

# Packer in Context: Formalism and Fairness in the Due Process Model

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PACKER, HERBERT L. 1968. *The Limits of the Criminal Sanction*. Stanford, CA: Stanford University Press. Pp. viii + 388. \$37.95 paper.

*Herbert Packer's The Limits of the Criminal Sanction (1968) has spawned decades of commentary. This essay argues that Packer's two-model conceptualization of the criminal process is best understood within his professional milieu of doctrinal legal scholarship and the political context of the Warren Court revolution. Within this context, the essay suggests a distinction between two due process visions: formalism and fairness. This distinction is useful for illuminating debates and decisions on criminal procedure matters in the Supreme Court such as Terry v. Ohio (1968) and Apprendi v. New Jersey (2000). I conclude by encouraging sensitivity to legal and historical context in future commentary on Packer's framework.*

## INTRODUCTION

The academic fascination with Herbert Packer's two models of the criminal process has yielded an amazing thread of scholarship involving a variety of academic disciplines, linking various topics, offering interesting insights on many criminal justice institutions and phenomena, and spanning more than four decades. This fruitful scholarly avenue began with the publication of Packer's classic article "Two Models of the Criminal Process" (1964a), and continued, more intensely and fiercely, after its reappearance as part 2 of *The Limits of the Criminal Sanction* (1968). That this enthusiasm and

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engagement persist to this day is proof that criminal justice scholarship indeed stands on the shoulders of giants.

In joining this commentary shortly after the fortieth anniversary of the book's publication, I wish to add two arguments to the discussion. The first half of my essay aims to explicate Packer's scholarship within his professional world—that of doctrinal scholars of criminal law—and the dramatic constitutional reality—the Warren Court revolution—that shaped his understanding of the criminal process. It is in this context that Packer's conceptualization of the criminal process as a continuum between crime control and due process is best appreciated and admired. Packer was not only an apt interpreter of the constitutional revolution—providing an astute observation of the transition to due process beyond a mere proliferation of pro-defendant decisions—but also a grim prophet who accurately predicted the backlash of the Burger and Rehnquist courts. The models, which were criticized by sociologists and political scientists at the time (and more so since), are, I argue, better assessed in light of their contribution to a more sophisticated doctrinal-legal understanding of the criminal process.

The second half of the essay argues that, even within the narrow framework of Supreme Court decisions, Packer failed to fully identify the “enemy” of due process. The Warren Court's due process paradigm was subverted by subsequent courts not just because of crime control–related considerations of efficiency and reliance on the police, but also because of a narrow, formalistic understanding of the meaning of due process. The roots of this adverse interpretation lie in the incorporation debates dating back to the nineteenth century, but these roots can explain much of the pro-government backlash of the post-Warren Courts, and particularly the work of Justice Scalia. In this respect, due process, with which Packer was disillusioned on his deathbed in 1972, seems to have been its own enemy.

## CRITIQUES OF PACKER'S MODELS

Reactions to the models started to appear after the publication of the 1964 article and continued after *The Limits of the Criminal Sanction's* publication, in multiple book reviews (Blumberg 1969; Katz 1969; Schwartz 1969; Charles 1970; Golding 1971). While the initial response was mostly favorable, as time passed, critique of Packer's framework increased. The type of critique depended greatly upon the discipline and research interests of the critic and, as can be seen from the following discussion, said more about the critics and their professional interests than about Packer. This was compounded by the fact that each of the book's three parts generated interest. Philosophers were drawn to the first part, which provided a diatribe against positivism and a sort of proto-economic argument about utilitarianism (Golding 1971). The enthusiasm about part 3, which argued against using

criminal sanctions in victimless crimes, was very timely, coinciding with huge changes in our approach toward, say, drug use (Schur 1965), but fell out of favor in the era of attention to victims' rights (Roach 1999). What received the greatest amount of attention over the long term, therefore, was part 2, which contained the two models of the criminal process: crime control and due process (Macdonald 2008). These drew much attention from social scientists and were later used to advance a variety of disciplinary and topical agendas that could not have been foreseen at the time of the book's publication.

Packer suggested that we can understand a given criminal process by locating it on a continuum between two extreme characterizations: the crime control model and the due process model. The models focused on different values and, as a consequence, required different preferences and processes. Neither model was supposed to depict an actual criminal justice system, but the balance between them would serve as a useful tool for assessing the values underlying a given system in the real world.

The crime control model, argued Packer, is shaped around the notion of procedural efficiency. Crime control means processing as many cases as possible in the fastest, most cost-effective way. This process is likened to a mass-production assembly line (with efficient convictions as the product). As a corollary, problematic cases that raise serious substantive or procedural issues need to be screened out as soon as possible. Packer inventively conceptualized the idea behind this screening process as the "presumption of guilt"—a descriptive probabilistic statement according to which a defendant whose case has passed police and prosecutorial muster is highly likely to be guilty. This presumption has several important implications. First, the crime control model places great emphasis on the early stages of the criminal process—police investigation and prosecutorial discretion in charging—as "gatekeepers" of the courts. Because of the importance of efficiency in these early steps, crime control places importance on providing the investigative mechanism with the power, freedom, and authority necessary to find out the truth. Second, the trial, a complicated and expensive stage fraught with technicalities and hurdles, is a less preferred mode for processing cases; instead, prescreened cases should be processed on the "fast track," through guilty pleas and plea bargains. Third, the model values finality and therefore discourages appellate review of court decisions.

By contrast, the due process model emphasizes the presumption of innocence and the need to ensure "quality control" in the outcome of criminal trials through a mechanism of fair process. This model has a much more suspicious view of the investigatory stage, regarding it as fraught with biases and potential for abuse. The trial, particularly its adversarial format, is hailed as a balanced mechanism that equips defendants with the necessary tools for effectively challenging law enforcement. These tools include the burden of proof, a series of constitutional trial rights, and effective representation by

defense counsel. The due process model is willing to sacrifice efficiency in order to avoid the possibility of an unjust outcome and is particularly concerned with preserving the rights of indigent and minority defendants, who are most vulnerable to abuse from the law enforcement apparatus. A due process system provides defendants not only with rights and safeguards during trial, but also with broader opportunities to review convictions.

