages of the criminal process, the remaining stages of the process can be relatively perfunctory without any loss in operating efficiency. The presumption of guilt is the operational expression of that confidence. It is not at all the opposite of the presumption of innocence, which is the polestar of the criminal process in the due process model. The two concepts are different rather than opposite ideas.

39 Id., at p.160; The concept requires some explanation, since it may appear startling to assert that what appears to be precise converse of our generally accepted ideology of a presumption of innocence can be an essential element of a model that does correspond in some respects to the actual operation of the criminal process.

40 Ibid; Packer makes it clear that once a man has been arrested and investigated without being found to be probably innocent, or, to put it differently, once a determination has been made that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty.

41 Id., pp.160-1.

42 Id., at p.161; Packer epitomise the difference by an example. A murderer, for reasons best known to himself, chooses to shoot his victim in plain view of a large number of people. When the police arrive, he hands them his gun and says, "I did it and I am glad." His account of what happened is corroborated by several eyewitnesses. He is placed under arrest and led off to jail. Under these circumstances, which may seem extreme but which in fact characterise with rough accuracy the evidentiary situation in a large proportion of criminal cases, it would be plainly absurd to maintain that more probably than not the suspect did not commit the killing. But that is not what the presumption of innocence means. It means that until there has been an adjudication of guilt by an authority legally competent to make such an adjudication, the suspect is to be treated, for reasons that have nothing whatever to do with the probable outcome of the case, as if his guilt is an open question.
The presumption of innocence is a direction to officials about how they are to proceed, and not a prediction of outcome. The presumption of guilt, however, is purely and simply a prediction of outcome. The presumption of innocence, then, is a direction to the authorities to ignore the presumption of guilt in their treatment of the suspect. It tells them, in effect, to close their eyes to what will frequently seem to be factual probabilities. The presumption of guilt is descriptive and factual while the presumption of innocence is normative and legal.

The pure crime control has no truck with the presumption of innocence.\(^43\) In presumption of guilt the crime control model finds a factual predicate for the position that the dominant goal of repressing crime can be achieved through highly summary processes without any great loss of efficiency, because the probability that, in the run of cases, the preliminary screening processes operated by the police and the prosecuting officials contain adequate guarantees of reliable fact-finding. This model indeed takes an even stronger position that subsequent processes, particularly those of a formal adjudicatory nature, are unlikely to produce as reliable fact-finding as the expert administrative process that precedes them is capable of. The criminal process thus must put special weight on the quality of administrative fact-finding. It becomes important, then, to place as few restrictions as possible on the character of the administrative fact-finding processes and to limit restrictions for other purposes. This view of restrictions on administrative fact-finding is a consistent theme in the development of the crime control model.\(^44\)

\(^{43}\) Id, at pp.161-2. However, Packer admits that the real life emanations are brought into uneasy compromise with the dictates of the dominant ideological position of presumption of innocence.

\(^{44}\) Id, at p.162.
Informal Fact Finding

In this model the center of gravity for the process lies in the early, administrative fact-finding stages. The subsequent stages are relatively unimportant and should be truncated as much as possible. The pure crime control model has very little use for many conspicuous features of the adjudicative process. In real life it works out a number of ingenious compromises with such features. Even in the pure model, however, there have to be devices for dealing with the suspect after the preliminary screening processes has resulted in a determination of probable guilt. The focal device is the plea of guilty. By means of it adjudicative fact-finding is reduced to a minimum. Thus the crime control model, when reduced to its barest essentials and operating at its most successful pitch, 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.

3.6. Due Process Values

The ideology of due process model is composed of a complex of ideas, some of them based on judgments about the efficacy of crime control devices, others having to do with quite different considerations. It is far more deeply impressed on the formal structure of the law than is the ideology of crime control. However, its ideology is not the converse of that underlying the crime control model it does not rest on the idea that it is not socially desirable to repress crime. If the crime control model resembles an assembly line, the due process model looks very much like an obstacle course. Each of its successive stages is designed to present formidable impediments to

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45 Ibid; Packer acknowledges that this too produces tensions with presently dominant ideology.
46 Id., at pp.162-3.
47 Id., p.163; Packer acknowledges that the critics of due process model raise such an allegation.
carrying the accused any further along in the process. An accurate tracing of the strands that make up this ideology is strangely difficult. \[48\]

Formal Fact Finding

The due process model rejects the premise of informal fact-finding, rather it insists for formal, adjudicative, adversary fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him. \[49\] Even then, the distrust of fact-finding processes that animates the due process model is not dissipated. The possibilities of human error being what they are, further scrutiny is necessary, or at least must be available, in case facts have been overlooked or suppressed in the heat of battle. The subsequent scrutiny must be available at least as long as there is an allegation of factual error that has not received an adjudicative hearing in a fact-finding context. The demand for finality is thus very low in the due process model. \[50\]

Reliability and Efficiency

The reliability of fact-finding processes constitutes the characteristic difference between the two models. The issue as to how much reliability is compatible with efficiency assumes great importance. \[51\] A high degree of probability in each case

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48 Ibid.

49 Id, pp.163-4; The due process model points out that in support of the rejection of informal fact-finding process that people are notoriously poor observers of disturbing events – the more emotion-arousing the context, the greater the possibility that recollection will be incorrect; confessions and admissions by persons in police custody may be induced by physical or psychological coercion so that the police end up hearing what the suspect thinks they want to hear rather than the truth; witnesses may be animated by a bias or interest that no one would trouble to discover except one specially charged with protecting the interests of the accused (as the police are not).

50 Ibid.

51 Ibid; Packer explains that granted that informal fact-finding will make some mistakes that can be remedied if backed up by adjudicative fact-finding. The desirability of providing this back up is not affirmed or negated by factual demonstrations or predictions that the increase in reliability will be x percent or x plus n percent.
that factual guilt has been accurately determined shows higher reliability of the criminal process, while the expeditious handling of the large numbers of cases that the process ingests shows its better efficiency. In the competing demands of reliability and efficiency the crime control model is more optimistic about the improbability of error in a significant number of cases, but it is also more tolerant about the amount of error that it will put up with. The due process model insists on the prevention and elimination of mistakes to the extent possible, whereas the crime control model accepts the probability of mistake up to the level at which they interfere with the goal of repressing crime, either because too many guilty people are escaping or more subtly, because general awareness of the unreliability of the process leads to a decrease in the deterrent efficacy of the criminal law. In this view, reliability and efficiency are not polar opposites but rather complementary characteristics.52

The system is reliable because efficient. Reliability becomes a matter of independent concern only when it becomes so attenuated as to impair efficiency. All of this the due process model rejects. If efficiency demands shortcuts around relatively then absolute efficiency must be rejected. The aim of the process is at least as much to protect factually innocent as it is to convict the factually guilty.53

The due process model disclaims any attempt to provide enhanced reliability for the fact-finding process and still produce a set of institutions and processes that would defer from those demanded by the crime control model. These are values quite different and more far reaching evolved from an original matrix of concern for the

52 Id. pp.164-5.
53 Ibid; Packer points out that it is a little like quality control in industrial technology: tolerable deviation from standard varies with the importance of conformity to standard in the destined uses of the product. The due process model resembles a factory that has to devote a substantial part of its input to quality control. This necessarily cuts down on quantitative out put.
maximisation of reliability. These values can be expressed in, although not adequately described by, the concept of the primacy of the individual and the complementary concept of limitation on official power.\textsuperscript{54}

The combination of stigma and laws of liberty that is embodied in the end result of the criminal process is the heaviest deprivation that government can inflict on the individual. Furthermore, the processes that culminate in these highly afflictive sanctions are in themselves coercive, restricting and demeaning. Power is always subject to abuse- sometimes subtle, other times, as in the criminal process open and ugly. Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must be subjected to controls that prevent it from operating with maximal efficiency. Maximal efficiency means maximal tyranny. And, although the due process model does not assert that minimal efficiency means minimal tyranny, it affords, a substantial diminution in the efficiency for preventing official oppression of the individual.\textsuperscript{55}

**Adjudicating Legal Guilt**

The most modest- seeming but potentially far reaching mechanism by which the due process model implements these antiauthoritarian values is the doctrine of legal guilt. According to this doctrine, a person is not to be held guilty of crime merely on a showing that in all probability, based upon reliable evidence he did factually what he is said to have done. Instead, he is to be held guilty if and only if these factual determinations are made in procedurally regular fashion and by authorities acting within competences duly allocated to them. Furthermore, he is not to be held guilty, even

\textsuperscript{54} Ibid.

\textsuperscript{55} id, at p. 165-6.
though the factual determination is or might be adverse to him, if various rules designed to protect him and to safeguard the integrity of the process are not given effect.\textsuperscript{56}

Wherever the competence to make adequate factual determinations, it is apparent that only a court that is aware of these guilt-defeating doctrines and is willing to apply them can be viewed as competent to make determinations of legal guilt. The police and the prosecutors are ruled out by lack of competence, in the first instance, and by lack of assurance of willingness in the second. Only an impartial court can be trusted to make determinations of legal as opposed to factual guilt.\textsuperscript{57}

**Presumption of Innocence**

In this concept of legal guilt lies the explanation for the apparently quixotic presumption of innocence. A man who, after police investigation, is charged with having committed a crime can hardly be said to be presumptively innocent, if what we mean is factual innocence. But if what we mean is that it has yet to be determined if any of the myriad legal doctrines that serve in one way or another the end of limiting official power through the observance of certain substantive and procedural regularities may be appropriately invoked to exculpate the accused, it cannot be said with confidence that he will be found guilty.\textsuperscript{58}

\textsuperscript{56} Ibid; Thus the tribunal that convicts him must have the power to deal with this kind of case ('jurisdiction') and must be geographically appropriate ('venue'); too long a time must not have elapsed since the offence was committed ('statute of limitations'); he must not have been previously convicted or acquitted of the same or substantially similar offence ('double jeopardy'); he must not fall within a category of persons, such as children or the insane who are legally immune to conviction ('criminal responsibility'); and so on. None of these requirements has anything to do with the factual question of whether the person did or did not engage in the conduct that is charged as the offence against him, yet favourable answers to any of them will mean that he is legally innocent.

