

## **Aims of the Criminal Justice System**

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Chapter 17 forthcoming in Marinella Marmo, Willem de Lint, and Darren Palmer (eds.) (2012) *Crime and Justice: A Guide to Criminology* (4<sup>th</sup> edition). Sydney: Lawbook Co. (Order of second and third editors is subject to change.)

*Note:* there may be slight additions or emendations as the chapter moves through the editorial process.

This chapter updates and revises Chapter 13, which was published in *Crime and Justice: A Guide to Criminology* (3<sup>rd</sup> edition, 2006) edited by Andrew Goldsmith, Mark Israel, and Kathleen Daly.

22 April 2011

# CHAPTER 17

## AIMS OF THE CRIMINAL JUSTICE SYSTEM

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- discretion
- retributive and utilitarian punishment
- Crime Control and Due Process Models
- processual and dispositive decisions
- indeterminate sentencing
- desert-based and individualised sentencing

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## INTRODUCTION

[17.05] This chapter considers the purposes, aims, and values of a criminal justice system and the controversy surrounding each of its terms: system, justice, and criminal. It describes the agencies that form the justice system and the passage of cases through it. Central to the criminal process is the exercise of *discretion* by police officers, prosecutors, defence attorneys, judicial officers, probation officers, and community and institutional correctional staff. As important are the roles of ordinary citizens in reporting crime, working with officials, and participating in the process. Ordinary citizens and justice system workers have strong beliefs on what a criminal justice system should try to achieve. These debates are reviewed, and models of the criminal process are described. Major theories of punishment and their changing popularity across two centuries are also discussed.

## THE PRACTICAL AND SYMBOLIC SIGNIFICANCE OF DOING JUSTICE

[17.10] Over the past two centuries in countries like Australia, the criminal justice system has served two purposes. The first is instrumental or utilitarian: the state responds to crime to secure benefits to the wider society such as crime prevention and crime reduction. A second is symbolic or non-utilitarian: the state must redress imbalances caused by those people who take illegal advantage of another or diminish their human dignity. The first is pragmatic and future oriented: policies and practices are evaluated by their consequences, by their future effects such as reducing crime or reforming people. The second is based on moral principles and is backward oriented: policies and practices are required to enunciate and reinforce what is collectively understood as right and wrong behaviour. Both *crime reduction* and *symbolism* are essential to contemporary notions of doing justice.

## THE CONTROVERSIAL CHARACTER OF THE CRIMINAL JUSTICE SYSTEM

### System or Collection of Agencies?

[17.15] The phrase *criminal justice system* invites much conjecture. Each term may be queried, and this leaves the validity of the phrase in doubt. All commentators agree that the various agencies that comprise the system are only loosely coupled. Although they are connected to each other and share certain objectives, they also have their own agendas. A more accurate term for *system* would be a “collection of interdependent agencies”, each having its own function.

As Davies, Croall and Tyrer (2005, p 10) observe, “the criminal law does not enforce itself”. Rather people working in particular agencies enforce it: that is, the police, prosecutors, magistrates and judges, and probation and prison personnel. Table 17.1 below lists each agency and its functions in Australia and other countries that have an adversarial (also termed accusatorial) criminal justice system. Adversarial criminal justice is associated with common law systems in countries such as Australia, New Zealand, the United States, Canada, and the United Kingdom. It means that the two parties in the case — the prosecution and the defence — bring evidence before a magistrate, judge, or jury, each of whom acts as a fact finder. Inquisitorial criminal justice is associated with civil law systems in countries such as Germany and France. In this system, the prosecutor or police officer assembles the case (or dossier), but the judge calls witnesses and examines them (see Sanders & Young 1994, pp 7-12).

Each criminal justice agency is subject to “legal regulation and bureaucratic administration” (Findlay, Odgers & Yeo 2009, p xxi). This means that while individuals such as police officers are empowered to gather evidence and make arrests, they must do so in a lawful manner.

