the trial on trial
VOLUME TWO
judgment and calling to account

EDITED BY ANTONY DUFF, LINDSAY FARMER, SANDRA MARSHALL AND VICTOR TADROS
What are the aims of a criminal trial? What social functions should it perform? And how is the trial as a political institution linked to other institutions in a democratic polity? What follows if we understand a criminal trial as calling a defendant to answer to a charge of criminal wrongdoing and, if he is judged to be responsible for such wrongdoing, to account for his conduct? A normative theory of the trial, an account of what trials ought to be and of what ends they should serve, must take these central aspects of the trial seriously; but they raise a number of difficult questions. They suggest that the trial should be seen as a communicative process: but what kinds of communication should it involve; are these kinds of communication in which lay participation is relevant or legitimate; what is the relationship between such communication (and the procedural rights that it generates) and the pursuit of truth? Behind such questions lie further questions about the political legitimacy of the trial. What kind of political theory does a communicative conception of the trial require? Can trials ever actually amount to more than the imposition of state power on the defendant? What political role might trials play in conflicts that must deal not simply with issues of individual responsibility but with broader collective wrongs, including wrongs perpetrated by, or in the name of, the state?

These issues are addressed by the essays in this volume, which arose from two workshops held in 2004. This is the second of three planned volumes to be produced by the Trial on Trial project, which aims to produce an adequate normative account of the criminal trial and its proper role in a democratic polity. The first volume, Truth and Due Process (a collection of essays based on workshops in 2003) was published in 2004; the third volume, in which the four editors of this volume develop their own normative account, will be published in 2007.
The Trial on Trial
Volume 2
Judgment and Calling to Account

Edited by
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LINDSAY FARMER
SANDRA MARSHALL
VICTOR TADROS
Preface

This book is the second published product of The Trial on Trial, a three-year project funded by the Arts and Humanities Research Council. It takes up new themes not considered in the first volume produced by the project: The Trial on Trial (Volume 1): Truth and Due Process, which was published by Hart Publishing in 2004, as well as further developing some of the issues considered in that volume. These two volumes contain revised versions of papers first given and discussed at two sets of workshops held in Scotland during 2003 and 2004. The four editors will conclude the project by producing their own book, which will outline a normative theory of the criminal trial.

We are grateful to the Arts and Humanities Research Council for funding the project, and to our universities (Edinburgh, Glasgow and Stirling) for their support. We also thank those who attended our monthly meetings during the year, who helped us to grapple with a number of issues that figure in this volume and will figure in the final book: Andrew Ashworth, Michele Burman, James Chalmers, Alastair Henry, Jeremy Horder, Neil Hutton, Nicola Lacey, Claire McDiarmid, Stephen Tierney and Adam Tomkins. Finally, we are very grateful to all the participants in the workshops, both to the authors of the papers in this volume, and to those who provided helpful commentaries on and discussions of the draft papers—Sarah Armstrong, Zenon Bankowski, Michael Brady, Emilio Christodoulidis, Rowan Cruft, Peter Duff, Dudley Knowles, Gerry Maher, Claire McDiarmid, Duncan Pritchard and Sarah Summers. Their involvement has provided an invaluable contribution both to this book, and to the project more generally.
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Introduction: Judgment and Calling to Account

ANTONY DUFF, LINDSAY FARMER, SANDRA MARSHALL AND VICTOR TADROS

THIS IS THE SECOND volume of papers to emerge from The Trial on Trial, a three-year research project funded by the Arts and Humanities Research Council, the ultimate aim of which is to work towards an adequate normative theory of the criminal trial—an account of the aims that criminal trials should serve, of the values by which they should be structured and which they should express, of the role they should play in our collective, formal responses to crime; an account, in the end, of what criminal trials ought to be, and of when (or whether) and why we should have them.

The Introduction to the first volume of papers provided a general account of the overall project and of its significance, as well as responding to some of the criticisms that might be offered of focusing in this way on the criminal trial.1 We will not repeat that account here, but should say something about the very idea of putting ‘the trial on trial’:2 by what authority, in whose name, by what standards of judgment, can we claim to put the trial on trial? Beyond the play on words, this title for the project appeals in part to the idea that the criminal trial as a legal event can itself be reflexively put on trial; we can ask how far it is consistent with its own legal standards and criteria. But it also appeals to the broader idea of a trial as a kind of test.3 Such ‘tests’ might, for instance, be quasi-judicial proceedings in which people are called to answer for their actions;4 or ‘trial periods’ during which people’s competence or suitability for a role is to be tested; or the ‘trials and tribulations’ that may be seen as tests of character; or experimental explorations, as in trial projects or clinical trials. What links these disparate phenomena is that someone or something is being put to a test, and

2 See B van Roermund, ‘The Political Trial and Reconciliation’, in this volume, 173, at 176.
3 See the discussion of the religious origins of the trial in R Fenn, Liturgies and Trials. The Secularisation of Religious Language (Oxford, Blackwell, 1982).
that their actions or properties will be judged against some more or less determinate standard. This raises a first, large problem for a project that aims to put ‘the trial on trial’. We have to ask both what it is that is to be put on trial or to the test, and what the appropriate standards or criteria are against which it is to be tested and judged.

The first question might seem unthreatening, since we are all familiar with criminal trials, at least of the kinds that take place in contemporary western systems of criminal justice. But even if we thus limit our perspective to our contemporary and familiar world, ‘criminal trials’ come in a wide variety of forms.5 Some trials are contested, but many (indeed most) involve no more than a ‘Guilty’ plea followed by a sentencing process that itself is often more or less automatic; in some the verdict is passed by a lay jury or by lay magistrates, whilst in others it is reached solely by a professional judge; in some jurisdictions the procedure is ‘adversarial’, in others it is ‘inquisitorial’ (though some doubt the utility of this distinction, given the extent to which supposedly adversarial procedures have been acquiring ‘inquisitorial’ features, and vice-versa);6 many deal with ‘ordinary’ crimes, but some deal with overtly political crimes or conflicts or with ‘crimes against humanity’;7 we must also consider the various procedures operated by ‘Truth and Reconciliation’ commissions, which share some features with, but also differ markedly from, the kinds of ‘ordinary’ criminal trial with which we are familiar.8

We must therefore ask whether we should aspire to provide a normative theory of ‘the criminal trial’ as such, rather than a theory of this or that kind of criminal trial (a question that Hodgson presses in this volume, in the light of what she argues are the different conceptions of the state, of the trial and of the roles of its main players that can be discerned behind the adversarial and the inquisitorial models).9 We must also ask whether political trials, and the processes of Truth and Reconciliation commissions, must be treated separately from ‘normal’ or ‘ordinary’ trials, or whether they can throw light on what even ‘normal’ or ‘ordinary’ trials are or ought to be.10

5 Historically it can be argued that the contested adversary trial, which dominates contemporary ideas of the trial, is a relative newcomer, developing only in the late 18th century, and as an exceptional form of trial. See J Langbein, The Origins of the Adversary Criminal Trial (Oxford, Oxford University Press, 2003).


9 The classic analysis of this is in M Damaska, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process (New Haven, Conn, Yale University Press, 1986).

10 Questions that are pressed by van Roermund, Douglas and Veitch in this volume, and to which we return below.
The second question, about the standards or criteria against which the criminal trial is to be tested, goes to the heart of our project, since it requires us to ask about the proper purposes of criminal trials, and about the values (moral, political, social, economic?) by which they should be structured and in terms of which they should therefore be judged. The first volume of papers from the project tackled some key aspects of this question.\(^1\) It focused particularly on the central but problematic role of truth in the criminal trial—on the extent to which the trial is, and ought to be, aimed at establishing the truth, as well as on what the object of the enquiry ought to be. It also dealt with some central structural features of the trial, in particular those that fall under the heading of ‘due process’. This volume takes up some of the same themes (as is inevitable in a project of this kind), but shifts the focus onto the idea that trials serve or should serve to call alleged wrongdoers to account, and to subject them to an appropriate kind of judgment. Volume III, which is being co-written by the four lead researchers, will build on these papers, and the various discussions we have had during the project, to try to develop a more complete normative theory of—or at least an adequate normative perspective on—the criminal trial. In the remainder of this Introduction, we will comment briefly on the two main themes of this volume, and on how the various papers connect to them. We begin with ‘calling to account’, as a slogan that points, we believe, to a key feature of the criminal trial as a distinctive kind of institution, before turning to ‘judgment’ as that which is supposed to emerge from, and to be justified by, the process of calling a defendant to account.

1. CALLING TO ACCOUNT

To say that the trial is a procedure through which alleged wrongdoers are called to account for their alleged wrongdoings is partly to deny that we should see it simply as a procedure for either establishing the truth of what happened in the past (whether this person committed this offence) or determining what is to happen in the future (whether this person should be liable to criminal punishment, or to some other mode of coercive official treatment). It is to give the defendant a central, and at least ideally an active, role in the trial—as the person to whom the criminal charge is addressed; who is summoned to answer that charge, and to answer for his conduct if it is proved to be criminal; and who is expected to accept responsibility for what he has done, and to accept the condemnation that a conviction expresses if his guilt is proved.\(^2\) It is, in other words, to begin not with a purely instrumental view of the trial, but with an approach that centres on the communicative and symbolic aims and functions of the trial procedure.

\(^1\) The Trial on Trial I, n 1 above.

\(^2\) For a sketch of this conception of the trial, see RA Duff, Trials and Punishments (Cambridge, Cambridge University Press, 1986), ch 4.
However, if we are to make ‘calling to account’ a central slogan for the criminal trial, we must answer three questions. First, who is to be called to account, by whom, and by what standards (for in calling someone to account we must appeal to some standards by reference to which the need for an account is established, and the adequacy or inadequacy of the account given is to be judged)? Secondly, why should it matter that the trial call anyone to account, rather than, for instance, simply trying to establish whether the defendant is guilty? Thirdly, what constitutes an account of the appropriate kind? Is a merely factual account adequate, or must it involve evaluation; and if the latter, what kind of commitment ought the court, and individuals in the court process, have to that evaluation? Does the proper account deal only with the events related in a criminal charge, or is it appropriate to consider those events in the light of a broader biography of the defendant and the victim? Might it also, either explicitly or implicitly, involve an account of the history of the community that the defendant and victim share, or of the institutions that govern them?13

The obvious answer to the first question is that it is defendants who are called to account; that they are called to account by the political community, through the courts whose task it is to apply the community’s laws; and that they are called to account under the standards that those laws lay down, for what those laws define as criminal wrongs. Although that answer is certainly not simply wrong, it is (as we will shortly see) neither complete nor unproblematic: it does, however, suggest the start of an answer to the second question. One reason for calling suspected offenders to account, rather than simply trying to establish whether they are guilty, is that this seems to accord them some of the respect that is due to them as responsible agents and as citizens: as Roberts puts it, it is to treat them as subjects who must be allowed to speak for themselves;14 it treats them, as Hildebrandt puts it, as addressors as well as addressees of the norms that the trial is to apply, who must be allowed a voice in the interpretation of those norms.15 However, if our aim is to explain why we or the courts are entitled to call the defendant to account, this answer is incomplete: it suggests a reason why defendants should be allowed to give an account of themselves, but not yet why they should be called to account—which implies a demand or expectation that they ought to answer the charge and offer an account of themselves.

We could begin to complete the answer to the second question by pursuing the idea that defendants should be treated as citizens who are both addressors and addressees of the norms that the trial is to apply (that is, of the substantive criminal law): as citizens who are bound, or who bind themselves, by laws that are their own. For if I contravene norms that bind me, and to which I am

13 For different aspects of this question, see, eg, the papers by Clark, Douglas, van Roermund and Veitch, this volume.
15 M Hildebrandt, ‘Trial and “Fair Trial”: From Peer to Subject to Citizen’, in this volume.
committed, as a member of a community, it is surely appropriate that I should have to answer for that contravention, for my wrongdoing, to my fellow members: that is part of what it is to be a responsible agent—one who can, and who can be expected, to answer for his actions. This idea that wrongdoers should be called to account, and should have to answer for their wrongs, not merely to those whom they have directly wronged, but also to those who share in the normative framework that defines their community, is a pervasive one. It is part of what underpins the concern (which Douglas discusses in this volume) that those who have committed atrocities should be brought to trial as a way of reasserting shared norms after periods of disruption. It underpins, and explains some of the unease about, the Truth and Reconciliation procedures that van Roermund and Veitch discuss in this volume: for the amnesties that the Commission offered depended upon ‘perpetrators making full and honest disclosure of all the facts and circumstances pertaining to the crime’,16 but not on their expressing any kind of contrition;17 perpetrators thus had in one way to give an account of the wrongs they had committed, but were not required to answer for them as wrongs. We can also see this idea at work in the rhetoric of ‘restorative justice’, and in the centrality given in some versions of restorative justice to apology: for apology is a way of answering for, and giving a would-be reconciliatory and repentant account of, one’s actions.18 In the context of the criminal trial, however, it is problematic in various ways, of which we can mention only two here.

First, if a criminal trial calls a defendant to account, or to answer for her actions, why is the defendant allowed to remain silent? The right of silence, during police investigation and at trial, is of course controversial in its status and grounds,19 and has been to some degree undermined in England by statutory provisions that allow courts sometimes to draw adverse inferences from silence.20 Defendants are also required to appear for trial when summoned to do so, and are expected, albeit not compelled, to enter a plea.21 Furthermore, if the prosecution can adduce evidence that is strong enough to warrant a conviction if it is not rebutted, a silent defendant is liable to be convicted. Nonetheless, the defendant has no duty to play an active role in the determination of guilt and innocence—it is for the prosecution to prove guilt, not for the defendant to disprove it. How then can we say that the trial calls the defendant to account? Part of the answer to this question might be that, although defendants are indeed called to account, they are not required (on pain of further punishment) to give an account of themselves, and that this reflects a concern to protect defendants

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16 Van Roermund, this volume, 185–9.
17 Veitch, this volume, 158–61.
18 See E Girling, M Smith and R Sparks, ‘The Trial and its Alternatives as Speech Situations’, in this volume, on the rituals and conversational dynamics of apology.
21 Though a failure to plead is treated as a not guilty plea. Criminal Law Act 1967, s 6(1)(c).
and their freedom of conscience against the state’s potentially oppressive power. Another part of the answer might be that defendants are called to account only when the prosecution has established a prima facie case against them in a public court, one which either judge or jury could regard as proving their guilt beyond reasonable doubt. It is only at this point that they have something to account or answer for, ie that they committed the crime charged; and if the prosecution has discharged that burden the defendant must then either offer an exculpatory account of the actions in question or accept conviction and punishment.

The second problem is deeper and more serious. If the defendant is called to account as both an addressee and an addressor of the norms by which she is judged, what can we say to or about the defendant who rejects those norms, or who does not recognise herself as belonging to the ‘we’ who claim to be their addressors? This question is raised most obviously by trials of avowedly ‘political’ offenders who reject the law under which they are tried or the regime whose law it is; but if we accept van Roermund’s argument in this volume that there is an ineliminable political dimension to every trial, or Veitch’s argument in this volume about the impossibility of fair trials in unfair societies, the question becomes acutely problematic for all trials, because we can no longer assume that the defendants who appear in our courts can be plausibly portrayed as both addressors and addressees of the law’s norms.

This issue also leads us back to the first question about calling to account: that of who is being called to account by whom. One important feature of many informal extra-legal procedures is that calling to account is a two-way process: the person who is called to account can respond by calling the accuser to account—a response that the accuser cannot condemn as improper. Now we could see the trial as a procedure in which the prosecutor, as well as the defendant, is in one way called to account: the prosecutor is called to make good the accusation against the defendant, to account publicly (we might say) for the decision to pursue the case, and is liable to formal or informal criticism if the charge proves to be ill-founded or frivolous. But our criminal trials are not procedures through which defendants can call the state or the political community to account: defendants are not allowed to argue that the laws under which they are tried lack legitimacy, or that the state lacks the right or the moral authority to try them; and whilst there is some scope for argument about the meaning of the norms that the trial is to apply (a point emphasised by Hildebrandt), that scope is very limited. Sometimes defendants can in fact have political arguments heard: magistrates have sometimes allowed politically

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22 For an interesting development of this problem, see E Christodoulidis, ‘The Objection that Cannot be Heard. Communication and Legitimacy in the Courtroom’ in The Trial on Trial I, n 1 above, 179, drawing on N Ballestrini, Les Invisibles (Paris, POL Editeur, 1987).

motivated defendants a certain amount of leeway in mounting defences of ‘necessity’; juries sometimes flout the law. But this is infrequent and often limited. Furthermore, its legal status is questionable: it is not clear whether, in such cases, there is an application of the laws and norms governing trials, or rather a stretching of or failure to apply the law.24

This leads us onto an aspect of the third question. Even if there is sometimes in fact some limited scope for political arguments to be heard in a criminal trial, even if judges or juries sometimes have some leeway in the application of the law in politically charged cases, this does not typically lead to any change in the substantive content of the law; and it is clear that the law and the state are not seriously or thoroughly called to account in the criminal trial. The question that naturally follows is whether it is enough to argue that there are other fora in which the state or the polity can be challenged and called to account.25 But even if the state or the polity is not formally called to account in the trial, a public trial does nonetheless put the law, and the polity whose law it is, on display, and thus opens the way to critical reflection on the law. However, once we begin to think beyond the defendant, as the person who is most obviously called to account and put on trial, we might see other ways in which other parties might be involved, and be held to account. Sherman Clark uses the rule that the defendant must be allowed to confront the prosecution’s witnesses as a way into a larger argument about how criminal trials, and the ways in which they are conducted, help to construct and constitute the identity of the political community itself: the rule expresses the idea that those who would accuse a fellow citizen ought to be ready to do so to her face, thus exhibiting what he calls the virtue of ‘egalitarian forthrightness’.26 This reminds us that calling to account involves at least two parties, the called and the caller: if it is the community as a whole that calls defendants to account in a trial, then members of the community must be ready to play their part in this process, including playing the role of witness—and witnesses are of course in an obvious way called to account, in that they are required to give an account of what they observed, and to respond to challenges from opposing counsel. (Though calling to account in this sense does not necessarily mean that one has ‘standing’ in the trial—see Hildebrandt’s argument about the standing of victims.)

When we think of the role of members of the political community in the trial, we cannot but think about the various modes of lay participation in the trial—of juries, most obviously, but also of lay magistrates or judges.27 One question about the role of such lay participants is whether they are well- or ill-suited to

24 See Lord Advocate’s Reference (No 1 of 2000) 2001 SCCR 297 for an example of this tension being played out between lower and higher courts.
25 See Duff, n 12 above, at 135–9; for a critical response, see Veitch in this volume, 164–70.
26 SJ Clark, “Who Do You Think You Are?”, in this volume; he also draws on the meaning of the ‘Miranda’ rule that suspects must be reminded of their rights.
27 We should also think about the roles of other players in the trial, and of what is due to them (as well as of what is expected of them)—a point that Paul Roberts emphasises in this volume.
make the kinds of judgment that trials involve; we will discuss this question in the following section. But other questions concern the other kinds of reason that we might see for insisting on lay participation in the trial. For instance, could we argue that lay participation serves the values of democracy? Tatjana Hörnle discusses this and other kinds of arguments in favour of lay participation, and finds them generally unpersuasive, insofar as they appeal to supposedly substantial differences that lay participation can make to the democratic credentials or to the justice and fairness of the trial; in the end, she concludes, lay participation is of symbolic rather than substantive significance.\(^\text{28}\) That is a conclusion with which Clark might agree, so long as we add that such symbols are important to our self-constitution as a political community. Mike Redmayne, however, would go further than this: he distinguishes ‘court-centred’ from ‘citizen-centred’ rationales for the use of juries; whilst the former concern the jury’s competence as a fact-finding and judgment-making body, the latter concerns the importance and impact of thus involving citizens in the governance of the conduct of their fellow citizens.\(^\text{29}\) We might then argue that jurors or lay judges are symbolic representatives of the community before whom the accused is being called to account. We might also say that jurors and other lay participants in the trial, as well as such professional participants as the judge, are themselves called to account: they have a role to play in the trial, a responsibility to discharge, and they are answerable for the way in which they discharge that responsibility.\(^\text{30}\)

Though we can in these ways extend the idea of ‘calling to account’ to other participants, and though it is important to think about their proper roles, it remains true that the primary focus of ‘calling to account’ is the defendant who is called to answer to the charge (even if it is also true that we must make provision for those who call defendants to account to be called to account themselves): if a central part of what justifies the criminal trial is that it is a calling to account, it is calling the defendant to account that must be central to that justification. But such a justification is still radically incomplete, in two ways.

First, there are ways of calling to account that do not involve or require a trial: as we noted above, advocates of ‘restorative justice’ often argue that its informal, non-punitive, and participatory procedures provide a better means of calling offenders to proper account than do criminal trials.\(^\text{31}\)

\(^{28}\) T Hörnle, ‘Democratic Accountability and Lay Participation in Criminal Trials’, in this volume.

\(^{29}\) M Redmayne, ‘Theorising Jury Reform’, in this volume. He also distinguishes a third kind of rationale, the ‘defendant-centred’, but argues that legitimate forms of this reduce to one of the other two rationales.

\(^{30}\) If they are answerable, it might be suggested, they should be expected to give reasons for their decisions: important though this question is, we cannot pursue it further here. For suggested reforms which begin to take this demand seriously, see Auld LJ, Review of the Criminal Courts of England and Wales (London, TSO, 2001; http://www.homeoffice.gov.uk) chs. 5, 10 and 11.

\(^{31}\) But see Girling, Smith and Sparks in this volume on the importance of the ritual aspects of restorative justice processes, and for the suggestion that the contrast between trials and restorative justice procedures is often overstated.
Secondly, even if we see value in a public and formal process of calling to account those who commit crimes (given the character of crimes as ‘public’ wrongs), it is not yet clear that or why this is important enough to justify the whole apparatus of the criminal trial. This second point is given added force when we think of how many cases are decided by a plea bargain that precludes any full trial (and that is often more of a bargaining process than anything that could be seen as a confessional answering for an admitted wrong). In his paper, Weigend picks up on the ways in which plea bargains and a number of other procedures and devices have significantly reduced the felt need for formal, contested, public trials, and asks what significant or substantive roles formal trials could now be expected to play. He finds no plausible ambitious answer to this question—for instance in terms of truth-seeking, or of public education: the most he thinks plausible, given the shift of the truth-seeking function to pre-trial processes and the large proportion of plea bargained ‘Guilty’ pleas, is that ‘the trial could retain a residual function as a control mechanism to test the plausibility of a guilty verdict’ in contested cases, and that there might be scope for a ‘mini-trial’ to check the propriety of bargained pleas.\(^{32}\)

This also suggests some potential ways of answering our third question—that of what sort of account is required. One answer to this might be that it will vary with the context and the actor. The prosecution must account for itself to the court, in the light of the aims of the prosecution service, and may have to answer to the wider political community too.\(^{33}\) Witnesses must give an account of events according to the standards of truthfulness required by the court, and egregious departures from this standard may be prosecuted for perjury. The jury must account for their decision according to their conscience and understanding of wider community values, while judges are accountable to appeal courts for their application of the law. Finally, the criminal justice process as a whole, through the trial, purports to express the values of the community through the application of the law, in a way in which its officials and operators can be made accountable for through the political process, to bodies such as Parliament.

This makes the idea of calling to account yet more complex in relation to the accused person. We might hesitate to say that silence is an ‘account’ in these terms (although it is a challenge to the prosecution and accusers to account for their charges), but Weigend’s paper suggests ways in which a guilty plea can be understood as a form of account, as a public recognition and acceptance of the charges. The account offered by the defendant in a full contested trial is different from, although not necessarily incompatible with this. In all this we see that the notion of an account depends greatly on the context and to whom it is owed. Equally, an account of the legitimacy of the trial depends on an awareness of,\(^{32}\) T Weigend, ‘Why Have a Trial when You Can Have a Bargain? A Mildly Pessimistic Outlook on the Future of the Criminal Trial’, in this volume.

\(^{33}\) See n 23 above.
and sensitivity to, the different kinds of accountability operating in the procedures and the diverse audiences for these accounts.

If we are still to claim that ‘calling to account’ is an important function of the trial, we must say more about why it is important—and then argue either that bargained ‘Guilty’ pleas are consistent with an adequate ‘calling to account’ or that they should not be allowed. One way to argue for the importance of calling to account is by showing the importance of the judgment that should emerge from that process—which is the other main topic of this volume.

2. JUDGMENT AND THE CRIMINAL TRIAL

To be called to account is also to be called to judgment: if I must answer or account to A for what I have done, I must submit myself to A’s judgment on my actions and on my account of them. If trials are callings to account, they thus aim to produce a judgment: but that seems anyway to be a distinctive feature of trials. Whether or not it is useful to portray them as callings to account, their immediate outcome is a judgment: a judgment that is typically made and passed on the defendant, and (which is important if we are to think of trials as callings to account) declared to her—hence the significance of the defendant standing in court to hear the verdict.34 But what kind of judgment is this?

The simple and obvious answer is that it is a judgment about the truth of the charge that was brought against the defendant—a judgment that he did or did not culpably commit the crime that the charge alleges he committed. That answer must at once be qualified for trials that operate under the presumption of innocence. The question that the fact finder must decide in such trials is whether the prosecution has proved the defendant’s guilt to the requisite standard of proof: we might therefore take the verdict to express either the judgment that it has done so, or the judgment that it has not—so that ‘Guilty’ means ‘Proved guilty’, whilst ‘Not guilty’ means ‘Not proved guilty’;35 an acquittal would then be understood, not as a declaration that the accused is innocent of the crime, but only as a more limited declaration that the prosecution has failed to prove her guilty. Perhaps even that is not quite right, however, if we take the presumption of innocence seriously: for if the defendant is to be presumed innocent unless proved guilty, the prosecution’s failure to prove her guilty leaves that presumption undefeated; in which case we might see the ‘Not guilty’ verdict as reasserting her innocence. There might then be a question about the broader

34 This is true, at least, of contested trials that are completed. When the defendant pleads ‘Guilty’, that plea can be seen as replacing, or as removing the need for, the formal judgment that a verdict expresses. When the defence successfully argues, at the close of the prosecution case, that there is no case to answer, we can see the judgment as being passed on the prosecution rather than (only) on the defendant—just as, as we noted in sect. 1, we can see the trial as holding the prosecution to account.

social implications of a 'not guilty' verdict. For example, is it consistent with the presumption of innocence that a defendant who has been found 'Not guilty' on a criminal charge might then face a civil suit, based on the same alleged offence, but requiring the plaintiff to meet a lower standard of proof than the prosecution must meet in a criminal trial?

This discussion raises a number of further questions about the truth that is supposedly sought by the trial and (we hope) declared in the verdict, and about how far we can see the trial as a search for such truth-declaring judgments. Some of these questions were discussed in the first volume of papers from this project, and reappear in different forms in this volume. Three questions are worth highlighting here: one concerns the extent to which the trial can be seen as concerned with truth at all; a second concerns the nature of the truth that the trial could be said to pursue; the third concerns the way in which, and the people by whom, that truth can best be pursued.

Richard Nobles and David Schiff offer a sceptical answer to the first question. Using a systems theoretical analysis, and looking especially at the role of appeal courts, they argue that criminal trials inevitably face a 'truth deficit'. Rights (legal rather than moral rights, and in particular procedural rights) are the key, rather than truth: it is rights that provide the system with the stability it requires, and that ground the finality to which criminal trials must aspire. Others, however, whilst recognising the constraints on truth-seeking under which the trial must operate, are more optimistic about the trial's purported aspirations towards truth. One example of this optimism is found in Lawrence Douglas's defence of 'perpetrator trials' of Nazi criminals: against the charge that such trials inevitably distort the historical record, and can establish only a limited and distorted 'legal truth', he argues that they can—given an appropriate flexibility and conceptual creativity, do justice both to the defendants and to history.

The need for conceptual flexibility that Douglas notes (the need to develop new legal concepts such as genocide and crimes against humanity to capture the crimes being tried at the 'perpetrator trials'; the changing of procedural rules to reflect the different aims of such trials) highlights an aspect of the third question, about the nature of the truth that trials claim to seek, or the nature of the account that the trial seeks to give. The charge against the defendant, whose

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36 See especially the papers by McEwan, Mattarvars, Pritchard, Jackson, Jung and Burns in The Trial on Trial I, n 1 above, and the Introduction to that volume, 19–28.
39 An apparent obstacle to the search for truth, which Nobles and Schiff emphasise and which Douglas notes, is that the trial process aims for a certain kind of finality: once the verdict is in, or once the appeal process is finished, the matter is to be treated as settled—whereas, critics argue, the search for truth is in principle open-ended, ie endless. Douglas argues, however (and the UK experience with the Criminal Cases Review Commissions might bear this out), that what was presented as final can later be brought into question.
truth or justice the trial is to determine, can plausibly be read as the charge that she committed a specified wrong, in violation of the norms by which she was bound: the judgment which the trial aims to produce and validate is thus not merely a factual judgment that this or that was done, but a normative judgment about that charge of wrongdoing; a conviction does not merely record that the defendant acted in a specified way—it condemns her as a wrongdoer.40 This aspect of the trial and its judgments provides part of the basis for Roberts’ argument in this volume that the central aim or object of the trial is to serve retributive justice, as an intrinsic remedial good: if we ask why the trial should aim for this kind of judgment, one answer is that it is intrinsically important that wrongdoing be identified and condemned—though Roberts also needs to show why that condemnation should be expressed in or should lead to punishment.41 But this aspect is also part of what gives force to the worries about the legitimacy of the trial that van Roermund and Veitch discuss in this volume: for we need then to ask what legitimates the values that inform those judgments and condemnations, or the political institutions in which they are articulated, and, accordingly, what gives the court authority over the defendant.

If the judgment that the trial aims to produce and to validate is a normative judgment of this kind, it requires, as Hildebrandt emphasises, an interpretation both of the norms that are to be applied and of the actions to which they are to be applied. One question, which we have already touched on, concerns the extent to which that interpretive question is or should be open: in particular, what scope could there and should there be for the defendant to argue for an interpretation of the norms that is radically at odds with their legal history (let alone to argue about their validity as binding norms)? This is also the question of how far the norms should be understood and interpreted as being strictly internal to the law, or how far they must be understood in terms of what are at least claimed to be the wider values of the polity as a whole: in judging that the defendant is ‘Guilty’, that is, should the fact finder be judging only that his actions satisfied the law’s definition of a crime, and that he lacked any legally recognised defence; or should she also be judging that the defendant has committed a genuine wrong that merits condemnation?42 But this also bears on the question of who is eligible or competent to reach this kind of judgment: for we need now to ask not only who is eligible or competent to make the kinds of factual judgment about what was done (and why) on which the verdict must

40 That at least is what convictions seem to involve in the case of mala in se crimes: we will need to ask more carefully, however, whether we can say that all criminal trials deal with charges of substantive wrongdoing, or that all criminal convictions condemn the defendant.

41 Compare MS Moore, Placing Blame: A General Theory of the Criminal Law (Oxford, Oxford University Press, 1997), 33–5: the criminal law, Moore argues, is a ‘functional kind whose function is to attain retributive justice’, by ‘punish[ing] all and only those who are morally culpable in the doing of some morally wrongful action’. Roberts, however, is concerned here with the criminal trial rather than with the criminal law as a whole; and he makes more room than Moore does for other ends and values that the trial can also serve.

42 This question bears particularly on the issue of jury nullification: see M Matravers, ‘More than Just Illogical: Truth and Jury Nullification’, in The Trial on Trial I, n 1 above, 71.
depend, but who is eligible or competent to make the normative judgments, about the meaning and application of the relevant norms, on which the verdict also depends.

This brings us to the third question that we noted above about truth in the criminal trial: who is to judge? In particular, what role (if any) should there be for lay participants to be involved in the judgment, whether as jurors or as lay magistrates or judges? It is often said that jurors are ill-equipped to serve as rational fact-finders, especially in complex cases—a doubt that feeds into Hörnle’s larger argument in this volume about the merits or point of lay participation. Partial responses to such doubts are offered in this volume by Redmayne, and by Burkhard Schäfer and Olav Wiegand. Redmayne’s ‘court-centred’ arguments for the use of juries claim that juries can be competent finders of fact, but also that they are well suited to make the kinds of normative judgment that verdicts require—most obviously when the offence itself is defined in terms (such as ‘dishonesty’, or ‘unreasonably’) that directly appeal to extra-legal moral norms;43 we should remember, however, that juries can properly fill this norm-interpreting and norm-applying role only insofar as they represent a normative community to which the defendant also belongs, and which shares an understanding of the relevant norms. Schafer and Wiegand aim to strengthen the argument for jurors as competent fact-finders, by drawing both on the history of juries and their perceived functions (especially the shift from an expectation that juries would bring their local knowledge to bear on a case to an expectation that they should approach each case without pre-knowledge), and on some of the findings of phenomenology and cognitive science.44 A crucial part of their argument is that jurors cannot be expected to approach the trial as blank slates; they will and should bring various types of pre- or background knowledge with them—but to guard against the dangers of pre-knowledge becoming prejudice, jurors also need to be given a more active role in the trial, for instance in questioning witnesses themselves.

This volume raises significant questions, and suggests substantial answers, that will contribute to a normative theory of the criminal trial. It addresses questions about the proper nature of the criminal trial by addressing the relationships between agents within the trial as well as its social and political role. The contributions presented here, along with those presented in the earlier volume, leave us with a daunting task: to construct, from the issues raised and from the disagreements and questions that arise, a plausible normative theory of the criminal trial. We are grateful to the authors of both volumes for showing us just how demanding such a task is, as well as making for such substantial progress in developing so many of its aspects: their work will assist us enormously in writing the third volume in this series.

43 The ‘court-centred’ rationale for juries is only part of Redmayne’s case: see at n 23 above on his further, ‘citizen-centred’ rationale.
2

Trial and ‘Fair Trial’: From Peer to Subject to Citizen

MIREILLE HILDEBRANDT*

1. INTRODUCTION

TO ANSWER THE question of who should have standing in the criminal trial, we must decide what the trial is about. If the trial is about the implementation of the criminal law after it has allegedly been violated, then the alleged victim and the alleged offender serve only as means to an end. They do not necessarily need standing in the trial; since the trial only determines the punishment of offenders in the hope that this will prevent them and others from violating the law in the future. The alleged victim can be a witness if needed and the alleged offender will be the object of both the investigations of the court and punishment if he is convicted. The only one with standing in the trial then is the public prosecutor, who will put forward his claim that the law has been violated by the defendant. Actually one wonders if there is any need to differentiate between prosecutor and judge, since both have a single and common goal: the implementation of the criminal law.

This rather uncommon view of the criminal trial was of course paradigmatic for centuries in continental Europe. After advancing within the canonical jurisdiction, the inquisitorial trial model was adopted within royal jurisdiction and triumphed over the mediative trials of the feudal and local jurisdictions that co-existed for a long time with the emerging royal jurisdiction. This royal jurisdiction was part and parcel of the civil law tradition, of which a written law, professional judges and a trial based on written documents are still central features. The idea that a trial is part of the implementation of the substantive law is—historically—also typical for the civil law tradition, with its emphasis on law as a system of legal rules that pre-exists the trial. However, the trial is currently seen as both a means of identifying a defendant as an offender, and a means to protect defendants against abuse of state powers. The former

* I would like to express my thanks to all the participants in the workshops in Glasgow and Stirling (March and September 2005) for their very interesting and challenging interventions, with special thanks to Lindsay Farmer for his written comments.
implies much more than a mechanical search for the truth, because it involves
censure of the criminal act (calling to account). Further, the most salient aspect
of our ‘fair trial’ is the fact that the procedure by which citizens are identified as
offenders not only constitutes but also limits the competence of the state in crim-
nal matters. In this paper I will speak of the ‘fair trial’ whenever I refer to a trial
that embodies this double instrumentality: in the democratic constitutional state
a ‘fair trial’ is at the same instance constitutive for and restrictive of the exercise
of the ius puniendi. I will argue that even though the inquisitorial inspirations
of the ‘fair trial’ in continental Europe differ substantially from the adversarial
inspirations in Anglo-American jurisdictions, both can be seen as demonstra-
tions of this ‘fair trial’ model. On the basis of a historical and systematic analy-
sis of this trial model I will raise a number of questions around the status of the
victim in the trial.

