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Reassessing Packer in the Light of International Human Rights Norms

FARKHANDA ZIA MANSOOR[†]

I. INTRODUCTION

This article analyzes different aspects of Herbert L. Packer's crime control and due process models in the light of different components of an individual's right to a fair trial, which is a fundamental individual human right. Packer developed his models to illuminate what he saw as two conflicting value systems that competed for priority in the operation of the criminal justice process.

The utilitarian approach dominated the classical period in criminology, where deterrence theory prevailed. However, when the scales tilt too far in the direction of deterrence and crime control, due process rights suffer. Similarly, when the right to a fair trial is violated, it results in questionable convictions, imprisonment, and even execution. When the public learns that innocent persons have been convicted and imprisoned, the justice system itself loses credibility. The risk of human rights violations starts from the moment officials become suspicious of a person and continues through arrest, pre-trial detention, during the trial and appeals, and at the time of imposition of punishment. To avoid wrongful convictions and to protect the individual's right to a fair trial through all of these stages, international fair-trial standards have been designed.

According to Packer's crime control model, repression of criminal conduct is viewed as the most important function of the criminal process. In the absence of such a repression, a general disregard for the criminal law would develop and citizens would live in constant fear. Crime control and due process (which is analogous to the right to a fair trial) approaches represent the extremes. In an attempt to reconcile them, the following issues arise: How can we reconcile the individual's right to a fair trial with the crime control model? Is the integrity of the criminal justice system a higher objective than the conviction of any individual? Is the repression of criminal conduct more important than the protection

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of an individual's right to a fair trial? This article addresses these weighty and substantial issues in an attempt to harmonize their competing interests.

II. PACKER'S MODELS

Herbert Packer developed a framework for evaluating the criminal process in the 1960s that proffered that tendencies in criminal justice might be evaluated by means of crime control and due process.¹ Under the crime control model, the most important function of the criminal process is the repression of criminal conduct.² In its absence, a general disregard for the criminal law would develop, and citizens would live in constant fear. According to Packer, "[t]he failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order and thence to the disappearance of an important condition of human freedom."³ To fulfil its purpose, the system must operate efficiently and must have the capacity to apprehend, try, and convict a high proportion of criminal offenders. But, because of high levels of crime and limited resources, the model's success depends on "speed[,] and minimizing the occasions for challenge."⁴ Accordingly, formal fact-finding through examination and cross-examination in court is slow and wasteful.⁵ Moreover, "speed can best be achieved by allowing the police to establish the facts through interrogation."⁶ To further guarantee speed, procedures must be uniform and routine, so that the model as a whole resembles a conveyor belt in its operation.⁷ Hence, "the presumption of guilt is what makes it possible for the system to deal efficiently with large numbers [of suspected criminals] as the crime control model demands."⁸

The expertise of police and prosecutors is relied upon to screen those who are likely innocent, while those who are likely guilty are passed quickly through the remaining stages of the process. "If there is confidence in the informal administrative fact-finding activities that take

¹ HERBERT L. PACKER, *THE LIMITS OF CRIMINAL SANCTION*, 153 (1969).

² *Id.* at 158. See also ANDREW SANDERS and RICHARD YOUNG, *Criminal Justice*, at 22 (2d ed. 2000).

³ *Id.*

⁴ Extra judicial processes are preferred to judicial processes. See *id.* at 159.

⁵ SANDERS & YOUNG, *supra* note 2, at 22.

⁶ PACKER, *supra* note 1, at 159.

⁷ *Id.*

⁸ *Id.* at 160.

place in the early stages of the criminal process, the remaining stages of the process can be relatively perfunctory without any loss in operating efficiency.”⁹

The model accepts that some mistakes will be made in identifying those that are likely guilty and those that are likely innocent, and it is prepared to tolerate those mistakes for the sake of overall achievement of efficient repression of crime. Moreover, if many guilty people escape liability, or if the system was perceived to be generally unreliable,¹⁰ then the deterrent effect of the criminal law would be weakened.¹¹ The wrongful conviction of the innocent is not seen as a problem *per se*. Safeguards against such miscarriages of justice are only essential where a failure to provide them would jeopardize the overall achievement of repressing crime. This means that the crime control model gives some importance to individuals’ rights in special circumstances only when the overall goal of repressing crime is being affected. Otherwise, findings of guilt should be regarded as final.¹² For the crime control model, it is intolerable that credible evidence is ruled inadmissible for the sole reason that the methods used to obtain it were improper. To let the guilty go free on such a technicality undermines crime control.¹³ Abuse of process to obtain evidence is immaterial.

Critics of the crime control model emphasize the dangers of error in non-adjudicative fact-finding: The police will naturally hold a belief that they have apprehended the correct suspect, although in fact this may not be true.¹⁴ This may be due in part to the fact that “[p]eople are notoriously unreliable observers of disturbing events,”¹⁵ or observers may be subject to a bias that the police either encourage or will not seek to discover. Further, confessions to the police may be induced by physical or psychological coercion. Indeed, eyewitness misidentifications are a common cause of wrongful conviction.¹⁶ Errors may occur due to psychological trauma or shock experienced by the

⁹ *Id.* at 160-61. See also SANDERS & YOUNG, *supra* note 2, at 22-23.

¹⁰ So, too, would this be the case if it were shown that innocent people were being prosecuted on a large scale.

