MAKING SENSE OF CRIMINAL JUSTICE

POLICIES AND PRACTICES

THIRD EDITION

G. LARRY MAYS ○ RICK RUDDELL

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Making Sense *of* Criminal Justice

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Policies and Practices

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THIRD EDITION

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PREFACE

Have you ever taken a course where you felt like you knew less when you finished than when you started? How about the course where the instructor told you all of the theories, policies, or practices that did not work, but little of what does work? We've heard these complaints from students over the years, and this book in some ways is a response to those laments.

This book is designed for criminal justice and other social science courses that fall into one of two categories: (1) the capstone course (sometimes called senior seminar) and (2) policy-oriented courses. It is aimed at an upper-division undergraduate and graduate market, so at this point all of you taking this class should have completed a wide variety of foundational courses in your major.

The book is organized somewhat like an introductory textbook would be arranged, with the standard police/courts/corrections treatment. However, a quick glance at the table of contents will show you that we have chosen to focus on a range of issues that continue to confront the criminal justice system.

We're assuming that many of you will choose a career in the criminal justice field or in one of the areas allied with criminal justice. We acknowledge that this may not be true for some of you, and a group of you may never work in criminal justice. However, as "good citizens" and active consumers of justice processes and services, it is essential to understand what is working and what is not working in the criminal justice arena.

We approached this project with certain assumptions in mind, and we feel that you will understand the book better once you understand our assumptions. First, the administration of justice is an inherently political process, and the criminal justice system in the United States (and in other nations as well) is a part of the country's political system. All of the laws that are enacted and all of the policies developed have at their very core a political dimension.

Second, all of our worldviews are shaped by our experiences, morals, values, ethics, and a host of other factors. Whether you are a Democrat, Republican, or Independent—liberal or conservative—your values (and our values) color the picture we see of the world. In terms of this book, that means that there are not

necessarily "right" answers. In some cases the choices may be between good, better, and best. In other cases the choices may be between the lesser of evils.

The reality is that there may be many more questions than there are answers. Our desire is that you will be tolerant of the viewpoints of others and able to ask better questions than you considered in your first college classes. Even after asking good questions you will need to be willing to live with a certain degree of ambiguity in terms of the answers you might receive.

Third, there is an endless supply of issues or controversies that could be addressed in a book like this one. Many of the ones we've chosen provide fruitful areas of debate. Some we chose because we're the ones writing the book. Others were suggested by some of our reviewers, including professors who have used this book in their courses. We take all the blame for what is missing and what may not be adequately explained. At the end of this section we will provide you with contact information. We would like to hear from you (as we so often hear from our students and former students) about your experiences with this book. In large measure, if this book is successful it will be because of you and not because of us.

Finally, a key assumption for us is that this course is one that will help you bring together bits and pieces of information that you have gleaned from your other classes. At this point it is not the instructor's responsibility to help you make sense of the criminal justice system in the United States, it is your responsibility. Good luck.

NEW TO THIS EDITION

- All of the chapters have been thoroughly revised, and updated data on all topics available have been incorporated.
- The focus on evidence-based practices has been expanded throughout the text.
- There has been an expanded use of the due process and crime control models presented in Chapter 2 as an analytical tool throughout the book.
- There is a new Chapter 3 focusing on criminal justice policy and some of the tools of policy analysis (this includes material originally in Chapter 15 of the second edition but it has been expanded for this edition).The police use of force chapter (now Chapter 5) includes a discussion of several of the high-profile cases involving the shooting of racial minorities (particularly African Americans) by the police in several locations.
- The list of Critical Review Questions has been revised and expanded for each chapter.
- We have continued to include five suggested writing assignments for each chapter.
- A significant number of figures visually illustrating concepts discussed in the text have been added.
- The chapter dealing with the war on terrorism (now Chapter 15) has been reoriented from a focus on events following the attacks occurring on

September 11, 2001, to the questions surrounding privacy versus the expanded use of surveillance techniques by governments at all levels.
- Emerging issues related to violence toward women are introduced, such as untested sexual assault kits, the increasing number of women behind bars, and responding to sexual assaults on campus.

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Although only the authors' names appear on the cover of a book, preparing a manuscript is a team effort, and many people supported us as we finished this work. First, both authors would like to acknowledge the assistance of Steve Helba, our editor at Oxford University Press, for helping us shepherd this book through revision and production. Steve has been a tireless supporter and promoter of this book and we are truly grateful for his enthusiasm and encouragement. He was ably supported by his assistant editor Larissa Albright. Second, we also thank the reviewers who provided guidance in moving us from the second to the third edition, Jimmy Bell (Jackson State University), Sara Buck Doude (Georgia College & State University), John P. Hoffmann (Brigham Young University), Richard Hough (University of West Florida), Rebecca Loftus (Arizona State University), Philip Mulvey (Illinois State University), Sheryl Van Horne (Eastern University). In addition, we thank the editors and staff at Oxford University Press who assisted throughout the production process, including Elizabeth Bortka and Patricia Berube.

Larry Mays would also like to acknowledge his wife Brenda for her infinite patience while he is working on a book (especially since he swears that every one will be "the last one"). Rick Ruddell thanks his wife Renu for her love, unwavering support, and understanding for the time he spends researching and writing.

ABOUT THE AUTHORS

G. Larry Mays is Regents Professor Emeritus of Criminal Justice at New Mexico State University. He served as a police officer in Knoxville, Tennessee, for five years in the early 1970s, and he holds a PhD in political science from the University of Tennessee. Dr. Mays taught at East Tennessee State University and Appalachian State University prior to coming to New Mexico State University in 1981. He has over 100 publications in refereed journals, practitioner publications, encyclopedia entries, and book chapters. This book is his twenty-seventh, including *American Courts and the Judicial Process*, second edition, with Laura Woods Fidelie (Oxford University Press). He is also coauthor with L. Thomas Winfree Jr. and Leanne Fiftal Alarid of *Introduction to Criminal Justice* (Wolters Kluwer Publishing Co.), and *Criminal Law: Core Concepts* with Jeremy Ball and Laura Woods Fidelie (Wolters Kluwer Publishing Co.). Additionally, he and Rick Ruddell are the coauthors of *Do the Crime, Do the Time* (Praeger Publishing Co.)

Rick Ruddell, the Law Foundation of Saskatchewan Chair in Police Studies, joined the department of Justice Studies at the University of Regina in 2010. Prior to this

appointment he served as director of operational research with the Correctional Service of Canada and held faculty positions at Eastern Kentucky University and the California State University–Chico. A graduate of the PhD program in Criminology and Criminal Justice at the University of Missouri–St. Louis, Dr. Ruddell's research has focused upon policing, juvenile justice, and corrections. His research has been disseminated in twelve books and over 100 peer-reviewed articles, technical reports, book chapters, and articles for professional journals. Dr. Ruddell has also worked with the Saskatchewan Ministry of Justice (Corrections and Policing Division) and during his tenure with the province held a number of front-line, supervisory, and managerial positions.

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CHAPTER 1

The Politics and Policy Dichotomy

INTRODUCTION

Why would a book about understanding the criminal justice system in the United States begin with a chapter on politics and policy? What do these two notions have to do with the operations of criminal justice agencies and the organizational environments within which criminal justice personnel function? The short answer is, everything.

Quite often people will say something like this: "We need to get politics out of the administration of justice in the United States." Or perhaps they will say it this way: "Politics should play no role in the criminal justice system." As we will see, politics is very much a part of the policymaking process in this country. In fact, the following section outlines the essential role that politics plays in every facet of policymaking, and this includes criminal justice policy.

THE ROLE OF POLITICS IN THE ADMINISTRATION OF JUSTICE

Most people have an idea of what ***politics*** means, or at least the use of the word conjures up certain images in the minds of virtually everyone. From the world of political science, Robert A. Dahl (1991, p. 1) has said that politics is "an unavoidable fact of human existence. Everyone is involved in some fashion at some time and in some kind of political system." He added that a political system is "any persistent pattern of human relationships that involves, to a significant extent, control, influence, power, or authority" (Dahl, 1991, p. 4). Another political scientist gave politics a shorthand definition: Politics essentially is "who gets the cookies" (Sego, 1978).

Currently, a variety of definitions are available for the word *politics*. Some authors see politics as a struggle within society to see who gets certain benefits and who is excluded from those benefits. They also include the dimensions of power and influence in their definition (Bardes, Shelley & Schmidt, 2011).

Other authors pose a related definition that politics is about resolving conflicts in a society and about who should receive different kinds of benefits (Sidlow & Henschen, 2008). Finally, another group of political scientists views politics as the way we decide who will govern and the types of policies resulting from that governance (Magleby, Light & Nemacheck, 2011).

In a democracy such as the United States, politics is all about decision making by the public, typically through their elected representatives. Therefore, to fully understand the critical role that politics plays in our form of government, and eventually the connection to the criminal justice system, it is best to think of a series of concentric circles illustrated in Figure 1.1 (see Levine, Musheno & Palumbo, 1986).

In the outermost circle is the **social system** of the United States. We could say that this circle represents all that we are as a nation. Moving inward, the next circle represents the nation's **political system**. This system is composed of all of the various forms and types of government at all levels. The political system includes mayors and town or city councils; county executives of many types and county courts or commissions; governors and state legislatures; and finally, the president of the United States and the U.S. Congress. Most of these groups and individuals are elected, and ultimately they answer to the electorate.

The next circle as we move inward is the nation's **legal system**. Within this domain legislative bodies are once again represented, along with courts and

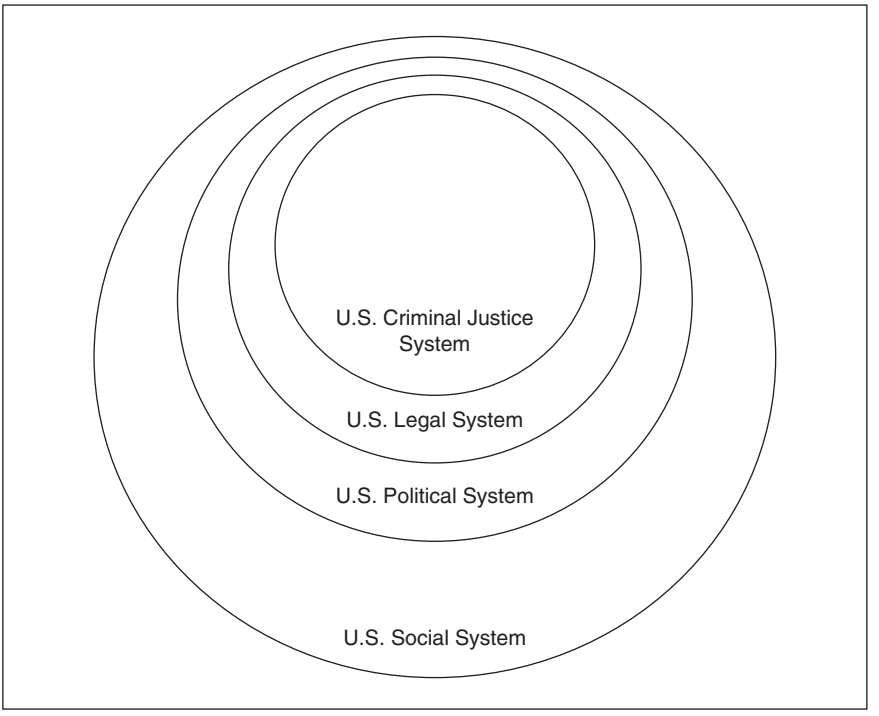

Figure 1.1 The U.S. Criminal Justice System as It Relates to Other U.S. Systems

other adjudicative forums. The legal system includes both the lawmakers and the law deciders.

The innermost circle is the **criminal justice system**. Traditionally, it is described as having three principal components: police, courts, and corrections. Law enforcement agencies operate at local (city and county), state, and federal levels. In 2013 there were 15,388 municipal police departments, sheriff's offices or state law enforcement agencies, and altogether they employed 724,690 full-time sworn officers (Burch, 2016, p. 9). There were an additional 120,000 full-time sworn federal personnel in 2008, the year for which most recent data were available (Reaves, 2012). The court system in reality is fifty-one court systems, those of the federal government and the states (Mays & Fidelie, 2017). Further, many jurisdictions also operate separate city and county courts. Finally, correctional agencies and organizations also operate at all three levels of government. Between 3,000 and 4,000 jails and other detention facilities represent local institutional corrections, with 1,719 state and 117 federal prisons rounding out the picture (Stephan, 2008; U.S. Government Accountability Office, 2012). There are also thousands of community-based correctional programs, including probation and parole agencies, group homes, and reintegration centers or halfway houses that provide support for prisoners returning to the community.