In Part One I will discuss the meaning of the trial: what does the trial do? This
analysis will not be performed in terms of reasons, which would produce a nor-
mative or moral account as is common in legal theory, nor will it be performed
in terms of causes, which would lead to a causal account, as is common in the
social sciences. Instead I will locate the function of the trial on the epistemolog-
ical level by referring to the job it does in holding together the fragile but con-
stitutive relationship between legal norms and actions. That way I will argue
that the trial has a vital and crucial role to play in the day-to-day construction
and reconstruction of our shared world.

In Part Two I will move on to the question of how the trial is organised in dif-
ferent types of societies, comparing the ‘fair trial’ process-model with that of the
process-model in non-state societies (the mediative model) and in absolute
states (the inquisitorial model). This way I hope to demonstrate both the specific
logic and the historicity of our ‘fair trial’. Building on the analysis in part one I
will argue that the ‘fair trial’ of Article 6 of the European Convention on Human
Rights (ECHR) is a condition of possibility in our type of society for punishment
to fulfil its role as a means of communicating crucial legal norms that concern
us all (not just victim and offender). This will be done in terms of a set of con-
stitutive principles that make a trial count as a ‘fair trial’, and which explain the
relationship with the juridical construction of the constitutional democratic
state. The epistemological level can then be extended by concluding that, if we
want our trials and punishments to be part of a democratic constitutional state,
we should protect and advance the institutionalisation of these principles. This
indicates how these constitutive principles can be relevant for a normative
theory of the trial.

In Part Three I will investigate the relationship between citizenship and ‘fair
trial’ in a democratic constitutional state. I will argue that the ‘fair trial’ is
organised to protect citizens as both potential victims and potential offenders.
Without embracing the totality of his Theory of Justice we can use Rawls’ veil
of innocence to reconstruct the ‘fair trial’ as a location/occasion where the
violation of legal norms is addressed in such a way that a citizen (uncertain
whether, when and how she will be victim or offender) would agree to be tried and have others tried. Looking into the history of the trial, the victim has legal standing as long as the state does not effectively hold a monopoly on violence, which brings in the question whether the demand for enlarged participation of the victim in the trial is related to failure of the state to exercise effectively its monopoly on violence. On the other hand, one could claim that the blind spot of the ‘fair trial’ towards the victim is related to the remnants of an absolute government that cannot accept competition in the exercise of its monopoly of violence. This raises the question whether the resurrection of the victim is indicative of a move towards the mediative process-model or is a new and overdue development within the logic of the ‘fair trial’.

2. THE MEANING OF THE CRIMINAL TRIAL

(i) The Trial as Nexus between Human Action and Legal Norms

When do we call something a criminal trial? As the initiators of *The Trial on Trial* explain in their introduction to the first part of the project, ‘any account of the central or essential features of criminal trials must be partly determined by an account of the proper purposes of the criminal trial. Whatever kind of “definition” we might produce must reflect, rather than being logically prior to, a normative theory of the trial’. In other words: any theory of what counts as a criminal trial presupposes an account of its sense or purpose. Such a sense, direction or purpose does not—yet—refer to the fact that trial or punishment can be analysed in terms of cause and effect. The claim will be that to understand punishment and trial, we need to move beyond rationalist or empiricist explanations, thus avoiding both the functionalist framework of the sociologist and the idealist framework of a moral theory. Both these functionalist and the idealist frameworks work on the Cartesian separation of body and mind; causal materiality and moral intellectualism. They unavoidably confront us with the impossibility of moving from the domain of the mental to that of the physical. An exploration of the mutually constitutive relationship between norms and actions shows that instrumentality and normativity form two sides of the same coin.

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2 A similar non-positivist understanding of legal matters can be found in the work of the German legal philosopher Gustav Radbruch, who demonstrated that to understand the concept of law one must understand the values it aims to realise: justice (equality), legal certainty (positivity) and purpose (instrumentality). These values may be at odds with each other, which could explain the tensions within and disagreements about the law: G Radbruch, *Rechtphilosophie* (ed E Wolf, Stuttgart, Kohler, 1950) 168–74.
Therefore, instead of discussing the purpose of the trial in terms of the administra-
tion of justice, I will focus on the decisive impact of the trial on (re)con-
struction of the fabric of legal norms that holds our world together. Terminology such as ‘the administration of justice’ seems to presume that justice is already out there and only needs bureaucratic implementation, while speaking of ‘the (re)construction of the fabric of legal norms’ seems to acknowledge the performative and constitutive function of the trial. This function is not situated at a sociological level of analysis, but finds its grounds in an epistemology that can explain the puzzling persistence of punitive interventions and crimin-
al trials in human society. Such a perspective can clarify the function of the trial as the nexus between human actions (both the crime and the punishment) and legal norms. To explain the role of the trial in this (re)construction, I have to make a small excursion into the relationship between norms and actions, in which I will initially use the term ‘rule’ as synonymous with ‘norm’. At this level of inquiry terms like ‘normative’ do not refer to morality as a separate domain of knowledge, but to the fact that our actions are implicitly ruled by norms. The relationship between rules and actions will explain the importance of both punitive interventions and trials.

(ii) To Follow a Rule

As Wittgenstein demonstrated in his *Philosophical Investigations*, following a rule is a very particular and pervasive aspect of human behaviour. Our actions do not speak for themselves and could easily be interpreted in numerous ways. To allow communication and interaction, some shared interpretation must be available and protected; otherwise a chaos of meaning would destabilise our living together. This shared interpretation is not in the first instance about whether an action is good or bad, permitted or prohibited, but about whether this action counts as a particular action. In the criminal trial, for example, we will be asked to decide whether a particular action counts as murder. The point is that this question cannot be answered without answering the question of what is the meaning of the legal rule that imposes punishment on murder. Only if we understand which types of cases fall within the scope of this rule can we decide whether the incriminated action indeed counts as murder. This involves us in the paradox that the decision that some action counts as murder is as much dictated by the rule that governs our understanding of murder, as that rule is dictated by the type of action that we understand as murder. Rule and action(s)

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seem to determine each other. The one does not precede the other; they presume each other. Their relationship is not causal or normative, but mutually constitutive. Wittgenstein’s insights into the nature of rule following can be combined fruitfully with speech–act theory, which has a keen eye for the performative character of the use of language.6 The mutual relation between rules and actions implies the fragility of both: even when the rule dictates what counts as murder, we can never be sure what that means until a case comes up and is decided. This decision, however, does not depend on our free will, because we are constrained by past decisions and by anticipation of future cases. And, to recall the circular nature of the relationship, the nature of these constraints also depends on our decision.

(iii) Normative and Imperative Dimension of Legal Norms

All this means two things for the lawyer. First of all, norms are not theoretical things, external to our actions. Instead they are the implicit standards that rule our actions.7 Without norms we cannot recognise our ways of going about in the world, nor can we anticipate the consequences of our actions. Without norms we would live in a chaos of meaning, blind as it were, unable to act at all. This action-theory of legal norms is, therefore, sometimes referred to as the expectancy model.8 Secondly, the establishment of the meaning of both actions and norms in a trial demands another action; deciding a case is a performative action because it (re)defines the actions in terms of the rule and vice versa. This performative aspect of norms is interesting for lawyers, because it is related to the positive (posited) aspect of legal norms. In our type of society legal norms are those norms that are posited or recognised as such by the state. Other social norms may at any time be confirmed as legal norms, but they may also remain outside the domain of law. It is even possible that legal ‘norms’ be enacted that do not rule our actions in any way—yet. In that case legal rules preceede our actions: we then have consciously to try to align our behaviour to these new legal rules. It should be obvious that this kind of law has a serious problem in terms of implementation. As long as an enacted legal rule does not implicitly rule our actions, rule-conformity seems to depend to a large extent on supervision. It seems enacted legal rules may initially lack the character of Wittgenstein’s rules, and they may indeed be theoretical things, external to our actions, posited by the state. In that case we are talking about legal norms as

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6 JL Austin, How to Do Things with Words (2nd edn, Oxford, Clarendon, 1975); P Ricoeur, Interpretation Theory (Austin, Tex, Texas UP, 1976); for the move from interpretation of text to the interpretation of actions, see P Ricoeur, Du Texte à l’action. Essais d’herméneutique II (Paris, Editions du Seuil, 1986).
commands that function between government and its legal subjects, without—yet—functioning between citizens. In general, however, we can say that legal norms can have two aspects: a normative aspect that refers to the mutual anticipations of citizens amongst each other, and an imperative aspect that refers to the authority of legal rules. In societies with a state this imperative aspect is derived from the state.

(iv) Why Punish?

The meaning of the criminal trial can now be discussed in further detail by looking into the need to react to an assumed violation of a legal norm. What happens when a norm that implicitly guides our actions is violated by what we call an offence? In a way the incriminated action invalidates or denies the norm as its guiding standard; it then also negates the norm as relevant information about what to expect from our fellow citizens. While the function of a norm is to enable us to ‘read’ the actions of other people and anticipate their behaviour, the violation of the norm creates a sense of uncertainty, and perhaps insecurity and fear, in those that took this norm as their point of reference. The measure of uncertainty, insecurity and fear will of course depend on the circumstances, but one thing should be clear: for the norm to regain its position as guiding-line, the negation must be undone. Punitive interventions are counter-actions that nullify the initial action. With this articulation of the function of punishment the existential character of punitive intervention is highlighted. Since norms are not understood here as theoretical, external things, but as the expectations that enable us to have a life together, the production and protection of these norms is a matter of crucial importance. In non-state societies such counter-actions are performed by private parties: we call them revenge. In a society with a government that has a monopoly on violence these counter-actions are performed by the state in the form of punishment: the painful censure of the incriminated action. With Duff I agree that this is a matter of communication rather than just expression: it communicates—by means of hard treatment—the rejection of the incriminated action to all those that share jurisdiction.

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9 Understanding punitive actions as reactions to norm violations is not at odds with more sociological accounts of crime and punishment, such as that proposed by David Garland in his *Punishment and Modern Society. A Study in Social Theory* (Chicago, Ill, U. of Chicago Press, 1990). However, it refers to another level of analysis.


(v) Why Hold a Trial?

This account of the function of punitive action (revenge or punishment) clarifies the fact that an offence is something more than a conflict or dispute between victim and offender. Apart from the fact that in the modern state many offences have no direct victim, the impact of the offence always extends beyond the direct 'parties' because the offence destabilises a legal norm that governs the actions of all citizens. If punishment is meant to re-establish the violated legal norm by inflicting a painful counter-action, the question remains what the trial contributes to this event.

If punishment is thus understood as communication the question is who determines how, if and which legal norm has been violated. If norms enable us to 'read' the actions of others and adequately to perform our own actions, then punishment (which itself is an action) must also be 'read' to do its job. 'Reading' the punishment means that one understands the action as an offence and thereby also reconstructs one's understanding of the legal norm that is at stake. This reconstruction is worked out during the trial where relevant facts and norms are decided after research and/or debate. In the next section we will look at the various ways in which this decision is worked out, depending on the type of trial. Punishment without trial makes it easier to misread the actions involved (both the offence and the punishment), and thus can confuse the understanding of the relevant legal norms, creating legal uncertainty. It will facilitate arbitrary punishment in the epistemological sense: instead of re-establishing the public meaning of a particular legal norm, different interpretations of both the actions and the legal norms may proliferate. Thus, it can be argued that punishment without a trial will lead to arbitrary punishment, personal insecurity and legal uncertainty.

3. MODELS OF CRIMINAL PROCESS

In this Part I will explain the workings of the criminal trial in three types of societies: non-state societies of free, equal men (peers); societies ruled by government, with special attention to the absolutist state; and societies organised as democracies under the rule of law. On the basis of anthropological and historical research three models—in the sense of ideal-types—can be constructed that exemplify the logic and structure of the criminal trial in each type of society. These are presented not as purely normative or factual reconstructions, but as a coherent presentation of the constraints that rule the trial in each respective

12 As Foucault demonstrated, the Ancien Régime in France communicated its absolute power through cruel and public punishment (combined with a secret inquisitorial procedure). It is only with the decline of absolutism that the seeds of the 'fair trial' emerge, shifting publicity from punishment to the trial. On publicity, see also below.
context. This will clarify the position of the different actors in the trial, depending on the presence or absence of a state. The specific constraints that developed within the ‘fair trial’ of the democratic constitutional state can then be integrated into a normative theory of the trial, for those that wish to promote democracy and the rule of law.

(i) Mediative Process-model: a Society of Peers

In societies without a state, jurisdiction is voluntary and proceedings are oral; those that share jurisdiction form a society of peers. This means five things: first, disputes and/or alleged violations of norms cannot be brought to court unless both ‘parties’ wish to bring them to court; secondly, the verdict of the court cannot be implemented by force; thirdly, since the law is not written it is not conceived as something that pre-exists the trial and needs only mechanical implementation; fourthly, the judge is a peer of the ‘parties’, his ‘authority’ depending on personal attributes, not on a hierarchical relationship; fifthly, as a consequence, the judge cannot find the law unless the parties agree on it, so the judge requires the co-operation of the parties. Punitive interventions in these societies are initiated by private parties often defined in terms of kinship or locality, instead of individuality. These parties can also initiate court proceedings to prevent such punitive interventions (revenge, feud, tribal warfare). The construction and maintenance of the law are in the hands of private parties, with both normative and imperative dimensions of the law depending on their actions. Matters of public concern will be decided by the entire people following an extended dialogue which continues until consensus is reached: such a meeting may involve a delicate reconstruction of legal norms, in which the addressors of norms are equivalent to the addressees. Such meetings can take the form of a trial when revenge or feuds are at stake: the court (constituted by the general assembly) can order compensation/satisfaction to be made by one party to another. What interests us here is the fact that the legal dimension of reality is continuously reconstructed in a dialogue of all those who share jurisdiction. The fact that the imperative aspect of legal norms is not derived from a state means that it depends on consensus, which may be very fragile. Power-relationships have a large, though not determinate, impact on the construction of consensus. To reduce the chance that brute force takes over, the trial is often highly ritualised and formalised, creating a sacred space to take decisions.

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that hold. The process-model of the trial in non-state societies is a mediative model, a ritualised balancing act that reconstructs the shared world of its people from case to case, without having recourse to the authority of the state.

(ii) Inquisitorial Process-model: a Society of Subjects

In modern state societies, as they advanced in Europe at the end of the Middle Ages, the state holds a monopoly on violence and the competence to issue general commands in the form of legal rules.\(^{15}\) Adjudication is distinguished from legislation and ‘police’, and criminal law is distinct from civil law (which often encompasses administrative law). Those who share jurisdiction are subjects to a sovereign. Criminal jurisdiction is now compulsory, and again this means five things: first, in criminal cases, the initiative to take a case to court is with the government; secondly, the verdict is imposed upon the offender; thirdly, especially in continental procedure, the—written, substantive—law precedes its implementation; fourthly, the judge derives his authority from the government and stands in a hierarchical relation to the defendant/offender; fifthly, as the judge does not depend on the co-operation of the defendant his verdict on matters of fact and law is unilateral and his judgment shares the authority of the state. Punitive interventions in the modern state fall within the reach of the monopoly of violence; their purpose is not only retribution and/or satisfaction between peers (horizontal interaction), but also retribution and/or satisfaction between government and offender (vertical interaction). Breaking the law is not only a negation of the normative and imperative aspect of legal norms as they function between citizens, but also the negation of the authority of the state.

In the absolute state the construction and maintenance of the law are entirely in the hands of the state. The king is no longer—as in the pre-modern state—the ultimate adjudicator but, in the first instance, the ultimate legislator: the king is the addressor of legal norms of which his subjects are the addressees. The judge is an officer of the crown who speaks for the king (rex est lex loquens), which means that the king can intervene and change a verdict if it is not to his liking. In the inquisitorial procedure of the absolute states in continental Europe the defendant/offender was treated as an object of investigation and—if found guilty—an object of punishment. The inquisitorial trial was centred on the written file and the implementation of a written law, that had to be applied simply because it was there and a violation was always also a violation of the authority of the king. The process-model of the absolute state is the inquisitorial

model, in which the defendant/offender is the subjected object (and the objectified subject) of a government without limits.

(iii) ‘Fair Trial’ as Process-model: a Society of Citizens

In a democratic constitutional state a new process-model evolves. Those who share jurisdiction form a society of citizens. Jurisdiction is compulsory and the monopoly on violence is in the hands of the state, but the construction and maintenance of law are no longer the monopoly of the king. Democracy demands that enacted law is constructed in such a way that people can identify themselves as both addressees and addressors of legal norms. The rule of law demands a check on democracy by creating space for individual freedom and by creating a judiciary that is independent of both the legislature and the executive, while bound to speak the law (jūdex est lex loquens). Both of these restrictions on the powers of the state are paradoxical, and these paradoxes pervade the criminal trial of the democratic constitutional state. The ‘fair trial’ model again implies five things. First, just as in the absolute state, the initiative to take a case to court is with the government, though this competence cannot be exercised in an arbitrary way. Secondly, the verdict of the court will be imposed on the offender. Thirdly, even in continental procedure, the importance of unwritten positive law is recognised as well as the importance of oral testimony. The idea that substantive criminal law precedes the criminal trial is transformed by the acknowledgment that judges inevitably make law. This—of course—does not mean that judges can change the law at will or impose their subjective ideas on its application. It only means the acknowledgment that judges are inevitably involved in the prudent (re)construction of legal norms in the light of the case at hand, connecting it with former cases and anticipating future cases. Fourthly, while the judge is not on an equal footing with the defendant, he is no longer a representative of the king. Instead the judge is bound to speak the law as it is laid down by the legislature, other judgments of the courts, and the actions of citizens in like circumstances. Unlike in the inquisitorial process-model the


17 This is one interpretation of Montesquieu’s famous words on the judge as ‘bouche de la loi’. Instead of the traditional idea that Montesquieu wanted judges to apply the law in a mechanical way, this interpretation points to the medieval adagium rex lex loquens est, which was typical for absolute monarchy. When it is the judge who speaks the law, instead of the king speaking through the judges, the loyalty of the judge shifts from the king to the impersonal law. Cf. KM Schönfeld, Montesquieu et ‘La bouche de la loi’ (Leiden, New Rhine Publishers, 1979). For a thorough discussion of the significance of Montesquieu for the emergence of the democratic constitutional state see Foqué and Hart, n 3 above, 67–84.
functions of judge and prosecution are separated and the object of investigation is also a legal subject who holds legal rights that create a certain *equality of arms* between prosecution and defence. Fifthly, the verdict of the judge is pronounced unilaterally; he does not need agreement from defence and prosecution. The loyalty of the judge is to the law, not to either one of the ‘parties’, even though one of them is representing the democratic government.

If we take the American Bill of Rights and the French *Déclaration des Droits de l’Homme et du Citoyen* as its symbolic starting point, the construction of the ‘fair trial’ process-model as we have it now took several hundred years. It is—like any other model—under constant reconstruction. If we take Article 6 ECHR as a guideline, its constitutive principles could be summarised as follows: (1) the judge of the ‘fair trial’ is impartial and independent, (2) the trial is public, (3) the defendant will not suffer punitive actions as long as her guilt is not legally established (presumption of innocence), (4) the defendant is provided with equality of arms, (5) the judgment will be based on evidence presented in court (principle of immediacy, connected with a normative preference for oral testimony), and (6) the proceedings are contradictory (either adversarial or contradictory in the continental sense).

(iv) The ‘Fair Trial’: Identification, Censure and Restriction on State Power

As I have mentioned in the introduction, the ‘fair trial’ embodies a double instrumentality: it prepares the identification of a defendant as an offender and thereby censures her for the offence, and it restricts the way in which the state can exercise its *ius puniendi*. The paradox of the democratic constitutional state implies two things: first, the state is organised in such a way that resistance against the exercise of state power is facilitated by the state itself (a judge can annul acts of legislation and government); and, secondly, democracy is not simple majority-rule but the organisation of society in such a way that minorities can become majorities and rule (until another minority transforms into a ruling majority etc.). The ‘fair trial’ embodies this paradox: the legal subject is given the means to resist the accusation by the same state that has charged her with an offence, and the setting of the ‘fair trial’ is such that the defendant can contest the common interpretation of her own action and/or the relevant legal norm. Though it may seem that these two paradoxes create legal uncertainty, this is only the case if we follow an epistemology that takes facts and norms as given. As soon as we accept that the trial links specific actions with specific norms and thus performs the reconstruction of these norms, the relevance of the constitutive principles of the ‘fair trial’ becomes clear. They are the condition of possibility for a serious debate about the meaning of both the incriminated action and the allegedly violated legal norm. Without an independent and impartial judge the defendant cannot expect to be taken seriously when she challenges the prosecutor’s interpretation of her actions and the relevant
norm(s). Without the legal means to achieve some equality of arms the defendant cannot stage her challenge. Staging her challenge makes sense because the judgment will be based on what happens in court, and to make her point she needs a position from which she can safely articulate her opposition. This also means that no punitive action can be taken against her until judgment has been pronounced. Thus, the trial is a stage on which to contest an accusation and to challenge a specific interpretation of the defendant’s actions (and the relevant legal norms), because without this theatre of debate judgments will have less force, be less convincing and be less powerful. Without this debate, the eventual punishment will be more open to misinterpretation (on the epistemological level) and will fall prey to arbitrary exercise of the *ius puniendi* (on the political level). The trial is democracy on a case-by-case basis: holding together the meanings of legal norms in the light of past cases, and in anticipation of future ones. In a complex and large-scale society such as ours, this day-to-day re-establishment of our shared norms is an indispensable counterpoint to democratic legislation.

(v) The Public Hearing of Article 6 ECHR

In explaining the relationship between a democratic constitutional state and its ‘fair trial’ I have so far touched on five of the six constitutive principles that constitute the *mise en scène* of the stage on which citizens can challenge the state’s exercise of the *ius puniendi*. That leaves us with one more point to make. One of the most important principles of the ‘fair trial’ is the external publicness of the trial. Without this, the ‘theatre of debate’ cannot spread knowledge of legal norms beyond the parties and the legal profession. The relationship between norms and actions implies that punishment can take effect only if its pronouncement is public. The same goes for the trial. If the result of punishment without trial is legal uncertainty (epistemologically) or the arbitrary use of state power (politically), then the same result can be expected from punishment following a trial behind closed doors. This points to the weakness, ineffectiveness and possible corruption of plea-bargaining, diversion and other forms of informal justice that usually depend on confidentiality.

Two kinds of criticism can be formulated against the effectiveness of the criminal trial as nexus between legal norm and action, since all seems to depend on the public nature of the trial. First of all, as Weigend convincingly demonstrates,20 the trial is becoming an ‘endangered species’ that does not fit with the

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19 Weigend, in this volume.
logic of a smooth administration of justice. Secondly, however interesting the ideal type of the ‘fair trial’ may be, reality confronts us with a trial that is witnessed by very few citizens, so unless we decide to put trials on television or the internet, the public hearing is a farce.

If it is true that plea-bargaining, diversion and other forms of informal justice are ineffective because they lack a public hearing, then certainly the ‘streamlined written administrative procedures’ Weigend refers to must be equally ineffective. My argument is indeed rather the opposite of this: precisely because so many violations of administrative legal rules (that already lack normative appeal) are dealt with by procedures that again lack normative appeal, violation of these norms increases. I would even claim that the fact that violations of many legal norms with relatively strong normative appeal are handled by forms of administrative procedure that come very close to the inquisitorial process model amounts to a failure to re-establish the normative authority of such legal norms (resulting in further violations and feelings of insecurity). So the first criticism in fact proves my point: the logic of the ‘fair trial’ is replaced by the logic of administrative justice. The administrative handling of criminal offences may save some time in the short term, but will certainly erode the normative effectiveness of criminal intervention in the long term.20

The second criticism is more challenging. If our trial is not really public in the sense that it communicates the meaning of legal norms and the censure of those who violated them, then the trial cannot perform closure of the nexus of legal norm and action. This criticism in fact refers to the balancing act that a democracy under the rule of law must perform for legislation and adjudication to cohere. If the meaning of legal norms depends exclusively on their day-to-day reconstruction in a full trial, the argument would make sense. However, the scale on which legal norms are meant to constrain our actions is too large to expect all guidance to be derived from what happens inside courts. A large-scale democracy such as ours cannot be ruled only by adjudication. That, however, was not the claim. The claim was that while the judge of the ‘fair trial’ is not under supervision of the legislator, she is constrained by enacted law. Legal certainty emerges from the nexus of legislation, administration and adjudication, which also means that the public nature of legal norms depends on the visibility and integrity of all three.

A last question remains: what is meant by ‘publicness’, and should it be equated with publicity? Does it imply the presence of all the citizens who share jurisdiction (which means those who will suffer or enjoy the consequences of the court’s decision on the scope of the legal norm that is at stake)? If this were the case nothing in our type of societies could be considered public. In a society without a state such presence would be very important, because the absence of a government puts the force of law in the hands of the assembly of peers. The public is addressor and addressee of its legal norms. But once a government is

20 Hildebrandt, n 3 above, English summary of the argument at 525–39.
instituted the meaning of publicness changes, indicating visibility and access without necessarily implying participation. In the ‘fair trial’ publicness is strongly attached to the principle of ‘equality of arms’, including internal transparency and the principle of immediacy. These principles protect the trial as a unity of action, time and place, guaranteeing that the judge grounds his verdict on evidence heard in court (immediacy) by all concerned (equality of arms, internal transparency), thus providing a coherent space and time to perform closure.21 Breaking this protected unity of space, time and action—by mistaking publicness for publicity—would result in a continuing debate between ever shifting actors, losing track of the issue at hand. Bringing in television, for instance, would create a public that can zap in and out of the proceedings, having a double hamburger while watching a victim articulating the details of her suffering. The connection between judge and public would not be restored—by finally allowing every citizen to see how justice is done—but broken, since the judge cannot sense the reactions of the audience or demand its respect.22

4. CITIZENSHIP AND ‘FAIR TRIAL’: THE STATUS OF VICTIM, DEFENDANT AND OFFENDER

(i) Citizenship: Freedom, Equality and Community

After presenting the trial as a decisive nexus between legal norms and actions, I have presented three different types of trials linked to three types of societies. The purpose of this exercise was to create a historical and analytical context for the discussion of citizenship and ‘fair trial’. Neither a mediative nor an inquisitorial process-model deals with citizens. The mediative model deals with men who are on an equal footing (peers). Their society is held together by complex loyalties based on kinship, locality and reciprocity; the jurisdiction they share is voluntary and not connected to a government. The inquisitorial model deals with men who are subjects of an absolute king. Their society is held together by a centralised power that can command its subjects by means of legislation, government and adjudication that are all forms of ‘police’ (government). It is only the ‘fair trial’ process-model that deals with citizens. While prosecutor and judge are officials, sharing the authority of the state, defendant and witnesses (and jury-members) are citizens.

21 AC ’t Hart, *Hier gelden wetten! Over strafrecht, Openbaar Ministerie en multiculturalisme* (Leiden, Gouda Quint, 2001) 131–67, especially at 152, n 60 with reference to the structure of the tragedy, attributed to Aristotle’s *Poetica*.

22 Compare L. Farmer, ‘Notable Trials and the Criminal Law in Scotland and England 1750–1900’ in P Chassaigne and JP Genet, *Droit et Société* (Paris, Sorbonne, 2003), who describes a historical shift from publicity directed to a concerned public (potential jury-members), to publicity targeting an audience that seems merely interested in a spectacle. Modern mass media may incline to take the last perspective, which has little to do with the type of publicness the ‘fair trial’ seeks.
A citizen could be defined by referring to the French terms *citoyen* and *bourgeois*. As *citoyen* the citizen participates in defining and realizing the public good, enjoying the positive freedom to co-produce the common world. As *bourgeois* she is free to go about her own business, enjoying the negative freedom to ward off intrusions from others. While the men who participate in the mediative trial owe their positive freedom to their independence, and while the subjects of the king have lost their positive freedom without yet having gained negative freedom, the citizens of the democratic constitutional state owe both their positive and negative freedom to the state. This is not to say that they are at the mercy of the state, as would be the case with an enlightened despotism. It means rather that the state is organised in such a way that it produces checks and balances that provide both these type of freedoms. Citizenship also implies equality before the law. In the exercise of her freedom as *bourgeoise*, a citizen can freely negotiate contracts and acquire property in the certainty that her legal rights are equal to those of any other party and will be enforced in court without prejudice. In the exercise of her freedom as *citoyenne* a citizen can vote, stand for election, voice and publish opinions, and organise meetings and associations, again with the certainty that her legal rights are equal to those of others and will be enforced in court without prejudice. As we all know, citizenship is traditionally based on freedom, equality and fraternity. In the debate between liberals and communitarians fraternity (community) has often been opposed to freedom. If we take individual actions to be mutually constitutive with norms, then both norms and actions are inherently relational. This also means that the freedom to act is bound by the norms that are its condition of possibility as well as its result. Freedom without community therefore has no meaning. Crime, trial and punishment presume community.

This, however, leaves the question whether crime must be regarded as an abuse of freedom that legitimises unequal treatment and exclusion from the community of citizens. Should defendants and/or offenders be treated differently from other citizens? Does punishment signify that the offender is—temporarily—excommunicated? And what do freedom, equality and community mean for the victim? As a citizen, the victim has lost both the duty and the right to avenge the harm he suffered. What has he won with this loss, and what can he expect from the ‘fair trial’ that seems so focused on the offender and the violated legal norms? What should be the implications of citizenship for our ‘fair trial’?

In order to answer this question I like to borrow Rawls’ veil of ignorance.23 Let us presume that from behind the veil of ignorance citizens have to re-invent the criminal trial in a way that produces the freedom, equality and community that fit with the democratic constitutional state. The question here is not how a particular victim or offender would organise the trial, but how citizens as potential

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law-abiding citizens, as potential victims and as potential offenders would organise the trial. We need Rawls’ veil only to hide whether one will be victim, defendant and/or offender. The advantage of this thought experiment is that we do not discriminate between categories of citizens but recognise that we could be any one, two or all of them at any time. How would our veiled citizens agree to be tried and to have others tried? What would be the position of the citizen who appears in court?

(ii) The Status of Defendant and Offender in Trial: the Focus of the Criminal Law

I will first look into the position of defendant and secondly into the position of offender (which, of course, are not equivalent). Being veiled I will do this from the perspectives of a citizen as potential law-abiding citizen, as potential victim and as potential defendant/offender. We should keep in mind that from her veiled position a citizen will have to integrate these perspectives, because the veil makes all three equally relevant.

How will our veiled citizens organise the position of a defendant in the trial? As potential law-abiding citizens we will look for a trial that combines censure of the offender with protection against state power. If trial and punishment do not communicate censure legal uncertainty will occur, because legal norms will lose their meaning. But if censure is not combined with a contradictory procedure the wrong person may be censured or irrelevant legal norms may be confirmed. The result again would be legal uncertainty. As argued above, freedom to act presumes norms that are both the condition of possibility and the result of our actions. Legal certainty is therefore a precondition for negative and positive freedom: only if the law is clear can we move freely within it in our private and public life. It is, however, important not to confuse legal certainty with the rigid application of legal rules that have no normative dimension: the legal certainty that can be achieved in the ‘fair trial’ is dependent on the careful (re)construction of the relevant legal norms in relation to the offence charged. By linking the relevant legal norm to its interactional context, the trial (re)establishes the normative aspect of the specific legal norm in a way that can never be achieved by a legislator. So, as potential law-abiding citizens, and even as potential victims, we would want a trial both to communicate censure and to put the defendant in a position to challenge the accusation of the state. Furthermore, as a potential defendant—not knowing whether one has indeed committed an offence—one will want to be provided with the legal means to challenge the charges. The defendant should share in the equal respect for all citizens, which means that the trial treats a defendant as ‘one of us’ instead of ‘one of them’. The trial will focus on the identification of the

24 On the importance of inclusive treatment of offenders see Duff, n 11 above, 75–7.
defendant as offender and—if the identification takes place—will appeal to the offender to take responsibility. Thus a ‘fair trial’ is about identification and, at the same time, about calling to account. This means that such a trial takes the defendant seriously as an equal and as part of the community of citizens who share jurisdiction. It seems to me that the ideal-type of our ‘fair trial’ is already attuned to these demands.

The interesting question is whether veiled citizens would opt for informal types of justice with regard to the position of the offender (after guilt has been established). If punishment is information about the fact that a certain action is ‘read’ as the negation of a certain legal norm, as potential law-abiding citizen, potential victim and even as potential offender one might agree that punishment is necessary to get the message through. But could it be that besides, or instead of, punishment other options could be developed to create freedom for the offender, by creating opportunities to participate in retributive or restorative justice, or by doing penance or repairing harm done to the victim? The ‘fair trial’ provides defendants with legal instruments to counter the charges, protecting and enhancing their freedom to ward off intrusion and to participate in the construction of both the facts and the relevant legal norms. However, the ‘fair trial’ does not create much room for active participation of the offender in the response (punishment) once the offence is recognised as such. The response is imposed on him without involving his initiative. This leads to questions concerning the ideal-type of our ‘fair trial’: can the procedure that is focused on identification and censure take the offender seriously as an equal, and can it really include him in the community of citizens?

Closely related is the question how citizens would organise the position of offender from their perspective of potential victim. Once the trial identifies the defendant as an offender, as potential victim we may want more from the offender than the passive endurance of whatever punishment is imposed. We may feel that the satisfaction we seek for the harm that has been done to us must go beyond the punishment of the offender and include, for instance, compensation paid by the offender. We shall come back to this when we look into the status of the victim. But as to the status of the offender it may be the case that both as potential offender and as potential victim we will want a trial that invites the offender to participate in his punishment (turning it into penance) and in restoring the harm done to the victim (which is not the same as financial compensation). However, it should be obvious that, both as potential offender and as potential victim, we would not want the offender to be forced into any of this. Punishment as well as financial compensation can be imposed on the offender, but penance and informal justice-procedure demand participation in a way that cannot be enforced. In addition, as potential victim we may want to avoid any contact with the offender, and be more than happy that the state has taken care of the censure that was called for. This would bring us back to the question whether we can integrate the invitation to do penance or informal justice into the ‘fair trial’ without forcing it on the offender.
The conclusion of the exercise seems to be that, as veiled citizens, we would reinvent the ‘fair trial’ with its constitutive principles to identify a defendant as an offender and to censure the offence. The focus of the criminal trial should be on the (re)construction of shared legal norms, because of the legal certainty it produces. At the same time, as potential offender and potential victim we may look for more participatory types of justice. The challenge will be to invent procedures that invite participation without stepping outside the logic of the democratic constitutional state. Within that logic, criminal justice should always be instrumental in both crime control (or restoration) and due process (protection against abuse of power). One of the paradoxes here may be that participatory justice requires an informality that goes against the need for formality that protects against abuse of power.