¹¹ SANDERS & YOUNG, *supra* note 2, at 23.

¹² PACKER, *supra* note 1, at 162.

¹³ SANDERS & YOUNG, *supra* note 2, at 23.

¹⁴ *Id.* at 24.

¹⁵ PACKER, *supra* note 1, at 163.

¹⁶ *False Confession, Wrongful Convictions & Eye Witness Error*, available at <http://faculty.ncwc.edu/toconnor/psy/psylect06.htm> (last visited Dec. 17, 2004).

eyewitness.¹⁷ In such circumstances, the process of fact-finding through examination and cross-examination will not be wasteful (as the crime control model provides), but helpful in searching for the truth, preventing errors, and wrongful convictions.

The due process model¹⁸ (e.g., an individual's right to a fair trial) provides protection against illegitimate conviction through procedural safeguards. If constitutional safeguards are breached, the conviction should be reversed through post-conviction appeal. Accordingly, the correctness of the decision is not the sole concern, and the method of conviction and trial process is important. Prevention and elimination of errors is an end in itself. A formal, adjudicative, fact-finding process, in which an impartial tribunal hears the case, and the accused has a full opportunity to defend him or herself, is necessary to reduce the dangers of error.¹⁹ Mistakes—for example, convicting the innocent or setting the guilty free—should be eliminated to the fullest extent possible. Inversely, under the crime control model, such mistakes are acceptable insofar as they do not interfere with the repression of crime. The due process model, on the other hand, protects individuals' rights to a fair trial, while the crime control model looks towards repression of the crime. Hence, the question arises of how to reconcile an individual's right to a fair trial under the crime control model.

III. THE HUMAN RIGHTS APPROACH

It is arguable that the balancing of conflicting criminal justice aims should not be driven by consequentialist calculations of which set of arrangements would produce the most overall benefit to society. Individual rights must be assigned some special weight in the balancing process.²⁰ The principal priorities lie in protecting the rights of individuals caught up in the criminal process. A "rights"-based model

¹⁷ A study reported by Borchard in 1932 found that eyewitness error contributed to forty-five percent of wrongful convictions. *Id.* (citing E. Borchard, *Convicting the Innocent* (1932)). In 1999, the APAS Div. 41 (American Psychology-Law Society), after reviewing a number of cases, found an eyewitness error rate of an astonishing ninety percent. *Id.* (citing Scott Sleek, *Many Eyewitnesses Identify Wrong Person*, *APA Monitor* (Feb. 1999) available at <http://www.apa.org/monitor/feb99/reno.html> (last visited May 20, 2005)).

¹⁸ PACKER, *supra* note 1, at 163-68.

¹⁹ See generally ANDREW ASHWORTH, *THE CRIMINAL PROCESS: AN EVALUATIVE STUDY* 27-28 (1994).

²⁰ *Id.* at 30-31.

proposes a “general framework of ethical principles” for the criminal process, including the right of innocent not to be convicted, fair treatment, presumption of innocence, the principle of legality,²¹ and the principle of equality of arms.²² According to this approach, an individual’s right to a fair trial must be protected because a purely utilitarian approach cannot keep the necessary balance.²³

Andrew Ashworth concedes that the protection of human rights is not the fundamental aim of the criminal process,²⁴ which leads to the question of why we process cases through the system towards a court appearance. Surely the answer cannot be found in respect for human rights, whether in the form of the European Convention on Human Rights (ECHR) or any other declaration. The aim of the criminal process is not to show respect for human rights. It is to assist the conviction of the guilty and the acquittal of the innocent in a way that respects the human rights of all individuals affected.²⁵ The protection of human rights, therefore, needs to form part of the fundamental justification but it cannot be the sole or even primary justification. Ashworth’s framework is a method for resolving criminal justice issues,²⁶ and it consists of balancing rights and interests only after a lengthy and careful process, whereby rights and interests are identified, arguments for including some and excluding others are set out, and appropriate weights are assigned to particular rights and interests.²⁷ Above all, this must be a properly researched, reasoned, and principled course of arguments.²⁸ His emphasis on procedural fairness could be viewed as a principled defense of the key elements of Packer’s due process model.²⁹ The human rights norms effectively force adoption of a due process rather than a crime control model.

Breaches of the rights set forth by the European Convention on Human Rights could be challenged before the European Court of Human Rights. If the Court were to rule that a breach had occurred, the English Courts would be obliged to amend the offending law in order to give

²¹ The law should state clearly and in advance the body of rules and exceptions relating to the rights and powers that may be taken over individuals during the criminal process.

²² SANDERS & YOUNG, *supra* note 2, at 22.

²³ *Id.*

²⁴ ASHWORTH, *supra* note 19, at 22.

²⁵ *Id.*

²⁶ *Id.* at 26.

²⁷ *Id.* at 27-37.

²⁸ *Id.* at 31.