\textsuperscript{57} Id, at p.167.

\textsuperscript{58} Ibid
In due process model by forcing the state to prove its case against the accused in an adjudicative context, the presumption of innocence saves to force into play all the qualifying and disabling doctrines that limit the use of the criminal sanction against the individual, thereby enhancing his opportunity to secure a favourable outcome. It vindicates the proposition that the factually guilty may nonetheless be legally innocent and should therefore be given a chance to qualify for that kind of treatment. The doctrine leads to limit the use of criminal sanction against the individual and it operates as a kind of self-fulfilling prophecy.\(^5^9\)

**Equality**

Another strand constituting the ideology underlying the due process model is the idea of equality. It represents a most powerful norm for influencing official conduct. The ideal of equality holds that there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.\(^6^0\) There are gross inequalities in the financial means of the accused as a class. In the adversary systems of criminal justice an effective defence is largely a function of the resources that can be mustered on behalf of the accused. The very large proportion of the accused being indigent will be denied an effective defence.\(^6^1\) The norm of equality prevents situations in which financial inability forms an absolute barrier to the assertion of a right that is in theory generally available.\(^6^2\)

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\(^5^9\) Ibid; Packer explains that by forcing the state to prove its case against the accused in an adjudicative context, the presumption of innocence serves to force into play all the qualifying and disabling doctrines that limit the use of criminal sanction against the individual, thereby enhancing his opportunity to secure a favourable outcome. By opening up a procedural situation that permits the successful assertion of defences having nothing to do with factual guilt, it vindicates the proposition that the factually guilty may nonetheless be legally innocent and should therefore be given a chance to qualify for that kind of treatment.

\(^6^0\) Ibid; see also *Griffin v. Illinois*, 351 U.S. 12, 19 (1956). The proposition is based on this decision.

\(^6^1\) Ibid.

\(^6^2\) Id at p. 169
Beyond this it may provide the basis for a claim whenever the system theoretically makes some kind of challenge available to an accused who has the means to press it. The norm of equality may be invoked to assert that the same kind of opportunity must be available to others as well. If the model of criminal process affords the accused who are in a sound financial position to avail the right to consult a lawyer before entering a plea, then the equality norm exerts powerful pressure to provide such an opportunity to all the accused irrespective of their financial status and to regard the failure to do so as a malfunctioning of the process of whose consequences the accused is entitled to be relieved.63

The mood of skepticism about the morality and utility of the criminal sanction, (taken either as a whole or in some of its application) constitutes the last strand of the ideology of the due process model.64 There are two kinds of problems that need to be dealt with in any model of the criminal process. One is what the rule shall be. The other is how the rules shall be implemented. The second is at least as important as the first. The distinctive difference between the two models is not only in the rules of conduct that they lay down but also in the sanctions that are to be invoked when a claim is presented that the rules have been breached and, no less importantly, in the timing that is permitted or required for the invocation of those sanctions.65

63 Id at pp.169-170
64 Id at p.170; Here Packer’s ideas are to be read in the light of- Paul Bator, ‘Finality in Criminal Law and Federal Habeas Corpus for State Prisoners’, 76 HLR 441 (1963). It reads at p.442: “In summary we are told that the criminal law’s notion of just condemnation and punishment is a cruel hypocrisy visited by a smug society on the psychology and economically crippled; that its premise of a morally autonomous will with at least some measure of choice whether to comply with the value expressed in a penal code is unscientific and outmoded; that its deterrent agent is misplaced, particularly in the case of the very members of society most likely to engage in criminal conduct; and that its failure to provide for individualized and humane rehabilitation of offenders is inhuman and wasteful.”
65 Id at p. 171.
The due process model locates at least some of the sanctions for breach of the operative rules in the criminal process itself. The relation between the rules and the sanctions for their breach, the two aspects of the process, is a purely formal one unless there is some mechanism for bringing them into play with each other. The hinge between them in the due process model is the availability of legal counsel. This has a double aspect. Many of the rules that the model requires are couched in terms of the availability of counsel to do various things at various stages of the process—this is the conventionally recognised aspect. Beyond it, there is a pervasive assumption that counsel is necessary in order to invoke sanctions for breach of any of the rules. The more freely available these sanctions are, the more important is the role of counsel in seeing to it that the sanctions are appropriately invoked. If the process is seen as a series of occasions for checking its own operation, the role of counsel is a much more nearly central one than is the case in a process that is seen as primarily concerned with expeditious determination of factual guilt. And if equality of operation is a governing norm, the availability of counsel to some is seen as requiring it for all. Of all the controverted aspects of the criminal process, the right to counsel, including the role of government in its provision, is the most dependent on what one’s model of the process looks like, and the least susceptible of resolution unless one has confronted the antinomies of the two models.66

The reason for the centrality is to be found in the assumption underlying both models that the process is an adversary one in which the initiative in invoking relevant rules rests primarily on the parties concerned, the state, and the accused. One

66 Id, at p.171.
could construct models that placed central responsibility on adjudicative agents such as committing magistrates and trial judges. 67

Because the crime control model is basically an affirmative model, emphasising at every turn the existence and exercise of official power, its validating authority is ultimately legislative (although proximately administrative). Because the due process model is basically a negative model, asserting limits on the nature of official power and on the modes of its exercise, its validating authority is judicial and requires an appeal to supra-legislative law, to the law of the Constitution. To the extent that tensions between the two models are resolved by deference to the due process model, the authoritative force at work is the judicial power, working in the distinctively judicial mode of invoking the sanction of nullity. That is at once the strength and the weakness of the due process model. 68

3.7. Models in operation

The operation of two models at various stages of the criminal process is to be observed for the purposes of description and analysis. The period from arrest through the decision to charge the suspect with a crime, the period from the decision to charge through the determination of guilt and the stage of review and correction of errors that have occurred during the earlier periods are the three major stages or periods in the criminal process.

67 Id., at p.172.
68 Id., at p.173; Packer pointing out the American legal order concludes that it is strength because there the appeal to the Constitution provides the last and the last and the overriding word and it is weakness because saying no in specific cases is an exercise in futility unless there is a general willingness on the part of the officials who operate the process to apply negative prescriptions across the board. The statements reinforcing the due process model come from the court, while at the same time facts denying it are established by the police and prosecutors.
3.8. Arrest for investigation

The act of taking a person into physical custody is arrest. It is normally the first stage of criminal process. It directly affects the suspect. On what basis are the police entitled to make an arrest and what consequences, if any, will flow from their making an illegal arrest, are two crucial issues arise at this stage of process. These are issues that divide the two models.

Crime control

The police should be entitled to arrest a person when they have reasonable suspicion to think that he has committed a particular criminal offence which is serious in character. It cannot be insisted that an arrest is permissible only in that situation. Many a time it is necessary for police to arrest certain known offenders at any time for the limited purpose of determining whether they have been engaging in antisocial activities especially when it is known that a crime of the sort they have committed has taken place and that it was physically possible for them to have committed it. In a wide variety of situations such as the one mentioned above justifying an arrest on the basis of 'probable suspicion' would be the exercise of hypocrisy.69

The power of the police to arrest people for the purpose of investigation and prevention is one that must exist if the police are to do their job properly. The only question is whether arrest for investigation and prevention should be made hypocritically and deviously, or openly and avowedly. It only causes disrespect for law when there are great deviations between what the law on the books authorises the police to do and what everyone knows they have to do.

69 Id, pp.176-7.
The police have no reason to abuse this power by arresting and holding law-abiding people. The innocent have nothing to fear. It is enough of a check on police discretion to let the dictates of police efficiency determine under what circumstances and for how long a person may be stopped and held for investigation. But if laws limiting police discretion to make an arrest are thought necessary they either should provide very liberal outer limits so as to accommodate all possible cases or, preferably, should acquire nothing more explicit than behaviour that is reasonable under all the circumstances.

The police should be given powers to arrest citizens irrespective of whether they are reasonably suspected of committing a particular crime. The standard should be no more than that a police officer honestly thinks that an arrest will serve the goal of crime control. Alternatively, the substantive laws must be so broadly defined that the police can easily overcome the reasonable suspicion hurdle so as to achieve the goal by means of frequent arrests. Thus it is preferable to have a combination of vague laws and lax standards for governing ‘arrest’. In order to check unlawful arrest the sanction of discipline by superiors shall be applied against the erring police officer. The person who is unlawfully arrested shall be permitted to resort to civil remedies against the erring police officer. On the other hand the crime control model never permits exclusion of evidence obtained as a result of unlawful arrest. Nor does it permit dismissal of prosecution for that reason. That kind of sanction for police misconduct simply gives the

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70 Id., at p.178; Packer proposes that the most appropriate sanction is discipline of the offending policemen by those best qualified to judge whether his conduct has lived up to professional standards—his superiors in the police department. Discipline by his superiors may make him a better policeman; in cases where that seems improbable, he should be dismissed from the force.
71 Ibid; Packer acknowledges that such civil remedies are less likely to serve the end of educating the erring police officer.
72 Ibid; The one kind of sanction that should be completely inadmissible is the kind that takes place in the criminal process itself: dismissal of prosecution or suppression of evidence.
criminal a windfall without affecting the conduct of the erring police. The type of sanction adopted by the crime control model does not impair police efficiency.