(iii) The Status of the Victim in Trial: Blind Spot or Vanishing Point?

The ‘fair trial’ is initiated by the state and aims at re-establishing the normative and imperative aspects of legal norms that have allegedly been violated. Since civil and criminal law started their separate lives, the aim of the criminal trial has not been dispute settlement or even the satisfaction of a particular party, and this goes for both the adversarial and the continental ‘fair trial’. The involvement of the jury was an intelligent way to enforce the normative aspect of legal norms; but the jury (re)presents common sense, not the victim. By integrating the jury into the royal jurisdiction, the imperative aspect of legal norms was brought into the realm of the king, who in the course of time acquired the same monopoly on jurisdiction and violence as his continental colleagues. The jury did prevent an inquisitorial procedure from developing, because for practical reasons the emphasis of the trial remained on oral proceedings and centred on the ‘day in court’, since originally jurors were illiterate and had only limited time to spare for their judicial duties. This prevented the development of a bureaucratic procedure with an emphasis on written documents and written laws, as came about in continental Europe. The inquisitorial trial was administered by professional judges, trained in deductive reasoning, while the jury trial was attuned to the needs of the lay jurors, trained in the practical reasoning of human experience. However, both the inquisitorial and the jury trial are fundamentally different from the mediative trial: initiative, procedure and verdict are all in the hands of the state; jurisdiction is compulsory; the verdict is imposed upon the offender; the judge is not a peer of the ‘parties’ and therefore does not need their co-operation. The victim has no legal standing.

Before we move on to the question of how our veiled citizens will organise the position of the victim in the trial, we have to indicate how we define legal standing. In US federal jurisdiction legal standing is a technical juridical term,
referring to the constitutional right to file a lawsuit in a federal court. Outside this technical meaning legal standing is used to mean anything from access to court to specific procedural rights to legal status in general (status as a legal person for instance). One could say that in the narrow sense of the right to initiate court proceedings, the criminal trial reserves legal standing to the prosecutor’s office. In a slightly broader sense one could say that the defendant has standing, in that he can appear in court with legal counsel and exercise a number of rights that provide him with a certain equality of arms. Even when a defendant is not treated as an equal of the prosecution, the asymmetrical nature of the criminal trial is compensated for by giving the defendant legal standing in this sense: he is not only the object of investigation and conviction but also a legal subject with the legal means to initiate the calling of witnesses or experts, disclosing documents and to question the interpretation of the law concerning his case. The victim seems rather left out. The trial is not between alleged victim and offender, but between prosecutor (representing the state, representing the community) and defence. For a long time it was taken for granted that the criminal trial is not about satisfaction for the victim but about satisfaction for the community. If a victim wanted satisfaction she should initiate civil proceedings and claim damages (including punitive damages if possible). The contribution of the victim to the trial was limited to her eventual obligation to testify as a witness, but she had no right to initiate proceedings, to be heard, to participate in sentencing, nor even the right to be informed of the course of the process (police investigations, charge, time and place of the trial, verdict, location and timing of the custody, date of release). Her right to be present at the trial equalled the right of any citizen to attend the public hearing of the ‘fair trial’; she had no special status during the trial.

What should be the position of the victim in a ‘fair trial’? How can the trial enhance the freedom of the victim, treat her with equal respect and confirm her place within the community during the trial? In 1985 the Council of Europe issued a Recommendation ‘on the position of the victim in the framework of criminal law and procedure’.26 At the level of the police it demands special training of officers; information for the victim on compensation and on the outcome of the investigation, and it stipulates that the police report sent to the prosecutor should contain information on the injuries to and losses of the victim. At the level of the prosecution, the Recommendation requests consideration of the victim’s position in the case of discretionary decisions. Special attention is given to the respect with which a victim should be questioned in connection with the criminal investigation. As to the court proceedings, the victim should be informed of the date and place of the hearing, and of her opportunities of obtaining compensation, and of the outcome of the case. A criminal court

should be able to order compensation by the offender to the victim (whether in
the form of a penal sanction, as a substitute or as an addition). All relevant
information regarding injuries and losses suffered by the victim should be made
available to the court, and when deciding upon form and measure of the
sentence the court should take into account the victim’s need for compensation
and any compensation (or offer to that end) made by the offender. This consid-
eration should also be made in the case of conditional sentences. At the enforce-
ment stage the collection of compensation should take priority over any other
financial sanction. Special attention is given to the protection of the privacy of
the victim and to special protection of the victim and his family against intimi-
dation and possible retaliation.

As should be clear, these recommendations are formulated as instructions to
the state as holder of the *ius puniendi*. This *ius puniendi* is in no way questioned
or weakened by legal standing in the strong sense of the victim. These instruc-
tions are shocking in so far as they seem to be completely self-evident: the fact
that they have to be written down paradoxically demonstrates the extent to
which the victim seems to have been ‘forgotten’ by the criminal justice system.
The recommendations concern information, compensation, respectful treat-
ment and protection. They recognise the vulnerable position of the victim in a
procedure that was invented to take the conflict out of her hands and transform
it into a conflict between state and offender, in which the state represents the
*res publica*, the common good, not the victim.

As far as freedom is concerned, the *ius puniendi* and the implied monopoly on
violence create room for a new type of freedom that takes away from the victim
not only the right but also the burden of revenge. Within the contours of the
democratic constitutional state this freedom has developed into the individual
freedom we have learned to value as central to our perception of agency and
moral accountability. Punishment and trial are constitutive for this freedom,
because they set the victim free to mourn the harm done and to pick up on life
without the burden of revenge. This does, of course, presume that the state’s
monopoly on violence is effective, in the sense that, as citizens, we expect the
state to protect us from victimhood to an extent that justifies the prohibition on
the use of violence for citizens. So, as long as the state can indeed protect its cit-
izens as potential victims, the *criminal law creates a freedom that depends on
the denial of legal standing in the strong sense for the victim*. This would mean
that, as veiled citizens, we would not opt for the introduction of the victim as a
‘party’ to the criminal trial. However, if we demand that citizens be treated with
equal respect, then the abovementioned recommendations from the Council of
Europe form an adequate summary of what is wrong with our ‘fair trial’. While
the alleged offender—after centuries of abuse of state power in the inquisitorial
trial—has been allocated the status of defendant to compensate for the inequal-
ities that are inherent in the criminal trial, the alleged victim has long been the
blind spot of the ‘fair trial’. The victim is overlooked, because she is, in a way,
the vanishing point of the trial: an effective criminal law is focused on the
offender with the aim of preventing victimhood in the future. From the perspective of equality and community a victim deserves to be treated with respect within the criminal justice system, but this does not mean that a victim should be given the chance to determine the exercise of the *ius puniendi* in a given case. While as a potential victim we will create a trial that includes rights for the victim (concerning information, compensation, respectful treatment and protection), we do not want to grant a type of rights that confuses the mediative trial of societies without a state with the ‘fair trial’ of the constitutional democratic state. We either appreciate the fruits of the monopoly on violence or we deny the authority of the state: you can’t have your cake and eat it too. This would mean that, for instance, victim impact statements are crucial information from the most crucial witness, bearing on the (re)construction of the incriminated action and legal norm. The statement could influence the sentence via this reconstruction, but not in any direct way that would confuse satisfaction for the victim with punishment and might introduce arbitrary punishment and legal uncertainty.

As potential victim and even as potential offender we may want to introduce informal types of justice. As we have seen, the criminal trial provides the offender with rights to ward off intrusions, but does little to invite his participation in the censure of his incriminated action. The same can be said of the position of the victim. Though in many jurisdictions a victim has the right to sue for damages, the ‘fair trial’ does not accommodate mediation or other restorative justice practices. These practices demand participation of both the offender and the victim and—for the reasons given above—they should be voluntary and must not be confused with punishment or with the ‘fair trial’. As before, the challenge is to invent procedures for participatory justice that incorporates the double instrumentality of the democratic constitutional state.²⁷

5. CONCLUDING REMARKS: TRIAL AND ERROR

It is commonly believed that a criminal trial is supposed to prevent the state from committing errors in the administration of justice. Rather than following this lead, I have worked on the idea that a trial is the occasion and location for a legal community to decide which kinds of actions violate crucial legal norms, after which the violation can be nullified by judgment and punishment. Different process-models that fit with different types of societies have been developed to analyse the way trial procedures prepare closure on matters of fact and legal norms. Moving from a society of peers (non-state societies) to a society of subjects (absolute monarchies) to a society of citizens (democratic

constitutional state), the historicity of the ‘fair trial’ has been explored to highlight the importance of its constitutive principles. By embodying these principles the ‘fair trial’ produces legal certainty and wards off arbitrary exercise of the *ius puniendi* on both the epistemological and the political levels. The workings of these principles facilitate the case-to-case reconstruction of legal norms in counterpoint to the enactment of general legal rules. One could say that the trial enables the reconstruction of law in a careful process of trial and error: the meaning of legal norms emerges only in the reiterated confrontation with human actions.

Having thus developed the meaning of the ‘fair trial’, we can move on to the level of a normative theory. If this is the kind of trial we want to advance and protect, we can, for instance, ask the question what the position of the victim should be. To answer that question I have explored the position of victim, defendant and offender from the perspective of citizens as potential victim, potential defendant and potential offender. As the contradictory public debate at the centre of the ‘fair trial’ produces legal certainty, a new type of freedom is created for the victim, who no longer suffers the burden of revenge, but who is also referred to the margins of the criminal trial. I have argued that the aims of the ‘fair trial’ require that its focus should remain on the actions of the alleged offender and on the relevance and meaning of associated legal norms. The need for information, compensation, respectful treatment and protection regarding the victim does not imply that victims should be given the status of party to the criminal trial, because this would confuse the meaning of the ‘fair trial’. At the same time, however, I conclude that we should acknowledge the challenge to invent procedures for participatory justice between victim and offender. To fit the logic of the ‘fair trial’ these procedures should integrate informal exchange with protection against abuse of power. This is no small challenge.
3

Theorising Procedural Tradition:
Subjects, Objects and Values in
Criminal Adjudication

PAUL ROBERTS*

1. (DIS)ORIENTATION IN PROCEDURAL TRADITION

The CRIMINAL TRIAL, it is widely believed, is currently ‘under attack’ from successive waves of legislative reform. In England and Wales, defenders of the status quo appear to have been wrong-footed by the government’s radical agenda for ‘modernizing’ criminal procedure, part of which has targeted traditional procedural guarantees for suspects and the accused which had come to be regarded as virtually sacrosanct and almost exempt from expectations of further explanation or justification. The prohibition on ‘double jeopardy’, exclusionary rules of evidence relating to hearsay

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and the accused’s extraneous misconduct (‘bad character’),\(^5\) and even the sacred
cow of jury trial\(^6\) have all been caught up in the most sweeping reforms of crim-
nal procedure for more than a century. The spell of apparent self-evidence has
been broken by this determinedly reformist agenda. Yet the government’s
unfolding legislative programme has rarely encountered concerted opposition
marshalling effective counter-arguments. It has more often been met with con-
fusion, disorientation, and question-begging appeals to tradition.

How should those who are professionally well-acquainted with criminal
adjudication, as practising lawyers or scholars, respond to recent reforms?
Nobody seriously thinks that legal tradition is immune from all criticism or that
modern reforms are inevitably misguided or botched. Certain aspects of English
criminal trials, including notably the treatment of witnesses and complainants,
have undeniably evolved in ways that were, and perhaps still are, deeply unsat-
sfactory, even to the point of embarrassing the functional efficacy and moral
integrity of criminal proceedings. Besides, criminal trial process must constantly
adapt to meet the challenges both of new forms of criminality (e.g. increasing
resort to witness intimidation), and of more demanding expectations and stand-
ards of performance. Developing a system of evidentiary rules to govern the
admissibility and presentation of information at trial, as a central preoccupa-
tion of procedural design and audit, is more akin to an on-going project of
construction, refinement and maintenance—a juridical Forth Bridge—than a
one-off design challenge to produce a definitively timeless procedural classic.

But policy-makers must be wary of countervailing pressures which threaten
to confound their best intentions. Legal reforms have a tendency to generate
their own internal logic and self-propelling momentum. If promoting witness
satisfaction is an objective of the government’s criminal justice policy,\(^7\) for
example, and opinion surveys demonstrate that recent reforms have increased
witness satisfaction somewhat, it is always tempting to infer that further, more
adventurous reform is necessary to raise ‘consumer satisfaction’ to the optimum
level.\(^8\) ‘We have made some progress, but we need to do more, go further, redou-
ble our efforts . . .’ is the conscientious policy-maker’s eternal \textit{motif}. Yet even
supposing that a particular reform was well-intentioned and implemented suc-
cessfully, how is one to judge when a sufficient dose of remedial discipline has
been administered and the tipping-point reached, when enough is enough? How
is it possible to determine if the law of diminishing returns has set in, or if
further reform in the same direction would be counterproductive? And what of
consequential impacts on related or competing objectives and values which a

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Evidence of Bad Character’ [2004] Crim LR 533; Roberts and Zuckerman, n 4 above, ch 11.

\(^6\) Criminal Justice Act 2003, Pt 7; see R Taylor, M Wasik and R Leng, \textit{Blackstone’s Guide to the

\(^7\) Cf \textit{Justice for All}, n 2 above, paras 0.22, 1.17.

\(^8\) Cf B Hamlyn, A Phelps, J Turtle and G Sattar, \textit{Are Special Measures Working? Evidence from
Surveys of Vulnerable and Intimidated Witnesses}, Home Office Research Study 283 (London, Home
system of criminal adjudication also claims to serve? To what extent can the existing scheme of values and objectives be reconciled with an intensification of particular remedial measures, or with further reform of any description?

Law reform is always supposed to make things better, which implies that there must be some criterion for differentiating between states of affairs as better, the same or worse than they were before. Ideally, one should be able to conceptualise a pattern or model—an ideal—of how things ought to be, and then endeavour through reform to bring existing decrepit practice into closer conformity with the ideal. In reality, it must be conceded that criminal process reform tends to be less about the implementation of grand designs, and more about incremental short-term advantage and pragmatic compromise. But even reformers with narrow horizons and tunnel-vision need evaluative criteria to measure the small-scale improvements they attempt to engineer. Without a broader sense of purpose or direction incremental reform would be hopelessly precarious and improvised, beset by the possibility that the next round of reforms would serve only to unravel the achievements of the last. With no conception of the ultimate destination, every two strides taken forward might be cancelled out by two retrogressive steps in the opposite direction. Indeed, progress or backsliding could not even be identified, much less quantified, without orientation to a discernible objective, or coherent set of objectives. Normative ideals, in short, are an inescapable concomitant of any successful programme of criminal process reform.

Is the traditional form of criminal adjudication in England and Wales essentially an arbitrary and intermittently irrational product of historical accidents, sectional interests, social deference and political inertia? This sceptical inference might easily be drawn from the way in which the present government’s radical agenda of modernisation is often presented. Yet there is surely a risk of rushing headlong to abandon traditional practices before their function and value have been properly appreciated. Perhaps a deeper, more appealing rationale can be identified for at least some of the traditional trial practices which have recently attracted criticism, a rationale that might prompt us to rethink the desirability of their reform or outright abolition? If the traditional form of criminal trial is now an endangered species in England and Wales, it is both important and timely to try to dispel some of the widespread confusion, misunderstandings, and ignorance surrounding the political morality of criminal adjudication before many of the criminal trial’s most distinctive, and arguably most valuable, features are reformed into extinction. Before intervening too precipitously reformers might pause to consider Joni Mitchell’s admonition: that ‘you don’t know what you’ve got ’till it’s gone’, by which time it might be much too late to get it back again.

This essay attempts to provide an illuminating normative sketch of the criminal trial, organised around a tri-partite division between ‘subjects’, ‘objects’

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9 ‘Big Yellow Taxi’ from Ladies of the Canyon (Reprise/Warner, 1970).
and ‘values’. The exposition proceeds from a broadly ‘liberal’ perspective, by which I mean a moral and political philosophy advocating personal autonomy, social welfare, pluralism, tolerance, democratic government, respect for human rights and the rule of law. This is, of course, the official philosophy of all western states, and its constitutive values are routinely espoused by the UK government, so the following discussion can be seen as an elaboration of the normative ideal to which policy-makers are already publicly committed in the penal sphere. I believe that liberal moral and political philosophy supplies the values which, roughly and with some admitted anomalies and deviations, constitute the deep structure of English criminal procedure law and practice. If this proposition holds water, there should be recognisable traces of liberal values in the doctrinal details of criminal procedure in which Evidence lawyers specialise; and when the details of criminal procedure law are aggregated into an overarching institutional structure, a liberal ideal of criminal adjudication should hang together as a plausible normative rationalisation of a distinctive procedural tradition.

The aim of the following discussion is to invest that normative ideal with some intelligible concrete content, and thereby make it more readily accessible as a guide for policy-makers and legislators contemplating criminal law reform, and as an effective critical resource for defending traditional practices against legislative overreaching. Thinking about criminal adjudication in terms of subjects, objects, and values may be only one (though I hope, one particularly instructive) way of articulating what criminal practitioners and legal scholars already grasp, at least intuitively, from their detailed study and practice of criminal procedure. Through the elaboration of a normative ideal, professional experience and legal expertise can be rendered more articulate, systematic, principled and instrumentally useful as knowledge capable of informing legal debate and policy-making. A central contention of the following exposition will be that there is more to criminal adjudication than procedural tradition, and yet more to procedural traditions than tradition-for-tradition’s-sake.

2. SUBJECTS: DIGNITY AND HUMANE TREATMENT

People can be described as ‘subjects’ in more than one sense, eg subjugated vassals of the reigning monarch, as opposed to citizens of a constitutional republic. In this essay, ‘subject’ simply denotes a human being, and subjects are separate persons with individual identities (subjectivities). Philosophers often describe subjects as (moral) agents—those who, through their rational agency, can choose to affect the way that the world goes, and goes for them, and so be held responsible (inter alia) for the outcomes they cause, or try to bring about. Subjects, agents and persons can all be regarded as synonyms for the purposes of the present discussion.

The status of personhood—being a subject—is tied conceptually to what I will call ‘the dignity principle’: subjects must at all times be treated with the
concern and respect to which they are entitled just in virtue of their humanity; this is what the dignity of subjects demands. Perhaps the most celebrated formulation of this influential idea is Kant’s:

Every human being has a legitimate claim to respect from his fellow human beings and is in turn bound to respect every other. Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being (either by others or even by himself) but must always be used at the same time as an end. It is just in this that his dignity (personality) consists. . . .

The significance of being a subject is that one should always be treated as a subject by other subjects and their legal-fictitious anthropomorphic projections (companies, governments, states, etc.). Subjects should never be reduced to the status of mere objects, or treated as though they were anything less (worthless, hence potentially worthless) than full members of the human race. To treat subjects as objects is to objectify them. This typically involves a denial of the subject’s autonomy, often reflected in baleful assumptions of his or her passivity, violability, fungibility and commodification (enslavement by degrees). Objectification is an assault on the inherent dignity of the subject, which simultaneously demeans the objectifier just as he or she denies the humanity of the person objectified. This is plainly a matter of degree, and also of context. The torturer, the racist bully and the sexist wolf-whistler all objectify their victims, and in this abuse of another’s subjectivity they are alike in debasing their own humanity. However, the extent to which each appears to revert to a primordial sub-humanity may be radically different in both duration and degree. Whereas the wolf-whistler gives a fleeting glimpse of his animalistic tendencies, the racist bully’s repeatedly abusive behaviour amounts (let us suppose) to more serious and prolonged episodes of demeaning objectification. In the extreme case, the professional torturer may have cultivated over long years of corrupting practice the confirmed character of a beast.

Though a torturer, bully or wolf-whistler, in their different ways, indulges in bestial conduct, a political community must not allow itself to be dragged down to their level of moral depravity in its treatment of citizens who become criminal suspects, accused or convicted offenders. Subjects do not—indeed, cannot—forfeit their inherent human dignity, even by denying that same dignity in others. Any claim to legitimacy in the censure and punishment of crime necessarily implies that state officials are doing more than ‘responding in kind’ to criminal activity or ‘fighting fire with fire’. Unless criminality is answered by just

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11 See MC. Nussbaum, ‘Objectification’ (1995) 24 Philosophy and Public Affairs 249, suggesting at 258 ‘that “objectification” is a relatively loose cluster-term, for whose application we sometimes treat any one of these features as sufficient, though more often a plurality of features is present when the term is applied’.

12 Ibid, 265.
censure and punishment, rather than by what is in effect a state-inflicted brand of criminality, two wrongs will truly not make a right. When criminal censure and punishment are justified, the offender is punished in the name of dignity, by reaffirming the dignity of his victim without detracting from the offender’s own or anybody else’s status as a human subject of inestimable value.

In modern times political scientists and legal theorists have developed the Kantian-inspired dignity principle and applied it to contemporary questions of political morality. Ronald Dworkin, for example, has elaborated an egalitarian liberal theory of rights, law and constitutional adjudication built up from the foundational precept that ‘any political decision must treat all citizens as equals, that is, as equally entitled to concern and respect’. Indeed, as the principal inspiration for John Rawls’ seminal *Theory of Justice*, competing conceptions of Kantian dignity have dominated the horizon of moral and political philosophy for the last 30 years. Related affirmations of the primacy of human dignity have found juristic expression in national constitutions, including the Council of Europe’s ECHR system. In the UK domestic context, Lord Hoffmann recently observed that ‘[h]uman rights are the rights essential to the life and dignity of the individual in a democratic society’. Baroness Hale subsequently placed the stamp of high judicial authority on the centrality of the dignity principle in English human rights jurisprudence:

Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. The essence of the Convention, as has often been said, is respect for human dignity and human freedom.

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14 Cf the chilling allegation that, in some communities, the police are regarded as ‘just another gang’: AW Alschuler, ‘Racial Profiling and the Constitution’ [2002] *University of Chicago Legal Forum* 163, at 195.
17 See, notably, Art 1 of the German Basic Law (Grundgesetz), entitled ‘Human Dignity’ (available, in translation, at http://www.jurisprudentia.de/jurisprudentia.html); s 1 of the 1996 Constitution of the Republic of South Africa.
Whilst precise terminology and fine-grained details may be idiosyncratic to particular theorists or legal jurisdictions, each of these conceptualisations proceeds from a shared core commitment to respecting the inherent dignity of human subjects.

The dignity principle boasts several major assets reinforcing its self-evident humanitarian appeal. First, it is a secular humanistic principle, which (so far as I know) is compatible with all the major world religions, but does not presuppose any kind of religious conviction. It is consequently apt to be underpinned by a relatively stable ‘overlapping consensus’, because virtually everybody can subscribe to the principle, even though they may do so for somewhat different reasons (humanists propounding a reflexively self-sustaining duty to humanity; Christians instructed to ‘love thy neighbour as thyself’; pragmatists calculating self-interest, etc.). A second important asset of the dignity principle is its universalism. All human beings without exception are subjects in the relevant sense. They are therefore always entitled to the protection of the dignity principle, even if individuals sometimes choose, or are forced by circumstances, to behave like animals themselves on particular occasions. This universalistic quality insulates the dignity principle from the tendency to exclude certain groups or individuals from the scope of moral concern and legal protection, which is a serious deficiency both of illegitimate forms of discrimination, like racial prejudice, and of forms of discrimination which are perfectly legitimate in certain contexts but which are prone to illegitimate over-extension: eg the distinction between citizens and non-citizens. The dignity principle supplies an attractive and secure moral foundation for universal human rights, whereas the protection of constitutional rights may be reserved only to citizens—a tradition extending from ancient Rome (where the status of citizenship was withheld from slaves, women and foreigners) to the detainees confined at Guantanamo Bay and in HMP Belmarsh.

In the context of criminal trial proceedings, the dignity principle mandates that every person appearing in a courtroom should be recognised and respected as a participating subject, rather than being objectified as a means to penal ends. This particularised forensic application of the dignity principle can be distilled into ‘the principle of humane treatment’, a normative standard with

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22 Of course, those with strong religious convictions will insist that, in the final analysis, human dignity is only intelligible in terms of the Love of God, or some similar theological principle: see, eg, MJ Perry, ‘The Morality of Human Rights: A Nonreligious Ground?’ (2005) 54 Emory LJ 97. Humanists have to hope that they can agree to disagree with theologians before reaching the limits of secular analysis.


24 A stark example is the behaviour of Jewish concentration camp detainees chosen by the Nazis to work as camp guards, described by P Levi, The Drowned and the Saved (London, Abacus, 1991).

25 Preventive detention of foreign nationals on grounds of their suspected terrorist activities was subsequently held to be unjustifiably discriminatory and contrary to human rights law: A v Home Secretary; X v Home Secretary [2004] UKHL 56.

26 Roberts and Zuckerman, n 4 above, 20–1.
significant traction on the administration of criminal proceedings. The subjects most obviously in jeopardy of ill-treatment or injustice when caught up in the toils of criminal process are those suspected or accused of criminal offences. Procedural rules foster humane treatment by protecting suspects and the accused from physical abuse or excessive psychological pressure at the hands of state officials,\(^{27}\) and by providing them with legal advice and assistance to prepare and present their cases in court.\(^{28}\) Evidential rules of exclusion and forensic reasoning\(^{29}\) perform related functions\(^{30}\) by affording accused persons fair opportunity to answer the charges against them, whilst at the same time not compelling them to speak if they choose to remain silent.\(^{31}\) Such rules of criminal evidence and procedure treat the accused as thinking, feeling, human subjects of official concern and respect—in other words, as people who are entitled to be given the opportunity to play an active part in procedures which could exert a direct and possibly catastrophic impact on their welfare, rather than as objects of state control to be manipulated for the greater good (or some more sinister purpose). This is neither an exclusive nor a reductive account of the law governing criminal adjudication. Particular rules and doctrines are often justified on instrumental grounds, especially their—real or supposed—contribution to effective fact-finding and efficient case-disposal. Procedural doctrines and principles also contribute in a broader sense to maintaining the moral integrity of criminal proceedings and the legitimacy of court verdicts.\(^{32}\) Nonetheless, the significance of the principle of humane treatment should not be overlooked or discounted in any comprehensive normative audit of criminal trial procedure.

Suspects and the accused are by no means the only people whose wellbeing is placed in jeopardy by their involvement in criminal proceedings. In recent years concerns have, quite rightly, been voiced about the courtroom experiences of complainants and other witnesses, amidst growing recognition that members of the public have sometimes been subjected to avoidably distressing and

\(^{27}\) Roberts and Zuckerman, n 4 above, 20–1, ch 9.
\(^{28}\) Ibid, §2.2.
\(^{29}\) On ‘forensic reasoning rules,’ see ibid, ch 10.
\(^{30}\) Though it does not follow that their value must be conceived, in functionalist terms, as exclusively instrumental: see sect 3, below. For a non-functionalist account of the presumption of innocence, see P Roberts, ‘Strict Liability and the Presumption of Innocence’ in A Simester (ed), *Appraising Strict Liability* (Oxford, OUP, 2005).
\(^{31}\) Internationally, these procedural guarantees are well represented in codes of criminal procedure, as well as in international human rights instruments and their interpretative jurisprudence. For useful surveys, see B Emmerson and A Ashworth, *Human Rights and Criminal Justice* (London, Sweet & Maxwell, 2001); CJM Safferling, *Towards an International Criminal Procedure* (Oxford, OUP, 2001).
unacceptably shabby treatment at the hands of legal professionals. This concern is particularly acute in relation to inherently vulnerable witnesses or those required to testify about very traumatic events in their lives, such as child witnesses and adult complainants of rape or sexual assault. Rules of evidence and procedure which place additional limitations on the cross-examination of vulnerable witnesses, or which in other ways ameliorate the trauma of testifying in court, are in partial fulfilment of the principle of humane treatment. Whether these reforms have yet gone far enough, or to the contrary have already gone too far, remain questions of intense moral and legal controversy and on-going empirical investigation.

Criminal justice professionals discharge duties of humane treatment owed to the accused, complainants, and witnesses in their capacity as state officials, and on behalf of the political community at large. However, if we take seriously the idea of treating all trial participants in accordance with the dignity principle, then an appropriate measure of concern and respect also needs to be extended to criminal justice professionals themselves. Police, prosecutors, judges, factfinders—even defence lawyers—are people, too! It follows that legislators and administrators bear responsibility for designing, implementing and maintaining a system of criminal process that is consistent with respecting the inherent human dignity of the personnel who have to operate that system on a daily basis. Police officers should not, for example, be required to participate in forms of criminal investigation that are demeaning or excessively dangerous. Lawyers should not be forced by the procedural system into advancing unethical or adopting immoral litigation strategies. Judges should not be obliged to enforce manifestly unethical rules of trial procedure. Jurors should not be kept hanging around unnecessarily just to suit the convenience of court administrators.


34 Youth Justice and Criminal Evidence Act 1999, ss 34–6, 41; Criminal Justice Act 2003, s 100.


36 Though magistrates and jurors are laypeople—ie non-lawyers—they discharge official duties in the administration of criminal justice.


This is not to say that the worst aspect of these or other regrettable practices is a breach of the duty of humanity owed to those involved in the administration of criminal justice. The most objectionable feature of a degrading form of police investigation may be that it impinges upon citizens’ liberty and privacy, or squanders precious policing resources. The most serious consequence of forcing defence lawyers to adopt immoral trial tactics may be an increased risk of miscarriages of justice, or of witnesses being humiliated in court. And the principal victim of an immoral law is the person to whom it is applied, rather than the judge who is obliged to apply it. But in these and countless other similar scenarios, that some feature of criminal trial process would breach the duty of humanity owed to criminal justice professionals and administrators is an additional reason, reinforcing any more apparent objections, for reforming or abandoning that practice, or refusing to adopt it in the first place.

The dignity principle always stands in need of context-sensitive, imaginative, particularistic elaboration. By extension, duties of humanity in the penal context must always take account of what precisely is at stake on each occasion calling for action or decision. For example, it might be regarded as unacceptably demeaning and incompatible with human dignity to require plain-clothes detectives to hang around public lavatories in order to police sexual encounters between consenting adults (at least in the absence of any serious public nuisance or widespread complaint), but not if the objective were to lure a vicious serial rapist out into the open. Whereas the former assignment seems embarrassingly sordid, the latter would be a job for a hero(ine) of law enforcement. Human practical reason—thinking—is the indispensable, irreducible, agency mediating between abstract moral principles and their translation into ethical conduct, in criminal proceedings as in everything else in life. Whilst a framework of law is an essential institutional corrective to the anarchy of untrammelled discretion exercised by unaccountable officials, justice is always to some extent a practical achievement of ethical professional judgement.

There is typically some element of instrumentality in all human relations: Kant’s injunction is against treating human beings ‘merely as a means’ not against means-treating tout court. In a criminal trial, for example, witnesses can be regarded as instruments of information-provision, and jurors as instruments of decision-making. Hard-pressed lawyers and judges are bound to view witnesses and jurors in these instrumental terms to some extent. What the dignity principle forbids, however, is the reductive instrumentalisation of witnesses and jurors to the point where only their forensic usefulness is routinely recognised.

40 Or worse: in most public bureaucracies, insiders occasionally fall back on sardonic gallows humour to get them through the day. A shared institutional culture of dismay at managerial incompetence, weary incredulity at the eternal folly of clients’ conduct, and bad-taste jokes may be an important crutch to professional morale. However, serious damage can be done to public confidence in the administration of criminal justice if this potentially corrosive material seeps out into the wider public domain.
and criminal justice professionals become blinded and disrespectful towards participants’ humanity. Dignity demands that information is procured from witnesses with courtesy and consideration—I can question your memory, or even challenge your veracity, in cross-examination without also implying by my mode of address or body language that you are lying scum—41—and that jurors are treated as valued partners in adjudication, rather than being spoken to like a remedial class of insufferably naughty children whom the judge needs to keep in check with a glare and stern admonitions.

To take seriously the application of the dignity principle to criminal proceedings is to recognise that the pursuit of justice hangs on the everyday conduct and decision-making of criminal justice professionals. One finding that consistently stands out from witness satisfaction surveys is that the little things matter.42 A bad attitude, personal animus, unkind words, superciliousness, even a dirty look threatens to betray the promise of the very best institutional and normative designs. This all-too-human aspect of criminal trial proceedings is typically overlooked in criminal justice commentaries and reformers’ prospectuses. Put it this way: the moral demands of justice weigh much more heavily and pervasively on the cops than on the robbers, notwithstanding the natural (animal) inclination to react to provocations in kind or, better still, to get one’s retaliation in first against predictable troublemakers. The dignity principle therefore has far-reaching, and relatively neglected, implications for how criminal justice professionals should be trained, as well as for how they should conduct themselves as lawyers, judges or police officers, etc., in their quotidian professional practice.

3. OBJECTS: CRIMINAL PROCEDURE AS A MEANINGFUL INSTRUMENT OF JUSTICE

Whilst subjects ought not to be objectified or reduced to mere instruments of others’ subjectivity, no such injunction applies to mere objects. Generally speaking, objects may safely be used as instruments with a clear moral conscience.43 Applying a similar train of thought specifically to criminal procedure, Ron Allen, a well-known American Evidence scholar, writes:

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41 There is admittedly a fine line between committed advocacy and witness abuse, and I doubt whether acontextual generalisations will take us very far in determining which is which. But I do want to stress the significance of the style and semiotics of cross-examination, in addition to its substance, in appraising techniques of evidence-testing, and the corresponding importance of schooling would-be advocates in the full extent of their ethical responsibilities.


43 Though it does not follow that all objects are inert, violable, fungible or open to unlimited commodification. These typical properties of objectification apply in different combinations, to different objects, in different times and places: Nussbaum, n 11 above, 257–65.
I do not think it plausible that we entered into society in order to have rights of the accused: they are obviously instrumental to something else.\textsuperscript{44}

Allen’s remark encapsulates the essential instrumentality of criminal procedure. Criminal process is patently not an embodied subject in the way that human beings are. It is an object of human creation, rather than a subject created human. When we say that criminal process has a particular ‘character’ or peculiar ‘characteristics’ we speak by way of analogy to human traits, or possibly in shorthand—vicariously attributing to criminal proceedings the traits of the people who, through their professional practice or in discharging the duties of citizenship, bring criminal adjudication to life. Criminal process is literally \textit{inanimate}; it has no soul (except by analogy, and one would be far less likely to speak of ‘the soul’ of criminal process than of its ‘character’). Criminal process is also in significant measure \textit{incorporeal}, lacking comprehensive embodiment in physical manifestation. Symbols of criminal process are, of course, institutionalised through a variety of familiar concrete forms: police officers on the beat, crime laboratories, courthouses, the accused in the dock, robed judges and bewigged barristers, and gaol (perhaps the ultimate penal icon) are all indubitably corporeal. Legislation enacted by Parliament and judicially-created precedents can all be consulted in real books, in real libraries; or, these days, in virtual books in virtual libraries (and even these electronic materials are easily converted into tangible hardcopy). Yet none of these real people, institutions or artefacts, or even all of them taken together, is criminal process, because criminal process is partly constituted by the normative regularities, practices and routines represented, however imperfectly, in such notions as ‘the law in action’ (as opposed to ‘law in the books’) and the ‘working rules’ or ‘occupational cultures’ of criminal justice professionals.\textsuperscript{45} Normativity is the irreducibly incorporeal dimension of criminal process. Whereas human subjects are essentially materially embodied,\textsuperscript{46} criminal process is part institutionalised object, part collectively conjured ghost.\textsuperscript{47}

The objectification of criminal process can be extended a stage further, by reflecting on the nature of its moral value. We need to ask: what is \textit{good} about


\textsuperscript{45} The point is perfectly general, but has been developed most fully in relation to policing: see, eg, A Sanders and R Young, Criminal Justice (2nd edn, London, Butterworths, 2000) 73–5; C Hoyle, \textit{Negotiating Domestic Violence} (Oxford, OUP, 1998); D Dixon, \textit{Law in Policing} (Oxford, OUP, 1997).