²⁹ CLIVE WALKER, *THE PREVENTION OF TERRORISM IN BRITISH LAW* 12 (2d ed. 1992).

effect to international obligations. The recognition that these procedures were slow eventually led to the passing of the Human Rights Act of 1998. The legislation requires British Courts to take account of the Convention and the decisions of the European Court.³⁰ If a common law precedent is found to be inconsistent with the Convention, the latter must be followed.³¹ If a court finds that an English statute cannot be interpreted in accordance with the Convention, the court may make a declaration of incompatibility.³²

Hence, the principles and rights established by the European Court of Human Rights provide criteria that can be used to evaluate a criminal justice system.³³ Laws and practices that undermine the rights established by the Court may be seen as unethical since they contravene international obligations and are inconsistent with the rule of law.³⁴

Further, human rights jurisprudence has now developed to the point where it embodies an authoritative resolution of at least some of the conflicting interests at stake within the criminal justice system.³⁵ Moreover, as a result of the Human Rights Act of 1998, human rights standards will play a much more influential role throughout the criminal process in the foreseeable future.³⁶ Never again will a Royal Commission be able to ignore human rights, as the Runciman Commission did.³⁷ For all these reasons, the protection of human rights must be considered in any modern analysis of the criminal justice system.

There is a growing European Union dimension to criminal law and criminal justice, particularly after the Maastricht Treaty. The articles of the Maastricht Treaty have priority over UK law, which should in any event be interpreted so as to accord with European Convention Law.³⁸ The European Court of Justice has tended to insist on procedural

³⁰ The Convention makes it a legal duty for public authorities (including central and local governmental bodies, courts, and police) to act compatibly with the ECHR. *A guide to the Criminal Justice System in England and Wales*, available at <http://www.homeoffice.gov.uk/rds/cjschap1.html> (last visited Dec. 17, 2004).

³¹ *Id.*

³² SANDERS & YOUNG, *supra* note 2, at 37.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 39.

³⁶ *Id.*

³⁷ *Id.*

³⁸ The ECJ, National Courts and the Supremacy of Community Law at <http://www.ecln.net/rome2002/craig.pdf> (last visited May 20, 2005).

protections and notions of a fair trial analogous to those declared by the ECHR.³⁹ It can also be argued that the European Convention was not drafted specifically with criminal proceedings in mind and that it ought to be reconsidered in light of increasing awareness of the effects of criminal cases on individuals and emerging standards of fairness.

IV. AN INDIVIDUAL'S RIGHT TO A FAIR TRIAL

The right to a fair trial figured prominently to guarantee human rights at an international level in 1948⁴⁰ and has been affirmed as a basic human right.⁴¹ The American Convention on Human Rights, African Charter on Human and Peoples Rights, European Convention on Human Rights, and International Convention on Civil and Political Rights, among others, consider the requirement of a fair trial as a human right in criminal proceedings.⁴² The specification of the term "criminal" is necessary to prevent contracting states from undermining the convention's due process guarantees by reclassifying an offense as disciplinary, administrative,⁴³ regulatory, or a civil penalty.⁴⁴ In *Campbell & Fell*, the court held that criminal procedure might have such serious consequences for the person concerned as to the duration of his detention that it was to be considered of a criminal character.⁴⁵ Duration is to be an important factor.

The right to a fair trial in criminal proceedings concerns the

³⁹ Ashworth, *supra* note 19, at 42-43.

⁴⁰ Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217(A) (III), U.N. Doc. A/810 (1948).

⁴¹ Universal Declaration of Human Rights art. 10-11, G.A. Res. 217(A) (III) U.N. Doc A/810 (1948), *reprinted in* BLACKSTONE'S INTERNATIONAL HUMAN RIGHTS DOCUMENTS 23 (P.R. Ghandhi ed., 2d ed. (2000)).

⁴² This right is granted in civil proceedings as well. For details, see Walker, *The Impact of European standards on the Right to a Fair Trial in Civil Proceedings in United Kingdom Domestic Law*, 4 EHRLR (1999).

⁴³ C.J.F. Kidd, *Disciplinary Proceedings and the Right to a Fair Criminal Trial under the European Convention on Human Rights*, 36 Int'l & Comp. L.Q. 856-57 (1987).

⁴⁴ Ben Emmerson QC and Andrew Ashworth QC, *Human Rights and Criminal Justice*, Sweet and Maxwell, 2001 at 149; Stavros, *The Guarantees for Accused Person Under Article 6 of the European Convention on Human Rights* 1-39 (1993); D.J. Harris et al., *The Law of the European Convention on Human Rights* 166-73 (1995). For the common law perspective on the definition of crime, see Glanville Williams, *The Definition of Crime*, 8 Current Legal Problems 107 (1955); Graham Hughes, *The Concept of Crime: An American View*, Crim. L. Rev. 239 (1959).

⁴⁵ *Cambell & Fell v. U.K.*, 7 Eur. H.R. 165 (1985).

additional element of protection of the accused against an abuse of power by the state. Its first component is *eglite des armes*, or “equality of arms,” meaning that the defendant must be given an equal opportunity in the proceedings before a tribunal.⁴⁶ In *Delcourt v. Belgium*, the applicant complained that a member of the Department of the Procurer General attached to the court, not only made his submission in open court but also took part in the court’s deliberations. The court observed that the department is not concerned with the prosecution of crime, and held that in those circumstances there was no violation of the principle of equality, as the duty of the department is to assist the court in supervising the lawfulness of the decision and to ensure the uniformity of judicial precedent, which does not affect the equality principle.⁴⁷ A competent, independent, and impartial tribunal established by law is essential to a fair trial.⁴⁸ The tribunal has to satisfy legal notions of competence, and the judges must be professionally qualified.⁴⁹ Among the bodies that have attracted critical attention are Special Courts’⁵⁰ self-management, comrade, state security, and gun courts. The HRC expressed that, in many countries, military or special courts try civilians,⁵¹ which presents serious problems as far as the impartial administration of justice is concerned. Often the establishments of such courts are under exceptional procedures that do not comply with normal standards of justice.

