(SAMPLE)

CRIMINAL PROCEDURE NOTES
LAWS5003 Semester One, 2016

★ Journal Articles ● Case Readings

CRIMINAL PROCEDURE

Topic One - Introduction to Criminal Procedure	**Page 1**
Principles underlying criminal justice	
Fair Trial – What constitutes a fair trial in the criminal context?	
Brown: The Criminal Process and Competing Versions of What the Law "Is"	
Pre-Trial Process	
Procedural v Substantial	**Page 2**
Discretionary Decisions: Under the powers of arrest	
Brown: The Criminal Process - Introduction	
The process of punishment	**Page 3**
3.1.4: The (in)visibility of pre-trial processes	
3.1.5: Technocratic Justice: the drive for efficiency	
★Tom Tyler: Why People Obey the Law: Procedural justice, legitimacy and compliance (2006).	**Page 4**
★David Garland, The Culture of Control: Crime and Social Order in Contemporary Society (2001): Ch. 5	**Page 5**
High crime rates as a normal social fact	**Page 6**
The myth of the sovereign state and its monopoly of crime control	
Adaptive Responses	
Defining Deviance Down: (pg. 10)	**Page 7**
Relocating and redefining responsibilities (pg. 12 - 13)	
Non-adaptive responses: Denial and Acting out (pg. 15- 16)	**Page 8**
STAGES OF CRIMINAL JUSTICE	**Page 9**
Jurisdictions of courts in NSW	
How do I determine where an offence will be heard?	**Page 10**
Elective or 'hybrid' offences	

Two tiers of justice **Page 11**

Readings: Stages of Criminal Justice

★Pat Carlen, Magistrates Justice Examines the structures of court rooms as "ritualistic spaces" **Page 13**

A right to silence **Page 14**

The expansion of summary jurisdiction

Topic Two - Police Powers and Discretion **Page 15**

Discretion and the 'construction of the suspect population'

Sources of police power include:

Consent as a source of police power

Regulation of the power to question

Specific provisions of LEPRA **Page 16**

Case study: Requesting ID

Case study: Arrest without a warrant

How is an arrest affected? **Page 17**

Safeguards: Part 15, ss201-203, 204A LEPRA

What are the potential consequences of unlawful arrest?

After arrest **Page 18**

★Interrogation, the right to silence, and the introduction of the ERISP

Search powers and reasonable suspicion **Page 19**

● R v Rondo (2001) 126 A Crim R 562
Stop and search. Reasonable suspicion = less than a reasonable belief but more than a possibility.

Consider: Gareth Griffith, Police Powers in NSW

Possible consequences of improperly or illegally obtained evidence

Power of entry in domestic violence situations **Page 20**

Readings: Police powers and discretion

"In cruder days" ... a dose of "low-level terror?"

PP McGuinness, "The Price of Liberalism", Sydney Morning Herald, 8/3/1995

The Extent of Discretion

An Illustration of Discretion: Constructing the suspect population **Page 21**

★M McConville et al, The case for Prosecution (1991)

An Illustration of Discretion: Police Move-on Powers

NSW Ombudsman, Policing Public Safety: Report under s 6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1998 **Page 22**

Regulating Discretion: Police and the Young Offenders Act 1997 **Page 22**

★Janet Chan, Jenny Bargen, Garth Luke and Garner Clancey, "Regulating Police Discretion: An assessment of the impact of the NSW YOA 1997" (2004)

An Illustration of Discretion: Summons or Arrest? **Page 23**

Neither Arrest Nor Summons: Assisting Police with their inquiries – "voluntary" attendance and the realm of "consent"

●S and J (1983) 32 SASR 174 at 185
The choice whether to comply/give consent must be a genuine choice. Even though police stated they were not under arrest at the time, they did not say he was free to go at any time

The non-justiciability of Selective Law Enforcement **Page 24**

●Wright v McQualter (1970) 17 FLR 305 at 318
Courts are reluctant to consider issues of selective enforcement relating to police discretion.

Powers of arrest (LEPRA Part 8)

Purpose of arrest **Page 25**

●R v Dungay [2001] NSWCCA 443
An arrest under s99 LEPRA must be for the purpose of taking proceedings in relation to the offence, and not for some extraneous purpose

●Zaravinos v State of New South Wales [2004] NSWCA 320
There were reasonable grounds to suspect that the plaintiff had committed an offence. However, the arrest was held to be unlawful because it was done for an extraneous purpose.