\textsuperscript{47} But note that, as an inter-subjective creation reproduced and sustained through discursive (interpretative; meaningful) social practice, the fact that criminal process is not fully tangible does not make it any less ‘objective’ or ‘real’ as a social institution.
criminal proceedings? What is the good in, or of, criminal adjudication? What, or whom, are these complex, institutionalised, official and authoritative social practices good for? Some inanimate, incorporeal entities are nonetheless invested with intrinsic moral value. Consider, for example, a friendship or a marriage. Like criminal process (as I have characterised it), a friendship may be symbolised by certain corporeal tokens (an invitation to dinner; a gift of flowers or a bottle of wine) or embodied in particular actions (a handshake, a kiss), but the friendship itself is an essentially incorporeal artefact of human relations. You can see the invitation, hear the greeting, smell the flowers, taste the wine and feel the handshake or the kiss, but the friendship itself lies beyond purely sensory perception. Moreover, friendship is good. Part of the goodness of a friendship is constituted by its instrumental contribution to the welfare of the friends, who enjoy each other’s company and are committed to providing mutual emotional and material support in times of need, etc. However, friendship is also intrinsically valuable. From a moral perspective, a world containing more friendships is pro tanto superior to a world containing fewer friends. It is good to be a friend, even if the friendship does not, or does not any longer, contribute directly to one’s emotional or material wellbeing. Even in those moments of moral weakness when ‘a friend in need’ can seem like a pest, most people acknowledge the duties of friendship and consider their fulfilment to have intrinsic moral worth. Friendship, of course, can go bad. A particular friendship may become abusive, stultifying, one-sided, all-give-and-no-take, sometimes to the point where it would be best, all things considered, to put an end to the relationship. Yet even at the point of a friendship’s dissolution there is sadness in recognition of the fact that a valuable human relationship is being disavowed. On balance, it might be advisable to make a clean and permanent break, but there is something more than nostalgia for better times in the melancholia of friendship lost.

In contrast to the intrinsically valuable institution of friendship, criminal process at first sight seems to be mere object, as it were, all the way down. A world with more criminal process is not pro tanto better than a world with less (indeed, one might suppose the inverse correlation). Criminal process appears to be devoid of intrinsic moral worth. Nobody sheds a wistful tear at the loss of an anachronistic criminal procedure or institution which is truly defunct. There is no Remembrance Day for the ‘hue and cry’, Assizes and Quarter Sessions, 50
or automatic corroboration warnings in sexual assault cases, and nobody appears to be particularly exercised about the imminent demise of committal proceedings for charges ‘triable either way’. These examples, plucked almost randomly from the bulging trashcan of legal history, suggest that—at least in principle—reforming criminal procedure can secure pure, unadulterated, social progress without any collateral harm to incidental or contiguous moral values.

Mere objects, lacking intrinsic moral value, must be evaluated in terms of their instrumental usefulness, that is to say, by the extent to which they advance or retard valuable objectives. Instruments are good or bad just insofar as they serve appropriate objectives. Morally valuable instruments must serve moral ends. Now, the objectives of criminal process are notoriously contested. Consequentialists advocate reductive goals of crime prevention through deterrence, reform, rehabilitation and incapacitation. Against the consequentialist’s exclusive preoccupation with consequences, deontologists insist on the intrinsic moral value of retributive justice. Many theorists prefer a ‘mixed’ approach, blending different aspects from each theoretical tradition in various combinations. These debates have raged for millennia, with no apparent prospect of resolution or consensus. Interminable debate reflects the intractability of the issues at stake. Unfortunately, it is not possible to proceed any further with our present inquiry without taking a stand on these controversies. For competing theories of criminal justice posit fundamentally different objectives for criminal trials.

Consequentialism, to my eyes, has dangerously imperialistic tendencies and, despite superficial attractions in limited contexts, is in principle difficult to restrain within morally acceptable bounds. Given free rein, it would wholly undermine the dignity principle and deliberately traduce Kant’s injunction, by treating people purely as a means in order to maximise some overriding criterion of goodness, such as aggregate social welfare (utilitarianism) or market efficiency (welfare economics). Adapting Rawls’s memorable turn of phrase, consequentialism is no respecter of persons. It follows that, in terms of the

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argument developed in this essay, consequentialist conceptions of political morality fail to satisfy a minimum threshold of eligibility. By disregarding the dignity of subjects, these maximising political moralities fall at the first normative hurdle.

Consequentialism could only be adopted at the second, ‘objects’ stage of normative theorising if it were interpreted more narrowly, not as a consequentialist conception of political morality at large, but as a consequentialist theory of criminal justice. That move would be conceptually coherent, but normatively hard to swallow. Once it has been accepted that human beings have intrinsic moral value, and that all forms of political governance and regulation (including penal justice) must respect the dignity principle, why would one be tempted to switch to a consequentialist ethics of criminal proceedings when the analysis is extended from subjects to objects? Part-time deontology makes no moral sense. The consequentialist’s best philosophical arguments operate at the interwoven levels of moral ontology and epistemology, where it can be claimed that all talk of intrinsic moral worth is superstitious hocus-pocus or, as Bentham said of fundamental human rights, ‘nonsense on stilts’. But if we agree that people qua subjects are inherently valuable, and that incorporeal entities like human friendships by extension are intrinsically good, then there is no peremptory or categorical reason for denying a similar moral status to retributive justice. The argument must now proceed within a deontological conception of political morality and penal ethics. Any subsequent appeal to consequentialist theorising (as opposed to taking proper account of the moral significance of consequences) would be redundant and theoretically incoherent, as well as morally misconceived.

There is understandable resistance to treating retributive justice as inherently valuable. People who readily accept deontological evaluations of human beings and human friendships baulk at the notion that punishment can be good in similar fashion. However, such resistance often derives from misconceptions about what is being claimed for retributivism. Retributive justice is neither sadism nor revenge. It has nothing to do with taking pleasure in suffering, and it is the very antithesis of an undisciplined reaction to wrongdoing in the heat of passion. Nor again is it suggested that a world with more retributive justice is pro tanto better than a world with less, and herein lies a genuine contrast with...
friendship. Retributive justice is a remedial virtue, the moral response to crime. The best world would be one in which crimes hardly ever occurred, pre-empting the need for a retributive reaction. But crime does occur in our world, and a significant proportion of it is serious. Crime calls for an appropriate official response, one which reaffirms the moral values, rights and interests embedded in criminal prohibitions (including the inherent dignity of the victim) and publicly censures criminal wrongdoing as a serious breach of the duties of morality and good citizenship which, the court’s verdict announces, ‘will not be tolerated in this political community’. Punishment, in the form of monetary penalties and material deprivations of liberty, is often necessary, pragmatically speaking, to drive these messages home to their intended audiences:63 the offender, his victim, their respective families and supporters, jurors, the public gallery, the media and society at large. In short, retributive justice is the virtue of righting criminal wrongs, and this is inherently good. Conversely, if the processes of criminal adjudication falter, leading to the censure and punishment of an innocent person, they produce a miscarriage of justice, which is seriously bad. Public condemnation is deeply resented by the innocent, whether or not official censure is accompanied by penal hard treatment in their case. Misplaced official censure publicly defames the innocent and in itself inflicts moral harm. It is also morally regrettable, though somewhat less seriously so in view of the fundamental asymmetries64 of criminal law enforcement, when crimes go uncensured and the offender evades his just deserts. If this is not strictly injustice, it is at least a failing, or lack, of justice. Ceteris paribus, a world in which a greater proportion of criminal offenders is brought to retributive justice is morally superior to a world in which there is proportionately less censure and punishment of the guilty, and correspondingly more impunity, political impotence, and victims of crime left stranded without redress.65

The overriding objective of criminal process—the essential point of this complex conjunction of norms, institutions, personnel, practices and relationships—is, we may now intelligibly assert, to serve retributive justice. Achieving retributive justice entails, inter alia, applying the right criminal laws to the right people in the right way. In order to be capable of serving retributive justice, the more particularised priorities of criminal trial process must include:

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65 Some readers will continue to insist that criminal trials serve some other purpose, to shame or deter offenders, to promote rehabilitation, to express society’s indignation, to satisfy victims’ thirst for vengeance, to further exclude marginalised socio-economic groups, to reinforce patriarchal oppression, to perpetuate racist discrimination against already-deprived minorities, or whatever. It should be stressed that my argument elaborates an ideal, and is in no way an apology for the current state of penal law and policy in England and Wales, much less for its practical realities. There is plenty of room for disagreement on these controversial moral issues, but the status of retributive justice cannot simply be ignored, side-stepped, or rebutted by default. Either retributive justice is intrinsically good, and criminal process is instrumentally valuable in serving retributive justice, or we need to hear a convincing moral argument to the contrary.
• accurate fact-finding;
• effective law application; and
• imposition of just censure and punishment.

Unlike retributive justice, which is an intrinsically valuable response to crime, criminal trial procedure is good, *prima facie*, only to the extent that it is an effective instrument of justice. If the adjudicative jobs of fact-finding, law applying, and imposing censure and punishment did not need to be done, we could dispense with criminal trials without losing anything of intrinsic value—unlike the loss of a life, or a friendship, or a great work of art, which is always a matter for regret, even where this loss was the best attainable outcome, all things considered (the deceased was killed in lawful self-defence; the friendship had become mutually destructive; the painting had to be ransomed to save the lives of hostages, etc.).

Systematic objectification of criminal process therefore yields this preliminary conclusion: whilst the world is always a better place for containing things which are inherently valuable, it is only contingently better for having criminal trials, on condition that:

(i) trials are instruments of retributive justice; and
(ii) they work (reasonably well, most of the time).

If the first condition were not met, criminal trials would at best be an irrational waste of public resources that ought to be devoted to a worthier cause. Failure to satisfy the second condition would imply that deficiencies in the adjudicative process are obstructing the supply of retributive justice from meeting genuine demand. In that scenario, procedural and/or institutional reform, rather than outright abandonment, would be the logical remedies.66

Modelling criminal adjudication as an instrument with one overriding end—to achieve (retributive) justice—seems to me to capture the essence of the institution. But powerful though it is, this model also patently over-simplifies. Instrumental conceptions of criminal procedure are subject to at least two important qualifications. First, criminal process *contingently* serves a range of independent values and purposes, in ways and with the implications explored in section 4, below. The remainder of this section explains, secondly, how particular aspects of criminal procedure, or even entire criminal procedure systems, can become invested with broader moral and political significance as part of a meaningful tradition of criminal adjudication. Accommodating these two features of criminal proceedings as they are experienced in practice requires a more nuanced characterisation of the criminal trial. Though criminal procedure remains in theoretical conception the instrument of retributive justice, it is never

66 Though it should not be assumed that reform is always a viable option. Sometimes it must be concluded, with regret, that even a relatively miserable performance is the best that can be achieved in the circumstances, so that any further legislative interventions or changes of policy would serve only to make matters worse.
in practice a wholly dispensable object of human society and politics, devoid of non-instrumental value.

Criminal trial procedure is only purely instrumental in abstract contemplation, whilst it remains, so to speak, on the legislative drawing-board. Once implemented by the courts, features of criminal trial procedure are institutionalised realities with the capacity to become invested with social and cultural meanings extending beyond their primary instrumental function. Aspects of legal process may assume distinctive symbolic meanings, with a powerful moral charge. Socially meaningful interpretations of trial practice could in turn have important political and juridical implications. For example, a particular mode of fact-finding—eg trial by jury—might come to symbolise something about the political covenant between a government and its people, perhaps that this polity is committed to a certain kind of participatory democracy.67 Or again, a prohibition on double jeopardy might symbolise a political community’s commitment to restraint in criminal prosecutions and its respect for the separation of powers and the finality of criminal verdicts.68 These are not random examples,69 but for the purposes of this discussion they are invoked only to exemplify the more general process through which instrumental criminal adjudication becomes invested with social meanings which, in turn, are constitutive of a distinctive constitutional culture. Clearly, not every detail, or even every major feature, of criminal trial procedure will generate such broader associations—examples of ‘meaningless’ procedural anachronisms have already been given. However, to the extent that criminal procedures function as ‘thick’,70 richly generative, cultural symbols, it cannot be said that they are mere instrumentalities of criminal adjudication that could be abandoned or abolished without loss once judged to be incapable of serving retributive justice effectively, or in the—highly improbable—event that retributive justice were no longer in demand.

On the assumption that criminal adjudication is richly symbolic, it should be possible, and worthwhile, to elaborate the meaningful nature of particular institutions, norms, and doctrines, etc., which together constitute a distinctive procedural tradition. This is, in the first instance, a descriptive, empirical

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67 The relationship between democracy and jury trial has been touched on by several contributors to the Trial on Trial project: see, eg, Matt Matravers, “More Than Just Illogical”: Truth and Jury Nullification and Robert P Burns, ‘The Distinctiveness of Trial Narrative’ in Duff et al (eds), n 1 above; and Sherman Clark’s essay in the present volume.
68 See n 3 above.
69 Being the subject of recent, highly controversial, reforms in England and Wales.
endeavour. The hypothesis could be tested only by reference to detailed accounts of legal practices and traditions, manifested in authentic juridical sources (Acts of Parliament, precedent cases, codes of practice, policy documents, operational manuals, etc.) and institutionalised professional routines (litigation strategies, judicial reasoning, courtroom etiquette and practice) and their sustaining legal and political cultures at particular points in time—a painstaking task of historical, legal and cultural reconstruction that must necessarily be postponed to other occasions. However, one generalisable feature of this analysis merits brief elaboration here. It is elementary political philosophy and trite law that justice must not only be done, but must manifestly be seen to be done.\(^\text{71}\) One essential precondition of justice being seen to be done is that criminal adjudication commands public confidence. The public can only have confidence in criminal adjudication, however, if the published rules, including rules of criminal procedure, have a reasonable degree of stability and longevity and government officials stick to them in practice. In this sense, criminal procedure—both as instrumental servant of retributive justice, and as meaningful symbol of legitimate constitutional authority—is inherently conservative.

The inherent conservatism of criminal procedure arises from the fact that everybody involved—accused, victims, witnesses, criminal justice professionals, jurors, the general public—must know where they stand, not only on the day of judgment but also in contemplating the consequences of criminal adjudication far into the future. Jurors, and through them society at large, must be confident that if the outcome of a criminal trial is that the accused is sent to prison for a substantial period,\(^\text{72}\) the moral and juridical foundations of the verdict will continue to bear the weight of that conviction and punishment during the whole period of the offender’s confinement, and even long after he has been released. A justice system constantly in the flux of major reform would, by contrast, struggle to generate public confidence that the moral and juridical basis of last year’s, or last month’s, convictions could be sustained into the next. Public confidence might be said in this sense to be invested in the aggregated symbol of a stable justice system—or more comprehensively, an enduring criminal justice bargain or ‘deal’—publicly announcing citizens’ rights and responsibilities in the penal sphere. A socially acceptable mechanism for resolving disputed questions of fact\(^\text{73}\) is likely to be at the heart of a political democracy’s criminal

\(^{71}\) Scott v Scott [1913] AC 417 (HL), at 463.

\(^{72}\) A pronounced illustration of a perfectly general case. The point holds with regard to non-custodial sanctions, and even in cases of suspended penalties or discharges. Meaningful penal censure must be enduring. A penal authority that constantly chopped and changed its mind, denouncing crimes today only to revoke its own denunciations tomorrow, could hardly inspire public confidence, or for that matter attain any other respectable penal objective.

\(^{73}\) The text simplifies. ‘Facts’ in law frequently involve normative evaluations and quasi-judicial exercises of classification: see Roberts and Zuckerman, n 4 above, sect 3.5; AAS Zuckerman, ‘Law, Fact or Justice?’ (1986) 66 Boston University LR 487. The text is also deliberately non-committal on the difficult epistemological issue of whether juries, judges and magistrates find facts or make them in the process of criminal adjudication.
justice deal. Though by no means precluding incremental and cumulatively extensive changes over time, any major legislative revision of criminal procedure risks jeopardising that public confidence in a stable procedural regime without which the ideal of penal justice cannot be translated into a practical achievement. Where justice cannot be seen, it literally does not exist (at least not fully), because the reflexive accessibility of justice to those whom the law addresses is mandated by definition. Concealed or incomprehensible justice is oxymoronic. At the limit, a system of justice in the throes of constant procedural revolution would barely qualify as a system of justice at all. It would more closely resemble an arbitrary lottery of legislative caprice and judicial discretion, perhaps not unlike the teleological system of penal ‘law’ implemented by the Nazis according to which the law was whatever the judge (party member) decided, ex post facto, would best promote the assimilated interests of Volk and Reich.

Both the particular and the generalised versions of this argument insist that specific criminal procedures may be, or may become, inherently meaningful and, to that extent, intrinsically valuable. In this way, social convention may generate moral value, in partial rebuttal of Hume’s ‘naturalistic fallacy’ that a descriptive ‘is’ can never generate a normative ‘ought’. Pacer Hume, social conventions are required to synthesise and extensively instantiate moral values, crystallising abstract principles into concrete moral duties and entitlements embedded in social practice. The symbolic meaning and related moral value of criminal procedure is often (merely) additive, contingent and external to the instrumental function of criminal adjudication in service of penal justice. These configurations are discussed in the next section. However, the examples of jury trial, double jeopardy and manifest public justice, all suggest—and if developed more fully might demonstrate—that the social symbolism of criminal procedure can also sometimes be constitutive, in the sense of being conventionally entailed, and thus fully internal to the achievement of penal justice through criminal adjudication. In which case, criminal procedure—or at least the constitutive parts of it—should be characterised as participating in the good of retributive justice, and not merely as an instrument to that valuable end.

74 Which may help to explain Langbein’s puzzlement at the fact that ‘a legal system will do almost anything, tolerate almost anything, before it will admit the need for reform in its system of proof and trial’: JH Langbein, ‘Torture and Plea Bargaining’ (1978) 46 University of Chicago LR 3, at 19.
75 Just as Neurath’s boat could be renewed at sea one plank at a time: cf ‘The Ship of Theseus’ in M Clark, Paradoxes from A to Z (London, Routledge, 2002).
76 In the same way that knowing that one is free is part of the very condition of being free: see P Pettit, Republicanism: A Theory of Freedom and Government (Oxford, OUP, 1997) chs 1–2.
4. VALUES: THE MORAL PLURALISM OF CRIMINAL ADJUDICATION

Deontological conceptions of morality are necessarily pluralistic, accommodating a range of irreducible moral goods. Monistic moralities, by contrast, are either fatally reductionist, or they are not monist in any conceptually rigorous sense. It is always a mistake to try to reduce the moral complexities of life to a single, scalar metric in order to perpetuate the fantasy of comprehensive commensurability of value. The reality is that on any occasion of human interaction a plurality of, often competing, moral considerations virtually always comes into play. Criminal trial proceedings fully reflect the complexities, challenges and dilemmas of moral pluralism.

Any institutionalised public practice as complex, symbolically meaningful and socially important as criminal adjudication is bound to impact significantly on a multitude of values and goals, in addition to its primary instrumental objective. As well as being the instrument of penal censure in the service of retributive justice, criminal trials are also, fairly obviously, concerned with democratic participation, accountability of officials, probity in public life, non-discrimination, fairness, the rule of law, reassertion of authority, social solidarity, national character and traditions, effective use of public resources and many other aspects of contemporary governance. In a sense, public administration, criminal law and social mores are ‘on trial’, along with the accused, in criminal trial proceedings. Churchill once remarked that ‘the mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country’. Criminal trial proceedings might by extension be regarded as a litmus of national character and political culture, with the emphatic rider that trials are more publicly ‘on show’ than activities hidden behind towering curtain prison walls. And if the character of a nation may be judged by its criminal process, there is a sense in which a people gets the form of criminal adjudication it deserves.

A distinction might be drawn between those additional goals and values that are internal to a comprehensive theory of retributive justice (including the symbolic dimensions of criminal procedure highlighted in the last section) and those which are essentially contingent and collateral to the primary objectives of criminal adjudication. For example, a fuller elucidation of retributive justice would need to specify the conditions under which criminal courts might exercise legitimate authority to pass judgment and impose penal censure and punishment. Any plausible account of legitimate political authority in modern
western societies would have to contain a substantial element of democratic participation and accountability. Thus, the arrangements for appointing, training, supervising and dismissing judges, magistrates, lawyers and jurors are likely to reflect democratic concerns in western legal jurisdictions, and a theory of retributive justice should not be considered complete without undertaking a ‘democratic audit’ of the relevant institutions and procedures.  

This example brings out the hierarchical structure of the normative conceptualisation of criminal adjudication developed in this essay. The first consideration is that subjects must take precedence over objects. Thereafter, the instrumental objective of imposing retributive justice is paramount (from the perspective of a normative conception of the criminal trial). Finally, tertiary values and objectives vie amongst themselves. It would be ludicrous to imagine that political communities set up penal systems for the express purpose of promoting democratic participation and accountability. We have parliamentary elections, party political broadcasts and manifestos, elected local councils, citizen representation on the management committees and review boards of multifarious public bodies, and the free press, the celebrated ‘fourth estate’ (after Crown, Lords and Commons), for these purposes. But whilst the point of criminal process is penal retribution, appropriate regard for considerations of democratic participation and accountability remains an imperative constraint integral to achieving retributive justice. Criminal trial proceedings thus become an occasion on which the incidental values and goals of democracy can, and to some extent must, be served.

A similar analysis, with far-reaching implications beyond the scope of this essay, can be extended to the pursuit of distributive justice. If the point of criminal adjudication were to distribute material resources more fairly within society, criminal process would be a thoroughly perverse institution which more often than not ‘succeeds’ in concentrating and accentuating, rather than alleviating, socio-economic disadvantage and social exclusion. The clientele of criminal courts and prisons almost everywhere is disproportionately poor, ill-educated, unemployed and immigrant. Whilst the tax and benefits system is (in part) directed towards distributive justice, however, criminal process is preoccupied with censuring and punishing criminal wrongdoing. Yet considerations of distributive justice cannot be neglected entirely in criminal adjudication, because conditions of extreme deprivation threaten to undermine the judgments of moral fault on which retributive justice rests. If Pauper steals

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82 There is, of course, a range of institutional models that might be said to satisfy the demand for democracy in practical terms. Direct popular election of judges is only the most literal, and not necessarily the most reliable, option. In many democracies it is believed that justice is best served by having elected politicians appoint independent legal professionals with security of tenure. Another model is the selection of lay jurors by random ballot.

83 Looking at the situation from a different perspective, eg prioritising democratic participation or social justice over retributive justice, would produce different conclusions. But far from qualifying the argument in any significant respect, this is merely a reminder that the meaning of what is seen is always partly a function of the viewer’s priorities.
a loaf of bread to save his family from starvation, his conduct is not morally blameworthy and he cannot legitimately be censured or punished. A further constraint on criminal process, therefore, is that it should not compound social exclusion and socio-economic disadvantage to the point where judgments of moral culpability can no longer be sustained. To this limited extent, distributive justice defines the horizon of criminal procedure, and criminal proceedings may be said in turn to consolidate the good of distributive justice.

Criminal process, in addition, routinely provides the occasion for promoting goals and values that are genuinely collateral to retributive justice. Two closely proximate, distinctively penal, collateral considerations may serve as illustrations: (1) crime reduction; and (2) mercy. On the assumption that a particular criminal prohibition is legitimate, we can agree that it would be preferable to pre-empt the need for ex post facto retributive justice by preventing breaches of the law ex ante. Provided that the means for securing crime prevention are compatible with the dictates of retributive justice, and not morally objectionable in themselves (in particular, they must not objectify a human subject in breach of the dignity principle), reductive techniques should be embraced. If criminal trials can contribute towards worthwhile goals of crime prevention within these constraints, they should be designed and conducted to do so. Here as before, there is no need to capitulate to the monist vice of ethical reductionism. Moral pluralism allows that a range of values and objectives may be promoted simultaneously; which is only to restate a common sense intuition. If there is no need to choose between retributive justice and crime prevention, because the two are entirely compatible in the particular circumstances envisaged, why not pursue both in tandem? Only those in thrall to dogmatic penal theories could regard this win-win choice as a hard decision.

Considerations of mercy often arise in connection with criminal punishment. Despite this familiar association, however, the impulse towards mercy cannot easily be accommodated within an account of criminal adjudication as the instrumental servant of retributive justice. Mercy is the virtue of tempering justice, and therefore necessarily external to it. Questions of mercy arise when the work of justice is done. It is controversial when, if ever, considerations of mercy should be taken into account when determining a criminal's fate. The law is not well suited to do justice simultaneously to retribution and mercy. If there is no need to choose between retributive justice and mercy, because the two are entirely compatible in the particular circumstances envisaged, why not pursue both in tandem? Only those in thrall to dogmatic penal theories could regard this win-win choice as a hard decision.

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85 Liberals generally argue that distributive justice is good, but disagree about the extent to which equality of outcome should be allowed to qualify other goods, such as political liberty and meritocratic desert.

86 As well as obviously ruling out ‘cruel and unusual’ exemplary punishments, this constraint might invalidate any severely liberty-limiting or grossly disproportionate measure designed to operate in terrorem, whether by overwhelming a person’s capacity for reasoned action or pour encourager les autres: see, further, D van Zyl Smit and A Ashworth, ‘Disproportionate Sentences as Human Rights Violations’ (2004) 67 MLR 541; RA Duff, Punishment, Communication, and Community (Oxford, OUP, 2001) ch 4; von Hirsch, n 13 above, ch 9.

mercy should be allowed to influence criminal adjudication, though this probably occurs regularly in England and Wales—nationally allowing personal mitigation to reduce an offender’s sentence, and in persuading a jury to acquit against the weight of evidence. To the extent that such considerations prevail, the criminal trial becomes a paradigmatic arena for prioritising the virtue of mercy over the strict requirements of justice.

Other values and goals which may arise in criminal adjudication are not distinctively penal. They are either general aspects of political governance, including the pervasive concern with economy and efficiency in public administration, or contingent features of the social processes, professional practices and institutional context of criminal trials. Certain contingent features are extensions of general public policies, such as the state’s commitment to non-discrimination in dealing with female or ethnic minority accused, complainants and witnesses. Other contingencies relate to the prosaic experiences of trial participants: think of the personal satisfaction derived by criminal justice professionals from a job well done, a tearful courtroom reunion between a mother at her wits’ end and her wayward son, or a friendship that happens to flourish between jurors who would otherwise never have met. Whatever else criminal trials may be, they are a thoroughly human occasion implicating the full moral spectrum of valuable personal and political relationships (as well as the correlating moral universe of evil, pain, suffering, torment, humiliation, shame and regret). Trials were not invented so that people with a taste for argument or for judging others’ conduct could find a stimulating professional career, or to bring families together, or as a way for jurors to make new friends. But all this, and much more, does occur in criminal adjudication, and to that extent criminal trials instantiate the intrinsic moral values of productive labour, flourishing family relationships and friendship, etc.

This point merits emphasis. Although the overriding objective of criminal trials is instrumental—to serve retributive justice—the institutions and processes of criminal adjudication afford material contexts in which a diverse plurality of intrinsic values is constantly, albeit contingently, invoked, experienced and replenished. Job satisfaction, friendships forged and family ties re-established in the penal context are phenomenologically just as real, and may contribute just as much to personal and collective wellbeing, as the experience of these goods in any other sphere or walk of life. Not only are these subsidiary goods merely incidental to the overriding objective of criminal process, however, they are manifestly not unique to criminal adjudication. Valuable experiences of this nature are an accidental by-product of criminal proceedings. Abolishing criminal trials tomorrow would hardly spell doom for all friendships, families and worthwhile careers everywhere. Family and friendships would continue to be

89 The exercise of ‘jury equity’ or (in America) ‘nullification’: see Roberts and Zuckerman, n 4 above, §2.3.
sustained in the myriad non-penal contexts in which these relationships flourish, and judges and lawyers would surely be able to find alternative careers sympathetic to their talents. It is the sustainability of these, and countless other, intrinsically valuable relationships across multiple social settings, together with their merely contingent association with criminal proceedings, which ensures that if retributive justice suddenly became obsolete, criminal trial process could be abandoned without consequential harm to these contingently-related values. The material and social conditions for promoting human flourishing and personal autonomy could be sustained, in the form of an adequate range of valuable options and opportunities, without any reference to criminal adjudication. People lived valuable lives before the modern institution of the criminal trial was invented, and could in principle do so again in conceivable—albeit technologically rather remote—future circumstances in which trials had become obsolete.

The dispensability of criminal adjudication holds just as securely for the more distinctively penal collateral goals and values. Retributive justice, as a remedial virtue, would become redundant only in the absence of (serious) crime. But in that event, there would be no call for policies of crime reduction, either. And since mercy (in the public sense considered here) functions only as an ameliorating adjunct to the imperatives of retribution, there would be no residual role for mercy in a world beyond retributive justice.

Those goals and values that might be regarded as internal to a comprehensive theory of retributive justice likewise, unsurprisingly, fall away when the overarching objective becomes redundant. Thus, to elaborate on a previous illustration, there are many alternative ways for citizens to participate directly in political administration without appointing them as magistrates or jurors, for example through various forms of community action, trade union activity, membership of pressure groups or involvement in local or national politics. Such alternatives to lay participation in criminal adjudication would serve the objective of popular self-government more efficiently and effectively than the prospect of a two-week stint of jury service once or twice during the course of a lifetime. Though English criminal trials currently provide valuable opportunities for direct democratic participation in government ‘of the people, by the people, and for the people’, such opportunities are contingent on the demand for retributive justice and are, in any case, overshadowed by an array of superior alternatives (superior from the perspective of promoting democratic participation).

90 J Raz, n 48 above, Pts IV and V.
91 Thus, for the present time at least, accurately ‘precogising’ crimes before they happen remains the stuff of science fiction, such as PK Dick’s Minority Report (London, Gollancz, 2000) (the plot of which, interestingly enough, pivots on the realisation that precognition turns out to be more fallible than people had been led to believe).
92 Public disapprobation, by way of some kind of ‘shaming ceremony’, might conceivably be sufficient to censure minor infractions, at a fraction of the cost of maintaining the cumbersome and expensive formal machinery of a traditional criminal justice system.
Finally, what of the symbolic meanings with which, as we saw in section 3, traditional criminal procedures may come to be invested? If the abolition of traditional institutions or practices of criminal adjudication might precipitate, for example, a loss of faith in the democratic accountability of government, or reduced respect for public officials, or a crisis of confidence in the moral integrity of a constitutional culture, it cannot be said, even with regard to obsolescent practices, that criminal procedure reform could be effected without courting potentially disastrous consequential loss. But this theoretical risk should not unduly disconcert governments with strong democratic credentials. Part of the answer is to ensure that only truly defunct or illegitimate criminal procedures are abandoned—otherwise a political community would rightly be regarded as diminished in its own and others’ eyes by the dilution of its penal heritage. Care must still be taken, even then, to divest outmoded criminal procedures of any broader symbolic significance. This entails communicating effectively to the public at large why a particular reform strategy has been pursued and that nothing further is implicated, materially or symbolically, in the legislative programme. The dissemination and management of information about criminal proceedings and their reform is a major topic in its own right, but one must hope that it is not beyond the wit of modern governments to explain in a way that ordinary people can comprehend why truly anachronistic criminal procedures should be abolished or reformed. In the unlikely scenario that a government’s perceived legitimacy ever came to depend on the symbolic appeal of instrumentally impotent and morally bankrupt criminal procedures, it would be an open question whether it would be preferable, in a liberal democracy, to let the government fall rather than to shore up a benighted hollow faith in procedural tradition—tradition merely for tradition’s sake.

5. THEORISING TRADITION IN CRIMINAL ADJUDICATION

The foundations of modern English criminal trial procedure were laid in the later eighteenth and nineteenth centuries, and the law of criminal evidence is largely a twentieth-century creation. Our procedural practices, as John Langbein is fond of pointing out, are therefore not quite as ancient as scholars and practitioners sometimes assert or assume. We nonetheless inherit a rich procedural tradition, which has evolved and been refined in practical adjudication—literally, through trial and error—over a period of several centuries. Its

93 This challenge is sometimes levelled, eg, at cross-examination as an instrument of truth-finding: see Roberts and Zuckerman, n 4 above, 215–21. However, cross-examination has staunch defenders as well as strident critics, and the issues between them are hardly clear cut. So this is not a persuasive counter-example. Procedural traditions may be weakened by sustained criticism, but they do not become impotent or morally bankrupt on the say-so of one party to the dispute. Indeed, procedural traditions may be strengthened and adapted to modern conditions through active debate.

guiding principles can be retraced through the warp and weft of English criminal jurisprudence to the systematic distillations of Blackstone, Hale and Coke, and beyond to iconic constitutional documents including, pre-eminently, Magna Carta. To accuse a modernising government of setting its face against ‘a thousand years of history’ is, of course, a rhetorical (im)posture. But perhaps it is worth considering whether it might be possible to extract a kernel of truth from such overblown claims, without slipping into the deeply conservative, mystical, romanticism of an Edmund Burke or William Blake.

English criminal trial procedure is currently caught between a modernising government disinterested in procedural traditions, almost to the point of contempt for our constitutional heritage, and the confusion and disorientation of its natural defenders amongst lawyers, scholars and civil libertarians. Mindful of the legitimate concerns of both constituencies, this essay has sketched out a normative conceptualisation of criminal adjudication organised around a tripartite division between subjects, objects and values. Its ‘subjects’ are the human participants in criminal trial proceedings, not just the accused and the complainant (‘the parties’), but all courtroom participants including witnesses, advocates, judges, jurors, court-staff (bailiffs, guards and ushers) and even observers from the public gallery. Criminal process, by contrast, is ‘object’, not subject, and its value is essentially instrumental: the overriding objective of criminal adjudication is to serve retributive justice (though criminal procedures may contingently become invested with symbolic meanings importing other goods). Finally, ‘values’ was a residual category containing all the important goals and values on which criminal adjudication sometimes has a bearing, but which are not already encompassed by the ‘subjects’ or ‘objects’ of criminal trials.