**Table 17.1** Major criminal justice agencies, personnel, and agency function in Australia.

<b>Police</b>
<b>(Police officers)</b>
Investigate crime
Prevent crime
Arrest and detain suspects
Maintain public order
Control traffic
Respond to criminal and non-criminal emergencies

## **Prosecution**

### **(Prosecutors)\***

Filter out weak cases, keep strong cases

Prepare cases for prosecution

Prosecute cases in Youth/Children's, Magistrates', District, and Supreme Courts, including preparing cases for trial

## **Courts**

### **(Justices of the peace, magistrates, and judges)\*\***

Decide on bail and remands (detention or not in pre-trial period)

Protect the rights of the defendant

Preside over the trial and plea process

Decide on guilt (magistrate, judge, or jury)

Sentence the defendant

Hear appeals against conviction and sentence

Provide public arena so that justice "can be seen" to be done

## **Community corrections**

### **(Community corrections officers)**

Prepare pre-sentence reports

Provide information to the court on the defendant's appropriateness for bail

Work with offenders with probation or community service sentences

Supervise released prisoners or pre-release work with persons in custody

## **Prisons**

### **(Corrections officers)**

Hold people on remand (in custody in pre-trial period)

Hold people who are sentenced to a term of imprisonment

Maintain appropriate conditions for those in custody

Provide activities that encourage learning and life skills

Prepare inmates for release

## **Other key organisations and actors**

Victim support groups: counsel and assist victims at all stages of the criminal process, from arrest to prison release

Defence lawyers: provide advice to and advocate on behalf of suspects, defendants, and sentenced individuals at all stages of the criminal process.

\*In Australia, prosecution is carried out by the police in some courts such as the Youth or Children's Courts and some Magistrates' Courts in non-metropolitan areas. Prosecution is carried out by the Department of Public Prosecution in Magistrates' Courts, District, and Supreme Courts.

\*\*Courts handle both criminal and civil matters.

Source: Adapted and revised from Davies, Croal and Tyrer 2005 (p 11) with permission of the authors.

In addition to the police, there are other regulatory agencies and justice commissions in Australia that have investigative and prosecutorial powers. These operate at the federal and state levels of government, and include the Australian Crime Commission (formerly the National Crime Authority) (federal), the Australian Securities and Investments Commission (federal), the Crime and Misconduct Commission (formerly the Criminal Justice Commission, Queensland), and the Independent Commission Against Corruption (New South Wales). These organisations have "enhanced powers" of investigation, "unfettered by protections of due process", and "operate in ways that do not recognise the traditional sequences of criminal justice" (Findlay et al 2009, p 80). Although most criminal justice matters are addressed at the state not the federal level, any sense of unity about a criminal justice system must confront the Commonwealth/State division of governmental responsibilities. Beyond the state and federal levels, there is yet another layer of criminal law and justice: international criminal justice, which is embodied in transnational bodies such as the International Criminal Court and ad hoc United Nations tribunals (Daly & Proietti-Scifoni 2011; Roberts 2002). This chapter describes the traditional, domestic agencies of criminal justice; Chapters xx and xx examine transnational crime and international law enforcement.

Even with a focus on domestic criminal justice, we find little evidence of a *system* of criminal justice. The agencies of criminal justice have different aims, which come into conflict with one another. Consider, for example, this list of aims put forward by the UK Home Office (quoted from Sanders & Young 1994, p 2):

- "to prevent and reduce crime, especially violent crime, and help victims;
- to ensure that those suspected, accused, and convicted of crimes are dealt with fairly, justly, and with a minimum of delay;

- to convict the guilty and acquit the innocent;
- to punish those found guilty in a suitable manner, and where possible, discourage further offending; and
- to achieve these aims as economically, efficiently, and effectively as possible.”

Conflicts over aims stem from the particular functions of each agency. For example, the police are to investigate crime and arrest and detain suspects, while the courts are to protect the rights of the defendant. Conflict may also emerge from the bureaucratic interests of each agency. For example, police may cut corners in following procedure so they can charge suspects as quickly and easily as possible, whereas prosecutors, as lawyers with duties to the courts, may insist on the letter (as well as the spirit) of the law being met. Linked to conflicts in aims are conflicts over values, that is, what the criminal justice system *ought* to be doing. For example, is it more important to handle cases *efficiently* or to ensure that people are *not subject to abuses of state power*? As we shall see in Packer’s (1968) analysis, the values of *crime control* and *due process* are equally desirable, but they conflict in practice.