Arrest as a last resort: common law pre-LEPRA

Arrest as a last resort: LEPRA s.99(3)

Case law on arrest powers under LEPRA s.99 **Page 26**

●Williams v DPP [2011] NSWSC 1085
An arrest must comply with LEPRA s.99(3) to be lawful. This can impact the conviction of offences relating to the arrest (i.e. resist police).

Other factors that may make an arrest unlawful

Discontinuing arrest and use of alternatives

Citizen's arrest **Page 27**

Resolving Disputes without Litigation

On the Spot Justice: Infringement Notices, Fines and "Simulated Governance"

★Pat O'Malley, "Fines, Risks and Damages: Money Sanctions and Justice in Control Societies" [2009] **Page 28**

★Pat O'Malley, "Simulated Justice: Risk, Money and Telemetric Policing" [2010] **Page 29**

Majority Verdicts **Page 29**

●Cheatle (1993)
Requirement of unanimity is an essential feature of the trial by jury guaranteed by s 80 of the Jury Act.

●Brownlee (2001)
HC held that two provisions of Jury Act allowing for reduction in no. of jurors from 12 to 10 in course of trial (s 22) and allowing for jury to separate at end of the day (rather than be sequestered, s 54) were both consistent with s 80

●Williams v Florida (1970) US
The essential feature of jury lies in the interposition btw the accused and his accuser of the common sense judgment of a group of laymen, and in community participation and shared responsibility that results from a groups determination of guilt or innocence

The expansion of summary jurisdiction **Page 30**

Restorative Justice

12.2.6 RISE (Reintegrative Shaming Experiments) **Page 31**

★John Braithwaite – Crime, shame and reintegration (1989) **Page 31**

Domestic Violence – AVO's

Legislative Changes around AVOs **Page 32**

Current Law

Grounds on which ADVO may be made - s16 of Crimes (Domestic and Personal Violence) Act 2007 **Page 33**

Issue Related to Policing Domestic Violence

Youth Justice Conferencing

Sentencing of Juveniles **Page 35**

Circle sentencing

★E Marchetti and K Daly, "Indigenous Courts and Justice Practices in Australia" May 2004 **Page 36**

The extent and culture of police verbal **Page 37**

Report of a Commission of Inquiry pursuant to Orders in Council (Fitzgerald Report) (1989) 206-7

A right to silence?

Detention for questioning? **Page 38**

●Clarke v Bailey (1933) 33 SR (NSW) 303

A constable arresting a person under powers given to him by statute must take him without delay and by the most direct route before a justice, unless the circumstances reasonably justify a departure from these requirements.

Crimes (Investigation of Commonwealth Offences) Amendment Act 1991.

Law Enforcement (Powers and Responsibilities) Act 2002 **Page 38**

★David Dixon, "'A window into the interviewing process'? The audio-visual recording of police interviews with suspects in New South Wales, Australia" (2006) **Page 39**

★M McConville et al, The Case For the Prosecution, (1991) at 65-67, 69-71, 78-79 Creating facts thorugh interrogation **Page 40**

Conditions of reform

Reasonable suspicion **Page 41**

Searches by consent

●***DPP v Leonard* (2001) 53 NSWLR 227**
A person may validly consent to a search even if not aware of the right to refuse, although it was held that such lack of awareness may be relevant to the issue of consent in some cases.

Types of personal search (LEPRA Part 4 Div 4)

Topic Three – Bail and Appeals **Page 43**

Legal doctrines being challenged by bail

Consequences of bail conditions

Trajectory of Bail Laws in NSW

★The Process is the Punishment – Malcolm Feeley **Page 44**

Questions **Page 45**

BASICS: What is bail?

PURPOSE: What are the competing considerations that bail legislation attempts to balance?

