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CRIMINOLOGY

FOUR MODELS OF THE CRIMINAL PROCESS

KENT ROACH*

I. INTRODUCTION

Ever since Herbert Packer published "Two Models of the Criminal Process" in 1964,¹ much thinking about criminal justice has been influenced by the construction of models. Models provide a useful way to cope with the complexity of the criminal process. They allow details to be simplified and common themes and trends to be highlighted. "As in the physical and social sciences, [models present] a hypothetical but coherent scheme for testing the evidence" produced by decisions made by thousands of actors in the criminal process every day.² Unlike the sciences, however, it is not possible or desirable to reduce the discretionary and humanistic systems of criminal justice to a single truth. Multiple models are helpful because "multiple versions of what is going on,

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¹ HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION PART II* (1968) [hereinafter PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*]; Herbert Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964) [hereinafter Packer, *Two Models*].

² MICHAEL KING, *THE FRAMEWORK OF CRIMINAL JUSTICE* 12 (1981).

existing side by side, may legitimately account in different ways for various aspects of the system's operation."³ For thirty-five years now, the major models have been Packer's due process and crime control models.

Models serve multiple purposes. They provide a guide to judge the actual or positive operation of the criminal justice system. Packer's crime control model suggested that most cases end in guilty pleas or prosecutorial withdrawals whereas his due process model suggested that the cases that go to trial and are appealed were the most influential. Models can also provide a normative guide to what values ought to influence the criminal law. Packer was somewhat reticent in this regard⁴, but it is clear that his crime control model was based on societal interests in security and order while his due process model was based on the primacy of the rights of the individual in relation to the state. Models of the criminal process can also describe the ideologies and discourses which surround criminal justice. The most successful models have become terms of art so that people in public discourse now debate and advocate the crime control and due process values that Packer identified.⁵ At a discursive level, Packer's models have become self-fulfilling prophecies.

The new models presented in this paper are based on different conceptions of victims' rights. Like Packer's crime control and due process models, they aspire to offer positive descriptions of the operation of the criminal justice system, normative statements about values that should guide criminal justice, and descriptions of the discourses which surround criminal justice. Models based on victims' rights can thus describe phenomena such as the new political case which pits the accused against crime victims or minority and other groups associated with crime vic-

³ *Id.* at 122.

⁴ He warned that his models were "not labelled Is and Ought . . . [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." PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, *supra* note 1, at 153.

⁵ Richard Ericson, *The State and Criminal Justice Reform in STATE CONTROL: CRIMINAL JUSTICE POLITICS IN CANADA* 21 (Robert S. Ratner & John L. McMullan eds., 1987).

tims,⁶ or restorative justice practices which bring crime victims and their supporters together with offenders and their supporters.⁷ Normatively, my punitive model of victims' rights affirms the retributive and expressive importance of punishment and the need for the rights of victims to be considered along with the rights of the accused. My non-punitive model of victims' rights attempts to minimize the pain of both victimization and punishment by stressing crime prevention and restorative justice. Discursively, both punitive and non-punitive models of victims' rights promise to control crime and respect victims, but the punitive model focuses all of its energy on the criminal justice system and the administration of punishment while the non-punitive model branches out into other areas of social development and integration. In short, the construction of models provides an accessible language to discuss the actual operation of the criminal process, the values of criminal justice, and the way that people think and talk about criminal justice.

None of the models discussed or presented in this paper were intended to operate to the exclusion of others or to be accepted as the only legitimate positive, normative, or discursive guide to the criminal process. It is, however, valuable to identify the areas where each model is dominant and to have a sense of the overall trends. It can be liberating to appreciate the different values found in the criminal process and the contingency of which model dominates in what particular area at what particular time. It can be constraining, however, if the models do not capture the full range of options or values in the criminal process⁸ and it will be suggested that this is true with respect to Packer's famous due process and crime control models. Packer's models may still strike a chord, but slowly and surely, they are becoming as out of date as other hits of the 1960's.

⁶ See generally GEORGE FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995).

⁷ See generally JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989); JOHN BRAITHWAITE & PHILLIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990).

⁸ The constraining nature of Packer's assumptions was first and masterfully discussed in John Griffiths' *Ideology in Criminal Procedure or a Third 'Model' of the Criminal Process*, 79 YALE L.J. 359 (1970).

Packer's models have been remarkably durable and still describe important facets of the practice and politics of criminal justice. Nevertheless, they have been persuasively criticized since they were first presented in 1964. They are now inadequate guides to describe the law and politics of criminal justice. Empirically, normatively, and discursively, they have become impoverished. They cannot explain why women, children, minorities and crime victims claim rights to the criminal sanction and they cannot comprehend the new political case which pits due process claims, not against the community's claims to enforce morality,⁹ but against the rights claims of crime victims and disadvantaged groups of potential victims. Packer's models thus cannot make any sense of contemporary debates about pornography¹⁰ or hate speech¹¹, influenced as they are by feminism and critical race theories which focus on the effects of such speech on disadvantaged groups. They also cannot make sense of contemporary concerns about the prevalence of sexual and domestic violence against women and children and hate crimes against minorities.

Packer's crime control model assumes that the criminal law could control crime without accounting for the fact, revealed by victimization studies,¹² that most crime victims do not report crime to the police. He assumes that punishment is necessary to control crime whereas it may achieve little in the way of general deterrence¹³ and may make things worse by stigmatizing offenders and producing defiance.¹⁴ Packer assumes that fair treatment could only be achieved through an adversarial criminal trial in which an

⁹ See generally PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965). Packer fell into the camp of liberals who opposed the use of the criminal law to enforce morality. For example, he criticized prostitution laws as "an attempt to secularize an essentially moralistic judgment" and dismissed the crime of incest as opposed to rape as "imaginary". PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, *supra* note 1, at 312, 328.

¹⁰ See generally CATHARINE MACKINNON, *ONLY WORDS* (1993).

¹¹ See generally Mayo Moran, *Talking About Hate Speech*, 1994 WIS. L. REV. 1425.

¹² See generally EZZAT FATTAH, *UNDERSTANDING CRIMINAL VICTIMIZATION* (1993); *REALIST CRIMINOLOGY: CRIME CONTROL AND POLICING IN THE 1990's* (John Lowman & Brian MacLean eds., 1992); HOLLY JOHNSON, *DANGEROUS DOMAINS: VIOLENCE AGAINST WOMEN IN CANADA* (1996).

¹³ See generally H. LAURENCE ROSS, *DETERRING THE DRINKING DRIVER: LEGAL POLICY AND SOCIAL CONTROL* (1984); CANADIAN SENTENCING COMMISSION, *SENTENCING REFORM: A CANADIAN APPROACH* 136-37 (1989).

¹⁴ JOHN HAGAN & BILL MCCARTHY, *MEAN STREETS* (1997).

accused is represented by a defense lawyer. We now know that defense lawyers rarely invoke due process rights¹⁵ and that circle-based alternatives such as restorative justice, family conferences, and Aboriginal justice can be run without lawyers and in a procedurally fair manner that encourages participation.¹⁶ Packer's assumptions about the conflict between crime control and due process were challenged by first the American¹⁷ and then the Canadian¹⁸ experience which demonstrated that a due process revolution was not inconsistent with increased crime control as measured by growing prison populations. Packer assumed that due process conflicts with crime control, but new research suggests that offenders may be more law abiding if treated fairly.¹⁹ Contrary to Packer's assumptions, fair treatment may be necessary for effective crime control and punishment may not be necessary to control crime.

New models of criminal justice will have to have some foundation in present practice, as well as some normative and discursive appeal. They should be able to describe the work of legislatures, administrators, and courts,²⁰ but not be limited by Packer's assumptions about the limited, liberal nature of governance or the central place of an adversarial system staffed by public sector professionals. New models should account for the large number of crimes that victims do not report and incorporate understandings of group rights and risks that have evolved since Packer wrote. They could eventually become part of criminal justice discourse

¹⁵ See generally RICHARD ERICSON & PATRICIA BARANEK, *THE ORDERING OF JUSTICE: A STUDY OF THE ACCUSED PERSONS AS DEPENDENTS IN THE CRIMINAL PROCESS* (1982); ANTHONY E. BOTTOMS & JOHN D. MCCLEAN, *DEFENDANTS IN THE CRIMINAL PROCESS* (1976).

¹⁶ John Braithwaite & Stephen Mugford, *Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders* 34 *BRIT. J. CRIMINOLOGY* 139 (1994); John Braithwaite, *Restorative Justice: Assessing an Immodest Theory and a Pessimistic Theory* (October 1997) (University of Toronto, Faculty of Law, Intensive Course Materials) (on file with author).

¹⁷ See generally MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995).

¹⁸ See generally MICHAEL MANDEL, *THE CHARTER OF RIGHTS AND FREEDOMS AND THE LEGALIZATION OF POLITICS IN CANADA* (1994).

¹⁹ See generally TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Braithwaite, *supra* note 16.

²⁰ BRAITHWAITE & PETTIT, *supra* note 7.

and used to either emphasize the rights of crime victims and demands for punishment or the needs of crime victims for better forms of crime prevention and restorative justice. Each new model will continue, however, only to offer a partial explanation of criminal justice and its conflicting values. Punitive and non-punitive forms of victims' rights will co-exist in different parts of the criminal justice system. Like Packer's models, victims' rights models will eventually have to be re-evaluated in light of new knowledge, practices, and politics. At present, however, punitive and non-punitive victims' rights models can explain much about the practices, norms, and discourses of criminal justice.

II. PACKER'S TWO MODELS OF CRIMINAL JUSTICE

The most successful attempt to construct models of the criminal process was achieved by the American legal scholar, Herbert Packer. His due process and crime control models set the standard for more than a generation of observers.²¹ Many have attempted to replace or add to Packer's models,²² but none have enjoyed his success and durability. Critics²³ have, however, had some success in de-constructing his models.

The essence of Packer's two models can be captured by evocative metaphors. The criminal process in the crime control model

²¹ See ANDREW SANDERS & RICHARD YOUNG, *CRIMINAL JUSTICE* 13 (1994); Abraham Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1974). For a recent debate which indicates continued interest in Packer's models, see David J. Smith, *Case Construction and the Goals of Criminal Process*, 37 BRIT. J. CRIMINOLOGY 319 (1997); Mike McConville et al., *Descriptive or Critical Sociology: The Choice is Yours*, 37 BRIT. J. CRIMINOLOGY 347 (1997); Peter Duff, *Crime Control, Due Process and 'The Case for the Prosecution'*, 38 BRIT. J. CRIMINOLOGY 611 (1998). This debate affirms the need to be sensitive to the existence of both crime control or efficiency values and due process or fairness values in legal and organizational cultures. Unfortunately, all the participants in the debate, particularly David Smith, follow Packer in assuming that efficient police investigations and prosecutions actually control crime. That assumption is critically assessed in this paper. See *supra* notes 12-19, and *infra* notes 133-34.

²² See generally Peter Arnella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983); Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973); Malcolm Feeley, *Two Models of the Criminal Process: An Organizational Perspective*, 7 L. & SOC'Y REV. 407 (1973); Griffiths, *supra* note 8.

²³ See generally ERICSON & BARANEK, *supra* note 15; DOREEN MCBARNET, *CONVICTION: LAW, THE STATE AND THE CONSTRUCTION OF JUSTICE* (1981).

resembles a high speed "assembly-line conveyor belt"²⁴ operated by the police and prosecutors. The end product of the assembly-line is a guilty plea. In contrast, the due process model is an "obstacle course"²⁵ in which defense lawyers argue before judges that the prosecution should be rejected because the accused's rights have been violated. The assembly line of the crime control model is primarily concerned with efficiency while the due process model is concerned with fairness to the accused and "quality control."²⁶ What follows are descriptions of the two abstract and dichotomized models as Packer understood them. Subsequent sections will move beyond these descriptions and place Packer's models in their historical and social contexts.