Due process

It is a basic right of free men not to be subject to physical restraint except for good cause. No one shall be arrested except upon a determination that a crime has probably been committed and that he is the person who probably committed it. Normally such a determination should be made independently by a magistrate in deciding whether to issue a warrant, but in situations of necessity it may be made by a police officer acting on a probative data that is subject to subsequent judicial scrutiny. Any less stringent standard opens the door to the probability of grave abuse. A society that covertly tolerates indiscriminate arrest is hypocritical, while one that approves its legality is well on the way to becoming totalitarian in nature.

It is far from being demonstrated that broad powers of arrest for investigation are necessary to the efficient operation of the police. If such arrests are actually tolerated on a wide scale it makes no sense to assert that legalising them is necessary to keep efficiency from being impaired. A totally efficient system of crime control would be totally repressive one, since it would require a total suspension of rights of privacy. The due process model desires a regime that fosters personal privacy and champions the dignity and inviolability of the individual. It is inevitable to pay a price for attaining such a regime. That price involves some sacrifice of police efficiency. Efficient law enforcement will be so heavily impaired by failure to adopt the proposed measure that the minimal conditions of public order necessary to provide the

\[13\] Ibid; Here Packer quotes much known line of Cardozo: "the criminal is to go free because the constable has blundered." – in *People v. Defore*, 242 N.Y. 13, 21(1926).

\[14\] Id, p.179.
environment in which individuals can be allowed to enjoy the fruits of personal freedom will in themselves cease to exist or be gravely impaired.\textsuperscript{75}

The practical consequence of enlarging police authority to detain individuals for questioning is not likely to be that all classes of the population there upon be subjected to interference. If that were the consequence the practice would carry its own limiting features because the popular outcry would be so great that these measures could not long be resorted to. The danger is rather that they will be applied in a discriminatory fashion to precisely those elements in the population - the poor, the ignorant, the illiterate, the unpopular - who are least able to draw attention to their plight and to whose sufferings the vast majority of the population are least responsive. Respect for law would plunge to lower degree if what the police are now thought to do \textit{sub rosa} became an officially sanctioned practice.\textsuperscript{76}

The need, then, is not to legalise practices that are presently illegal but widespread. Rather, it is to reaffirm their illegality and at the same time to take steps to reduce their incidents. Then there is the question of sanctions for illegal arrest. To the extent possible these sanctions should be located within the criminal process itself, because it is the efficiency of that process that they seek so mistakenly to promote the process should penalise and thus label as insufficient, arrest that are based on any standard less rigorous than probable cause. As a minimal requirement any evidence that is obtained directly or indirectly on the basis of an illegal arrest should be suppressed. Beyond that, any criminal prosecution commenced on the basis of an illegal arrest should be dismissed, preferably with prejudice, but at the least with the consequence that the entire process if it is to be re-invoked must be started over again from scratch.

\textsuperscript{75} Id. at pp.179-180.
\textsuperscript{76} Id. p.180.
and all records, working papers and the like prepared in the course of the first illegal proceeding impounded and destroyed.\textsuperscript{77}

Most illegal arrests do not result in criminal prosecution and are therefore not amenable to sanctions imposed in the criminal process itself. A variety of devices should be marshaled to provide effective sanctions against arrests for investigation. The ordinary tort action against the policeman has very limited usefulness. It should be supplemented by provision for a statutory action against governmental unit employing the offending policeman with a high enough minimum recovery to make suit worthwhile.\textsuperscript{78}

3.9. Access to counsel

The period from the time that a suspect is arrested until he is brought before a magistrate is likely to be the crucial phase in the investigation of a crime. This phase is investigative, not judicial. There is nothing going on at this point that requires or can tolerate the intervention of a lawyer. It is absolutely necessary for the police to question the suspect at this point without undue interference. This is their only chance to enlist the cooperation of the one person most likely to know the truth. Because the police do not arrest without probable cause, there is a high degree of probability that useful information can be learned from the suspect. If he is given an opportunity to consult a lawyer at this stage of the proceeding, he will invariably be told to say nothing. The most expeditious way of clearing a case will then be foreclosed, and the police will have to take the more laborious route of developing evidence unaided by leads redound to the disadvantage of the innocent suspect, because he will be deterred from making statements that would otherwise lead to his early release. The only person benefiting

\textsuperscript{77} Ibid.

\textsuperscript{78} Id, p.181; Since an important public service is performed by attorneys who bring suits against errant police officers there should also be provision for allowing attorney's fees in cases where action is successful. Direct disciplinary measures against the offending police officer are also desirable.
from this procedure will be the guilty suspect, who is accordingly enabled to make it
difficult, if not impossible, for a conviction to be obtained. As a result, the protection
that the community enjoys against criminal activity will decline. A lawyer’s place is in
court. He should not enter a criminal case until it is in court.79

Due process model

A hardened and sophisticated criminal knows enough to keep silent in the
face of police interrogation. He knows that he does not have to talk and that he is not
likely to realise any advantage by talking. An inexperienced person in the toils of the
law knows none of this. Unless the operative rules forbid it, the situations of these two
categories of suspects are bound to be unequal.80

Likewise, there is no moment in the criminal process when the disparity in
resources between the state and the accused is greater than the moment of arrest. There
is every opportunity for overreaching and abuse on the part of the police. There is no
limit to the extent to which these opportunities are taken advantage of except in the
police’s own sense of self-restraint. Later correctives palliate but not suffice. It is not
hard to predict whose word will be taken if a contradiction arises in the police station.81

The only way to ensure that these two equally obnoxious forms of inequality
do not have a decisively malign impact on the criminal process is to require at the time
of arrest- (1) that the suspect be immediately apprised of his right to remain silent and to
have a lawyer; (2) that he promptly be given access to a lawyer, either his own or one

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79 Id., at pp.202-3.
80 Id., at p.203.
81 Ibid.
appointed for him; or (3) that failing the presence of a lawyer to protect the suspect's interest, he not be subjected to police interrogation.  

3.10. Detention and interrogation after arrest

After every lawful arrest for investigation the detention of the arrested person and the interrogation of him during detention constitute an important stage of the criminal process. Both models adopt different mode of procedure at this stage.

Crime control

The police cannot be expected to solve crimes by independent investigation alone. The best source of information is usually the suspect himself. Without the cooperation of suspects, many crimes could not be solved at all. The police must have a reasonable opportunity to interrogate the suspect in private before he has a chance to fabricate a story or to decide that he will not cooperate. The psychologically optimal time for getting this kind of cooperation from the suspect is immediately after his arrest, before he has had a chance to rally his forces. Any kind of outside interference is likely to diminish the prospect that the suspect will cooperate in the interrogation. Therefore he should not be entitled to interact with his family, friends or lawyer. The first thing a lawyer will advise him is to say nothing to the police. Once he gets that kind of reinforcement, the chances of getting any useful information out him sink to zero.  

The police should not be entitled to hold the suspect for interrogation indefinitely, nor would they want to do so. But no hard and fast rule can be permitted to interrogate the suspect before bringing him before a magistrate. The gravity of the

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82 Ibid.
83 Id., at pp.187-8.
crime, its complexity, the amount of criminal sophistication that the suspect appears to have- all these are relevant factors in determining how long he should be held. The standard ought to be length of time, given all the circumstances, during which it is reasonable to suppose that legitimate techniques of interrogation may be expected to produce useful information or that extrinsic investigation may be expected to produce convincing proof either of the suspect's innocence or of his guilt. 84

The family of suspect is entitled to know where he is, but they should not be entitled to talk with him, because that may impair the effectiveness of the interrogation.

The principle is that hard and fast rules cannot be laid down if police efficiency is not to be impaired. Thus the rules must be flexible and that good faith mistakes about their applicability in any given case should not be penalized. If the police err by holding a suspect too long, he has no complaint, because they would not be holding him unless they had some good basis for their belief that he had committed a crime. 85

Any trustworthy statement obtained from a suspect during a period of police interrogation should of course be admissible into evidence against him. Criminal investigation is search for truth, and anything that aids the search should be encouraged. There is, of course, a danger that occasionally police will not live up to professional standards and will use coercive measures to elicit a confession from a suspect. That is not to be condoned, nonetheless the confession obtained by coercion is not at all suppressed or excluded. Rather the evil of the coerced confession is that it may result in the conviction of an innocent man. Again there is no way of laying down hard and fast

84 Ibid.
85 Id., at pp.188-9. The public has a complaint to the extent that police resources are thereby shown to have been used inefficiently, but the redress for that is intradepartmental discipline in flagrant cases and a general program of administrative management that keeps such occasions to a minimum.
rules about what kinds of police conduct are coercive. It is a factual question in each case whether the accused's confession is unreliable. An accused against whom a confession introduced into evidence should have to convince the adjudicating authority that the circumstances under which it was elicited were so coercive that more probably than not the confession was untrue. In reaching a determination on that issue, the trier of fact should of course be entitled consider the other evidence in the case, and if it points toward guilt and tends to corroborate the confession, should be entitled to take that into account in determining whether, more likely than not, the confession was untrue.\(^{86}\)

The sanctions available for mistreating a person in custody are simple, if vigorously pursued, to ensure that this kind of conduct will be rare. It is by raising professional standards through internal administrative methods rather than altering the outcome of randomly selected criminal prosecutions that improper police conduct is being eliminated. The use of force is not in itself determinative of the reliability of a confession and should therefore not be conclusive against the admissibility of a confession.\(^{87}\) The practices less likely than the use of force to be coercive, such as an overlong period of detention unaccompanied by physical abuse, should not count conclusively against the admissibility of a confession.\(^{88}\)

### Due process

In this model the decision to arrest in order to be valid must be based on probable cause to believe that the suspect has committed a crime.\(^{89}\) Once a suspect has

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\(^{86}\) Ibid.

