

THE CRIME CONTROLS AND DUE PROCESS MODELS

By Brandon A. Perron, Board Certified Criminal Defense Investigator

The American justice system's need for an effective strategy to combat crime has been debated for years. In fact, close examination reveals that the core of the controversy and conflicting philosophies are fundamentally liberal and conservative and thus political in nature. Consider the goals of the American Criminal Justice system for a moment. Primarily the goals can be categorized into two very distinct missions: (1) the need to enforce the law and maintain social order, and (2) the need to protect people from injustice.^[1] A cursory examination would appear to reflect that the two goals represent a common and consistent ideology. However, the two goals are generally considered to be in conflict with each other. The first goal is referred to as the crime control model and was developed by Herbert Packer and presented to the academic world in his analysis of the criminal justice system in the 1960s.^[2] This model places an emphasis and priority upon the aggressive arrest, prosecution, and conviction of criminals. The second goal is quite the opposite focusing upon protecting the individual rights of the accused and is commonly referred to as the due process model.

The political considerations are obvious. Historically, the conservative position has generally endorsed the crime control model with the liberal position defending and supporting the due process model. Many would argue that the two positions would always be in conflict with each other forcing the American justice system to either make a choice or remain ineffective. To some the decision is black or white arguing that only one of the two goals can be effectively pursued. Unfortunately, such a perspective is a common symptom of political influence. After all, police agencies are government entities and therefore generally have no choice but to answer and conform to changing political will.

Consider the various methods employed to pursue the crime control model. The argument in support of such a philosophy and its methods is rather compelling. Proponents endorse an all-out assault upon criminal activity. The term "War on Crime" is commonly referred to by politicians and law enforcement as a means to identify, pursue, isolate, and ultimately eliminate the criminal element in our society. Such a strategy may include targeting high crime areas, increased patrols and traffic stops, profiling, undercover sting operations, wiretapping, surveillance, and aggressive raids and searches designed to break the back of criminal activity. Proponents argue that certain individual rights must be sacrificed for the common good. The positive effects of such a strategy are obvious in that criminals and criminal activity becomes the direct target of law enforcement. Entire neighborhoods plagued by prostitution, drugs, and gang activity have been cleared and made safe for law-abiding citizens. Due to the existence of significant and visible results such strategies are also generally popular by the citizenry and politicians. However, the "War on Crime" like all wars often results in collateral damage. For example, in Morgantown, West Virginia police raided the home of a 72-year-old woman based upon what the police claimed was a "bad tip". According to a confidential informant, the suspect residence was a drug den cultivating marijuana plants. However, the aggressive raid resulted only in the recovery of 60 pepper and tomato plants.^[3] Such collateral damage is often considered

acceptable. Unfortunately, collateral damage can also result in the loss of human life. Real war” maintains a degree of what is referred to as “acceptable losses”. Consider the following case in point: In Boston, Massachusetts, a drug raid by police left a 75 year old minister dead of a heart attack. The raid was based upon information from a paid informant, rejected two months earlier by police as “unreliable”. The police, prepared and expecting to encounter “four heavily armed drug dealers and a kilogram of cocaine”, burst into the apartment of the minister with a SWAT team. The 75-year-old minister described as “frail” was chased into his bedroom by police, wrestled to the floor, and handcuffed. The minister collapsed during the struggle and died of heart failure. Following the incident the police learned that the informant had provided the wrong apartment number. The police commissioner later apologized stating that “the one tragic fact which is clear at this time is that the minister was an innocent victim in the continuing war on drugs.” [4] The two examples described here are extreme but also significant. The strict proponents of the crime control model must ask themselves if such incidents are acceptable losses. The ancient Roman advocate Cicero made an interesting and relevant point when he said, “the law is silent during war”. [5]

The strengths and weaknesses of the crime control model have been demonstrated but what of the due process model? Should the American Justice system be focused solely upon the fundamental freedoms and individual rights of each and every citizen? American jurisprudence is grounded in the philosophy set forth by Sir William Blackstone: “It is better that ten guilty escape than one innocent suffer”. [6] The due process model demands a careful and informed consideration of the facts of each individual case. According to this model, law enforcement agents must recognize the rights of suspects during arrest, questioning, and handling. In addition, constitutional guarantees must be considered by judges and prosecutors during trials. The primary mission of the due process model is to protect innocent people from wrongful conviction. [7] It is doubtful that many would argue against the fact that we must engage in significant efforts to protect those who may be falsely accused. However, many argue that while the due process model focuses upon the rights of the accused it ignores the rights of victims.