The analytical discipline of this conceptualisation derives from its hierarchical structure. Accordingly, the first, most urgent consideration is that people are subjects and their dignity must be respected. This is the level, roughly speaking, of non-negotiable universal human rights to life, liberty and the pursuit of happiness, which for centuries prior to the advent of modern human rights discourse have always been amongst the primary interests protected by national criminal law. The second consideration translates into the essentially instrumental value of criminal process in service of retributive justice. The extent to which criminal procedures can be regarded as manipulable objects with purely instrumental value must, however, be qualified to take account of the symbolic significance of criminal adjudication, as part of a complex, institutionalised, and above all meaningful set of social and legal practices. Finally, at the third stage of the analysis, myriad additional goals and values, some internal to retributive justice, others entirely collateral, must be accommodated, but only to the extent that they are compatible with the first two considerations—on pain of failing to comply with the imperatives of justice and human dignity. In a fuller elaboration than it was possible to provide in this essay, the purpose and parameters of third-category ‘values’ would need to be specified with some care to avoid a mire of inconvenient facts, ill-fitting ideas and general theoretical detritus.
Normative theorising is inherently, irremediably and unapologetically evaluative, and therefore inevitably controversial. Moreover, the exposition assumed, rather than argued for, liberal models of human flourishing, political association and criminal adjudication. Critics will always say that rival theories make the wrong value choices, ask the wrong questions, adopt the wrong perspective, address the wrong subject-matter, assume the wrong priorities, etc. Advocates of theistic religions might challenge the primacy of human interests in my conceptualisation of ‘subjects’, for example, whilst critics of traditional penalty, such as advocates of restorative justice,95 would be reluctant to accept that retribution is the overriding ‘object’ of criminal procedure. And open-ended references to ‘values’, above all, plainly invite the broadest of theoretical challenges. But why should this picture of wide-ranging moral controversy be regarded as alarming, unless one harbours the rather naïve expectation that practical morality must be plain and simple? To the contrary, as Raz has shown,96 moral pluralism implies incommensurability, which in turn paves the way for chronic and pervasive value conflict and the familiar demands of practical reason. A normative conceptualisation which is faithful to its subject-matter accordingly must convey a sense of the genuine complexities, obstacles and challenges which constantly frustrate the administration of criminal justice. Attempts to airbrush hard moral choices out of sight (and consequently out of mind), or to offer false reassurances of elegant, arithmetic-deductive solutions to the messy moral dilemmas of collective social life, are equivalent in moral epistemology to the quack remedies of the snakeoil salesman.

Trading concepts has limited appeal, and is ultimately beside the normative point, since moral questions require moral answers. My contention has been that we can get a firmer grip on the morality of criminal adjudication by theorising the trial as a hierarchical integration of subjects, objects and values. This conceptualisation seems to me to accommodate deep-seated intuitions and broadly-based expectations of criminal trials in England and Wales. It also helps to clarify neglected, obscure or perplexing aspects of criminal adjudication, particularly the range, purchase and status of its values and objectives, and the role and significance of procedural tradition. Still, in reinterpreting the more-or-less familiar I have also assumed a great deal. This essay’s normative theorising can only be as good as its liberal philosophical foundations, whilst the practical value of the exercise remains to be demonstrated in the policy arenas of criminal law reform and the forensic crucible of criminal adjudication.

96 Raz, n 48 above, chs 13–14.
The Trial and its Alternatives as Speech Situations

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1. INTRODUCTION

ONE IMPORTANT WAY in which the trial has been put ‘on trial’ in recent years is through the invention (or possibly discovery) of other methods of handling troubles, disputes and indeed criminal offences. Latterly, the most influential of such alternatives has been the movement in favour of restorative justice. Restorative justice has been eloquently and passionately championed, most notably by Braithwaite, and its international reach has been striking and impressive. During a period when—especially but not exclusively in the United States—many observers have been acutely concerned with the seemingly inexorable escalation of conventional penal control through imprisonment, this apparently against-the-grain progress is especially noteworthy. Although building upon a much longer tradition of interest in ‘informalism’, restorative justice has become the rallying point for various strains of scepticism towards trials and punishments.

One effect of this movement is to enlarge and perhaps clarify the range of possible responses to the question ‘Why hold a trial?’ Certainly it is the intention of Braithwaite and others that the seeming self-evidence of the need for the trial be challenged. Thus, the argument goes, we may be better able to riposte ‘Why hold a trial rather than pursue another determinate course of action, such as a restorative justice conference?’. On the view of the champions of restorative justice there are often excellent reasons not to hold a trial and to do something

* We would like to thank Richard Jones and our fellow participants in the Trial on Trial seminars for their insightful comments


else instead. Thus Braithwaite argues on the basis of his ‘restorative consequen-
tialism’ that conventional penal practices tend to produce humiliation,
alienation and defiance in the offender, and frustration and dissatisfaction in
the victim. In other words, it is argued, the trial may often prove useless, if not
indeed counter-productive, from the point of view of at least some of its pre-
tended benefits—especially those that relate to the emotional condition of the
participants—perhaps giving rise to the further suspicion that the real reasons
for its persistence lie quite elsewhere.

These are of course substantial claims, both in the thoroughgoing nature of
the critique that they intend and the scope of the alternative programme that
they prefer. In our view this argument tends to proceed via a sharp—perhaps
indeed sometimes overdrawn—series of contrasts. Trials are exclusionary;
restorative justice procedures reintegrative. Trials are stigmatising; restorative
justice confer special conferences conclude (ideally) in reconciliation. Trials are in the business
of placing blame on individuals, restorative justice recasts blame and responsi-
bility amongst communities. Trials, it is argued, play the pain game whilst
delegating the task of pain delivery itself to professionals. By contrast when
responsibility is conferred upon the restorative justice conference the delivery of
pain is de-centred. Trials reproduce ‘shame-rage spirals’; restorative justice
unravels them. It is not our aim in this paper to ‘debunk’ these claims, though it
should be noted that some writers have already questioned the sharpness of the
contrast both in normative and empirical terms. We do however want to pro-
pose some methodological principles, arising from related empirical work that
we have conducted, that may facilitate (dare we say mediate?) debate.

The issue on which we wish to focus is that of the uses of speech in the alter-
native settings of trials and restorative justice encounters. Below, we will outline
why we consider this to be a key issue for research, and to some extent still an
inadequately developed one. We will suggest that this up-close level of empiri-
cal engagement is helpful in teasing out what could be meant by the notion of
ritual in this discussion and what seems to be at stake in different accounts of
ritual. We then attempt to clarify what may be meant by certain privileged
terms, such as apology, and we introduce some brief examples from our previ-

3 See Braithwaite, n 1 above, 116.
4 See L Sherman, ‘Deterrence, Defiance and Irrelevance: a Theory of the Criminal Sanction’
5 See also Strang, n 1 above.
7 Ibid.
8 See A von Hirsch, Censure and Sanctions (Oxford, OUP, 1993); A von Hirsch and U Narayan,
‘Degradedness and Intrusiveness in ibid, 80; RA Duff, ‘Alternatives to Punishment—or Alternative
Punishments?’ in W Cragg (ed), Retributivism and its Critics (Stuttgart, Franz Steiner, 1992) 44 and
‘Penal Communications: Recent Work in the Philosophy of Punishment’ in M Toury (ed), Crime
9 See, eg, K Daly, ‘Revisiting the Relationship between Retributive and Restorative Justice’ in
H Strang and J Braithwaite (eds) Restorative Justice: From Philosophy to Practice (Aldershot,
ous empirical work to illuminate this. We will conclude by proposing that approaches to what passes between the actors in the court or conference room that focus on the question of *interaction ritual* and deploy conversation-analytic methods amongst others may enable clearer discussion of the similarities and differences between these settings and the conceptions of persons, social relations and conduct that are mobilised there.

We freely acknowledge at the outset that we do not at present have new empirical data from restorative justice (RJ) encounters with which to substantiate our suggestions. Our empirical examples are drawn instead from a study of 9-year old children conversing in more hypothetical ways about problems of justice and punishment. Without wishing to overstate the analogy between these and the scene of the RJ conference we see them as relevant in the following respects. First, some similar issues arise repeatedly—notably the question of what is involved in giving and accepting an apology. Secondly, we have gone to some pains to transcribe and analyse our data as conversations. In our view much social science research in various fields rests on producing or observing and recording conversational data, but less often follows through the methodological implications of having done so, or the potential analytic benefits of so doing. Yet in a field such as RJ, in which the dynamics of encounters are part-and-parcel of the practice itself and acknowledged as critical to its outcomes, developing this particular methodological sensibility further might prove particularly helpful. For example, we might emphasise the sense in which the effectiveness of the acts of apologising and accepting depend on shared understandings of the proprieties that govern these conversational sequences in everyday life. Similarly we might to some extent reconsider the evidently a state aroused *within* an individual and perhaps more as an intersubjective product of interaction, attended by a definite set of conventions and expectations as to the proper manner of its expression and performance. Indeed we see these perspectives as very much consistent with recent developments in RJ theory which understand RJ procedures as ‘communal processes’ and stigma and reintegration work as ‘communications’. Thirdly, Braithwaite and his co-workers have recently affirmed the significance of RJ as an ‘opportunity for deliberation’ in a context of

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13 See, eg, Ahmed et al, n 1 above, 52–4 and 78–93.


15 See Ahmed et al, n 1 above, 11.

16 Ibid, 42.

17 Ibid, 28.
‘communal moral education’. On this view ‘the deliberation educates the community as to why this particular kind of act should be shameful.’ One of the attractions of RJ practices in schools, they argue, lies in offering children a chance to listen to ‘the moral reasoning of young citizens as they discover for themselves the curriculum of crimes’. This view of the matter is close in spirit to the work that we have undertaken in convening conversations with children, and thus provides a further point of connection between these bodies of theory and research.

2. RITUAL, APOLOGY AND RESTORATIVE JUSTICE

Braithwaite has described the potency of what transpires in an RJ encounter as involving the use of ‘common sense rituals’. This is presumably meant by way of contrast with the (implicitly) arcane rituals of the trial scene. Whereas those are designed to mark persons involved in their authoritative, professional capacities (as judges and advocates possessed of special status and esoteric knowledge, for example), RJ practices entail rituals that emulate the dialogic character of everyday life—accessible, intelligible, candid. Conferences, according to Braithwaite, ‘ritualise ordinary-language oratories of love and hate’. These emotively potent common sense rituals are designed to bring about the ‘symbolic reparation’ at the heart of restorative justice. Shaming occurs ‘naturally’, according to Braithwaite, once the appropriate conditions have been created.

Apology is a key example of an everyday action that can and sometimes must assume a ritual form. Indeed we suggest that the apologies and acceptances that Braithwaite envisages as natural to humans, and which are so central to RJ practices, arise in and must be understood through an account of, the turn-taking rules of conversation and their binding effect on participants, especially where public formulae impose a certain obligation. There are two issues here that we would like to address in this paper. The first concerns the conceptualisation of apology as a ritual performance, and the second is ‘apology’ as a speech event, subject not only to ritual ‘rules’ but the rules and requirements of everyday conversation and interaction.

18 See Ahmed et al, n 1 above, 55.
19 Ibid, 25.
21 See Braithwaite, n 1 above, 118.
23 Braithwaite, n 1 above 120.
In important recent work Collins has restated the centrality of interaction ritual to social analysis generally. In his view a theory of interaction ritual will be 'above all a theory of situations', rather than of individuals simpliciter or of more abstractly known macroscopic structures. Collins argues that one of the most significant, albeit latterly somewhat neglected, legacies of the Durkheimian tradition in sociology and anthropology is (contrary to most commonplace readings) the micro-sociological understanding of the production solidarities and shared symbols through interaction in small groups. Collins thus construes Goffman as one of Durkheim’s most faithful, as well as most creative, successors. For Collins a key aspect of this inheritance is to focus on the ways in which we are compelled by ‘the demands of sociality in the here-and-now’. The situation, as he puts it, ‘has its requirements’. Amongst the generic features of ritual actions in Collins’s view are that they tend to feature situational co-presence, that they focus interaction, that they are entraining (they include pressures towards conformity and ‘thus show one is a member of society’); that they thereby ‘do honour to what is socially valued’, and that, when ritual proprieties are broken, people feel ‘moral uneasiness’. One of the key functions of apologies, on this interpretation, is the restoration of ‘ritual equilibrium’. For Collins, rituals are ‘the nodes of social structure’ in that ‘it is in rituals that a group creates its symbols’. 

So, in what sense is what goes on in RJ ritual? Restorative justice conferences have claimed inspiration from established sets of rituals of apology, shaming and re-integration, drawing support from examples of traditional practices from various parts of the world. Braithwaite, for example, contrasts the Maori way of shaming with the individuated Western sense of guilt. Similarly, reference is made to the ‘healing circles’ said to characterise indigenous North American conflict resolutions. Nevertheless, a basic premise of the RJ movement is that, given some degree of tailoring or customisation, such rituals can be successfully transplanted across different cultural and political contexts, and that these retain their power and relevance even in the seemingly less propitious ground of late-modern, western, urban settings.

Rituals are stylised events, repetitive and rule governed acts that almost always involve some use of symbolic words and actions. There is little doubt that conferences are stylised and generic performances. A successful conference should contain the following bundle of what Van Ness has described as equally important and necessary elements for a fully restorative response. There has to be a meeting of the parties and their supporters, there has to be communication between the parties (they have to listen and be listened to), there has to

25 N 10 above.
26 Ibid, ch 1.
27 Braithwaite, n 1 above 119.
be agreement by the parties (to participate, to abide by the rules of the meeting),
there has to be an apology by the offender, restitution to the victim, respect
shown to all the parties and inclusion of all parties. Mediators and conveners are
given detailed direction and advice about where participants sit and how to
enforce and ensure turn-taking, respect, and how to bring about (albeit not
coevicially) an apology. Both the actors present and the kinds of interaction are
therefore quite highly scripted. Yet it could be argued that this contrasts with
the claims of informality and spontaneity that restorative justice makes. The
restorative conference performance may allow participants to
ad lib,
but only
under careful guidance.

What kinds of ritual performances are RJ conferences, thus conceived? They
can be conceptualised as a very specific and indeed potent kind of ritual, namely
a rite of passage, a ritual that marks a person’s transition from one set of socially
identified circumstances to another. The passage in this case is from an excluded
deviant to a re-admitted member of the community. The anthropological liter-
ature on rites of passage identifies an intermediate, liminal stage, one in which
the person has already been stripped of his or her old status before he or she has
assumed his or her new one. It is for this reason that Braithwaite sets out his
well-known conditions for successful reintegration ceremonies—by express
contrast with Garfinkel’s seminal account of those at work in rituals or cere-
monies of degradation.29 Indeed Braithwaite and his co-workers have continued
to refine and revise their advice on the most appropriate ways of conducting RJ
conferences.30

For Turner the transformative nature of ritual rests precisely in the liminal
stage: ‘[r]itual transforms, and transformation occurs most radically in the rit-
ual pupation of liminal seclusion—at least in life-crisis rituals’.31 The liminal
stage is considered to be dangerous and polluting.32 It also renders individuals
and communities vulnerable to the elements and emotions which the ritual has
unleashed. In the case of restorative justice conferences a liminal moment may
occur at different points in the proceedings. The first is after those wronged
expose their hurt and allocate blame. At that stage those wronged shed their
everyday identity to adopt one of victimhood, whilst the offender sheds her
everyday identity to become the object of blame. Both parties are vulnerable at
that stage unless an adequate apology is offered. The second in-between stage is
the time after the apology and before its acceptance. The offender has now
accepted responsibility and blame and has acknowledged the irreparable dam-
age done by her actions. Unless the ‘victim’ accepts the apology—reintegration

29 J Braithwaite and S Mugford, ‘Conditions of Successful Reintegration Ceremonies’ (1994) 34
British J Criminology 139; H Garfinkel, ‘Conditions of Successful Degradation Ceremonies’ (1956)
61 Am J Sociology 420.
31 V Turner, On the Edge of the Bush: Anthropology as Experience (Tucson, Ariz, U Arizona
Press, 1985) 80.
will not be possible. If we envisage restorative justice conferences as rituals of constructive conflict then these key events are central to their success and also indicative of the risks which they pose. In these ceremonies or rituals shame must be acknowledged by apology and reciprocated by forgiveness.

The rule-governed nature of ritual has been seen as a way of managing risk—removing or indeed reducing risks in activities with uncertain and unpredictable outcomes. Yet rituals remain inherently risky enterprises. The implementation of the rules that govern the performance of ritual is subject to the vagaries of interpretation by the participating actors and by difficulties in the implementation of such rules. The re-enactment of ritual ‘contains its own performative hazard; it risks its effects’. In RJ rituals Braithwaite and Mugford identified 14 different conditions which would lead to reintegrative shaming. These ‘conditions’, which range from the encouragement of empathy and generosity, the redressing of power imbalances, to the uncoupling of the offence from the offender, present nearly insurmountable performative challenges. Their every re-enactment would necessitate, and indeed invites, practitioners and participants to engage in interpretation, innovation and improvisation. The ‘performative hazard’ of such rituals is therefore high. Yet how do we evaluate successful ritual performances? As a means to an end, rituals set themselves up to measures and degrees of success and failure. Their measures of success may not only be instrumental (i.e. that the offender stopped offending, that he or she made reparations or that he or she offered an apology), they may also be aesthetic, evocative or moral. These latter measures of success can be seen as part of what Retzinger and Scheff have called the ‘symbolic reparation’ work of such conferences. In our view these latter measures of success and failure of symbolic reparation are also in urgent need of empirical research and methodological innovation. For this reason, a key methodological strategy for apprehending the work of the ceremonial, and for contrasting what goes on at the trial and in the conference, is via the differing kinds of talk that take place in each.

3. APPROACHING JUSTICE PROCEDURES THROUGH TALK

Trials are special occasions in many ways, even if those that take place in the lower courts of most western criminal justice systems often have a routinised

36 See Strathern, n 34 above, 292–3.
37 N 29 above.
38 Howe, n 35 above.
39 Ibid, 97.
40 N 22 above.
and jaded quality. Occasions that are constituted as special often are so in and through the distinctive kinds of speech that take place there. The rules that produce speech at a trial—who can say what, when, how and with what effects—have long been an object of fascination to conversation analysts and other students of interaction. These observers have treated the courtroom as an especially intriguing place in which to catch the rule-governed character of all conversation, by looking at a place where the rules are explicit and more obviously prescriptive. As Conley and O’Barr\(^4\) indicate, there is a rich tradition of socio-linguistic analysis that begins from the premise that studying the organisation of conversation is revealing of basic aspects of social organisation. Those who take this view engage in what Hymes\(^4\) has called ‘the ethnography of speaking’, defined as the systematic study of the ‘situations and uses, patterns and functions of speaking as a social activity’. When we apply this sensibility to legal arenas we begin to investigate what Conley and O’Barr\(^4\) term ‘the linguistic enactment of law’s power’.

It could be argued that this tradition of enquiry has been less fully integrated with the general development of socio-legal studies and criminology than might have been hoped, since the primary interests of its practitioners really lay with the speech rather than with the personal and social predicaments of the trial. Nevertheless there is a body of work that can in principle inform our understanding of the sorts of discourse positions that are mobilised in the process of prosecution and trial. The benefit of such work is that it draws the gaze of sociological observation downwards to the ethno-linguistic level of engagement, and thus fixes attention on what it might be to stand accused, to allocate or displace blame, to impose sanctions and so on, and on how each of these transactions is produced \(in\;situ\).\(^4\) It can thus be argued that approaching punishment dilemmas through talk helps to open the general concerns of the sociology of punishment with the distribution and transmission of penal ‘sensibilities’ to nuanced, empirical study. We may thus be able to record and analyse how ways of distancing (blaming, condemning, isolating) and of affiliating (naming, facing, identifying, reconciling) are marked in and effected through discourse. Through the closer study of talk in diverse settings we may be able to explore how stances towards punishment, apology or reconciliation are produced, and hence what the speakers can imagine as appropriate to do to or with a misbehaving other.

\(^4\) N 12 above, 10.
\(^4\) N 12 above.
The special and constrained circumstances of the trial expressly delimit what kinds of speech are permitted and constrain and direct its production. What happens when we decide not to hold a trial in the classic sense but to attempt some other kind of justice procedure, such as a restorative justice conference? Some current work on these increasingly prevalent processes has begun to explore their modes of operation—the eliciting of emotional display, the ritual demonstration of remorse and regret—in interesting ways. We propose that it is timely to consider these encounters too more expressly as speech situations. Indeed, given the weight that RJ proponents attach to the dimensions of ‘ritual’ and ‘ceremonial’, and the centrality of the distinction between the reintegrative ceremonials of RJ versus the degrading or alienating potentiality attributed to the courtroom scene, the discussion seems to demand this level of analysis. How do these rituals actually work? What are the components of a ceremony? What counts as a satisfactory outcome?

For example, one charge that RJ exponents identify as a severe shortcoming of traditional trials is the irrelevance there of forgiveness (as providing resolution of the trouble for victim and offender) and the displacement of any attempt at apology from the ordinary setting of everyday exchange that the victim and offender inhabit to the formal institution of the court. A wise judge may take account of expressions of remorse, and may on occasion be influenced by the magnanimity of a victim. But these seem secondary and discretionary matters. For its champions a distinctive feature of RJ, and one of its advantages over the trial, centres on its ability to elicit a situated shame in the offender and to call forth a heartfelt apology that induces a sea-change in both offender and victim and enables forgiveness and reconciliation.

This is a form of dramatic social action constituted and progressed through words: it is quintessentially a speech event. It has long been established that language is moulded to the context of interaction and achieves much of its meaningfulness from that context, which it also crucially shapes and creates. In the courtroom, where much socio-linguistic work has taken place, the language used—who speaks, in what sequence of turns, for how long, and who terminates a certain strip of interaction—is heavily shaped by the setting and its purposes. Indeed these distinctive linguistic features are part and parcel of the way in which we recognise a court as distinct from any other kind of occasion. In the RJ encounter, speech is equally important, but in different ways. There much is held to ride on the production of certain appropriate utterances and on the sincerity or authenticity with which they are said. But how is this accomplished? Let us consider this further with special reference to the act of apologising.

4. SAYING SORRY (AND MEANING IT) . . .

Although acknowledged as pivotal in the RJ literature the moment of apology seems to us still relatively under-analysed there. In the remainder of this paper
we will seek to consider more closely what it means to ‘say sorry’ or to be ashamed, and by extension what these may involve in the context of an RJ conference. At present this seems to us to be the ‘black box’ of the conference session. Outcomes are described in terms of misty-eyed handshakes and gruff back-slappings, respectable success rates are claimed, and impressive quantitative research is under way to evaluate these at an empirical level. Affirmations about how the conference works are anchored in cultural arguments, but the precise ‘how’ still seems somewhat shrouded in mystique.

We have, as we have acknowledged, as yet no new data from RJ conferences with which to illuminate the conversational dynamics which, we are arguing, are so important in enriching future analysis. We can however introduce some insights from an earlier empirical study that we conducted with groups of 9-year olds in three English schools. We take these to be relevant because they provide examples of the methodological principles that we advocate, and because in places they address the question of apology explicitly. We have argued elsewhere that, despite an incipient ‘cultural turn’ in the sociology of punishment, largely stimulated by Garland’s account of penal ‘sensibilities’, surprisingly little examination exists at any level of empirical detail of how penal questions actually figure in the everyday consciousness or conversations of people in the ordinary settings of their lives. We sought to refresh discussion of contemporary penal culture by exploring it from the perspective of conversation. The conversations in question here were ones that we conducted with children, but they could also be of many other kinds.

By considering the children’s conversations about punishment dilemmas we wanted to refocus on the problems of cultural reproduction and circulation—the transmission, assimilation (and often subversion) of cultural categories by young people in the course of their induction into a certain world of values and value-conflicts. There is a sense in which this is a casual process, a *bricolage*—snippets are picked up here and there from television, stories, newspapers, school, adult talk and, very occasionally in our sample, personal experience of the criminal justice system. But there are also overt pedagogic activities stemming from governmental interests in moral education.

Instead of interviewing children singly or conducting a survey we chose to initiate conversations with them in groups. In so doing we sought to generate data that were conceptually richer, more open and more expansive than those with which the sociology of punishment often deals. We have thereby also tried to address many of the issues of power (directiveness, appropriacy, intimidation, silencing and so on) that arise in adult–child interactions. Instead of limiting our engagement with the children to question-and-answer couplets we used various

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46 See, eg, Smith et al, n 11 above.
imaginative scenarios to facilitate conversation and debate amongst the children. Although instigated and to some degree guided by us, each such conversation is a distinct discursive event, and we are able to use linguistically sensitive techniques to track the thematic development and group dynamics involved (including, therefore, the reflexive awareness of our own role and contributions). Whilst this is not the place for a full discussion of our method, it is an important aspect of our approach that it foregrounds both the speech-situation that we have created and the analytic work involved in reporting what went on. We do not presuppose, for example, that we have somehow tapped the essential inner world of each child; neither can we claim to have produced definitive interpretations of their talk. The relationship between meaning, context, production and interpretation is fluid and ultimately unfinished. Our engagement with our recorded conversations, initially as participants and subsequently as transcribers and repeated listeners, gives us a particular sense of the meanings and significances generated. We hope we have presented these in an accountable and plausible way, but we are aware both of the limitations of the reported transcript alone and that a listener-in of our conversations could potentially have brought away their own further sets of significances and meanings. However, what we have garnered is a particular set of discourse dynamics, engaged by the spur of deliberating on the dilemmas and intractabilities of troublesome people and situations and the uses of sanctions and penalties. In investigating children’s talk about justice and punishment we are pursuing one way—although only one amongst numerous ways—of making the position of punishment in contemporary culture researchable. The way we have chosen involves bringing the sociology of punishment more seriously into contact with the ‘ethnography of speaking’.48

A further reason why it is interesting to turn to children at this point is that ‘saying you’re sorry’ is so much a part of growing up. Apologising seems somehow part and parcel of the condition of childhood, perhaps because it is being actively learnt. There would seem to be some sense in which we encourage children to see apologising as a morally basic action. Indeed, it can be difficult to make a direct apology as an adult without feeling ‘childlike’. An understanding here of children’s appreciations of what apologising is might provide some sort of underpinning for a full-scale analysis (not yet undertaken) of the discourse dynamics of the conferencing process. What is saying sorry, and how and why might it ‘work’?

There are many issues around ‘saying sorry’ that arise in the children’s conversations. For example, one group of four girls suggests removing disruptive children from shared activities and making them sit in a ‘naughty persons’ corner’. Then, according to one girl, they would ‘see why they’ve had to come out and then tell them and if it’s a good enough answer’ they can be released. A second girl adds: ‘[b]ut they have to say sorry to the person, whatever they did

48 Hymes, n 12 above; A Duranti, Linguistic Anthropology (Cambridge, Cambridge UP, 1997).
to them’. What the girls describe is a process of separation of the offender, an account of what they’ve done, the receipt of a satisfactory response, an apology and subsequent reintegration—all handled by those involved in the incident. This is deeply resonant with the symbolic efficacy of the apology in RJ. It might also be seen as a cultural fragment that suggests that, at least at this point in their sentimental education, the children are more in tune with Braithwaite’s view of Maori shaming procedures than with the dominant ‘Western sense of guilt’.49

‘Saying sorry’ has several communicative and moral functions.50 It defines the predicament of the listener as one of violation, of harm done. By apologising the speaker takes responsibility for the damage done to the other. The speaker may also thereby have to acknowledge the impossibility of merely undoing any harm already done to the one they have wronged. The apology acknowledges ‘an act that cannot be undone, but that cannot go unnoticed’.51 This, it is argued, creates a ‘moral asymmetry’ between the one who apologise and the recipient which is at the heart of the speech act of apology.52 Thus Tavuchis proposes that ‘we are faced . . . with an apparently enigmatic situation in which the offender asks forgiveness as the necessary and symbolic corrective for a harmful action on the flimsiest of grounds: a speech act that is predicated on the impossibility of restitution’.53 Saying ‘sorry’ in an apology is a ritualistic language token that is intended simultaneously to indicate an acknowledgement of harm done and a concomitant emotional orientation of regret and/or shame.

Apologising thus looks like a very hazardous and highly morally charged action. Proper apologies leave us very vulnerable. In acknowledging the moral asymmetry between ourselves and those we have offended (ie the impossibility of restitution) we sacrifice our right to self-justification, defence or excuse without any guarantee of forgiveness. Aaron Lazare54 asserts that: ‘[w]hat makes an apology work is the exchange of shame and power between the offender and the offended.’

One way of construing this dynamic between shame and power is to consider it in terms of the concept of face. Goffman55 defines face as ‘the positive social value a person effectively claims for himself. . . . Face is an image of self delineated in terms of approved social attributes.’ Saying sorry involves a loss of face, because it is an acknowledgement that our social image of approved attributes is, and is seen to be, to this extent untenable. This is a highly emotional issue. As

40 Braithwaite, n 1 above, 119.
42 Ibid, 13.
44 Tavuchis n 50 above, 34.
Goffman says,56 ‘a person tends to experience an immediate emotional response to the face which a contact with others allows him; he cathects his face: his “feelings” become attached to it.’

This creates an ambivalent emotional instability centred on the loss of face. The loss comes at a time when face is embattled, and possibly already somewhat eroded, by the circumstances, behaviours, speeches of others. The apology is a speech act that requires the self-infliction of further damage: the undermining of one’s own social image and the relinquishment of power. This damage should then be ‘healed’, or face reinstated, by the response of the forgiving victim: the power lies with him or her. This is a dangerous transaction if it is to work without anger, resentment, or simply superficial formality. When we are ashamed we are conscious of a loss, or sacrifice, of face. To say sorry under these conditions is to submit our damaged face to the hands of the recipient of our apology. We cede power to him or her—the power to accept our apology or not and thus to help us to regain face or not. We may be helped here, however, by the ordinary dynamics of conversation in which the most ‘natural’, and indeed more or less obligatory, response to an apology (its adjacent ‘pair’) is an acceptance, however graceful or otherwise.

The successful negotiation of these intricacies is further hedged around by the expectations aroused by the context in which the apology takes place. What exactly one says will be understood in terms of these expectations. Drew and Heritage57 refer to two types of expectation: (1) those established by previous turns of talk, either intended or unintended by the speaker; and (2) those that arise from ‘the more general context of the interaction, the social identities of the participants, and the assumptions about the scope of conduct that conventionally attach to such events . . .’.58

‘Kate’ in the following example (like all the other speakers in the following discussion she is 9 years old) is describing the *sequelae* of a telling-off:

They get a—they get—they get angry lots of times with their mum and dad but they only do things like pull faces behind their back, but after that they say they’re sorry and they know—that they’ve done wrong, and their parents still love them but they never do anything bad (like? that?).

This is a familiar course of events, starting with humiliation and resentment at the ‘telling-off’, and followed by the private salvaging of face, the acknowledging of wrongdoing and apology, and resumption of normal relationships. The delicate dangers of the transaction are indicated by the unseen pulling of faces, but here it is within the comparatively safe context of a parent–child relationship. Arguably other apologies, those outside the familial setting, cannot have the same certainty about expectations arising from the context and the identities involved. This risk presumably has much to do with Braithwaite’s

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56 Ibid.
57 Drew and Heritage, n 44 above, 12.
emphasis on support for the parties to the RJ conference by ‘communities of care’.

Johnstone⁵⁹ writes of the dependence of the repair of the social bond on ‘shame dynamics’ and the evocation of the right emotions. There may indeed be expectations about inner states that are far more ambiguous than those between parents and children, but what both participants and observers witness in a successful RJ procedure is the inducement and enactment of a particular social relationship.

This social relationship is subtly generated thorough the amassing of appropriate linguistic (and non-linguistic) communications. Children are well aware of the ability to say sorry but not mean it, and also of the extra aggravation caused by a face-saving offender who says sorry in an intentionally offensive way.

Sarah has described an incident in which she complained to the teacher about the behaviour of Ben, and Ben’s response to a reprimand has been to say ‘Soorry’ with a high falling pitch and extended vowels.

Adult: Do you think he means it when he says sorry?
Sarah: No.
Others: No.
Jane: Some boys don’t mean it until you hurt them inside.

The trick is to achieve the ‘hurt inside’ (the genesis of feeling) in a socially productive way—in Braithwaite’s terms, to shame without stigma. Shame, on this view, is something one comes to feel for oneself, whereas humiliation is a feeling that is inflicted on you by others. In terms of face, it is the realisation that one has damaged one’s own face, as opposed to damage inflicted on one’s face by a hostile other. But arriving at this point seems to be a fragile and readily derailed process. It suggests the requirement of shared cultural underpinning of what the situation demands, as well as a certain level of conversational adroitness and skill in going through the right sequences of turns, in the right manner.

Comments by the children suggest a subtle appreciation of shame dynamics. Their concept of shame also comprises a relational component. In the following two examples, the children have been asked to imagine how they would feel if they were parents and their children were troublemakers: (the naughty children are envisaged in a remand home or boarding school):

Sally: If it was my children and they did that I wouldn’t come and visit them.
Mary: I’d be ashamed of them.
Sally: Yes.
Meg: I would. I’d put them up for adoption.
Joan: I wouldn’t blame you.
Adult: When you’re grown up how would you feel if your children are in trouble with the police?

Keith: Kill ’em.
Tim: Ashamed.
Sue: Mad.
Rose: I’d feel ashamed.
Adult: Rose and Tim say ashamed.
Sue: Angry, mad.
Adult: Sue says mad.
Tim: Ashamed and angry.
Adult: What did you say Keith?
Keith: I don’t know, probably furious.
Adult: What would you try and do about it?
Keith: Tell the police I was sorry or something.

In this third example, Ellie is comparing adult and child wrongdoers. Part of the understanding of shame mobilised here seems to include an appreciation of the different positions and commitments of adults and children. Shame seems to be implicated in the growth of understanding, in the enmeshing of social integration and the assumption of its concomitant obligations:

I think the adults would feel a bit more ashamed than, than younger people coz they’ve got more responsibilities and they’d feel ashamed coz they’ve let the children down or wife or husband or any relation, really, but I think that the children would just think it, it was a bad thing coz their parents and their relations wouldn’t approve of it.

In this final example, we join four girls part way through an extended discussion of how children might feel ‘dead stupid and bad’ or ‘ashamed’ after breaking some windows:

Jade: When they’re doing it erm they think it’s fun when they’ve done it and the parents have told them not to then they feel ashamed of themselves.
Adult: Yeah, I think Ellie thought they’d feel ashamed of themselves almost straight away is that right, when they see what they’ve done?
Ellie: When they think, think back, like before they tell their parents erm they feel ashamed and then coz they feel ashamed they might just own up and tell their parents.

Later in the discussion Nell had a suggestion about how adults can cope with children who are repeatedly naughty:

You could just tell them what they’ve done wrong and they like be ashamed of themselves.

And the girls return to this point further on again:

Jade: When you’re older you have to learn erm more if you like done something wrong and you feel really ashamed I suppose.
Nell: I think when you’re older you know more of what you’ve done, and then you try not to get anyone else involved and then you probably run off.
Lois: When you’re in school like, when the teachers talk about it, erm then they realise what they’ve done.
This process of learning, understanding or realising what you’ve done is not always connected explicitly to shame, but is often referred to as a crucial step in the process of learning to do better, or, as the children style it, ‘learning a lesson’.\(^6\) If these communications go awry, however—by virtue of a lack of understanding or receptivity on the part of one or more of the actors—then it is quite possible to fail to learn one lesson or to learn a different lesson entirely.

This, we believe, is the quandary broached by many groups of children when they discuss the possibility of punishment creating anger or resentment and hardening the offender’s anti-social proclivities.\(^6\)

5. CONCLUSIONS

We have been selective in our reference to data from our study here. Elsewhere we have discussed other strips from our material in which children say quite other things.\(^6\) We are very far from suggesting that this focus on apologies and shame dynamics is the singular thrust of the children’s discourse. But there is some support here for at least some of the contentions of the RJ literature. Apologies really are important to these speakers. Shame is a really powerful, and double-edged, presence in their lives.

But this is not just a simple endorsement of a stated position. Our principal point has been a methodological one. What produces the outcome is a conversational dynamic and needs to be studied and appreciated as such. Apology is produced by rules of politeness in turn-taking; that is its genesis. Hence it can and must assume ritual form. But the process of apologising places us in a delicate danger. To return to Goffman, it is almost always a condition of interaction that we look after one another’s face. To the extent that the RJ conference successfully calls upon our embedded social competence, and replicates the conditions of ordinary conversation, it does so by relying on the dynamics of turn-taking and the premises of appropriacy that operate there. In one sense this makes apologising a possible, even an expected, move, and hence likely to succeed to some extent. The RJ conference thus relies for its success on the more or less conscious design of a special form of conversation. First, by bringing about a dialogue between two face-to-face parties we subject them to the rules of turn-taking and face-maintenance, and these are deeply engrained social practices. Secondly, saying sorry is a way of retrieving face from the hurt other and thus presents itself as a feasible route through and out of an impasse.