\(^{87}\) Ibid.

\(^{88}\) Id, at p.190.

\(^{89}\) Ibid; Packer puts it another way, the police should not arrest unless information in their hands at that time seems likely, subject to the vicissitudes of the litigation process, to provide a case that will result in a conviction. It follows that if proper arrest standards have been employed, there is no necessity to get additional evidence out of the mouth of the defendant he is to be arrested so that he may be held to answer the case against him, not so that a case against him that does not exist at the time of his arrest can be developed.
been arrested, he should be brought before a magistrate without unnecessary delay, which is to say as soon as it is physically possible to do so, once the preliminary formalities of recording his arrest have been completed. An arrested person has the right to test the legality of his arrest in a judicial proceeding. The right is practically diluted through delay unless the accused is promptly brought before a magistrate. Since a suspect is entitled to be at liberty pending the judicial determination of his guilt or innocence, there must be as promptly as possible after arrest a proceeding in which the conditions of his release - for example release on bail - are determined. This right too is diluted by delay unless the suspect is promptly brought before a magistrate.

The suspect is entitled to the assistance of counsel most acutely as soon as he is arrested. As a practical matter, he is unlikely to receive that right unless he is promptly advised of it. Once again, his prompt production before an impartial judicial officer is necessary if his right is not to be diluted by delay.90

As soon as a suspect is arrested the police are bound to tell him that he is under no obligation to answer questions, that he will suffer no detriment by refusing to answer questions, that he may answer questions in his own interest to clear himself of suspicion (but that anything he says may be used in evidence), and, above all, that he is entitled to see a lawyer if he wants to do so.91

If the suspect does not make self-incriminating statements while under arrest and before he is brought before a magistrate their admissibility into evidence against him should be barred under any of the following conditions: (1) if the police failed to warn him of his rights, including his right to the assistance of a lawyer; (2) if he was questioned after the required warnings were given, unless he expressly waived his rights to be silent and to

90 Ibid.
91 Id, at p. 191.
see a lawyer; (3) if the confession was made during a period of detention that exceed what
was necessary to get him promptly before a magistrate; or (4) if the confession was made by
other coercive means, such as the use of force. Any confession made under these
circumstances should be regarded as “involuntary”- and should be excluded at the trial in
order to deprive the police of any incentive to obtain such a confession.92

The rationale of exclusion is not that the confession is untrustworthy, but
that it is at odds with the postulates of an accusatory system of criminal justice in which
it is up to the state to make its case against an accused without forcing him cooperate in
the process, and without capitalizing on his ignorance of his legal rights. It follows,
then, that the existence of other evidence of guilt has no bearing on the admissibility of
the confession or on the necessity for reversing a conviction based in part on such a
confession. It also follows that the procedure for determining the admissibility of a
confession must be such as to avoid any possibility of prejudice to the defendant
through the process of determining admissibility.93

3.11. Electronic surveillance

Crime control

The war on organised crime demands the use of electronic surveillance. High-
ranking members of organised crime syndicates are insulated by layers of structure from
direct participation in the crimes committed by their underlings. If they are to be
implicated, it must be by showing that they have directed a conspiracy. Since their role
may not even be known to the immediate participants in any given illegal transaction of

92 Ibid.
93 Ibid. Packer points out that in a jury trial the issue of the admissibility of a confession should be
litigated on a record made before the judge and out of the hearing of the jury, so that the trial judge has
the clear and undivided responsibility for deciding whether the jury should hear the confession and so
that a reviewing court can have an unambiguous basis for deciding whether the trial judge reached the
proper conclusion.
gambling or narcotics, the only way in evidence can be secured against them is by listening in on their telephone conversations and otherwise monitoring their discussions. Almost without exception, the conviction of top underworld figures has depended on the use of evidence or evidential leads obtained through electronic surveillance. 94

It is undeniable that abuses may occur, but the danger is greatly outweighed by the necessity for using these devices. Judicial control of the use of surveillance device will probably not do much to protect against excess of enforcement zeal because it is impossible for the judge to whom application is made for an authorising order to do more than generally satisfy himself that the police have reasonable grounds for wishing to use the devices to overhear conversations on a particular telephone line or in a particular place. Judges cannot exercise continuous and detailed supervisions over the monitoring. And the nature of the business is such that there is going to be a high ratio of chaff to wheat. However, we do not object in principle to having to obtain a court order, so long as judges do not require an impossible degree of specific about what we were looking for, we wouldn't have to look. 95

There should be no limitations on the kinds of criminal activity police are allowed to investigate using surveillance devices. Sometimes an important underworld figure can be tripped up on the basis of a relatively minor criminal charge by the same token, we should be free to use what turns up whether it is what we were looking for or not. Law-abiding citizens have nothing to fear. If conversations that we overhear produce no leads to evidence of criminal activity, we are not interested in them. Law

94 Id, at pp. 195-6.
95 Ibid.
enforcement has neither the time nor the inclination to build up files of information about activity that is not criminal.

Due process

The right of privacy cannot be forced to give way to the asserted exigencies of law enforcement. The use of electronic surveillance constitutes just the kind of indiscriminate general search that the law guards against. In the name of necessity this grant of power would permit an unscrupulous policeman or prosecutor to pry into the private lives of people almost at will. Knowledge that this was so would certainly inhibit the free expression of thoughts and feelings that makes life our society worth living. Electronic surveillance by anyone under any circumstances should be outlawed.\textsuperscript{96}

This is the optimal position. If it cannot be established, certainly it is essential that police authority for electronic surveillance be strictly limited to a small class of very serious cases. The fight against organised crime is far too vague and sweeping a rubric to provide adequate protection. And the offences allegedly committed by organised criminals are committed by many others as well. The most that should be authorised is the use of electronic surveillance in case of espionage, treason, or other crimes directly affecting national security. And even in such cases as these, there should be judicial control comparable to what would be exercised in deciding whether to issue a search warrant.\textsuperscript{97}

3.12. Illegally searched evidence

In every criminal process there are bound to the rules that delineate the circumstances under which the police may invade the privacy of the home in their

\textsuperscript{96} Id, at p.197.

\textsuperscript{97} Ibid.
search for evidence that will aid in convicting persons accused of crime. The competing models are appropriate to redress the person whose privacy has been unlawfully invaded and to deter similar unlawful invasions in the future.

Crime control

The police are bound to mistakes, and it is of course desirable that these mistakes be minimised. Here, as elsewhere, the way to deal with mistakes is to afford a remedy by people whose privacy has been improperly invaded and to correct, by discipline and education, the future conduct of the officers who make the mistakes. It is unwise and unnecessary to provide the allegedly injured party with a windfall in the form of freedom from criminal conviction when his guilt is demonstrable.98

There is no need for any special aid to private legal actions initiated for redress of illegal searches. The ordinary tort action that is available to law-abiding people when their interests have been invaded ought to be good enough for the criminal. The 'victim' should be entitled only to monetary compensation against the erring police in addition to moving the superiors to inflict discipline and education on such errands.99 In any event, there is no reason why evidence should not be used in the criminal process without regard to the manner in which it has been obtained. Here, unlike the problem of

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98 Id, at p.199.
99 Ibid; Let him hire a lawyer, sue the police, and persuade a jury if he can, that he has been actually damaged in a way that entitles him to monetary compensation. The discipline and education of the police is a matter, like any other problem of maintaining morale and standards in this large bureaucratic organisation, for the police department itself. The "victim" is entitled to have his complaint considered; but he has no further interest, once the facts have been drawn to the attention of the proper departmental authorities.
the confession, there is no question of trustworthiness or reliability. Physical evidence is physical evidence, regardless of how it is obtained. 100

Due process

The ordinary remedies for trespass upon one's property are totally deficient as a means for securing police compliance with rules regarding illegal searches and seizures. The victim usually is in no position to sue; even if he is, juries are notoriously unlikely to provide a remedy; and even if they do, police officers are often judgment-proof. Likewise, departmental discipline is an ineffective deterrent. The police are expected to get evidence upon which convictions may be obtained; if they do so it is unlikely that their superiors will regard their illegal conduct as inefficient. The problem is that legality may mean inefficiency from the police standpoint, and efficiency is a value they tend to place above adherence to the finer points of constitutional law.