A first family of critiques of the two models emerged from law and society circles, particularly from the community involved in the then-nascent field of criminal courtroom ethnographies. Upon the publication of the book, a review by Blumberg (1969) argued that the models hid a reality that was closer to the crime control model: a system guided mostly by efficiency and plea-bargaining. This was a sociological comment on the detachment of legal scholars from the everyday realities of courtroom dynamics, particularly in lower courts. The point was presented more forcefully by Malcolm Feeley (1979a, 1979b), who argued that the two models were not made from the same fabric. Due process, Feeley argued, was a normative, idealized concept generated by the court, masking the empirical reality, which was actually much closer to crime control. Doreen McBarnet (1981) pushed this angle further by arguing that, in fact, the veneer of due process existed for the purpose of securing convictions under the guise of legitimacy, and therefore “due process [was] for crime control” (156).

Another family of critiques addressed the insufficiency of the two models to describe the universe of the criminal process. The first commentary in this vein came from John Griffiths, at the time an unconventional young scholar interested in law and society at Yale Law School. Griffiths addressed the Packer book in two consecutive pieces: a lengthy book review in which he called *The Limits* “a very disappointing book. . . very, very bad indeed” (1970b, 1388), and a subsequent piece in which he argued that the models were narrow in their application and in fact presented two sides of the same model: the “battle” between the “police perspective” and the “ACLU perspective” (1970a, 367). To Griffiths, the choice between the two models consisted merely in the question of which of the two biases was to be built into the system. As an alternative to this framework of battle, Griffiths proposed a “family model.” Under this new paradigm, the state was to approach offenders as it would children, punishing them so that they learn a lesson and helping their reintegration into society. In many ways, Griffiths’s paradigm was a forerunner of three lines of inquiry: the “republican” models presented by Braithwaite and Pettit (1992), the problem-solving courts’ philosophy (McCoy 2003), and studies examining whether legal systems outside the United States could be mapped onto the two-model construct (Foote 1992). At the time, however, his intense critique cost him tenure at Yale. Kalman (2005) argues that Griffiths’s tenure vote had a broader context: his attack on Packer was seen as a broader attack on Langdellian law school teaching and as support for the nascent law and society paradigm at the

expense of the “old school” doctrinal models, arguably as part of a broader political “purge” of leftist faculty members in the late 1960s.

Suggestions for additional models followed. In a broad-ranging piece Michael King (1981) offered an array of alternatives that included the medical model (corresponding to the positivist school in criminology), the bureaucratic model (which could be seen as a variation on the crime control model), the status passage model (focusing on stigma and labeling), and the power model (invoking critical criminology, particularly Marxism). These models were grounded in a variety of broader perspectives (for an excellent discussion of their criminological roots, see Sebba 2006). One additional model that has received much attention in the literature is related to victim perspectives. Douglas Beloof (1999) argued that the victim brings into the process a set of separate interests that did not completely align with either the crime control or due process models and were generated by the secondary harm caused by the process. The victim’s interests could align with those of the state or with those of the defendant with regard to the decision to charge, and they could be diametrically opposed to the state and defendant’s preference for plea bargaining. Kent Roach (1999) elaborated the victim perspective by introducing two victim models: a punitive and nonpunitive one. The punitive model is a variation on King’s status passage model, with an emphasis on victims; a version of this model, which refers not to actual victims but to their invocation by the state, appears later in Simon’s (2007) *Governing through Crime*. Roach’s second model is an amalgam of restorative justice and Griffiths’s family model. Others such as John Stickels (2008) further refined victim models to address victim satisfaction. A recent contribution to the “additional model/new paradigm” family is a piece by Keith Findley (2009), which argues that the innocence movement transcends the differences between crime control and due process by strengthening the connection between a rights-based process and reliability.

A recent critique by Stuart Macdonald (2008) returns to the basics of “modeling” criminal justice. Macdonald argues, in opposition to Damaska (1973), that Packer’s intent may not have been to provide practical descriptions of the process, but rather to present two Weberian ideal types without attaching a value judgment to them. His choice of ideal types, however, was problematic: “Packer’s dialogue between the two models . . . reveals two voices speaking at cross-purposes: a crime control model that fails to articulate its model clearly, and a due process voice that has failed to understand the model of its opponent” (Macdonald 2008, 276). Building on Nils Jareborg (1995) and others, Macdonald suggests a more consistent approach to modeling, offering a typology of models based on a spectrum of the feasibility of their implementation. Some of these models are more useful for evaluation, while others are better suited as a framework for empirical work. As an example of the former, he suggests a set of four pure “ideal types” of the

criminal process, exaggerated to the point of impossibility, as the Weberian ideal would require.

It is important to point out which of these critiques were leveled directly against Packer and which ones merely used his framework as a structure for pointing out new ideas and institutions as they emerged. The early ethnographic critics had reasonable grounds to argue that Packer ignored empirical findings from the field, pointing to the fact that his crime control model was far less of a “model,” and much more of a reality, than his framework would suggest. Similarly, Griffiths’s ideological critique addressed the narrowness of Packer’s conceptual framework. On the other hand, the victim-model critics, especially Roach, are careful to point out that neither sensitivity to victim-related concerns nor skepticism of the concept of victimless crime could be expected from Packer at the time he was writing. This distinction points to an important lesson for today’s readers of Packer’s work: Packer’s models and their limitations should be understood not only in the political context of his time, but also in light of his academic milieu.

