CHAPTER EIGHT

Two Models of the Criminal Process

INTRODUCTION

People who commit crimes appear to share the prevalent impression that punishment is an unpleasantness that is best avoided. They ordinarily take care to avoid being caught. If arrested, they ordinarily deny their guilt and otherwise try not to cooperate with the police. If brought to trial, they do whatever their resources permit to resist being convicted. And even after they have been convicted and sent to prison, their efforts to secure their freedom do not cease. It is a struggle from start to finish. This struggle is often referred to as the criminal process, a compendious term that stands for all the complexes of activity that operate to bring the substantive law of crime to bear (or to keep it from coming to bear) on persons who are suspected of having committed crimes. It can be described, but only partially and inadequately, by referring to the rules of law that govern the apprehension, screening, and trial of persons suspected of crime. It consists at least as importantly of patterns of official activity that correspond only in the roughest kind of way to the prescriptions of procedural rules. As a result of recent emphasis on empirical research into the administration of criminal justice, we are just beginning to be aware how very rough the correspondence is.

At the same time, and perhaps in part as a result of this new accretion of knowledge, some of our lawmaking institutions—particularly the Supreme Court of the United States—have begun

to add measurably to the prescriptions of law that are meant to govern the operation of the criminal process. This accretion has become, in the last few years, exponential in extent and velocity. We are faced with an interesting paradox: the more we learn about the Is of the criminal process, the more we are instructed about its Ought and the greater the gulf between Is and Ought appears to become. We learn that very few people get adequate legal representation in the criminal process; we are simultaneously told that the Constitution requires people to be afforded adequate legal representation in the criminal process. We learn that coercion is often used to extract confessions from suspected criminals; we are then told that convictions based on coerced confessions may not be permitted to stand. We discover that the police often use methods in gathering evidence that violate the norms of privacy protected by the Fourth Amendment; we are told that evidence obtained in this way must be excluded from the criminal trial. But these prescriptions about how the process ought to operate do not automatically become part of the patterns of official behavior in the criminal process. Is and Ought share an increasingly uneasy coexistence. Doubts are stirred about the kind of criminal process we want to have.

The kind of criminal process we have is an important determinant of the kind of behavior content that the criminal law ought rationally to comprise. Logically, the substantive question may appear to be prior: decide what kinds of conduct one wants to reach through the criminal process, and then decide what kind of process is best calculated to deal with those kinds of conduct. It has not worked that way. On the whole, the process has been at least as much a given as the content of the criminal law. But it is far from being a given in any rigid sense.

The shape of the criminal process affects the substance of the criminal law in two general ways. First, one would want to know, before adding a new category of behavior to the list of crimes and therefore placing an additional burden on the process, whether it is easy or hard to employ the criminal process. The more expeditious the process, the greater the number of people with whom it can deal and, therefore, the greater the variety of antisocial conduct that can be confided in whole or in part to the

criminal law for inhibition. On the other hand, the harder the process is to use, the smaller the number of people who can be handled by it at any given level of resources for staffing and operating it. The harder it is to put a suspected criminal in jail, the fewer the number of cases that can be handled in a year by a given number of policemen, prosecutors, defense lawyers, judges and jurymen, probation officers, etc., etc. A second and subtler relationship exists between the characteristic functioning of the process and the kinds of conduct with which it can efficiently deal. Perhaps the clearest example, but by no means the only one, is in the area of what have been referred to as victimless crimes, i.e., offenses that do not result in anyone's feeling that he has been injured so as to impel him to bring the offense to the attention of the authorities. The offense of fornication is an example. In a jurisdiction where it is illegal for two persons not married to each other to have sexual intercourse, there is a substantial enforcement problem (or would be, if the law were taken seriously) because people who voluntarily have sexual intercourse with each other often do not feel that they have been victimized and therefore often do not complain to the police. Consensual transactions in gambling and narcotics present the same problem, somewhat exacerbated by the fact that we take these forms of conduct rather more seriously than fornication. To the difficulties of apprehending a criminal when it is known that he has committed a crime are added the difficulties of knowing that a crime has been committed. In this sense, the victimless crime always presents a greater problem to the criminal process than does the crime with an ascertainable victim. But this problem may be minimized if the criminal process has at its disposal measures designed to increase the probability that the commission of such offenses will become known. If suspects may be entrapped into committing offenses, if the police may arrest and search a suspect without evidence that he has committed an offense, if wiretaps and other forms of electronic surveillance are permitted, it becomes easier to detect the commission of offenses of this sort. But if these measures are prohibited and if the prohibitions are observed in practice, it becomes more difficult, and eventually there may come a point at which the capacity of the

criminal process to deal with victimless offenses becomes so attenuated that a failure of enforcement occurs.