Procedure

Power to refuse to hear bail application: **Page 46**

★Hogg: Increasing remand rates, punishment, the presumption of innocence and likelihood of Conviction

Conflating bail and sentence: the rise of diversionary options

★Freiberg, N Morgan - Between bail and sentence: the conflation of dispositional options **Page 47**

●**Abdulrahman v R [2015] NSWCCA 238** **Page 48**
Bail: Unacceptable risk; Strength of Crown case; Balance of seriousness of

offending and community protection against personal matters affecting the applicant; Unacceptable risk found, bail application refused

How should the bail authority make a bail decision? **Page 49**

Rules of evidence for bail proceedings

s21 Right to release for certain offences **Page 49**

What kind of bail conditions can be imposed? **Page 50**

When is it appropriate to impose bail conditions?

What happens if a person doesn't comply with bail conditions?

Proposed Changes to the Bail Act 2013

How to make or oppose a bail application **Page 51**

Does the "show cause" requirement apply? **Page 52**

Judicial guidance of 'show cause' requirements **Page 54**

●LIST OF KEY CASES FROM LEGAL AID WEBSITE RELATING TO SHOW CAUSE AND UNACCEPTABLE RISK **Page 55**

Appeals **Page 62**

Criminal appeals process in NSW – Local Court

Criminal appeals process from District and Supreme Court NSW **Page 63**

Review of the system of criminal appeals in New South Wales in 2014 by the New South Wales Law Reform Commission **Page 63**

What a good criminal appeal system should look like

Appeals: Local to District **Page 64**

Appeals: Local to Supreme

Appeals: District/Supreme to CCA **Page 65**

Appeals to HC **Page 66**

What happens if an appeal is successful?

NSW law reform: double jeopardy

Appeals Cases **Page 67**

●R v Carroll (2002) 213 CLR 635
A new trial for perjury after new evidence was found in a murder case to indicate the accused had lied under oath, was actually a breach of the principle of double jeopardy, and an abuse of process

●Weiss v The Queen (2005) 224 CLR 300
It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of an offence on which the jury returned its verdict guilty

●**Baiada Poultry v The Queen [2012] HCA 14** **Page 68**
The fundamental duty of the appellate court under the criminal appeal statute is to decide the appeal. Here the question is whether there had been a miscarriage of justice in relation to procedure, not relating to the jury's verdict. It was not open to the Court of Appeal to decide whether or not the right verdict had been reached, it was whether the trial judge had improperly directed the jury.

●**Mraz v The Queen (1955) 93 CLR 493** **Page 68**
Proviso to S6(1) of the Criminal Appeal Act does not mean that a convicted person on appeal must show that he ought not to have been convicted of anything. Note: Proviso set out in set out in s 6(1) of the Criminal Appeal Act 1912 (NSW) that the court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred

Readings: Appeals **Page 69**

The structure of the Criminal Courts System

Magistrates and Local Courts

Supreme and District Courts

The Appellate Jurisdiction of the Higher Courts

Appeal from Local Court to the District Court **Page 70**

Appeal from Local Court to Supreme Court

Appeal from the District or Supreme Court to the Court of Criminal Appeal

Determination of Appeals **Page 71**

★"Conviction and Sentence Appeal in NSW CCA 1996-2002" P Poletti and L Barnes

Appeals to the High Court **Page 72**

●**Veen (1979) 23 ALR 281**
Very rare to allow appeals against sentence. This is because such appeals seldom involve a point of law of general application. The HCA is not experienced at administering criminal sentences

Topic Four – Pre-Trial Process, The Decision to Prosecute and Mandatory Defence Disclosure **Page 73**

1. Discretion in the prosecutorial function

2. The role of the prosecutor

Police Prosecutions **Page 74**

●**Woods v R [2012]**
Breaches of prosecutor's duties

3. The decision to prosecute? **Page 75**

Reasons for Decisions: DPP Guideline 12

Case study: The Chaser – Decision not to prosecute **Page 76**

Election for offence to be dealt with on indictment (DPP Guideline 8)

Outcomes of pre-trial investigation **Page 77**

4. Charge negotiation and the production of guilty pleas

Charge/plea negotiation: risks and safeguards **Page 77**

5. Pre-trial disclosure requirements – prosecution and defence **Page 78**

Defence disclosure

Legislative obligations on parties to disclose information prior to trial

Readings: Pre-Trial Process and Prosecutions

Discretion in the Criteria for Prosecution **Page 79**

The Adversarial System and the (In)Visibility of the Pre-Trial Process

Police Control over Pre-Trial Process

★R Hogg, "Identifying and Reforming the Problems of the Justice System"

Independent Police Prosecutors? **Page 80**

Duties of the Prosecutor

Disclosure

NSWLRC survey of prosecutors in 1987

(Disclosure, miscarriage of justice cases) **Page 81**

●Lawless
On HCA appeal majority held that suppressed items did not constitute 'fresh evidence' and reaffirmed that NO rule of law requires a P to disclose material favourable to the D.