## PACKER IN CONTEXT

Macdonald builds his presentation of ideal models on Packer’s explicit intention to create two extreme ends of a continuum, rather than a realistic depiction of the American (or any other) legal system. However, despite Packer’s declarations, the models seem to be more linked to the existing American criminal process. Rather than seeing this as a theoretical limitation, as Macdonald does, I see it as evidence of the extent to which Packer’s thinking was influenced by the constitutional revolution he was witnessing, as the Warren Court gradually incorporated the provisions of the Bill of Rights against the states. Within this particular context, Packer’s modeling can be seen as an astute and broad-minded attempt to conceptualize a change that went far beyond merely ruling more often for the defendant in criminal procedure cases: rather than merely being a “pro-defendant” court, the Warren Court was busy creating—through a mechanism of constitutional incorporation and by delivering a substantial blow to federalism—a framework of review for criminal procedure that relied on the conceptualization of the adversarial process as the solution for the ills and biases of the investigatory prosecutorial approach.

It is important to keep in mind that, as exemplified by the Griffiths incident, law schools were far more doctrinal, and much more removed from social sciences, than they are today. Interdisciplinary work was less common, and law and society types such as Griffiths were seen as outliers rather than heralds of an exciting trend. Pathbreaking ethnographies were conducted by political scientists and sociologists including Sudnow (1965) and Foote (1956) and later Feeley (1979a), Heumann (1981), Eisenstein and Jacob

(1977), and Nardulli (1978). While these scholars were drawn to courtroom dynamics (Nardulli 1978), plea bargaining (Feeley 1979b; Heumann 1981), and policing (Goldstein 1960; Skolnick 1966), legal scholars had only begun to formulate criminal procedure as a doctrinal field, and as they did, they focused mostly on Supreme Court decisions. Criminal procedure was understood to be a subfield of constitutional law, and would remain so, for many scholars and in many schools, for many years to come.

It is in this professional context that Packer's contribution can best be appreciated. Within the context of legal scholarship, Packer may have created the crime control model primarily as an analytic device, a sort of "what are we fighting" straw man, to highlight the dramatic effect of the due process revolution. The concept of a crime control model was new to his doctrinal readers and demonstrates his ability not only to transcend the doctrinal discourse, but also to find interest in the invisible parts of the process: police stations and lower courts. The audacity of using the phrase "presumption of guilt" to describe the system's perception of the probabilistic realities of the courtroom workday must have seemed revolutionary. Part of this openness may be due to Packer's broader horizons. In his impressive but short career, Packer served as vice provost of Stanford and must have been exposed to interdisciplinary work more than his colleagues (Ehrlich et al., 1972). His earlier work on ex-Communists (Packer 1958) engaged directly with political topics, as did his analysis of the Warren Commission's report on the Kennedy assassination (Packer 1964b) and his critique of doctrinal review of police discretion (Packer 1966). Packer was broad minded enough, and enough of a public figure, to be able to transcend the doctrinal discourse and offer a broader way to understand the Warren Court revolution. It is insightful to compare his work to Abraham Goldstein's; Goldstein (1973) astutely demonstrated how the criminal game was "rigged" on behalf of the state and against the defendant but did not broaden this perspective, as Packer did, to examine the process as a whole beyond who "wins."

When one is considering Packer's work within the disciplinary realm he occupied, it is clear why the book was such a major success with legal scholars, who considered it novel and refreshing (Katz 1969; Schwartz 1969). By contrast, reviews by social scientists criticized Packer for not engaging more with the nascent world of empirical inquiry of lower courts. In any case, the primary audience for the models was probably the prominent legal scholars at elite law schools, whose gaze was fixed upon the Supreme Court and the Constitution.

What did Packer add to the legal dichotomy between progovernment and prodefendant decisions? Some of this, as Goldstein (1973) later pointed out, could be explained as a transition from an adversarial to an inquisitorial process. However, there were some broader issues at stake. Crime control was characterized not merely by sympathy for the government's position but by a respect for efficiency as a primary goal of the process. This emphasis drives a

preference for the less transparent, and more unencumbered, investigatory phase of the process over the hurdles of trial. Due process, while sympathetic to defendants by generating rights, was more than that; it stood for the belief that bright-line rules and hurdles were the best way to guarantee accurate outcomes in the process.

The wisdom of Packer's broader framework made even more sense after his death, when criminal procedure scholars turned their attention to the reversal of the Warren Court trends. That the Warren era was revolutionary in many respects, bringing the Constitution to bear upon issues of defendants' rights and police regulation, could hardly be disputed. However, few scholars pointed to its demise when analyzing Burger Court decisions. Peter Arenella (1983–1984) recounts the proceedings of a conference featuring prominent scholars such as Yale Kamisar and Jerold Israel, who argued that the Burger Court era could hardly be regarded as a “counterrevolution” and did not produce significantly more pro-government decisions. Arenella provides an excellent critique of these approaches as shallow and one dimensional. Using the broader Packer framework, he demonstrates the dramatic paradigm change by showing how the post-Warren decisions are characterized by a shift away from bright-line procedural rules as a cure for system malfunctions and toward an overarching goal of convicting the factually guilty. The 1970s, and even more so the 1980s, show an increasing pro-government reliance on “totality of the circumstances” tests, which incorporate issues of factual guilt and allow the police broad powers and discretion in determining case disposition prior to trial. Later decisions narrow the broad constitutional protections provided by Warren Court decisions, such as the *Miranda* warnings and the *Gideon* right to counsel. In this decision, deference to state mechanisms was an important factor. Finally, the post-Warren Court decisions placed great value upon finality, leading to a significant narrowing of postconviction remedies.<sup>1</sup>

Packer's models are therefore both narrower and broader in scope than the comments and critiques would suggest. They are narrower in the sense that they function best, and are best understood, as an explanation of US Supreme Court decisions at a unique moment in time and as a prophecy of a countertrend that occurred after that special moment had passed. However, they are broader in the sense that they offer an understanding of the significance of Warren Court decisions, and of the subsequent backlash that goes beyond mere shifts between the government's side and the defendant's side. The transitions speak volumes about the different Courts' understandings of the relative importance of different stages of the process, the extent of their willingness to rely on rights discourse as a mechanism for accurate decision making, and their perceptions about objectivity and bias in the process.