This means that the criminal justice system in the United States is part of the legal system. The legal system is part of the political system, and the political system is part of the larger social system of the nation (see Calvi & Coleman, 2008). Therefore, the illustration of the concentric circles demonstrates the connection between politics and the policymaking process and operations of the criminal justice system. Historically, most criminal justice activities were seen as local concerns, and they were influenced primarily by local politics. In the past four decades, state and federal governments have become increasingly involved in justice issues and systems. In the following chapters, we explore some of the implications of this trend and the reasons for these changes.

SOURCES OF LAW

In the United States, there are numerous sources of law, and fundamentally each source and type of law is an expression of policy. Although you have studied most of the sources and types of law in other courses, we briefly review these in this section to set the stage for the discussions that follow.

At the highest level in this country is **constitutional law**. We have the Constitution of the United States of America, and each of the fifty states has its own unique constitution. Article VI, Clause 2 of the U.S. Constitution declares that the "Constitution, and the Laws of the United States which shall be made in Pursuance there of . . . shall be the supreme Law of the Land." This means that every statute, executive action, and court decision at every level must square with the dictates of the Constitution.

The **Bill of Rights**, the first ten amendments to the Constitution, is of particular importance. The Fourth, Fifth, Sixth, and Eighth Amendments define

many of the protections specifically related to the criminal justice process and spell out the rights that citizens have. The protections provided by state constitutions often mirror the U.S. Constitution, and some states provide for even more extensive rights.

A second source of law in this country is **common law**. We inherited the common law traditions from England, and forty-nine of the fifty states (Louisiana is the exception since it operates under a code law, or Napoleonic Code, tradition), as well as the federal government, have legal systems that are influenced by common law. In England, the common law was unwritten, judge-made law based on local norms and customs. As the common law system of jurisprudence matured, court decisions were based on the decisions that had gone before, and the notion of precedent (or *stare decisis*) became a strong value in common law countries such as the United States.

It is important to remember that the common law is not static; it changes over time. For example, if college students decide as a rite of spring to run naked on the campus, they might be arrested and charged with common law lewdness even though there was no specific law prohibiting running naked. In practice, today most common law offenses have been incorporated into state and federal statutes.

Statutory law is what most people envision when they think of the concept of law. Legislatures enact criminal and civil statutes, as well as substantive and procedural statutes. Statutes are created by local, state, and federal lawmaking bodies. City councils and county commissions, state legislatures, and the U.S. Congress develop statutory laws as a series of written codes that are systematically compiled and published in regularly updated volumes. Most university and public libraries have copies of state codes, as well as the criminal and civil codes of the federal government. If you are not familiar with these volumes, now is a good time to take a trip to the library to thumb through them.

Case law, as a source of law, is related to both constitutional law and statutory law. Case law results from the decisions of state and federal appellate courts. In most instances, when these courts decide cases, the judges or justices issue written opinions that are published in volumes, which often are called "reports" or "reporters." Although your college or university may not have a law school, your library still might have copies of some of the regional or federal reporting series, or you can find key cases through commercial legal services such as LEXIS/NEXIS® or Web sites such as findlaw.com.

Appellate courts are referred to as "collegial courts" because cases are decided by groups of judges rather than by a single judge as in the initial trials. When appellate judges hear cases, they must decide what the Constitution provides, what the relevant statutes say, and what all of this means. Therefore, case law clearly illustrates the notion of judicial interpretation and, to a very large extent, demonstrates the policymaking powers of judges. However, it is essential to emphasize that case law will apply only to the level of government for which the particular court has jurisdiction. This means that cases decided by a state court of last resort (e.g., a state's supreme court) are binding only on the courts and citizens of that

particular state. By extension, cases decided by the U.S. Supreme Court apply to all federal courts, all state courts, and all U.S. citizens (and even non-citizens).

A final source of law and a clear source of policy in the United States is **administrative law**, sometimes called **regulatory law**. State administrative or regulatory agencies can be the source for some of these laws, but the most visible sources are the federal regulatory agencies. Most of these agencies are part of the "alphabet soup" of the federal government, and they include the Federal Communications Commission (FCC), the Federal Aviation Administration (FAA), the Interstate Commerce Commission (ICC), the Securities and Exchange Commission (SEC), the Food and Drug Administration (FDA), the Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), and many others. Altogether, these agencies have rulemaking powers that border on law creation. Bureaucrats working for these agenices can propose regulations that apply to individuals, businesses, and organizations and publish these proposed regulations in the *Federal Register*. After an appropriate period of publication, review, and comment, these regulations become regulatory laws unless challenged in court and overturned by a judge. Most people are not aware of the sheer volume of rules and regulations that are enacted each year by these unelected bureaucrats; Crews (2012, p. 2) noted that in 2011 alone, 3,807 final rules were added to the *Federal Register*, which increased the size of the *Register* to 81,247 pages. On December 31, 2016 the *Federal Register* was up to 95,894 pages (Crews, 2017).

It is essential for us to fully understand these sources of law and the roles they play in law and policymaking in our society. In the following section, we examine in greater detail how governmental processes create laws and otherwise define the operations of the criminal justice system.

PUBLIC POLICY AND THE POLICYMAKING PROCESS

Unlike the word *politics*, for which definitions abound, definitions for *policy* are a little more elusive. At its core, policy is a course of action or a direction established by one of the three branches of government—executive, legislative, or judicial—or by the permanent bureaucracy housed in administrative agencies. The *Bouvier Law Dictionary* defines *policy* as "The sum purpose that a legal rule or institution is intended to achieve . . . It is the purpose for which law is created or enforced" (Sheppard, 2012, p. 2076).

Oftentimes the policymaking process is depicted as a flowchart with neat paths moving from one decision point to the next. In reality, given that political and criminal justice agencies are human institutions, the process can best be described as fluid and ever-changing.

In a recent book on the public policy process Gerston (2015, pp. 7–14) says that public policymaking involves the following components:

(1) policy issues—These include both substantive issues that represent major concerns by the public, and symbolic issues that call for quick fixes; in terms of

criminal justice, substantive issues are represented by concerns such as homeland security, the death penalty, and shootings of citizens by the police; by contrast, symbolic issues may involve corruption by public officials that while concerning to citizens do not threaten to alter the political structure.

(2) actors—A variety of actors have an impact on criminal justice policymaking and these include high-ranking law enforcement officials, correctional administrators, and (as we have already mentioned) judges at various levels throughout the United States; typically frontline criminal justice personnel would not be considered to be in a policymaking role, but some could argue that in their day-to-day interactions with the public, police officers and assistant prosecuting attorneys become de facto policymakers.

(3) resources—This category can be divided into two components: first, there is the legislative allocation of resources necessary for all justice agencies to carry out their assigned tasks; second, there is the distribution of resources within agencies (what we might think of as budget line items) that determines what actual agency priorities are.

(4) public institutions—These are represented by the three major branches of government—legislative, executive, and judicial—at the local, state, and national levels; however, also included in this category are members of the permanent bureaucracy (cabinet departments and other executive agencies and their staffs), state and federal regulatory agencies, as well as public interest groups.

Taking all of these components into consideration we see that some issues are raised by the public (shootings by police officers, for example) and some are raised by politicians and other public figures. When there are calls for action, legislative and executive agencies typically respond by formulating plans (policies) to address public concerns. In this process there will be discussions of the resources necessary to implement the plan or plans that have been proposed. Finally, consideration should be given to evaluating the policy to determine its effectiveness or the desirability for policy modification (unfortunately, this step is not always done in public agencies).

Again, it is important to emphasize that the policymaking process for criminal justice agencies is not linear and it does not always proceed at a predictable pace or direction. Each step is subject to interruption and redirection as new issues are raised or as new problems are identified or redefined.

As this chapter demonstrates, policies arise from a number of governmental entities. These policies are developed through the political process, and their implementation and enforcement set criminal justice agencies on certain courses of action. In reading through this text (particularly Chapters 4–15), keep in mind the policy development, implementation, and enforcement processes. Ask yourself the following questions as you read each chapter:

1. What is the primary policy that is designed to address this problem?
2. When was the policy developed?
3. Who were the major players who favored or opposed the policy?
4. Has the policy been implemented as it was envisioned?

5. Has the policy achieved the desired effect(s)?
6. Have there been modifications to the policy?
7. Is the policy ineffective, and therefore in need of termination? Engaging in this exercise will help you make better sense of the sometimes chaotic world of criminal justice policies and processes.

POLITICS AND LEGISLATIVE PROCESSES AND FUNCTIONS

While legislatures operate outside of the domain normally associated with the criminal justice system, much of what legislative bodies do has an impact on day-to-day criminal justice operations. For example, legislatures enact both substantive and procedural laws. The laws created by legislatures give the criminal justice system and its personnel more procedural rules to follow and laws to enforce. As previously mentioned, legislatures enact civil laws and criminal laws. Within the category of criminal laws, offenses are designated as either felonies or misdemeanors. Legislative bodies can even make further distinctions by establishing different levels of felonies (first-, second-, and third-degree felonies, for example), and they can categorize misdemeanors by degrees or as petty misdemeanors or simply as misdemeanors.

Legislatures also are responsible for creating many types of courts, including new specialized courts such as gun courts, drug courts, and mental health courts (Mays & Fidelie, 2017). The exceptions to this statement, of course, are the so-called Article III courts of the United States. These courts are broadly described in Article III of the U.S. Constitution, and they provide the federal judiciary with some degree of independence from the other two branches of government.

Even in this realm, however, Congress can establish new federal court districts and can create new federal circuit courts of appeals.[1] Additionally, state legislatures and the U.S. Congress can modify the jurisdictions of courts from time to time. For example, at the state level, legislatures have removed some of the most serious offenses, such as murder, from the jurisdiction of the juvenile courts and have placed the jurisdiction for these cases in adult courts (Mays & Ruddell, 2012). In a few states, juvenile courts and adult courts have concurrent jurisdiction over certain offenses, which means that prosecutors can file charges in either juvenile or adult courts. Less serious crimes, such as traffic law violations, also may be removed from juvenile courts and placed in the adult courts that hear similar cases.

Finally, legislative bodies appropriate the funds that pay for the salaries, equipment, training, and other costs associated with operating criminal justice agencies. This is a major expenditure for most levels of government in the United States. For example, the Bureau of Justice Statistics reported that about $260 billion was spent in the United States on justice system expenditures in 2010, and this was up from $228 billion in 2007 (Kyckelhahn, 2011, 2014). It is interesting that in 2010 almost 2.5 million people worked in all facets of the criminal justice system in the United States. The majority of justice system employees

work for local (city and county) governments and most of them provide police protection. About one-third of the justice system personnel work for state governments and nearly 60 percent of them are employed in corrections. The remainder (11.6 percent) work for the federal government. Overall, nearly three-fourths of the justice system employees in the United States are in law enforcement-related duties (Kyckelhahn, 2014). All of these numbers indicate something of the magnitude of justice system expenditures in the United States, and legislative bodies are obligated to provide the funding necessary to meet the operational needs of police, court, and correctional agencies.

This section demonstrates that the U.S. legislatures at both the state and federal levels play a major role in defining criminal justice policy. Legislative bodies establish laws, as well as create regulatory agencies that exercise oversight of certain industries, such as transportation, aviation, and environmental protection, on behalf of the legislature (Calvi & Coleman, 2008). In addition, the legislative branch holds the purse strings for all aspects of the criminal justice system in the United States. The allocation of funding clearly is one way legislatures can define and redefine priorities and policies.