Interaction rituals serve to attune their participants and focus their attention. They provide for the intensification and circulation of emotions. They are,

\(^6\) Smith et al, n 11 above.
\(^6\) Sherman, n 4 above.
Collins argues, following Durkheim, the site of production of intersubjectivity and the generation of emblems of membership and exclusion. We suggest that conversation-analytic methods foreground for discussion some of the basic premises on which situated interactions depend, such as the moral centrality of the act of apologising. We argue that this approach sharpens discussion of the relationship between punishment and its alternatives as aspects of the social imaginary.

The trial has its own highly specific rules and dynamics. The RJ conference, by contrast, has a bundle of the kind of properties that the children in our study also nominate as important. What’s going on in a conference works, if at all, because it is more like a conversation, albeit of a special kind. It follows, however, that many of the features that Braithwaite asserts as natural are actually produced in intelligible ways in situ.

Thus, the different dynamics and outcomes of the trial and its alternatives (insofar as they are indeed different) are much to do with their difference as situations for the enactment of ritual performances and the production of speech. Herein lie some aspects of great potential significance about the production of different possible subjectivities, or discourse positions. It is no less ‘natural’ to the children in our study to imagine themselves in the position of the stern meter-out of severe punishments, for example, as we have also shown elsewhere. What seems to matter is the establishment of certain rules and conditions for the ritual production of discourse which situate us variably in distinct relations of sympathy or estrangement between the one who offends and the one who punishes or who remits punishment.

Apology here is a key term, but also a complex one. We might—speculatively—argue that what goes on in RJ is somewhere between the original Greek sense of the term apology (apologia) and its more currently dominant usage. In the original Greek sense of the term, apologia means to give account, a formal defence or justification of one’s position or action. In an apologia, even though the apparent wrongness of the position may be vindicated, the person who offers an apology admits to have ‘apparently’ been in the wrong but also presents some ameliorating circumstance which explains why she was in the wrong. Both senses of apologia/apology seem really important to humans. Part of the process of evaluation of the trial and its alternatives has to do with which of them are possible in each setting.

63 N 10 above.
Who Do You Think You Are?: The Criminal Trial and Community Character

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THIS ESSAY ARGUES that the criminal trial may play a role in the construction and expression of community identity and character. I do not merely mean that a trial may provide an opportunity for the articulation of substantive values related to the crime being prosecuted on a given occasion. In fact, it is not at all clear that the trial is structured in ways conducive to the thoughtful elaboration of substantive norms. My claim here is different, and focuses on the fact of the trial, and on some of its particularly salient procedural elements. I suggest that the way in which members of a community go about the crucial and inherently troubling project of sitting in judgment on fellow citizens may say a great deal about who they are—and who they want to be—as a community. The phrase ‘Who do you think you are?’ is a familiar, instinctive, and in my view illuminating response to presumption—and to those in particular who would presume to judge others. Who do we think we are, indeed? To judge and to punish, is to say as much about one’s self as about those over whom one would sit in judgment. The trial, on this view, is a sort of periodic public crucible in which a community faces the difficult, troubling, and thus self-defining task of judgment.

If so, the study of the trial calls for a form of analysis so far neglected. In broad outline, students of the trial, and of the criminal justice system generally, tend to focus on two sorts of questions. First, from various utilitarian perspectives, we quite sensibly ask what the trial can and should accomplish in terms of efficiency, deterrence and such. Secondly, from various normative perspectives, we ask—as do many of the participants in this project—what is required of the trial in terms of fairness, justice, rights or other first principles variously articulated. I suggest a third way. In addition to asking what the trial can accomplish, and in addition to asking what makes a trial right or wrong, we should ask what

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it says about us. If a label for this approach is required, perhaps ‘communitarian virtue ethics’ might be as good as any. As virtue ethics in moral theory has attempted to identify, or perhaps recapture, an Aristotelian, character-focused supplement to regnant utilitarian or deontological frameworks, I suggest the addition to legal theory of a character-focused approach to high profile legal institutions in general, and to the criminal trial in particular.

1. THE CRIMINAL TRIAL

This essay focuses primarily on two aspects of the criminal trial and/or criminal procedure: the so-called Miranda warnings required to be given to criminal defendants by police in the United States; and the right of criminal defendants to ‘be confronted’ with state witnesses. On my view, neither of these practices is fully explicable by reference to either the consequentialist or the strictly normative frameworks in which these matters are generally discussed. Rather, each also serves or is capable of serving to say something potentially significant about character of the community making use of that process. I hope to suggest as well that many aspects of the criminal trial might fruitfully be viewed in this way (as vehicles for not just the articulation but as well the construction of public character.

My starting point here—my operating assumption, about which I will have more to say—is that character matters. People do and should care about whether they are or can see themselves as brave, just, temperate, egalitarian, and the like. One reason character matters—though hardly the only reason—is that it is not exogenous to behaviour. Conduct, on this view, is not merely revelatory of character but as well constitutive—meaning simply that what one does is not just a consequence but also a cause of what sort of person one is or hopes to become. Character, understood in this way, is not merely a description of behaviour, even habitual behaviour, but an essential central pivot in a cycle of conduct, community, and self-conception.

From this perspective, I argue that a narrow focus on the conduct of the criminal trial, without an awareness of the sort of public character revealed and constructed by that institution, will never allow for a satisfying or complete explication of this important aspect of public life. When we ask how we should deal with criminal defendants—what to say to or do with them on arrest; what sort of testimony to use against them; and how ultimately to adjudicate their guilt or innocence—we should think not only about protecting and recognising their rights, and not only about deciding the case correctly, but also about what we are saying about, and constructing within, ourselves, through the ways in which we pursue these vital ends.

Why should the trial serve this end? Given the multiplicity of roles that have been or might be attributed to the trial, is it sensible to look to this institution as well for the articulation and construction of public identity? It is, and for at least
two sorts of reasons. First, the trial is one of the few things a political community does as a community. If character is indeed constructed largely through conduct—virtue built by the doing of virtuous acts—an individual who wants to be or become brave or kind must begin by behaving courageously or with kindness. So, too, with a community. A people that wants to understand itself as just or egalitarian or merciful needs to find occasions on which to act in those ways. There are, however, relatively few things a people does explicitly on behalf of or in the name of the relevant political community as a whole. Or, rather, there are relatively few such things that appear to offer the flexibility, saliency and richness of context necessary to aid in the articulation of subtle aspects of self-conception. There is foreign policy, including war; there is politics, including elections; and there is law, including the trial. It seems to me that each of these represents an important opportunity for people not just to do what they think is right or useful, but as well to say something about who they think they are.

It might be objected that in the case of the trial there is too much at stake—that too many ‘real’ considerations and consequences hinge on the conduct of the trial to allow for the luxury of worrying about symbolic or expressive concerns of this sort. Of course, the same could be said with equal force regarding foreign policy or domestic politics. Things done in the name of a political community are generally things that matter. The more important point, however, is that the high stakes involved in a criminal trial provide an important reason why this is just the right sort of institution to look to for the articulation of public identity. If one wants to be or become brave, one needs to face real danger. If one wants to enact and thus construct generosity, it will not do to give only of one’s unnecessary surplus. It is how a community behaves in the face of real and serious consequences that will serve to define its character.

The criminal trial is a particularly salient institution in this regard because it is the vehicle through which we sit in judgment, and through which we therefore make a strong, if implicit, claim of worthiness and entitlement. We have before us a man. We know that perhaps but for the grace of God there go we. And yet we presume to take him from his home, bring him before us, judge him, punish him. We may take from him his liberty, his standing as a member of our community. Grant that this is right and necessary—that a society must devise means of judgment, and must be willing to protect itself from crime. It is still a terrible thing, and one which inevitably embodies an enormous claim of authority and entitlement. When we sit in judgment we are holding ourselves out as people—as the kind of a community—that are worthy of this task. It is the seriousness, the gravity, of the act of judgment which gives rise to our legitimate and laudable emphasis on procedural fairness and substantive accuracy in criminal procedure. But these things focus on the defendant—the one judged. I am concerned about us who would presume to sit in judgment. Who are we that we should do this? Whether we intend to do so or not, we answer this question in part through the way we conduct our trials.
Now, it will not do to merely say that a community might want to understand itself as ‘just’ or ‘fair’, and then to ask what the conduct of the trial reveals along those lines. Such an inquiry, with the relevant meaning framed at such a high level of generality, would immediately collapse into an examination, albeit at one remove, of the substantive value. At some level every community presumably wants to see itself as fair and just; and, if so, little insight is to be gained by asking what those broadly stated values say about a given community. Instead, the interesting questions focus on what a given tradition or rule or practice might be understood to say about how a particular community sees itself—about how its particular socially and historically and culturally situated conceptions of justice or fairness or the like, as reflected in the trial or other salient institutions—might show that particular community’s character or aspirations.

I will, therefore, by way of illustration if not by necessity, suggest one of the things I think the practices I focus on here might be understood to say about a community. In particular, I will focus on what I see as one thread of the American character or self-conception. If it is helpful to think of it this way, I want to define or identify a ‘virtue’ or trait of character I see playing a significant role in the American identity. I suggest that the two facets of criminal procedure I examine here—as well as several other aspects of the trial itself—reveal and aspire to a certain form of courage and directness. If a label is helpful, this might be described as the virtue of ‘egalitarian forthrightness’. It is a Gary Cooper, John Wayne, ‘look them in the eye’ ethic. It is an ethic that sees it as ignoble and cowardly to shoot a man in the back, even if you are convinced that he truly needs and deserves to be shot. Through the examples offered below, I hope to flesh out this virtue, which, I suggest, is a significant aspect of American community identity; and one both manifested and constituted by the way in which criminal trials are conducted in the United States.

Now, I am not lobbying to have egalitarian forthrightness enshrined as a fifth cardinal virtue, as if it were a trait to which every community ought to aspire. Nor, however, do I see it as merely a personality trait or local characteristic—akin to styles of dress or habits of diet—which might be considered merely a matter of taste. No. Egalitarian forthrightness, as I present it, has normative content. It is defensibly a good way to be—a subset, perhaps, of courage—or situated at the intersection of courage, understood as the willingness to confront danger, justice, understood as fairness, and temperance, understood as self-command. And it is a virtue arguably implicated in particular by the act of judgment.

But I make no claim to expertise, let alone any universality, on this particular score; and I would be happy, even eager, to be met with either of two related objections. First, it may be objected that the particular practices I highlight do not mean what I suggest they mean. Secondly, it may be argued that even if these traits are revealed and constructed in something like the way I suggest, they are not to be admired. Amen on both counts. It is quite possible, for example, that what I see as displaying an admirable courage others may interpret as evincing
a dangerous hubris, or that what I see as cultivating an honourable forthright-
ness others may view as a manifestation of an outmoded honour-based ethos.
My aim here is to engender a discussion and encourage a certain way of
thinking—one which would place character alongside efficiency and fairness as
legitimate ways of talking about function and consequences of the criminal trial.
My hope is that thoughtful commentators familiar with specific communities
will be encouraged to take up the question—to take seriously the role poten-
tially played by legal institutions as manifestations and building blocks of
public character.

2. THE MEANING OF MIRANDA

An issue of particular and unique significance to American law involves not so
much trial procedure, per se, as police procedure—although it certainly has an
impact on the conduct of criminal trials. Under *Miranda v Arizona*, police are
required to provide potential criminal defendants with certain specific informa-
tion regarding their constitutional rights. This requirement has given rise to the
famous ‘*Miranda* warnings’, familiar to many Americans as much from
television and movies as from the reading of Supreme Court cases or from any
personal exposure to the criminal justice system: ‘You have the right to remain
silent; anything you say can and will be used against you . . .’. The *Miranda*
warnings provide a good starting point because their symbolic role is so obvi-
ous, if never fully appreciated. As the United States Supreme Court observed
when it reaffirmed *Miranda* in *Dickerson v United States*, the warnings have
‘become embedded in routine police practice to the point where the warnings
have become part of our national culture’. The question, however, is what
they symbolise. What role do they play in the ‘national culture’? What might it be
understood to say about a community to require this sort of recitation to would-
be criminal defendants?

My focus here is not on the details of the *Miranda* rule, the analysis of which
has produced and continues to produce reams of case law and scholarly com-
mentary; but let me frame the debate at least enough to situate my own sugges-
tion. The ongoing judicial and scholarly discussion of *Miranda* is framed in
terms of a predictable, albeit eminently sensible, series of questions, geared to
figuring out just what sort of warnings, under what circumstances, are or ought
to be required. Given that, as interpreted by the United States Supreme Court in
*Dickerson*, the *Miranda* rule is of Constitutional, rather than merely prophyl-
lactic, status, what exactly does it demand? This inquiry is often connected to a
historical/policy debate over the intent or purposes of the doctrine. Was it—is it—primarily aimed at protecting the rights of particular defendants? Or is a

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primary aim the regulation and central of police behaviour? If, as is almost cer-
tainly the case, both ends were and are at work, what does this tell us about the
particular content of the rule—or of the warnings mandated by the rule? This
debate is accompanied and informed by a line of empirical work on the actual
consequences of *Miranda*. How and when are the warnings in fact used by
police? Does the rule in fact protect defendants in a meaningful way?

Without discounting in any way the significance of these ongoing debates
over the legal/normative and/or empirical/consequentialist status of *Miranda*,
the most important function currently performed by the recitation of the man-
dated warnings in the United States may be something else entirely. I suggest
that the *Miranda* warnings may play a role much like that played by the grace
said by a Catholic family before meals. Presumably, the members of the family
do not believe that the food will spoil if they forego the ritual; and they may or
may not have given much thought to the precise content of the prayer. What
they are doing, however, whether they think of it this way or not, is pausing at
a central and symbolically important moment in the life of the family—the
evening meal—to remind themselves of what kind of family they are or want to
be. In the life of a state, one particularly freighted and pregnant moment is that
of an arrest, when the force of the state intervenes to deprive a citizen of his or
her liberty, when it formally holds itself out as empowered and prepared to sit
in judgment. On those occasions, *Miranda* requires that there be a pause, a
recitation, an invocation, of some of what that state claims to stand for—of
what kind of community it wants understand itself to be.

There are at least two ways in which the *Miranda* warnings, thus understood,
might be expressive and constitutive of public character. Begin with the content
of the warnings. Police are required, prior to conducting a custodial interro-
gation, to inform defendants of several substantive rights—including the right
against self-incrimination and the right to counsel. Thus in this critical inter-
action between state and citizen, the agent of the state is required to pause and
recite two central principles thought to govern this interaction. And those prin-
ciples both relate to the giving of voice to the defendant—to enabling the
defendant to speak, or not, as articulately as he is able in his own defence. This
is an articulation of a particular conception of the relationship between the cit-
izen and state, in which the citizen, even at the moment when he has run afoul
of state power, and has lost his or her liberty, retains his or her voice. Even as he
or she is forced to surrender himself or herself to the external, physical control
of the state, he or she remains in control of what he or she will be required or
enabled to bring forth from within. The *Miranda* warnings can thus be seen as
a ritual invocation of the value placed by the community on a particular vision
of autonomy—an invocation arguably as important for those representing the
state as for those being arrested.3

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3 As one commentator observed, ‘[t]he reading of rights affects the questioner, even if it glances
off the suspect’ DA Dripps, ‘Beyond the Warren Court and its Conservative Critics: Toward a
Again, I am quite open to the possibility that *Miranda* may mean different things to different people. Scott Turow, for example, argued several years ago that *Miranda* symbolises both equality, in that everyone is made equally knowledgeable about his or her rights, and civilian control, in that he knows it need not just be him versus the police in the interrogation room.\footnote{S Turow, ‘Miranda’s Value in the Trenches’, *NY Times*, 28 June, 2000, at A1.} In the view of another commentator, ‘*Miranda* serves the symbolic function of communicating that there are moral and constitutional limits on the methods we will permit police to engage in during official questioning’.\footnote{RA Leo, ‘The Impact of Miranda Revisited’ (1996) 86 *J Crim L & Criminology* 621, at 678.} And yet another commentator put it this way: ‘[f]or those concerned only with the “bottom line” *Miranda* may seem a mere symbol. But the symbolic effects of criminal procedure guarantees are important; they underscore our societal commitment to restraint in an area in which emotions easily run uncontrolled.’\footnote{SJ Schulhofer, ‘Reconsidering Miranda’ (1987) 154 *U Chi L Rev* 435 at 460.} The key point is that we have no warrant for appending the ubiquitous epithet ‘merely’ to discussions of the symbolic or expressive roll played by the *Miranda* warnings.

To that let me add a modest observation I have not seen made elsewhere. In my view, the most important symbolic function played by *Miranda* warnings comes not primarily from their content, but from the very fact that the warnings are given. There is a sense in which warning someone at the time of arrest—reminding them of their rights, whatever those precise rights may be—is a form of arming that person for the confrontation about to ensue. It is arguably a manifestation of a desire for fair play, a reflection of disdain for the cowardly sneak attack, of an ethos that one should not shoot an unarmed man. This, as I have suggested, is one important facet of the American self-conception. It is the vision of the straight-shooting cowboy, giving his nemesis a chance to arm himself for the showdown at noon. This vision is acted out—both articulated and performed—day after day on American streets and on American television sets. This small ritual drama, like a prayer, recalls and thus helps construct each day a particular vision of community identity.

Do police, criminal defendants or television viewers actually think about all this each time they give, receive or watch recited *Miranda* warnings? Of course not. Grant, then, that the *Miranda* mini-drama is in many or most cases recited and enacted with the same perfunctory haste that no doubt marks many ritual acts, religious and secular. But solemnity is hardly the only harbinger of significance. Conduct constructs character not only by inspiring occasional solemn reflection, but as well by engendering constant or regular low-level awareness. When were you ‘taught’ the mores and values by which you now define yourself? Chances are you cannot point to a moment when you were ‘persuaded’ that it is a good idea to be kind or generous or brave or thoughtful or temperate or any of the things you are or aspire to be. You developed that identity, that set of aspirations, that character, by watching and judging a thousand
little daily dramas. And by performing in them, acting out the character to which you aspire. That many of these acts eventually come to be habit—performed on many occasions without reflection—in no way negates their ongoing constitutive significance.

One might object that merely to enact this identity—to recite these ideals without necessarily living up to them—is unrealistic, even hypocritical. But to make that charge in such broad strokes is to lose sight of the critical distinction here is between hypocrisy and aspiration. The invocation is like a prayer—a statement as much of what community aspires to be. Now, if a community were to simply recite certain principles without any effort to act on them, and without any real desire to be the sort of people suggested by the symbolic act, the gesture might indeed be empty or hypocritical. But the mere fact that a people cannot or does not always live up to its own aspirations does not render hollow the regular articulation of those aspirations. To aim to be better than we are is not hypocrisy, but hope.

3. THE COURAGE OF CRAWFORD

While the *Miranda* warnings are arguably an explicit articulation of aspects of community identity or character, it is not the case that only overt avowals can serve this sort of constitutive function. Once the expressive, identity-constituting aspects of criminal procedure are brought into focus, it is easy to see the way in which various aspects of the trial itself might play this role. Indeed, to describe the trial as theatre or performance of one form or another is so commonplace as to be cliché. The question, again, is what this means. What is being performed or enacted?

Once at trial, it is often thought that defendants ought to have the right to confront and cross-examine witnesses against them. Why might a criminal justice system require that criminal defendants be afforded this opportunity? What matters, and what ought to matter, about this aspect of trial procedure? In particular, if we could be confident that an incriminating statement made out of court, prior to trial, were accurate and reliable, would there still be a reason, even a necessity, for requiring the person who made that statement to testify at trial in front of the defendant and submit to cross-examination? Focusing on this question provides a useful way of thinking about what sort of ends—beyond accuracy and reliability—we might want the criminal trial to serve. In order to suggest an answer to this question, it is helpful to look, very briefly, at the recent evolution of American law on this point.

In American law, the right of defendants to confront and cross-examine witnesses at trial is protected by two different and overlapping regimes: Constitutional criminal procedure, and the law of evidence. The Sixth Amendment to the United States Constitution protects the right directly, by mandating that criminal defendants be ‘confronted with witnesses against
them’. The rule against hearsay also serves to protect this right, albeit indirectly, by making inadmissible many statements made out of court. Until very recently, American courts appeared to assume that the primary—perhaps sole—reason for requiring confrontation by accusing witnesses was to insure the accuracy of trial testimony. If witnesses were not required to confront, defendants would not be able to cross-examine, and the accuracy of trial testimony might be compromised.

Consider the paradigmatic situation: an incriminating statement is made out of court—perhaps to a police officer, or over the phone in an emergency ‘911’ phone call. By the time of trial, however, the person who made that statement is either unwilling or unable to testify. Would the introduction of that statement violate the defendant’s constitutional right to confrontation? Would it violate the hearsay rule? Are these two separate questions—the Constitutional status of the out of court statement and its status under the hearsay rule—or are they interconnected?

Given that accuracy was thought to be the end served by both the Confrontation Clause and the rule against hearsay, it is perhaps not surprising that these two questions were until recently seen as closely connected. Judicial interpretation of the Constitutional right to confrontation had become intertwined with—some would say bogged down in—the intricacies of the hearsay rule. Prior to the recent United States Supreme Court decision in Crawford v Washington, the Confrontation Clause was interpreted within a complicated framework under which the presence or absence of a violation of the constitutional right to confrontation hinged essentially on whether the introduction of the statement in question would or would not violate the rule against hearsay.

Without going into the intricacies of the hearsay rule, that determination hinges largely on considerations of accuracy, such that broad categories of out-of-court statements are held not to violate the hearsay rule because they are thought to be in the run of things accurate enough to justify admission. Following this accuracy-based logic, courts interpreting the Confrontation Clause held that out-of-court statements which fall under a ‘firmly rooted’ exception to the hearsay rule did not violate a defendant’s right to confrontation when introduced against him at trial. Moreover, even if a statement did not fall within a particular firmly rooted exception, it could still be introduced against a defendant if the court were to find sufficient ‘indicia of reliability’. The upshot was that if a court found an out-of-court statement to be sufficiently reliable, its admission at trial would not be held to violate the defendant’s Constitutional right to confrontation.

Recently, however, the United States Supreme Court articulated a very different approach. In Crawford v Washington, the Court held that if an out-of-court statement is ‘testimonial’ in nature, its admission against a criminal
defendant at trial does violate that defendant’s confrontation right, even if the statement is such as to leave little or no doubt as to its reliability. The *Crawford* decision has achieved the laudable end of severing analysis of the Confrontation Clause from the morass of the rule against hearsay. Instead of asking whether the out-of-court statement in question falls within an exception to the hearsay rule (or is otherwise sufficiently ‘reliable’), courts are directed to ask whether the statement is ‘testimonial’. In the wake of *Crawford*, the primary question on the minds of American Constitutional Law scholars (not to mention criminal prosecutors and defence attorneys), regarding the Confrontation Clause, is obviously one of definition. What will count as a testimonial statement? The Court in *Crawford* did not resolve this question, but instead offered a set of illustrations and possible definitions, leaving the precise articulation of the standard to future case law.

The Court in *Crawford* quoted three possible standards for determining whether a statement should be considered ‘testimonial’ so as to implicate the confrontation right if offered against a defendant:

—ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;

—extrajudicial statements . . . contained in formalised testimonial materials, such as affidavits, depositions, prior testimony, or confessions; or

—statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial9

The Court left unanswered the question which of these standards ought to govern, or whether indeed some combination of the above, or some alternative formulation entirely, will be employed to flesh out this central aspect of the new Confrontation Clause doctrine.

On my view, however, before we can answer the question of what sorts of statements ought to be considered testimonial, we ought to address the prior and perhaps more significant question of why. What is the rationale behind the testimonial standard, however precisely defined? My colleague, Richard Friedman, who has long criticised the incoherence of the prior regime and argued for just the sort of doctrinal change announced in *Crawford*—and has thus seen his labours and arguments vindicated by the Court—has suggested that confrontation is simply and historically ‘a fundamental condition under which testimony is to be given’.10 With due respect, I find this both unsatisfying and inadequate. It is unsatisfying not to have an appealing rationale for an important rule of this sort, other than the fact that it is more elegant than the messy way the rule was interpreted before, or that this is simply the way we do

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9 541 US 36, 54 (2004); 124 S Ct 1354 at 1364.
it. And it is inadequate because only a coherent rationale can provide consistent and normatively appealing guidance for future development of the law in this area. What we need to know, therefore, is why. Why should testimonial statements introduced against a defendant be seen to violate that defendant’s rights even where the statement’s accuracy and reliability is clear?

It seems to me, as I suggested prior to Crawford in an article arguing for just the sort of change advocated by Friedman and subsequently announced by the Court, that the reason to exclude out-of-court testimonial statements is not because testimony without confrontation is necessarily reliable, but because it is ignoble. Throughout the long history of the confrontation right, one theme has been consistently present, if never explicitly dominant. The idea is that it is somehow wrong—base and cowardly and inconsistent with the respect we owe our fellows—to accuse someone without being willing to look them in the eye and stand behind that accusation. If, therefore, you are going to ask the state to exert its power over a citizen through the criminal process on the force of your word—on the authority of your testimony—you need to be willing to accept and acknowledge your agency in that process by confronting the one you have accused.

There is not space to review here the history of the confrontation right; but consider by way of example what may be the oldest surviving reference to the right, or something like it, in the Old Testament. Immediately after the passage requiring that there be two witnesses in capital cases, the Book of Deuteronomy continues to state not only the explicit requirement that testimony be given in front of the accused, but this as well: ‘[t]he hands of the witnesses shall be first upon him to put him to death, and afterward the hands of all the people. So thou shalt put evil away from among you.’ In other words, those who would accuse cannot do so from within or hidden by the mob. They must come forward and put their own reputations on the line. They must stand behind and take responsibility for both the accusation and its consequences.

Or, leaping forward several millennia, consider the following passage from Coy v Iowa, a 1988 Confrontation Clause case from the United States Supreme Court. Justice Scalia, writing for the majority, quotes a statement attributed to President Eisenhower:

In Abilene, he said, it was necessary to ‘[m]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. . . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow.’

11 ‘At the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death’: Deuteronomy 17:6.
12 Deuteronomy 19:16–18.
13 Deuteronomy 17:7.
Again, the point is not merely, even primarily, that unconfronted testimony will necessarily be unreliable, but that the act of accusation without a willingness to confront is simply an unacceptable act of ignoble cowardice—an act worthy of outrage, and not to be abetted by the state. The focus is on the witness, rather than the defendant; and on meaning, rather than consequences.

If this rationale or something like it is at work, the standard for determining whether statements are testimonial ought to be some combination of the first and third possibilities articulated by the court—a standard not limited to formal, let alone in-court statements, but rather keyed to the reasonable expectations of the declarant. Ideally, one might look for a purely subjective standard. If this particular accuser knew or expected that the accusation would be used against the accused in a criminal proceeding, he or she must come forward. In the interest of administrability, however, it may make sense to employ a slightly more objective standard, focused on what a reasonable person in the position of the accuser would know, have or should have known. But the principle remains.

If the statement represents an effort by the state to abet the ignoble act of behind-the-back accusation, its introduction would violate the Confrontation rights of the accused.

The Confrontation requirement thus embodies and enacts a certain view of the proper relationship between citizens—of the sort of respect owed by each to each. And it enacts as well, and thereby helps construct, a closely related virtue to be looked for in and aspired to by members of the community.

4. COMMUNITY AND CHARACTER

I have focused on two particular facets of criminal procedure and the trial. But it should be clear that the idea of trial procedure as constitutive and revelatory of community character ought to be applicable in a wide range of contexts, especially as to relatively well-known or high-profile aspects of the way in which trials are conducted. In particular, it seems to me that other facets might be evaluated in light of the particular virtue of forthright courage sketched out above.

One example, which I have written about elsewhere, is the use of juries to decide criminal cases. It seems to be that juries serve as an institution though which members of the community take turns not just sitting in judgment—deciding criminal cases—but as well standing behind those sometimes difficult judgments and acknowledging agency in and responsibility for them. This is manifested in—among other aspects of the jury’s role—the unanimity requirement, the absence of directed verdicts in criminal cases, and the way in which the practice known as jury nullification is at the same time both discouraged and protected. In all of these ways members of the jury are encouraged, if not forced, to see themselves not just as decision-makers but also as responsibility-takers.

They are forced to confront, as it were, what it is that they, and through them the community as a whole, must do in and through the criminal justice system. This reflects, in my view, the same ethic of forthrightness manifested in the confrontation clause.

Another area of trial procedure which in my view cries out to be examined in this way is the use of various forms of ‘bargained-for’ testimony. In American law, it is impermissible to pay directly for fact testimony in a criminal case. However, it is routine for convictions to be secured through the use of plea bargains or grants of immunity of various sorts. State witnesses are in this way paid in a currency often more valuable to them than cash. No doubt some version of this practice is justifiable, even necessary. In thinking about its costs, however, it seems to me that concerns of the sort outlined in this essay ought to be central. What does it say to let slide one crime in an effort to prosecute another? Similarly, the employment by police of informants or undercover operatives is a practice that might profitably be examined from this perspective. What does it say to use the systematic violation of trust as a central method of protecting a community from crime. Again, the practice may well be explained or justified. But that explanation or justification ought to be developed with an eye to the broader consequences—intended or not—for the character of the community thus protected.

Rather than multiply examples, however, let me finish by returning briefly to the essential question. Why should we focus on the community character manifested by the trial? This can be framed as a pragmatic question. Why waste time arguing about this sort of thing when there are so many ‘real’ matters—consequentialist or normative—to be concerned with? Alternatively, it can be framed as a broader theoretical inquiry about the relationship between the individual and the community. What can be meant by the character of a community, other than a sum or summary of the traits of its members? What is the connection between the virtue, or virtues, of or in a community, and the virtue or virtues of the members of that community?

This is of course an inquiry at the centre of Plato’s Republic. In various ways, Plato has Socrates ask what is the relationship between the character or soul of the community and that of the individual? But it is Aristotle who offers at least one set of responses to this question.

The first answer, hinted at above, is that the most reliable, if not always the easiest, way to guide conduct is by constructing character. Aristotle put it this way in the Nicomachean Ethics: ‘[t]he truest student of politics, too, is thought to have studied virtue above all things: for he wishes to make his fellow citizens god and obedient to the laws.’ And he subsequently elaborates: ‘... legislators make the citizens good by forming habits on them, and this is the wish of every legislator, and those who do not effect it miss their mark, and it is in this that a good constitution differs from a bad one’. On this view, the way to help people
consistently to behave in ways which are courageous or just or temperate is not simply to prohibit and hope to deter contrary action, nor even to reward or provide incentives for the conduct one desires, but rather to find ways of helping them see themselves as those sorts of people. This, in turn, is best accomplished by helping them find occasions on which to display, construct and ultimately internalise that self-conception.

In addition to seeing the construction of character as working in the service of the community, however, it is also possible to make instrumental arguments going in the other direction. Perhaps one ought to focus on the ability of the community to enable and foster the development of individual character. This perspective will appeal in particular to those who embrace the essential Aristotelian premise that human flourishing is a product essentially of what sort of person one is able to become. If wellbeing flows from the cultivation of virtue or character, and if the end of community is to serve wellbeing, then instead of asking ethics to serve politics, perhaps the opposite ought to be the case. This may be possible in at least two ways. First, and most obviously, it is difficult to be virtuous—to focus on the development of one’s character—when one is in desperate need or constant danger. Aristotle acknowledges this when he highlights the role of politics in creating the external conditions requisite for the development and exercise of virtue.19

But there is another way in which community is necessary to character. Not only ought community to create the conditions—freedom from need, security, etc.—necessary to the development of virtue, but it can and ought to serve a more essential role in this regard. Community—social life, politics—is the vehicle through which we define the very virtues to which we then aspire. The public construction and expression of character is analogous to the collective effort of cathedral-building in a medieval town. Before we can aim to be courageous, or temperate, or forthright, or patient, we need to identify, cultivate or erect those virtues. This is not to say that the virtues are arbitrary; but nor are they self-evident or self-defining. So we look to our communities to provide us with models, and with the opportunity and context to enact and articulate the traits of character—the virtues—through which we can define ourselves and find meaning.

And law is one of the ways community can do this for us. Our high-profile legal and political acts, of which the trial is a particularly salient instance, can thus provide us with more than security and material wellbeing—the external conditions necessary for the development of the sort of character conducive to our flourishing. They can and ought to provide us as well with vehicles through which to construct and understand that character. They give us ways of understanding ourselves, of enacting and embodying the virtues to which we aspire.

Again, it might be convenient if this could be accomplished in contexts where nothing else is at stake—if we could set up separate institutions for the con-

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19 Politics, Bk VII, Ch 1.
struction and articulation of character and virtue, thus allowing us to focus on purely instrumental or purely normative matters in the conduct of important public business. But it does not work that way. Of course, we can and do make purely symbolic efforts to define ourselves—public ceremony being a prime example. But in the end we are how we act where it matters, and where people are paying attention—where both the heat and the lights are on. The trial, on this view, offers a critical opportunity for us not just to prosecute and deter crime, and not merely to articulate particular substantive values, but as well to answer in part the vital question. Who, indeed, do we think we are?
Theorising Jury Reform

MIKE REDMAYNE

The reform of aspects of the jury system has recently much occupied criminal justice policy-makers in England and Wales. Reform debates have raised questions about the proper scope of the jury’s jurisdiction (whether it should try complex cases, and whether it tries too many non-serious cases); about the defendant’s ability to waive jury trial; about the accountability of the jury (whether it should justify its decisions, and to what extent appeal courts should investigate allegations about biased jurors); and about the proper composition of the jury in ‘racially sensitive’ cases. Other jurisdictions, too, face similar issues. In 2001 the New Zealand Law Commission published an extensive report on the criminal jury, while in the United States the jury and its role is an ever-popular topic in the law reviews. If there is one thing that links the various reform issues, it seems to be this: the question of how to manage the tension between accurate fact-finding in the criminal trial, and other normative aspects of the trial, in particular the element of democratic engagement involved in the use of the jury.

The aim of this essay is not to examine all of these reform debates in detail. It is, rather, to explore some of the theoretical underpinnings of jury trial, in order to show how a theory of the jury can inform those debates and, in particular, to see just how deep is the tension identified in the preceding paragraph. Before embarking on this task, however, it is necessary to say something about the reasons for paying so much attention to the jury.

There is always a risk, in jury scholarship, of claiming too much importance for the jury. The plain truth is, of course, that jury trial is rare both internationally and within those jurisdictions that do use juries. Many legal systems do not use juries at all, or use them in a very different form to the English jury.

which will be the focus of this essay. And even within England and Wales, jury trial is the exception. The vast majority of cases are heard in the magistrates’ court, where there is no jury, and even in Crown Court the majority of defendants plead guilty and so are sentenced by a judge but not tried by a jury. While it is important to recognise these facts, we should also be wary of jumping to the conclusion that jury trial is of minimal, or no more than symbolic, value. In those jurisdictions which use them, juries make some of the most difficult decisions that any society has to make: decisions about whether a particular person has committed, for example, murder or rape. While we should not ignore the mechanisms used to deal with other cases, the institution making these very significant decisions surely deserves detailed scrutiny, however rarely it is used. Further, jury trial is just one example of the much larger category of lay adjudication. In England, contested cases not heard by a jury are usually still decided by lay people: the magistracy. And, looking beyond England and Wales, one finds that many criminal justice systems do use some form of lay adjudication. While this essay focuses on the English jury—because it is necessary to have a clear example to discuss—some of the points made about the case for jury trial might be adapted to make a wider case for lay involvement in the criminal trial. The final point to be made is that the case for jury trial made in this essay is a fairly nuanced one. There will be no grand claims about the wonders of juries, or about the impoverishment of those jurisdictions which do not use them.