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1. As Roach (1999) reports, Packer himself felt this transition keenly, and at the end of his life reported disappointment in the failure of the due process model.



My own critique of Packer's models, therefore, resides within this disciplinary context. Focusing primarily on the transitions in Supreme Court decisions, the question is whether Packer's one-dimensional spectrum is inclusive enough to explain the Warren Court revolution and the backlash that followed it.

## TWO DUE PROCESS MODELS, OR WHY THE CRIME CONTROL-DUE PROCESS SPECTRUM UNDEREXPLAINS SUPREME COURT DECISIONS

In a scholarly world that recognizes Packer's models as classic, much of what occurred in the Supreme Court from the 1970s onward is explained, even in law school textbooks, as a shift from due process to crime control (Dressler and Thomas 2006; Whitebread and Slobogin 2006). Much in the vein of Arenella's analysis, the common wisdom in the field is that the post-Warren Court decisions reflect greater trust in the police (through relaxing the probable cause requirements, allowing for good-faith exceptions to the exclusionary rule, and creating more exceptions to the warrant requirement); more emphasis on factual guilt than on the normative presumption of innocence (by generating a difference between violations of the voluntary confession requirement, which might compromise actual accuracy, and *Miranda* violations, which are seen as technical); less intervention in state rules (especially when those might require budgetary expenditure, as in providing counsel for indigent defendants); and more emphasis on finality (by limiting access to appeals, and especially to federal habeas corpus proceedings). Law and society scholarship has regarded these doctrinal changes as a symptom of broader political trends prompted by the Nixon era's "tough on crime" politics (Beckett 1997; Garland 2001; Simon 2007; Lynch 2009). And, indeed, the Supreme Court was not insulated from these broad processes; Nixon's appointees—Justices Burger, Blackmun, Powell, and Rehnquist—constituted a significant change in the Court's composition, leading the Court toward more conservative decisions, though attitudinal research suggests that these changes should be viewed more subtly (Epstein et al. 1998). However, some trends remain more difficult to explain. One such mystery is *Terry v. Ohio* (1968), a decision authored by Warren himself, which is largely credited for giving police much leeway in conducting stops and frisks and for enabling pretextual stops and racial profiling (Aviram and Portman 2009). Is *Terry* a crime control decision? And how do we read some of Justice Scalia's decisions, such as his insistence upon the right to jury in deciding sentencing enhancements in *Apprendi v. New Jersey* (2000)?

The answer to such mysteries, I argue, lies in a more refined understanding of Packer's due process model. In considering crime control as the antithesis of due process, Packer failed to identify another "enemy" of the Warren

**TABLE 1.**  
**Formalism and Fairness**

	Formalism	Fairness
Meaning of due process	A guarantee of formal procedural rights	Attention to an overall experience of a fair hearing
The “constitutional package”	Defendants benefit from all rights in the Bill of Rights, and not beyond them	Defendants benefit from a general perception of fairness, which may extend beyond the Bill of Rights or exclude rights when they are detrimental to fairness
The stage	Emphasis on the guilt phase as the “main show” of the criminal process	Emphasis on other stages of the process, such as sentencing
Presumption of innocence	Essential for due process	Secondary to other fairness considerations
The actors	Emphasis on traditional actors: defense attorney and juries	Emphasis on pragmatic helpers: judges and therapeutic professionals
Notion of equality	Constitutional rights are blind to demographics.	Model is aware of class, race, and gender differences

Court revolution: the darker side of due process itself. A careful analysis of the constitutional stances of Supreme Court justices leads to the conclusion that there is not one due process model, but two. The first model emphasizes formalism, whereas the second one emphasizes fairness. Table 1 summarizes the main differences between the two concepts of due process.

Advocates of formalism regard due process as adherence to the set of rights provided by the Bill of Rights, to the letter of the law, and in some cases in accordance with their interpretation of the intent of the Framers of the Constitution. Fairness advocates, on the other hand, have a more flexible definition of due process, ascribing more importance to an overall sense of fairness. In contrast to formalists, who provide defendants with all rights in the Bill of Rights and none beyond the official “constitutional package,” fairness advocates might offer some rights beyond those in the Bill of Rights and might also dispense with some of the constitutional guarantees when those are not conducive to a sense that one’s case was considered holistically and fairly, with the defendant’s best interests in mind.

In Packer’s original dichotomy, crime control emphasized the investigatory stage, while due process emphasized the trial stage. Within the trial phase, formalist due process focuses on the adjudication of guilt as the “main show” of the criminal trial and therefore guarantees rights that are directly related to this phase; the most important of these rights is the presumption of

innocence. Fairness-centered due process, by contrast, focuses more on the pre- and posttrial stages of the criminal process. The possibility of informally dismissing cases based on flimsy evidence or governmental misconduct becomes an important, albeit less visible, arena for fairness (Findley 2009). The sentencing phase in particular becomes more important, and has more consequences, in a realm of plea bargains and a tiny percentage of trials; the focus here is on careful consideration of the individual defendant's circumstances, to frame a forward-looking sentence. Consequently, formalist due process places much emphasis on actors pertaining to the guilt-adjudication phase, such as the defense attorney and, even more so, the jury, while fairness-centered due process might dispense with juries when they are perceived to be biased or overly punitive and may place more emphasis on actors who have more discretionary power in the pre- and posttrial stages, such as judges, probation officers, and other therapeutic personnel.

Finally, the two conceptions of due process share a concern for equality, but they understand the concept in different ways. Formalist due process perceives equality as the need to provide constitutional rights on a universal basis, blind to the defendant's demographics. Fairness-based due process, however, brings to the table awareness of defendants' individual characteristics and might differentiate among defendants on the basis of class, race, and gender when these factors contribute to biases or inattentiveness to the defendant's particular circumstances.