●Re Van Beelen (1974)
Failure to call any one of the witnesses in question cannot constitute a ground for (calling into question) the conviction'

●Apostilides (1984)
Failure to call known witnesses thus forcing defence to call them: decision not to call witness only a ground for setting aside conviction if, when viewed against conduct of trial as whole, it is seen to give rise to a miscarriage of justice.

●Jamiesen (1992) CCA NSW **Page 82**
Held that in all the circumstances and having regard to the purpose for which Wells was to be called to witness box, there was no obligation of Crown to inform counsel for A that an indemnity had been granted to a witness whom the D intended to call

●Anderson (1991) 53 A Crim R 421
A procedural miscarriage of justice will be found where the Crown attempts to persuade the jury towards inferences that cannot be substantiated by evidence.

The Centrality of the Guilty Plea and Plea Bargaining

★K Mack and S Roach Anleu, “Balancing Principle and Pragmatism: Guilty Pleas” (1954) 4 Journal of Judicial Adminisration 232 **Page 83**

★S Roach Anleu and K Mack, “Intersections Between In-Court Procedures and the Production of Guilty Pleas” (2009) 42 ANZ J of Criminal 1

Magistrates and the Production of Guilty Pleas

Charge Bargaining **Page 84**

DPP Prosecution Guidelines

Benefits and Criticisms of Plea Bargaining

●Brown (1989) NSW CCA **Page 85**
A trial judge has the power to stay criminal proceedings in the ground that they constitute an “abuse of process”. However, the DPP prosecutor does have a very wide discretion. An abuse of process has a very narrow meaning, because the DPP have a lot of consideration to take into account and the court should not intervene

●Gas; SJK [2004] HCA
Court does not necessarily have to adhere to plea agreements.

3.5.7 “Clearing the books”: taking outstanding charges into account **Page 86**

Spigelman CJ – gives two rationales for taking outstanding charges into account

Sentence Indication Bargaining

A series of Australian decisions heavily criticised sentence indication bargaining

The Pressures to Plead **Page 87**

●Winchester (1992) 58 A Crim R 345
The court determined that the degree of discount afforded depends according to the '"reason"' why the defendant pleaded guilty:
- *If the guilty plea was the result of contrition (remorse), it depends on the degree to which recognition of guilt was inevitable (ie, more discount when the guilty plea was less inevitable)*
- *If the guilty plea was the result of trying to save the court time and costs, the discount depends on how soon the plea was entered.*

Topic Five – Sentencing and Punishment **Page 88**

1. Sources of law

2. Justifications for punishment

3. Purposes of sentencing

Judicial discretion

Striking the balance

4. Confining judicial discretion **Page 89**

Prescription of maximum penalties

General power to reduce penalties (s 21CSPA)

Penalties that may be imposed **Page 90**

Division 3 – Non-custodial alternatives

CSPA s10 Dismissal of charges and conditional discharge of offender

The principle of proportionality **Page 91**

Factors to consider in sentencing **Page 91**

s 21A(2) – Aggravating factors (eg)

s 21A(3) – Mitigating factors (eg) **Page 92**

CSPA Court to take other matters into account

s22 Guilty plea to be taken into account **Page 93**

Guideline judgments CSPA Part 3, Div 4 (ss36-42A)

Jurisic Guideline – Death by Dangerous Driving

(Guideline Judgment Cases) **Page 93**

●Jurisic (1998)
Guideline judgment for death by dangerous driving. Discusses benefits of guideline judgments: "Tension between maintaining maximum flexibility in the exercise of discretion, on one hand, and ensuring consistency in sentencing decisions, on the other."