Identifying where the borders of the criminal justice system lie is an increasingly difficult task. Do we include the Australian Tax Office, for example, because it carries out its own investigations into taxation offences? Do we include mental health workers, who work jointly with police patrol officers in crisis response teams, to respond to people suffering from serious psychiatric conditions? What about members of the Salvation Army and other volunteers who work in Magistrates’ Courts providing aid and advice to persons facing court? What we see are networks of agencies and organisations both within and outside the public sector. Inter-agency co-operation is viewed as increasingly important in this environment. More and more, politicians and policy makers talk of the need for “whole of government” responses to problems; and thus, it can be a mistake to think too narrowly about the ambit of the criminal justice system.

In the criminal justice arena, the most important power that people have, whether working as police officers, legal officials, or in other roles, is *discretion* in decision-making. Criminal justice is not “an entirely predictable, consistent or certain system”. Rather, “it is a sequence of decision situations where people apply, distort or ignore rules, and where other people have their lives and futures directly affected by such decisions” (Findlay et al 2009, pp xix-xx). Such decisions are made in particular professional contexts by people in workgroups; they anticipate decisions at subsequent stages of the criminal process, and they are affected by what came before. The exercise of discretion poses important questions for theory and research. For example, are some people given more favourable treatment than others? Should “like” crimes be treated the same or differently, depending on the offender’s background, social circumstances, prior offending?

## Justice or Injustice?

[17.20] Many dispute the phrase criminal justice system, saying we should call it the criminal *injustice* system. Indeed, several Australian books have been published with this title (for example, Zdenkowi, Ronalds & Richardson 1987) (see also Chapter xx). What are they saying? Some are criticising practices by the police, prosecutors, or courts that suggest a “too harsh” enforcement of laws. Members of this group would say that the police more often target certain groups for arrest, typically members of racial-ethnic minority groups, and this selective use of police discretion leads incrementally to the disproportionate imprisonment of racial-ethnic minority group members. Others are criticising practices that suggest a “too lax” enforcement of laws. Members of this group would say that suspects and defendants are let off too easily, by not being arrested or prosecuted; or if they are found guilty, by not being “punished enough” for an offence. Thus, justice for some is injustice to others; injustice for some, justice to others. This alerts us to the always contested and political nature of what is considered a *just* response to crime, and to different concerns people have in *seeking justice*.

## Criminal?

[17.25] Finally, the term *criminal* needs to be considered. What separates criminal from non-criminal acts, or actions that are subject to a civil or administrative process rather than a criminal process? The correct answer, albeit unsatisfying, is in the form of a tautology. A criminal act is that which has been defined by a state as a crime and subject to criminal penalties. What is and is not a crime varies across time and by country, as do the penalties associated with crime. As pointed out in Chapter 1, *crime* and *criminals* are societal definitions: they are recreated, affirmed, and mobilised in the daily lives of ordinary citizens, not just those workers in the justice system.

We could define the criminal justice system this way: a loosely coupled collection of interdependent agencies, each having bureaucratic interests, and each having specific functions (which can be in conflict with other agencies) that are subject to legal regulations, where agency workers have great discretion in making decisions when responding (or not responding) to harms defined as criminal by the state, and where value conflicts exist within and across agencies and in the general population about the meaning of justice. This is a long and complicated definition, and for brevity’s sake, we shall use the shorthand phrase criminal justice system. However, be mindful of the complexity and controversy associated with each term.

## THE FLOW OF THE CRIMINAL PROCESS

[17.30] Figure 17.1 below shows how cases move through the criminal justice system, beginning with *entry into the system* and ending with *exit out of the system*. Along the right side of the figure are the major phases of the criminal process and each agency's functions: investigation and charging, presentation of the case in the pre-trial period, adjudication (that is, deciding on guilt or innocence or entering a guilty plea), sentencing, and managing offenders. At each phase, people make decisions to keep the case in the system or not. Chapter xx details the roles, powers, and legal obligations of the police, prosecutors, and judicial officers at each stage of the criminal process. This chapter focuses on the different models, values, and aims of the criminal process and of punishment.