The court must be impartial and independent from other organs of government as viewed in the doctrine of separation of power.⁵² However, Graefrath has a different concept of the separation of power.

⁴⁶ Universal Declaration on Human Rights, Art. 10 (UNA Res. 217 (A) III), 10 Dec. 1948); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14(1), 999 U.N.T.S. 171; Human Rights Act, 1998, c. 42, § 6(1).

⁴⁷ LOUIS HENKIN, *THE INTERNATIONAL BILL OF RIGHTS, THE COVENANT OF CIVIL & POLITICAL RIGHTS* 138-155 (Columbia University Press 1981); *Delcourt v. Belgium*, 11 Eur. Ct. H.R. (ser B) (1970).

⁴⁸ David Harris, *The Right to a Fair Trial in Criminal Proceedings as a Human Right*, in 16 *International & Comparative Law Quarterly* 348, 354 (1967).

⁴⁹ HENKIN, *supra* note 47.

⁵⁰ A trial must be conducted by a court established by law. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14(1), 999 U.N.T.S. 171; Human Rights Act, 1998, c. 42, § 6(1).

⁵¹ DOMINICK MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE, ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 399 (Clarendon Press, Oxford 1991). Harris, *supra* note 48, at 354.

⁵² Art. 14(1), UN Draft Covenant; Art. 6 (1) European Convention; Martin L. Friedland, *Judicial Independence and Accountability: A Canadian Perspective*, 7 *CRIM. L.F.* 605-623 (1996).

He did not think that the separation of powers and the establishment of professional and irremovable Judges were of themselves guarantees for the establishment of an independent judiciary. “Furthermore, the irremovability of judges could be seen as a kind of discrimination and privilege vis-à-vis other professions on the grounds of social status and could be dangerous to the establishment of a democratic society.”⁵³ The lack of independence may be shown if the “situation is potentially unsatisfactory and [if] it has had in fact a significant and continuing effect upon the court’s behaviour.”⁵⁴

The factors that affect the independence and impartiality of the judiciary are legislature or executive interference to set aside judicial decisions, defective rules and procedures governing the appointment, election, nomination, dismissal, recall, suspension, transfer, and retirement of judges, and their terms, conditions, and tenure, among many others.⁵⁵

A public hearing is essential for a fair trial as public proceedings ensure a fair trial by protecting the litigant against arbitrary decisions.⁵⁶ English criminal procedure requires that all evidence and argument must take place in public, with access being afforded to the press.⁵⁷ When the court proceedings are not hidden from the public, this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public’s confidence in the administration of justice, which is an essential element of the right to a fair trial. However, adverse publicity carries a risk of prejudice to the fair trial,⁵⁸ particularly if the case is to be tried to a jury. English courts have responded to this risk by holding that prejudicial publicity may lead to the stay of a criminal prosecution on grounds of abuse of process, where no fair trial is possible, and may lead to the quashing of a criminal conviction.⁵⁹ The crime control model,

⁵³ DOMINICK MCGOLDRICK, *supra* note 51 at 401.

⁵⁴ *Id.* See also Eisenberg, *Independence of Judges in the State of Israel*, 5 *Journal of the International Commission of Jurists* 74 at 83-84 (1964).

⁵⁵ DOMINICK MCGOLDRICK, *supra* note 51, at 401.

⁵⁶ *Cambell & Fell v. U.K.*, *supra* note 39. See also P. VAN DIJK AND G. J. H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 325 (Kluwer Law and Taxation Publishers) (2nd ed. 1990).

⁵⁷ Ben Emmerson QC and Andrew Ashworth QC, *supra* note 44, at 359.

⁵⁸ It is also notable that the HRC regards the public hearing requirement as an important safeguard.

⁵⁹ *R v. McCann and ors*, 92 Cr. App. R. 239 (1991). See also Universal Declaration on Human Rights, Art. 10 (UNA Res. 217 (A) III), 10 Dec. 1948); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14(1), 999 U.N.T.S. 171.

which prefers an informal fact-finding procedure, most certainly cannot provide protection against arbitrariness.

In special circumstances, a trial can be held in private where it is in the interests of the parties, for maintenance of justice and for reasons of national security. For example, proceedings or judgement shall be made public except where the interests of juveniles so demand.⁶⁰ In the *Bulger Killers* case, the commission declared that the public trial of the accused in an adult court amid massive and highly charged media coverage was severely intimidating and prevented them from playing an effective role in the proceedings, thereby impairing fact-finding and the allocation of responsibility.⁶¹

The accused must be informed promptly⁶² of the nature and cause of the charge against him or her in the language he or she understands.⁶³ In the *Ofner* case,⁶⁴ the European Commission explained that the degree of information required is that which enables the accused to prepare his or her defence accordingly. The accused has the right to have adequate time and facilities to prepare a defence and to communicate with counsel of his or her own choosing. But what amounts to “adequate time”? The answer depends upon the facts of each case. For example, the European Commission⁶⁵ ruled that a fifteen-day time limit upon the right to appeal was not prima facie a breach of the above rule. The term “facilities”⁶⁶ also includes personal communication between the accused and his or her counsel where the accused is in custody. In the *Golder* case, a refusal to permit detainees to correspond with their counsel or persons providing legal aid was found to be contrary to the provision of Article 6.⁶⁷ The right to counsel is not infringed, at least where legal aid is

⁶⁰ *Id.*

⁶¹ Clare Dyer, *Bulger Killers ‘Were Denied Fair Trial,’* GUARDIAN, Mar. 16, 1999, at 2.