The only practical way to control illegal searches is to take the profit out of them. This means that any evidence illegally obtained cannot be permitted as evidence. It should be suppressed before or during trial; if it is not convictions obtained in whole or in part on its basis should be reversed. Beyond that any evidence obtained by leads provided by the result of an illegal search should also be banned so that there may be no easy evasion of the mandate. In doubtful cases, where it is unclear whether there is a connection or how strong it is, the standard should be one that resolves doubts most strongly against the preferred evidence whenever its discovery has been preceded by illegal searches. Whenever an illegal search for evidence is shown to have taken place

100 Ibid; Packer cites an example: If one suspected of illegally possessing heroine is found to have heroine on the kitchen shelf, this supply of narcotics is reliable evidence of his guilt, whether the search that turned it up is later found by some judge to be legal or illegal.
the model requires not only the exclusion of evidence obtained by illegality but also dismissal of the prosecution.\textsuperscript{101}

3.13. The decision to charge

Crime control

The prosecutor is in the best possible position to evaluate the evidence collected by the police and to decide whether it warrants holding the suspect for a determination. The prosecutor must in any event do so in every case. It would be a waste of time and resources to require that the job be done over again by a magistrate. The prosecutor has no interest in pressing cases that are unlikely to result in conviction. His professional reputation is generally based on the proportion of convictions that he obtains in cases in which a charge has been lodged against a suspect. Therefore, the interest of the suspect in not being prosecuted on a completely groundless charge is amply protected by confiding the screening decision at the stage of the process entirely to the prosecutor's discretion. Any system that required a preliminary judicial examination in all criminal cases would collapse of its own weight. There are simply not enough trained magistrates to go around. The most that should be expected of the preliminary hearing is the appointment of counsel and the setting of bail.\textsuperscript{102}

There may be occasions when the prosecutor needs some support in the decision to charge suspect. He may need to rally community sentiment in a case that has aroused widespread interest or in one where the suspect is a public official or otherwise prominent. Conversely, he may want to take a sounding of general opinion to see whether it will back such a prosecution. In this kind of situation a grand jury proves useful, providing as it does a kind of miniature public opinion poll for the prosecutor. If

\textsuperscript{101} Id, p.200.
\textsuperscript{102} Id, at p.206.
the grand jury disapproves, the prosecutor need pass the case no further and can turn aside any criticism by pointing to the action of the grand jury. If, on the other hand, the grand jury approves, as it ordinarily will when the prosecutor voices a desire to press charges, any charge made is reinforced by the authority and prestige of the grand jury. Of course, the usefulness of the grand jury procedure depends on its secrecy. It is not an adversary proceeding, and the suspect is not entitled to be present, or to have the aid of counsel if he does testify, or to know what has gone on before the grand jury. If these conditions of secrecy are breached, the grand jury device simply provides another occasion for delaying or defeating the machinery of criminal justice. The prosecutor should control the decision to charge. He should be entitled to institute charges either by filing an information or by persuading the grand jury to return an indictment. In either case, he should not have to wait for a judicial officer to rule that the evidence is sufficient to support the institution of criminal charges against the suspect. The decision to convert a “suspect” into a “defendant” should be entirely up to the prosecutor.

Due process

It would be ridiculous to expect every arrest to produce a case sufficiently strong to warrant criminal prosecution. Some screening must take place. The appropriate forum for that screening process is not released before that stage is reached. The prosecutor cannot be trusted to do this screening job any more than the police can. Discretion at this stage of the process means substantial abandonment of an adversary system. Beyond this, any standard for deciding when the evidence at hand is

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103 Id., at p.207.
104 Ibid.
105 Ibid; Packer clarifies: why should we do so in the large number of cases in which the evidence in the hands of the police is inadmissible but may lead to the discovery of other, possibly admissible evidence if the process is not terminated?
sufficient to support a charge is bound to be too broad to be applied in a nondiscriminatory way unless it is applied impartially and openly, two adverbs that do not describe the operations of a public prosecutor.106

If the criminal process afforded a speedy and non-coercive mechanism for guilt determination without pre-trial detention, there might be something more to be said for dispensing with the requirement of a preliminary hearing. As it is, such a screening operation by an adequate opportunity to challenge the processes being invoked against them.

The preliminary hearing should be held in public or in private at the option of the suspect. He should be entitled to be present and to have the assistance of counsel. The prosecution should be required to present enough testimony, of a kind and in a form admissible at the trial on the merits, to support a judgment that there is probable cause to charge the suspect with a specific crime or crimes. It is apparent that the traditional grand jury proceeding does not conform to these requirements.

It is obvious that the effective implementation of these standards for "judicializing" the preliminary examination requires that counsel be available to the suspect at this stage of the proceeding. Indeed, if counsel is to be effective at this stage, he should probably enter the case at an earlier stage, as soon after arrest as possible, so that he may familiarize himself with the case before rather than during the hearing. It is equally obvious that the accused must be made to understand the function of the preliminary examination and the assistance of counsel in connection with it. Without that understanding, no waiver of the right to preliminary examination should be allowed

106 Id., at p.208.
to stand. Indeed, it is doubtful that any waiver of preliminary examination should be allowed unless the suspect has had the assistance of counsel. The only effective sanction for ensuring that these procedures are followed in the sanction of nullity: a conviction obtained without adequate preliminary examination should not be allowed to stand.

3.14. Pre-trial detention

Crime control

The vast majority of persons charged with crime are factually guilty. An arrest that results in a formal charge has behind it a double assurance of reliability: the judgment of the police officer who made the arrest is backed up by that of the prosecutor, who has decided that there is enough evidence to hold the defendant for trial. For all practical purposes, the defendant is a criminal. Just because the assembly line cannot move fast enough for him to be immediately disposed of is no reason for him to go free. If he does go free there is a risk that he will not appear for trial, a risk that is heightened when he is well aware that he is guilty and has a lively expectation of probable punishment. If he does not appear voluntarily, the limited resources of the system will have to be devoted to tracking him down and bringing him in. that may be tolerable when it occurs sporadically and on small scale. On the other hand if large numbers of people are turned loose before trial, the chances are that the problem will get out of hand we will be faced with a vicious circle. The more people fail to appear, the more people will be encouraged not to appear, and the whole system will collapse.\(^\text{107}\)

Another risk is that the known criminals will commit further crimes while at large awaiting trial is in itself an adequate reason for not making pre-trial liberty the

\(^{107}\) Id, at p.212.
norm. The more hardened the criminal, the greater the likelihood that this will happen.108 The danger to property and human life that results from letting known offenders go free even temporarily is inexcusable because it is so easily avoidable.109

Even for first offenders and others who do not seem very likely to repeat their crimes while awaiting trial, there are good reasons why pre-trial liberty should not be available as a matter of right. Courts are inclined to be lenient with first and other minor offenders. Prosecutions of these offenders are likely to be dismissed in a large proportion of cases because it is not worthwhile to use the limited available resources to prosecute them. If their cases are not dismissed, the offenders may nonetheless be put on probation or fined or given suspended sentences— all dispositions that fall short of having any significant effect on their future conduct. For many such persons, a short period spent in jail awaiting trial is not only a useful reminder that crime does not pay but also the only such reminder they are likely to get.

Other considerations apart, it is likely that a significantly higher percentage of defendants who now plead guilty would elect to stand trial if they could be at liberty pending trial. People who know that they are guilty would just as soon get it over with and take what is coming to them if, in order to gamble on the off chance of an acquittal, they have to spend weeks or months in jail awaiting trial. But if they are released pending trial, the incentive to plead guilty is greatly reduced. The inevitable delays of the process, as well as those that are not so inevitable but can be brought about by carelessness or bad faith would then work in favour of the defendant rather than, as is the situation when he is in custody against him. It is unlikely that there would be a significant rise in the percentage of defendants eventually found not guilty because we are considering here

108 Ibid. Thus, burglars will commit more burglaries; narcotics peddlers will sell more narcotics; gunman will stage more robberies.
109 Ibid.
only those people who are probably guilty. Due to delay the chances for disappearance of
witnesses at the time of trial, and getting off the guilty accused through human error
(mistakes by judges, jurors or prosecutors are very high. The main danger is that increase
in time required to litigate cases that don’t really need not to be litigated would put an
intolerable strain on what is already an overburdened process. This consideration alone
argues against a policy that makes pretrial liberty the norm.110

However the model acknowledges the bail system under which there is a
nominal right to pretrial liberty. Still there is no such right because of the discretion
granted the committing magistrate who can set bail in an amount that the defendant is u
likely to be able to afford. Such an attitude is tantamount to the discretionary system
required by the crime control model.

It is true that there are injustices in the bail system that are not required by the
demands of the crime control model. There may be many instances in which police
efficiency would be promoted by not chittering up station houses and detention centers
with minute use of summons instead of arrest or release after arrest without the posting of
bail may be desirable. However the pretrial detention is to be mitigated for some people, it
ought to be done explicitly for the purpose of promoting the efficiency of criminal process
rather than for the purpose of adhering to some abstract notion of a “right” to pretrial
liberty. In cases of serious crime the confinement of the accused for adjudication of guilt
definitely serves the ends of the process and should be regarded as the norm.