1. THE CASE FOR JURY TRIAL: THREE PERSPECTIVES

The jury is not usually thought of as having a single justification. A variety of different reasons are given in support of jury trial, and the very fact of variety can make it difficult to link the case for the jury to the debates about its reform. A principal argument of this essay is that we can gain a more coherent view of the jury by recognising that the arguments for it can be classified as belonging to three broad perspectives. These are court-centred, citizen-centred and defendant-centred perspectives on the jury.

6 The exception is that some cases in the magistrates’ courts are heard by (professional) District Judges.
7 On Germany, see W Perron, ‘Lay Participation in Germany’ (2001) 72 Int Rev Penal L 181. A valuable discussion of lay participation in general is S Doran and R Glenn, Lay Involvement in Adjudication (Belfast, TSO, 2000).
The Court-centred Perspective

The jury may be a valuable institution because it does well those things which we expect courts to do well. The idea here is that the principal function of courts is fact-finding, and that there is reason to think that juries have certain attributes which make them good fact-finders. Of course, this is simplistic in that courts need to be judged against values other than pure fact-finding accuracy; but we will see those other values accounted for in the discussion of other perspectives on jury trial, so there is no need to complicate things by introducing them here.

In considering why juries may be good fact-finders, it is important to bear in mind that the point of comparison is a single judge (or perhaps a small panel of judges). A group of 12 randomly selected people may have advantages over a judge in fact-finding. For one thing, the jury is likely to contain a broader range of experience and expertise than the single judge simply because of its size. The social class of the jurors is likely to differ from that of the judge, and this may give them better insight into the sort of situation which is the subject of the trial. The point is not (yet) that juries will empathise with or understand the defendant better than the judge. It is a simpler one: it is known that in their deliberations, juries draw heavily on their own experiences in order to piece together the evidence offered at trial; having some knowledge of, for example, typical behaviour in rough pubs may be valuable in judging the plausibility of accounts put forward at trial.

We can better appreciate the jury’s strengths as a fact-finder by noting the sort of questions which have to be answered in a criminal trial. Those questions are not just the basic factual ones of ‘what happened’ and ‘did the defendant do it’. Many trials involve evaluative questions such as ‘did the defendant use reasonable force’, ‘was the defendant dishonest’; and every trial involves the question ‘what is reasonable doubt’. These questions seem to involve community standards and a jury—a cross-section of the community—seems well placed to answer them. This is perhaps most obvious with the question of dishonesty, which is partly defined in terms of community standards, and with the gross negligence standard for manslaughter, which has been described as ‘supremely


a jury question. But with these most blatant examples, one might well detect some circularity. Those community-based standards may exist precisely because we have a jury, thus pointing to the jury’s suitability in applying them might not seem to advance the argument. In fact, this point raises the deeper question whether it is good to have a criminal law defined in terms of community standards, a point to which we will return below.

This court-centred perspective on the jury might appear to put too much weight on the jury’s abilities as a fact-finder. After all, many critics of the jury system take the view that lay people do not make good fact-finders. There are various responses to this. Some weaknesses of the jury system may stem from the sheer complexity of the law and the instructions that juries are asked to apply, and could be dealt with by simplification. But the most general response is simply that the vast majority of jury research paints a positive picture of the jury’s fact-finding abilities.

(ii) The Citizen-centred Perspective

The jury may be a good thing from the point of view of the jurors themselves, or, put another way, from the perspective of citizens who have the opportunity to sit on juries. In the broadest terms, this is because the jury system enables citizens to engage in governance. This occurs in several ways.

Most directly, the jury system involves citizens in determining whether their fellow citizens have infringed the criminal law—and here again the evaluative nature of many of those decisions should be emphasised. But the jury system also involves citizens in governance in a less direct sense. Giving citizens a decision-making role in criminal cases involves them in a dialogue of sorts with the legislature and with prosecutors. If jurors are seen as being reluctant to convict in particular types of cases, this may prompt law reform, or persuade prosecutors not to bring prosecutions. The law on motor manslaughter, for example, was said to have been changed in part because of the reluctance of jurors to con-
vict those who killed while driving of the serious crime of manslaughter. In Canada, reform of the law on abortion may have been prompted partly by the reluctance of juries to convict doctors who carried out illegal abortions.

These law reform examples may seem rather marginal: causation is hard to prove, and nowadays it is perhaps rare for the jury to prompt law reform in this way. The jury may in fact have more influence over the shape of the law because law reformers engage it in a sort of imaginary dialogue. When discussing reform of the law on sex offences in England and Wales, the Law Commission was very conscious of the need for a ‘jury acceptable’ law: one that would not seem so harsh that jurors would baulk at applying it. A similar concern can be seen in the Commission’s recent work on partial defences to murder.

By involving citizens in governance, the jury system has an educative role. It informs citizens about the workings of the criminal process and about the content of the criminal law. It gives citizens a sense of responsibility, and involves them in listening to a range of views. In short, the jury makes citizens better citizens. This particular defence of the jury might seem to be lapsing into the sort of romanticism which we earlier promised to eschew. After all, many people respond to the jury summons letter by attempting to avoid jury duty. The reluctance of many citizens to vote, is of course, not an argument against democracy, but then, in England at least, voting is not compulsory. The compulsory nature of jury duty is certainly something which merits serious justification, though that will not be attempted here. There is, however, a simpler response to the charge of romanticism. Recent empirical work on jury service in England suggests that, despite initial reluctance, most jurors find the experience valuable and educational in just the ways described above.

In her contribution to this volume, Tatjana Hörnle argues against lay participation in the criminal trial being necessarily democratic. The argument here, by contrast, is that one example of lay participation—the jury—involves citizens in governance, in various ways. The term ‘governance’ is chosen partly so as to avoid the more contentious ‘democratic’, which might be taken to imply that legal systems which do not use juries are somehow undemocratic. There is obviously no necessary connection between lay participation and democracy.

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14 See J Gobert, Justice, Democracy and the Jury (Aldershot, Dartmouth, 1997) 32. The state does not always give in, and this is perhaps appropriate. The reluctance of juries to convict in drink driving cases led to the offence being redefined as summary (non-jury) only. See S Enright and J Morton, Taking Liberties: The Criminal Jury in the 1990s (London, Weidenfeld and Nicolson, 1990) 27.


18 See Matthews et al, n 9 above, 30, 32–3, 42, 44, 64–6.

19 Hörnle, in this volume.

Nevertheless, the examples used here show that where the jury has a reasonable degree of freedom, the jury system does allow citizens to influence the way in which they are governed, and does increase the feeling of citizenship among those who serve on juries. Whether this should be taken to show that the jury can enhance democratic values is perhaps debatable, but there can be no doubt that these aspects of the jury system are potentially valuable.

(iii) The Defendant-Centred Perspective

The discourse around jury trial often frames trial by jury as the defendant’s right. The defendant is said to have a right to be tried by his peers, who are less likely to be distanced socially—or in terms of age and race—from him than a professional judge. The jury is likely to have a better understanding of the defendant than a judge.

The jury also has a protective role vis-à-vis defendants. The jury’s distance from the state allows it to guard against unjust prosecution, and will sometimes be a better guarantee of impartiality than membership of the judiciary. The importance of this is underlined by the inclusion of the right to be tried by an independent and impartial tribunal in Article 6 of the European Convention on Human Rights. Each jury’s brief engagement with the criminal process also prevents ‘case hardening’.

2. ANALYSING AND REFINING THE PERSPECTIVES

The main reason for distinguishing these three perspectives is to suggest that we can differentiate between them in terms of their cogency as reasons for the institution of trial by jury. To put it simply: only the court-centred and citizen-centred perspectives provide cogent reasons for jury trial. When thinking about juries, and especially about reform of the jury system, we should avoid talking of the defendant’s right to jury trial, but stress instead the courts’ and citizens’ interests in the system. But that really is to put it too simply; much now needs to be said about how the perspectives interrelate.

It is not that there is nothing to be said for any of the values incorporated under the defendant-centred perspective—who could argue against impartiality? It is, rather, that what is valuable among the defendant-centred reasons can be accounted for in terms of court- and citizen-centred perspectives. The point is not that it is a mistake to argue that jury trial is valuable because it protects defendant’s interests, but that such arguments give no extra mileage once we have acknowledged the interests courts and citizens have in jury trial. Given that some of the defendant-centred arguments are suspect, it is better to confine ourselves to the other two perspectives. Consider the argument that jury trial is valuable because it protects defendants. The first thing to say is that this
argument at least requires a good deal of unpacking, some of which will be done in the discussion of impartiality and nullification which follows. Without careful analysis, the general notion of the protective jury is potentially dangerous for, rather like the obstacle course metaphor used to explain Herbert Packer’s due process model of criminal procedure,21 it might suggest that making it hard for the state to convict a defendant is a good thing in itself. That is mistaken. We should not want to make conviction hard, but merely to protect, to a suitable degree, against false conviction.22 Now take the example of impartiality. Defendants certainly have an interest in being tried by an impartial tribunal, but impartiality is essential to good fact-finding, and is therefore already a court-centred value. Here there is an advantage in not connecting the argument for impartiality to the defendant’s interests. Some defendants do have an interest in a partial tribunal—one that is biased in their favour—and this view might find some support in the defendant-centred value of ‘trial by peers’. But it is difficult to see what legitimate value there is in being tried by one’s peers unless it is accounted for in terms of the court-centred value of accurate fact-finding. Underlying the (terribly vague) argument that a defendant should be tried by his peers may be the view that empathy is crucial to judgment. But it is hard to understand why this should be so unless one makes the mistake of equating lack of empathy with hostility.

Similar arguments can be made about another value associated with jury trial, one which has barely been mentioned so far. John Gardner has suggested that a case for the jury might be found in the desirability of a procedure that promotes defendants giving ‘explanatory dialogues’ in public: explanations of their conduct which are not highly technical but which are addressed to the world at large.23 Antony Duff has also stressed the importance of a criminal law framed in the language of the citizens to whom it is addressed.24 But it would be wrong to suggest that the accessibility of the criminal law is something which is only of interest to defendants. If an accessible criminal law is a good thing, then this is something which is in the interests of all citizens, and can be accounted for under the citizen-centred perspective. It is also, presumably, something which the state should want to achieve, and would therefore be a court-centred value too.

There is, however, one aspect of jury trial which is not so easily accounted for from perspectives other than the defendant-centred one. This is the ability of the jury not to apply the criminal law: jury nullification, or jury equity, as it is called. Some people view jury nullification as a justifying reason for the institution of

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jury trial. If that is right, and if nullification is best explained by taking the
defendant’s perspective (it might be seen as protecting defendants), then we
should be loath to dismiss that perspective when thinking about the jury.

An initial point to make is that it is certainly questionable that nullification
provides a justifying reason for jury trial. For some, nullification is an anarchic
power which conflicts with the rule of law and democratic values; the possibil-
ity of nullification can be considered a reason against jury trial. In fact, there are
many attitudes which can be taken towards nullification. A very narrow view of
the jury’s right to nullify would consider it an unwanted side effect of the jury
system. The power to nullify can be seen as existing because of other aspects of
the jury system: juries do not give special verdicts, do not have to give reasons
for their decisions, and prosecutors have limited appeal rights. These might be
seen as valuable attributes of the jury system (arguably, they prevent the judge
having too much control over the jury, the jury’s task being too technical, and
protect the innocent), and the power to nullify understood as an inevitable,
though undesirable, side effect. A slightly broader view of nullification would
consider it as an exercise of conscience by the jurors involved.25 The jurors
might feel convicting the defendant to be irreconcilable with their own strongly
held beliefs. Here, nullification would be considered to be justified only in
extreme cases (jurors would be expected to consider the importance of the rule
of law before nullifying), but to be a valuable safety valve, given that jury ser-
vice is compulsory.26 This is still a fairly narrow view of nullification. Somewhat
wider again is the view that nullification is appropriate, given the nature of legal
rules. Sometimes rules have unexpected consequences, and operate so as to
criminalise behaviour which the rule-maker would never have wanted to
criminalise; or perhaps the rule-maker did realise that the behaviour would be
criminalised, and viewed that as an undesirable but acceptable consequence of
the need to craft a rule of sufficient generality to be workable. This might be
termed the interpretive theory of nullification:27 possible examples would be the
acquittal of a mentally subnormal defendant of a crime of objective mens rea,28
or a defendant in possession of cannabis for medical reasons.29 Broader still is a
view of nullification which sees it as properly used even though the jurors recog-
nise that the rule-maker would not condone acquittal, and even though it is not
an extreme case where the jurors could not live with their consciences if they
convicted. Acquittal of Clive Ponting for breach of the Official Secrets Act is an
example: here the jury might still be seen as acting democratically, even if in a
way which, owing to failings in democracy, the rule-maker would not con-
done.30 This might be thought of as a communicative view of nullification: as in
the Canadian abortion cases, the jury is expressing its disapproval of the law in
the hope that the legislature, or prosecutors, will take notice. This majoritarian
view is still distinguishable from more anarchic forms of nullification.31 One
example of more extreme nullification is Paul Butler’s proposal that black jurors
respond to racism in the criminal justice system by acquitting black defendants
tried for non-violent offences.32 Another would be jurors expressing their per-
sonal moral preferences, for example by refusing to convict defendants who
have planted bombs outside abortion clinics.33

The object here is not to argue for a particular view of nullification, but to
question whether justificatory accounts of nullification need be seen as
defendant-centred. The point is of more than theoretical interest: a defendant-
centred account of nullification suggests that, as in some jurisdictions in the
United States, defendants should be able to argue the merits of the law in court,
and should have the right to a nullification instruction from the judge.34 A
defendant-centred theory would also have implications for some of the jury
reform debates which we will examine below. Now it is not too difficult to
account for many versions of nullification from a citizen-centred perspective.
The conscience and communicative versions are clearly citizen-centred. The
Butler and personal moral preference versions could probably be explained in a
similar manner. But there may well be concerns that defendant-protective
aspects of nullification are simply being explained away in order to protect a
stubborn thesis about the reasons for jury trial. So let us look at the strongest
cases for nullification being defendant-protective. The Ponting acquittal pro-
vides a good example. This is an example of nullification which draws much
sympathy, and which does seem to be well accounted for in terms of the jury’s
role in protecting defendants from the state. Also relevant here is an argument
made by Neil MacCormick, which might be used to link the interpretive view of
nullification to the protection of defendants.35 MacCormick’s argument is
developed in an essay on the rule of law, and therefore has the additional merit

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30 Ponting, a civil servant, leaked secret information to the media in order to show that
Parliament had been misled over a sensitive issue. See G Drewry, ‘The Ponting Case—Leaking in the
Public Interest’ [1985] Public Law 203.
31 See Marder, n 27 above.
105 Yale LJ 677.
33 Of course—and this is one of the many difficulties nullification gives rise to—it is not easy to
distinguish this example from the Canadian one involving abortion.
35 N MacCormick, ‘Rhetoric and the Rule of Law’ in D Dyzenhaus (ed), Recrafting the Rule of
of suggesting how nullification may be compatible with the rule of law rather than being in conflict with it. MacCormick contrasts the rule of law—associated with certainty and security—with what he terms the ‘arguable character’ of law, the plain fact that legal rules are rarely clear but always open to interpretation. In the end, MacCormick finds no real conflict between the two, because the arguable character of law plays an important role in protecting people from arbitrary or oppressive state action, and thus shares a justification with the rule of law. He even links the arguable character of law to the rights of the defence: to challenge and rebut the case against it. There is no security against arbitrary government unless such challenges are freely permitted, and subjected to adjudication by officers of state separate from and distanced from those officers who run prosecu-
tions.36

In fact, MacCormick’s argument can be used to argue for a relatively narrow view of nullification. In the quotation above, MacCormick stops with the judge; open argument before independent judges is enough to provide security to citi-
zens. Nullification pushes things further: even if the judge has decided that the law provides no loophole for the defendant, jurors may still decide to acquit. Now even if we support a power to nullify, we might still want to think of the power as limited. In MacCormick’s terms, while law is arguable and should be argued about, the arguments should be structured and reasoned. What links many of the less extreme forms of nullification is that they are majoritarian; they involve jurors applying the law in a way which they believe would have widespread support, and do not lapse into the expression of personal moral preferences. Here, the deliberative nature of jury decision-making plays an important role: a juror’s decision to nullify should be capable of being explained to, and winning some degree of assent from, her fellow jurors.37 This vision of nullification is not necessarily incompatible with a protective view of the practice, but it can largely be explained in terms of a citizen-centred account of the jury, and this does mean that defendant protection is a less crucial part of our thinking about nullification. By nullifying, juries are expressing the norms which they think the community would want to hold defendants to. There is something valuable in theorising nullification in this way. By stressing the norms of the wider community, we are better able to distance nullification from its more controversial, anarchic, side.

Of course, by claiming that a certain theory can justify a limited form of nullification we in no way guarantee that jurors do not use nullification in a broader and more controversial way. In fact, if it turned out that jurors did actually use nullification in the broader way, we might find that, on balance, we

37 An account which stresses the deliberative nature of jury decision-making, and connects this to the nullification debate, is J Abramson, We, The Jury: The Jury System and the Ideal of Democracy (New York, Basic Books, 1994).
were against trial by jury. However, the citizen-centred account can guard against the more controversial instances of nullification. If our theory of nullification is citizen-centred, then we will probably not want to allow defendants to argue the merits of the law, or demand a nullification instruction from the judge. And this will help to keep nullification within bounds.\textsuperscript{38} It also seems that in practice juries are not as anarchic as some may fear. Under the present system, where juries are not informed of their power to nullify, juries rarely nullify, and tend to do so out of concerns about fairness rather than to advance a personal agenda.\textsuperscript{39}

Nullification is certainly the hardest case for the argument that the defendant-centred perspective does not provide a strong case for jury trial. Even if we adopt a relatively narrow view of nullification, it is hard to rule out the defendant having a legitimate interest, and one independent of the citizens’ interests, in a case such as \textit{Ponting}. Perhaps the most that can be said is that there is considerable overlap between the two perspectives here; we will see below that the vagueness of this conclusion is not too great a problem. The case of nullification apart, however, there is a relatively clear lesson to be drawn from this part of the discussion. When thinking about the reasons for jury trial, and how the jury system might be reformed, we should be very wary of thinking in terms of the defendant’s right to jury trial.

3. PRINCIPLED JURY REFORM

We shall now move on to look at three recent debates on reform of the jury system in England and Wales, to show how these can be elucidated by this analytical framework. In the process, we will continue to refine that framework.

(i) Jury Waiver

A number of jurisdictions allow defendants to opt out of jury trial; the details vary.\textsuperscript{40} Sometimes waiver is available only for certain crimes, and the prosecution can have more or less say in the decision to waive. For example, the original version of the Criminal Justice Act 2003 (CJA) included a right of jury waiver.\textsuperscript{41} The provision was a relatively simple one. The defendant could ask for trial by judge alone, and the judge was obliged to grant the request unless

\textsuperscript{38} See the discussion of the empirical research in Schopp, n 25 above, 2051–2.
\textsuperscript{41} The original version of the Act can be found at http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldbills/069/2003069.htm. The jury waiver provision is at cl 41.
one of a small range of exceptions applied, the most general of which was where the judge was satisfied that there were exceptional circumstances which made it necessary in the public interest for there to be a jury trial. Alongside this were two rather strange exceptions, allowing the judge to refuse the request where the trial would raise issues concerning the administration of civil or criminal justice.

The framework developed above has rather obvious implications for jury waiver. If jury trial is justified by court-centred and citizen-centred reasons, then the defendant’s wishes are irrelevant. To put it very bluntly: the defendant has no right to jury trial in the first place, so there is no question of his waiving it. Things, however, are rather more complex than this allows. As was explained above, the situation is not that the defendant has no legitimate interest in jury trial, but that there is no extra mileage (and some lack of clarity) to be gained in framing things in terms of the defendant’s interests, because those interests, where they are worth respecting, are already those of the court and citizens. As we move from theory to practice, however, we see that there is some value in taking the defendant’s expression of his own interests into account. Both the court and the defendant have a strong interest in impartial and thus accurate fact-finding. However, it may be that the defendant has a stronger incentive to raise the possibility of bias, and a keener sense of when it is likely to arise. Allowing the defendant a say in whether there should be trial by jury might then make sense; we would be using the defendant as a suitable proxy for the court’s own interests in impartiality. There is some evidence, for example, that juries find it difficult to judge child abuse cases impartially, and it might be appropriate here to allow the defendant to choose trial by judge alone. But this will not always be the situation: it is possible for the defendant’s and courts’ interests to diverge. Guilty defendants have no interest in accurate fact-finding, and there might be some cases where we should be suspicious of the defendant’s desire for trial by judge alone: a case involving the issue of dishonesty, or obscenity, would be an example.

How does the citizen’s interest in trying cases fit into the picture? So far we have said nothing about how these two interests might be ranked, but there is a good argument that the court’s interests in accurate fact-finding are weightier than those of the community in engaging in governance. For one thing, much of the community’s interest is general, and replacing the jury by a judge in an individual case will not threaten it in a serious manner. Indeed, the community’s demand to try a particular case—‘we want to try Ian Huntley’—might raise fears that it has a partial interest. However, the interests of the defendant and the community will sometimes converge. The citizenry has a particularly strong interest in trying cases where nullification is a possibility, but where it is, the defendant is unlikely to forego his opportunity to benefit from it. A Ponting is the sort of defendant least likely to request trial by judge alone.

42 See N Vidmar, ‘Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials’ (1997) 21
Law & Human Behavior 5.
43 Ian Huntley was tried for the murder of two young girls, a crime which aroused immense public interest.
These thoughts give us a much clearer perspective on the jury waiver provision in the original Criminal Justice Act. This was weighted too heavily in favour of the defendant’s wishes. The defendant had no obligation to justify his request, the prosecutor had no input into the decision, and the court could only refuse waiver in exceptional cases. Much better would be a three-sided process, where court and prosecution can also offer their views. Even harder to justify was the way the provision highlighted the interest in jury trial in cases raising issues about the administration of justice. The idea here was presumably that if, for example, a judge was tried for perverting the course of justice, he should not too easily be able to request trial by a fellow judge. This is a rather cynical use of the jury to symbolise independence from the state in a tiny number of sensitive cases. If that is really the only good reason for the institution of trial by jury, we would be better off scrapping the system altogether.

(ii) Serious Fraud Cases

While the waiver provision was dropped from the Criminal Justice Act at the last minute, the Act does contain a provision on trial by judge alone in cases of serious and complex fraud. The most obvious argument for this sort of provision is court-centred: that juries do not make good fact-finders in cases involving complex financial dealings. There is probably something to this, in that the special expertise about everyday life which gives jurors an advantage over judges in run of the mill cases is likely to be absent. But while this may not make jurors better fact-finders than judges, we should not jump to the conclusion that juries lack the competence to try complex cases. The empirical research in fact suggests that jurors deal remarkably well with both complicated and lengthy trials. This is in part because a group of 12 people is likely to contain some very competent individuals, who can compensate for less able jurors. There is, however, a further argument for removing complex cases from the jury, one which is arguably stronger than the complexity argument. Fraud—and other—trials can sometimes last for a very long time. In extreme cases, jurors may have to spend several months hearing a criminal case. This may have a distorting effect on the jury which comes to sit in such a case—only those not in employment are serious candidates—but, more importantly, it is an awful lot to ask of jurors.

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44 CJA 2003, s 43. There had long been interest in this reform: see Juries in Serious Fraud Trials: A Consultation Document (London, Home Office, 1998).


46 See Matthews et al, n 9 above, 26, 28, 71, who found that juries were less representative in longer trials, and note that even two weeks’ service was a lot to ask of jurors. The authors suggest reducing the length of jury service.
If our case for jury trial rests to a considerable extent on citizen-centred values, then we have to ask if lengthy service is something we can rightly ask of citizens. The implication of this is that case length, not complexity, should be the driving factor when courts consider applications under section 43 of the CJA 2003.

The demands made on jurors may be a good reason for having some alternative to jury trial in complex fraud cases, but there are counter-arguments too. The most cogent of these is that the key issue in fraud cases is often one of dishonesty. Dishonesty, of course, is one of the standards of responsibility which was noted earlier as being particularly appropriate for jury decision-making (contrast a more cut and dried issue, such as identity). For those with no practical experience of serious fraud cases, it is difficult to know how serious a criticism this is. But it is possible that supporters of jury trial make too much of it. The dishonesty question involves jurors asking whether the defendant has been dishonest by community standards. In ordinary cases, jurors can draw on their everyday experiences and moral standards in order to provide an answer. But they may find it difficult to apply those everyday experiences to a defendant who is alleged to have infringed standards of honesty in some complicated and esoteric business transaction, especially if the defendant claims that his behaviour is widely condoned by the business community. It is possible, then, that in a complex fraud case a judge is as well placed to decide the dishonesty question as a jury.

The question about jury trial in complex fraud cases is interesting for the way in which it illuminates the tension between accurate fact-finding and other values associated with the criminal trial and instantiated by the jury. One argument of this essay is that we should value juries for their fact-finding skills. If this is right, then it will be appreciated that the jury creates less tension between competing aims than is often supposed. If juries are good fact-finders, then there is no conflict between their use and the goal of fact-finding accuracy. This sort of dynamic plays out interestingly in the fraud trial scenario. If it were the case that juries were not good fact-finders in complex cases, then there would be less reason to use juries in fraud cases in the first place. The length of trial point is similar: if fraud trials are very long, then the citizen’s interests in deliberating in fraud cases is immediately less strong than it is in normal cases. It may also be diminished because fraud trials are not ones where nullification is a live issue. It seems only to be the dishonesty issue which creates much of a case for the use of juries in these trials. In particular, the fraud trial does seem to be a situation where the defendant has no legitimate interest in trial by jury that is not already accounted for under the court’s and citizen’s interests.

(iii) Race and the Jury

It has been suggested that, in cases involving a racial element, ethnic minority defendants should be able to request ethnic minority representation on the
Although this proposal has not yet been taken up in England and Wales, and in fact the Court of Appeal has frowned on attempts to manipulate the racial composition of juries, it is still an interesting one to ponder. There are various practical issues about its workability, but we will continue to concentrate on issues of principle.

It is depressingly easy to argue for the racial representation proposal by appealing to the idea of trial by one’s peers. It is difficult to see what substance there might be in this: it is surely not sensible to argue that only those like us are able to judge us, or hold us to appropriate standards of responsibility. If we want to find a case for racial representation, it is better to concentrate on court- and citizen-centred arguments. The latter, however, seem to lead nowhere. Citizens have an interest in sitting on juries, but to argue that they have a particular interest in hearing cases dealing with their own racial group is to embrace a protective view of the jury which, we have seen, is difficult to justify. Of course, it is important that ethnic minorities are not under-represented on juries; everyone should have an equal chance of participating in governance through the jury system, but that is not an argument for skewing things in an individual case; if anything, it is an argument against it. We are left with court-centred arguments.

Bias and fact-finding ability are the key issues here. The empirical picture is complex, but there is some evidence to suggest that white juries are biased against black defendants. Taken at its highest the evidence provides a case for ethnic minority representation in any case involving a black defendant, not just those where the case includes a ‘racial element’; in fact, there is evidence that white jurors are least biased in cases where they are aware that there is a racial issue. The strongest argument for the racial representation proposal is a basic one about fact-finding. Part of the case for the jury’s fact-finding ability is that juries are likely to contain expertise about the sorts of everyday situations involved in most trials. Ethnic minority jurors may be able to provide valuable expertise about the facts in cases involving ethnic minority defendants. A good review of the research is SR Sommers and PC Ellsworth, ‘How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research’ (2003) 78 Chicago-Kent L Rev 997.
example of this is a case described by Douglas Lichtman, where a Korean man was convicted of the murder of his daughter. This is a case described by Douglas Lichtman, where a Korean man was convicted of the murder of his daughter. The prosecution emphasised his impassive reaction when shown his daughter's body, a reaction which, it appears, may have been perfectly appropriate for a Korean man. Having a Korean on the jury might have helped the fact-finding process in this case. But a system of racial quotas would have to be very sophisticated to deliver just the right sort of expertise to help out in a case such as this. Solving the problem by calling an expert to give evidence to the jury would surely be a better solution.

There is a further argument on the race issue which is not easily categorised in our framework of court-, citizen- and defendant-centred perspectives. This is the argument that racial representation on juries trying racially sensitive cases is necessary to ensure the legitimacy of the criminal process. This is an important argument, because it has a wider resonance in debates about the jury, an institution which is often said to play an important role in legitimating criminal justice; indeed, for some this is the jury's most important task. When considering the legitimacy argument it should be noted that race-based manipulation of the jury may do just as much to undermine its legitimacy as to bolster it. Random selection of jurors is one of the strengths of the jury system, as it helps to ensure that juries do appear to be independent and impartial. For some, racial manipulation of the jury may give the impression that one group is receiving special treatment, or that verdicts are being tilted in its favour. There is also a more fundamental issue here. We doubtless want out criminal justice system to appear to be legitimate, but surely what is most important is that appearances match reality. If there is a good case to be made for racial quotas (and it is far from clear that there is), then we should implement that reform. If we are worried about appearances, we should seek to educate people about the good reasons we have for using racial quotas. Legitimacy arguments should not carry much weight with respect to any of the reforms we have discussed here.

4. CONCLUSIONS

Reform of aspects of the jury system is likely to be constantly on the agenda of those systems which use jury trial. The debates surrounding reform are often frustrating: they frequently rely on rhetoric about the jury—its being the 'lamp that shows that freedom lives', for example—or emphasise the defendant's right to jury trial, with little analysis of the reasons for jury trial and how they might

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54 This is the principal argument for racial representation in Fukurai and Krooth, n 49 above.
55 See Darbyshire, n 5 above.
relate to the reform agenda.57 This essay has tried to show a better way of thinking about jury reform. In doing so, it has shown how the tensions between the different aims of the criminal trial may not be as deep, where the jury is concerned, as is sometimes supposed.

In closing, it is worth saying something about a much harder question, one touched on briefly in the introduction. Many jurisdictions do not have jury trial; are juries so valuable that they should consider adopting them? One point to make here is that juries may work better in some jurisdictions than in others. For juries to work well, the citizens who compose them need to be reasonably well educated and prepared to take on the responsibility of judging other people.58 We have stressed here the fact-finding advantages that juries seem to have over professional judges, stemming in part from the range of different experiences of jurors. It may then be that juries work well in societies with a reasonable degree of pluralism. If everyone has the same experiences, there will be less need for the jury. But in societies which are fragmented along racial, religious, class or other lines, juries may not work well either. If juries split into racial or religious factions, then they will not meet the deliberative ideal which is at the heart of the jury system.59 In discussing racial quotas, little was made of the possibility that, say, white jurors might be strongly biased against black defendants. If race relations really are in a state where that is a real concern, then we probably do not have a society where jury trial will work well.60

Leaving aside these very general issues, it is difficult to make the case that juryless jurisdictions should adopt the jury. There is no obvious way of weighing up the pros and cons of the institution. Is it better to have reasoned decisions or a wider pool of knowledge among the fact-finding body? Is the risk that juries will nullify inappropriately worth running, given that nullification will sometimes be valuable? Just asking these questions shows their futility. Jurisdictions which have juries, of course, are often very attached to them. It may well be that with the jury a certain degree of entrenchment occurs. Juries change the way we think about justice, and they change the way our criminal laws are framed. To give up the jury would then mean much more than giving up a particular fact-finding institution. Perhaps the strongest case that can be made for the jury then is somewhat independent of the institution itself: that it

57 A notable exception is Abramson, n 37 above.
58 Juries were abolished in Singapore in 1970. There is some evidence that jurors found it difficult to understand basic legal concepts, and were reluctant to condemn other people. Concerns about these matters played some role in the decision to get rid of the jury. See A Phang Boon Leong, ‘Jury Trial in Singapore and Malaysia: The Unmaking of a Legal Institution’ (1983) 25 Malaysian L Rev 50.
59 See Abramson, n 37 above, ch 2.
60 This problem may also have played some role in the decision to abolish juries in Singapore, a racially fragmented society, where there were concerns about strong group loyalties. See Phang Boon Leong, n 58 above. It was a major factor leading to abolition in South Africa in 1969; see MS Heubner, ‘Who Decides? Restructuring Criminal Justice for a Democratic South Africa’ (1993) 102 Yale LJ 961, 970–6. On the new South Africa, see also N Steytler, ‘Democratizing the Criminal Justice System in South Africa’ (1991) 18 Social Justice 141, 147–51.
is good to have standards of criminal responsibility framed in a language which is easily comprehensible to citizens. But the very independence of this value suggests that there may be other ways of achieving it than the complex and cumbersome institution of trial by jury.
It’s Good to Talk—Speaking Rights and the Jury

BURKHARD SCHÄFER* AND OLAV K WIEGAND†

1. DEMOCRACY OR TRUTH? ANATOMY OF A FALSE DICHOTOMY

This paper explores the leverage that a comparative and transdisciplinary perspective can bring to a normative theory of the trial process. In particular, we will attempt an analysis of recent proposals to reform the jury trial from the perspective of phenomenological theories of learning and interpretation. The aim is not just to contribute to the debate on the reform of trial by jury, which in the UK at least is of diminishing importance. Rather, we also hope to draw some general lessons from this case study for the normative analysis of the trial process from a comparative perspective. High-profile debates on law reform force legal systems self-reflexively to explicate their underlying principles and assumptions. This is in particular the case when, as part of these reform debates, taken-for-granted assumptions of municipal legal systems are contrasted with alternative solutions of foreign law. Phenomenology too takes at its starting point a self-reflexive approach to the lived world experience, and is therefore a good candidate for putting the pre-theoretical reflections that dominate the political debate on law reform on a sound theoretical footing.

In the US, public discontent with the justice system focuses on the jury.1 High-profile trials such as those of Simpson and Mendez called into question its compatibility with the ideal of the rule of law.2 Criticism of the jury is not, of course, a new phenomenon. Mark Twain wrote, ‘The jury system puts a ban on intelligence and honesty, and a premium upon ignorance, stupidity and perjury.

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1 See S Daniels and J Martin, Civil Juries and the Politics of Reform (Chicago, Ill, Northwestern University Press, 1995); RM Young, Using Social Science to Assess the Need for Jury Reform in South Carolina South Carolina L Rev 135.
2 L Griffin, ‘The Image We See is our Own—Defending the Jury’s Territory at the Heart of the Democratic Process’ (1990) 75 Nebraska L Rev 333.
It’s a shame that we must continue to use a worthless system because it was good a thousand years ago’. 3 And for Jerome Frank, ‘incompetent, prejudiced and lawless’ jurors apply laws they don’t understand to facts they can’t get straight. 4

In the UK, too, jury scepticism is a recurrent theme.5 Much of the criticism focuses on the question what ‘trial by peers’ can (or ought to) mean in a pluralist society.6 However, criticism of their reliability as a ‘finder of truth’, though not as pronounced as in the US, is also frequently voiced,7 especially in more complex and technical cases.8 It is this second kind of criticism, the question of cognitively optimal trial procedures, which is at the centre of this paper.