⁶² International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14, para. 3, sec. a (hereinafter ICCPR). See also Eur. Conv. on H.R., February 2003, art. 6, para. 3, sec. a (hereinafter ECHR). See also Inter-Am. Conv. on H.R., Nov. 11, 1969, art. 8, para. 1 (hereinafter ACHR).

⁶³ Charge is used in UN text; accusation is used in European and American texts, as it was in the earlier UN version. David Harris, *supra* note 48, at 362.

⁶⁴ 3 Year Book of European Convention on Human Rights at 322.

⁶⁵ Application 441/58, 2 Year Book of the European Convention on Human Rights at 391. *The Wemhoff case* (second decision) 7 Year Book of European Convention on Human Rights at 283. See also Harris, *supra* note 48, at 463 (1967).

⁶⁶ One meaning of “facility” is access to documents or similar evidence, which the defense reasonably needs in the preparation of its case. David Harris, *supra* note 48, at 363.

⁶⁷ *Golder v. U.K.*, 1 Eur. Ct. H.R. 524 (1979-80).

given, where counsel lives some distance away and communication cannot be in person.⁶⁸ The European Commission ruled that a lawyer is free to refuse his or her services, and a violation of the Convention only occurs where the refusal is due to official pressure.⁶⁹ Article 6 imposes an obligation on the state to establish courts that operate within reasonable time and without undue delay.⁷⁰

ICCPR guarantees an accused the right to be present while tried, and the guarantee provided extends to all stages in the taking of evidence.⁷¹ The reason why the accused should be present at the trial is that he or she may hear the case against him and have the opportunity to defend himself. Further, presence is not limited to merely physical presence, but also the capability to understand the proceedings.⁷² The right of an accused to be present at the hearing of a charge is fundamental to the fairness of the proceedings.

The accused may not be compelled to testify against himself or to confess his guilt,⁷³ and the accused is presumed innocent until his or her guilt is proved beyond reasonable doubt.⁷⁴ The burden of proof is on the prosecution and the accused has the benefit of doubt.⁷⁵ A violation of the presumption was alleged in the *Nielson* case.⁷⁶ It was held that the presumption does not mean that the accused is guaranteed that a witness at his or her trial will express no prejudicial opinions concerning guilt or innocence.⁷⁷ Hence, the right to a fair trial is based on the presumption of innocence, while the Crime Control model is based on a presumption of guilt.

Most legal systems provide special procedures for juvenile accused

⁶⁸ Application 1135/61, 6 Year Book of the European Convention on Human Rights at 194. In that case, the lawyer appointed to act for the applicant lived 200 kilometers away. The commission found it sufficient that communication by post was possible.

⁶⁹ Application 1420/62, 1477/62 and 1478/62, 6 Year Book of the European Convention on Human Rights, 590 at 628.

⁷⁰ ECHR, art. 6, para. 1; *see also* ICCPR art. 14, para.1, sec. c.

⁷¹ ICCPR art. 14, para. 2, sec. d; *see also* MCGOLDRICK, *supra* note 55, at 408: "Members have asked for details of any rules or procedures excluding or restricting a defendant's presence at trial. Doubts have been raised about trials *in absentia*."

⁷² EMMERSON ET AL., *supra* note 44, at 401.

⁷³ ICCPR art. 14, para. 3, sec. g.

⁷⁴ ICCPR art. 14, para. 2.

⁷⁵ MCGOLDRICK, *supra* note 51, at 405.

⁷⁶ 2 Year Book of the European Convention on Human Rights, at 412.

⁷⁷ *Id.*

or witnesses.⁷⁸ In *V v. The United Kingdom*⁷⁹, the court held that where juveniles are tried in the Crown court, Article 6 requires a special procedure that promotes the welfare of the young defendant and enables him or her to understand and participate fully in the proceedings.

Everyone convicted of a crime shall have the right to his or her conviction and sentence being reviewed by a higher tribunal according to law.⁸⁰ The Convention does not guarantee a right of appeal as a component of the right to a fair hearing.⁸¹ The right to appeal is guaranteed as soon as the criminal conviction is determined. A criminal conviction is not really determined as long as the verdict of acquittal or conviction has not become final.⁸² It is “of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal.”⁸³

The right to compensation for wrongful conviction is guaranteed in ICCPR.⁸⁴ This of course is a matter that arises after the trial, even if that term is extended to include appeal proceedings. Hence, it is not an aspect of the right to a fair trial in the sense of the provisions that have been examined so far. Even so, the question is intimately connected with the administration of the criminal law. If it is to be regarded as appropriated for inclusion in a human rights guarantee at all, it is best to attach it to the text relating to a fair trial.⁸⁵ No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted.⁸⁶ Protection against double jeopardy

⁷⁸ In the UN Commission on Human Rights this term refers to “young people for whom the codes of most countries make special provisions though the maximum age might be different in different countries.” E/CN.4/SR. 167, p.16.

⁷⁹ 30 Eur. Ct. H.R. 121 (2000).

⁸⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 16, para. 5 (hereinafter ICCPR).