Thus, a pragmatic approach to the central question of what the criminal law is good for would require both a general assessment of whether the criminal process is a high-speed or a low-speed instrument of social control, and a series of specific assessments of its fitness for handling particular kinds of antisocial behavior. Such assessments are necessary if we are to have a basis for elaborating the criteria that ought to affect legislative invocation of the criminal sanction. How can we provide ourselves with an understanding of the criminal process that pays due regard to its static and dynamic elements? There are, to be sure, aspects of the criminal process that vary only inconsequentially from place to place and from time to time. But its dynamism is clear—clearer today, perhaps, than ever before. We need to have an idea of the potentialities for change in the system and the probable direction that change is taking and may be expected to take in the future. We need to detach ourselves from the welter of more or less connected details that describe the myriad ways in which the criminal process does operate or may be likely to operate in mid-twentieth-century America, so that we can begin to see how the system as a whole might be able to deal with the variety of missions we confide to it.

One way to do this kind of job is to abstract from reality, to build a model. In a sense, a model is just what an examination of the constitutional and statutory provisions that govern the operation of the criminal process would produce. This in effect is the way analysis of the legal system has traditionally proceeded. It has considerable utility as an index of current value choices; but it produces a model that will not tell us very much about some important problems that the system encounters and that will only fortuitously tell us anything useful about how the system actually operates. On the other hand, the kind of model that might emerge from an attempt to cut loose from the law on the books and to describe, as accurately as possible, what actually goes on in the real-life world of the criminal process would so subordinate the inquiry to the tyranny of the actual that the existence of competing value choices would be obscured. The

kind of criminal process we have depends importantly on certain value choices that are reflected, explicitly or implicitly, in its habitual functioning. The kind of model we need is one that permits us to recognize explicitly the value choices that underlie the details of the criminal process. In a word, what we need is a *normative* model or models. It will take more than one model, but it will not take more than two.

Two models of the criminal process will let us perceive the normative antinomy at the heart of the criminal law. These models are not labeled Is and Ought, nor are they to be taken in that sense. Rather, they represent an attempt to abstract two separate value systems that compete for priority in the operation of the criminal process. Neither is presented as either corresponding to reality or representing the ideal to the exclusion of the other. The two models 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.

I call these two models the Due Process Model and the Crime Control Model. In the rest of this chapter I shall sketch their animating presuppositions, and in succeeding chapters I shall show how the two models apply to a selection of representative problems that arise at successive stages of the criminal process. As we examine the way the models operate in each successive stage, we will raise two further inquiries: first, where on a spectrum between the extremes represented by the two models do our present practices seem approximately to fall; second, what appears to be the direction and thrust of current and foreseeable trends along each such spectrum?

There is a risk in an enterprise of this sort that is latent in any attempt to polarize. It is, simply, that values are too various to be pinned down to yes-or-no answers. The models are distortions of reality. And, since they are normative in character, there is a danger of seeing one or the other as Good or Bad. The reader will have his preferences, as I do, but we should not be so rigid as to demand consistently polarized answers to the range of questions

posed in the criminal process. The weighty questions of public policy that inhere in any attempt to discern where on the spectrum of normative choice the "right" answer lies are beyond the scope of the present inquiry. The attempt here is primarily to clarify the terms of discussion by isolating the assumptions that underlie competing policy claims and examining the conclusions that those claims, if fully accepted, would lead to.

VALUES UNDERLYING THE MODELS

Each of the two models we are about to examine is an attempt to give operational content to a complex of values underlying the criminal law. As I have suggested earlier, it is possible to identify two competing systems of values, the tension between which accounts for the intense activity now observable in the development of the criminal process. The actors in this development—lawmakers, judges, police, prosecutors, defense lawyers—do not often pause to articulate the values that underlie the positions that they take on any given issue. Indeed, it would be a gross oversimplification to ascribe a coherent and consistent set of values to any of these actors. Each of the two competing schemes of values we will be developing in this section contains components that are demonstrably present some of the time in some of the actors' preferences regarding the criminal process. No one person has ever identified himself as holding all of the values that underlie these two models. The models are polarities, and so are the schemes of value that underlie them. A person who subscribed to all of the values underlying one model to the exclusion of all of the values underlying the other would be rightly viewed as a fanatic. The values are presented here as an aid to analysis, not as a program for action.

Some Common Ground. However, the polarity of the two models is not absolute. Although it would be possible to construct models that exist in an institutional vacuum, it would not serve our purposes to do so. We are postulating, not a criminal process that operates in any kind of society at all, but rather one that operates within the framework of contemporary American society. This leaves plenty of room for polarization, but it does

require the observance of some limits. A model of the criminal process that left out of account relatively stable and enduring features of the American legal system would not have much relevance to our central inquiry. For convenience, these elements of stability and continuity can be roughly equated with minimal agreed limits expressed in the Constitution of the United States and, more importantly, with unarticulated assumptions that can be perceived to underlie those limits. Of course, it is true that the Constitution is constantly appealed to by proponents and opponents of many measures that affect the criminal process. And only the naive would deny that there are few conclusive positions that can be reached by appeal to the Constitution. Yet there are assumptions about the criminal process that are widely shared and that may be viewed as common ground for the operation of any model of the criminal process. Our first task is to clarify these assumptions.