CRIMINAL JUSTICE POLICYMAKING

It is important to consider the connection between public policy and the political process. Hojnacki (2000, p. 6) says there are four characteristics of government activity that define public policy:

1. Only governmental entities and actors or agents of government can "make and implement public policy."
2. Policies are deliberate acts "designed to achieve some predetermined goals and objectives."
3. Policies involve what is done, not just what is intended (however, as we will see, there still can be a gap between what was intended and what was actually accomplished).
4. Policies should be consistent and predictable in their application and not left to the interpretation of individual governmental agents.

He adds that "[p]ublic policy is the product of the political system" and is "whatever the government chooses to do or not to do" (Hojnacki, 2000, pp. 6, 19).

Previously in this chapter we briefly discussed the public policymaking process; however, Levine, Musheno, and Palumbo (1986, pp. 8–9) list six stages of the policymaking process that are related to criminal justice (or any other public agencies, for that matter) in greater detail:

1. The first stage is *agenda setting*. This is where a problem becomes apparent enough that some governmental action seems warranted.
2. The second stage is *policy formulation*. Alternatives are developed for dealing with the problem, and compromises among the various actors and interests often are worked out.

3. The third stage involves *policy implementation*. Administrative agencies formulate specific programs or plans of action to tackle the problems.
4. *Policy impact* is the fourth stage of the policymaking process. Impact is concerned with the extent to which the policy that has been implemented addresses the initial problem.
5. *Policy evaluation* is the fifth stage in the process. Here there is an analysis of whether, or the extent to which the policy has achieved its goals.
6. The sixth and final stage is *termination*. A policy will be ended if it has not achieved the intended goals and objectives.

We could add feedback as an additional step and that could take us back to one of the previous stages (although not necessarily Stage 1).

To more fully appreciate the policymaking process, let us examine each of the six stages more carefully.[2] To do this, we take the specific example of driving while intoxicated (DWI) to illustrate what can happen. First, the problem is identified in the agenda-setting stage. This may happen as the result of various things, such as news media accounts of notorious cases. The public may show a growing concern, for instance, if someone has been arrested twenty times for DWI or a family is killed on Christmas Eve by a drunk driver. Some famous person also could be involved in these situations either as a victim or an offender, which Walker (2015) called "celebrated cases." Additionally, **public interest groups** such as Mothers Against Drunk Driving (MADD) demand governmental action.

The second stage—policy formulation—typically takes place in the legislative arena. This may occur at the national, state, or local levels. However, all three branches of government (legislative, executive, and judicial) may be involved, and often the result is a new law or a modification to an existing law (making penalties for certain crimes more severe, for example). Box 1-1 discusses the importance of funding, budget formulation, and priorities that arise in the legislative process.

The policy-implementation stage can be problematic for a variety of reasons. For example, we must emphasize that laws do not necessarily change human behavior, and again, drunk driving is a good example. New laws and stiffer penalties may or may not reduce drunk driving. Even threatening repeat offenders with prison terms will not stop some people from driving while intoxicated. Furthermore, the agencies charged with implementing the laws (the police, for example) may modify the aims of the legislation to fit their own goals or missions, and resource limitations (such as money, personnel, and/or equipment) may make some laws or policies difficult to implement as originally envisioned.

To illustrate how funding can influence legislation, we return to our example of DWI. In the 1980s and 1990s, many states established blood-alcohol levels of 0.10 (0.10 grams per 210 liters of breath) as the legal benchmark for driving while intoxicated. The federal government, however, tied the granting of billions of dollars in federal highway funding to the stipulation that states must establish a blood alcohol level of 0.08 as the standard for intoxication. Although states could choose to maintain the 0.10 standard, they would suffer significant financial

BOX 1-1

The Money Game

State legislatures and the U.S. Congress spend a lot of their time considering bills that are proposed by the executive branch of government (the governor or the president), as well as bills that are initiated by legislators themselves. Eventually, for most legislation, the question seems to be: What is this going to cost? As a result, every legislative body in the country has a budget or finance office that will provide some estimate on the price tag for a particular piece of legislation (for example, at the federal level the body that performs this function is the Congressional Budget Office).

The budgetary process involves politics like in every other stage of arriving at legislation. Legislators try to persuade one another that certain bills are worthy of passage and funding. In the process, there can be tradeoffs. In effect, one legislator says to another (or to others), "You vote for my bill, and I'll vote for yours." The result is a budgetary "Christmas tree" with something for everyone. However, this does not ensure that problems are approached in a systematic and comprehensive (or effective) manner. Much of the legislative process addresses matters in a piecemeal fashion, and therein lies some of the problems in dealing with a social issue such as crime. We may end up doing what is popular (most state legislators really like bricks-and-mortar projects such as new prisons) or politically expedient (such as punitive sentencing policies), not necessarily what is "best."

The most appealing pieces of legislation are the most likely to pass and to receive significant funding. In effect, the dollar amounts attached to particular bills say something about where these items fit in the executive or legislative (or both) list of priorities. Again, some legislation is very partisan (associated with one political party or the other), and some is bipartisan (supported by both political parties), but it is all political.

For the most part there is not much publicity about how funding is allocated, but there was a very public debate in 2017 about withholding federal grants going to sanctuary cities. Sanctuary cities limit their cooperation with federal agencies enforcing immigration laws, such as holding an undocumented immigrant for federal authorities. The Trump administration has threatened to withhold funding from cities that do not cooperate with them, and Attorney General Jeff Sessions says that "[t]his administration will not simply give away grant dollars to city governments that proudly violate the rule of law and protect criminal aliens at the expense of public safety" (cited in Jacobs, 2017). Chicago has sued the federal government over the threatened withholding of federal funds and a federal court in November 2017 ruled that the President's executive order that attempted to deny funds to sanctuary cities was unconstitutional.

consequences for not adopting the lower level. As a result, the 0.08 blood alcohol content is now the standard in all fifty states.

Again, the issue of drunk driving can be used to illustrate problems related to policy implementation (see Box 1-2). When we look at the problem of drunk driving, we clearly can see issues related to policy impact. Quite often politicians, members of the general public, and public interest groups such as MADD will ask, "Why don't the laws stop drunk driving?" The answers are as complex as

BOX 1-2

Why Good Ideas Go Bad or Bad Ideas Go Good

There are many reasons why a particular policy may not be successful. The concept may be flawed from its inception, it may be poorly implemented (or not implemented at all), or the program or policy may suffer from lack of evaluation or follow-through. Of all of these, implementation is the most important factor. Briefly, let us consider the problems associated with poor implementation.

First, legislatures may ask criminal justice agencies to do the impossible. For instance, no law, policy, or program will stop some people from driving while intoxicated. If legislators think that adding fifty more state police or highway patrol officers will significantly reduce the DWI problem, they may be disappointed. Furthermore, there is no guarantee that an increase in the number of officers (without a specific legislative mandate) will result in an increased police presence on the highways. Some of these officers may be diverted to other equally pressing functions within the department.

Second, agencies may not know specifically what the legislative intent is for passing a bill. The legislature may enact a tough seat belt law (after receiving lobbying pressure from the insurance industry), but there may be no indication of whether officers should employ "active" enforcement (looking for motorists who are not wearing seat belts) or "passive" enforcement (merely citing motorists for seat belt violations when they are stopped for other infractions).

Finally, sometimes new laws are passed with no additional resources. New responsibilities may fall into the all-too-familiar "other duties as assigned" category, and as a result, there may be little implementation of the new law given employees' already busy schedules. This can be seen in some jurisdictions where judges regularly impose restitution orders on probationers, with the assumption that probation officers (POs) will be the enforcers. POs simply may ignore this part of the sentence because they are unwilling or unable to be collection agents.

By contrast, some ideas are politically appealing and are implemented very effectively. Nevertheless, that does not mean that such ideas will have the intended policy results. Let us look at a few examples.

First, consider gun control, a topic we examine more fully in Chapter 6. A quick search of one of the legal sites on the Internet reveals that the United States is a nation of gun laws. In fact, when all of the federal, state, and local laws are combined, the total is several thousand. How much impact have these laws had on violence related to firearms in the United States? The answer is probably very little. Several points seem especially relevant here:

- An estimated 310 million non-military firearms are in circulation in the United States. If no other firearms were manufactured or sold from this day forward, the existing stockpile of weapons would last into the twenty-second century.
- Most of the firearms owned in the United States are used very seldom, and nearly all are used legally.
- Most of the illegal use of firearms is by people who may not legally own or possess weapons in the first place.
- Most criminals obtain firearms through "straw purchases" (someone lawfully purchases a weapon for another person who cannot buy one legally; this practice is a violation of federal law), theft of weapons in burglaries, or black market sales.

(*Continued*)

BOX 1-2

Why Good Ideas Go Bad or Bad Ideas Go Good (*continued*)

Additional laws and stepped-up enforcement by agencies such as the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) might have some impact on firearms and criminal activity (especially violence), but probably very little.[3] In their examination of 172 studies of gun control, for example, Makarios and Pratt (2012) found that gun laws had only a weak effect on violence associated with firearms.

Second, consider get-tough sentencing, such as the three-strikes laws adopted by twenty-eight states and the federal government as of 2016 (Legal Match, 2016). We examine sentencing changes in Chapter 7, but for the moment let us look at the unintended consequences of these politically popular sentencing changes.

When the first "three strikes and you're out" laws were passed by Washington and California, the assumption by the general public was that the aim was incapacitation of violent offenders. However, quite often these offenders are incarcerated for long periods of time for committing non-violent crimes. If we look at the sentencing records of states such as California, what we see is that persistent nonviolent offenders are receiving lengthy sentences (twenty-five years to life) under the three-strikes provision. This practice has resulted in 6,908 third-strikers imprisoned in California on March 31, 2016 (California Department of Corrections and Rehabilitation, 2016), and over 2,700 of them are imprisoned on non-violent offenses (Vargas-Edmond & Edmond Vargas, 2017). At an average cost of $70,812 to house a California inmate in 2017 (Legislative Analyst's Office, 2017), the direct costs of imprisoning these third-strike offenders are over $490 million annually, and that cost will increase significantly as these prisoners age, as elderly prisoners require more expensive health care.

Therefore, on the one hand, the public may be no safer as a result of greatly enhanced sentences; on the other hand, a situation has been created where the scarce and expensive commodity of prison space has been filled with nonviolent property offenders (Kovandzic, Sloan & Vieraitis, 2004; Mays & Winfree, 2014). There is also the possibility that these very long sentences will result in injustice from the imposition of disproportionately harsh punishments.

On November 6, 2012, some eighteen years after the original legislation was enacted, California voters amended that state's three-strikes law so that a serious or violent felony was required to be a third strike. In addition, the amended legislation also allows offenders already sentenced as third-strikers, but convicted of a minor offense as their third strike, to be resentenced. While prisoners have the ability to seek resentencing, California's Supreme Court held that judges could refuse to shorten their sentences (Dolan, 2017). Thus, the public can sometimes play a role in amending criminal justice legislation, although it may take years before the impact of this amended legislation can be assessed, and newly enacted laws are often challenged in the courts.

These areas illustrate some of the difficulties associated with policy implementation. Some good policy ideas are poorly implemented or not implemented at all, and other policies of questionable value are implemented fully but with unintended consequences. In either case, the end result involves some dimension of policy failure.

the problem. Perhaps the best way to respond is through another series of questions. Has the law been fully implemented? Do the police have the resources (or the knowledge) to apprehend a significant proportion of drunk drivers? Are we making correct assumptions about human behavior? For example, does punishment really serve as a deterrent? Are we dealing with a driving problem or a drinking problem (alcoholism)? Asking these questions helps us develop a better appreciation for the difficulty in addressing many social problems.

Evaluation research increasingly has become a key component related to criminal justice policies (see Chapter 3). In fact, many of you taking this course may be required to take a research methods class, and you still are not sure why. Perhaps we can answer that for you now. A variety of answers help explain this question, but for our purposes, one use of research—program evaluation—is especially appropriate.