A. THE CRIME CONTROL MODEL

The crime control model looks to the legislature, as opposed to the courts, as its "validating authority"²⁷ and accepts the extensive reliance that legislatures place on the criminal sanction. The criminal sanction is assumed to be "a positive guarantor of social freedom" and necessary for the maintenance of "public order."²⁸ It is employed both for the liberal purpose of protecting people and their property from harm and for the conservative purpose of promoting order and social stability.²⁹ Perhaps because he wrote without regard to victimization studies revealing that most crime is never reported to the police, let alone prosecuted, Packer assumed that efficient police investigations and prosecutions could control crime.

Given the reality of limited law enforcement resources,³⁰ the criminal process must place "a premium on speed and finality."³¹ This is achieved by allowing its expert administrators, the police and prosecutors, to screen out the innocent and secure "as expe-

²⁴ PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, *supra* note 1, at 159.

²⁵ *Id.* at 163.

²⁶ *Id.* at 165.

²⁷ *Id.* at 173.

²⁸ *Id.* at 158.

²⁹ *See generally*, JOHN HAGAN, *THE DISREPUTABLE PLEASURES: CRIME AND DEVIANCE IN CANADA* (1991).

³⁰ *But see* ANDREW ASHWORTH, *THE CRIMINAL PROCESS* 26 (1994).

³¹ PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, *supra* note 1, at 159.

ditionously as possible, the conviction of the rest, with a minimum of occasions for challenge, let alone post-audit."³² Most fact-finding in the crime control model is conducted by the police in the streets and station-houses, not by lawyers and judges in the courts. The police, as well as the public,³³ are concerned with "factual guilt," in the sense that the accused probably committed the criminal act. They are not overly concerned with "legal guilt" that could be established beyond a reasonable doubt through admissible evidence and after considering all the accused's rights and defenses.

The police are given broad investigative powers to arrest people for questioning and this is often the quickest means to establish if the suspect is factually guilty.³⁴ The only limitations on police interrogations are those designed to ensure the reliability of the suspect's statements. "[T]he evil of a coerced confession is that it may result in the conviction of an innocent man. . . . It is a factual question in each case whether the accused's confession is unreliable."³⁵ Detained people are not allowed to contact a lawyer because this will slow down the process and only benefit the guilty, who will follow their lawyer's advice not to say anything. "A lawyer's place is in court. He should not enter a criminal case until it is in court."³⁶ The police should also have wide powers to conduct searches because only the factually guilty have something to hide.³⁷ Illegally seized evidence should be admissible at trial. Unlike coerced confessions, guns, drugs and stolen property reveal the truth no matter how the police obtained them.³⁸

It would be a mistake to dismiss the crime control model as a thuggish model that is unconcerned with police abuse. Police misconduct should be taken seriously in disciplinary, civil and even criminal proceedings. In this respect, the crime control model embraces Dicey's idea that the rule of law is based on the

³² *Id.* at 160.

³³ *But see* Arnella, *supra* note 22, at 185.

³⁴ *See* PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, *supra* note 1, at 177.

³⁵ *Id.* at 189.

³⁶ *Id.* at 203.

³⁷ *Id.* at 196.

³⁸ *Id.* at 199.

ability to impose the ordinary law on state officials.³⁹ What the crime control model rejects is allowing "the criminal . . . to go free because the constable has blundered."⁴⁰ The criminal trial of a factually guilty accused is an inappropriate and indirect vehicle for addressing police and prosecutorial misconduct.

The trial is not that important in the crime control model because its "center of gravity . . . lies in the early, administrative fact-finding stages."⁴¹ The prosecutor, as opposed to a judge at a preliminary hearing, "is in the best possible position to evaluate the evidence amassed by the police and decide whether it warrants holding the suspect for a determination of guilt."⁴² Prosecutors, like police, can be trusted not to waste their limited time and resources on the innocent. Pre-trial detention is the rule, not only to ensure the accused's presence at trial, but to prevent future crime and to persuade the accused to plead guilty at the first opportunity.⁴³ Under these conditions "[i]t is in the interest of all—the prosecutor, the judge, the defendant—to terminate without trial every case in which there is no genuine doubt about the factual guilt of the defendant."⁴⁴ Trial judges should happily accept guilty pleas and not inquire into the factual accuracy of the plea or whether the accused had any defenses. They should also give the accused a sentencing discount for saving resources by pleading guilty at the earliest opportunity.⁴⁵

Because of the ability of the police and prosecutors to screen out the factually innocent, judges and jurors should not be "haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime."⁴⁶ Appeals should not be encouraged and only allowed if the accused establishes that "no reasonable trier of fact

³⁹ See ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 193 (10th ed. 1959).

⁴⁰ *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

⁴¹ See PACKER, THE LIMITS OF THE CRIMINAL SANCTION, *supra* note 1, at 162.

⁴² *Id.* at 206.

⁴³ *Id.* at 211-14.

⁴⁴ *Id.* at 222.

⁴⁵ *Id.* at 223.

⁴⁶ *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

could have convicted on the evidence presented."⁴⁷ The prosecutor should also be allowed to appeal because the acquittal of a guilty person is as harmful and more likely to occur than the conviction of an innocent person.

B. THE DUE PROCESS MODEL

The due process model starts with "skepticism about the morality and utility of the criminal sanction"⁴⁸ especially in relation to "victimless crimes" based on consensual transactions.⁴⁹ This skepticism is based on the liberal values of "the primacy of the individual and the complementary concept of limitation on official power"⁵⁰ and concerns about the intrusive policing required to enforce drug, obscenity, and prostitution laws. Many police abuses could be prevented if the legislature did not insist on criminalizing such activities. Decriminalization would also reduce the workload of the criminal justice system and allow more time to be devoted to respecting the rights of those accused of more serious crimes. The due process model places much less emphasis on efficiency and guilty pleas than the crime control model. Its "validating authority"⁵¹ is the Supreme Court and the restrictions that courts interpreting the Constitution place on the state's creation and pursuit of crime.

The due process model is also concerned with equality in the sense that all accused regardless of wealth or social status should receive equal treatment by, for example, being represented by a lawyer.⁵² Minorities and the poor bear the brunt of police abuse and prosecutions.⁵³ It is assumed that protecting the due process rights of all accused will protect the rights of the most disadvantaged. Perhaps because he wrote before victimization studies and feminist and critical realist scholarship documented disproportionate victimization among the disadvantaged, Packer did not consider that crime victims are also frequently from the same dis-

⁴⁷ PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, *supra* note 1, at 230.

⁴⁸ *Id.* at 170.

⁴⁹ *Id.* at 151.

⁵⁰ *Id.* at 165.

⁵¹ *Id.* at 173.

⁵² *Id.* at 168.

⁵³ *Id.* at 180.

advantaged groups. He could only see the criminal case as a bipolar matter between the state and the accused.

The due process model imposes numerous restraints on the police in order to protect the rights of suspects and minimize informal fact-finding in the streets and station-houses. The police should not arrest or detain a person in order to develop their case. If there is any communication between the police and the accused, the accused should be carefully informed about the right to be silent and the right to contact counsel. "[T]here is no moment in the criminal process when the disparity in resources between the state and the accused is greater than at the moment of arrest."⁵⁴ Any statements taken absent a clear and voluntary waiver by the accused of his or her rights should be excluded from a subsequent criminal trial in order to protect the accused from unfair self-incrimination.

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 a defendant without forcing him to co-operate in the process, and without capitalizing on his ignorance of his legal rights.⁵⁵

The criminal trials of the factually guilty accused must address violations of their rights because those subject to police abuse—"the poor, the ignorant, the illiterate, the unpopular"⁵⁶—will not, as required by the crime control model, be able to bring separate civil, disciplinary, or criminal actions. Because police and prosecutors are so concerned with short cuts, it is also necessary within the trial to "penalize, and thus label as inefficient" any violations of the accused's rights.⁵⁷ Strong "prophylactic and deterrent"⁵⁸ exclusionary rules are necessary because much police abuse will never reach the stage of a criminal trial.

Judges at preliminary hearings must be satisfied that a *prima facie* case exists. "The prosecutor cannot be trusted to do this

⁵⁴ *Id.* at 203.

⁵⁵ *Id.* at 191.

⁵⁶ *Id.* at 180.

⁵⁷ *Id.*

⁵⁸ *Id.* at 168.

screening job any more than the police can."⁵⁹ Because of the presumption of innocence and the harmful effects of pre-trial detention on the preparation of a defense, an accused should be detained awaiting trial only when absolutely necessary to ensure attendance at trial. Alternatives to cash bail should be used because "a system that makes pre-trial freedom conditional on financial ability is discriminatory."⁶⁰ Neither the prosecutor nor the judge should encourage guilty pleas by offering deals to an accused who pleads guilty.⁶¹ "A criminal trial should be viewed not as an undesirable burden but rather as the logical and proper culmination of the process."⁶² The criminal trial is concerned not with factual guilt, but with whether the prosecutor can establish legal guilt beyond a reasonable doubt on the basis of legally obtained evidence. Only defense lawyers and appointed judges can be relied upon to appreciate the importance of legal guilt.⁶³

Because of the concern about even minor risks of convicting the innocent, the accused should have wide rights of appeal. Appellate courts should reverse convictions whenever trial judges failed to protect the accused's rights. "The reversal of a criminal conviction is a small price to pay for an affirmation of proper values and a deterrent example of what will happen when those values are slighted."⁶⁴ Just as the legislature sets the tone by criminalizing much conduct in the crime control model, the Supreme Court is the most important institution in the due process model because it defines the legal rights and remedies of the accused.⁶⁵

III. THE HISTORICAL CONTEXT OF PACKER'S MODELS

Although Packer's models have had remarkable durability, they are a product of the time and place in which they were conceived. Writing in the 1960's in the United States, Packer be-

⁵⁹ *Id.* at 207.

⁶⁰ *Id.* at 217.

⁶¹ *Id.* at 224.

⁶² *Id.*

⁶³ *Id.* at 167.

⁶⁴ *Id.* at 231-32.

⁶⁵ *Id.* at 173.

lieved that the criminal process "is being turned from an assembly line into an obstacle course."⁶⁶ The most important factor was the activism of the United States Supreme Court under the leadership of Chief Justice Earl Warren.⁶⁷ In less than a decade, the Warren Court fundamentally changed the rules of the game and moved the American criminal justice system in the direction of due process.

In 1961, the Warren Court imposed on the states the exclusionary rule, which rendered unconstitutionally seized evidence inadmissible in criminal trials.⁶⁸ The exclusionary rule was intended to deter constitutional violations by removing the incentive for police to disregard the Constitution.⁶⁹ Courts excluded involuntary confessions not on the crime control ground that they might be unreliable, but because they infringed the accused's rights and were obtained through police misconduct.⁷⁰ The Warren Court also regulated the ability of police to conduct searches incident to arrest;⁷¹ obtain search warrants;⁷² engage in electronic surveillance;⁷³ and conduct investigative stop-and-frisk searches.⁷⁴

Defense counsel play a key role in the due process model and Packer believed the Warren Court's most significant decision was *Gideon v. Wainwright*⁷⁵ which required the states to provide defense counsel to those charged with felonies who could not afford to hire their own lawyer. The famous *Miranda*⁷⁶ rules required that the police inform suspects subject to custodial interrogation of their right to counsel, including publicly funded counsel. Failure to provide these warnings or allow an accused to obtain a lawyer

⁶⁶ *Id.* at 239.