The Fourth Amendment of the United States Constitution prohibits unreasonable search and seizures stating, “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched and the persons or things to be seized.” [8] The law enforcement community repeatedly complains that the Fourth Amendment limits their ability to combat crime. Careful study reveals that the limitations upon law enforcement actually stem from the various and never ending decisions rendered by the courts in respect to their interpretation of the Fourth Amendment. New interpretations may expand or further limit the power of the police. Such changes often cause confusion and are subject to change and new interpretation at any time by the courts. Furthermore, the due process model does not limit itself to the Fourth Amendment. The police must also consider the individual rights of the accused in respect to many of the individual rights guaranteed by the Bill of Rights. For example, 1) a right to be assumed innocent until proven guilty, 2) a right against arrest without probable cause, 3) a right against self-incrimination, 4) a right to an attorney, and 5) a right to fair questioning by the police. [9] Of course this

is just a small sampling of the individual rights guaranteed by the United States Constitution and they are continually subject to change as interpreted by the courts. Where does it end? Do the rights of the individual outweigh the rights of the many? Proponents of the due process model argue that the rights of the one in fact represent the rights of the many. However, everyone does not always view the claims of victory by due process model proponents as just or moral for that matter. On March 21, 2001 the American Civil Liberties Union (ACLU) hailed a 6-3 decision by the United States Supreme Court “holding that pregnant women cannot be subject to warrantless, suspicionless searches simply because they are pregnant” .[\[10\]](#) The issue in question was presented in *Ferguson V. City of Charleston*, specifically related to a public hospitals policy that pregnant women be subjected to surreptitious drug screens of their urine, results of which were turned over to the police. The policy resulted in the arrest of twenty-nine women. The ACLU stated that the decision “sends a clear message that even a conservative court is not willing to allow the serious erosion of our basic constitutional rights in the name of the war on drugs.” [\[11\]](#) The decision in this case provided an example of the continuing debate in respect to the due process model. The decision rendered in *Ferguson V. City of Charleston* could be considered a weakness or strength of the due process model dependent upon your particular perspective.

We have addressed both the crime control model and the due process model and have found significant strengths and weaknesses inherent to both of them. Close examination reveals that law enforcement agencies must be careful not to allow their agencies to pursue one model with disregard for the other. Both appear to have potential pitfalls and dangers that could threaten both safety and security and the individual freedoms that have made the United States a beacon of stability and freedom throughout the world. Liberal proponents of the due process model believe that the crime control model is too harsh and pursues the ideology of a police state. The arguments of the conservative supporters of the crime control model complain that the due process model protects the guilty at the expense of innocent law abiding citizens. However, we must recognize that we will probably always be confronted with ideological conflict from each end of the philosophical and political spectrum. Considering the various weaknesses and strengths of the two models some experts, such as noted criminologist Frank Scmalleger, support a new approach where “it is realistic to think of the U.S. system of justice as representative of *crime control through due process*” .[\[12\]](#) Such a philosophy provides a moderate approach that protects the individual freedoms Americans have fought and died for and protects society from a criminal element that is intent on doing them harm. Frank Scmalleger argues that crime control through due process combines the strengths of the two models while also recognizing and avoiding the weaknesses and potential dangers to our society. A true test of this model has been thrust upon the American justice system. The tragic and horrific events of the September 11, 2001 terrorist attack upon the World Trade Center and Pentagon will force a heated and emotional debate. Thousands of lives have been lost in a senseless attack on United States soil. Criminal Justice and Judicial leaders will be confronted with the daunting task of balancing the responsibility of protecting American citizens while also protecting the individual rights of those accused. However, the political winds have already changed with many Americans concerned primarily with security and safety. This emotional shift may evolve into a philosophical change and result in an American public willing to sacrifice a degree of individual freedom in exchange for security and safety. Of course, characterization of the terrorist act as an “Act of War” will almost certainly change the rules. It is within this context that Cicero’s words will be tested and my inevitably haunt us.

It is impossible to know what the future holds in respect to the American justice system. The future is often determined not by our intentions but by the uncontrollable events we encounter while pursuing our goals. Criminal Justice administrators may not be able to achieve every goal they set for their agency but they can maintain a clear and focused philosophy. The *crime control through due process* model appears to be the best strategy to deal with crime in the days ahead. It is interesting to note that Frank Schmalleger's interpretation and combination of the two models appears to be consistent with the very framework laid out by the founding fathers in the United States Constitution when they wrote, "We the People of the United States, in Order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."^[13] Only time will tell.

[1] Kenneth J. Peak, *Justice Administration*, third edition 2001, Prentice Hall, page 14.

[2] Frank Schmalleger, *Criminal Justice Today*, fifth edition, Prentice Hall 1999, page 28.

[3] *Crime & The Drug War*, *The Confidential Informant Crime Magazine*, Volume 2, Issue 1 (Winter 1995)

[4] *Crime & The Drug War*, *The Confidential Informant Crime Magazine*, Volume 2, Issue 1 (Winter 1995)

[5] Applewhite, Evans, Frothingham, *And I Quote*, St. Martins Press 1992.

[6] Brandon A. Perron, *Uncovering Reasonable Doubt*, Morris Press 1998, page iii.

[7] Frank Schmalleger, *Criminal Justice Today*, fifth edition, Prentice Hall 1999, page 28.

[8] John M. Scheb & John M. Scheb II, *Criminal Law & Procedure*, third edition, West/Wadsworth 1999, page 367, reference The United States Constitution, 4th Amendment.

[9] Frank Schmalleger, *Criminal Justice Today*, fifth edition, Prentice Hall 1999, page 27.

[10] www.aclu.org, ACLU Freedom Network press release, 2001.

[11] www.aclu.org, ACLU Freedom Network press release, 2001.

[12] Kenneth J. Peak, *Justice Administration*, third edition 2001, Prentice Hall, page 14.

[13] The United States Constitution.