Evaluation often is mandated when state and federal governments give agencies money to implement a certain program. Evaluation research determines how the funds were used and the degree to which a program could be termed a success. However, it is important to emphasize that success is not the only criterion for program continuation. For example, we might have an anti-DWI program that does not seem to have much impact but continues because it is popular with politicians and the police. Often we find government programs outliving their initial mandate simply because they are politically popular. An illustration of a criminal justice program that continued to exist in the face of negative research findings is correctional boot camps for juveniles and adults. When boot camps began to appear in the early 1980s, a number of states jumped on the bandwagon to create such programs. Within a decade, research had demonstrated little efficacy of boot camps in reducing recidivism (Meade & Steiner, 2010). Nevertheless, they appealed to politicians and members of the general public who saw them as dispensing "real" punishment. Despite the fact that evaluations show little effectiveness, a few boot camps have persisted, but the number of offenders in these programs has substantially declined. In terms of juvenile boot camps, a review of the Census of Juvenile Residential Placement data showed that while there were 3,811 juveniles in these programs in 1997, that number decreased to 249 in the entire nation by 2015 (Sickmund, Sladky, Kang, & Puzzanchera, 2017). This brings us to the issue of program termination. We find with many criminal justice projects that programs may be ended because of, in spite of, or without careful evaluation (see Mears, 2017). As previously noted, some programs continue because they are politically or publicly popular. The Drug Abuse Resistance and Education (DARE) program comes to mind here. A number of evaluations, for example, have shown that this intervention is ineffective in reducing adolescent drug and alcohol use (see Rosenbaum, 2007), yet the U.S. Attorney General was promoting these programs in 2017 (see Chapter 3).

By the same token, effective or successful programs may not flourish because they do not have political support or constituencies that lobby for them. Prison industries programs come to mind as an example. Although prison industries can generate income and provide inmates with valuable work experience, the

public strongly believes that inmates are less deserving of such opportunities than the least deserving members of free society. In addition, some private companies oppose prison industries despite the fact that they provide inmates with jobs and save state governments money. One notable example is an office furniture company that protests that government contracts for furnishings often go to prison industries, and they believe that is unfair competition.

As we have noted, policies are made in a variety of ways. We previously pointed out that the "political" branches of government (the executive and the legislative branches) are explicitly in the business of policymaking. The president and state governors enact policies through cabinet-level officials, and they articulate their policy directions through the budget-making process. For example, during the presidency of Bill Clinton, one of the major national priorities was adding more law enforcement officers to state and local police agencies. The Justice Department created the Office of Community Oriented Policing Services (COPS) to aid in "advancing the practice of community policing in the nation's state, local, territorial, and tribal law enforcement agencies" (COPS, 2016a). It was originally established to provide federal funding for 100,000 new police officers nationwide. Funding for these officers is one reason for the net increase in the number of U.S. police officers, especially at the local level: An examination of Bureau of Justice Statistics data, for instance, shows that the number of officers increased by over 50 percent between 1987 and 2007 (see Kyckelhahn, 2011), but that number remained stable between 2008 and 2012 (Banks, Hendrix, Hickman & Kyckelhahn, 2016). We return to the topic of community policing in Chapter 4.

Under Republican presidents Nixon, Ford, and Reagan, the federal government initiated and supported a "war on drugs" (actually a series of such "wars"). Money was poured into increased law enforcement efforts and, to a lesser extent, education and treatment programs. Again, these and various other anticrime programs illustrate the role the federal government has played in developing and articulating crime control policy.

Congress aids in the policy process by conducting hearings, passing legislation, and—as previously discussed—providing the funding to implement such programs. However, Congress can on its own initiative develop crime control policy as well. Members of the House of Representatives or the Senate may receive requests from justice agencies in their home states to aid in providing funding or new laws. For example, the ongoing debate over immigration reform has seen state and local law enforcement agencies along the United States–Mexico border lobbying members of Congress for help in "securing the border." At times, the president and the Congress may be developing legislative proposals that are parallel to one another. In other instances, these two branches of government may create proposals that are in conflict—as occurred between the state of Arizona and the federal government in terms of controlling illegal immigration. This case ended up in the Supreme Court, and in the ***Arizona et al. v. the United States*** (2012) decision the Court sided with the federal government, although it upheld the ability of law enforcement to check on a person's immigration status while enforcing other laws.

Although the executive and legislative branches most often are thought of in regard to the creation of policy, it is important to acknowledge once again that the judicial branch certainly has an impact on the policy process, as illustrated in the *Arizona et al. v. the United States* (2012) case. Several other Supreme Court rulings clearly illustrate this point in terms of the operations of justice systems. First, in ***Blakely v. Washington*** (2004), and in ***United States v. Booker*** and the companion case of ***United States v. Fanfan*** (2005), the Supreme Court ruled that the Federal Sentencing Guidelines, developed by the U.S. Sentencing Commission and enacted into law by the U.S. Congress, could not be imposed in a mandatory way on federal judges. Judges could use the guidelines in an advisory fashion, but the specific sentences could not be prescribed for federal judges. Congress could establish broad sentencing parameters, but judges had the ultimate authority to decide what a particular sentence should be.

Second, in the case of ***Miller v. Alabama*** (2012), the Supreme Court struck down the laws that enabled adult court judges to sentence persons who were not eighteen years of age at the time of their offense to sentences of life imprisonment without the possibility of parole for any offense, and the ***Montgomery v. Louisiana*** (2016) decision applied that decision to persons already sentenced The Court had previously eliminated the juvenile death penalty in the ***Roper v. Simmons*** (2005) decision and made it unconstitutional to impose sentences of life without the possibility of parole for non-homicide offenses in the ***Graham v. Florida*** (2010) case (see Chapter 14). Third, in ***Dorsey v. United States*** (2012) and ***Hill v. United States*** (2012) the Supreme Court allowed more lenient sentences (under a 2010 federal law) for individuals currently convicted of, but not yet sentenced for, drug crimes involving crack cocaine. Without a doubt, these recent cases demonstrate the ability of the courts (and especially the Supreme Court) to have an effect on the policy process.

CONCLUSIONS

The criminal justice system in the United States is intimately linked to the political system. That is both a good news and a bad news situation. It is good news because criminal justice policy should reflect the popular will of the citizens. Criminal justice policy is influenced by political elites, politicians, public interest groups, the general public, business interests, and the news media. In some cases public opinion leads public policy, and in other cases it follows public policy; however, these policies should be openly debated and developed in an atmosphere that allows for public scrutiny and comments. This means that criminal justice policy is linked to the political processes and political agendas of a broad range of groups and individuals. The bad news about this is that sometimes ineffective policies such as the "war on drugs" and the "three strikes and you're out" laws of the 1980s and 1990s have remained publicly and politically popular, although agency support for punitive practices seems to be waning as governments have become increasingly cash-strapped. However, this does not mean that they will have the impact that was envisioned for them. At best, some of

these policies might turn out to be ineffective. At worst, they might produce an opposite outcome from what originally was envisioned.

As you read the following chapters that address current issues in the criminal justice system, keep in mind the role politics plays in the development of policy. Each of these issues represents a major policy dimension within the criminal justice system, and each illustrates the ways in which politics can influence policies.

KEY TERMS

administrative law
Arizona et al. v. the United States
Bill of Rights
Blakely v. Washington
case law
common law
constitutional law
criminal justice system
Dorsey v. United States
Graham v. Florida
Hill v. United States
legal system
Miller v. Alabama
Montgomery v. Louisiana
political system
politics
public interest groups
regulatory law
Roper v. Simmons
social system
statutory law
United States v. Booker
United States v. Fanfan

CRITICAL REVIEW QUESTIONS

1. A fellow student in one of your classes makes this statement: "Politics should have no place in the U.S. criminal justice system." How do you respond and why?
2. What is the relationship between the political system and the criminal justice system in the United States?
3. Figure 1.1 in the chapter shows a set of concentric circles. Look at this illustration again and describe the essential idea that is being conveyed.
4. The fact that criminal justice processes are spread over three levels of government (local, state, and federal) and three branches of government (legislative, executive, and judicial) contributes to some sense of inefficiency. Why do we have a criminal justice system that is arranged in such a fragmented and decentralized way? What would be the "costs" associated with having a more efficient system? (You might want to revisit this question after you finish Chapter 16).
5. In many high school civics classes, students are taught that the legislative branch of government "makes the laws." Is this an accurate statement? Why or why not?
6. What do we mean when we talk about public interest groups? Give examples of a public interest group and the issue or issues with which it is concerned.
7. What do we mean by the common law and how does it compare with modern statutory law? You might want to make lists of the features of each.
8. Is case law really "law"? Explain.
9. Are "politics" and "policy" two distinct notions or simply parts of something bigger? Explain your answer.
10. Make a list of the reasons why a new, tougher law aimed at curbing drunk driving might not be effective.

WRITING ASSIGNMENTS

1. There are a variety of definitions of the word *politics* both in the chapter and elsewhere. In 100 words or less provide a definition of this word as if you were trying to describe it to someone totally unfamiliar with politics.
2. Go to the Bureau of Justice Statistics homepage (bjs.ojp.usdoj.gov) and find the latest statistics on justice system employment and expenditures. In three short paragraphs explain what has been happening to employment and expenditures in (1) policing, (2) corrections, and (3) judicial and legal services.
3. Define the word *policy*. Explain the relationship between policy and the political processes in the United States.
4. List and explain the various sources of law in the United States.
5. In a one-page essay respond to this statement: "The criminal justice system in the United States is inherently designed to be inefficient."

RECOMMENDED READINGS

Natasha A. Frost, Joshua Freilich, and Todd R. Clear, editors (2010). *Contemporary Issues in Criminal Justice Policy*. Belmont, CA: Wadsworth/Cengage. This book has twenty-four readings prepared for and presented at a meeting of the American Society of Criminology. Each reading also has a response essay. The papers address many of the issues contained in the book you are reading, and they reflect some of the best thinking and scholarship on many of the same issues we address.

Karim Ismaili, editor (2017). *U.S. Criminal Justice Policy*, 2nd ed. Burlington, MA: Jones & Bartlett. This reader begins with a discussion of public policy and the policymaking process in the United States. The fifteen readings deal with topics such as race and urban policing, procedural fairness in the courts, prisoner reentry, juvenile justice policy, homeland security, technology and crime, and human trafficking. This is a useful addition to the study and discussion of policy within the field of criminal justice.

Nancy E. Marion and Willard M. Oliver (2006). *The Public Policy of Criminal Justice*. Upper Saddle River, NJ: Prentice Hall. Marion and Oliver take a political science/public policy approach to examining criminal justice. In Chapter 3, they analyze the public policy process in depth, and in Chapters 4–7, they look at what each branch of government brings to the development of criminal justice policy. Three chapters in this book are particularly noteworthy: Chapter 8, which considers the influence of public opinion and the media; Chapter 9 on interest groups; and Chapter 14, which develops a case study of criminal justice policy.

CHAPTER 2

Crime Control versus Due Process

INTRODUCTION

A number of different models have been used to explain criminal justice operations in the United States. Two of the models that are frequently encountered in introductory criminal justice courses were proposed by **Herbert Packer**. In 1968, Packer published an insightful book, *The Limits of the Criminal Sanction*, which described the two models—crime control and due process. They are the focus of this chapter and should provide you with a clear way of making sense of criminal justice policies as you read the remainder of this book.

One of the first points to emphasize about Packer's models is that they are prototypes or ideal types. In other words, in the real world you might not find them in their purest form. They are abstractions of reality and not necessarily reality itself, just as a model train is an oversimplified representation of a real train.

Second, Packer himself was quick to emphasize that the two models do not represent the "is" versus the "ought to be," or the "real" versus the "ideal." They are not intended to be representations of the way a perfect criminal justice system would operate. They simply provide us with *two different viewpoints* for interpreting why the system operates the way it does and, in turn, the way criminal cases are processed.

These two views sometimes are characterized as "conservative" versus "liberal," and it is these descriptions that provide a simple and usually correct labeling system (see Walker, 2015; Wylie-Marques, 2002). However, we cannot merely assume that the crime control model is conservative without question and that the due process model is liberal. That would present an oversimplification or a generalization that might be hard to defend. In reality, many criminal justice policies in the United States contain both conservative and liberal elements. They frequently serve multiple and, unfortunately, competing purposes (Tonry, 2017b). With these caveats in mind, let us turn to examining the features of Packer's two models.

THE CRIME CONTROL MODEL

At the most basic level, the crime control model operates from a viewpoint that protecting the welfare of the majority of citizens is more important than the rights or liberties of any single individual. Public safety becomes a principal concern for advocates of the crime control model, and fundamentally they believe that if we are not safe as a society, then individuals are not safe either.