●Henry (1999) – post Jurisic – armed robbery **Page 94**
Application accepted for guideline judgement

●Ponfield (1999) – break and enter
No pattern of leniency – rejected application for guideline judgement

●Muldrock (2011)
Sentencing discretion at common law → principles of proportionality, parity, totality and avoidance of double punishment - "erred by treating the provision of the standard non-parole period as having determinative significance"

Instinctive Synthesis

The sentencing process (CSPA) **Page 95**

Readings: Sentencing and punishment

★The Australian Law Reform Commission on the Objectives of Purposes of Sentencing

ALRC, Sentencing of Federal Offenders Discussion Paper 70

Purposes of Sentencing in NSW Legislation **Page 96**

★"Just Deserts": the rise of the new retributivism and critique

Alternate Forms of Punishment (Restorative Justice)

Legislative Constraints **Page 97**

Guideline Judgments

Preventative Detention

Sentencing Methodologies and Principles **Page 98**

Intuitive synthesis/two-tier

★Garland – 'Philosophical Argument and Ideological Effect'

●**Veen v The Queen** **Page 98**
Guy said he would reoffend, given life. Overturned and given 12 years: "punishment inflicted must be proportionate to the crime"

●**Veen (No 2) (HCA 1988)** **Page 99**
9 months after release, Veen killed another victim in similar circumstances to first homicide. Sentenced to life and not overturned. Difference – it was uncertain in Veen No 1, now clear that Veen had propensity to kill under influence of alcohol and stress

"It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence"

Purposes of Sentencing

cf s3A *Crimes (Sentencing Procedure) Act* 1999

Sentencing and Indigenous Australians

●**Fernando (1992)**
Same sentencing principles to be applied irrespective of identity

●**Bugmy (2013)** **Page 100**
Grounds of appeal – relevance of the appellant's deprived background and mental illness. Reconsideration of Fernando principles: "Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate the offender's sentence."

Sentencing options (List: Classifications; Pre-sentence interventions; rising of the court; good behaviour bond, etc)

Mandatory sentencing **Page 103**

CRIMINAL PROCEDURE
Topic One – Introduction to Criminal Procedure

The 'fundamental principle' and the principles underlying the Criminal Justice System

The Prosecution bears the onus of proof and the accused cannot be compelled to give evidence for the Prosecution: Her Honour Justice Kiefel in Lee v NSW Crime Commission (Lee (No 1)) [2013] (Henning et al, The Trial).

Principles underlying criminal justice

i. Right to personal liberty
ii. Presumption of innocence
iii. No detention without legal cause (related to (i) – the right to personal liberty).
iv. No punishment without conviction by due process.
v. A fair trial: Dietrich v The Queen (1992) 177 CLR 292.
vi. Individualised justice and consistency in decision making.
vii. Special provision for young people.

Fair Trial – What constitutes a fair trial in the criminal context?

- Trial by jury?
  - S80 of the Constitution (Cth offences only): "The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the state where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes."
  - Kingswell (1985) HC, Brown (1986) HC, Cheng (2000) HC.
- The right to legal representation?
  - Dietrich (1992) HC.

Readings: Principles of the Criminal Justice System

Brown 1.3 p17: The Criminal Process and Competing Versions of What the Law "Is"

'Criminal law is constituted in such a way as to segregate and substantially exclude coverage of criminal procedure,' largely because the whole area is too vast to be dealt with in one place. We are faced with the need to develop principles of selectivity. In criminal law the onus (burden of proof) is on the prosecution.

1.3.1 Pre-Trial Process:

- Substantive criminal laws apply to both courts and the public.
  - Versions of them apply with varying degrees of self-consciousness, by members of the public in relation to their own behaviour and in making decisions on whether or not to report an event to the police.
  - For example, rape or date rape might not be reported due to the scrutiny the person will face within the criminal process.
- Enforcement agencies make decisions on what the criminal law "is", intertwined with decisions about the extent to which it should be enforced.
  - If they decide to bring charges, they will initially determine the precise nature of the charge.
  - Crown prosecutors play a similar role in deciding what counts to lay in an indictment following criminal proceedings.'

Procedural – discretionary aspects to the pre-trial criminal process

Substantive – rules of criminal law applied by the courts.