As the following discussion will show, the roots of the two due process models lie in the debate over whether the Fourteenth Amendment "incorporated" the Bill of Rights and therefore applied them to the states. More importantly, the distinction between the two due process models explains some of the previously unexplained transition in Supreme Court decisions, especially when one is considering Justice Warren's decision in *Terry* as an example of fairness-based due process, and Justice Scalia's decision in *Apprendi* as an example of formalism-based due process.

### Doctrinal Origins of the Formalism-Fairness Dichotomy

The rival understandings of due process precede the Warren Court and can be traced back to the Black-Harlan debate on incorporation. To provide a short background to the debate, court rulings in the nineteenth century, prior to the ratification of the Fourteenth Amendment, shied away from interpreting the Bill of Rights as applicable to state cases (*Barron v. Baltimore* 1833). Even after the Fourteenth Amendment provided a doctrinal vehicle for imposing federal constitutional rulings on the states, courts were initially hesitant to do so (as in the case of grand juries; see *Hurtado v. California* 1884). Gradually, however, two approaches toward incorporation began to emerge.

The first approach, advocated by Justice Black, was a formalist understanding of incorporation. Under this approach, the Fourteenth Amendment incorporated the Bill of Rights and had no independent meaning beyond that. Any attempt to read a broader meaning into “due process,” beyond merely being the technical sum of rights in the other amendments, was considered to be “itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power” (*Adamson v. California* 1947, 74–75). While this is by no means a crime control approach, it conveys serious concerns about “the consequences of the Court’s practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights” (89).

The second approach, whose most prominent advocate was Justice Harlan, did not aim at incorporating all federal constitutional rights against the states as a whole; instead, incorporation would depend on the context of the right. Following the reasoning in *Powell v. Alabama* (1932), advocates of this approach examined the practical effects of trials on certain types of defendants, particularly minorities and the indigent. Constitutional rights would be provided to state defendants on a case-by-case basis, and the judgment would be made based on their contribution to the overall fairness of the hearing (Cord 1975–1976; Amar 1998).

These two approaches are the ends of a second continuum, one that differs from Packer’s crime control–due process continuum in that it is hard to say which of the two approaches—due process formalism or due process fairness—is better for criminal defendants, and which favors the government. On the one hand, a flexible interpretation of the Fourteenth Amendment could mean reading into the term “due process” additional protections beyond those provided by the Constitution, such as a right to a fair hearing during sentencing, or a right to rehabilitation. On the other hand, the flexibility could (and, to Harlan, did) mean that some Bill of Rights provisions would not necessarily be applied to the states.

It is also important to keep in mind that the “overall fairness” approach had the potential of being more sensitive to the local contexts of different jurisdictions, based on their different population demographics, cultural backgrounds, and law enforcement techniques. Harlan was explicitly concerned about the ultimate result of a wholesale formalist approach, which would be “compelled uniformity, which is inconsistent with the purpose of our federal system and which is achieved either by encroachment on the States’ sovereign powers or by dilution in federal law enforcement of the specific protections found in the Bill of Rights” (*Malloy v. Hogan* 1964, 15–16). For Harlan, attentiveness to local context meant more restraint toward certain state practices, but the flexibility could also be interpreted as guaranteeing more protections in some local contexts, such as, for example, defending minorities

in places in which their rights were more vulnerable, as in *Powell v. Alabama* (1932).<sup>2</sup>

### The *Terry* Decision as an Example of Fairness-Centered Due Process

As mentioned earlier, the conventional wisdom in criminal procedure scholarship is to see the Warren Court as embracing due process at the expense of crime control, with subsequent Courts reversing the emphasis. The strong reaction to the due process revolution as it was happening, and the subsequent judicial and political backlash against it during the Nixon administration, may have been aimed at the civil rights movement in general (Beckett 1997), but the rhetoric fueling it was directed against the Warren Court decisions as symbolic manifestations of that revolution (Baker and Blumenthal 1983). This rhetoric targeted several decisions in particular: *Mapp v. Ohio* (1961), which established the exclusionary rule; *Gideon v. Wainwright* (1963), which incorporated the right to counsel against the states and at the states' expense; and especially *Miranda v. Arizona* (1966), which established the quintessential Miranda warnings. While much subsequent sociolegal evidence showed that the warnings were rendered meaningless by police interrogatory techniques (Leo 1996, 2008), at the time they were both hailed and maligned as symbols of due process. The reasoning in *Miranda*, written by Warren himself, is a classic Packeresque due process problematization of a biased and dangerous police force, including examples from police manuals to demonstrate the amount of trickery that criminal defendants are subjected to.

Given this background and its symbolic importance, many doctrinal scholars are puzzled by the Warren Court's decision in *Terry v. Ohio* (1968), which appears to go against the due process grain (Maclin 1998; Katz 2004–2005; Schwartz 1995–1996). The decision itself dealt with the realm of “lesser” searches and seizures, short of an arrest or a full search, which one might assume were occurring on a regular basis on lesser grounds than probable cause and a warrant. Officer McFadden, the officer who conducted the *Terry* search, spent thirty-five years walking a Cleveland beat but will be forever remembered for the brief detention detailed in the facts. Observing two men standing in the corner who “didn’t look right [to him] at the time,” he deduced that they were casing stores for a robbery, briefly detained them, patted down the outside of Terry’s clothing, and found a pistol. Given these facts, the Court could have adhered to the probable cause requirement for searches, thus rendering Terry’s stop and pat down unconstitutional. Instead, Warren opted for a lower standard, requiring a lesser degree of suspicion—reasonable suspicion—for conducting a mere stop or a frisk.

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2. For more on the racial aspect of the decision, see Goodman (1995).