⁶⁷ See generally, LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS*, 111-217 (1983); CRAIG BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* (1993); FRED GRAHAM, *THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW* (1970).

⁶⁸ See *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁶⁹ *Elkins v. United States*, 364 U.S. 206 (1960).

⁷⁰ See, e.g., *Rogers v. Richmond*, 365 U.S. 534 (1961).

⁷¹ See *Chimel v. California*, 395 U.S. 752 (1969).

⁷² See *Spinelli v. United States*, 393 U.S. 410 (1969).

⁷³ *Katz v. United States*, 389 U.S. 347 (1967).

⁷⁴ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁷⁵ 372 U.S. 335 (1963). See PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, *supra* note 1, at 236-37.

⁷⁶ *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

would result in the exclusion of even trustworthy confessions. The *Miranda* rules were designed to protect the right against self-incrimination which was extended from the court house to the station house. *Miranda* was so controversial that Congress unsuccessfully attempted to overrule it.⁷⁷

The Warren Court affected criminal trials by imposing speedy trial obligations on the states;⁷⁸ requiring prosecutors to disclose exculpatory evidence to the accused;⁷⁹ and holding that the accused's silence at trial could not be used as evidence of guilt.⁸⁰ Proceedings designed to discover the best interests of juvenile delinquents were affected by rulings that young people had the same due process rights as adults. This included protection against self-incrimination, the right to be represented by counsel, the right to confront and cross-examine witnesses⁸¹ and the right to have guilt proved beyond a reasonable doubt.⁸² The Warren Court was concerned with protecting the accused from the state's power in the streets, station houses, and courthouses.

Packer recognized that the due process promoted by the United States Supreme Court was fragile. It required "constant attention"⁸³ from the courts and even minor changes in judicial personnel or attitudes would make a difference. Legislatures would not support due process because "reform in the criminal process has very little political appeal" and "[e]very significant move in the Due Process direction" would be "greeted with dire predictions about an imminent breakdown in the criminal process." Packer was confident, however, that because they were based on the "high ground of the Constitution", due process decisions could not be overruled by the legislature.⁸⁴

⁷⁷ BAKER, *supra* note 67, at 207-08; *see generally*, BRADLEY, *supra* note 67.

⁷⁸ *Klopfert v. North Carolina*, 386 U.S. 213, 216 (1967).

⁷⁹ *Brady v. Maryland*, 373 U.S. 83, 86 (1963).

⁸⁰ *Griffin v. Illinois*, 380 U.S. 609, 613 (1965).

⁸¹ *In Re Gault*, 387 U.S. 1, 2-3 (1967).

⁸² *In Re Winship*, 397 U.S. 358, 367 (1970).

⁸³ *See* PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, *supra* note 1, at 240.

⁸⁴ *Id.* at 241-42. In other countries, such as Canada, Israel and South Africa, which allow the legislature to justify limitations on the accused's rights, there may be considerably more scope for dialogue between courts and the legislatures and the legislatures may frequently have the last word. *See also* KENT ROACH, *INSTITUTIONAL CHOICE, CO-OPERATION AND STRUGGLE IN THE AGE OF THE CHARTER, THE CHARTER'S IMPACT*

The year that Packer's major work was published, Congress enacted the aptly named *Omnibus Crime Control and Safe Streets Act* that attempted to overrule *Miranda* and was "designed more to chastise the Supreme Court than to improve the law."⁸⁵ Courts largely ignored the parts of this law which purported to overrule the Warren Court's constitutional rulings, but it did indicate that the tide of public sentiment was against the due process model and that politicians remained committed to crime control.

Shortly before his death in 1972, Packer conceded that the due process revolution in the United States had failed. He recognized that empirical studies suggested that even the robust exclusionary rules created in *Mapp* and *Miranda* "change nothing."⁸⁶ To the end, however, he maintained his faith in decriminalization and argued that "we can never effect changes in the criminal process until we limit and thereby decrease the case load that afflicts all the instruments of the criminal process."⁸⁷ Packer hoped that due process would encourage legislatures to place less reliance on the criminal sanction especially with respect to abortion, incest, bigamy, gambling, public drunkenness, homosexuality, narcotics, pornography, and prostitution, all of which he believed were "victimless" crimes. Because these crimes involved "consensual transactions,"⁸⁸ they required the police to engage in entrapment, electronic surveillance, searches, and interrogations. The police were the most intrusive and visible, "when they are doing their least important" work.⁸⁹ In advocating decriminalization of such crimes, Packer reflected much liberal thought of the time.⁹⁰ With the exception of abortion and gambling, most of Packer's argu-

ON THE CRIMINAL JUSTICE SYSTEM (Jamie Cameron ed. 1996); Guido Calabresi, *Foreword: Anti-Discrimination and Constitutional Accountability* 105 HARV. L. REV. 80, 91 (1991).

⁸⁵ FRED GRAHAM, *THE SELF INFLICTED WOUND* 319 (1970); See also BAKER, *supra* note 67; BRADLEY, *supra* note 67 at 30.

⁸⁶ Herbert Packer, *Criminal Code Revision*, 23 U. TORONTO. L.J. 1, 13 (1973).

⁸⁷ *Id.*

⁸⁸ PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, *supra* note 1, at 151.

⁸⁹ *Id.* at 284.

⁹⁰ See generally TROY DUSTER, *THE LEGISLATION OF MORALITY: LAW, DRUGS, AND MORAL JUDGMENT* (1970); EDWIN SCHUR, *CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOUR AND PUBLIC POLICY* (1965); Sanford Kadish, *The Crisis of Overcriminalization*, 374 ANNALS OF POL. SCI. 157 (1967); Jerome Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 S. CAL. L. REV. 588 (1968).

ments for decriminalization did not win the day and today seem dated and insensitive in light of new understandings of harms and risks and skepticism about whether disadvantaged individuals genuinely consent to such activities.

Packer's models also seem outdated today because they ignore crime victims.⁹¹ Packer wrote before victimization studies revealed high levels of unreported crime and he assumed that efficiency in processing the minority of cases reported to the police would actually control crime. Of all the crime victims that Packer neglected, the most influential have been women.⁹² Packer failed to include women in more important ways than his constant use of the masculine pronoun. He wrote at a time when sexual and domestic violence against women and children was publicly ignored and seen as a private matter. Feminism only emerged as a powerful intellectual and political force after Packer had articulated his models and this should be considered in any evaluation of his work.

IV. CRITICISMS OF PACKER'S MODELS

Packer's work has attracted significant criticism. His due process model appears to be empirically irrelevant in most cases and critical theorists argue that instead of restraining the state, the illusion of due process enables and legitimates crime control. Others have suggested that due process is all too real and by hindering crime control harms the disadvantaged.⁹³ Some critics have argued that Packer's two models are united by liberal, adversarial assumptions which limit creative thinking about criminal justice.⁹⁴ The models also fail to take account of new knowledge about crime victimization and new concerns about crime victims.

⁹¹ ASHWORTH, *supra* note 30, at 28.

⁹² ROBERT ELIAS, *THE POLITICS OF VICTIMIZATION* 20 (1986); *see generally* PAUL ROCK, *A VIEW FROM THE SHADOWS* (1986).

⁹³ MACKINNON, *supra* note 10, at 45-69.

⁹⁴ Griffiths, *supra* note 8, at 395-96.

A. THE EMPIRICAL IRRELEVANCE OF DUE PROCESS: THE PROCESS IS THE PUNISHMENT

Empirical researchers are suspicious of attempts to reduce the complexities of the criminal process to rational goals such as crime control or due process. Malcolm Feeley has argued that "any analysis of organizational behavior must be open-ended enough to identify and deal with the multiplicity of goals, values, and incentives of the various actors comprising the system. To do otherwise is likely to lead into the trap of reification and away from social theory."⁹⁵ Many empirical studies have illustrated that police, prosecutors, judges, and defense counsel share common organizational interests that defy the contrasting ideologies of crime control and due process. These professionals are bureaucrats who habitually co-operate to maximize their own organizational interests, not warriors for crime control or due process. This does not make the fact that we think they are such warriors insignificant.

Due process is irrelevant in minor cases because "the cost of invoking one's rights is frequently greater than the loss of the rights themselves, which is why so many defendants accept a guilty plea without a battle."⁹⁶ Due process rights "function largely as hollow symbols of fairness or at best as luxuries or reserves to be called upon only in big, intense, or particularly difficult cases."⁹⁷ Defense lawyers frequently recommend guilty pleas in order to secure the most efficient and lenient disposition for their clients.⁹⁸ Organizationally, they are agents of crime control who only rarely challenge the admissibility of evidence and launch appeals.⁹⁹

These empirical accounts of the operation of the criminal process confirm Packer's sense that in most cases, the criminal process operates as a crime control assembly line culminating in the guilty plea. What would have surprised Packer is that defense lawyers, judges, and the accused, his agents of due process, all find

⁹⁵ Feeley, *supra* note 22, at 415.

⁹⁶ MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT* 277 (1979).

⁹⁷ *Id.* at 290.

⁹⁸ See generally, BOTTOMS & McCLEAN, *supra* note 15; JOHN BALDWIN & MICHAEL McCONVILLE, *NEGOTIATED JUSTICE* (1977); MICHAEL McCONVILLE ET AL., *STANDING ACCUSED* (1994).

⁹⁹ ERICSON & BARANEEK, *supra* note 15.

guilty pleas to be in their own interests. This empirical research suggests that, at best, there are "two tiers of justice."¹⁰⁰ Packer's models retain their utility, but due process begins to look like a thin, shiny veneer that dresses up the ugly reality of crime control.

B. THE IDEOLOGICAL SIGNIFICANCE OF DUE PROCESS: DUE PROCESS IS FOR CRIME CONTROL

If due process appears irrelevant to so many empirical researchers, this begs the question of its ideological or political function. For many critics, the answer is that "due process is for crime control."¹⁰¹ This is a catchy slogan, but one that must be carefully unpacked because it means different things at different times to even the same people.¹⁰²

Due process can be for crime control because the formal law created by legislatures and courts enable police and prosecutors to exercise broad and discretionary powers. Doreen McBarnet found that the procedural law of England and Scotland did not embrace the due process values articulated by Packer, but rather authorized the police and prosecutorial discretion associated with crime control.¹⁰³ Richard Ericson drew similar conclusions in his study of the formal and informal powers of patrol officers and detectives in Canada before the 1982 enactment of a constitutional bill of rights.¹⁰⁴ The law was expansive, vague or silent about the limits of police power and "even in the rare instances where the police introduce evidence in court which is judged to have been obtained as a result of an illegal search, the evidence is still admis-

¹⁰⁰ MCBARNET, *supra* note 23, at 123.

¹⁰¹ *Id.* at 156. See also PATRICIA CARLEN, *MAGISTRATES' JUSTICE* 42 (1976); ERICSON & BARANEK, *supra* note 15, at 223.

¹⁰² Doreen McBarnet was explicit about this when she stated: "The vague notion of 'due process' or 'the law in the books' in fact collapses two quite distinct aspects of law into one: the general principles around which the law is discussed—the rhetoric of justice—and the actual procedures and rules by which justice or legality are operationised." MCBARNET, *supra* note 23, at 6. Richard Ericson similarly noted that: "[t]he model of due process in opposition to crime control is salient primarily in the discourse of the public culture. In the control culture of statutes, case law, and the work of legal agents, 'due process is for crime control.'" RICHARD V. ERICSON, *THE CONSTITUTION OF LEGAL INEQUALITY* 28 (1983).