First, there is the assumption, implicit in the ex post facto clause of the Constitution, that the function of defining conduct that may be treated as criminal is separate from and prior to the process of identifying and dealing with persons as criminals. How wide or narrow the definition of criminal conduct must be is an important question of policy that yields highly variable results depending on the values held by those making the relevant decisions.[1] But that there must be a means of definition that is in some sense separate from and prior to the operation of the process is clear. If this were not so, our efforts to deal with the phenomenon of organized crime would appear ludicrous indeed (which is not to say that we have by any means exhausted the possibilities for dealing with that problem within the limits of this basic assumption).

A related assumption that limits the area of controversy is that the criminal process ordinarily ought to be invoked by those charged with the responsibility for doing so when it appears that a crime has been committed and that there is a reasonable prospect of apprehending and convicting its perpetrator. Although police and prosecutors are allowed broad discretion for deciding not to invoke the criminal process, it is commonly agreed that

[1] See above, Chapter Five.

these officials have no general dispensing power. If the legislature has decided that certain conduct is to be treated as criminal, the decision-makers at every level of the criminal process are expected to accept that basic decision as a premise for action. The controversial nature of the occasional case in which the relevant decision-makers appear not to have played their appointed role only serves to highlight the strength with which the premise holds. This assumption may be viewed as the other side of the ex post facto coin. Just as conduct that is not proscribed as criminal may not be dealt with in the criminal process, so conduct that has been denominated as criminal must be treated as such by the participants in the criminal process acting within their respective competences.

Next, there is the assumption that there are limits to the powers of government to investigate and apprehend persons suspected of committing crimes. I do not refer to the controversy (settled recently, at least in broad outline) as to whether the Fourth Amendment's prohibition against unreasonable searches and seizures applies to the states with the same force with which it applies to the federal government.[2] Rather, I am talking about the general assumption that a degree of scrutiny and control must be exercised with respect to the activities of law enforcement officers, that the security and privacy of the individual may not be invaded at will. It is possible to imagine a society in which even lip service is not paid to this assumption. Nazi Germany approached but never quite reached this position. But no one in our society would maintain that any individual may be taken into custody at any time and held without any limitation of time during the process of investigating his possible commission of crimes, or would argue that there should be no form of redress for violation of at least some standards for official investigative conduct. Although this assumption may not appear to have much in the way of positive content, its absence would render moot some of our most hotly controverted problems. If there were not general agreement that there must be some limits on police power to detain and investigate, the highly controversial provisions of the Uniform Arrest Act, permitting the police to detain a person

[2] Mapp v. Ohio, 367 U.S. 643 (1961); Ker v. California, 374 U.S. 23 (1963).

for questioning for a short period even though they do not have grounds for making an arrest, would be a magnanimous concession by the all-powerful state rather than, as it is now perceived, a substantial expansion of police power.[8]

Finally, there is a complex of assumptions embraced by terms such as "the adversary system," "procedural due process," "notice and an opportunity to be heard," and "day in court." Common to them all is the notion that the alleged criminal is not merely an object to be acted upon but an independent entity in the process who may, if he so desires, force the operators of the process to demonstrate to an independent authority (judge and jury) that he is guilty of the charges against him. It is a minimal assumption. It speaks in terms of "may" rather than "must." It permits but does not require the accused, acting by himself or through his own agent, to play an active role in the process. By virtue of that fact the process becomes or has the capacity to become a contest between, if not equals, at least independent actors. As we shall see, much of the space between the two models is occupied by stronger or weaker notions of how this contest is to be arranged, in what cases it is to be played, and by what rules. The Crime Control Model tends to de-emphasize this adversary aspect of the process; the Due Process Model tends to make it central. The common ground, and it is important, is the agreement that the process has, for everyone subjected to it, at least the potentiality of becoming to some extent an adversary struggle.

So much for common ground. There is a good deal of it, even in the narrowest view. Its existence should not be overlooked, because it is, by definition, what permits partial resolutions of the tension between the two models to take place. The rhetoric of the criminal process consists largely of claims that disputed territory is "really" common ground: that, for example, the premise of an adversary system "necessarily" embraces the appointment of counsel for everyone accused of crime, or conversely, that the obligation to pursue persons suspected of committing crimes "necessarily" embraces interrogation of suspects without the intervention of counsel. We may smile indulgently at such claims; they are rhetoric, and no more. But the form in which they are

[8] See below, pp. 175–86.

made suggests an important truth: that there *is* a common ground of value assumption about the criminal process that makes continued discourse about its problems possible.

Crime Control Values. The value system that underlies the Crime Control Model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process. The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order and thence to the disappearance of an important condition of human freedom. If the laws go unenforced—which is to say, if it is perceived that there is a high percentage of failure to apprehend and convict in the criminal process—a general disregard for legal controls tends to develop. The law-abiding citizen then becomes the victim of all sorts of unjustifiable invasions of his interests. His security of person and property is sharply diminished, and, therefore, so is his liberty to function as a member of society. The claim ultimately is that the criminal process is a positive guarantor of social freedom. In order to achieve this high purpose, the Crime Control Model requires that primary attention be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime.