**Figure 17.1** *Flows through the criminal justice system.*

[Insert Figure 17.1 here]

*Note:* This flow diagram is indicative and does not include complexities of the justice system or variations across jurisdictions.

*Source:* Reprinted by permission from the Steering Committee for the Review of Government Provision 2004.

## THE ROLE OF ORDINARY CITIZENS

[17.35] A major problem with the phrase *criminal justice system* is that it trains our attention, wrongly, to visualise the response to crime as being that which only agency officials such as police officers, magistrates, and corrections officers do. As Lacey (1994, p 8) astutely notes, “the most under-noticed feature [of the criminal process] is that its whole operation depends on the decisions and actions of ordinary citizens”.

Citizens play many roles (Lacey 1994, pp 8-10). First, they elect people to represent them in making laws, and indirectly, in enforcing them. Secondly, and most crucially, they play a substantial role, more so than the police, in detecting and reporting crime. British data suggest that 77% to 96% of crimes recorded by the police came via citizen reports, not police detection (Lacey 1994, note 11, p 8). Police and prosecutorial investigation and evidence gathering depend heavily on the goodwill and participation of citizens as witnesses and victims of crime. Thirdly, citizens serve on juries. Fourthly, those who are victims of crime may, in addition to their role as a witness, be asked to participate in court diversion schemes such as conferencing (see Chapter 24). Fifthly, citizens work as volunteers and paid workers in criminal justice agencies and in organisations that serve criminal justice agencies.

Two other groups have enormous influence on the criminal process: politicians and those working in media organisations. Politicians can directly affect the criminal justice system by passing laws, such as “truth in sentencing”, that constrain the discretion of sentencing officials and increase the numbers of people in prison. Passage of legislation on social and economic policies also has an indirect effect on the crime rate, as for example, when there are cutbacks to unemployment benefits or when a new road is built, which cuts through a town and disrupts social cohesion. The role of the commercial media is to largely entertain, not to educate the public about crime and the criminal justice system. As Chapter 3 suggests, by viewing television news, crime reality shows, and justice dramas (both real and fictional), citizens learn about the criminal justice system and form impressions, often inaccurate, about its practices.

## MODELS OF THE CRIMINAL PROCESS

### Crime Control and Due Process

[17.40] Writing in the 1960s, when major changes were taking place in the United States criminal justice system, Packer (1968, p 150) observed that “we are faced with an interesting paradox: the more we learn about the Is of the criminal process, the more we are instructed about its Ought and the greater the gulf between Is and Ought appears to become”. As an example of the Is and Ought, Packer pointed out that while at the time, few suspects got “adequate legal representation” (the Is), a United States Supreme Court decision in the 1960s made it a requirement that everyone charged with a felony (that is, an offence punishable by more than one year of incarceration) should receive adequate legal representation (the Ought). Although the evolution of *rights* and *protections* accorded citizens accused of crime differs in the United States and Australia, Packer’s discussion of different values in the criminal process is relevant to Australia.

Packer depicted two value systems in the criminal process, calling them the Crime Control Model and the Due Process Model (Table 17.2 below). The Crime Control model is concerned with the *efficiency* of the criminal process, whereas the Due Process Model is concerned with the *accuracy and reliability* of the decisions made. An efficient criminal justice system calls for weeding

out what Packer refers to as the factually guilty from the non-guilty cases as early as possible by police officers and prosecutors, who make decisions based on talking with witnesses and reviewing the evidence. Once this screening is accomplished, the case proceeds through successive stages until it is disposed. During these later stages, Packer said that officials operate on a *presumption of guilt*, meaning that, based on earlier informal investigations, they can assume that innocent individuals have been weeded out.