Due process

A person accused of crime is not a criminal. The sharpest distinction must be
observed between the status of an accused and that of a person who has been duly convicted

110 Id, at p.213.
of committing a crime. Perhaps, the most important, and certainly the most obvious, operational distinction between the two lies in the issue of physical restraint. Pending the formal adjudication of guilt by the only authority with the institutional competence to decree it - a court - the status of the convicted in this most important of respects. 111

An accused who is confined pending trial is greatly impeded in the preparation of his defense. He needs to be able to confer on a free and unrestricted basis with his attorney, something that is notoriously hard to do in custody. He may be most likely person to interview and track down witnesses in his own behalf - something he cannot do if he is in jail. His earning capacity is cut off. He may lose his job. His family may suffer acute economic hardship. All these things may happen before he is found guilty. Furthermore, the economic and other deprivations sustained as a result of pre-trial confinement measures that inhibit the accused person’s will to resist. He is rendered more likely to plead guilty and, as a result to waive the various safeguards against unjust conviction that the system provides. When this happens on a large scale, the adversary system as a whole suffers because its vitality depends on effective challenge. 112

A person accused of crime is entitled to remain free until judged guilty so long as his freedom does not threaten to subvert the orderly process of criminal justice. His freedom could have this effect only if he deliberately omitted to appear at the time and place appointed for trial. If persons accused of crime could with impunity fail to appear, the premise of cooperation on which a system of pretrial liberty depends could

111 Id., at p.214.
112 Id., at pp.214-5.
not in practice be realised. Hence, it is important that the right to pre-trial liberty be exercised in a way that does not jeopardise the process as a whole.\textsuperscript{113}

The right to pre-trial liberty has been firmly established by the institution by bail. It has been thought that the requirement of a financial deterrent to flight will adequately protect the viability of the system while ensuring that the defendant can enjoy liberty before his trial. The requirement that the accused be released pending trial on the basis of bail or whatever other device or combination of devices will ensure his presence at the trial without denying him freedom on grounds that have nothing to do with the assurance of his presence. Bail is simply one way- and not the only one- of assuring a defendant's presence at his trial. If the institution of bail does not adequately promote the desired combination of goals, then the alternatives thereto are to be resorted to. The alternatives might include such deterrents to flight as criminal penalties for nonappearance, the use of summons rather than arrest (with its attendant physical custody) to initiate criminal prosecution, release of arrested accused on their own recognizance or in the custody of some responsible person, and use of cash bail instead of bail bonds.

Where bail is used, it must be set according to the circumstances of the individual case rather than on a mechanical basis. Thus, the nature offence is only one of several elements to be taken into account in making the bail decision. Setting bail mechanically on the basis of a schedule for certain offences may in itself be an effective denial of the defendant's right. Essentially, a hearing for the setting of bail must be a fact-finding process in which the financial resources of the accused, his roots in the community, the nature and circumstances of the offence charged, and other relevant factors are all taken into account in arriving at the minimum level of bail required to

\textsuperscript{113} Ibid.
assure a reasonable probability of the particular defendant's appearance for trial. It is completely unacceptable to set bail at a figure that the accused is thought to be unable to meet. Speedy appellate review must be available to correct errors of this sort, still another reason why the bail decision must initially be made on the basis of a record that others can subsequently appraise. To the extent that adequate investigative and other fact-finding resources are not brought to bear, the defendant should be entitled to go free on nominal bail or no bail. The period of custody should in no event exceed the minimum required after arrest to ascertain the relevant facts about the suspect's situation. Normally this should be done by the time the committing magistrate has made the decision to hold the arrested person for subsequent proceedings.114

For indigent accused any bail is excessive. There is substantial percentage of persons who do not succeed in making bail and are therefore held in custody pending trial. It may be that the decision not to seek bail in many of these cases is a voluntary one: a man who knows that he is factually guilty may simply decide that it isn't worth his while to spend money on a bail bond premium. However, many people who are eventually adjudged guilty do post bond and are released pending trial. Their awareness that they are guilty may be just as the poor man's, but they avail themselves of their right to be free pending adjudication of guilt. It is unfair to deny the poor the same right simply because for them the marginal utility of the bail money is higher than it is for the rich. At any rate, it is clear that if all persons in custody were informed of their right to be free on some basis other than the payment of bail premiums, may of those who now spend days or weeks or even months in custody awaiting trial would avail themselves of

114Id, at p.216.
these other means. And, if that is so, it seems to follow that system that makes pre-trial freedom conditional on financial ability is discriminatory.\textsuperscript{115}

It is antithetical to our conceptions of justice to permit pre-trial detention to be used as a means of informal punishment in advance of (or instead of) a formal determination of guilt and sentence. And to speak of the possibility that the accused may commit further crimes if left at large is to beg the question; for it has not yet been determined that he has committed any crime at all. Many of the limitations on substantive criminal enactments safeguard us against being punished for a mere propensity to commit crime. The logic of preventive detention would extend to persons newly released from prison; why not re-arrest them and lock them up because they may commit another crime?\textsuperscript{116}

The problem of what to do with dangerous people who have not been convicted of committing crimes is a troublesome one. It far transcends the question of preventive detention of persons accused of crime. The solution, if there is one, must include setting up standards for determining who is dangerous and providing the minimal procedural due process safeguards of notice and a hearing for persons whom the state seeks to confine on this ground. Whatever, the solution, it cannot bypass these basic due process requirements by permitting the indiscriminate preventive detention of people who are accused of crime. The problem can in any event be minimised by shortening the interval between charge and trial.\textsuperscript{117}

In some cases it is possible that the accused if left at large will threaten witnesses, destroy evidence, or otherwise impede the preparation of the case against him. This is said

\textsuperscript{115} ibid; Packer cautions: Indeed, given the malfunctioning of the present system where the financially disadvantaged are concerned, it may well be that the bail system should be ruled out for rich and poor alike. One need not pursue the argument to that extreme, however, to recognise that a system that conditions pre-trial release exclusively or even predominantly on the provision of financial assurance of presence at trial is a seriously defective one.

\textsuperscript{116} Id, at p.217.

\textsuperscript{117} Id, at pp.218-9.
to be particularly likely in the case of men involved in organised crime.\textsuperscript{118} The due process model deals with this problem by giving witnesses police protection, by placing the accused under an injunction backed up by the contempt power, by providing criminal penalties for tampering with witnesses, and the like. The vice of detaining a defendant before he actually does anything bad is obvious: it penalises him for a mere disposition, a totally unapprovable thing, and it thus opens the way for the most widespread abuses. At the first concrete sign that the accused has engaged in obstructive activities, it is altogether proper to seek to confine him on the basis of proof that obstructive activities have taken place. But there is a great difference between doing this on the basis of proof after fact and doing it on the basis of suspicion before the fact.

In summary, the pre-trial liberty should be the norm in due process model.\textsuperscript{119}

3.15. Plea of guilty

The plea of guilty is one of the institutions of the criminal justice where a guilty plea rather than trial is the dominant mode of guilt-determination. A substantive number of criminal prosecutions terminate with the entry of a plea of guilty.

Crime control

The model prefers plea of guilty to dispose of as large a proportion of cases as possible without trial. Such a termination of prosecution is in the interest of all-the prosecutor, the judge, the defendant. There is a distinct social advantage to terminating criminal proceedings without trial whenever the defendant is willing to do so. The judge must ensure that the plea of guilty is entered on his own free will.

\textsuperscript{118} ibid; Packer clarifies: The argument is a little hard to understand. The higher the degree of organisation involved, the less likely it would seem to be that the personal attention of the defendant would be required to promote obstructive tactics.

\textsuperscript{119} Id, at p.220.
The judge need not inquire into the factual circumstances underlying the commission of the offence except to the extent that he thinks it will help him perform his sentencing function. It serves to bypass issues that can only result in a weakening of effective criminal justice.

Due process

The arraignment is the fulcrum of the entire criminal process. It is at this point that one of two things happens: either the possible errors and abuses at the earlier, largely unscrutinised stages of the process are exposed to judicial scrutiny or they are forever submerged in a plea of guilty. It is not only a device for expediting the handling of criminal cases; it is kind of Iron Curtain that cuts off, almost always irrevocably, any disinterested scrutiny of the earlier stages of the process. Guilty pleas should therefore be discouraged. However the model permits guilty plea to a limited extent. It must be accepted scrupulously. No kind of pressure either by the prosecutor or by the judge, should be brought to bear on a defendant to induce him to plead guilty.120

Appeal

Crime control

Once a determination of guilt has been made either by entry of a plea or by adjudication, the paramount objective of the criminal process should be to carry out the sentence of the court as speedily as possible. The model desires that people who violate the law will be swiftly and certainly subjected to punishment. Appeal will definitely undermine and cause delay to this objective. Thus appeals should be so effectively

120 Id, at p.224.
discouraged that merely taking an appeal will itself be fairly reliable indicator that the case contains substantial possibility of error concerning the factual guilt.\textsuperscript{121}

If appeal in criminal cases is available as a matter of right, restrictions must be imposed to ensure that the right is exercised responsibly. The model places very heavy emphasis on the plea of guilty as the central determining device.

No issue should be raisable on appeal that was not raised at an earlier stage of the process. No conviction should be reversed for insufficiency of evidence unless the appellate tribunal finds that no reasonable trier of fact could have convicted on the evidence presented. Appeals against a verdict of acquittal should be available to the prosecution to the same extent that appeals against a conviction are available to the defence. Errors not relating to the sufficiency of the evidence to establish factual guilt - errors in the admission or exclusion of evidence, in the trial judge - should not provide a basis for reversal of a conviction on appeal unless it is found that in the absence of the error or errors the result would probably have been different. Finally, no errors should suffice for reversal if the appellate court concludes on a review of all the evidence that the factual guilt of the accused was adequately established.\textsuperscript{122}

Due process

In this model appeal has a much broader function.\textsuperscript{123} It operates to correct errors in the assessment of factual guilt (at least when they have hurt the accused’s case), but that is only the beginning of its function. It serves, more importantly, as the

\textsuperscript{121} Id., at p.229.
\textsuperscript{122} Id., at p.230.
\textsuperscript{123} Id., at p.228.
forum in which infringements on the rights of the accused that have accumulated at the earlier stages of the process can be redressed and their repetition in subsequent cases deterred. The appellate forum has distance from and independence of the police-prosecutor nexus into which the trial court is so often drawn.  