Efficiency of operation is not, of course, a criterion that can be applied in a vacuum. By "efficiency" we mean the system's capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders whose offenses become known. In a society in which only the grossest forms of antisocial behavior were made criminal and in which the crime rate was exceedingly low, the criminal process might require the devotion of many more man-hours of police, prosecutorial, and judicial time per case than ours does, and still operate with tolerable efficiency. A society that was prepared to increase even further the resources devoted to the suppression of crime might cope with a rising crime rate without sacrifice of efficiency while continuing to maintain an elaborate and time-consuming set of criminal processes. However, neither of these possible characteristics corresponds with social reality in this country. We use the criminal

sanction to cover an increasingly wide spectrum of behavior thought to be antisocial, and the amount of crime is very high indeed, although both level and trend are hard to assess.[4] At the same time, although precise measures are not available, it does not appear that we are disposed in the public sector of the economy to increase very drastically the quantity, much less the quality, of the resources devoted to the suppression of criminal activity through the operation of the criminal process. These factors have an important bearing on the criteria of efficiency, and therefore on the nature of the Crime Control Model.

The model, in order to operate successfully, must produce a high rate of apprehension and conviction, and must do so in a context where the magnitudes being dealt with are very large and the resources for dealing with them are very limited. There must then be a premium on speed and finality. Speed, in turn, depends on informality and on uniformity; finality depends on minimizing the occasions for challenge. The process must not be cluttered up with ceremonious rituals that do not advance the progress of a case. Facts can be established more quickly through interrogation in a police station than through the formal process of examination and cross-examination in a court. It follows that extrajudicial processes should be preferred to judicial processes, informal operations to formal ones. But informality is not enough; there must also be uniformity. Routine, stereotyped procedures are essential if large numbers are being handled. The model that will operate successfully on these presuppositions must be an administrative, almost a managerial, model. The image that comes to mind is an assembly-line conveyor belt down which moves an endless stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and who perform on each case as it comes by the same small but essential operation that brings it one step closer to being a finished product, or, to exchange the metaphor for the reality, a closed file. The criminal process, in this model, is seen as a screening process in which each successive stage—pre-arrest investigation, arrest, post-arrest investigation, preparation for trial, trial or entry of plea, convic-

[4] See President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, D.C., 1967), chap. 2.

tion, disposition—involves a series of routinized operations whose success is gauged primarily by their tendency to pass the case along to a successful conclusion.

What is a successful conclusion? One that throws off at an early stage those cases in which it appears unlikely that the person apprehended is an offender and then secures, as expeditiously as possible, the conviction of the rest, with a minimum of occasions for challenge, let alone post-audit. By the application of administrative expertness, primarily that of the police and prosecutors, an early determination of probable innocence or guilt emerges. Those who are probably innocent are screened out. Those who are probably guilty are passed quickly through the remaining stages of the process. The key to the operation of the model regarding those who are not screened out is what I shall call a presumption of guilt. The concept requires some explanation, since it may appear startling to assert that what appears to be the precise converse of our generally accepted ideology of a presumption of innocence can be an essential element of a model that does correspond in some respects to the actual operation of the criminal process.

The presumption of guilt is what makes it possible for the system to deal efficiently with large numbers, as the Crime Control Model demands. The supposition is that the screening processes operated by police and prosecutors are reliable indicators of probable guilt. Once a man has been arrested and investigated without being found to be probably innocent, or, to put it differently, once a determination has been made that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty. The precise point at which this occurs will vary from case to case; in many cases it will occur as soon as the suspect is arrested, or even before, if the evidence of probable guilt that has come to the attention of the authorities is sufficiently strong. But in any case the presumption of guilt will begin to operate well before the "suspect" becomes a "defendant."

The presumption of guilt is not, of course, a thing. Nor is it even a rule of law in the usual sense. It simply is the consequence of a complex of attitudes, a mood. If there is confidence in the

reliability of informal administrative fact-finding activities that take place in the early stages of the criminal process, the remaining stages of the process can be relatively perfunctory without any loss in operating efficiency. The presumption of guilt, as it operates in the Crime Control Model, is the operational expression of that confidence.

It would be a mistake to think of the presumption of guilt as the opposite of the presumption of innocence that we are so used to thinking of as the polestar of the criminal process and that, as we shall see, occupies an important position in the Due Process Model. The presumption of innocence is not its opposite; it is irrelevant to the presumption of guilt; the two concepts are different rather than opposite ideas. The difference can perhaps be epitomized by an example. A murderer, for reasons best known to himself, chooses to shoot his victim in plain view of a large number of people. When the police arrive, he hands them his gun and says, "I did it and I'm glad." His account of what happened is corroborated by several eyewitnesses. He is placed under arrest and led off to jail. Under these circumstances, which may seem extreme but which in fact characterize with rough accuracy the evidentiary situation in a large proportion of criminal cases, it would be plainly absurd to maintain that more probably than not the suspect did not commit the killing. But that is not what the presumption of innocence means. It means that until there has been an adjudication of guilt by an authority legally competent to make such an adjudication, the suspect is to be treated, for reasons that have nothing whatever to do with the probable outcome of the case, as if his guilt is an open question.