**Table 17.2** Values and elements associated with the Crime Control and Due Process Models.

	<b>Crime Control Model</b>	<b>Due Process Model</b>
<b>primary function of the criminal process</b>	To control crime by apprehending and convicting those who commit crime.	To ensure that crime is controlled in a lawful manner; ensure that citizens are
<b>primary value</b>	Efficiency	Reliability
<b>Operational activities</b>	With high case loads and limited resources, a premium is placed on speed and finality. Speed depends on informality and uniformity. Finality depends on reducing challenges to decisions.	With human fallibility in witnessing crime and with state powers over citizens, a premium is placed on rendering accurate and reliable decisions. Accuracy depends on the quality of fact finding. This necessitates formal decision-making and may necessitate challenges to earlier decisions—all of which may take time.
<b>emphasis</b>	Quantity of “factually guilty” people apprehended and convicted.	Quality of criminal procedures and decisions rendered; distinguishes between “factual guilt” and “legal guilt”.
<b>reliance on</b>	Early stages of the criminal process, informal fact gathering, and abilities of the investigative and prosecutorial officers.	Later stages of the criminal process, formal adversarial fact finding, and the abilities of judicial officers and defence attorneys.
<b>metaphor</b>	Assembly line conveyor belt	Obstacle course

Source: Adapted from Packer (1968, ch 8).

The Due Process Model has less faith in the reliability and accuracy of decisions made in the early stages of the criminal process. Greater reliance is placed on formal fact finding in the adjudication phase of the criminal process. Judicial officers are supposed to operate on a presumption of innocence, meaning that, they must “ignore the presumption of guilt” in their treatment of the accused. “It tells them to close their eyes to what will frequently seem to be factual probabilities” (Packer 1968, p 161). The Due Process Model distinguishes between the factually and legally guilty, whereas the Crime Control Model does not. *Factual guilt* is based on evidence of a person’s commission of a crime, whereas *legal guilt* is based not only on this evidence, but also that the state has acted legally in obtaining evidence and proving its case.

The models differ sharply in their views of citizen–state relations in the criminal process. The Due Process Model is primarily concerned with the power of state officials to wrongly deprive citizens of their liberty. Because the criminal process is stigmatising and penal sanctions are highly coercive, the Due Process Model emphasises methods of checking the powers of state officials. The Crime Control Model is primarily concerned with the maintenance of public order, without which citizens cannot enjoy their liberty. It assumes that state officials exercise their discretion in a lawful manner with a tolerable degree of error.

Ashworth (1998, pp 27-28) points out several problems with Packer’s models, among them: he failed to discuss the relationship between Due Process and Crime Control; he paid insufficient attention to financial pressures on the state’s response to crime; he was silent on victims; and there are some logical lapses. Ashworth also says that in emphasising the value of speed in the Crime Control Model, Packer ignored the equal concern that a Due Process Model would give to “unreasonable delay” (1998, p 28). On the relationship between the models, he suggests that we might view Crime Control as “the underlying purpose of the system, but that it ... should be qualified out of respect to Due Process” (p 27). There is another way to view the relationship, as Doreen McBarnet (1981) and others have. The Crime Control Model is evident in Magistrates’ Courts (or lower courts in Figure 17.1 above), which dispose of the less serious cases, typically by guilty pleas, and where trials are uncommon. The Due Process Model is more frequent in District and Supreme Courts (the higher courts in Figure 17.1 above), which handle more serious cases, where a higher proportion of matters are dealt with by trial, and where the full repertoire of legal arguments and options is utilised (see Chapter xx on two tiers of justice).

## THE CRIMINAL PROCESS AS A FUNNEL

[17.45] Many more common crimes, such as assaults and theft, occur than are reported to the police. Once an offence is reported, the police may decide not to investigate it or be unable to identify a suspect. If they do identify a suspect, that person may not be apprehended or arrested, or charged with a crime. If a suspect is arrested and charged, the case may go to court, but the charges may be dismissed. If a case is finalised in court by conviction (typically by a defendant's entering a plea of guilty to the offence or to a less serious offence), the defendant may receive a non-incarceration sentence. This narrowing of cases from a large number experienced by victims to a trickle of defendants convicted and sanctioned has the appearance of a funnel.

Rates of reporting crime to the police vary by the type of offence. National victimisation data for 2008-09 show that Australian household victims of motor vehicle theft and completed break and enter incidents were more likely to report these incidents to the police (87% and 76% respectively), than were violent crime victims. Less than half (45%) of physical assault victims, 39% of robbery victims, and 31% of sexual assault victims<sup>1</sup> said they reported the incident to the police (Australian Bureau of Statistics 2010, p 1). After an offence is reported to the police, there is a well-known 'funneling process' as the number of cases going further into the system grows progressively smaller.