- Pressures and tendencies organized around class, race, gender, cultural and other relations, structure the exercise of discretion so as to produce selective application and development of the substantive criminal law.
- Substantive criminal laws do not simply "play upon" the "facts" produced by the operation of the pre-trial criminal process.
    - The police and prosecutors have developed their own versions – at least of what enforceable criminal law "is".
    - These influence the way in which they exercise their discretions and play a vital part in determining the "facts" which are produced for consideration by the courts. They also have an impact upon the development of criminal law at an appeal court level.

Discretionary Decisions: Under the powers of arrest:

- The criterion will usually be whether or not there is a reasonable suspicion that an offence has been committed.
    - Involves questions of fact rather than law, but where the offense is framed in broad terms, such as "offensive behaviour", questions of fact and law become intertwined.
- The decisions of the police officers will rest fundamentally on their version(s) of what the law of "offensive behaviour", in the context of arrest, "is".
- In absence of prosecution, the version of the law will not be subject to any further review outside of the police force, except in the unlikely event that the person arrested brings civil proceedings.
    - Jury instructions given by the trial judge cannot be readily assumed that the jury understands it.
- Division b/w fact and law is not clear. Criminal laws often use flexible standards which have to be worked out on a case-by-case basis by juries and magistrates.
- They are frequently asked what is "reasonable" or whether or not somebody has acted "dishonestly".

1.3.2 The Trial:

- Decisions made by trial judges about definitions of criminal offenses are subject to appeal and adjustment.
- Decision on a point of law made by a judge or magistrate is only "wrong" if it is corrected on appeal.
- Opportunities for the prosecution to appeal against a finding of *not guilty* are limited.
- Law makers must be conscious of the relationship which exists b/w the requirements of substantive law and the practices used by enforcement agencies to collect and extract evidence to meet those requirements.
- Criminalization is the process of identifying an act deemed dangerous to the dominant social order and designating it as criminally punishable.

Brown 3.1 p144: The Criminal Process - Introduction

How crime and criminal law are apprehended is dependent on a complex range of historical, economic, political, ideological, cultural, moral, and social forces, dependent on the ways knowledge about crime is produced within various institutions and networks of power relations.

The themes outlined in this chapter will illuminate the blurred and complex relationship b/w substantive law and procedural context.

3.1.1 The Ubiquity of discretion:

- "The law" in the form of statutory provisions and common law formulations governing the criminal process is more of a resource, guide to action, than some form of prescriptive code to be "implemented".
    - Examine the nature of this discretion – those of police discretion whether to arrest or summons a suspect, the non-justiciability of selective law enforcement, police move-on powers, regulating police discretion in juvenile justice, and the discretion to prosecute.

3.1.2 Two tiers of justice:

- Term used by McBarnet (Conviction (1981) at 123), is used to highlight the significant differences between summary justice administered by magistrates and higher court justice by judges.
    - McBarnet: the tier of higher courts *"is for public consumption, the arena where the ideology of justice is put on display. The other, lower courts, deliberately structured in defiance of the ideology of justice, is concerned less with subtle ideological messages than with direct control" (at 153).*
    - McBarnet's discussion enables us to give greater weight to summary justice, to see it as more important than one might gather from traditional criminal law texts.
- Popular cultural explorations of law, crime and justice focus on the operations of the higher courts.
- Meanwhile the vast bulk and an increasing proportion of criminal cases, including many that have traditionally been heard in the higher courts, are dealt with summarily.
    - Under this theme, we can examine effects of this concentration on higher court justice and attempt to redress it by stressing the centrality, expansion and changing nature of summary justice.

3.1.3: The process of punishment

- The traditional standpoint about the criminal process views punishment as being administered only after a formal adversarial adjudication of guilt, against backdrop of the presumption of innocence.
- Malcolm Feeley challenged this view directly in The Process is Punishment (1979) p301 of Brown.
    - The distinction between pre-trial processes and formal adjudication of guilt as a pre-condition for punishment was somewhat illusory.
    - For many, punishment, in the form of arrest, detention, denial of bail, prolonged pre-trial custody in police cells precedes formal legal adjudication of guilt.
    - This is especially true in relation to summary justice, where the adjudication of guilt will only lead to a fine.