The first forum in which abuses of official power should be corrected in the criminal process is the trial. However, they are not always corrected there, and indeed the trial process may itself be a fertile source of additional abuses. Then the accused can very well get it corrected at the appellate stage. The right of appeal is an important safeguard for the rights of the individual accused. Beyond this, it plays an essential role in the law making process. For the steady flow of criminal cases on the appellate level provides the raw material for the elaboration of those very rights. If the model is to retain its dynamic character, there must be full and unrestricted access to the appellate phase of the process.  

There should be no limitations on the convicted accused's right to appeal. Financial restrictions are as much out of place here as they are at other levels of the process. If the appellant cannot afford to pay a filing fee, it must be given to him; if he cannot afford to buy a transcript, it must be given to him; if he cannot afford to hire a lawyer, he must be given to him. 

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124 Id. at pp.228-9.
125 Id. at p.230.
126 Id. at p.231; Packer points out: The last point is very important; whether reversible errors justifying an appeal have occurred is certainly a matter on which the convicted defendant need the help of a lawyer; there is no more technical aspect to the criminal process. No lawyer will advise an appeal where grounds for appeal are lacking, but only a lawyer can tell whether the grounds are there or not; for at this stage of the process it is legal errors rather than factual guilt that are primarily at issue.
3.16. France

French penal law recognises three classes of offences: felonies, misdemeanors and petty offences.\(^{127}\) The gravity of an offence is measured by the severity of the punishment prescribed for it.\(^ {128}\)

The first step in the prosecution of an offender for most offences is an investigation conducted by an examining magistrate.\(^ {129}\) The examining magistrate is bound to conduct preparatory investigation in felony cases, while it is permissible in misdemeanor cases in the absence of special provisions.\(^ {130}\) The investigation conducted by the examining magistrate is a regular part of the judicial process. Its function is channeling cases to the trial court having jurisdiction of which accused can most reasonably be expected to be convicted.

There are two ways in which a case may be initiated.\(^ {131}\) If a complaint is filed accompanied by a claim for civil damages, the magistrate is empowered to proceed with his investigation.\(^ {132}\) If the complaint is unaccompanied with a claim for damages it must be forwarded to the local prosecutor. If the prosecutor decides to pursue the matter

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\(^ {127}\) Offences, felonies and misdemeanors are called *infractions, crimes and delits* respectively in the French Penal Code. Arts. 6, 7, 8 & 9. Petty offence is called *contravention de simple police.*

\(^ {128}\) A petty offence (*contravention*) is punishable by imprisonment for not more than two months and a fine of not more than two thousand new francs (*une peine de simple police*); a misdemeanor (*delit*) is an offence punishable by jailing or imprisonment for not more than five years and a fine of more than two thousand new francs (*une peine correctionnelle*); and a felony (*crime*) is an offence punishable by more severe penalties, such as death or imprisonment at hard labour (*une peine criminelle* or *une peine afflicte et infamante*).

\(^ {129}\) Code of Criminal Procedure, Art. 79; investigation is called *information*.

\(^ {130}\) *Ibid*; A different procedure is adopted for the prosecution of each class of offence so as to provide a measure of protection for the accused commensurate with the security of the penalty carried by each offence.

\(^ {131}\) Id, Arts. 51, 80 & 86.

\(^ {132}\) Id, Arts. 85 & 86; See Howard, ‘Compensation in French Criminal Procedure’, (1958)21 MLR 387-400.
he so notifies the examining magistrate. It is upon initial application that the jurisdiction to investigate is based.

Once the investigation is initiated, the examining magistrate is free to inquire into any offence related to that stated in the complaint or application and may proceed to investigate any person who may appeal to be involved. The examining magistrate is empowered to undertake all acts of investigation that he deems useful to the manifestation of the truth. If the examining magistrate is himself incapable of undertaking all the acts of investigation he may give a commission rogatory to officers of the judicial police that they may execute all the acts of the investigation necessary under the conditions. The examining magistrate prepares a report of those acts as well as all procedural movements. The report is called dossier.

The persons who are ordered to appear and give evidence must do so, subject to a penalty for non-appearance, as for contempt. The subject of the investigation is not put on his oath as are other witnesses, and he may have the assistance of counsel if he chooses. The witnesses other than the civil claimant are not entitled to the assistance of counsel at these hearings unless they are advised that they are being investigated. The

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133 Id., Art.80; The prosecutor can make use of the institution of police investigation, for arriving at the decision as to whether to pursue the matter. Here police investigation means preliminary investigation by the judicial police designated in Article 20, according to the provisions of Articles 75-78. See also, Anton, 'L' instruction Criminelle', (1960)9 Am. J. Comp. L, 441-457.
134 Id., Art.81.
135 Id., Art.109; It provides that every person cited to be heard as a witness is bound to appear, to take the oath and to make a statement subject to the provisions of Article 378 of the Penal Code. If the witness does not appear, the examining magistrate may on the request of the prosecuting attorney, have him picked up by the police and sentence him to a fine of from 400 to 1,000 new francs. If he appears later, he may, however, on protection of his excuses and justifications, be released from that punishment by the examining magistrate after the prosecuting attorney has been heard.
136 Id., Arts.103 & 104.
137 Id., Art.117; The accused and the civil party may at any time in the investigation acquaint the examining magistrate with the name of counsel chose by them.
The magistrate is required to warn them should that be the case.\textsuperscript{141} The proceedings are not open to the public.\textsuperscript{142} The proceedings are in writing or promptly reduced to writing\textsuperscript{143} and are not adversary in form, except in a very limited sense.\textsuperscript{144}

The investigation need not end in a formal charge against anyone. During his investigation the magistrate may find that the statute of limitations has run and that he has therefore no jurisdiction.\textsuperscript{145} The magistrate may, in his order closing the investigation, find that there are not charges enough to justify prosecution, that the facts as shown do not constitute an offence, or that it is not appropriate to prosecute.\textsuperscript{146}

Appeals may be preferred against orders of the examining magistrate to the indicting chamber of the local court of appeal. The prosecutor may appeal from any order of the magistrate. The accused may appeal orders assuming jurisdiction, permitting civil claims to be filed, allowing extended preventive detention, or refusing provisional release on bail. A civil party may appeal from an order refusing to investigate and other orders

\textsuperscript{141} Id, Arts.104, 105; The witnesses shall take an oath to speak all the truth, nothing but the truth. (Art.103). Any person included by name in a complaint accompanied by a civil claim may refuse to be heard as a witness. The examining magistrate shall so advise him after acquainting him with the complaint. Mention of this shall be made in the official report. In case of refusal, he may be heard only as an accused. (Art.104). Art.105 provides that the examining magistrate so conducting investigation and magistrates and officers of the judicial police on commission rogatory may not, with intention to cut off the rights of the defence, hear as witnesses persons against whom there exist grave and concordant indications of guilt.

\textsuperscript{142} Id, Art.I1. It provides that proceedings in the course of inquiry and investigation shall be secret, unless otherwise provided by law and without prejudice to the rights of the defence. Each person who officially participates in that proceeding is bound to maintain professional secrecy, under the conditions and subject to the penalties of Article 378 of the Penal Code.

\textsuperscript{143} Id, Art.107.

\textsuperscript{144} Id, Art.120. It provides that the prosecuting attorney and counsel for the accused and the civil party may speak only in order to pose questions after having been authorised by the examining magistrate. If that authorization is refused them, the text of the questions shall be reproduced in or attached to the official report.

\textsuperscript{145} Id, Arts.7, 8, 9. The periods of limitation prescribed for felony, misdemeanor and violation are ten, three and one years respectively.

\textsuperscript{146} Id, Art.177; It provides that if the examining magistrate determines that the facts do not constitute either a felony, a misdemeanor or a violation or if the perpetrator remains unknown or if there are not sufficient charges against the accused, he shall declare, by order, that it is not appropriate to continue. The accused under detention shall be released on such a conclusion. The examining magistrate shall decide on the restitution of objects seized at the same time. He shall fix the expenses and condemn the civil part to costs if there was one in the case.
that he can show will prejudice his civil interests. If the magistrate finds that it is an appropriate case for prosecution, he issues an order for transfer. If the offence charged is a petty offence the case is transferred to a police court for trial. If the offence is misdemeanor, it is transferred for trial to the appropriate court of primary jurisdiction. If a felony is involved, the case is not transferred to a trial court but goes first to the indicting chamber of the local court of appeal.

The indicting chamber of the court of appeal has exclusive jurisdiction to order the trial of felonies. It considers only the report of the magistrate's investigation, petition of the prosecutor and briefs submitted by the civil parties and the accused. Counsel for the civil party and the accused may appear and argue the case. No other witnesses are examined.