⁸¹ ICCPR art 6. But where domestic law provides for an appeal against conviction or sentence, whether on grounds of fact or law, than the appeal proceeding will be treated as an extension of the trial process, and accordingly will be subject to the requirements of Art. 6.

⁸² *Delcourt v. Belg.*, 1 Eur. Ct. H.R. 355 at Para. 25 (1979-80).

⁸³ *Lala v. Neth.*, 18 Eur. Ct. H.R. 586 at Para. 33 (1994); *Pelladoah v. Neth.*, 19 Eur. Ct. H.R. 81 at Para. 40 (1995).

⁸⁴ ICCPR art 14, para 6.

⁸⁵ David Harris, *supra* note 43, at 373-74.

⁸⁶ ICCPR art 14, para. 7. All European states recognize that once ordinary appellate remedies have been exhausted, or the relevant time limit for appealing has expired, a conviction or acquittal is to be regarded as irrevocable, and acquires the quality of *res judicata*.

is granted.

The right to a fair trial is granted by various human rights documents with the basic aim of seeking justice for individuals. The concept of justice is timeless, as is the corresponding concern about wrongfully convicting an innocent person. As Daniel Webster once proclaimed, justice is the “greatest interest of man on earth.”⁸⁷

V. THE RIGHT NOT TO BE WRONGLY CONVICTED

One fundamental purpose of the criminal process is to ensure accuracy of outcomes—or what Bentham termed “rectitude”—which requires recognition of the weaknesses of certain types of evidence and taking steps to avoid or minimize the risks of mistaken assessments of evidence which leads to wrongful acquittals or convictions. The detailed provisions of Article 6 ensure that the proceedings—not just the trial—are fair.⁸⁸ Issues related to evidence are of paramount importance. The court has stated that the rights in Article 6(3) are only particular examples of the overall right to a fair trial.⁸⁹ The Strasbourg court has taken the view that decisions about evidence are largely a matter for the domestic courts.⁹⁰ Wadham and Mountford say “that evidence is in general a matter for the domestic courts”⁹¹ and Article 6 does not require any particular rules for evidence, provided the trial as a whole is fair.

However, the use of evidence obtained by maltreatment may make the trial unfair. If the behaviour of the prosecution agencies has deprived a guilty verdict of its moral legitimacy, the appellate court must have residual power to quash the verdict, no matter how strong the evidence of guilt. The integrity of the criminal justice system is a higher objective than the conviction of an individual.⁹² (Under the crime control model, credible evidence is not discarded simply because the methods to obtain it were improper. Where there is sufficient reliable evidence of guilt, even the most serious misconduct by the prosecution should not result in the conviction being quashed.)

Similarly, the use of hearsay evidence without being tested may also

⁸⁷ C. Ronald Huff, Arye Rattner, Edward Sagarin, *Convicted but innocent. Wrongful Convictions and Public Policy*, Sage publications (1996).

⁸⁸ *Karasa v. Switz.*, 18 Eur. Ct. H.R. 188 at Paras. 44-61 (1991).

⁸⁹ *Artico v. Italy*, 3 Eur. Ct.H.R. 1 (1980).

⁹⁰ *Schenk v. Switz.*, 13 Eur. Ct. H.R. 242 (1991).

⁹¹ *Edwards v. U.K.*, 15 Eur. Ct. H.R. 417 (1992).

⁹² *Sanders and Young*, *supra* note 2, at 23.

create unfairness.⁹³ The right not to be wrongly convicted is a strongly expressed principle, which relates closely to one aspect of rectitude. Ronald Dworkin has argued that the right of an innocent person not to be convicted should be regarded as fundamental.⁹⁴ It is not a mere harm but a moral harm. For one thing, there is a misapplication of blame, and a public censure, which is a deep injustice. The right to a fair trial insists on a criminal process and justice system to avoid miscarriages of justice and wrongful convictions.⁹⁵ In contrast, according to the crime control model, repression of criminal conduct is the main target and prevention of wrongful conviction is secondary.

VI. INTEGRITY PRINCIPLE

The integrity of the administration of the criminal justice system requires that law enforcement officers should not use methods of investigation that breach the law and that courts should not act upon evidence obtained by those means. (The integrity principle is consistent with the human rights approach.) If the system is to retain its legitimacy and moral authority, it must ensure that its agents do not themselves break the law. Justices Holmes and Brandeis argued in *Olmstead v. United States* that government is the potent, omnipresent teacher.⁹⁶ For good or for ill, it teaches by its example. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself, which subsequently invites anarchy.

Moreover, there is strong evidence that individuals are more likely to accept decisions if they believe that the proceedings were fair.⁹⁷ It can therefore be argued that the integrity principle must be supported because it is right.⁹⁸ The House of Lords in *R. v. Horseferry Road*⁹⁹ held that English courts should not adopt a behaviour that threatens either basic human rights or the rule of law. This is a restatement of the integrity principle, because it accepts that unlawful behaviour at one stage of criminal process can reflect upon the integrity of the whole. Moreover, it links the principle to both basic human rights and the rule of

⁹³ *Kostovski v. Neth.*, 12 Eur. Ct. H. R. 434 (1989).

⁹⁴ Ashworth, *supra* note 19, at 50.

⁹⁵ *Id.* at 51.

⁹⁶ *Olmstead v. United States*, 277 U.S. 438, 484-85 (1928).