The presumption of innocence is a direction to officials about how they are to proceed, not a prediction of outcome. The presumption of guilt, however, is purely and simply a prediction of outcome. The presumption of innocence is, then, a direction to the authorities to ignore the presumption of guilt in their treatment of the suspect. It tells them, in effect, to close their eyes to what will frequently seem to be factual probabilities. The reasons why it tells them this are among the animating presuppositions of the Due Process Model, and we will come to them shortly. It is enough to note at this point that the presumption of guilt is de-

scriptive and factual; the presumption of innocence is normative and legal. The pure Crime Control Model has no truck with the presumption of innocence, although its real-life emanations are, as we shall see, brought into uneasy compromise with the dictates of this dominant ideological position. In the presumption of guilt this model finds a factual predicate for the position that the dominant goal of repressing crime can be achieved through highly summary processes without any great loss of efficiency (as previously defined), because of the probability that, in the run of cases, the preliminary screening processes operated by the police and the prosecuting officials contain adequate guarantees of reliable fact-finding. Indeed, the model takes an even stronger position. It is that subsequent processes, particularly those of a formal adjudicatory nature, are unlikely to produce as reliable fact-finding as the expert administrative process that precedes them is capable of. The criminal process thus must put special weight on the quality of administrative fact-finding. It becomes important, then, to place as few restrictions as possible on the character of the administrative fact-finding processes and to limit restrictions to such as enhance reliability, excluding those designed for other purposes. As we shall see, this view of restrictions on administrative fact-finding is a consistent theme in the development of the Crime Control Model.

In this model, as I have suggested, the center of gravity for the process lies in the early, administrative fact-finding stages. The complementary proposition is that the subsequent stages are relatively unimportant and should be truncated as much as possible. This, too, produces tensions with presently dominant ideology. The pure Crime Control Model has very little use for many conspicuous features of the adjudicative process, and in real life works out a number of ingenious compromises with them. Even in the pure model, however, there have to be devices for dealing with the suspect after the preliminary screening process has resulted in a determination of probable guilt. The focal device, as we shall see, is the plea of guilty; through its use, adjudicative fact-finding is reduced to a minimum. It might be said of the Crime Control Model that, when reduced to its barest essentials and operating at its most successful pitch, it offers two possibili-

ties: an administrative fact-finding process leading (1) to exoneration of the suspect or (2) to the entry of a plea of guilty.

Due Process Values. If the Crime Control Model resembles an assembly line, the Due Process Model looks very much like an obstacle course. Each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process. Its ideology is not the converse of that underlying the Crime Control Model. It does not rest on the idea that it is not socially desirable to repress crime, although critics of its application have been known to claim so. Its ideology is composed of a complex of ideas, some of them based on judgments about the efficacy of crime control devices, others having to do with quite different considerations. The ideology of due process is far more deeply impressed on the formal structure of the law than is the ideology of crime control; yet an accurate tracing of the strands that make it up is strangely difficult. What follows is only an attempt at an approximation.

The Due Process Model encounters its rival on the Crime Control Model's own ground in respect to the reliability of fact-finding processes. The Crime Control Model, as we have suggested, places heavy reliance on the ability of investigative and prosecutorial officers, acting in an informal setting in which their distinctive skills are given full sway, to elicit and reconstruct a tolerably accurate account of what actually took place in an alleged criminal event. The Due Process Model rejects this premise and substitutes for it a view of informal, nonadjudicative fact-finding that stresses the possibility of error. People are notoriously poor observers of disturbing events—the more emotion-arousing the context, the greater the possibility that recollection will be incorrect; confessions and admissions by persons in police custody may be induced by physical or psychological coercion so that the police end up hearing what the suspect thinks they want to hear rather than the truth; witnesses may be animated by a bias or interest that no one would trouble to discover except one specially charged with protecting the interests of the accused (as the police are not). Considerations of this kind all lead to a rejection of informal fact-finding processes as definitive of factual guilt and to an insistence on formal, adjudicative, adversary fact-

finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him. Even then, the distrust of fact-finding processes that animates the Due Process Model is not dissipated. The possibilities of human error being what they are, further scrutiny is necessary, or at least must be available, in case facts have been overlooked or suppressed in the heat of battle. How far this subsequent scrutiny must be available is a hotly controverted issue today. In the pure Due Process Model the answer would be: at least as long as there is an allegation of factual error that has not received an adjudicative hearing in a fact-finding context. The demand for finality is thus very low in the Due Process Model.