3.1.4: The (in)visibility of pre-trial processes

- Connects with the above themes; a common approach conceives of pre-trial processes as essentially preliminary and administrative, geared to investigate suspects before the courts for legal adjudication.
- **Result:** the extensive exercise of police discretion, in its actual exercise, is effectively non-justiciable.
    - Over the past few decades, there's been increasing recognition that various exercises of police and prosecutorial discretion do not merely involve the finding of evidence but have a constitutive role in the construction of a case.
    - **Mallard case** illustrates the setting aside of evidence that does not support the case and is therefore thought to be irrelevant.
        - It might also involve conscious decisions to construct evidence in a way so as to assist the prosecution.

        - Thus, there has been legal and political struggle to render pre-trial criminal justice processes open to greater visibility.

3.1.5: Technocratic Justice: the drive for efficiency

- Debates over cost, waste, efficiency, managerial competence, technological issues.
- **Innovation:** the removal of restrictive and archaic practices has been felt in the sphere of criminal justice; in line with the drive for micro-economic reform of Australian institutions.
    - **Effects on civil sphere:** cost considerations underwrite increasing recourse to mediation methods.
    - **Effects on criminal:** similar developments might be to move to on-the-spot fines for a range of less serious summary offences.
- Overabundance of violations and low clear-up rates have led to a situation where some sorts of acquisitive activities such as break and enter are now mainly regulated through the actuarial technologies of insurance rather than through the criminal law.
    - The drive to 'rationalise' the operations of an expensive criminal justice system might be illustrated by developments such as the massive expansion in summary jurisdiction, restrictions on committal proceedings, the empirical demise of jury trial and increasing attacks on the "inefficiency" and "irrationality" of jury trial, increased pressures to produce and reward guilty pleas through discounts and sentence-indication schemes, continual struggles over legal aid funding, etc.
        - On the other hand, such developments are far from uniform, and neither easily justified nor easily implemented, so are often opposed.
    - Efficiency and technocratic considerations will not always prove politically popular and may cause significant practical problems for the criminal justice system, as has arguably proved to be the case with the experiment in sentence indication in NSW.

3.1.6: Therapeutic Jurisprudence and procedural justice

- Therapeutic jurisprudence is partly at odds with that of technocratic justice
    - This forms part of a wider trend towards non-adversarial forms of justice.
    - Seeks to assess the therapeutic and counter-therapeutic consequences of law and the ways in which it was implemented.
    - These notions have become influential in a diverse range of developments e.g. intervention program orders attached to bail conditions, mental health courts, circle sentencing and other forms of "restorative justice".

A significant component of therapeutic jurisprudence is emphasis on procedural justice:

Tom Tyler: Why People Obey the Law: Procedural justice, legitimacy and compliance (2006). Found that in USA, evaluations of experiences with police and courts were based more on the perceived justice

- **Identified 7 issues which affected whether citizens saw justice procedures are fair:**
    1. Degree of which authorities were motivated to be fair
    2. Judgments of the honesty of authorities
    3. Degree of which authorities followed ethical principles of conduct
    4. Extent to which opportunities for representation were provided
    5. The quality of the decisions made
    6. The opportunity for error correction
    7. Whether the authorities behaved in a biased fashion

3.1.7: Elements of a fair trial

- Implied right to fair trial is also somewhat at odds with drive to technocratic justice, as expounded by the HCA in cases such as Dietrich.
    - Dietrich may be read as indicating an increasing consitutionalisation of various areas of the law as HCA has moved to elaborate certain forms of implied rights in the Aus Constitution.
    - But limited to the fact that Australia does not have a Bill of Rights.

- Developments towards fair trial principles are also confronted directly by the introduction of detention without trial for certain categories of especially dangerous offenders, such as those convicted of certain sex and terrorism offences.

3.1.8: Internationalism and Human Rights

- Human rights discourse is having increasing effect through the incorporation of international treaties in domestic law, the ratification of international Protocols which give citizens of nation states an avenue of complaint to a UN Committee and through developments such as the ICCR (*International Covenant on Civil and Political Rights*).
- The absence of either a constitutional or statutory Bill or Rights distinguishes Australia from comparable countries such as USA, Canada, NZ, and UK.

3.1.9: Miscarriages of Justice

- Police malpractice, media prejudice, inadequacy of appeal processes, the dangers of reliance on certain forms of evidence (expert, forensic, eye witness, etc) and other contributing factors have come under scrutiny in the aftermath of Australian cases such as Chamberlain, Anderson, Pohl, Stafford and Mallard.
- Under this theme, we examine some of the key practices producing miscarriages of justice, the adequacy of appeal processes, and reviews of conviction.