¹⁰³ See generally MCBARNET, *supra* note 23.

¹⁰⁴ See generally RICHARD ERICSON, *MAKING CRIME* (1981); RICHARD ERICSON, *REPRODUCING ORDER* (1982).

sible because of the lack of an exclusionary rule."¹⁰⁵ Law was "enabling" and "explicitly for crime control" because it gave police and detectives great discretion and was formulated for their "pragmatic use and benefit."¹⁰⁶

These conclusions about the operational content of the law would not surprise or threaten Packer. The United Kingdom and pre-Charter Canada did not have a constitutional Bill of Rights or a tradition of judicial activism, both key elements of the due process model. Packer would expect that the adoption of a constitutional bill of rights would allow the courts to infuse the operational content of the law with due process, but would recognize that legislatures would still pass laws to enable police and prosecutors to pursue crime control. The discovery of crime control values in the formal law is not, however, trivial, and Packer can be criticized for ahistorically ignoring that before the Warren Court, many American courts embraced crime control.¹⁰⁷ As Mike McConville et al. noted, due process and crime control are both embedded in fundamental legal principles.¹⁰⁸ This means that troubling police practices can be legitimated by "a legal rhetoric" that is "expressive of crime control values."¹⁰⁹ Crime control is an ideology that appeals to legislators and some judges, as well as a description of how the police and courts operate.

Due process is also said to be for crime control because it helps legitimate the imposition of the criminal sanction. Due process refers here not so much to the operational content of the law, but to the "rhetoric of justice"¹¹⁰ or the "rhetoric of reform."¹¹¹

¹⁰⁵ ERICSON, MAKING CRIME, *supra* note 104, at 15

¹⁰⁶ *Id.* at 11.

¹⁰⁷ Goldstein, *supra* note, 21 at 1010.

¹⁰⁸ MIKE MCCONVILLE ET AL., THE CASE FOR THE PROSECUTION 189-90 (1991)

¹⁰⁹ *Id.* But see Smith, *supra* note 21, at 395-96, who somewhat unfairly criticises McConville et al. for ignoring the importance of crime control.

¹¹⁰ The rhetoric of justice is based on an ideology of legality. Hence Professor McBarnet's oft-quoted phrase:

Legality requires that officials be governed by law; the law is based on post hoc decisions. Legality requires each case to be judged on its own facts; the law makes previous convictions grounds for defining behaviour as an offence. Legality requires incriminating evidence as the basis for arrest and search; the law allows arrest and search in order to establish it. Legality embodies individual civil rights against public or state interests; the law makes state and the public interest a justification for ignoring civil rights.

This idealized and publicly consumed version of the law supports crime control by creating the illusion that accused are treated fairly and have every opportunity to exercise their rights in the due process obstacle course. In reality, however, the passive and dependent accused is processed along the crime control assembly line. Packer would have been surprised and threatened by this purported relation between due process and crime control. He believed that due process would, however imperfectly, restrain crime control, not legitimate it.

The critical claim that due process is consistent with crime control is quite persuasive. In Canada, prison populations increased dramatically at a time when the Supreme Court imposed significant due process restrictions on police and prosecutors.¹¹² In the United States, due process standards have not slowed the war on drugs or rising prison populations.¹¹³ The only question is whether prison populations would be even higher without due process.¹¹⁴ Prison capacities, however, seem to be a more plausible restraint on prison growth than infrequently imposed due process remedies such as the exclusion of evidence.¹¹⁵

DOREEN MCBARNET, *ARREST: THE LEGAL CONTEXT OF POLICING, THE BRITISH POLICE* 39 (1979).

¹¹¹ ERICSON & BARANEK, *supra* note 15, at 230. Ericson writes:

[T]he 'rights' /due process/crime control debate is more understandable in the context of the state's ideological work in the public culture concerning how it should proceed in relation to troublesome citizens than in terms of how it does proceed. It creates illusions, displacing reform talk away from social control and serving as an instrument of that control.

Ericson, *supra* note 5, at 30.

¹¹² MANDEL, *supra* note 18; Michael Mandel, "Fundamental Justice", *Repression and Social Power*, in *THE CHARTER'S IMPACT ON THE CRIMINAL JUSTICE SYSTEM* 369, 376-77 (Jamie Cameron ed., 1996). In some respects, Canadian due process standards exceeded those imposed by even the Warren Court. See generally KENT ROACH, *CONSTITUTIONAL REMEDIES IN CANADA* §§ 10.680-10.830 (1994); Robert Harvie & Hamar Foster, *Ties that Bind?: The Supreme Court of Canada, American Jurisprudence and the Revision of the Canadian Criminal Law under the Charter*, 29 *OSGOODE HALL L. J.* 729 (1990); Kent Roach & M.L. Friedland, *Borderline Justice: Policing in the Two Niagaras*, 23 *AM. J. CRIM. L.* 241 (1996).

¹¹³ See TONRY, *supra* note 17, at vii.

¹¹⁴ See DON STUART, *CHARTER JUSTICE IN CANADIAN CRIMINAL LAW* 1-4 (2nd ed. 1996).

¹¹⁵ See Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule*, *AM. B. FOUND. RES. J.* 585, 606-09 (1983).

The critical claim that due process has legitimated crime control is more problematic. It is one thing to accept that due process will not empty the jails or even restrain prison growth, but it is quite another to suggest that the crime control business would not have boomed in the absence of due process. The media imperfectly transmits due process decisions for public consumption. When publicized, due process decisions seem to offend public sensibilities by creating the impression that the courts allow the factually guilty to go unpunished. As Packer recognized, due process decisions are fragile and subject to subtle judicial and legislative revision. Due process decisions constitute an indirect and somewhat strange way to legitimate the criminal sanction to the public.

Critics who claim that due process has legitimated crime control often ignore the role that victims' rights play in legitimating the criminal sanction and giving crime control a new and powerful human and rights-bearing face. Because he defines the disadvantaged in class terms, Michael Mandel¹¹⁶ does not emphasize the ability of politicized, post-materialist¹¹⁷ groups such as feminists and crime victims to lobby for and legitimate increased crime control. Victims' rights legitimate the criminal sanction more directly and emotionally than due process. Although some victims' rights initiatives are vulnerable to judicial review, they are generally more stable than due process initiatives because they often originate from populist advocacy and result in legislative and administrative reform. The contingency, fragility and controversial nature of due process makes it difficult to see it as an elaborate legitimation technique, especially when compared to victims' rights.

¹¹⁶ See MANDEL, *supra* note 18, at 239-40.

¹¹⁷ Post-materialist because their sense of identity is defined in terms of common gender, race, cultural or ethnic origin rather than class. See generally ALAN C. CAIRNS, *RECONFIGURATIONS: CANADIAN CITIZENSHIP AND CONSTITUTIONAL CHANGE* (1995); see also Frederick L. Morton, *The Charter Revolution and the Court Party*, 30 *OSGOODE HALL L.J.* 627, 631-35 (1992).

C. THE LIMITED LIBERAL AND ADVERSARIAL VISION OF PACKER'S MODELS

Packer's due process and crime control models have been criticized for their procedural and political assumptions. They were designed to operate "within the framework of contemporary American society"¹¹⁸ and assumed an adversarial system, even though most of the world employs inquisitorial procedures. This has political as well as procedural implications. The adversarial system is based on a vision of a reactive state that is only concerned with settling discrete disputes as opposed to an activist state which attempts to "manage the lives of people and steer society."¹¹⁹ Victims' rights initiatives can move the state beyond its minimalist position and result in attempts by the state to manage risks and harms and redress feelings of insecurity, alienation and disrespect among crime victims and potential victims of crime.

Packer conceived of rights in a traditional liberal manner as a negative check on government. They were to protect the individual from the state and remedies were limited to the "sanction of nullity"¹²⁰ in which evidence was excluded and prosecutions rejected. He did not imagine rights as a positive guarantee of security or equality or conceive the criminal sanction as a remedy required to respect the rights of victims and potential victims of crime. The limited vision of Packer's models did not go unnoticed at the time he wrote. In 1970, John Griffiths criticized Packer for operating within the "prevailing ideology" of liberal, American legal thought.¹²¹ Packer's models were united in their assumption that individuals had interests opposed to those of the state and the community. They only differed in whether the individual or the state had the upper hand.

Griffiths presented a third "family" model that assumed that the state and the accused, like a parent and child, had common interests if only because they continued to live together after punishment.¹²² The needs of the accused were more important than

¹¹⁸ PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, *supra* note 1, at 154.

¹¹⁹ MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 11 (1986).

¹²⁰ PACKER, *THE LIMITS OF THE CRIMINAL SANCTION*, *supra* note 1, at 240-41.

¹²¹ Griffiths, *supra* note 8, at 359-60.

¹²² *Id.* at 371-73.

his or her rights and the state was assumed to act in good faith.¹²³ The closest example of this "family" model were juvenile delinquent acts which allowed the state to pursue the child's best interests in a parental manner.¹²⁴ John Braithwaite has returned to Griffiths' family model as a source of inspiration for his influential model of re-integrative shaming through informal, non-punitive and non-adversarial interventions which shame offenders for their crimes, but offer support and re-integration through families and communities.¹²⁵ Braithwaite criticizes the crime control model for taking disputes out of the hands of offenders, victims and the larger community: "The assembly-line justice of contemporary court systems puts insufficient emphasis on reprobation in its preoccupation with efficient dispensing of formal sanctions."¹²⁶ He supports due process as an option, but suggests that the interests of offenders and victims are not fundamentally at odds and that lawyers and judges should not appropriate disputes from offenders, victims, and their families and their communities.¹²⁷ The family model of juvenile justice is now being re-invigorated through contemporary interest in family conferencing, restorative justice, and victim-offender reconciliation.

Both Griffiths' and Braithwaite's work owe important debts to Aboriginal justice which most clearly and eloquently reveals the liberal and adversarial assumptions of Packer's models. Drawing on his study of dispute resolution among the Cheyenne,¹²⁸ Karl

¹²³ *Id.*

¹²⁴ *Id.* at 388. This parental approach was, however, subject to due process challenges. See *supra* notes 81-82.

¹²⁵ See generally BRAITHWAITE, *supra* note 7.

¹²⁶ *Id.* at 180-81.

¹²⁷ *Id.* See also Nils Christie, *Conflict as Property*, 17 BRIT. J. CRIMINOLOGY 1, 10-12 (1977).

¹²⁸ See generally KARL N. LEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941). Much anthropological work of this era is justifiably suspect because of its value assumptions that non-western cultures were "primitive." Nevertheless, much work by Aboriginal commentators has defined the difference between Aboriginal and western concepts of justice in similar terms by stressing the emphasis placed on healing and restorative justice within Aboriginal justice in contrast with the emphasis placed on rights and adversarial relations in western models of criminal justice.

For example, the Manitoba Aboriginal Justice Inquiry has observed that "[i]n the Ojibway concept of order, when a person is wronged it is understood that the wrongdoer must repair the order and harmony of the community by undoing the wrong." REPORT OF THE ABORIGINAL JUSTICE INQUIRY OF MANITOBA, VOLUME 1: THE JUSTICE SYSTEM AND

Llewellyn was perhaps the first commentator to contrast “parental” and “arm’s length” models of criminal justice. In the parental model, “the officials will drum up evidence” for the accused because “[t]hey want to find him innocent; he is part of their team.”¹²⁹ If the accused is factually guilty, the trial is concerned with the restoration of the offender with the victim and the community, not the isolation and punishment of the offender. “Its purpose is . . . to bring the erring brother, now known to be such, to repentance, to open confession and to reintegration with the community of which he *was and still is regarded as an integral part*.”¹³⁰ A parental model of criminal justice rejects Packer’s assumption that the individual and the state have fundamentally opposed interests.