Daly and Bouhours (2010) analysed rape case attrition in five countries, including Australia. The findings for Australia from 1990 to the present were that of 100 complaints recorded by the police, 20 were adjudicated in court, and 11.5% resulted in convictions to any sexual offence. The funneling process varies by offence type. Using 2006 South Australian data on incidents recorded by the police, we find that of serious criminal trespass offences, just 2% resulted in conviction. By comparison of recorded drink driving offences, 78% resulted in conviction. A significant source of case attrition occurs early in the criminal process, although this varies by offence. Of offences recorded by the South Australian police in 2006, the percent cleared by apprehensions was about 61% for rape and 60% for major assaults; by comparison, it was 10% for serious criminal trespass and 100% for drink driving (Office of Crime Statistics 2006a, 2006b). Differences in victim-offender relations (known or not known), coupled with how the offence is detected (for drink driving, detection is entirely by police), explain this offence-based variability.

## PUNISHMENT: VALUES, THEORIES, AND PRACTICES

[17.50] Following Ashworth (1998), we may distinguish between two types of decisions in the criminal process. One is *processual*, that is, decisions about "the processing of the case from initial charge through to trial" (p 10); these include police procedures in questioning suspects and gathering evidence, and prosecutorial decisions on what charges to lay. Another is *dispositive*, that is, decisions about "the disposal of the case" (p 10). The most well-known dispositive decision is sentencing, but there are earlier points in the criminal process where a police officer or prosecutor can make a dispositive decision by diverting a case from the court process. Although the distinction between processual and dispositive decisions can blur in practice, it alerts us to the different values that guide each. Processual decisions are guided by values of *legality* (for example, not convicting the innocent, integrity in methods of investigation, and a minimum of burdens on a defendant in the pretrial period) and *equality before the law* (consistency of treatment and avoiding discriminatory practices) (Ashworth 1998, pp 50-61). Dispositive decisions are guided by values of *proportionality* and *crime prevention or reduction* (pp 61-63). From the beginnings of modern criminal law, legal scholars and philosophers have debated the relative importance of the values of proportionality and crime prevention in punishment. The two values are often in conflict.

### Proportionality: Desert Theory and Retributive Punishment

[17.55] Proportionality is associated with desert theory, a modern form of retributive punishment. The core idea is that the penalty structure should reflect a relationship between crime seriousness and punishment seriousness (harshness), and that the absolute level of punishment should be in proportion to the harm. Thus, for example, we recognise that shoplifting is a less serious offence than robbery, and it should receive a less onerous punishment; and we recognise that five years in prison is an excessive punishment for shoplifting. A retributive justification for punishment means that a crime must be censured and that a punishment (penalty or sanction) should reflect the degree of blameworthiness that we attach to the act. The aim is to punish a crime that has occurred in the past, and thus, we may say it takes a *backward* orientation to punishment (von Hirsch 1985).

### Crime Prevention: Deterrence, Rehabilitation, and Incapacitation and Utilitarian Punishment

[17.60] Crime prevention is associated with several theories of punishment: deterrence, rehabilitation, and incapacitation (or protecting a community by removing an offender from it). Its aim is utilitarian, that is, to prevent future crime by reforming offenders or protecting the community, and thus, it takes a *forward* orientation to punishment. The major theories associated with crime prevention or reduction are as follows:

- Individual deterrence (also termed specific or special deterrence): to dissuade or deter an offender from committing a crime in the future.

- General deterrence: to dissuade or deter members of the broader community from committing a crime in the future.
- Rehabilitation: to change the attitudes or behaviour of offenders so they do not commit crime in the future.
- Incapacitation: to protect community members from certain offenders who may pose a threat to their welfare and safety.

### Dialogue Box 17.1

#### Punishment in Practice

Reflect on the ways in which crime prevention and desert values may conflict. Consider, for example, a first time offender convicted of stealing \$100 in goods from a shop with another offender convicted of the same offence, but who has been convicted five times previously for shoplifting. Desert theory might propose a penalty of ten hours of community service for a theft of \$100, with some mitigation if this was a first offence. However, what does a sentencer do if an offender keeps committing the same offence? The typical practice in Australia is to impose a sentence that partly reflects the offence seriousness (desert), but the main concern is to deter an offender from committing future crime. Hence, rather than imposing a penalty of ten hours of community service for a sixth offence of shoplifting, the sentencer would be inclined to take into account the offender's previous record, escalate the penalty, and hope that this will stop the offender from stealing again.