One typical interpretation endorsed by critics sees this decision as supportive of a crime control model sensitive to the realities of everyday policing (Amar 1998) and therefore empowering police officers to exercise discretion, which can be said to endorse decision making based on criteria such as race (Schwartz 1995–1996; Maclin 1998; Sundby 1998). Warren's intimate acquaintance with policing, which came from his experience being a prosecutor as well as having been victimized by crime (Cray 2008), could provide an explanation for a practical approach based on acknowledging the realities and challenges of law enforcement. It is evocative of sociolegal discussions of police discretion (Goldstein 1960; Muir 1977). The Court was also not unaware of the political climate surrounding its rights revolution in general and the law of search and seizure in particular. Prior to the incorporation of the exclusionary rule in 1961, most police searches and seizures went unregulated. At that time, half of the states had no exclusionary rule for their police (Katz 2004–2005). The criminological attention to the police in the 1960s and 1970s revealed an organizational ethos of "us versus them," which was not conducive to the need to develop procedures to deal with the new rigid probable cause requirement. The Court came under increasing fire for decisions on criminal procedure rights, and police officers faced potentially violent confrontations in the streets. Legislatures authorized increased policing including "stop and frisk" statutes (Dudley 1998). *Terry* was decided in June 1968, during the presidential campaign in which Nixon and Agnew directed much criticism against the Warren Court. And, indeed, the decision explicitly mentions sympathy to police officers and their dilemmas in the field.

This classic interpretation of the case builds not only on Warren's background and the context of *Terry*'s outcome at the time, but also on *Terry*'s progeny: a series of cases expanding police authority for "frisks" beyond the *Terry* scenario to cars and homes (*Michigan v. Long* 1983; *Maryland v. Buie* 1990), minimizing the suspicion required for searches (*Adams v. Williams* 1972; *Alabama v. White* 1990), and authorizing racial profiling (*Whren et al. v. United States* 1996).

However, the eventual eight-to-one majority decision, which authorized an entire category of lesser searches and seizures based on less than probable cause, cannot be wholly explained by a crime control paradigm. Warren's language is clearly sensitive to the plight of defendants, particularly minorities, if not predictive of *Terry*'s potential to generate pretextual stops and racial profiling:

The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule . . . may exact a high toll in human injury and frustration of efforts

to prevent crime. No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us. [However,] [u]nder our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing . . . [and] [w]hen such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials. (*Terry* 1968, 14–15)

While crime control explains the expansion police power in *Terry*, it does little to explain the Court's extreme reticence and its desire to narrow its holding. Even the more police-friendly concurrence by Justice Harlan required some level of suspicion before a suspect could be detained and patted down.

A better, albeit counterintuitive, understanding of the decision in *Terry*, therefore, is as a paragon of fairness-centered due process. Its legacy is the Warren Court's decision to wade into an area of police conduct that it had previously left completely unregulated for state agents and subject to a rigid probable cause analysis for federal agents. In *Terry*, the justices recognized that it would provide "initial guidelines for law enforcement authorities and courts throughout the land as this important new field of law develops" (31). However, they did not simply rubber stamp police arguments, nor did they rule as widely as they could have on the facts. Rather, the Court crafted a nuanced opinion identifying a narrow standard, and highlighting the impact of excessive police practices on particular communities, while also recognizing the danger to police officers of easy access to firearms and a charged atmosphere in the streets.

This nuance was communicated in Warren's opinion in a variety of ways. First, he explicitly rejected the usage of the terms "frisk" and "stop," which might have suggested that police authority in *Terry* was "outside the purview of the Fourth Amendment because neither action rises to the level of a 'search' or 'seizure' within the meaning of the constitution" (17). Second, he took special care delineating the amount of suspicion necessary, basing it on actual facts, rather than a hunch. Third, he carefully delineated the scope of permissible search to patting the external surface of clothing to detect arms.

In short, as the clerk who drafted the decision explained years later, *Terry* was a first, cautious step along an uncharted path, and I think it fair to say that the opinion's restraint set an important example for the Supreme Court and lower courts in later cases in their approach to the myriad issues that grow out of what Chief Justice Warren called "the protean variety of the street encounter." (Dudley 1998, 898).

While the eventual ramifications of *Terry* were very much in the crime control vein, *Terry*'s initial intent was to make police activity more visible and controllable. Such an interpretation allows us to understand *Terry* in the

context of the overall project of the Warren Court, rather than as an unexplainable outlier.

### **The *Apprendi* and *Blakely* Decisions as a Site of Struggle between Formalism-Centered and Fairness-Centered Due Process**

As mentioned earlier, conventional wisdom sees the post-Warren Courts as crime control oriented. This analysis holds true with regard to a variety of issues and is easy to overgeneralize because of the pro-government direction of the Burger, Rehnquist, and Roberts Courts. Doing so, however, runs the risk of misunderstanding the source of some of the important and far-reaching pro-government decisions of the post-Warren Courts, specifically those authored by Justice Scalia.

Scalia, whom no one would suspect of natural pro-defendant biases, authored an influential concurring opinion and was the decisive swing vote in *Apprendi v. New Jersey* (2000), which held that any fact (save for the existence of prior convictions) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. This decision, as well as a series of dissents by Scalia, would later prompt the Court's decision in *Blakely v. Washington* (2004), which extended the *Apprendi* rule to any fact that must be found in order to increase the sentence, even if it is within a statutorily allowable range of the then-mandatory sentencing guidelines.

Long before *Apprendi*, Scalia sought an end to the extensive use of sentencing enhancements and focused almost exclusively on a due process rationale. Soon after he arrived on the Court, he expressed unease with the Federal Sentencing Commission. He argued that the commission is an unconstitutional delegation of power and cited to the political philosopher John Locke, among other sources, regarding fundamental principles of governance (*Mistretta v. United States* 1986). By the end of the 1990s, he had refined his focus to the jury trial right (*Almendarez-Torres v. United States* 1998; *Monge v. California* 1998; *Jones v. United States* 1999), upon which he later based his influential concurring opinion in *Apprendi*.