This strand of due process ideology is not enough to sustain the model. If all that were at issue between the two models was a series of questions about the reliability of fact-finding processes, we would have but one model of the criminal process, the nature of whose constituent elements would pose questions of fact not of value. Even if the discussion is confined, for the moment, to the question of reliability, it is apparent that more is at stake than simply an evaluation of what kinds of fact-finding processes, alone or in combination, are likely to produce the most nearly reliable results. The stumbling block is this: how much reliability is compatible with efficiency? Granted that informal fact-finding will make some mistakes that can be remedied if backed up by adjudicative fact-finding, the desirability of providing this backup is not affirmed or negated by factual demonstrations or predictions that the increase in reliability will be x per cent or x plus n per cent. It still remains to ask how much weight is to be given to the competing demands of reliability (a high degree of probability in each case that factual guilt has been accurately determined) and efficiency (expeditious handling of the large numbers of cases that the process ingests). The Crime Control Model is more optimistic about the improbability of error in a significant number of cases; but it is also, though only in part therefore, more tolerant about the amount of error that it will put up with. The Due Process Model insists on the prevention and elimination of mistakes to the extent possible; the Crime

Control Model accepts the probability of mistakes up to the level at which they interfere with the goal of repressing crime, either because too many guilty people are escaping or, more subtly, because general awareness of the unreliability of the process leads to a decrease in the deterrent efficacy of the criminal law. In this view, reliability and efficiency are not polar opposites but rather complementary characteristics. The system is reliable *because* efficient; reliability becomes a matter of independent concern only when it becomes so attenuated as to impair efficiency. All of this the Due Process Model rejects. If efficiency demands short-cuts around reliability, then absolute efficiency must be rejected. The aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty. It is a little like quality control in industrial technology: tolerable deviation from standard varies with the importance of conformity to standard in the destined uses of the product. The Due Process Model resembles a factory that has to devote a substantial part of its input to quality control. This necessarily cuts down on quantitative output.

All of this is only the beginning of the ideological difference between the two models. The Due Process Model could disclaim any attempt to provide enhanced reliability for the fact-finding process and still produce a set of institutions and processes that would differ sharply from those demanded by the Crime Control Model. Indeed, it may not be too great an oversimplification to assert that in point of historical development the doctrinal pressures emanating from the demands of the Due Process Model have tended to evolve from an original matrix of concern for the maximization of reliability into values quite different and more far-reaching. These values can be expressed in, although not adequately described by, the concept of the primacy of the individual and the complementary concept of limitation on official power.

The combination of stigma and loss of liberty that is embodied in the end result of the criminal process is viewed as being the heaviest deprivation that government can inflict on the individual. Furthermore, the processes that culminate in these highly afflictive sanctions are seen as in themselves coercive, restricting,

and demeaning. Power is always subject to abuse—sometimes subtle, other times, as in the criminal process, open and ugly. Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must, in this model, be subjected to controls that prevent it from operating with maximal efficiency. According to this ideology, maximal efficiency means maximal tyranny. And, although no one would assert that minimal efficiency means minimal tyranny, the proponents of the Due Process Model would accept with considerable equanimity a substantial diminution in the efficiency with which the criminal process operates in the interest of preventing official oppression of the individual.

The most modest-seeming but potentially far-reaching mechanism by which the Due Process Model implements these anti-authoritarian values is the doctrine of legal guilt. According to this doctrine, a person is not to be held guilty of crime merely on a showing that in all probability, based upon reliable evidence, he did factually what he is said to have done. Instead, he is to be held guilty if and only if these factual determinations are made in procedurally regular fashion and by authorities acting within competences duly allocated to them. Furthermore, he is not to be held guilty, even though the factual determination is or might be adverse to him, if various rules designed to protect him and to safeguard the integrity of the process are not given effect: the tribunal that convicts him must have the power to deal with his kind of case ("jurisdiction") and must be geographically appropriate ("venue"); too long a time must not have elapsed since the offense was committed ("statute of limitations"); he must not have been previously convicted or acquitted of the same or a substantially similar offense ("double jeopardy"); he must not fall within a category of persons, such as children or the insane, who are legally immune to conviction ("criminal responsibility"); and so on. None of these requirements has anything to do with the factual question of whether the person did or did not engage in the conduct that is charged as the offense against him; yet favorable answers to any of them will mean that he is legally innocent. Wherever the competence to make adequate factual determinations lies, it is apparent that only a tribunal that is aware of these

guilt-defeating doctrines and is willing to apply them can be viewed as competent to make determinations of legal guilt. The police and the prosecutors are ruled out by lack of competence, in the first instance, and by lack of assurance of willingness, in the second. Only an impartial tribunal can be trusted to make determinations of legal as opposed to factual guilt.

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

Beyond the question of predictability this model posits a functional reason for observing the presumption of innocence: by forcing the state to prove its case against the accused in an adjudicative context, the presumption of innocence serves to force into play all the qualifying and disabling doctrines that limit the use of the criminal sanction against the individual, thereby enhancing his opportunity to secure a favorable outcome. In this sense, the presumption of innocence may be seen to operate as a kind of self-fulfilling prophecy. By opening up a procedural situation that permits the successful assertion of defenses having nothing to do with factual guilt, it vindicates the proposition that the factually guilty may nonetheless be legally innocent and should therefore be given a chance to qualify for that kind of treatment.