ABORIGINAL PEOPLES 36 (1991). Mary Ellen Turpel has stressed the parental role of elders in Aboriginal justice by stating that

[e]lders do not judge. They see the whole person and find ways (through stories, meditations, prayers and ceremonies) of helping an individual understand the shortcomings or problems that led to anti-social acts. They focus on harmony, rehabilitation, reintegration of an offender into the family, clan and community—not on guilt.

Mary Ellen Turpel, *On the Question of Adapting the Canadian Criminal Justice System for Aboriginal Peoples: Don't Fence Me In*, in ABORIGINAL PEOPLES AND THE JUSTICE SYSTEM: REPORT OF THE NATIONAL ROUNDTABLE ON ABORIGINAL JUSTICE ISSUES 176 (Royal Commission on Aboriginal Peoples 1993). Other Aboriginal commentators, however, have expressed punitive victims’ rights concerns that elders and Aboriginal justice will not take crime, particularly crime against women, seriously enough and will be excessively lenient. See Teresa Nahanee, *Dancing with a Gorilla: Aboriginal Women, Justice and the Charter*, in ABORIGINAL PEOPLES AND THE JUSTICE SYSTEM: REPORT OF THE NATIONAL ROUNDTABLE ON ABORIGINAL JUSTICE ISSUES 360-61 (Royal Commission on Aboriginal Peoples 1993).

¹²⁹ KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 448 (1962).

¹³⁰ *Id.* at 448 (emphasis in original). Judge Murray Sinclair has explained that “[t]he primary meaning of ‘justice’ in an Aboriginal society would be that of restoring peace and equilibrium to the community through reconciling the accused with his or her own conscience and with the individual or family that is wronged.” Murray Sinclair, *Aboriginal Peoples, Justice and the Law*, in CONTINUING POUNDMAKER’S AND RIEL’S QUEST 178 (Richard Gosse et al. eds., 1994). This definition includes both restorative justice and healing. Sometimes more stress is placed on restoring harmony, sometimes more on healing. Official discussions of Aboriginal justice tend to emphasize restorative justice in part because of the world-wide movement towards restorative justice and the involvement of spirituality in the complex process of healing. See, e.g., REPORT OF THE ABORIGINAL JUSTICE INQUIRY OF MANITOBA, *supra* note 128, at 22; ROYAL COMMISSION ON ABORIGINAL PEOPLES, BRIDGING THE CULTURAL DIVIDE 214 (1996).

The arm's length model of criminal justice was more distrustful than the parental model of officials at the start, but more punitive in the end. The offender was protected by rights, but was not considered as part of the team. The distrust of officials resulted in a formal trial "before a tribunal artificially sterilized of knowledge of the facts, under a procedure which rigidly eliminates a great deal of relevant evidence."¹³¹ This arm's length model was consistent with Packer's due process model. Family models of justice and Aboriginal justice reveal Packer's assumptions of an adversarial criminal process and a liberal reactive state. New models might approach criminal justice with less emphasis on professional and adversarial conflict between the accused and the state and more emphasis on reconciling offenders, victims,¹³² their families, and their communities.

D. PACKER'S NEGLECT OF THE RISK OF VICTIMIZATION

Packer wrote before victimization studies documented widespread under-reporting of crime to the police and the pervasive risk of crime. Victimization studies assisted the victims' rights movement by providing "the ammunition of concrete data, generated by a government department, to back up rhetorical claims about the seriousness of the problem."¹³³ Packer's data set was police-reported crime statistics, and he assumed that better clearance rates would control crime. Victimization studies challenged this assumption by demonstrating that the crime control activities of police and prosecutors only affected a minority of crimes. In many cases, victims were aware that contacting the police about crimes was useless and some feared they would be re-victimized by

¹³¹ LLEWELLYN, *supra* note 129, at 445.

¹³² Patricia Monture-Okanee and Mary Ellen Turpel have argued that "no victims' right movement is necessary in an Aboriginal system of justice because the victim would never be forgotten in the first place if the system was operating according to custom" and that "the victim is not brushed aside in the quest for punishment. It is only by focusing on the victim and the offender and considering how they can heal and be reintegrated into the community that the needs of the people are served." Patricia A. Monture-Okanee & Mary E. Turpel, *Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice*, 26 U. BRIT. COLUM. L. REV. 239, 258 (1992).

¹³³ MIKE MAGUIRE & JOHN POINTING, *VICTIMS OF CRIME: A NEW DEAL* 7 (1988).

the criminal process.¹⁵⁴ New models of criminal justice should integrate this new knowledge about unreported crime.

The high rate of unreported crime in victimization surveys is subject to different interpretations. It can be construed as a sign that the criminal justice system has failed and is insensitive to crime victims and particular groups who are disproportionately exposed to some or all crimes. This interpretation has inspired reforms which attempt to increase the reporting and prosecution of sexual and domestic assaults.¹⁵⁵ Realist criminologists also note that victimization studies suggest that the economically disadvantaged suffer crime disproportionately.¹⁵⁶ The disproportionate victimization of African Americans¹⁵⁷ is also starting to play a more important role in debates about criminal justice. More generally, victimization studies can provide evidence of a great unsatisfied demand for the criminal sanction and a damning critique of the inadequacy of the present system. When risk is expanded into the fear of crime (which is also being increasingly measured), victimization surveys may be laying the basis for non-diminishing demands for arrests, prosecutions, and criminal justice reform. The failure of these state-based crime control activities to control most crime, as well as limits to which an adversarial and punitive system can be victim sensitive, may be a recipe for unending dissatisfaction.

On the other hand, unreported crime can be seen as a sign of legal pluralism which can trigger informal and non-state-based re-

¹⁵⁴ A 1993 Canadian victimization survey found that 90% of sexual assaults, 68% of assaults, 53% of robberies, 54% of vandalism, 48% of motor vehicle theft or attempted theft and 32% of break and enters or attempted break and enters were never reported to the police. The researchers concluded that "for the most part, the reasons for non-reporting appear to relate to the perceived usefulness of reporting. Generally speaking, victims who did not report the incident to the police saw the event as one that was best dealt with another way, that was too minor to report, or that they thought the police could not do anything about." Rosemary Gartner & Anthony Doob, *Trends in Criminal Victimization 1988-93*, 14 JURISTAT 4 (1994).

¹⁵⁵ See generally JULIAN ROBERTS & RENATE M. MOHR, *CONFRONTING SEXUAL ASSAULT: A DECADE OF LEGAL AND SOCIAL CHANGE* (1994); CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASS ROOTS REVOLUTION AND ITS IMPACT* (1992).

¹⁵⁶ See generally REALIST CRIMINOLOGY, *supra* note 12.

¹⁵⁷ See RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 76 (1997); Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 ETHNICITY, CRIME & IMMIGR. 311, 312-14 (1997).

actions to crimes. Victims who do not report crimes to the public police may nevertheless be taking their own actions to deal with the crime, including the administration of informal sanctions and preventive actions. Crime victims are already more likely to seek compensation from their insurance companies than through state-based compensation or restitution schemes.¹³⁸ Those with sufficient resources may find that private police, who are not bound by due process standards or the need to produce convictions, are more useful in preventing crime and limiting losses than the public police.¹³⁹ The knowledge that the risk of crime is pervasive and unmanageable through traditional crime control strategies may push victims' rights advocates towards new forms of governance. These include neo-liberal responses such as target hardening, neighborhood watch, surveillance, risk profiling, and insurance.¹⁴⁰ In other contexts, it may lead to the regulation of "soft targets" who can help prevent crime¹⁴¹ or a more fundamental re-examination of the way male identities and sexualities result in sexual violence towards women and children.¹⁴² These new forms of governance range the political spectrum in their respective dependence on individuals, corporations and communities, but they are all united in placing less reliance on the criminal sanction and punishment.

Victimization surveys can be seen as another measurement of a risk society¹⁴³ in which we can measure, but cannot fully control risks. The failure to control crime is often seen as a particularly salient form of government failure and not often assimilated with the greater risks of accidents and disease. The measurement of

¹³⁸ See JOHN HAGAN, *VICTIMS BEFORE THE LAW* 186-92 (1983).

¹³⁹ See MICHAEL BROGDEN & CLIFFORD SHEARING, *POLICING FOR A NEW SOUTH AFRICA* 5 (1993).

¹⁴⁰ See RICHARD V. ERICSON & KEVIN D., *HAGGARTY POLICING THE RISK SOCIETY* 41-46 (1997); Malcolm M. Feeley & Johnathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 *CRIMINOLOGY* 449 (1992); David Garland, *The Limits of the Sovereign State*, 36 *BRIT. J. CRIMINOLOGY* 445, 452-55 (1996).

¹⁴¹ John Braithwaite, *On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers*, 47 *U. TORONTO L.J.* 305, 326-34 (1997).

¹⁴² John Braithwaite & Kathleen Daly, *Masculinities, Violence and Communication Control, in WIFE ASSAULT AND THE CANADIAN CRIMINAL JUSTICE SYSTEM* 207 (Marina Valverde et al. eds., 1995).

¹⁴³ See generally ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* (1992).

the risk of crime produces a constant, reflexive source of critique about the criminal justice system. Knowledge about risk can gain "a new political significance" and constitute "the moral statements of a scientized society."¹⁴⁴ Victimization studies frequently are employed for political ends. Statistics describing the percentage of women and children who are assaulted and sexually assaulted during their lives have resonance in policy debates before legislatures, administrators, and courts.¹⁴⁵ The claims of groups subject to disproportionate imprisonment are also becoming important in policy debates about criminal justice,¹⁴⁶ as are statistics documenting hate crimes against minorities.¹⁴⁷ The increased risk that the disadvantaged—women, children, minorities—will suffer crimes and/or imprisonment has been joined with rights discourse to produce a new language of victims' rights. Groups will use their disproportionate exposure to documented risks to make new demands on the criminal justice system.

The risk of crime victimization is now measured and known and should be integrated into new models of criminal justice. Victims' rights models will be more aligned with the activist state

¹⁴⁴ *Id.* at 23, 176.

¹⁴⁵ A British Columbia policy encouraging arrests in cases of spousal assaults is prefaced with the statistical information that

an average of two women every week were killed by their partners. Researchers and professionals working with assaulted women estimate that each year one in eight women, living in a relationship with a man, will be assaulted. In addition, research indicates that as many as 35 violent episodes may have occurred before a women seeks police intervention.

Ministry of the Attorney General of British Columbia, *Violence Against Women in Relationships Policy* (1993), in *WIFE ASSAULT AND THE CANADIAN CRIMINAL JUSTICE SYSTEM* 324 app. A (Marina Valverde et al. eds., 1995). Victimization studies suggesting that one in ten women were assaulted by their partners played an important role in the development of Canadian policies concerning spousal assault. See PAUL ROCK, *A VIEW FROM THE SHADOWS* 275 (1986); N. Zoe Hilton, *One in Ten: The Struggle and Disempowerment of the Battered Women's Movement*, 7 *CANADIAN J. FAM. L.* 313, 313-16 (1989). Victimization studies suggesting that five in ten women were sexually assaulted have played a role in debates about the constitutionality of "rape shield" laws. *Regina v. Seaboyer* [1991] 2 S.C.R. 577, 649.

¹⁴⁶ See Kent Roach, *Systemic Racism and Criminal Justice Policy*, 15 *WINDSOR Y.B. OF ACCESS TO JUST.* 236, 247-48 (1996).