### Eighteenth Century Foundations of Punishment

[17.65] A member of the 18th century Italian intelligentsia, Cesare Beccaria (1738-1794) sketched the foundations of modern criminal law and punishment in western societies. His book, *On Crimes and Punishments* (1767/1963), had a decisive impact on societies' criminal codes. Beccaria was, in part, a utilitarian: he took a forward view to punishment by arguing that its overarching purpose is to prevent crime (Beirne 1993, p 30). At the same time, he said that the amount of punishment should not be excessive and that it should be in proportion to the harm caused; thus, he took a backward view based on desert principles. He applied a highly rationalist and mathematical approach to sentencing by proposing that the penalties for crime should only be slightly higher than the gains from crime. In this way, potential offenders would calculate the costs and benefits from crime, and most rational people would be deterred from committing crime. He did not consider what the penalties for crime might be for people with previous convictions.

### Nineteenth Century Transformations

[17.70] A century later, the justifications for punishment shifted dramatically from punishing *the crime* to punishing, reforming, or segregating *criminals*. Cesare Lombroso (1835-1909), an Italian doctor, and his colleagues founded what they called the Positive School of Criminology, which utilised the developing pseudo-science of criminal anthropology to identify and separate criminals from non-criminals. According to Lombroso, it was important to identify and segregate *born criminals* before they committed a crime. Over time, Lombroso's ideas changed dramatically; by the turn of the 20th century, he believed that there were both biological and social (or environmental) causes of crime (Lombroso-Ferraro 1911/1972).

In the latter part of the 19th century, and stemming from mixed interests, both humanitarian and otherwise, prison officials, social workers, and probation officers proposed that the criminal justice system should have a more constructive purpose of reforming and rehabilitating offenders. These ideas were consolidated with the emergence of the juvenile court, first established in South Australia in 1895 and Chicago in 1899. During the first half of the 20th century, the *rehabilitative ideal* was prominent and with it, *indeterminate sentencing*. An example of an indeterminate sentence would be "no more than 20 years" for an offence; what a person ultimately served was decided by parole board members' judgments of a prisoner's efforts to reform in prison. Indeterminate sentences permitted judicial officers and parole board members wide-ranging discretion in the imposition of penalties and in the actual time served in prison. Such an approach gave decision makers enormous flexibility to impose "therapy or restraint" and "to have it both ways: to be optimistic about criminals' potential for improvement while simultaneously being realistic about their potential for future criminal activity" (von Hirsch 1985, pp 5-6).

### Twentieth Century Shift to Desert-Based Sentencing

[17.75] The wide-ranging discretion by judicial officers and parole boards, coupled with the Civil Rights Movement, led to a political crisis in the United States in the 1960s and 1970s. Prisoners rebelled over the conditions of confinement and perceived inconsistencies in punishment. The period saw a shift to a desert-based sentencing policy (also termed *just deserts*), which emphasised proportionate and fixed punishment, along with a table of tariffs, which reduced sentencers' discretion in sentencing. Desert-based sentencing had some effect on Australian sentencing, but not as strongly as it did in other nations, especially in the United States (Freiberg 1997). What has changed decisively in Australia, however, as elsewhere, is that the rehabilitative aim of

punishment has been joined with, and at times superseded by, other aims. In particular, there is renewed interest in desert-based criteria and in holding offenders accountable for their acts.

While we see change over the past two centuries in the emphasis given to crime reduction or proportionality in punishment, the most important thing we learn from historical and contemporary practices is that the criminal justice system announces many goals and has a variety of practices, often in direct conflict with one another. This is illustrated well by developments during the 1970s. During this time, two quite different sentencing policies were in place: desert-based sentencing, which aims to punish *the crime* (often by using “sentencing grids” to fix penalties) and mandatory sentencing, which aims to punish *certain people* more harshly (those convicted of particular offences such as burglary or who have previous convictions (see Chapter xx). In Australia, there has been comparatively little interest in sentencing grids or mandatory penalties (such as the “three strikes” laws). There is greater interest in experimenting with new justice practices and courts, which accord attention to individualising responses and centre on the particular needs and problems of people (see Chapter 20).