The possibility of legal innocence is expanded enormously when the criminal process is viewed as the appropriate forum for correcting its own abuses. This notion may well account for a greater amount of the distance between the two models than any other. In theory the Crime Control Model can tolerate rules that forbid illegal arrests, unreasonable searches, coercive interroga-

tions, and the like. What it cannot tolerate is the vindication of those rules in the criminal process itself through the exclusion of evidence illegally obtained or through the reversal of convictions in cases where the criminal process has breached the rules laid down for its observance. And the Due Process Model, although it may in the first instance be addressed to the maintenance of reliable fact-finding techniques, comes eventually to incorporate prophylactic and deterrent rules that result in the release of the factually guilty even in cases in which blotting out the illegality would still leave an adjudicative fact-finder convinced of the accused person's guilt. Only by penalizing errant police and prosecutors within the criminal process itself can adequate pressure be maintained, so the argument runs, to induce conformity with the Due Process Model.

Another strand in the complex of attitudes underlying the Due Process Model is the idea—itself a shorthand statement for a complex of attitudes—of equality. This notion has only recently emerged as an explicit basis for pressing the demands of the Due Process Model, but it appears to represent, at least in its potential, a most powerful norm for influencing official conduct. Stated most starkly, the ideal of equality holds that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[5] The factual predicate underlying this assertion is that there are gross inequalities in the financial means of criminal defendants as a class, that in an adversary system of criminal justice an effective defense is largely a function of the resources that can be mustered on behalf of the accused, and that the very large proportion of criminal defendants who are, operationally speaking, "indigent" will thus be denied an effective defense. This factual premise has been strongly reinforced by recent studies that in turn have been both a cause and an effect of an increasing emphasis upon norms for the criminal process based on the premise.

The norms derived from the premise do not take the form of an insistence upon governmental responsibility to provide literally equal opportunities for all criminal defendants to challenge the process. Rather, they take as their point of departure the notion that the criminal process, initiated as it is by government

[5] Griffin v. Illinois, 351 U.S. 12, 19 (1956).

and containing as it does the likelihood of severe deprivations at the hands of government, imposes some kind of public obligation to ensure that financial inability does not destroy the capacity of an accused to assert what may be meritorious challenges to the processes being invoked against him. At its most gross, the norm of equality would act to prevent situations in which financial inability forms an absolute barrier to the assertion of a right that is in theory generally available, as where there is a right to appeal that is, however, effectively conditional upon the filing of a trial transcript obtained at the defendant's expense. Beyond this, it may provide the basis for a claim whenever the system theoretically makes some kind of challenge available to an accused who has the means to press it. If, for example, a defendant who is adequately represented has the opportunity to prevent the case against him from coming to the trial stage by forcing the state to its proof in a preliminary hearing, the norm of equality may be invoked to assert that the same kind of opportunity must be available to others as well. In a sense the system as it functions for the small minority whose resources permit them to exploit all its defensive possibilities provides a benchmark by which its functioning in all other cases is to be tested: not, perhaps, to guarantee literal identity but rather to provide a measure of whether the process as a whole is recognizably of the same general order. The demands made by a norm of this kind are likely by their very nature to be quite sweeping. Although the norm's imperatives may be initially limited to determining whether in a particular case the accused was injured or prejudiced by his relative inability to make an appropriate challenge, the norm of equality very quickly moves to another level on which the demand is that the process in general be adapted to minimize discriminations rather than that a mere series of post hoc determinations of discrimination be made or makeable.

It should be observed that the impact of the equality norm will vary greatly depending upon the point in time at which it is introduced into a model of the criminal process. If one were starting from scratch to decide how the process ought to work, the norm of equality would have nothing very important to say on such questions as, for example, whether an accused should have the effective assistance of counsel in deciding whether to enter a

plea of guilty. One could decide, on quite independent considerations, that it is or is not a good thing to afford that facility to the generality of persons accused of crime. But the impact of the equality norm becomes far greater when it is brought to bear on a process whose contours have already been shaped. If our model of the criminal process affords defendants who are in a financial position to do so the right to consult a lawyer before entering a plea, then the equality norm exerts powerful pressure to provide such an opportunity to all defendants and to regard the failure to do so as a malfunctioning of the process of whose consequences the accused is entitled to be relieved. In a sense, this has been the role of the equality norm in affecting the real-world criminal process. It has made its appearance on the scene comparatively late, and has therefore encountered a system in which the relative financial inability of most persons accused of crime results in treatment very different from that accorded the small minority of the financially capable. For this reason, its impact has already been substantial and may be expected to be even more so in the future.

There is a final strand of thought in the Due Process Model that is often ignored but that needs to be candidly faced if thought on the subject is not to be obscured. This is a mood of skepticism about the morality and utility of the criminal sanction, taken either as a whole or in some of its applications. The subject is a large and complicated one, comprehending as it does much of the intellectual history of our times. It is properly the subject of another essay altogether. To put the matter briefly, one cannot improve upon the statement by Professor Paul Bator:

> In summary we are told that the criminal law's notion of just condemnation and punishment is a cruel hypocrisy visited by a smug society on the psychologically and economically crippled; that its premise of a morally autonomous will with at least some measure of choice whether to comply with the values expressed in a penal code is unscientific and outmoded; that its reliance on punishment as an educational and deterrent agent is misplaced, particularly in the case of the very members of society most likely to engage in criminal conduct; and that its failure to provide for individualized and humane rehabilitation of offenders is inhuman and wasteful.[6]

[6] *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 442 (1963).