Like Scalia in his concurrence, the *Apprendi* majority justified the right it announced as firmly rooted in due process. In *Apprendi*, the relevant criminal statute imposed a ten-year maximum for possession of a gun, but a separate hate-crime statute allowed an increase to twenty years for crimes motivated by racism or intimidation against certain protected categories. The hate-crime statute provided that applicability would be decided by a judge, based on the preponderance of the evidence. The Court held that the finding that a certain offense was a "hate crime" constituted an element of the offense and therefore required a jury decision.



The opinion relied on a classic case invoking due process rights, *In re Winship* (1970), to explain the right. *Winship*, authored by Justice Brennan, held that proof beyond a reasonable doubt of every element is one of the “essentials of due process and fair treatment” (359) that must be afforded even to juveniles. The reasoning draws heavily on due process model ideas. In a relatively minor juvenile case regarding money stolen from a locker, Brennan discussed extensively the purpose of the criminal justice system itself. He explained that fact finding is inherently subjective and the burden affects the margin of error. Justice Harlan’s concurrence explained further that

[I] view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free. It is only because of the nearly complete and long-standing acceptance of the reasonable doubt standard by the States in criminal trials that the Court has not, before today, had to hold explicitly that due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil litigation. (372)

Contrasting Scalia’s concurring opinion with Justice Breyer’s dissent in *Apprendi*, and subsequently in *Blakely*, is a fascinating exercise in distinguishing between formalism-centered and fairness-centered due process. In his *Apprendi* dissent, Breyer expressed concern that extending the jury trial could potentially harm a defendant by placing him in the “awkward (and conceivably unfair) position of having to deny he committed the crime yet offer proof about how he committed it” (*Apprendi* 2000, 557). In *Blakely*, which addressed the question of whether the *Apprendi* right to a jury extends to facts found in the sentencing guidelines, Breyer’s dissent focused particularly on the concern that introducing more formalism into trials would merely strengthen the prosecutor’s position in a system characterized by plea bargains. His explanation of these concerns is a classic fairness-centered, outcome-oriented argument:

The fairness and effectiveness of a sentencing system, and the related fairness and effectiveness of the criminal justice system itself, depends upon the legislature’s possessing the constitutional authority (within due process limits) to make that labeling decision. To restrict radically the legislature’s power in this respect, as the majority interprets the Sixth Amendment to do, prevents the legislature from seeking sentencing systems that are consistent with, and indeed may help to advance, the Constitution’s greater fairness goals. (*Blakely* 2004, 345)

The argument favors administrative and legislative regulation of sentencing, but to benefit defendants. Breyer’s pragmatist due process is evident

throughout the opinion: As he argued, “whatever the faults of guidelines systems—and there are many—they are more likely to find their cure in legislation emerging from the experience of, and discussion among, all elements of the criminal justice community, than in a virtually unchangeable constitutional decision of this Court” (345–46).

Scalia’s responses to Breyer’s concerns are a classic example of formalism-centered due process. Scalia directly accuses Breyer of supporting a system that is “an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State” (498). Breyer, according to Scalia, imagines a “bureaucratic realm of perfect equity” where

the facts that determine the length of sentence to which the defendant is exposed will be determined to exist (on a more-likely-than-not basis) by a single employee of the State. It is certainly arguable (Justice Breyer argues it) that this sacrifice of prior protections is worth it. But it is not arguable that, just because one thinks it is a better system, it must be, or is even more likely to be, the system envisioned by a Constitution that guarantees trial by jury. (498).

In an explicit expression of preference for the law-in-the-books set of trial rights over the realities of plea bargaining, Scalia argues that Breyer’s preference for nonadversarial fact finding is “an assault on jury trial generally” (313). He explains,

Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers’ paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment. Under the dissenters’ alternative, he has no such right. That should be the end of the matter. (313)

What is the meaning of this debate in the context of Packer’s work? As argued by Stephanos Bibas (2001a, 2001b, 2001c) in a series of articles written following the *Apprendi* decision, it represents a preference for formalism over effective defendants’ rights. In these pieces, later cited by Breyer in *Blakely*, Bibas explained his opposition to *Apprendi* as a fairness-centered due process concern stemming from the need to maintain fairness within the constraints of plea-bargaining and mass convictions. Bibas (2001b) suggested that

*Apprendi* is a trade-off of a meaningful sentencing hearing right for a meaningless jury trial right for the vast majority of defendants because of plea pressure.

For our purposes, Bibas's argument implies that the *Apprendi* majority made a choice between two due process model options, by focusing on a formalist, and impractical, insistence on rights at the guilt phase at the expense of a richer, more meaningful hearing at the sentencing phase. Bibas (2001b) states, "the right to trial by jury . . . is the one [right] that undermines defendants' right to hearings in the world of guilty pleas" (335).

Does due process extend to the sentencing phase and require a "more meaningful hearing"? Arguably, if imposing a higher sentence requires proving certain conduct by a certain evidentiary standard, the sentencing hearing merits consideration from the due process perspective. However, other aspects of the hearing constitute an administrative procedure. The hearing must fit the appropriate punishment to the crime. Outcomes form a significant basis for the discussion. The hearing is less formal than the jury trial and many evidentiary rules are relaxed. Court officers, such as probation officers, charged with offender supervision may play as significant a role as the prosecutors in explaining the appropriate punishment. The presumption of innocence or "legal guilt" no longer applies, except to the extent that a rational basis remains after *Apprendi*. Therefore, the sentencing phase may be more flexible, more open, and more conducive to substantive fairness than the guilt phase, even when guilt is determined through the paragon of formalist due process, the jury trial.

Has the adherence to formalist due process in *Apprendi* really worked to the defendants' detriment? This question has been the subject of extensive debate (Bibas 2001a, 2001b; King and Klein 2001). Bibas's argument depends to a large extent on the manner in which judges and prosecutors exercise their discretion. However, debate and later case law did show that for certain types of defendants, *Apprendi* is a curse rather than a blessing.