¹⁴⁷ See generally JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS* (1998).

and its desire to manage risk and to recognize group and positive rights. At the same time, old paradigms die hard. One of the dangers of victims' rights is that it will replicate Packer's crime control assumption that the criminal sanction controls crime and now risk. New knowledge about risk of crime can produce an unending demand for the criminal sanction and criminal justice reform. The risk of crime will always be easier to calculate than to control. Attempts to achieve zero risk through zero tolerance may produce unending dissatisfaction, as well as conflict with due process claims. At the same time, however, this new knowledge about the failure of the criminal law to control the pervasive risk of crime could de-center the criminal sanction as a means to prevent and to respond to crime. Victims' rights can move toward the criminal sanction and reformulate Packer's crime control model by adding considerations of rights and risks. At the same time, however, victims' rights could move away from reliance on the criminal sanction, but without relying on Packer's confident assertion that much crime was victimless.

V. NEW MODELS OF VICTIMS' RIGHTS

The two new models of victims' rights presented in this paper are a punitive model of victims' rights which relies upon the criminal sanction and punishment, and a non-punitive model of victims' rights which stresses crime prevention and restorative justice. Like Packer's obstacle course due process model and assembly line crime control model, these models can also be summed up by evocative metaphors. The punitive model of victims' rights can be represented as a roller coaster. It preserves the linear orientation of the crime control and due process models as it moves towards trials, appeals, and punishments, but the ride is bumpier because of the well-documented failure of the criminal sanction to control crime and respect victims and new political cases which pit due process claims against victims' rights claims. The non-punitive model of victims' rights is represented by a circle which symbolizes successful crime prevention through family and community-building and successful acts of restorative justice. Both crime prevention and restorative justice can draw individuals together as a community. The non-punitive model is more holistic

and can merge into general issues of health, well-being, and social justice, whereas the punitive model promotes the criminalization and legalization of these issues.¹⁴⁸

A. THE PUNITIVE MODEL OF VICTIMS' RIGHTS: A ROLLER COASTER MODEL

This model combines the crime control assembly line and the due process obstacle course to create a roller coaster. It is in a state of constant crisis as it responds to the inadequacies of crime control to protect and serve victims, as revealed by victimization studies and accounts of crime victims being re-victimized by the adversarial process. It is also in crisis because of the perceived need to defend the criminal sanction from due process challenges. Normatively, it asserts the rights of crime victims and potential victims of crime as worthy of respect. The punitive model of victims' rights thus features the new political case in which the rights of victims and potential victims are pitted against the accused's due process rights.¹⁴⁹ The defense of the criminal sanction in the new political case frequently replicates the crime control assumption that the criminal law can control crime. Demands by groups of victims and potential victims for the criminal sanction often focus on the equal protection of the criminal law, as opposed to the quality of that protection.¹⁵⁰

Victimization studies revealing high levels of unreported crime play an important role. Each new victimization study confirms the failure of the existing system. Along with reports of victims being treated badly in the existing system, this produces strong demands for criminal justice reform. There may be some recognition of the need for other social, economic, and cultural reforms to reduce crime, but these are less symbolically satisfying and more difficult to achieve. The punitive model places the

¹⁴⁸ The legalization of politics reflects a process in which legal debates in courts and rights claims dominate political and legislative debate. See, e.g., MANDEL, *supra* note 18, at 61-64. In my view, legalized politics are often derived from the criminalization of politics which refers to a process in which social, economic, cultural, and political problems are addressed primarily through criminal law reform.

¹⁴⁹ See FLETCHER, *supra* note 6, at 152.

¹⁵⁰ See e.g., KENNEDY, *supra* note 137, at 311; Christine Boyle, *The Role of Equality in Criminal Law*, 58 SASK. L. REV. 203, 215-16 (1994).

criminal justice system under constant pressure to improve itself to encourage victims to report their crimes, to prevent re-victimization within the criminal process, and to respond to high levels of victimization. Unlike the crime control model, good clearance and conviction rates for the minority of crimes reported to police are no longer enough.

There is much less deference to legislators, police, and prosecutors than in the crime control model. Petitions and advocacy may be used to jump start the legislative process. Police and prosecutors may find their work subject to critical scrutiny not only from the accused, but from victims and their representatives. Victims demand their rights to protection and solicitude from legislators and criminal justice professionals in strong and sometimes emotional terms. Victims' bills of rights attempt to match the rights given to the accused, and there are demands that the rights of victims have the same constitutional status as the rights of the accused.¹⁵¹ Demands by crime victims and their supporters for standing in the criminal trial can disrupt the efficiency of a crime control assembly line designed to encourage the accused and the prosecutor to agree to a guilty plea. Plea bargaining, despite its centrality in the crime control model, is suspect because it does not include victims or meet their expectations. The assertion of rights, as represented by victims' bills of rights and victims' claims to constitutional security, participatory, and equality rights, encourages the expression of grievances, both at crime, and the state's treatment of crime victims.

There are some significant similarities between the crime control model and punitive forms of victims' rights. They both

¹⁵¹ The President's Task Force on Victims of Crime proposed a constitutional amendment that would have provided crime victims the right to be present and to be heard at all critical stages of criminal proceedings. See PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114-15 (1982) [hereinafter FINAL REPORT]. Many state constitutions give crime victims rights to notices of various proceedings and rights to participate in the proceedings. In 1996, a victims' rights amendment was introduced in the United States Senate. It would have provided crime victims with the right to be informed of and to be present at proceedings; to be heard at sentencing including the right to object to a previously negotiated plea; to be informed of the offender's release or escape, to a speedy trial free from unreasonable delay, full restitution from the convicted offender, reasonable measures to protect the victim from violence or intimidation from the accused and notice of the victim's rights. S. J. Res. 52, 104th Cong. (1996).

focus on factual as opposed to legal guilt. It is the commission of the criminal act as reported by victims to researchers or the police, not the state's ability to prove guilt beyond a reasonable doubt or compliance with legal rights, which defines victimization. Support for victims, not faith in the expert judgment of police and prosecutors, produces the operational presumption of guilt that Packer associated with the crime control model. A punitive victims' rights model tends to divide people into the dichotomous categories of victims and perpetrators while recognizing that in a few cases the accused may fall into the former category. There is a tendency to stress the innocence of victims and the guilt of offenders.¹⁵² The punitive mindset, as well as a desire to avoid all appearances of blaming the victim, tends to downplay the overlap in the population and behavior of some victims and offenders. Crime prevention may be suspect to the extent that it suggests that victims bear any responsibility for the crime.¹⁵³ Restorative justice is rejected because of concerns that victims should not have to face offenders and fears that it places too much emphasis on the offender's rehabilitation.¹⁵⁴

A punitive victims' rights model resembles the crime control model by assuming that the enactment of a criminal law, prosecution, and punishment controls crime. Some victims' advocates demonstrate the same enthusiasm for the criminal sanction that characterizes the crime control model.¹⁵⁵ This may represent the

¹⁵² Ignoring evidence that suggests a substantial overlap in offenders and victims, the President's Task Force portrayed offenders as random, cruel and acquisitive predators while victims were depicted as passive, innocent and permanently damaged. See FINAL REPORT, *supra* note 151, at 11.

¹⁵³ See LORENNE CLARK & DEBRA LEWIS, RAPE: THE PRICE OF COERCIVE SEXUALITY 147-58 (1977).

¹⁵⁴ See Stuart Scheingold et al., *Sexual Violence, Victim Advocacy and Republican Criminology: Washington State's Community Protection Act*, 28 L. & SOC'Y REV. 729, 739-41 (1994).

¹⁵⁵ The President's Task Force on Crime Victims has proposed legislation to make it easier to deny bail, to abolish parole, and to abolish the exclusionary rule for search and seizure violations. In this report, victims' rights were almost always for crime control and there was no discussion of crime prevention or restorative justice. The crime control orientation of this report is symbolized by its recommendation that school officials be guilty of a misdemeanor if they did not report drug and violence offenses to the police. See FINAL REPORT, *supra* note 151, at 31-32. A Canadian federal/provincial task force on crime victims published its report a year later. It took a more European and less punitive approach by emphasizing the needs of victims for services and restitution and by not

capture of victims' rights by professionalized interests in crime control¹⁵⁶ or the domination of victims' advocacy groups by those who have experienced the most serious of crimes. The nature of criminal justice politics, which are often mobilized by well publicized and horrible cases of violence, lead some to conclude that it is "unrealistic to expect victim advocacy to spearhead the movement toward re-integrative shaming."¹⁵⁷ Victim advocacy is often focused on creating new criminal laws in the hope that they will prevent future victimization. Feminist reforms of sexual assault laws and new laws targeting the sexual abuse of children are designed not only to protect the privacy and integrity of victims, but to make convictions easier to obtain. Victim impact statements and victim involvement at sentencing and parole hearings are often directed towards greater punishment. Much more directly than due process, victims' rights can enable and legitimate crime control.

Like the crime control model, punitive forms of victims' rights oppose due process claims because they divert attention from factual guilt and allow the criminal to go free. The important difference, however, is that due process claims are countered with claims that victims and groups of potential victims have rights that deserve respect and not the less convincing arguments that police and prosecutors made relatively minor mistakes or that due process will threaten public order. In California and some other states, victims' bills of rights have included provisions to limit the exclusionary rule.¹⁵⁸ Women's groups and other equality seekers have expressed concern that due process decisions will frustrate the reporting and prosecution of some crimes.¹⁵⁹ As in the crime

being concerned with challenging the accused's due process protections. See FEDERAL/PROVINCIAL TASK FORCE ON JUSTICE FOR VICTIMS OF CRIME, TASK FORCE REPORT 8, 10-11 (1983).

¹⁵⁶ See ELIAS, *supra* note 92, at 233-35 (1986); ROBERT ELIAS, VICTIMS STILL: THE POLITICAL MANIPULATION OF CRIME VICTIMS 2-3 (1993). See generally THE PLIGHT OF CRIME VICTIMS IN MODERN SOCIETY (Ezzat Fattah ed. 1989).

¹⁵⁷ Scheingold et al., *supra* note 154, at 759.

¹⁵⁸ See Daniel E. Lungren, *Victims and the Exclusionary Rule*, 19 HARV. J.L. & PUB. POL'Y 695 (1996).

¹⁵⁹ See, e.g., Diana Majury, *Seaboyer and Gayme, A Study In Equality*, in CONFRONTING SEXUAL ASSAULT: A DECADE OF LEGAL AND SOCIAL CHANGE, (Julian Roberts & Renate Mohr eds. 1994). In Canada, Supreme Court decisions striking down "rape shield"

control model, there is resistance to vindicating the accused's due process rights in the criminal trial of a factually guilty accused. The resistance in the punitive victims' rights model is stronger, however, because it is undertaken in the name of the rights of crime victims.

Many of the most significant episodes in recent criminal justice politics have involved clashes between those who assert due process rights and those who assert the security, participatory and equality rights of crime victims and potential victims. Before the 1980's, the political case was fought between the state and the individual. The state asserted its powers and claims to enforce the community's morality against the accused's claims to represent the individual and freedom. Conservatives sided with the state¹⁶⁰ while liberals, such as Packer, sided with the accused. The new political case is fundamentally different. The accused still claims to represent the individual and freedom, but now the state and victims invoke the rights of crime victims and potential victims. The new political case does not ignore victims, but it promotes a clash between their rights and those of the accused while reproducing the crime control assumption that the criminal sanction controls crime.