⁹⁷ Ashworth, *supra* note 19, at 53.

⁹⁸ *Id.*

⁹⁹ 1 AC 42 (1992).

law.¹⁰⁰ It would be nonsense for a legal system to have contradictory rules, because that would give conflicting signals to citizens or adjudicators, and that in turn would flout one of the basic elements of the idea of law as a method of guiding conduct.

Ashworth believes that the majority of citizens do not object to a little illegality if apparently major criminals are brought to book.¹⁰¹ A powerful consideration in public interest is the desirability that as many serious offenders as possible be prosecuted and convicted. It has been used in *R. v. Latif and Shahzad*,¹⁰² as a justification for overlooking misconduct, which might otherwise have been held to compromise the integrity of the criminal process. It has been used to justify taking extra powers against certain types of suspects and offenders, without respect for human rights. The Criminal Justice Act of 1987 granted far-reaching investigative powers to serious fraud offences *without* hardly a reference to Article 6(2) of the ECHR.¹⁰³

Can this be the proper approach? If rights are to have value, they must operate to protect individuals against the demands of the collectivists (which is the demand of the crime control model). The right of an innocent person not to be convicted has its most powerful application to measures attended by a risk of the miscarriage of justice, for example, the use of identification or confession evidence. Thus, the powers in respect of serious fraud must be shown to be compatible with the presumption of innocence set out in Article 6(2) of the ECHR, a provision containing no exception.

The Court of Appeal in *R. v Khan (Sultan)* said that under the English Law, there was, in general, nothing unlawful about a breach of privacy and that it was a common law rule that relevant evidence, obtained by the police by improper means, was admissible in a criminal trial (which is consistent with the crime control model).¹⁰⁴ The fact that evidence had been obtained in circumstances that amounted to a breach of Article 8¹⁰⁵ was relevant as well, but not determinative of the judge's

¹⁰⁰ Ashworth, *supra* note 19 at 54.

¹⁰¹ *Id.* at 53.

¹⁰² 1 W.L.R. 104 (Eng. H.L. 1996).

¹⁰³ *Saunders v. United Kingdom*, 23 E.H.R.R. 313 (Eur. Ct. H.R. 1996).

¹⁰⁴ *R v. Khan (Sultan)*, 3 All ER (1996).

¹⁰⁵ Art. 8 Convention for the Protection of Human Rights and Fundamental Freedoms 1950. Rome, 4 November 1950 Entry into force 3 September 1953 available at <http://www.selfregulation.info/cocon/echr-txt.htm> (last visited on May 20, 05)

discretion to admit or exclude such evidence under Section 78.¹⁰⁶ The judge's discretion had to be exercised as to whether the admission of the evidence would render the trial unfair, and the use at a criminal trial of material obtained in breach of the rights of privacy enshrined in Article 8 did not necessarily mean that the trial would be unfair.¹⁰⁷

In the above cases, the court tried to reconcile the individual's right to a fair trial, which says that evidence obtained by police, using improper means, is inadmissible, while the crime control model posits that it is intolerable to declare credible evidence inadmissible only because it is obtained through improper methods. The Court tried to reconcile the right to a fair trial and crime control approach by avoiding extreme positions, making it a condition for acceptance of evidence obtained through improper means, that it does not render the trial unfair. In the *Sultan Khan* case the court considered the right to privacy relevant but not a determinative factor, as it did not render the trial unfair.

VII. WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE

In the words of Dr. Martin Luther King, Jr., "[i]njustice anywhere is a threat to justice everywhere."¹⁰⁸ The fact is that innocent people are convicted and later exonerated. The United States, England, and other countries have seen several cases of executed people whose innocence was later established.¹⁰⁹ Many were executed even when there was great doubt as to their guilt, and several others who were innocent had their lives saved from the hands of the executioner only after appeal.¹¹⁰ Bedaus and Radelet's research showed that in United States during the period from 1905 and 1974, twenty-three innocent persons were executed.¹¹¹ For every wrongful conviction, the actual offender unjustly remains free, perhaps to victimize additional citizens. In a number of cases, errors have been discovered in the investigation and trial stages

¹⁰⁶ S.78 of Police and Criminal Evidence Act (PACE) 1984 provides the court with the discretion to exclude otherwise admissible evidence which the prosecution proposes to use, where having regard to all the circumstances, including how the evidence (e.g., a confession) was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. *Available at* <http://www.forensicmed.co.uk/confessions.htm> (last visited on May 20, 2005).

¹⁰⁷ *R. v. Khan*, 3 All E.R. 289 (H.L. 1996).

¹⁰⁸ Huff, Rattner, Sagarin, *supra* note 87, at 150.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

which led to wrongful convictions, followed by defendants spending long years in prison for serious crimes that they did not commit.¹¹²

In the *Birmingham Six* case in 1975, the defendants had been convicted of murder by causing an explosion.¹¹³ Their appeal was dismissed.¹¹⁴ In 1987, the Home Secretary referred the case back to the Court of Appeal, on the grounds that the defendants had been beaten following their arrest. The appeal was dismissed.¹¹⁵ In 1990, the case was referred to the Court of Appeal again as a result of more new evidence.¹¹⁶ Finally, in 1991, the Court of Appeal quashed the convictions.¹¹⁷ The defendants had maintained from the outset that they had been beaten and that the so-called confessions were false, but served over sixteen years in prison.¹¹⁸ The Crown Prosecution Service decided that there was sufficient evidence to prosecute three investigating police officers, for perjury and conspiracy to pervert the course of justice, but the judge stayed the prosecution, because the publicity of the *Birmingham Six* case made it impossible for the police officers to receive a fair trial.¹¹⁹