Journal Article: David Garland, The Culture of Control: Crime and Social Order in Contemporary Society (2001): Ch. 5

Social changes to crime control and criminal justice.

Talks about:

- **Social changes to crime control and criminal justice**
- **High crime rates as a normal social fact**
- **The myth of the sovereign state and its monopoly of crime control**
- **Adaptive Responses**
  - 6 main types of adaptation:
    - Rationalization for justice
    - Commercialization of justice
    - Defining deviance down
    - Redefining success
    - Concentrating upon consequences
    - Redistributing responsibility
- **Non-adaptive responses: Denial and Acting out**
- **The contradictions of official criminology: (pg. 19)**

In summary: Adaption, denial and acting out, if these responses to the crime control predicament have produced polices that, however incoherent in their own terms, fit remarkably well into the broader framework of contemporary social and economic policy, it would be a 'miracle of system alignment'.

More detailed summary: Journal Article: David Garland, The Culture of Control: Crime and Social Order in Contemporary Society (2001): Ch. 5

Social changes to crime control and criminal justice:

- Series of accommodations and adjustments undertaken by various agencies in response to the specific pressures, problems or opportunities these agencies encountered. Some experienced from outside the system while others within the framework of criminal justice agencies. (pg.2).

    - The distinction b/w 'inside' and 'outside' has become a wider gap.
- Over the last period of the 20th century, new emergence, new philosophies of punishment and new objectives emerged to improve crime policy and the new political and cultural context in which it operates - to invent new and more effective mechanisms of crime control and new ways of representing crime and justice. (pg. 2).
- Substantial challenge to a society's institutional arrangements creates practical problems and uncertainties – with one field of social action (crime control) appearing to align itself with structures that developed in other fields.
    - Reason: because of actions of actors and agencies involved. State actors with involvement of institutions have a central significance for the public at large (pg. 30.

High crime rates as a normal social fact:

- From post-war to 70s; high crime rates were viewed as a social fact and integrated in society.
    - However, between 60s 90s it levelled off by introduction a notion of 'fear of crime'.
- High crimes rates have become pattered regularities. And recorded crime statistics confirmed the annual increase of crime rates.

The myth of the sovereign state and its monopoly of crime control:

- It is a myth that sovereign state is capable of delivering 'law and order' and controlling crime within its territorial boundaries. (pg. 5).
    - But this myth of law and order created challenges for the states as their sovereignty was already under attack on a number of different aspects.

Adaptive Responses:

- Over time adaptive solutions became increasingly more politicized alternatives. (pg. 7).
- 6 main types of adaptation:
    - Rationalization for justice
    - Commercialization of justice
    - Defining deviance down
    - Redefining success
    - Concentrating upon consequences
    - Redistributing responsibility
        - New style of criminology reasoning

- *Rationalization for justice: (pg. 8)*
    - For administrators in charge of criminal justice agencies, high rates of crime brought immediate problems of increased caseloads and strained resources along with loss of public confidence.
    - Criminal justice agencies had to expand their capacities and transform their practices in order to keep up with the caseload.
    - Increase in crime experienced as the failure of crime control.
    - Police depts. began to professionalise themselves by investing in technology made available by the Law Enforcement Administration Authority (LEAA) by instituting the '911 policing' made possible via phone and car.
        - Consequence: widened the gap between police and the public.
    - Systematisation of the criminal justice by use of IT, operation models and computerised data as a new mechanism for promoting inter-agency co-ordination became important in the 80s and 90s.
        - The system allowed greater measure of central planning and control. Enhanced government's capacity to pursue system wide policy objectives.
    - By the 90s the new infrastructure of computers, information technology and detailed information gathering gave rise to a new way of 'smart' crime control as police sentencers and prison authorities began to use computers and geo-coded data to focus decision-making and target interventions.

- *Commercialization of justice: (pg. 9)*
    - Privatization and commercialization took place in the criminal justice system.
    - 80's and 90's government and states reliance on the private sector increased as they contracted commercial businesses to privatize crime control by providing new prison facilities.