There are four courses open to the indicting chamber once the case has been submitted to them. First, the court may decide that further investigation is necessary before action can be taken. On such a decision, it orders to commit the case to one of the judges of the court or to an examining magistrate for action. Secondly, the court may decide that it is an inappropriate case for prosecution for the nature of offence or the evidence available, and issue orders like that of the examining magistrate refusing to investigate. Thirdly, the court may decide that the offence of which the accused is subject to conviction is not a felony. In such case the court renders a decree transferring the case to a court of primary jurisdiction or a police court, as the case may be. The

147 Id. Art.186.
148 It is called ordonnance de renvoi.
149 Id, Art.178; a police court is called tribunal d' instance.
150 Id, Art.179; a court of primary jurisdiction is called tribunal de grande instance.
151 Id, Art.181.
152 Id, Art.199.
153 Id, Art.205.
154 Id, Art.212; The order is called arret de non-lieu.
155 Id, Art.213; The decree is called arret de renvoi.
fourth, and most usual, course that may be taken by the court is to render a decree of indictment transferring the case to the assize court for trial. 156

3.17. Trial court

The court having jurisdiction over the smallest offences consists of a single judge. 157 There are several ways in which a case can be brought before the court. 158 The culprit and the accuser may voluntarily appear before the court where justice will be rendered rather summarily. Another, and the most usual, way for offences to come in is by petition of the victim or the local prosecution. 159 On receipt of a petition, an order to appear is issued by the court and is served on the accused or at his domicile by the bailiff of the court. 160 The accused must be given not less than five days in which to appear, failing which he can be tried in absentia, subject to his right in some cases to demand a rehearing at a later date. 161 The local police commissioner is charged with pressing the interests of the public if the penalty that can be assessed is less than ten days in jail and a fine of 400 new francs, since there is no prosecutor assigned to this court. 162 The trial is open to the public unless the court finds that this would endanger the public order or welfare, but minors may always be excluded by the judge if he sees fit to do so.

The recorder reads aloud the transcript of the examining magistrate’s investigation, if there is one. The judge then questions the accused and asks if he has a

156 Id., Art. 594; The decree of indictment is called arret de mise en accusation.
157 Id., Arts. 521 & 523; The court is called tribunal de police (where hearing criminal case).
158 Id., Art. 531.
159 The local prosecutor is called the ministere public.
160 Id., Art. 532; The order to appear is called citation directe.
161 Id., Arts. 487, 489 to 493 and 544; It is to be noted that if the prosecution was begun before the examining magistrate the accused is already well aware of the pendency of the action and the necessity for appearing for trial. When the examining magistrate issued his order remanding the case for trial before a police court, he so notified the accused and, if he had been held in custody, released him. See Arts. 178 and 180.
162 Id., Art. 45.
statement to make. The witnesses are put on oath and testify under questioning by the judge. The civil claimant, if any and the prosecutor then argue their cases. Thereafter defense is heard in argument. The civil party and the prosecutor may reply to the defense argument. Again the defense has the right to have the last word. The judge then announces his decision on both the criminal prosecution and the civil claim or adjourn the case for announcing decision. An appeal may be taken to the local court of appeal by any party whose interests have been infringed.

Now consider the trial of misdemeanors. The court always consists of three judges. Unlike the proceedings before the examining magistrate, here the hearing must be public except that the court may vote to close them if the public order or welfare is endangered, and the president of the court may prohibit the admissions of minors. The procedures starting from recorder's reading of transcript to the last word of argument of defense, as involved in the trial held in police court, are there in the trial of misdemeanor.

After the last argument, the court first considers the question of its jurisdiction. If the court finds that the offence should have been prosecuted before the police court, it may enter a final decision. And, if the court finds that the offence was a felony, it must enter an order transferring the case to the prosecutor for further action.

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163 Id. Art.388; The court is the criminal chamber of the tribunal de grande instance.
164 Id. Arts.400 & 402.
165 Id. Arts.427 to 461.
166 Id. Art.466.
167 The court may also order that the accused be taken or held in custody for further proceedings as provided under Art.469.
Appeal against the judgment in misdemeanor cases can be preferred to the local court of appeal by the accused, the civil party, the prosecutor attached to the trial court and the attorney-general attached to the court of appeal.\textsuperscript{168}

In trial of felonies the procedure is much more elaborate. The assize court is the competent court to try such offences.\textsuperscript{169} The cases to be tried are transferred to it by the indicting chamber of the local court of appeal. The assize court is presided over by the president and consists of a jury. It holds quarterly sessions.\textsuperscript{170} The president has a proactive role to play. He assures himself that proper notice of the decree for trial was given to the accused.\textsuperscript{171} He interrogates the accused.\textsuperscript{172} The accused is then asked to designate counsel to assist in his defence.\textsuperscript{173} If from interrogation of the accused or from the report of the examining magistrate the president feels that further investigation is required he may conduct such an investigation or order another judge of the court or an examining magistrate to do so.\textsuperscript{174} Moreover, the president may order the joinder or severance of trials if associated offences or defendants have been brought for trial at the same term.\textsuperscript{175}

The trial that follows is also unique in many respects. It with the selection of trial jurors from the panel called for the term of court.\textsuperscript{176} The jurors are chosen by lot, but the prosecution is allowed four and the defence is allowed five peremptory challenges.\textsuperscript{177} No reason may ever be given for a challenge.\textsuperscript{178} If the trial promises to be a long one the court may order that one or more alternative jurors be selected.\textsuperscript{179}

\textsuperscript{168}Id., Arts.496, 497.  
\textsuperscript{169}The assize court is called \textit{cour d'assises}.  
\textsuperscript{170}Id., Arts.236 &240.  
\textsuperscript{171}Id., Art.270.  
\textsuperscript{172}Id., Art.273.  
\textsuperscript{173}Id., Art.275; The counsel is so appointed for the accused from among the attorneys called \textit{avocats} or \textit{avoues} admitted to practice before the court.  
\textsuperscript{174}Id., Arts.283, 284.  
\textsuperscript{175}Id., Arts.285 & 286.  
\textsuperscript{176}Id., Art.296.  
\textsuperscript{177}Id., Art.299.  
\textsuperscript{178}Id., Arts.297, 298.  
\textsuperscript{179}Id., Art.296.
The trial must be public unless the judges of the court decide that it would endanger the public order or welfare, and the president may prohibit the attendance of minors. The trial once begun must continue without interruption to judgment unless it is ordered by the court to allow eat and sleep.

The trial begins with a reading by the recorder of the decree of indictment. The president then interrogates the accused and tells him he may make any statement he wishes, but the president is not supposed to indicate any opinion on his guilt or innocence. The witnesses called by the prosecution, civil claimant and accused are then heard. The witness is put on oath. The president may pose questions to the witness after each statement. The witness shall not be interrupted otherwise. After the witness has finished the prosecutor may pose questions directly to the accused and the witnesses. The other judges and the jurors may with the president's approval, ask questions, and counsel for the accused and civil claimant may submit questions to be asked by the president. The witness must remain in the courtroom until the court requires to deliberate unless he is excused by the president.

After examination of all witnesses, counsel for the civil claimant argues his position, followed by the argument of prosecutor. The accused and his counsel then present the argument of the defence. If the prosecutor or civil claimant replies to the

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180 Id., Art.306.
181 Id., Art.307; The president of the court is responsible for maintaining the orderly progress of the trial and has power to do whatever he may deem necessary to discover the truth. See Arts.308, 309, 310.
403, 535.
182 Id., Art.327.
183 Id., Art.328.
184 Id., Art.329; Before giving his statement, the witness is asked by the president of the court to state his name, age, occupation, domicile, if he knew the accused before offence, and whether is related to or employed by the accused or a civil claimant as required under Art.331.
185 Id., Arts.331, 335; Unless a witness is related to the accused or a civil claimant or is under sixteen years old, he is required to swear that he will speak without favour or fear and tell nothing but the truth.
186 Id., Art.332.
187 Id., Art.312.
188 Id., Arts.311, 312, 332.
189 Id., Art.334.
defence the accused has another opportunity to speak. The defence has a right always to have the last word. 190

On completion of argument, the court, judges and jurors, retire to deliberate. Before the court retires, however, the president must instruct them that they should ask themselves in silent reflection whether the impression of the evidence on their minds leaves them thoroughly convinced of the guilt of the accused. 191 Nothing may be considered by them that has not been prosecuted orally at trial. The court after a period of deliberation, votes by secret ballot. 192 The accused cannot be convicted unless eight of the twelve members vote for conviction. 193 Thus at least five of the nine jurors must vote for any conviction. If the vote is for conviction the court proceeds to vote on a penalty. Each member proposes a penalty by secret ballot, and the penalty must receive a majority of the votes to prevail. The members continue to vote until they arrive at penalty. On the third and subsequent ballots the most severe penalty proposed on the preceding ballot is stricken from the list of penalties available. 194 A penalty arrived at, the court returns to the courtroom, and after the accused is brought in, the president announces the decision and the penalty, if the accused was not acquitted. 195 If a civil claim has been tried along with the criminal charges the three judges then decide that part of the case and hand down their decision. 196 Civil damages may be awarded even if the accused has been acquitted. 197

190 Id, Art.346.
191 Id, Art.353.
192 Id, Arts.356-358.
193 Id, Art.359.
194 Id, Art.362.
195 Id, Art.366.
196 Id, Art.371.
197 Id, Art.372.
The French Criminal system is in the process of undergoing drastic changes to fall in line with the requirements of ECHR. They include broad reforms to strengthen the rights of the accused, to simplify and clarify aspects of criminal procedure and to reduce delay.198 Presumption of innocence is now described as a cardinal principle, which should be respected at all stages of the criminal process and from which other principles follow. Investigations are made time bound with justifications to be stated for any delay.199 A juge des libertes et de la detention has been created for determining questions of pretrial detention and also to adjudicate on issues affecting rights and liberties of the suspect.200 At the close of the instruction, the juge d'instruction sends the case directly to the Cour d' assises without having to remit the file to the procureur first.201 The Cour d' assises tries the most serious offences, crimes and comprises a jury of nine and three judges who together determines guilt or innocence and the sentence. Until recently there was no appeal against conviction to a differently Cour d' assises with twelve jurors who may decide by a 10:2 majority202. The procureur may also appeal against an acquittal203.

199 Arts. 175-1 and 175-2
200 Art. 175-1
201 Art. 175-1
202 Arts. 231,296,297,298,359,360 and 362.

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