This skepticism, which may be fairly said to be widespread among the most influential and articulate contemporary leaders of informed opinion, leads to an attitude toward the processes of the criminal law that, to quote Mr. Bator again, engenders "a peculiar receptivity toward claims of injustice which arise within the traditional structure of the system itself; fundamental disagreement and unease about the very bases of the criminal law has, inevitably, created acute pressure at least to expand and liberalize those of its processes and doctrines which serve to make more tentative its judgments or limit its power." In short, doubts about the ends for which power is being exercised create pressure to limit the discretion with which that power is exercised.

The point need not be pressed to the extreme of doubts about or rejection of the premises upon which the criminal sanction in general rests. Unease may be stirred simply by reflection on the variety of uses to which the criminal sanction is put and by a judgment that an increasingly large proportion of those uses may represent an unwise invocation of so extreme a sanction. It would be an interesting irony if doubts about the propriety of certain uses of the criminal sanction prove to contribute to a restrictive trend in the criminal process that in the end requires a choice among uses and finally an abandonment of some of the very uses that stirred the original doubts, but for a reason quite unrelated to those doubts.

There are two kinds of problems that need to be dealt with in any model of the criminal process. One is what the rules shall be. The other is how the rules shall be implemented. The second is at least as important as the first. As we shall see time and again in our detailed development of the models, the distinctive difference between the two models is not only in the rules of conduct that they lay down but also in the sanctions that are to be invoked when a claim is presented that the rules have been breached and, no less importantly, in the timing that is permitted or required for the invocation of those sanctions.

As I have already suggested, the Due Process Model locates at least some of the sanctions for breach of the operative rules in the criminal process itself. The relation between these two aspects of the process—the rules and the sanctions for their breach—is a purely formal one unless there is some mechanism for bringing

them into play with each other. The hinge between them in the Due Process Model is the availability of legal counsel. This has a double aspect. Many of the rules that the model requires are couched in terms of the availability of counsel to do various things at various stages of the process—this is the conventionally recognized aspect; beyond it, there is a pervasive assumption that counsel is necessary in order to invoke sanctions for breach of any of the rules. The more freely available these sanctions are, the more important is the role of counsel in seeing to it that the sanctions are appropriately invoked. If the process is seen as a series of occasions for checking its own operation, the role of counsel is a much more nearly central one than is the case in a process that is seen as primarily concerned with expeditious determination of factual guilt. And if equality of operation is a governing norm, the availability of counsel to some is seen as requiring it for all. Of all the controverted aspects of the criminal process, the right to counsel, including the role of government in its provision, is the most dependent on what one's model of the process looks like, and the least susceptible of resolution unless one has confronted the antinomies of the two models.

I do not mean to suggest that questions about the right to counsel disappear if one adopts a model of the process that conforms more or less closely to the Crime Control Model, but only that such questions become absolutely central if one's model moves very far down the spectrum of possibilities toward the pure Due Process Model. The reason for this centrality is to be found in the assumption underlying both models that the process is an adversary one in which the initiative in invoking relevant rules rests primarily on the parties concerned, the state, and the accused. One could construct models that placed central responsibility on adjudicative agents such as committing magistrates and trial judges. And there are, as we shall see, marginal but nonetheless important adjustments in the role of the adjudicative agents that enter into the models with which we are concerned. For present purposes it is enough to say that these adjustments are marginal, that the animating presuppositions that underlie both models in the context of the American criminal system relegate the adjudicative agents to a relatively passive role, and therefore place central importance on the role of counsel.

One last introductory note before we proceed to a detailed examination of some aspects of the two models in operation. What assumptions do we make about the sources of authority to shape the real-world operations of the criminal process? Recognizing that our models are only models, what agencies of government have the power to pick and choose between their competing demands? Once again, the limiting features of the American context come into play. Ours is not a system of legislative supremacy. The distinctively American institution of judicial review exercises a limiting and ultimately a shaping influence on the criminal process. Because the Crime Control Model is basically an affirmative model, emphasizing at every turn the existence and exercise of official power, its validating authority is ultimately legislative (although proximately administrative). Because the Due Process Model is basically a negative model, asserting limits on the nature of official power and on the modes of its exercise, its validating authority is judicial and requires an appeal to supra-legislative law, to the law of the Constitution. To the extent that tensions between the two models are resolved by deference to the Due Process Model, the authoritative force at work is the judicial power, working in the distinctively judicial mode of invoking the sanction of nullity. That is at once the strength and the weakness of the Due Process Model: its strength because in our system the appeal to the Constitution provides the last and the overriding word; its weakness because saying no in specific cases is an exercise in futility unless there is a general willingness on the part of the officials who operate the process to apply negative prescriptions across the board. It is no accident that statements reinforcing the Due Process Model come from the courts, while at the same time facts denying it are established by the police and prosecutors.

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