The punitive model of victims' rights also challenges Packer's idea of victimless crimes based on speech or consensual transactions. Packer's claims about the presence of consent and absence of victims have been vigorously contested. His work was done before feminism became a major intellectual and political force. Although most feminists supported Packer's belief that abortion should be decriminalized, they did so for different reasons. Their concern was not so much difficulty of enforcement or even liberty, but equality for women. This concern could justify the use of

restrictions on the admissibility of the complainant's prior sexual history, recognizing a defense of extreme intoxication to crimes of assault and sexual assault and recognizing a right of the accused to disclosure of complainants' medical records were all in short order met with legislative replies that altered the Court's decision and stressed the rights of women and children as victims and potential victims of sexual violence. See *Regina v. Seaboyer* [1991] 2 S.C.R. 577 and *Criminal Code* § 276 as amended S.C. ch.38, § 2 (1992) (Can.); *Regina v. Daviault* [1994] 3 S.C.R. 63 and *Criminal Code* § 33.1 as amended S.C. ch.32 § 1 (1995) (Can.); *Regina v. O'Connor* [1995] 4 S.C.R. 411 and *Criminal Code* §§ 278.1-278.91 as amended S.C. ch. 30 § 1 (1997) (Can.).

¹⁶⁰ See, e.g., DEVLIN, *supra* note 9.

the criminal sanction to protect women from pro-life protests. Some feminists vigorously contested Packer's claims that prostitution and pornography were consensual and victimless.¹⁶¹ Some critical race theorists also argue that hate speech produces victims.¹⁶² Without any theory about unequal power in society, Packer did not question the genuineness of consent or the effect of crime on disadvantaged groups. Since the time he wrote, harm has been expanded to include the risk of future violence, psychological harm produced by anxiety and fear and contributions to unequal social relations. In addition, victimization studies have made clear that disadvantaged groups, such as African Americans, are disproportionately victimized by crime.¹⁶³ It can no longer be assumed, as Packer did, that due process decisions will advance equality and protect the most disadvantaged.

Expanded understandings of harm also implicated the role of the state. Packer's individualistic, liberal assumptions about the limited, adversarial role of the state have been challenged. Victimization studies and other measures of risk society have been used to demand that the state better manage security. Because of fiscal restraint and skepticism about social welfare reforms, however, many demands for state activism in the 1980's and 1990's were channeled into the criminal process. The punitive model of victims' rights can promote a criminalization of politics in which social, economic, cultural and political problems are primarily addressed through the use of the criminal sanction. Reformed sexual assault laws and mandatory prosecution of spousal abuse can be the primary response to the subordination of women; reform of laws against the sexual abuse of children can be offered as the primary response to the sexualization and neglect of children; hate crime legislation can be offered as the punitive and symbolic

¹⁶¹ See MACKINNON, *supra* note 10, at 206-07.

¹⁶² Mari Matsuda, *Public Responses to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2322-23 (1989). Packer was concerned about equality, but writing in the height of the civil rights era, he assumed that the Warren Court's due process decisions would protect "the urban poor, and particularly those who belong to minority groups, [who] provide most of the raw material for the criminal process." Herbert L. Packer, *The Courts, The Police and the Rest of Us*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 238, 241 (1966).

¹⁶³ See generally Sampson & Lauritson, *supra* note 137.

response to pervasive discrimination, and victim impact statements can be offered as the solution to society's poor treatment of crime victims. In the punitive model of victims' rights, the criminal sanction is the primary response to the widespread suffering and subordination recorded by victimization studies.

The recent politics of criminal justice has been a bumpy roller coaster ride. A punitive victims' rights model has continued to rely on the criminal sanction; it has found itself in conflict with due process claims and has failed, despite zero tolerance strategies, to reduce the risk of crime victimization to zero. Concern about crime victims and disadvantaged groups of potential victims has provided a new symbolic and legitimating language for the same old crime control routine of enacting criminal laws, arresting, convicting, and imprisoning a minority of the people who break those laws, and opposing due process claims. Victims' rights have become the new rights-bearing face of crime control. Because they employ the concepts of risks and rights, victims' rights are much more powerful than crime control.

The major improvement over the crime control model is that the dissatisfaction of crime victims and disadvantaged groups is no longer ignored. Unlike the crime control model which revolves around the organizational interests of police and prosecutors, victims' rights takes victim dissatisfaction with the process and the failure to prevent crime seriously. This can make the system reflexively critical. By taking victim satisfaction and security as the measure of its success, punitive versions of victims' rights may have laid the foundation for eventual recognition of the limits of the criminal law in controlling crime. The corporation and the upper middle class home owner with their surveillance cameras and private police have already learned this lesson, but there is a real danger that disadvantaged individuals and groups will be left behind and be forced to rely on a crime control system that fails to control crime and invites due process challenges.

B. THE NON-PUNITIVE MODEL OF VICTIMS' RIGHTS: A CIRCLE MODEL

Another direction for victims' rights is away from the roller coaster of relying on an inadequate criminal sanction and countering due process claims, and towards the prevention of crime

and restorative justice once crime has occurred. Both the processes of prevention and restoration can be represented by a circle. One manifestation of the circle may be the gated community with its own private police force. Another example would be a successful neighborhood watch or the self-policing of families and communities.¹⁶⁴ Once a crime has occurred, the circle represents processes of healing, compensation, and restorative justice. Normatively, the circle model stresses the needs of victims more than their rights,¹⁶⁵ and it seeks to minimize the pain of both victimization and punishment.

Victimization studies revealing high levels of unreported crime are seen more as a failure of social policy than a failure of the criminal justice system to control crime. Unlike in the punitive version of victims' rights, unreported crime is not automatically viewed with suspicion or alarm. Many crime victims are remarkably non-punitive in their decision not to report crime to the police. To be sure, some non-reporting is related to the inadequacy and inhospitality of the criminal justice system and fears of retaliation from offenders. Some victims, however, do not report crimes because they have found a better way to deal with their victimization that may draw upon strategies such as avoidance, shaming, apologies, and informal restitution. They may also judge the matter to be too minor or inconvenient to justify official intervention, or prefer the privacy, time, and control of non-reporting. Unlike in the punitive victims' rights, crime control, or due process models, the victim's decision not to invoke the criminal process deserves respect unless it can be shown that it only reflects coercion or the inadequacies of the present system. "Only a 'victim-centered' model would prioritize the interests of victims at the expense of the public interest. No-one has yet managed to develop a victim centered model which is also consistent with due process or crime control."¹⁶⁶ Victims are allowed to define their own interests and their wishes are not pathologized as a product

¹⁶⁴ BROGDEN & SHEARING, *supra* note 139, at 106-7.

¹⁶⁵ On needs as opposed to rights based discourse, see MICHAEL IGNATIEFF, *THE NEEDS OF STRANGERS* 9-23 (1984); Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859, 898-903 (1991).

¹⁶⁶ SANDERS & YOUNG, *supra* note 21, at 26.

of learned helplessness.¹⁶⁷ The prevalence of non-reporting suggests that a non-punitive victims' rights model shares with the due process model considerable skepticism about the utility of the criminal sanction.

A non-punitive approach is not deferential to traditional crime control strategies and agents, but unlike the punitive model de-centers their importance. Families, schools, employers, town planners, insurers, and those who fail to provide social services and economic opportunities are also responsible for crime.¹⁶⁸ The challenge is to jump traditional jurisdictional lines and not to diffuse responsibility too thinly. Crime prevention can be achieved through social development to identify and provide services for those at risk of crime. Early childhood intervention targeting disruptive and anti-social behavior and poor parenting skills may help prevent future crime,¹⁶⁹ as well as blur bright line distinctions between victims and offenders. At the same time, more immediate forms of crime prevention including target hardening, better lighting, information exchange among bureaucracies, and changing high risk activities also play a role. Public health approaches focus much more on the victim than do traditional criminal justice responses which attempt to deter and punish offenders.¹⁷⁰ Unlike in the punitive model, there is little

¹⁶⁷ Lenore Walker's controversial idea that battered women suffer from a syndrome of learned helplessness can inspire policies such as mandatory arrest and prosecution policies which discount the victim's desires in the prosecution process. See generally LENORE WALKER, *THE BATTERED WOMEN* (1979); DONALD DOWNS, *MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY AND THE LAW* (1996).

¹⁶⁸ See Garland, *supra* note 140, at 453. The 1985 United Nations Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power § 4(a) promotes a non-punitive model of victims' rights in part by calling on states "to implement social, health, educational, economic and specific crime prevention policies to reduce victimization and encourage assistance to victims in distress." *Id.* at § 4. Unlike most domestic victims' bills of rights, it also endorses a holistic, multidisciplinary approach to victimisation by recognizing that "victims should receive the necessary material, medical, psychological and social assistance through governmental, community-based and indigenous means." *Id.* at § A.14.

¹⁶⁹ See Richard Tremblay & Wendy Craig, *Developmental Crime Prevention*, in *BUILDING A SAFER SOCIETY: STRATEGIC APPROACHES TO CRIME PREVENTION* 151, 189-218 (Michael Tonry & David Farrington eds., 1995).

¹⁷⁰ See Mark Moore, *Public Health and Criminal Justice Approaches to Crime Prevention*, in *BUILDING A SAFER SOCIETY: STRATEGIC APPROACHES TO CRIME PREVENTION*, *supra* note 169, at 234, 241.

concern about blaming offenders or victims. Following a public health approach, the non-punitive model recognizes that offenders and victims often come from similar populations and that these populations are disproportionately exposed to harms other than crime.¹⁷¹ Crime prevention may evolve into a more comprehensive approach to safety, security, and well-being which does not make hard and fast distinctions between the risk of victimization by crime and other harms and risks.¹⁷²

Once a crime has been committed, the focus is on reducing the harm it causes through healing, compensation, and restorative justice.¹⁷³ The circle can be closed without any outside intervention as crime victims take their own actions to heal and attempt to prevent the crime in the future. More prosaically, the circle of restoration may simply be a claim on an insurance policy which returns the money the policy-holder invested in insurance premiums.¹⁷⁴ When the victim does report crime, the circle can be represented by a process of restorative justice which allows the offender to take responsibility for the crime and attempt to repair the harm done to victims. This is often achieved through informal proceedings such as Aboriginal healing circles,¹⁷⁵ family conferences,¹⁷⁶ and victim-offender reconciliation programs¹⁷⁷ in which all of the actors are seated in a circle. All of these interventions are united by their concern for the welfare of both offenders

¹⁷¹ See generally FATTAH, *supra* note 12, at 110-28.

¹⁷² A non-punitive victims' rights model would also be concerned about the overrepresentation of disadvantaged groups in prison and the victims of state inflicted violence. The United Nations Declaration supports this concern by including those victimized by state officials, as well as private individuals, in its understanding of victims. See LeRoy Lamborn, *The UN Declaration on Victims: Incorporating 'Abuse of Power'*, 19 RUTGERS L.J. 59, 70 (1987).

¹⁷³ The 1985 U.N. Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power § A.7 encourages restorative justice by calling for the use of "[i]nformal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices . . . to facilitate conciliation and redress for victims." *Id.* at § A.7.

¹⁷⁴ See HAGAN, *supra* note 138, at 187; ERICSON & HAGGERTY, *supra* note 140, at 408-9.

¹⁷⁵ See generally RUPERT ROSS, *RETURNING TO THE TEACHINGS: EXPLORING ABORIGINAL JUSTICE* (1996).

¹⁷⁶ See generally JOE HUDSON, *FAMILY GROUP CONFERENCING PERSPECTIVES ON POLICY AND PRACTICE* (1996); Braithwaite & Mugford, *supra* note 16.