One such example is proving drug quantity for sentencing purposes in narcotics cases. As early as 2001, speculation emerged that, in light of *Apprendi*, any drug quantity would be explicitly stated in the indictment and sent to the jury for all drug-trafficking cases (Hrvatín 2001). This possibility created a serious incentive for defendants to plead guilty: proving drug quantity before the jury would lead the prosecution to expose the jury to a mountain of narcotics, a sight that might be severely prejudicial in the sentencing phase. This issue is significant because of the large percentage of drug trials, which constitute one-third of the federal courts' caseload (Bureau of Justice Statistics 2007). In addition, there is Bibas's practical concern that "in the real world of guilty pleas . . . where fewer than 4% of defendants ever get to juries . . . rhetorical invocation of juries is almost pointless" (Bibas 2001a, 317). Under the new post-*Apprendi* regime, prosecutors can now force a defendant to concede to a certain quantity of drugs as part of receiving a

plea agreement, where previously the defendant could have challenged it at the sentencing. Bibas suggests that the prosecutor can force an all-or-nothing plea deal at an earlier phase of the trial, without having to purchase the waiver of the right to contest enhancements at the sentencing hearing with additional concessions.

Ironically, the *Apprendi* and *Blakely* decisions eventually served as the doctrinal foundation for subsequent decisions that stripped the sentencing guidelines of their mandatory power (*United States v. Booker* 2005; *Cunningham v. California* 2007). This outcome, restoring some judicial discretion and potentially weakening the overarching prosecutorial discretion, resonated with the scholarly and judicial critiques of the sentencing guidelines (*Community Release Board v. Superior Court* 1979; Griset 1991; *People v. Bagnald* 1991; Stith and Cabranes 1998). It was not, however, a natural continuation of the formalist due process reasoning behind *Apprendi* and *Blakely*, both of which advocated more, rather than less, structure in decision making. Scalia, who dissented in the *Booker* decision and in subsequent fairness-centered decisions on the matter, would see them as a sneaky move on the part of fairness-centered due process advocates and would mention in later decisions that he “lamented” the unclear implications of the “different majority” in *Booker* (*Rita v. United States* 2007); Justice Thomas’s views are similar (*Kimbrough v. United States* 2007).

### CONCLUSION: THE LIMITS OF THE LIMITS OF THE CRIMINAL SANCTION

What do the *Terry* and *Apprendi/Blakely* stories teach us about the application of Packer’s models to the Supreme Court’s rulings? While the crime control–due process continuum is a helpful tool for understanding Supreme Court decisions on criminal procedure, it is not inclusive enough to explain some of the pragmatism of the Warren Court, or some of Justice Scalia’s influential decisions, which relied on formal adherence to the constitutional language rather than on the need to assist law enforcement officials in their battle against crime or to protect defendants. These rationalizations were not mere rhetorical devices on the part of Warren and Scalia; they present strongly held convictions about the meaning, administration, and priorities of procedural justice. While no justice can be said to subscribe exclusively to a certain “model of criminal process,” these examples demonstrate how beliefs about the importance of exact phrasing of constitutional rights, or the relative significance of stages in the process, shape Supreme Court decisions, which, as argued earlier, were the natural playing field for Packer’s models.

It is important to point out that crime control perspectives matter even within a framework that acknowledges different conceptualizations of due

process. Indeed, the formalism-fairness divide is deeply informed by the Supreme Court's awareness of the realities of crime control. Echoing the social science critiques of Packer from the 1960s and 1970s, both Chief Justice Warren in *Terry* and Justice Breyer in *Apprendi* and *Blakely* aimed at expanding the constitutional set of rights precisely because of what they correctly perceived to be the empirical realities of criminal justice: a powerful and largely unsupervised police force reacting to law enforcement needs in the street and a massive apparatus of plea bargaining that marginalizes much of the constitutional set of trial rights. In some ways, in contrast to McBarret's (1981) assertion that "due process is for crime control" (156), it could be said that awareness of crime control has shaped and strengthened the fairness aspect of due process, whereas formalist due process has largely reflected a judicial perception that ignores the realities of lower courts and the need for efficiency. The Warren Court's enterprise emerges from this analysis as a complex amalgam of the naive belief that rules can overcome deeply engrained realities in the law enforcement field and the realistic assertion that constitutional supervision—when liberally and creatively interpreted—is better than no supervision at all.

Some of the newer decisions of the Rehnquist and Roberts Courts, such as the *Booker* and *Cunningham* decisions, which undermined the mandatory power of the rigid sentencing structure, might have encouraged Packer, who became disillusioned with the potential of due process to change the criminal apparatus. His exposure to the Warren Court revolution, and to the beginning of its downfall after the Nixon election, would lead him to believe that formalism was not the answer to the ailments of the criminal process. However, he might have been excited by the potential to expand the concept of due process beyond the formal language in the Bill of Rights so as to encompass broader notions of fairness and sentencing-oriented concerns. The original incorporation debate, which took place many decades before the publication of *The Limits*, could have suggested this direction, but its more modern incarnations may have been beyond even Packer's predictive talents.

Finally, examining Packer's contribution to courtroom research scholarship in its disciplinary and political context does not imply fault or poverty in the model—quite the opposite. Indeed, it is a testament of the models' usefulness, rather than their flaws, that they inspired so much subsequent scholarship, which suggested models and patterns beyond those that Packer could have foreseen in 1964 or 1968. New work should be careful not to unfairly present Packer's arguments as straw-man arguments or to present new frontiers that were, at the time, beyond most criminal justice scholars' imagination as direct attacks on his framework. Our use of Packer's two-model continuum as a proverbial coat hanger for new frameworks and paradigms is a natural and welcome device of critique and analysis. We must not forget the debt of gratitude we owe the useful basic paradigm we have built so much upon.

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