This means that the **crime control model** supports the suppression of crime in society. The police should be able to prevent some crimes; however, in the absence of crime prevention, they will respond in a reactive way to investigate crimes and to apprehend suspects. Such actions by the police and the vigorous prosecution of accused offenders are thought to promote the law's deterrent effect. In a sense, the efficiency of the crime control model should demonstrate to everyone the swift, sure, and accurate operation of the legal system and the punishment of offenders.

In terms of the criminal justice system, the crime control model relies heavily on the operations of the police and prosecutors. Law enforcement agencies often are characterized as the "thin blue line" that stands between civilization and anarchy. To the extent that this is true, the police carry the bulk of crime control responsibilities. Crime control, then, is predicated on the fact-finding and criminal investigative functions of law enforcement agencies and prosecutors at various levels in the United States. Adherents of the crime control model trust the police and prosecuting attorneys to do an adequate job of gathering evidence and screening for legal sufficiency in order that there can be an arrest and eventual conviction of people who violate the law.

One of the ironies of focusing on the police in the crime control model centers on the view that a significant amount of police time and a number of resources are devoted to crime fighting. As most students of criminal justice quickly learn in their first year of course work, the vast majority of the typical police officer's time is concentrated on order maintenance and public service. This leaves crime control as a relatively minor—though symbolically significant—part of the job.

The operations of the crime control model are built around notions such as efficiency, coupled with swift and final resolution of cases. Packer (1968, p. 159) stated, "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." This "emphasis on speed favors plea bargaining, prosecutorial discretion, and mandatory sentencing in which occasions for legal challenge are minimized" (Wylie-Marques, 2002, p. 377). Therefore, similar types of cases are lumped together and are treated similarly. The result is that the crime control model operates much like an assembly line with "routine and stereotyped procedures" (Packer, 1968, p. 159). The notion of **assembly-line justice** is based on this characterization.

Assembly-line justice is a label applied to the rapid and routine handling of cases, particularly by the lower-level criminal courts in the United States. Mays and Fidelie (2017, p. 284) noted that "While these courts are sometimes called

courts of inferior jurisdiction, they are not inferior relative to the size of the caseload they carry. In fact, these lower level tribunals are the workhorses of most state court systems since they process the vast majority of civil and criminal cases filed."

However, rapid and routine processing of cases is not only confined to the inferior courts but also apparent in most criminal justice operations. Welch (2002, p. 77) said that within the crime control model, assembly-line justice "stresses efficiency, reliability, and productivity, as measured by increases in arrests, convictions, and incarcerations." In other words, like a factory assembly line, the justice assembly line aims at handling the maximum number of cases, in the shortest time possible, with the lowest expenditure of resources and, hopefully, a minimum number of mistakes.

One element that must be factored into assembly-line justice is the operation of the **courtroom work group** (Metcalf, 2016). The courtroom work group is composed of a changing cast of characters, but at its core are judges, prosecutors, and defense attorneys. This group pursues a number of organizational goals, among which are fostering cooperation and expediting case processing (see Neubauer & Fradella, 2017). The foundation of this approach is a shared understanding of the most appropriate sanction ("the going rate") for a given offense within that court (Mays & Fidelie, 2017). This means that it is in the best interest of all members of the courtroom work group (although not necessarily the defendant) to limit case processing time as long as the proposed sanction is within the range of those normally imposed. Thus, through its interactions, the courtroom work group actually may facilitate the crime control model and promote assembly-line justice.

The final feature often associated with the crime control model is what Packer (1968, p. 160) considered a "**presumption of guilt**," sometimes called **factual guilt**. In the criminal justice system, we are accustomed to hearing that a person is innocent unless and until the state can prove him or her guilty beyond a reasonable doubt. Nevertheless, the presumption of guilt assumes that the vast majority of defendants *are* guilty. If a person is innocent or if there is a problem with the case, it will be kicked off the assembly line by the agents responsible for quality control. Therefore, the presumption of guilt is a "prediction of outcome," meaning that it is likely the person is guilty and will plead guilty or be found guilty. The farther the case progresses along the assembly line, the higher the level of guilt presumed by members of the news media, most agents of the criminal justice system, and even some potential jurors.

One way to understand factual guilt or the presumption of guilt is to examine a hypothetical case. Assume the police receive a burglar alarm call to an elementary school building late at night. A search of the building turns up a suspect hiding under a desk in one of the classrooms. It is safe to assume that a high level of factual guilt—that is, a presumption of guilt—attaches to such a person. The police believe (they would say they really "know") that he is guilty. The prosecutor handling the case believes that the person is guilty, and if a jury hears the facts, they may agree that the suspect (now a defendant) is guilty as well. However, it is essential to emphasize here that even the person caught

in flagrante delicto (in other words, red-handed) has the right to insist on a trial and to make the state *prove* him or her guilty. As we will see later in this chapter, the practical effect of the presumption of guilt is to keep the assembly line moving through the use of plea bargaining.

As you read through the remainder of this book, ask yourself if the topics being presented and the policies being examined can be classified as crime control. (As a note of warning, some issues are much more easily classified than others.) Do they promote efficiency within the criminal justice system, along with the processing of offenders in a rapid and routine manner? Policies that on their surface are aimed at increased public safety are, by definition, crime control–oriented.

THE DUE PROCESS MODEL

Sheppard (2012, p. 895) says that due process of law involves the "Constitutional rights in life, liberty, and property interests that cannot be burdened without due cause or appropriate procedures. Due process of law is a fundamental aspect of the law, including not only the process by which law must be created and applied but also the scope within which certain laws must be made and enforced and beyond which laws ought to leave individuals to their own liberty."

The concept of due process is found in the Fifth and Fourteenth Amendments to the U.S. Constitution. The Fifth Amendment says, in part, that "No person shall be . . . deprived of life, liberty, or property without due process of law," and the Fourteenth Amendment specifies further that "No State . . . shall deprive any person of life, liberty, or property, without due process of law." While the Constitution does not define *due process*, the Supreme Court consistently has emphasized that *due process* means "that which is fundamentally fair."

Substantive due process provides that laws not only be fair but also promote some legitimate governmental purpose or function. By contrast, **procedural due process** defines the ways in which the government must go about applying laws in a just and evenhanded manner (see Kelly, 2002). Procedural due process involves rules governing admissions and confessions, and the proper admission of physical evidence. It also includes questions about the right to counsel, speedy trials, public trials, and trials by a jury of peers.

David Rottman (2011, p. 96), a staff member of the National Center for State Courts, says that in going about their business, courts must be concerned with procedural fairness for obvious reasons. Procedural fairness means that "The courts must by their actions generate a belief that court decisions should be adhered to even if the case outcome is not favorable. In short, they must be viewed by individual defendants as possessing legitimacy if they are to administer undesirable outcomes and still be obeyed." Taken together, these two elements of due process mean that the federal, state, and local governments can, and often do, intrude into the lives of citizens in various ways, but that they must do so in a way that is fair.

The **due process model** is based on the protection of the individual accused of crime, as outlined in the Constitution of the United States, along with state constitutions and federal and state statutes. Due process is the idea that in enacting laws the government must pursue legitimate purposes (substantive due process) and it must do so in a fundamentally fair way (procedural due process).

This model is much more concerned with formal fact-finding procedures than is the crime control model. This fact finding typically occurs in the give-and-take of the criminal trial. It rejects (or at least minimizes) the goals of speed and efficiency in disposing a case and instead stresses getting at the truth. Efficiency and finality take a back seat to trying to eliminate errors. Packer (1968, p. 165) noted, "The aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty." The sometimes-quoted phrase "It is better for ten guilty people to go free than for one innocent person to go to prison" illustrates some of the values associated with the due process model.

In terms of the two models we are considering here, Wylie-Marques (2002) said that the due process model is the opposite of the crime control model. However, Tonry (2017b, p. 8) disagrees and says that "crime prevention and due process are, of course, not opposites; both are essential in a civilized society." To further muddy the waters Packer (1968) emphasized that the two models are not necessarily opposite, but simply different ways of viewing criminal justice processes. Whereas the roles of the police and prosecutors tend to dominate discussions of the crime control model, the courts—and especially the appellate courts—take center stage in the due process model.

Finally, while the crime control model operates on a presumption of guilt (or factual guilt), the due process model is based on the notion of **legal guilt**. Legal guilt (or the **presumption of innocence**) tells criminal justice officials how they are to proceed in processing a case, and it is not "a prediction of outcome" (Packer, 1968, p. 161). Saying that defendants are presumed innocent does not mean they likely are innocent or that it is possible they will be found innocent. It means that guilt is not to be assumed. Therefore, guilt can exist only when the state has proven the defendant guilty beyond a reasonable doubt and the jury has returned a verdict of guilty.

The due process model frequently is characterized as being supported by liberals. However, a more accurate characterization is that it is supported by civil libertarians, and not just those who belong to civil liberties groups. It stresses the fundamental fairness and procedural regularity with which the government should behave toward those individuals accused of criminal activity. In the end, due process protects not only those people charged with criminal activity, but also all of us.

THE PRACTICAL DIFFERENCES BETWEEN THE MODELS

Now we need to ask the question: So what? In other words, what difference does it make which model of the criminal process we prefer or which one may be in operation at any one time? Answering the "so what" question often is not that easy,

and in the end many leave this discussion largely unsatisfied. Nevertheless, we should examine the development of criminal justice policy in the United States since the 1960s, particularly in light of Packer's two models.

Many of you reading this chapter will immediately identify at a fundamental level with some or all of the tenets of either the crime control model or the due process model. This says something about your perspective or worldview. As you will see, you are not alone in holding a particular perspective. Quite often politicians, policymakers, and members of the general public will share your perspective. Yet, you should keep in mind that history has repeatedly demonstrated that what is popular is not always right, nor is what is right always popular.

For example, conservatives often stress the idea that people commit crimes as a result of rational choices, or their own free will. As a result, the response is that offenders should be held fully accountable for their acts, and they should be punished accordingly. By contrast, liberals may take the position that everyone in society is subject to a variety of influences, and none of us is totally a free moral agent. Therefore, we need to take into consideration the social, economic, psychological, and biological factors that influence people to engage in a variety of behaviors (including crime). These perspectives help people make sense of why individuals behave in certain ways—for example, why people commit crimes or why some people commit certain crimes. We often call these various perspectives *theories*, although that is sometimes a word from which students recoil. For our purposes in this text, it is important to remember that criminal justice policies in the United States frequently are enacted with one of these two theoretical viewpoints in mind.

Crime Control Model Policies

As mentioned previously, the crime control model is assumed by most people to represent a conservative orientation toward controlling law-violating behavior (Walker, 2015; Wylie-Marques, 2002), and the due process model illustrates a liberal (or civil liberties) view. If this is correct, what has been the dominant philosophy guiding criminal justice policy in the United States in recent years?

It is safe to say that since the late 1960s, the United States has been in a protracted period of enacting crime control policies (Tonry, 2017b). Richard Nixon used crime as a major political issue in his 1968 presidential campaign. Once elected, Nixon began his presidency promising to get tough on crime and to appoint federal judges who were conservative or who held a nonactivist orientation in their judicial decision making. This change was significant because before the 1960s, crime was largely considered a local matter and federal politicians had little interest in "street crime." Beckett and Sasson (2003) contend that the only way the federal government could get involved in fighting street crime was to increase drug enforcement.

One of the first pieces of legislation that passed under Richard Nixon's presidency was the Omnibus Crime Control and Safe Streets Act of 1968.[4] This law provided substantial federal funding for state and local law enforcement agencies so they could better train and equip their officers through the Law Enforcement

Assistance Administration (Mabrey, 2005). This legislation also created the Law Enforcement Education Program (LEEP) that would pay part of the costs for police officers to attend college. As a result of the LEEP program, the number of colleges offering law enforcement (and later criminal justice) degrees—from the associate's degree through the doctorate—increased from 184 to 1,070 within ten years (see Rydberg & Terrill, 2010). Some people have compared the impact of the LEEP program in the 1960s and 1970s to the GI Bill after World War II in spurring college attendance.