In the case of *Isidore Zimmerman*, the convict was on death row in New York. Two hours before he was scheduled to be executed, his punishment was commuted to life imprisonment.¹²⁰ He served twenty-four years before he was completely exonerated.¹²¹ He won a judgment for compensation after battling for twenty years and was awarded one million dollars.¹²² He died four months later.¹²³

The criminal justice system, starting with police investigation of an alleged crime and culminating in the appellate courts, tends to ratify errors made at lower levels in the system. The further a case progresses in the system, the less chance there is that an error will be discovered and

¹¹² Joshua Rozenberg, *Miscarriages of Justice*, CRIMINAL JUSTICE UNDER STRESS 91-117 (Eric Stockdale & Silvia Casale, eds., 1992).

¹¹³ *R v. McKenny et al.* 93 Cr.App.R. 287 (1991).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 318.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Responding to Custody Levels--Compensation for Miscarriage of Justice*, available at <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/car/kip6/21.html> (last visited Apr. 4, 2005).

¹²¹ *Id.*

¹²² *Id.*

¹²³ Huff, Rattner, Sagarin, *supra* note 87.

corrected unless it involves a basic issue of constitutional rights and due process.¹²⁴ It is not possible to prevent all wrongful convictions, but the probability of a wrongful conviction can be reduced by improving not only the procedure of obtaining and collecting evidence, but the procedure before and during the trial as well. In decreasing the rate of wrongful convictions, the formal fact-finding procedure of a fair trial can play a more effective role than the informal fact-finding procedure of the crime control model.

VIII. IDENTIFYING AND EXONERATING CONVICTED INNOCENTS

Packer's due process model, like an individual's right to a fair trial, emphasizes quality control. To achieve that end, the model incorporates certain assumptions about post-conviction appeals. The appellate court should be entitled to consider any error prejudicial to the rights of the accused.¹²⁵ Any error that violates the defendant's basic rights should be grounds for reversal, independent of the strength of the case against the defendant.¹²⁶ Abuses that occur at the trial level, such as prosecutorial misconduct, prejudicial publicity, and ineffective counsel, must be recognized at the appellate level.¹²⁷ Having examined cases of wrongful conviction, it becomes clear that Packer's prescriptions remain important safeguards against errors that have been committed in *Zimmerman*, *Birmingham Six*, and many others.¹²⁸

IX. CONCLUSION

The criminal process is often subject to the conflicting aims and interests of the individual and society. Those conflicts can be resolved by protecting individual rights and by achieving the goal of controlling crime. As Ashworth suggests, this can be done

by organizing the criminal process in such a way as to render the risk of wrongful conviction acceptably low and this necessitates research both into the sources of error and the consequences of erecting safeguards against them. The

¹²⁴ *Id.*

¹²⁵ PACKER, *supra* note 1, at 231.

¹²⁶ *Id.*

¹²⁷ *Id.* at 230-32.

¹²⁸ Huff, Rattner, Sagarin, *supra* note 87. at 153-54.

process of resolving the conflicts should be securely based on facts established by research.¹²⁹

Some of the advocates of a “rights” approach decline to recognize that rights should ever be limited in practice. However, the rights cannot be always absolute; in certain limited circumstances, there may be justification for derogation, for example, because of some national emergency. But any derogation from these rights should be reasoned and minimal. Similarly, the pure utilitarian approach is practically unacceptable in this century which has oppressive regimes without assigning some special weight to certain individual rights. The balancing approach may provide a mechanism for avoiding extreme positions and recognizing practical realities.

It is mistaken to regard the right to a fair trial (the due process model) as one in which the aim is only to protect the suspects. The two models share much common ground, including the assumption that the criminal process ordinarily ought to be invoked by those charged with the responsibility for doing so. When it appears that a crime has been committed, a degree of scrutiny and control must be exercised with respect to the activities of law enforcement officers, and that the security and privacy of the individual may not be invaded at will. It thus follows that both models incorporate the belief that law enforcement is socially desirable because of its crime preventive effects.

Additionally, both models incorporate the belief that there must be some limits to the power of the government to pursue this underlying aim. The difference between the models is that they represent different points of view about what those limits should be. There has to be a compromise between the values of the due process and crime control, because the crime control goal could not be pursued at all if the due process constraints were pressed to the limit of what is possible.¹³⁰ Moreover, while a system that adhered fully to the due process model would no doubt be “inefficient” at producing convictions, it would still seek to convict some of the factually guilty—there would be quantitative output, not just quality control.¹³¹

Packer’s crime control and due process models can be useful for increasing the understanding of the problem of wrongful conviction and

¹²⁹ Ashworth, *supra* note 19, at 52.

¹³⁰ Mike McConville, et al., *Descriptive Critical Sociology: The Choice Is Yours*, 37 *Brit. J. Criminology* 347, 355-56 (1997).

¹³¹ PACKER, *supra* note 1, at 165.

the formulation of public policy recommendations to reduce the frequency with which wrongful convictions occur. If efforts are focused on preventable errors and a fair trial, the criminal justice system can substantially reduce wrongful convictions.