## CONCLUSION

[17.80] The most remarked upon feature of the criminal justice system is its complexity. It is not one, but many things; it announces not one, but many goals. Its overarching purposes are instrumental and symbolic: to change the person (or social conditions) that made the wrong possible and to announce that offending is wrong. The system announces goals of both individualised treatment of offenders *and* equal treatment of “like crimes”. Specifically, one imperative is to fashion responses to individuals based on their circumstances and potential for reform (individual-based, crime prevention). This is joined with a second imperative, which is to punish like offences the same and in proportion to the harm (offence-based, desert). There are shifts over time in preferred punishment values, and conflict over values in any one time period.

Theories and philosophical debates about what legal process, justice, and punishment *ought to be* are a first step in understanding the criminal process. As important is understanding how justice *actually gets done*, that is, the discretionary decision making of professional groups, organisations, and individuals, who are guided by law and rules, but who also operate according to other criteria such as organisational efficiency, work group norms, bureaucratic and professional interests, and economic constraints. The agencies that form a *system* of criminal justice are loosely linked, not well co-ordinated. Agencies’ aims and functions are frequently in conflict, as are the overall system’s values of efficiency and due process. Such conflict in values and aims both within and across the agencies of criminal justice, as well as among those in the wider society, means that seeking justice is forever an elusive and contested ideal.

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## QUESTIONS

1. Give examples of when the functions of the police, prosecution, courts, or corrections may be in conflict.
2. What is the difference between people who are viewed as “not guilty”, “factually guilty”, and “legally guilty”? Should the primary focus of the criminal justice system be to apprehend and sanction as many factually guilty people as possible? Or should it be to make decisions according to legal principles and requirements, which may result in releasing a number of factually guilty people?
3. Is it possible to separate *the act* from *the actor* in responding to crime or in sentencing?
4. Give examples of when ordinary citizens play an important role in responding to crime.
5. Analyse the ways in which the symbolic and utilitarian purposes of the criminal justice system are discussed in the news. Are certain crimes or lawbreakers subject to attention for symbolic rather than utilitarian reasons?
6. If you were a defendant, would you prefer to be sentenced under a “just deserts” or an “individualised” model of sentencing? Explain why.
7. When people say that they “want justice”, what do they want?
8. How would you change Figure 17.1 to reflect the role and experiences of victims in the criminal justice process?

## FURTHER READING

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## USEFUL WEBSITES

[www.ag.gov.au/](http://www.ag.gov.au/)

Australian Government Attorney-General's Department, which has links to individual States and Territories by clicking on Legal System and Justice, and then Australian Government Law Sites

[www.justiceaction.org.au](http://www.justiceaction.org.au)

Reports on actions taken on behalf of incarcerated people

All Australian States and Territories provide data on crime and justice, but the following jurisdictions have especially good data and reports on criminal justice processing:

[www.crc.law.uwa.edu.au](http://www.crc.law.uwa.edu.au)

Crime Research Centre, University of Western Australia

[www.lawlink.nsw.gov.au/bocsar/](http://www.lawlink.nsw.gov.au/bocsar/)

New South Wales Bureau of Crime Statistics and Research

[www.ocsar.sa.gov.au](http://www.ocsar.sa.gov.au)

South Australian Office of Crime Statistics and Research

[www.oesr.qld.gov.au/queensland\\_by\\_theme/society/crime\\_justice/index.shtml](http://www.oesr.qld.gov.au/queensland_by_theme/society/crime_justice/index.shtml)  
Queensland Office of Economic and Statistical Research, Crime and Justice

## NOTES

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<sup>1</sup> Rates of report to the police for sexual assault depend on how questions are asked and the degree to which the interview context is supportive of victims. Specialized victimisation surveys of violence against women in five countries (including Australia) show that rates of reporting sexual assault range from 6% to 20%, with an average of 14% (Daly and Bouhours 2010, pp 574-75), and for Australia, 15.5%.