In case it seems that the crime control orientation has been linked only with Republican presidents (although this is largely true), during the presidency of Bill Clinton, two clear examples of crime control legislation were signed into law (Mabrey, 2005). In 1994, President Clinton signed the Violent Crime Control and Law Enforcement Act, and in 1996, he signed the Antiterrorism and Effective Death Penalty Act (AEDPA). These two laws expanded the death penalty in federal cases, as well as limited appeals by prison inmates. Furthermore, during Clinton's eight-year presidency, the nation's prison population soared by 673,000 inmates or by about 50 percent (Center on Juvenile and Criminal Justice, 2001), including a 56 percent increase in federal prisoners (Gramlich, 2017). Alexander (2016) says that "when Clinton left office in 2001, the United States had the highest rate of incarceration in the world" and that increase was largely due to imprisoning more African Americans.

Crime control policies have been manifested in other ways as well. For example, Richard Nixon's "war on crime" of the 1960s and 1970s eventually gave way to a "war on drugs" waged by both Presidents Reagan and George H. W. Bush in the 1980s. Increasing amounts of federal money were poured into the interdiction and apprehension efforts of law enforcement agencies, especially those at the federal level. The Drug Enforcement Administration became the front-line agency in America's "war on drugs," and while some monies were earmarked for drug education and treatment, the lion's share of funding went into law enforcement and suppression efforts.

The 1970s and 1980s also saw changes in state and federal sentencing policies. At this time, there was much debate over sentencing purposes in the United States. Both liberals and conservatives were dissatisfied with the system of **indeterminate sentences** that had been in place for nearly 100 years. This system, along with discretionary parole (as created by legislative bodies), gave state parole boards and correctional officials considerable discretion in how much time an offender would serve in prison (Tonry, 2017c). The work of people such as David Fogel (1975) and others provided the philosophical justification for the development of **determinate sentences**, and a number of states (led by Maine in 1976) moved to restrict or eliminate discretionary parole (see Tonry, 2017c). By eliminating parole, it was said to add **truth in sentencing**, so that offenders would serve most of their sentences, less any "good time" credits earned (Sabol, Rosich, Mallik-Kane, Kirk & Dubin, 2002; Steiner & Cain, 2017). The result was a movement toward not only determinate sentences but also more predictable sentencing through the use of **sentencing guidelines**. Sentencing guidelines provide

a prescriptive plan by which judges determine the appropriate sentence within a two-dimensional matrix, given the offender's present offense and criminal history. The guidelines typically are developed by a government commission and then enacted into law by the appropriate legislative body. The guidelines may be advisory or mandatory in which case they become binding on all judges within the particular jurisdiction (such as a state).

In the end, the results were more people incarcerated with longer average sentences for offenders, a goal that was supported by crime control model advocates (see DiIulio, 2001; Wright, 2004). For example, from year-end 2000 until year-end 2015, the number of people held in federal and state prisons increased from 1,394,200 to 1,526,800 (Carson & Anderson, 2016). This growth in inmate population occurred at the same time that the rates for most crimes were decreasing. Crime control advocates argued that the increase in incarceration resulted in the decrease in crime rates. Others have reported that imprisonment has only a minor impact on crime, and that the two trends sometimes operate independently of one another. Scholars such as Austin and Irwin (2011) argue that there are other explanations for the increase in imprisonment rates, such as changes in public opinion, partisan politics, political fragmentation, and the rise of the prison-industrial complex in the United States (see also Pfaff, 2017).

Although we will consider juvenile crime more fully in Chapter 14, it is important to note at this point that the crime control model also has influenced the operation of the juvenile justice system in the United States. Beginning in the early 1980s, several states instituted policy changes to get tough with what was perceived as a substantial juvenile crime wave (Bernard & Kurlychek, 2010). Among the measures that were enacted were lowering the age at which youths could be tried as adults from sixteen in many states to fifteen or even fourteen years. Also, the number of offenses that qualified for transfer was expanded (Heilbrun, DeMatteo, King & Filone, 2017). During this era many states legislatively excluded certain young offenders from juvenile courts and automatically transferred them to adult court jurisdiction. For example, many states now exclude juveniles who have committed offenses that call for life in prison, including homicides and other serious personal offenses such as rape, armed robbery, or kidnapping (Gardner, 2009).

In addition to making it easier to transfer teenagers to adult courts, state juvenile codes were also amended to transform juvenile sentences from indeterminate to determinate, and a small number of states implemented sentencing guidelines for juveniles that closely paralleled those of their adult counterparts (Mears, 2002). Juvenile court hearings became increasingly formal, and while many youths still were diverted from the formal system of adjudication, those who remained faced harsher penalties (Mays & Ruddell, 2012). Altogether these changes mark a trend similar to the decreasing emphasis on rehabilitation for adult offenders.

Illustrations of get-tough, crime control–oriented penalties imposed on juveniles involve adult prison sentences and lengthy sentences, including life

sentences (see Chapter 14). A number of states have developed what are called **blended sentences** (Brown & Sorensen, 2012). This approach allows for either juvenile sentences or adult sentences (including prison time) to be imposed on youths. For those youths who meet statutory age and offense criteria, adult penalties—including incarceration in the state's adult prisons—are very real possibilities. When Schaefer and Uggen (2016) looked at these policies, they found that states that had punitive adult sentencing were also likely to use these blended sentencing schemes. Occasionally, the response by crime control advocates when discussing these tough-on-crime policies is that "if you're old enough to do the crime, you're old enough to do the time" (Mays & Ruddell, 2012).

The ultimate sanction for any offender is the death penalty. In the case of ***Furman v. Georgia*** (1972), the U.S. Supreme Court ruled that the death penalty, as it was then imposed, was arbitrary and capricious. When Georgia and a number of other states rewrote their death penalty laws, a challenge was again mounted; however, the Supreme Court ruled in ***Gregg v. Georgia*** (1976) that the revised capital punishment statutes were constitutional. Every year since 1976, the Supreme Court has received challenges to the death penalty, and while the Court has issued rulings that have restricted the circumstances under which executions are imposed (and the people who should qualify for execution, including offenders who were juveniles at the time of the offense, see *Roper v. Simmons,* 2005), the Court has never shown an indication that it was willing to declare capital punishment, in and of itself, as a violation of the Eighth Amendment's prohibition of cruel and unusual punishment.[5] In 1996 Congress passed the AEDPA, which restricted the time limits and the bases for appeals by state and federal inmates. The restrictions imposed by AEDPA limit *habeas corpus* appeals by prisoners and also set time limits within which all appeals (including those arising in capital cases) must be filed.

Due Process Model Policies

After reviewing the previous section, it would be easy to conclude that after three decades of dominance by the crime control model, the due process model is dead or at least dying. Perhaps the response by Mark Twain to premature newspaper reports of his death is appropriate here: "The reports of my death have been greatly exaggerated." In the same way, it is premature to report the death of the due process model in the criminal justice system in the United States.

Arguably, the golden era of the due process model was during the period when Earl Warren was Chief Justice of the U.S. Supreme Court (1953–1969). In the first half of the 1960s, the Warren Court issued rulings in such historic cases as ***Mapp v. Ohio*** (1961), ***Escobedo v. Illinois*** (1964), ***Gideon v. Wainwright*** (1963), and ***Miranda v. Arizona*** (1966).[6] These decisions articulated or expanded the due process rights of adult criminal defendants, and similar rights also were extended to accused delinquents in decisions such as ***Kent v. United States*** (1966), ***In re Gault*** (1967), ***In re Winship*** (1970), and ***Breed v. Jones*** (1975).[7] The "due process revolution" of the 1960s led right-wing groups such as the John Birch Society to begin an "Impeach Earl Warren" campaign.

While there have been criticisms of some of the procedural due process cases decided by the Supreme Court, a great deal of the Warren Court's legacy remains intact. In fact, among the three branches of government, the Supreme Court (even in its current, somewhat conservative, configuration) seems the most committed to notions of due process. For example, since the beginning of the 21st century, in the case of ***Kyllo v. United States*** (2001), the Supreme Court ruled that an exterior scan of a house with a thermal scanning device, to detect the heat signature of "grow lights" to allow the indoor cultivation of marijuana, constituted a search and required officers to obtain a search warrant. Also, in ***Missouri v. Seibert*** (2004), the Court held that it was unconstitutional for the police to interrogate a suspect without giving the *Miranda* warnings. In this case, the police deliberately did not give the *Miranda* warnings and questioned a suspect until a confession was obtained. Then they questioned the suspect again after giving *Miranda* warnings and tried to use the second confession.

Although the U.S. Supreme Court generally has retained a due process orientation, even with a fairly conservative plurality on the Court, there have been concerns in some states that the Court has retreated from the standards established during the Warren Court era. Therefore, some state supreme courts (and not just those of more "liberal" states) have taken the stand that the Court sets the *minimum* due process constitutional standards, but that state supreme courts can apply state constitutional provisions that establish even greater personal protections.[8] This means that in areas such as Fourth Amendment search and seizure cases, state supreme courts may decide cases based on their state constitution that are more restrictive than decisions provided by the U.S. Supreme Court.

For example, Hayes (1999) said that there was a concern in some states that the U.S. Supreme Court "was retreating in its protection of individual rights." At the same time, the Supreme Court seemed to encourage "state courts to utilize state constitutions as the basis of their rulings concerning constitutional rights." Thus, in ***State v. Gomez*** (1997), the New Mexico Supreme Court did not support some warrantless searches by the police that might be permitted by the U.S. Supreme Court (Hayes 1999). In simplest terms, this demonstrates that the efficacy of the due process model does not depend solely on the U.S. Supreme Court and that other state and federal courts apply this model as well.

It is also important to ask what other evidence we might have today of the vitality of the due process model. At least three illustrations come to mind. First, as discussed, the use of determinate sentencing is a way to promote truth in sentencing. Several states have adopted sentencing guidelines with the explicit purpose of limiting or eliminating sentence disparities (see Mays, 2004). A review of court rulings over the past three decades demonstrates that similarly situated offenders often did not receive similar sentences. Under indeterminate sentencing schemes, judges were permitted to consider or ignore a wide array of factors in deciding on the appropriate sentence. Legislatures gave them that authority, and it was exercised with a great deal of discretion. Sentencing guidelines normally consider only two factors—present offense and criminal history—in determining the sentence. Under the determinate sentencing system, factors such as race,

gender, drug use, and employment history are supposed to be irrelevant, and sentence disparities should all but disappear. While human nature still plays a role in the sentencing process, most states with mandatory sentencing guidelines have found that the degree of disparity among cases has been reduced among various racial and ethnic groups and between males and females.[9]

Second, addressing disparity in the juvenile justice system has become an explicit priority of the Office of Juvenile Justice and Delinquency Prevention (OJJDP), a division of the U.S. Department of Justice. One of OJJDP's national priority goals is to identify, address, and remedy **disproportionate minority contact (DMC)** among juvenile offenders.[10] State juvenile authorities are challenged to examine every stage of the processing of juvenile offenders to determine if African American, Hispanic, American Indian, and Pacific Islander youths (among others) are overrepresented at any stage of the handling of accused delinquents. For OJJDP's purposes, the population at risk includes those 10 to 17 years old.

To illustrate the challenge of DMC, Table 2.1 shows how African American youths are overrepresented in juvenile justice processes at virtually every stage, from arrest through adjudication and incarceration. Rovner (2016, p. 8) found that although youth incarceration dropped by 47 percent between 2003 and 2013, the rate of African American youths in secure confinement actually *increased* by 15 percent making the African American commitment rate four times greater than the white rate (p. 2). In Chapter 8, we address the topic of race and incarceration and the mistrust that many minority groups have of the criminal justice system. It has been speculated that ensuring just and fair outcomes in justice systems may actually increase the likelihood that citizens will follow the law (Rottman, 2011; Tyler, 2006).