¹⁷⁷ See HOWARD ZEHR, *CHANGING LENSES* 181 (1990); Daniel Van Ness, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L. FORUM 251, 258 (1993).

and victims, informal non-punitive approaches, and wide community participation. The key players in these circles should be the victim, the offender, and their families and supporters—not police, prosecutors, defense lawyers or judges who may appropriate their dispute.¹⁷⁸ Victims play the most crucial role and this gives them some of the power and autonomy that was taken away by the crime. They have the power to decide whether to accept apologies and plans for reparation. In a punitive victims' rights approach, however, they can only make representations to legislators, judges, and administrators who retain the ultimate power to impose punishment.

Restorative justice focuses on factual guilt, but explores the reasons why the offender has committed the offense. One reason may be past victimization or deprivation, but this does not produce an "abuse excuse"¹⁷⁹ which by leading to a verdict of acquittal denies the suffering of the immediate victim. Restorative justice also marginalizes due process rights by encouraging the offender to accept responsibility for the offense rather than requiring the state to prove beyond a reasonable doubt that the offender committed the crime and that the state complied with the offender's legal rights. There is, however, no permanent opposition to due process and it is important that all participants be treated fairly and be allowed to speak. Restorative justice works best if offenders voluntarily participate and accept responsibility for the offense. Offenders already do this in many cases when they plead guilty, and they should be even more willing to do so in a less punitive system. The greater challenge will be persuading victims to participate because they may fear or disdain the offender or have unrealistic expectations about the benefits of a formal trial. Some offenders and/or victims will not participate and trials will be necessary. When offenders do not believe that their activities should be criminal, some of these trials may produce clashes between due process and victims' rights. Although the resulting new political cases are at the core of punitive models of victims' rights, they are at the periphery of a non-punitive one.

¹⁷⁸ See generally Christie, *supra* note 127.

¹⁷⁹ See generally ALAN DERSHOWITZ, *THE ABUSE EXCUSE* (1994).

Restorative justice provides a genuine alternative to crime control or due process. The latter models focus on the state, either as the primary victim of crime or the perpetrator of rights violations, and largely act upon offenders and victims. The crime control model imposes punishment on the offender while giving the victim at best indirect recognition and no tangible repair. It embraces a model of justice which is "pre-occupied with the past to the detriment of the future."¹⁸⁰ The due process model in turn encourages the offender to deny responsibility for the crime and because of its professional and adversarial orientation alienates the offender, the victim and the larger community. It focuses on rights to the exclusion of duties, including the duty to repair the harm.¹⁸¹

Although some feminists lend support to the punitive model by their focus on criminal law reform to increase the likelihood of punishment, others eschew punitive strategies. Carol Smart has criticized criminal justice reforms which "make women embrace their victim status more warmly."¹⁸² Although violence against women cannot be ignored, Smart would be skeptical of punitive strategies which empower police and prosecutors and link women and children as passive victims. Laureen Snider similarly has argued that "[b]y focusing feminist energies on villains and victims, political and theoretical attention is directed away from tactics with greater potential to empower and ameliorate."¹⁸³ She advocates a move away from the emphasis on "injuries and punishment [which] has its origins in anger"¹⁸⁴ towards "non-punitive actions that directly and indirectly alleviate human suffering . . . [and] promote healing rather than punishment."¹⁸⁵ Feminists who stress the importance of relationships also could support restorative justice because of its emphasis on "informality, an emphasis on familial relationships and emotional maturity rather

¹⁸⁰ ZEHR, *supra* note 177, at 72.

¹⁸¹ See HERMAN BIANCHI, JUSTICE AS SANCTUARY 38 (1994).

¹⁸² See CAROL SMART, FEMINISM AND THE POWER OF LAW 47 (1989).

¹⁸³ Laureen Snider, *Feminism, Punishment and the Potential of Empowerment*, 9 CAN. J.L. & SOC'Y 75, 77 (1994).

¹⁸⁴ *Id.* at 76.

¹⁸⁵ *Id.* at 103.

than strict notions of guilt."¹⁸⁶ Some feminists even support prison abolition on the basis that prison does not control crime and renounces caring for inmates.¹⁸⁷ This approach is, however, controversial and many other feminists are concerned that restorative justice will excuse male violence and reproduce the subordination of women.¹⁸⁸

As demonstrated by their frequent decisions not to report crime, victims can be non-punitive and their practical interests may not always be in punishment. Protecting victims through crime prevention and restorative justice could create genuine alternatives to crime control and due process. These changes will probably not be heralded by a legislative act or a judicial decision. They will generally occur at the local level with increased reliance on public and private forms of crime prevention, victim-offender reconciliation, family conferencing, and Aboriginal justice. These interventions have the potential to take power and control away from the criminal justice professionals who dominate the crime control and due process models. Because it involves victims and communities and does not deny that crime has occurred, restorative justice may have a better decriminalization potential than due process.

¹⁸⁶ Frances Heidensohn, *Models of Justice: Portia or Persephone?*, 14 INT'L J. OF THE SOC. OF L. 287, 296 (1986). As Martha Minow observes:

Retributive approaches may reinforce anger and a sense of victimhood; reparative approaches instead can help victims move beyond anger and beyond a sense of powerlessness. Reparative or restorative justice can secure public acknowledgement and condemnation of the wrong, although through mechanisms that differ from prosecution, conviction, and punishment of wrongdoers. Restorative justice can also afford victims the position of relative power represented by the capacity to forgive—whether or not the individual victims proceed then to forgive particular perpetrators. Where victims do forgive, it is as much for their own healing and embrace of a future without rage as it is for the benefit of the offender.

Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 23 NEW ENG. L. REV. 967, 969-70 (1998).

¹⁸⁷ See generally RUTH MORRIS, *CRUMBLING WALLS: WHY PRISONS FAIL* (1989); see also Dianne Martin, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Strategies*, 36 OSGOODE HALL L.J. 151 (1998).

¹⁸⁸ Martha Minow has observed that "most feminists are not among those advocating forgiving, restorative approaches towards offenders who commit violence against women, or other kinds of violent crime." Minow, *supra* note 186, at 974.

A non-punitive model of victims' rights may also address some concerns about the use of the term "victim." A focus on punishment tends to concentrate on what happened in the past and define a person by his or her past victimization. On the other hand, concerns about restoration and prevention look to the future and make room for healing, empowerment, forgiveness, and a richer and dynamic identity for crime victims that is not limited by being a victim who demands increased punishment. The use of punishment to express solidarity with victims often shatters a social consensus about the need to respect those who have suffered harms and wrongs. Very few can ignore the need to support those who have lost their loved ones to murder, but reasonable people can disagree about the amount of punishment that is appropriate or necessary or whether victim impact statements should be allowed in capital cases.¹⁸⁹ Few people would disagree with the urgent need to respond to widespread sexual and domestic assault of women and children, but there can be reasonable disagreements about restrictions on the accused's right to call evidence and mandatory charge policies. Less punitive approaches can give those who have been victimized in the past more power and support than crime control measures which, while increasingly undertaken in the name of victims, often affirm the powers of criminal justice professionals and frequently collide with due process claims.

VI. CONCLUSION

I have critically assessed Packer's crime control and due process models of the criminal process and articulated new models based on punitive and non punitive forms of victims' rights. It is tempting to suggest that the crime control model represents our past; the due process and the punitive victims' right models compete in the present and the future depends on whether punitive or non-punitive forms of victims' rights dominate. True to Packer's original warning, however, any actual system of criminal justice is bound to reflect aspects of all of the models. There will

¹⁸⁹ See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991); *Booth v. Maryland*, 482 U.S. 496 (1987); Austin Sarat, *Vengeance, Victims and the Identities of Law*, 6 SOC. & LEGAL STUD. 163, 171-80 (1997).

be a continued need for punishment and incapacitation in the worst cases and continued conflict between due process and victims' rights. Much will depend on when punitive responses are deemed necessary and if crime prevention and restorative justice are accepted as legitimate responses to crime.

The punitive victims' rights model is new because it employs rights and risk to justify the criminal sanction, but otherwise it is quite similar to the old crime control model. It replicates Packer's assumption that the criminal law controls crime and his battle between due process and crime control (the latter now reconceived and strengthened as victims' rights). Non-punitive approaches, however, avoid Packer's mistakes by not relying on punishment to control crime, by treating people fairly and as responsible citizens in non-adversarial proceedings, and by seeking to reconcile the interests of offenders, victims and their communities through restorative justice and crime prevention.

The future of criminal justice may largely depend on how victims' rights evolve. The well-trodden path leads towards the criminal sanction and more victim-sensitive prosecutions as a means to protect and recognize crime victims and potential victims. Its dangers are more symbolic and divisive battles over the primacy of the rights of the accused and the victim and the reproduction of the false assumption that the criminal law controls crime. A less traveled, but more promising, path leads towards increased emphasis on crime prevention and restorative justice. Its dangers are disrupting the monopoly of criminal justice professionals and abandoning traditional assumptions about the criminal law. Its benefits are minimizing new political cases which pit due process against victims' rights and providing crime victims and offenders, their families and communities, a greater role in constructively responding to crime. Both paths have their place, but the non-punitive path is in danger of being neglected, disparaged, and even abandoned.

Due process protections have not decreased prison populations in either Canada or the United States. They remain a necessary, but not a sufficient means to protect liberty and prevent domination. Victims' rights emerged in the last two decades as the new means to legitimate crime control, including its very

shaky assumption that the criminal law controls crime, and to counter due process claims in the new political case. Victims' rights supported the tendency in an age of fiscal restraint and disillusionment to criminalize politics by offering criminal justice reforms as the answer to society's ills.

Nevertheless, this punitive trajectory was not uniform or inevitable. Victimization studies and concerns for victims made the system more reflexively critical of its ability to achieve safety and security. Such information can marginalize crime control bureaucracies' self-validating emphasis on clearance and conviction rates. High levels of unreported crime and victim dissatisfaction can be constructed to create demands for criminal justice reform, but they can also inspire interventions which placed less reliance on criminal prosecutions and punishment and more emphasis on crime prevention and restorative justice.

There is irony in my optimistic conclusion that non-punitive forms of victims' rights could lead to less reliance on the criminal sanction. Thirty-five years ago, Herbert Packer made the very same prediction about due process and much of this paper was devoted to explaining why he was wrong. Due process has proven to be consistent with increased crime control as measured by expanding prison populations. Seeing victims' rights as a means to decrease reliance on the criminal sanction may be repeating Packer's mistake, but in a much more obvious manner. Victims' rights could not only be consistent with increased crime control, but could enable and legitimate punitive outcomes much more directly than due process. My pessimistic conclusion is that victims' rights will continue as the new and improved face of crime control.

Yet there are reasons to be optimistic about developments which include victims, but do not rely on punishment. Corporations and the advantaged already invest in crime prevention which does not rely on state imposed punishment. The disadvantaged must not be left to rely on the false promise of crime control and to fight new political cases to defend a criminal sanction that unfortunately does not control crime. Developmental forms of crime prevention resist the criminalization of politics by recognizing some of the early determinants of crime and linkages be-

tween crime and social and economic deprivation. When crime has been committed, family conferences, Aboriginal justice, and victim-offender reconciliation all make room for victims without relying on punishment or producing divisive and symbolic battles between victims' rights and due process.

The victims of crime should no longer be ignored. In the worlds of prosecutions and punishment, they can be informed and consulted, but will have little real decision-making power. Some victims' rights will be recognized, but they will often be pitted against due process rights. In the worlds of crime prevention and restorative justice, however, victims and potential victims of crime, may find more decision-making power and less opposition. Hopefully they—all of us ultimately—can find more security and satisfaction.