Table 2.1 Youth Outcomes by Race, 2013

	AFRICAN AMERICAN JUVENILES	WHITE JUVENILES
Out of every 10,000 teenagers	738 arrests	322 arrests
Out of every 1,000 arrests	934 referrals to juvenile court	806 referrals to juvenile court
Out of every 1,000 arrests	217 diverted away from formal court processing	298 diverted away from formal court processing
Out of every 1,000 cases referred to juvenile court	249 detained prior to adjudication	186 detained prior to adjudication
Out of every 1,000 cases tried in juvenile court	511 adjudicated delinquent	518 adjudicated delinquent
Out of every 1,000 juveniles adjudicated delinquent	611 received probation	648 received probation
Out of every 1,000 juveniles adjudicated delinquent	272 commitments	228 commitments

Source: Rovner (2016)

Third, as a result of the identification of thousands of individuals wrongfully convicted or exonerated there has been increasing government support to prevent or correct errors and misconduct that led to these miscarriages of justice. Findley (2017, p. 61) describes how the federal government has engaged in "high-profile measures to recognize the reality of wrongful convictions, direct funding of innocence work, use of federal purse strings to shape criminal justice policy, setting an example through legislation on matters as diverse as access to postconviction DNA testing and compensating the wrongly convicted, and leadership on issues such as the problems with the forensic sciences." Some states, including Texas, have taken significant steps to reduce wrongful convictions, which we cover in more detail in Chapter 10 (Innocence Project, 2017d).

CONCLUSIONS

Herbert Packer's models of the criminal process give us two ways to view the processing of criminal cases in the United States. However, in a broader context, these models also tell us something about the development of criminal justice policies and the orientations of politicians and policymakers at all levels of government. In examining the underlying assumptions of the crime control and due process models, several conclusions become apparent.

First, it is difficult to find either the crime control model or the due process model in its purest form almost anywhere. The two models exist as something of hybrids in most jurisdictions across the United States. In fact, it probably is most accurate to think of the two models as existing along a continuum. Therefore, moving from one state or locality to another, from one level of government to another, or among the various branches of government will move us toward one end of the continuum or the other. Much of the content in the chapters that follow describes the political, social, and economic forces that move us from one end of the continuum to the other (see Goodman, Page, & Phelps, 2017).

Second, the U.S. Supreme Court clearly operated in the due process domain for much of the 1960s and even into the 1970s. At the same time, virtually every president elected since 1968 has had a more or less crime control orientation. Among these presidents, perhaps Jimmy Carter had the least overt law-and-order orientation, while Bill Clinton and Ronald Reagan seemed to be the most focused on crime control issues. Regardless of one's political office or party affiliation, however, no politician wants to be labeled "soft on crime" (Pfaff, 2017).

Third, even today—with the crime control model still dominating state and federal policies—elements of the due process model can be found throughout the system, and there seems to be a growing interest in rehabilitating offenders, the number of state prisoners has been decreasing, several states are actively working toward bail reform, and the death penalty seems to be dying a slow death. Therefore, we are left to ask: Which model will hold sway in the next decade, and what social, political, or economic issues will cause a society to shift from one of these models or paradigms to another?

KEY TERMS

assembly-line justice
Atkins v. Virginia
Blakely v. Washington
blended sentences
Breed v. Jones
courtroom work group
crime control model
determinate sentences
disproportionate minority contact (DMC)
due process model
Escobedo v. Illinois
factual guilt
Furman v. Georgia
Gault, In re
Gideon v. Wainwright
Gregg v. Georgia
in flagrante delicto
indeterminate sentences
Kent v. United States
Kyllo v. United States
legal guilt
Mapp v. Ohio
Miranda v. Arizona
Missouri v. Seibert
Packer, Herbert
presumption of guilt
presumption of innocence
procedural due process
sentencing guidelines
State v. Gomez
substantive due process
truth in sentencing
United States v. Booker
United States v. Fanfan
Weeks v. United States
Winship, In re

CRITICAL REVIEW QUESTIONS

1. Compare and contrast the various elements of Packer's two models of the criminal process. Where in the criminal justice system are we most likely to find the two different models at work? Explain.
2. Are politicians correct when they assume that the public demands increasingly harsher sanctions for criminal offenders? Is this a figment of the politicians' imaginations, or do they have substantial evidence of the punitive orientation of the public?
3. Why do most politicians, especially at the national level, seem to support a crime control orientation?
4. How do substantive due process and procedural due process differ? Which of these is more likely to be associated with the public's perception of technicalities in the processing of criminal cases?
5. Is crime policy really a concern of the federal government, or is it something of a symbolic issue? Aren't most crime problems (and their solutions) situated at the local level?
6. In which courts are you most likely to see assembly-line justice operating? Explain and give examples.
7. What is meant by the "courtroom work group," and what impact can this group have on criminal justice policies and practices?
8. What are the differences between indeterminate sentencing and determinate sentencing? Which (if either) of these is more consistent with the crime control model? Which with the due process model? Do sentencing guidelines fit with either of the two models? Explain.
9. Do we have any evidence that the death penalty serves as a deterrent to would-be killers? What has been the general trend since the mid-1970s in the rulings by the U.S. Supreme Court in regard to the death penalty?
10. In three or four paragraphs respond to the open-ended proposition that "the juvenile justice system in the United States is becoming more like the adult system as a result of . . ."

WRITING ASSIGNMENTS

1. Prepare a two-column sheet that contains the elements associated with the crime control model in one column and those associated with the due process model in the second column.
2. In two or three paragraphs compare and contrast indeterminate sentencing with determinate sentencing. What are the policy assumptions associated with each?
3. Prepare a written response to the notion that crime rates in the United States have gone down largely as a result of more people going to prison.
4. Go to the Bureau of Justice Statistics home page or the Death Penalty Information Center and look up the most recent figures on the death penalty. In a one-page essay explain (1) what has been happening to the number of people on death row in the United States in the past twenty years; (2) what has happened to the number of executions annually; and (3) what the numbers show about people released from death row as a result of having their convictions overturned or their sentences commuted.
5. As a wrap-up to this chapter (and to help you synthesize what you've read) prepare a one-page essay speculating on whether the crime control or the due process model will dominate in the next ten years. Explain your position.

RECOMMENDED READINGS

John P. Orth (2003). *Due Process of Law: A Brief History*. Lawrence, KS: University Press of Kansas. Orth says that his book was written to explain how the simple phrase "due process of law" has become so complicated and contested. Instead of beginning with the framers of the Constitution, Orth takes a hypothetical case approach based on the common law. The result is a highly readable book that addresses one of the most complex concepts in our legal system.

Herbert L. Packer (1968). *The Limits of the Criminal Sanction*. Stanford, CA: Stanford University Press. Although they are now over fifty years old, the materials discussed by Packer are still relevant today. In fact, this book has become a standard point of reference for many introductory textbooks in the field of criminal justice, and it remains one of the most influential works ever published on this topic. It provides the framework for this chapter, and it should be required reading for all students of criminal justice.

William J. Stuntz (2011). *The Collapse of American Criminal Justice*. Cambridge, MA: Harvard University Press. Stuntz provides a historical review of legislation intended to control crime with a focus on cultural wars (e.g., wars on prostitution and drugs and alcohol). He is critical of the due process revolution ushered in by the Warren Supreme Court and argues that its emphasis on procedures, and not equal protections, led to a legal environment that contributed to harsh punishments.

Franklin E. Zimring (2012). *The City That Became Safe: New York's Lessons for Urban Crime and its Control*. New York: Oxford University Press. While rates of police-reported crime dropped throughout the United States, Zimring shows that they dropped more in New York than in any other large metropolitan area. This book focuses on the role of the police in this change, and Zimring attributes the New York crime reduction to deploying more officers on the streets, new tactics, as well as changes in police management. Unlike many examples illustrated in our book, Zimring shows that the justice system can successfully reduce crime.

CHAPTER 3

Understanding Criminal Justice Policy

INTRODUCTION

All of us want a criminal justice system that treats victims and offenders in a fair and just manner, and is both cost-efficient and effective in reducing crime. An analysis of U.S. crime control strategies, however, shows that some of our policies are misguided, costly, or are ineffective in reducing crime. Mears (2017) has called our justice system out-of-control, and there are no shortages of examples. Between 1971 and 2017, for instance, U.S. taxpayers spent over a trillion dollars to wage a war on drugs (Coyne & Hall, 2017). Despite imprisoning millions of drug-law offenders since the 1970s research has shown that locking them up has not reduced drug use, nor has demand been lowered as the numbers of persons arrested for drug offenses and overdoses have not dropped (Pew Charitable Trusts, 2017). In fact, the *New York Times* estimated that around 64,000 people died from overdoses in 2016 (Katz, 2017), which is more than the number of Americans who will die in motor vehicle crashes and firearm homicides combined.

A question arising from those poor outcomes after a four-decades-long war on drugs is whether there are more effective ways to confront substance abuse problems, such as expanding the number of drug prevention programs, treatment programs for those with addictions, or specialized courts for drug offenders. All of those solutions are cheaper and less harmful than placing people in jail or prison for their involvement in drug-related crimes, especially since so few drug offenders get help behind bars. Once incarcerated, only 11.2 percent of the 1.5 million prison and jail inmates with an alcohol or drug problem actually received any professional addictions treatment (National Center on Addiction and Substance Abuse, 2010, p. 4).

One of the challenges that policymakers confront in their crime reduction efforts is that crime is a complex social problem that defies easy solutions (Walker, 2015). There is no shortage of ideas on how to reduce crime but there is sometimes a disconnection between what is proposed by lawmakers and the legislation that is eventually passed. Furthermore, the implementation of that policy

"on the streets" might not resemble what was originally intended by the legislators who passed the law, as the police, courtroom work group, and correctional officials have considerable discretion, and many reforms have been frustrated by staff inaction. Writing about reforming the courts, for example, Harris and Jesilow (2000, p. 187) say that "members of the courtroom workgroup will act to mediate or nullify legislative enactments that affect the operation of the courts."

In the sections that follow we examine several issues related to criminal justice policy including the stakeholders involved in those processes and barriers to implementing rational policies. We also observe that even after some policies are implemented there are sometimes unintended consequences of these reforms that might make our efforts less effective, or even reduce our safety by increasing crime. Some of those negative results might be reduced if we base policy development on the outcomes of research and evaluation. Altogether, introducing rational criminal justice policies is an easy task to describe on paper, but is an incredibly difficult goal to achieve in the real world.

CHALLENGES TO RATIONAL CRIMINAL JUSTICE POLICIES

Many scholars have been critical of U.S. criminal justice policies that have turned out to be irrational, such as lengthy pre-trial incarceration for first-time nonviolent offenders, boot camps that provide no rehabilitation, lifelong imprisonment for youths under the age of eighteen who committed non-homicide offenses, third strikes for nonviolent offenses that result in twenty-five-year sentences, and sentencing some drug offenders to decades behind bars (Tonry, 2017a). Walker (2015, p. 22) observed that many criminal justice policies were a plague of nonsense and he argues that many of the ideas we have about offenders, crime, and criminal justice system operations are based on faulty assumptions, what he calls "resting on faith rather than facts."

Sometimes we can't even agree on what is a crime. Reiman and Leighton (2017) have questioned justice system priorities, where we vigorously pursue and prosecute offenders committing "crimes on the streets" (who are usually poor) while paying less attention to the persons and corporations who commit thefts such as price fixing that fleece the public, offenses that reduce the quality of our lives (such as the illegal dumping of toxic waste), or result in our deaths. Employees at General Motors (GM), for example, knew that the ignition switches on some of their vehicles were faulty for over a decade, but failed to fix the problem, which led to the deaths of at least 124 people and the injuries of another 275 (Stempel, 2017). Boudette (2017) notes that "GM paid $900 million to settle a federal criminal investigation." Although the people who were killed from this negligence were just as dead as somebody shot after a drunken argument, no GM executives were ever prosecuted or incarcerated. Given those findings, one might ask whether our justice system is rational and how our system evolved into its current state.

Mears (2010, pp. 20–33) described seven barriers to enacting rational criminal justice policies. As we noted in Chapter 1 the policymaking process is seldom

straightforward and once politicians get involved in turning a good idea about crime reduction into legislation there is always going to be some compromise. The need to compromise is not necessarily a bad thing as the checks and balances on government powers limit the ability of politicians to enact radical policies that might turn out to be harmful. In this section, the seven barriers to rational justice policies identified by Mears are briefly described and they include:

- the politicization of crime,
- false dichotomies,
- bad cases make bad policies,
- symbolic gestures,
- public opinion,
- swings between extremes, and
- limited production of policy research.

With respect to the politicization of crime, in Chapter 2 we described how Richard Nixon used the crime issue to increase his political support in the 1968 presidential campaign, and a half-century later, crime control is still a popular campaign issue for federal, state, and local politicians. One of the challenges of using crime control as a political issue is that controlling crime isn't a simple proposition and since the 1970s many Democrat and Republican politicians have been elected after campaigning on a "get tough on crime" agenda. This was also true in the 2016 presidential election as candidate Donald Trump was committed to a tough-on-crime agenda, and he expressed unwavering support for the police. Hillary Clinton, by contrast, promoted justice system reform, including ending **mass incarceration** (also called **mass imprisonment**). The United States has the second highest incarceration rate in the world and we imprison four to five times as many offenders per capita as most European nations (Walmsley, 2016), despite the fact that crime rates are generally similar between these nations, although murder rates in the United States are typically higher.

Wozniak (2016) observed that voters punish politicians who express ideas that seem "soft on crime" and the outcome of the 2016 presidential election suggests he was correct. One long-term outcome of implementing wars on crime and drugs, however, is that the justice system has lost the trust and confidence of citizens from most marginalized social groups, and taxpayers are stuck with paying for the tough-on-crime policies, which include an over-reliance on incarceration. Not only are our criminal justice policies too expensive for many jurisdictions to afford, but the overuse of imprisonment (and the security level of inmates placed within a prison) may actually contribute to higher levels of crime with some offenders once released (Gaes & Camp, 2009).

In terms of false dichotomies for policy decisions, Mears (2010, p. 22) defines this as an approach where politicians condense criminal justice polices into "either-or" choices, and he uses the example of using either punishment or rehabilitation to change offender behavior. Reliance upon only one of these options is a poor choice for policymakers interested in making positive reforms because there are varieties of offenders and not all of them will respond positively to a single approach, just

as we wouldn't expect that all people suffering from cancer would be cured by the same treatment. Thus, we need a range of options so we can divert some nonviolent, first-time offenders from the justice system altogether, or impose relatively "soft" sanctions on them so that their futures aren't harmed, while keeping the ability to levy harsh punishments on offenders who pose a high risk to public safety.

One of the problems that politicians must confront involves incidents where serious or extreme, but rarely occurring, crimes can lead to the enactment of bad policies. This is sometimes called "hard cases make bad law." These cases always receive considerable media attention and often the circumstances of the case or the offender lead to a lack of punishment or the case "falls through the cracks" of the system. Phrased another way, the justice system usually does a good job of dealing with average cases, but sometimes fails when it comes to exceptional cases that rarely occur. An example of a tough case is that of Willie Bosket, a fifteen-year-old who killed two New York subway passengers in 1978. Because he had not reached his sixteenth birthday, he could not be punished in an adult court and there was public outrage that he escaped severe punishment for his role in these murders. The public outrage from this case led to the revision of New York's juvenile justice code to lower the age where adult punishments could be imposed. One unforeseen outcome was that after the new juvenile justice legislation was introduced a large number of young persons, who were not involved in serious crimes, were receiving harsh punishments in adult courts (Singer, 1996).

Mears (2010) observed that legislators use policies he calls symbolic gestures to show the public they are being responsive to the crime problem. Often these policies are introduced soon after a widely publicized or high-profile case occurs. The USA PATRIOT Act, for example, was passed only forty-five days after the 9/11 attacks and few of the legislators who voted on the bill actually read the 342-page document. This is sometimes called a **knee-jerk reaction** of policymakers to a celebrated case—when legislation is quickly passed to respond to an outrageous or rare case. Sometimes these laws are named after a crime victim, such as Megan's Law (that required sex offender registration information to be accessible to the public). Frank (2016) observed that "If a law has a first name, that is a bad sign," and that "Bills named after sympathetic victims are the worst form of knee-jerk lawmaking, but it's a surefire political vote-getting device."

Most symbolic gestures result in making punishments more severe for offenders and Mears observed that some of these sanctions are invisible to the public, what many scholars call **collateral consequences**. Collateral consequences are nonlegal sanctions such as restrictions on voting, access to occupations, as well as placing restrictions on firearms ownership, where offenders live, and their ability to access educational or social services, such as prohibiting persons convicted of some drug crimes from living in public housing. There are thousands of these laws throughout the country, and while some of them make sense—such as restricting sexual offenders from working with youths—some are less rational. Restricting sex offenders from living within 2,000 feet of a school, park, or day care center, for example, forces some of these people into homelessness (Carpenter, 2017). The unforeseen outcome, however, is that homelessness

decreases an ex-prisoner's likelihood of obtaining work, establishing relationships with nonoffenders, and may increase the social isolation of these offenders. These factors will increase their risk of re-offending (Grossi, 2017).

Many of the barriers to developing rational criminal justice policies described thus far are related to the impact of public opinion about crime and criminals on the behavior of politicians. The American public tends to be quite punitive toward offenders, and this can motivate legislators to continue their tough-on-crime campaign platforms, even during times of dropping crime rates. Public support for the death penalty, for example, has remained fairly constant for over seventy years: The Gallup organization started asking Americans about capital punishment in 1941 (59 percent favored the death penalty at that time) but that support was 60 percent in October 2016—although it had declined from a high of 80 percent support in 1994, which was at the peak of U.S. homicide rates (Gallup, 2017a). Politicians are reluctant to swim against the current of public opinion if they want to be re-elected. As a result, they are very sensitive to polls and if the public is tough on crime, they are more likely to express those sentiments in their campaigns.

The problem with political responsiveness to public opinion is that the American justice system is more political than almost any other nation. Most local and state judges, county sheriffs and district attorneys, for example, are elected officials whereas the justice systems in other nations are run by bureaucrats who tend to be isolated from public opinion. Pfaff (2017) argues that the leading cause of U.S. mass imprisonment is the increasingly powerful role that prosecutors have played since the 1980s. Since most district attorneys are elected, they must seek the approval of voters who, as noted above, are consistently punitive. As a result there are many rewards for seeking harsh punishments but almost no value to showing mercy. Another issue that increases the likelihood of harsh sanctions is that state taxpayers are stuck with the bill for decisions made by local prosecutors.

Elliott (1997, p. 294) says that politicians and the public are continually in search of a quick and easy solution to crime, or a "silver bullet." By contrast, almost every criminologist proposes that effective crime reduction strategies must rely upon a broad range of interventions—to respond to a diverse range of offenders and the different circumstances that lead to crime. Mears (2010) contends that many jurisdictions are guilty of prioritizing interventions that focus on a single cause they believe underlies most crime, such as reducing illicit drug use, which in turn reduces street crime and the violence caused by competition for illicit drug markets. Alternatively, having only one primary response to crime, such as imprisoning offenders (without the alternative of rehabilitative options) could also be considered a single response or silver bullet.

Some scholars have observed that our responses to crime resemble a pendulum where shifts in justice system priorities occur. The most common example is the movement from a justice system that placed a greater priority on rehabilitation throughout the 1960s and early 1970s, but was replaced by the get-tough movement by the mid-1970s that resulted in mass imprisonment. Goodman, Page, and Phelps (2017, p.123) challenge the idea of a pendulum and argue that

metaphor is overly simplistic because policy reforms are the end result of political struggles that take place in the larger social context, and they observed that:

> [e]conomics matter. Crime trends matter. Racial, ethnic, and gender inequality matter. Wars, depressions, moral panics about gruesome violence—they all matter. . . . People make them matter. And people make them matter in particular ways (and not others) in the face of opposition from other actors who have competing visions of crime, punishment, justice, rights, freedom, and a host of other ideologically inflected issues.

Their argument has an appeal because there are groups of stakeholders who are advocating for policy reform over the long-term: Mothers Against Drunk Driving, for example, has been advocating for tougher drunk driving laws since 1980. There are times when different ideas about justice may become more popular. When economic times are tough, for instance, placing offenders on probation may be seen by the public as more desirable than imprisoning them: In California, for example, it cost $70,812 to house a state prisoner in 2016 (Legislative Analyst's Office 2017a), while probationers can be supervised for a fraction of that cost.

One issue underling the enactment of irrational criminal justice policies is that we have a limited understanding of "what works" in reducing re-offending or the factors that increase the effectiveness of the police, courts, and corrections. Mears (2010; 2017), an advocate for program evaluation, says that we have done a poor job of demonstrating why some programs are effective while others are not. He contends that a rational criminal justice system would be based on expanding the use of programs that are effective and eliminating ineffective programs. While that is a good idea in theory, it is very difficult to cut ineffective programs. For example, we have known since the mid-1990s that DARE (drug abuse resistance education) programs do not have the desired impact of reducing youthful drug use, but we still fund these programs as they are popular with the public, police, and schools. Programs such as DARE become almost "untouchable" and after learning about the dismal results of a 1994 evaluation the executive director for DARE programs said, "I don't get it. It's like kicking Santa Claus" (Marlow & Rhodes, 1994). While most federal funding to DARE programs was cut in the 1990s and 2000s, Attorney General Jeff Sessions has expressed a desire to revive the program (Ingraham, 2017).

One barrier that Mears (2010) did not address in his analysis was how vested interests impact justice system operations. When people's paychecks depend on locking up offenders, they will resist reforms that threaten their livelihood. Gottschalk (2015b, paragraph 16) observed that:

> Prison guards' unions, state departments of corrections, law enforcement associations, the private corrections industry, and the financial firms that devise bonds and other mechanisms to fund prison infrastructure all stand in the way of a deep reduction in the incarcerated population.

Other stakeholders benefit from high imprisonment practices, including the rural towns that lobby for prison construction to replace lost agriculture and manufacturing jobs. The private correctional industry is often singled out as

the stakeholder with the most to lose by reforming high imprisonment policies (Gottschalk 2015b). Without the option of private correctional operations, state and the federal correctional systems would either have to expand their institutional capacities, or increase community-based correctional programs, as they did prior to the prison expansion of the mid-1970s. During that era probation and parole acted as a "safety valve" for prison overcrowding (Tonry, 2017a).

Other industries have an interest in keeping the status quo when it comes to high incarceration policies. Tonry (2017a) pointed out, for example, that pretrial detention is overused and is harmful to marginalized (e.g., poor and minority) populations. Advocacy organizations, such as the Prison Policy Initiative, contend that the number of jail inmates has increased substantially since the 1980s, when many accused were released on their own recognizance (Rabuy & Kopf, 2016). These organizations have argued that the bail industry has benefitted from those policy changes, and White (2017) reported that about $14 billion in bail bonds are issued every year by 25,000 bail-bond companies. Although legislative reforms have been introduced in several state legislatures in 2017 and 2018 to reduce our reliance on cash bail for nonviolent offenders, there have been no sweeping changes. A number of organizations have said that this lack of change is due to lobbying from organizations such as the Professional Bail Agents of the United States (2017) who expressed the position that "[t]he bail industry is under attack!" That brings us back to the question of who gains and who loses when a new criminal justice program is introduced or an old one is eliminated or reformed. In addition to the challenge of stifled reforms, some changes can have unanticipated outcomes, and these are described in Box 3-1.

BOX 3-1

Unintended and Unforeseen Consequences of Criminal Justice Policy

Legislation intended to improve justice system operations sometimes has outcomes that were not considered or are unforeseen by the politicians and policymakers who enacted the law. As we learn in the following chapters, some justice system reforms have not had their desired impacts. Prior to the introduction of the juvenile court in 1899, for example, youth cases were heard in adult courts, and mixing adults and children in the same jails, police lock-ups, and correctional facilities led to the abuse of some youths. After reformers created a separate juvenile justice system, it was believed these courts would act in their best interests. Later it was found that the due process protections of these children were sometimes disregarded and they were placed in reform schools and harshly punished. Some juveniles were placed in custody for years for status offenses (acts that were not illegal for adults to commit) such as truancy or failing to listen to their parents (Bernard & Kurlychek, 2010). In fact, Schwartz (1989) reported that some girls placed in custody for experimenting with their sexuality spent more time in these correctional facilities than some young men who had committed serious and violent offenses.

One way that politicians can increase justice system rationality is to allow newly enacted laws to expire after a set amount of time, such as a decade. This