Even proponents of trial by jury often take for granted that, as a model of establishing the truth, it falls short of our cognitively best procedures. If this is the case, justifications for the use of laypeople in the criminal justice process must assume that the procedural rules of criminal trials (also) serve other values.9 The most frequently cited rationale for lay participation is that the jury embodies the ideals of participatory democracy, that it is a ‘little Parliament’.10 For a normative theory of the trial, this juxtaposition of (cognitive) truth values and other social and political values is problematic for a number of reasons. First, it is premised on a ‘thin’ and rather cynical notion of democracy. Democratic procedures are by implication seen as incapable of establishing truth. For if democratic procedures were efficient in establishing truth, they could not be the source of miscarriages of justice when used in the trial process. The metaphor of the ‘little parliament’ can help us to give a quick outline of the argument that we hope to develop. Is the activity of a juror at present, under current procedural rules, even remotely similar to that of a parliamentarian? One function of a British MP, and the one with the highest public profile, is to ask questions of the executive. The role of jurors, by contrast, is largely passive. Active interrogation of the parties, while technically legal in the UK, is actively discouraged. The reason for this, as we will see, is a misconceived epistemology of truth finding. If only, so to speak, the jury were a little parliament, then it could also better fulfil its task of establishing the facts. The search for procedures that are cognitively optimal for establishing truth, therefore, is not in conflict with democratic ideals, but, on the contrary, can improve them and give them a true meaning.

10 See in particular P Devlin, Trial by Jury (London, Stevens, 1956). The quotation is from 64.
Second, they open the door for cultural relativism and undercut the normative potential of comparative legal research into cognitively optimal fact-finding procedures. If it is a legitimate function of trials to serve political values, then different political systems will necessarily also create with necessity different models of procedure. To learn from foreign procedure, let alone transplant their concepts, is then impossible in principle.11 Historically, the potential to improve domestic law played an important role in establishing comparative law as an academic discipline.12 More recently, this initial enthusiasm has become subject to principled objections which challenge the very possibility of legal transplanta- 
tion and cross-jurisdiction learning. One aspiration of this paper is to show how many of these concerns can be taken on board, and nonetheless normative capital be gained from comparative legal analysis.

Third, the conflict between truth values and political values is potentially much more dramatic than the proponents of the argument may realise. It is not just that the pursuit of democratic ideals necessitates the inclusion of people who are unqualified, ignorant or cognitively ill-equipped, that is, people lacking relevant knowledge and experience. Rather, the very characteristics that make a person a good citizen for the purpose of democratic participation might make him a bad juror for the purpose of fact finding, demanding the exclusion of the most qualified jurors. The crucial concept here is the notion of ‘bias’. As the US experience on jury selection shows, procedural rules intended to provide an unbiased jury have the tendency to exclude precisely those jurors whom we would ideally want to sit in Parliament. This is not a mere accident but follows from the internal logic of trial procedure. What the requirement of an unbiased jury tries to rule out is a juror who convicts for no other reason than his disapproval of the political or ethical opinions of the accused. This can be achieved by excluding everyone who might have formed prior political (ethical) beliefs—and that means people who are deeply involved in the social and political life of their communities.13

The strategy taken in this paper is to question the explanatory value of the democracy vs truth dichotomy and similar juxtapositions. This will allow us to reject the ‘gap fill’ model of democratic values in the trial process. Quite the reverse, we will argue that it is misconceived epistemological ideas of truth finding and the procedural rules that implement them that prevent the jury from being both cognitively optimal triers of fact and participants in a democratic process. To do this, we have to establish a nexus between two aspects of jury

13 Nor is this problem restricted to juries. In the UK, the exclusion of Lord Hoffmann in the Pinochet trial because of his membership of Amnesty International means, if followed through logically, insisting that judges must be so politically and socially disengaged as to border on the socially dysfunctional.
trial which are normally discussed separately. As we will argue, the issues of 'juror activism' and 'prior knowledge' are intimately linked. In a nutshell, the danger of bias inherent in previous knowledge can be mitigated by allowing jurors more active participation in the trial process. If, therefore, we want knowledgeable jurors, we also must allow active jurors.

We will start by giving an extended account of the legal debate surrounding jury reform in the US. Following that, we will give an account of some contemporary theories of learning that shed a new light on the legal debate.

2. JURY ACTIVISM: THE US EXPERIENCE

While in the UK reform of the legal process centres on a more active role for the judge, and reform of the jury system generally means limitations on its use, a growing number of US courts are experimenting with juror questioning. Academic writing, drawing from cognitive psychology, educational theory and sociology broadly favours that move, and empirical evaluations appear favourable. Capello and Strenio in their summary of research findings on jury reform state that empowering jurors to ask questions increases their attentiveness and interest in the case, deepens their concentration on the presentation of the testimony, and heightens awareness of their fact-finding mission. It helps them to understand and remember facts and issues, clarifies the evidence and decrease the confusion caused by complicated facts, unfamiliar or technical terminology or the failure to hear or remember prior evidence:

As a result, jurors make better decisions. Their questions alleviate lingering doubts and uncertainties about the testimony, assist their memory and comprehension, and help them organise the evidence.

Arizona took the lead in jury reform, and in 1995 began encouraging the questioning of witnesses by jurors. In 1996, a blue ribbon commission created by the Judicial Council of California recommended adoption of the practice, finding that 'the benefits of juror questioning outweigh the largely speculative concerns'. Since then, most other states have followed suit, and at present only Nebraska, Texas and Mississippi explicitly prohibit the practice.

16 B Cappello and J Sterino, ‘Juror Questioning: The Verdict Is In’ (2000) 36 Trial 44.
The overwhelming majority of federal and state appellate courts leave the issue to the discretion of the trial court in principle although they insist on a number of procedural safeguards.

The US Courts of Appeals held in approximately 30 decisions that juror questioning lies within the discretion of the trial courts.\textsuperscript{19} While most of the federal courts of appeals acknowledge the benefits of the practice (especially in complex cases), they also express concern over the dangers. This is particularly apparent in criminal trials. In \textit{United States v Ajmal}, the district court encouraged questioning even though it ‘was not necessitated by the factual intricacies of this banal drug conspiracy, nor was it prompted by the urging of the jurors themselves’.\textsuperscript{20}

For opponents of this move, the practice violates the underlying logic of the adversarial process.\textsuperscript{21} To accept it is also to accept an inquisitorial system along continental European lines.\textsuperscript{22} Impartiality and passivity are in this view interdependent.\textsuperscript{23} Moreover, this transformation endangers the neutrality of the jury, which is central to the adversarial process.\textsuperscript{24}

In \textit{United States v Johnson}, Chief Judge Lay of the eighth circuit observed:\textsuperscript{25}

> The fundamental problem with juror questions lies in the gross distortion of the adversary system and the misconception of the role of the jury as a neutral factfinder in the adversary process. Those who doubt the value of the adversary system or who question its continuance will not object to distortion of the jury’s role. However, as long as we adhere to an adversary system of justice, the neutrality and objectivity of the juror must be sacrosanct.

And:

> Experience teaches that there are numerous situations in which it might cause actual unfairness—some so subtle as to defy detection by the accused or control by the judge. This argument applies with equal force to the practice of juror questioning, a practice fraught with potential unfairness of a subtle and psychological nature that is difficult to identify with particularity.

This point has been echoed by many other courts including the Court of Appeals for the Seventh Circuit in \textit{United States v Feinberg}: ‘[w]itness questioning by jurors is fraught with risks. If permitted to go too far, examination by jurors may convert the jurors to advocates, compromising their neutrality’.\textsuperscript{26}

\textsuperscript{19} Ibid, 442 with further references.  
\textsuperscript{20} \textit{United States v Ajmal} 67 F3d 18, (2nd cir, 1995), see also Neff, n 18 above, 446.  
\textsuperscript{24} Berkowitz, n 14 above, 147.  
\textsuperscript{25} \textit{United States v Johnson} 892 F 2d 707, 713 (8th Cir, 1989).  
\textsuperscript{26} \textit{United States v Feinberg} 89 F 3d 333, 336 (7th Cir, 1996); see also DeBenedetto v Goodyear Tire & Rubber Co., 754 F 2d 512, 517 (4th Cir, 1985).
The Supreme Court of Virginia expressed a similar concern in *Williams v Commonwealth*: ‘[j]uror neutrality will often appear to be compromised because the questions posed are often in the form of commentary on the evidence’.27

Proponents and opponents of a more active trier of fact often invoke comparative law observations that interpret these developments as a transplantation of civil law ideas into the common law context. This analysis is not restricted to academic writing. The Texas Court of Criminal Appeals concluded in *Morrison* that the threat to the adversarial structure of the judicial system posed by allowing jurors to question witnesses mandated that such practice not be permitted regardless of potential cognitive advantages.28 The court stated that ‘[t]he adversary theory as it has prevailed for the past 200 years maintains that the devotion of the participants, judge, juror and advocate, each to a single function, leads to the fairest and most efficient resolution of the dispute’. The court further noted Texas’s ‘staunch loyalty to adversarial principles’, a loyalty demonstrated by its ‘stated disapproval of the nonadversarial practice of trial judges’ examination of witnesses’. The court concluded that ‘[t]he benefits of allowing jurors to participate in soliciting evidence are far from clear and fade to insignificance in light of the perils presented to adversarial principles’.

At this point, it is helpful for the discussion to have a closer look at the historical background of the jury trial. 29 Quite often ‘cultural’ explanations in comparative law use a statist model of culture. Common law and civil law cultures are seen as solidified objects, a perception that emphasises their difference. By seeing cultures as constantly in flux, re-adjusting and changing, we can reinterpret some of the findings, not as a convergence between separate objects, but as a way in which internal tensions are resolved.30

As early as 1898, Maitland and Pollock observed that, despite the reservations of many Englishmen in admitting that the cornerstone of their justice system was a foreign import, the trial by jury was French in origin.31 Frankish royalty used local members of the community to collect information on local conditions. Called the *inquisitio*, citizens participated in it by informing, not deciding. It was this active model for the jury that was exported to England as a result of the Norman Conquest.32

In this respect, the early English juries strongly resembled their continental counterpart. At the time of William the Conqueror, juries consisted of neigh-

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27 *Williams v Commonwealth* 484 SE 2d 153 (Va Ct App, 1997).
32 Dann, n 15 above, at 1233.
bours summoned by the sheriff to settle a dispute by ‘declaring the truth’ on the basis of their own knowledge.\textsuperscript{33} Jurors were ‘integrated into the fabric of the proceedings’ and expected to investigate the facts if they did not know them.\textsuperscript{34} This included talking with the parties and amongst themselves about the case prior to trial.\textsuperscript{35} Contemporary comparative law classifications would see both the emphasis on ‘truth’ and the emphasis on prior knowledge as indicative of continental legal procedure, indicating the problems inherent in the use of these dichotomies.

As time passed, juries began to receive evidence in court. While jurors relied more and more upon trial testimony, and their role as investigators diminished, they retained their ability to ask questions of witnesses without the permission of the court. In fact, the jurors’ oath to get at the truth ensured that juror questions could not be prohibited by the judge.\textsuperscript{36}

Remnants of juror activism could still be found in the eighteenth century. However, ‘this transition, from the role of an active fact finder “integrated into the fabric of the proceeding” to that of a “passive fact finder” required to passively listen \[sic\] to and choose between the parties’ evidence was slow and incomplete’.\textsuperscript{37} The US inherited customs and practices surrounding English jury trials. Juror activism is therefore unsurprisingly reported from US courts in the eighteenth and nineteenth centuries. It was upheld as a juror’s right in \textit{Schaefer v St Louis and Suburban Railway Company} in 1895,\textsuperscript{38} and in 1907, North Carolina became the first state formally to permit juror questioning. After 1930, however, the present consensus that rejects jury activism seems firmly established.\textsuperscript{39}

3. PUTTING JURY ACTIVISM IN CONTEXT

As indicated above, part of the argument developed here is that the debate about juror activism is best understood in the wider context of ‘bias’ in the trial process. At least for a given unproblematic understanding of bias, lawyers from different legal cultures, and indeed lawyers and scientists, will easily agree that ‘biased’ inferences are detrimental to both truth and justice. The judge who convicts despite his better knowledge because he has something to gain from the conviction displays the same kind of undesirable behaviour as the scientist who falsifies test results because his sponsors pay him to do so. In both cases, we condemn their behaviour in part because it is detrimental to the truth. Legal

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\item \textsuperscript{33} Pollock and Maitland, n 31 above, at 138–43.
\item \textsuperscript{34} D Austin, ‘Why Jurors Don’t Heed the Trial’, \textit{National Law Journal}, 12 Aug 1985, at 15.
\item \textsuperscript{35} Pollock and Maitland, n 31 above, at 624–7.
\item \textsuperscript{36} JM Hassett, ‘A Jury’s Pre-Trial Knowledge in Historical Perspective’, (1980) 43 \textit{Law and Contemporary Problems} 158; J Hawles, \textit{The Englishman’s Right or a Dialogue Between a Barrister and a Jurymen} (Philadelphia, Penn, Thomson, 1798).
\item \textsuperscript{37} Dann, n 15 above, 1236.
\item \textsuperscript{38} \textit{Schaefer v St Louis & Suburban Ry. Co.} 30 SW 331, 333 (Mo, 1895).
\item \textsuperscript{39} J Abramson \textit{We, the Jury} (New York, Basic Books, 1994) at 5–22.
\end{itemize}

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systems typically provide for rules outlawing this type of behaviour. However, this consensus disappears once the question becomes one of which institutional set-ups are most apt to prevent more subtle and subconscious forms of prejudice and bias. Continental legal systems, for instance, view the transmission of written information to the judge prior to the principal proceedings as an important means of ensuring judicial impartiality. Away from the parties and free from the temptation to be swayed by their personal charm, a distanced, neutral and objective assessment of the situation becomes possible. Physical distance results in cognitive distance. For the UK lawyer, this argument is seriously flawed. The more the trier of facts knows about material aspects of the case prior to the proceedings, the more his mind will be closed to new information during the trial. Pre-information results in pre-judice. Two famous US trials show how at the same time when the US jury finally shifted towards being a totally passive trier of facts, it also became less knowledgeable. In Oliver North’s 1989 trial, all jurors who had seen North’s congressional testimony were excused. This effectively excluded jurors who were at all politically aware. In contrast, in Aaron Burr’s trial in 1807, only jurors who expressed a decisive opinion on the crime were disqualified. Chief Justice Marshall’s vision of the ideal jury in the Burr case differs markedly from the blank slate that courts favoured later. At least at that time, a distinction was made between pre-trial information and a predisposition against considering the facts.

While in the UK, there has been no corresponding move towards an increased jury activism, the situation is different for the single judge in civil proceedings. The Woolf report combines the two issues that we have discussed here, the question of pre-information and activism.

The first is Woolf’s recommendation that judges should have time to ‘pre-read the papers’. According to Jolowicz, this change means ‘a replacement of the judge who remains largely ignorant of the case he is to try until the case begins, by the judge who knows in advance, and is expected to know, a great deal about all aspects of the case’. Widespread opposition to Woolf’s proposals cites unsurprisingly the inherent danger of biased decision-making. This clearly mirrors the changes in attitude described above in US juries. Only if it is possible, to echo the words of Chief Justice Marshall, to ‘distinguish pre-trial information and a predisposition against considering the facts’ can Woolf’s
proposal be safely adopted without raising the danger of undesirably biased decision-making. The second point is the greatly increased scope of judicial activism during the trial process advocated by Woolf. That both proposals are presented as a package further supports our claim that pre-knowledge and activism are intimately interrelated. Once the importance of pre-information is accepted, it becomes necessary to address the danger of potential bias inherent in the availability of prior knowledge. One way of achieving this, as we will argue below, is by making the pre-knowledge explicit and subject to criticism in open dialogue. Activism, the participation in a process of question and answer, therefore mitigates the inherent danger of pre-knowledge. The cognitive arguments developed below that support this nexus can therefore be seen as an epistemological justification of the Woolf reform. However, unlike the main gist of the Woolf proposal, this justification is not based on efficiency arguments, but on the positive contribution the combination of pre-knowledge and activism has on the fact finding process.

We will now leave the historical analysis behind and develop a normative account of activism and pre-knowledge by the trier of facts, based on cognitive psychology. This will allow us to make sense of the historical developments described so far.

4. BALANCING KNOWLEDGE AND IMPARTIALITY

(i) Bias in Gestalt Psychology

A recurrent theme in the court decisions that are sceptical of juror activism is the use of a specific cognitive model in which the ideal juror is seen as a passive, empty vessel to be filled with the information, and only the information, given to him by the parties in the trial. In this way, academic analysis and court decisions that are sceptical of jury reform echo quite explicitly ideas of empiricist epistemology. We have argued elsewhere that this ‘co-evolution’ of empiricist epistemology and the passive/uninformed⁴⁷ trier of facts in Anglo-American jurisdictions, active/pre-informed trier of facts and idealist epistemology in continental Europe can explain some of the contingent differences between the two approaches to the trial process.⁴⁸ Here however, we will focus on the normative arguments that can be made in favour of juror activism.

In what follows we will construct an alternative, non-empirist account of activist triers of facts, based on ideas from phenomenology and cognitive psychology (Gestalt theory). Gestalt psychology is chosen as representative of ‘activist’ theories because it explicitly addresses the issue of bias and the role

⁴⁷ ‘Uninformed’ should be understood here in the sense of the Oliver North trial mentioned above, that is ‘free from potentially prejudicial previous knowledge’.

of prejudice in successful cross-cultural communication. We wish to direct attention to general aspects of learning, understanding and problem-solving that have, in our view, the potential to readjust the framework of the debate surrounding pre-trial information and jury activism.

Critics of the reforms described above see them as a move towards an inquisitorial system, where the jury finds new facts overlooked by the parties, and in the process loses its impartiality. Within our model, however, jury (and judge) activity is not understood as a way of fact finding, but fact interpretation, ie as a way of learning more about what the parties are trying to establish. The concept of ‘adversarial procedure’ is therefore understood more narrowly than in the above cases. In the adversarial process in this sense of the word, the parties alone decide which witnesses to call. By contrast, the inquisitorial systems of continental Europe give the judge the right to appoint expert witnesses in particular, and also have typically broader discretion in calling or rejecting ordinary witnesses. This distinction is not affected by the reform proposals discussed here and, in this sense, the parties remain the master of the proceedings. Once, however, they have decided which witnesses to call, the interpretation of their statements can in both traditions require active involvement by the trier of facts. Fact interpretation will be viewed as a process by which relevant background knowledge for judges and juries can be modified and supplemented in order for it to become applicable to the situation at hand. The primary means of carrying through that process is interactive, linguistic dialogue. The outcome (ideally) is a set of rational beliefs that must, conceptually, be distinguished from prejudices—the latter being beliefs that are derived from background knowledge without modification and adjustment to a particular situation. The word’s etymology (prae-iudicium) implies that the judgment in question was made before the particular facts of the situation were known.

From the perspective of cognitive psychology, background knowledge serves ambivalent purposes: on the one hand it may appear as a set of prejudices that block the assessment of new situations. If background knowledge remains unmodified, people interpret situations and information in terms of their previous experiences and habitualised decision procedures. On the other hand it is a basic fact of cognitive psychology that we can handle knives and forks because, and only because, we have had previous experience with knives and forks. The reason eating with knives and forks ‘just works’ is that it exemplifies a class of habitualised behaviour that does not require—at least in the general case—non-trivial adjustment to the particular situation.

Seen from a phenomenological point of view, the abovementioned ambivalence in the impact of background-knowledge on our judging and acting stems from what phenomenologists have termed the typicality of consciousness. A
particular type is the prelinguistic counterpart of what appears as an ‘empirical concept’ on the linguistic level. The meaning of objects and situations we encounter can only be grasped in light of a cognitive type by which we understand the collection of all experiences a subject has had with regard to structurally similar situations, actions or certain tools, etc.\(^{51}\) Examples include eating with knives and forks, certain situations in traffic, as well as everyday patterns of human behaviour and social interaction.\(^{52}\) Cognitive types are to be located on the pre-linguistic level, ie they initiate and guide our understanding by evoking pre-explicit expectations. Since the emergence of ‘cognitive sciences’ in the early 1980s the phenomenological theory of types has received strong support from the theory of prototypes.\(^{53}\) With this grounding in the psychology of type acquisition, we can now understand the abovementioned ambivalence as follows: on the one hand, types are essential for even most elementary cognition and behaviour in the world. Cognitive and practical development of a child is essentially development and differentiation of its typicality, and being an expert on X means having a highly differentiated typicality of X at one’s disposal.\(^{54}\) On the other hand, it is true indeed that acquired associations and habitualisation can be so strong that they even affect visual perception. Within Gestalt theory these influences have been investigated under the heading of ‘expectation errors’.\(^{55}\) About a decade ago people started to transfer results from the Gestalt theory of perception to a general theory of the dynamics of erroneous processes of action.\(^{56}\)

General ‘expectation errors’, ie unjustified application of cognitive types cannot, however, be avoided by selecting juries with a less differentiated typicality. Indeed, that would equate to choosing the less experienced driver for transporting risky chemicals, or looking for the less experienced fire-man to extinguish a burning nuclear power-station. Both cases are self-evident, and do not need further comment, although it is at the same time a common view that habitualised behaviour and ways of thinking may block the development of unconventional problem-solving.

From the point of view of Gestalt psychology, learning means acquiring problem-solving competence (within a certain field). Problem-solving, in turn, is considered as a process of transforming scattered manifolds of facts (an

\(^{51}\) Ibid, para 83.
aggregate) into an organic totality (a Gestalt) within which every fact and item has a meaning relative to other items and facts within the common whole.\textsuperscript{57}

For the issues relating to this study, the emphasis which Gestalt theorist have placed upon the role of explanation is the most important. We quote from a summary given by the Gestalt theorists Irvin Rock and Steven Palmer:

Although no one has explained how insight occurs, the Gestaltists did illuminate certain aspects of how understanding could be achieved. One way humans can do it, unlike animals, is by having something explained to them. \textit{Mere listening is not enough}, of course, for the listener must achieve the same cognitive structure as the explainer in order to become aware of the essential connections among the relevant facts.\textsuperscript{58}

(ii) \textbf{Gestalt Psychology and the ‘Learning Juror’}

While bias is therefore inevitable, we can overcome its negative consequences through a process of learning—if how our biases affect us is explained to us, we can transcend them. However, ‘mere listening’ is not enough for efficient learning. So how can the juror achieve the same cognitive structures as the explainer in a trial process?

A notion of common ground has been central to recent developments in linguistics and computational work on interaction in dialogues. These schools draw explicitly on the abovementioned ideas from phenomenology, and especially the ethnomethodological studies which followed the sociology of the life-world. In particular Clark’s work on grounding made it possible to gain new insights into a whole range of linguistic phenomena: from the way speakers develop a shared vocabulary and eliminate misunderstandings through pragmatic interaction, to more general theories of language change and language acquisition.\textsuperscript{59} This gave rise to a number of studies which emphasised the interaction of culture, meaning and understanding.\textsuperscript{60} Cultures came to be understood as a set of assumptions which no longer needed to be questioned. New information is processed against his cultural background. Crucially though, this does not in any way rule out the possibility of transcending these cultural boundaries. On the contrary, presuppositions are seen to play a crucial role in the process of agreeing shared meanings between speakers who were initially using contradictory conceptual schemes.\textsuperscript{61}

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\item \textsuperscript{57} J Ceraso, ‘Perceptual Organization Affects both the Learning and Integration of Object Properties’ in Rock (ed), n 52 above, 113.
\item \textsuperscript{58} I Rock and S Palmer, ‘The Legacy of Gestalt Psychology’ (1990) 263 \textit{Scientific American} \textbf{48}.
\item \textsuperscript{59} HH Clark, \textit{Using Language} (Cambridge, Cambridge UP, 1996).
\end{itemize}
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Clark’s research made an important contribution to our understanding of second language acquisition, and the changes in conceptual frameworks when exposed to stimuli from a different (cultural) context. Conceptual distinctions and classifications can emerge through a process of negotiation and adjustment which is aided, rather than undermined, by the preconceived ideas of its participants. Prejudices, ultimately, constitute cultures and transgress them.

5. THE JURY AS VICARIOUS LEARNER

In the debate so far, one of the problems proponents of reform face is that their arguments for the legitimacy of jury reform are always also a criticism of the existing system. The stronger the argument, the weaker the justification for past decisions. Quite often, this is turned against them as an apparent contradicatio ad absurdum. If it is true that people can only gain understanding through active exchanges, then all decisions, for centuries past, have been flawed. As this is patently absurd, it must be possible to learn in a non-communicative way. Following on from this, some commentators conclude that the argument for increased jury participation must be wrong. We will now try to show how passive juries and judges learn under the present system in common law jurisdictions. Previous attempts to use learning analogies to promote the idea of interactive juries have sometimes likened the present situation to that of a student in a lecture. The rules of the courtroom are seen as imposing additional constraints on this ‘learning environment’. These specific constraints reduce what is at the best of times an unsatisfactory teaching and learning experience into a travesty of learning. While it is difficult enough to teach students through lectures alone, to teach students with hugely diverse, but otherwise unknown, intellectual abilities and knowledge of a wide range of subjects without supporting written material seems impossible indeed. The dialogical, adversarial way of presenting information is cited as an additional handicap for this form of learning. However, we believe that this criticism not only is exaggerated, but also does not sufficiently acknowledge the benefits for learning that can be derived through an adversarial setting. Recent research on the ‘vicarious learner’, the silent observer of dialogues in class, indicates that, far from being a simple passive recipient of information, he actively (re)constructs the information exchanged in the dialogues in a way very different from that of a student

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who is merely lectured to.\textsuperscript{66} In the same way, the present passive jury is not just the equivalent of a student in an incomprehensible lecture.

Learning can occur not only through participation in dialogue, but also through observing the discussions of others. Research on ‘vicarious’ learning has found both cognitive and social benefits.\textsuperscript{67} Studies comparing learning in groups that were exposed to dialogical exposition to those who were not indicate a number of interesting differences. Many of the best learning dialogues involve making explicit inferences which would normally remain unspoken. Assumptions are made by the participants which often do not appear to be shared or to be part of the common ground needed for understanding.\textsuperscript{68} By following through a logical process of derivation, the authority of the tutor is replaced by the authority of reasoning norms that can be explicitly discussed and agreed. With the development of the common ground being thus relatively out in the open, it seems that derivational dialogues are well suited to allowing overhearers to follow the process vicariously.\textsuperscript{69} This is however, exactly the cognitive skill which we would want ideally in a jury—making decisions which are swayed, not by the reputation of the council for the parties, but by their arguments. Now we can see how a passive jury necessitates adversarial proceedings (and not the other way round, as normally assumed). In one crucial aspect, the above analogy that likened trials to lectures is wrong. In most lectures, one person talks and the rest listen. In trials, two parties argue and the rest observe.

6. EVALUATION AND INTERPRETATION

We can now draw a number of tentative conclusions from our observations. The fixed oppositions of the inquisitorial and adversarial systems give at best an incomplete, at worst a misleading, explanation of the proposed reforms in the US (and to a lesser extent the UK). This is due partly to the fact that the very categories of ‘inquisitorial’ and ‘adversarial’ are misleading when applied to legal procedures in their entirety. This allows us analytically to distinguish certain features in continental jurisdictions which coincide with, but are conceptually independent from, the inquisitorial features that are also present.


\textsuperscript{67} McKendree and Mayes, n 66 above, 161–4.

\textsuperscript{68} Clark, n 59 above.

\textsuperscript{69} J Lee, F Dineen and J McKendree, ‘Supporting Student Discussions: It Isn’t Just Talk’ in D Darina and I Stanchev (eds), Proceedings of IFIP WG 3.3 ‘Research on Educational Applications of Information Technologies’ (Sofia, VIRTech, 1997) 124.
Instead, we argued that the issue at hand is a distinction between two kinds of learners: the active jury which learns through a process of grounding and the passive jury which can be identified as a vicarious learner. While grounded learning is possible in both adversarial and inquisitorial systems, the vicarious learner requires presentation of material in a dialogical setting which will typically be adversarial.

The fact-finding process in all legal systems is faced with a tension between two concepts. Reliable inference demands two things of a decision-maker: that she be competent, informed and knowledgeable, and that she be unbiased. At least with a certain understanding of ‘bias’ or prejudice, these two requirements are incompatible: the least prejudiced person is the person with the least amount of previous knowledge or convictions. We saw how, over the centuries, common law began to emphasise the requirement of ‘unbiased’, while civilian jurisdictions emphasised the requirement of ‘knowledgeable’. The question of previous knowledge bears directly upon the question of activism. The more previous knowledge a legal system allows, the more important it becomes that the inherent danger for prejudice is mitigated by an active interchange that can challenge and transform pre-judgment through systematic doubt. Conversely, a passive trier of facts relies on an adversarial presentation of evidence. This is the concept of the vicarious learner that, so to speak, inverts the traditional understanding of the relation between adversarial system and passivity. In our analysis, the passive jury is not a precondition of the adversarial process. However, an adversarial, dialogical presentation of evidence is a precondition for successful passive learning. This means that it is possible to transform vicarious juries into grounded juries without changing the nature of the procedure from adversarial to inquisitorial. As Damaska has convincingly argued, cultural differences that underpin these different paradigms might make it impossible to transplant features which change the very nature of the respective procedures, however cognitively advantageous they may be. However, if our analysis is correct, then the introduction of jury activism is conceptually and historically compatible with the adversarial process. Empirical findings about the respective cognitive advantages therefore translate directly into normative proposals for jury reform. And, as the overwhelming majority of empirical studies from the US indicate, active jurors indeed learn more efficiently than vicarious ones. A final line of justification for juror activism can only be indicated here. The pre-knowledge-rich but active juror also fits the Bayesian analysis of rational reasoning under uncertainty. In the Bayesian approach, subjective probabilities are used as prior probabilities in situations where objectively determined distributions are missing. This applies for a wide range of evidence types. We intuitively feel, for instance, that it is highly relevant in an arson trial if it can be established that the defendant moved flats seven times in a year, and each time the flat caught fire soon after. That we have no reliable statistics that correlate domestic fires and moving from flat to flat does not prevent us from drawing inferences on the basis of this information. This means that the reliability of our
conclusions depend to some extent on subjective preknowledge and its reliability. In response to this problem, Bayesians interpret the process of evidence evaluation as a dynamic process of belief revision, in the process of which the subjective probabilities become more and more accurate. For the blank slate model, this is problematic in at least two respects. First, prior probabilities look suspiciously like a prejudgement of facts that should only be established by the parties. Secondly, a system that systematically tries to exclude parties who have prior information will necessarily produce people whose prior probabilities are going to be unreliable. The continental system provides a less problematic application of the Bayesian approach, in that the emphasis on the importance of prior knowledge will increase the reliability of the prior odds, while the requirement to make this preknowledge explicit can provide for a system of belief-revision sympathetic to the belief-revision interpretation of Bayes.70

The slow, evolutionary change of jurors from witnesses of the facts to judges of the facts reduced juror activism. The premium on impartiality became a mandate for ignorant jurors. The change from an active to a passive jury coincided with the rise of empiricist epistemology in England, first through Bacon, later through the thinkers of the Enlightenment, and John Locke in particular. The epistemological model they favoured was that of the mind as passive ‘blank slate’ on which sense data are impressed. Facts in this model speak for themselves. Previous information is not only unnecessary, it positively endangers a true impression of the sense data in the mind of the observer if the observer uses it actively to interpret this information. This epistemological theory was supplemented by an ideology that was essentially sceptical of tradition and perceived knowledge, and instead placed a premium on direct, personal experience. The ideal truth-seeker in this model approaches each problem (so to speak) from scratch, making the necessary experiences himself and separating carefully the process of fact-gathering from the process of judgment. This understanding of science and rationality fits ideally with a model of the jury as essentially passive, taking in all the information presented to them, refraining from deliberation even amongst themselves before all the evidence has been heard and only then coming to a conclusion. On the continent, the opposing school of idealism, in contrast, always assumed an active role for the observer in creating her model of the world. We are always in an interpretative context which, in Hegelian terms, we may dialectically develop further but never totally leave behind. This corresponds to a model of the legal fact-finding process in which previous knowledge is not only acknowledged but encouraged, provided the holder of this knowledge enters into the dialectical, active process of critique.

To this extent, we do indeed have a culturally determined notion of the role of bias and knowledge. However, the ideal of the ‘blank slate’ is unattainable, and more effective learning takes place in a setting that acknowledges the role

of prior knowledge. In pursuit of a misunderstood and ultimately empty ideal, efficient safeguards for the reduction of prejudice, ie interactivity, was abandoned. Once this path was pursued, the more restrictive attitude towards previous knowledge necessarily followed. This however conflicted with the normative reason for having trial by jury in the first place. The underlying rationale for juries holds that jurors can contribute valuable knowledge about the community’s attitude to the crime without being swayed by prejudicial preconceptions of the defendant.  

The search for a local but impartial jury highlights the inherent tensions between knowledge and impartiality. An understanding of jury impartiality that can be achieved only by disqualifying the best-informed members of the community does not inspire confidence in the reliability of jury verdicts. The decline in public perceptions of the legitimacy of the jury represents the cost of the shift to an ideal encompassing emptiness.  

The insistence on an impartial jury creates a false opposition between well-informed jurors and fair-minded jurors. A founding ideal of the jury system is that the judgments it renders should be informed by life experiences, but the increased emphasis on the juror as a blank slate has undermined the jury’s role as the ‘conscience of the community’. Following Abramson, what is proposed here is a more contextual analysis of impartiality in order to ‘insulate justice from popular prejudice and yet leave it in the hands of the populace’. However, to solve the tension between knowledge and prejudice, this knowledgeable jury also has to be an active jury. Jury activism therefore, to conclude, does not constitute a shift from an Anglo-American adversarial model to an inquisitorial one, but rather reconnects the jury to its past, by shifting the balance between its conflicting rationales. This strengthens the democratic function of the jury as fact finder based on local knowledge, without compromising its function as unbiased fact finder.

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71 Griffin, n 2 above, 229.
72 Abramson, n 39 above, 22.
Democratic Accountability and Lay Participation in Criminal Trials

TATJANA HöRNLE*

1. INTRODUCTION: JURIES AND LAY JUDGES IN ENGLAND AND IN GERMANY

Which conditions must a court fulfil to rule legitimately about the defendant and his or her offence? To what degree are the topics ‘democratic accountability’ and ‘just and fair trials’ related? Specifically, is lay participation an essential or at least an important element—or is it merely a matter of historic developments and conventions? Lay participation is a central element in the organisation of criminal trials in the United Kingdom—both in jury trials and in the magistrates’ courts. Although jury trials are rare events and the vast majority of sentences are not based on juries’ decisions, the existence of juries plays a crucial role in the theoretical framework for criminal trials. The introductory summary of our workshop bears witness to that by stating that one of the three conditions thought crucial to ensure legitimacy (besides separation of powers and publicity of the trial) is the involvement of laypeople. The words ‘involvement’ and ‘participation’ point to a modus in which professional judges and lay persons co-operate. One could take the concept of democratic accountability further and argue that a truly democratic model should rely on lay judges only. Magistrates’ courts could be seen as a model of democratic jurisdiction. However, I will not pursue this line of thought. The status quo in England is not generally praised for the outstanding quality of the magistrates’ work. Rather, criminal lawyers criticise their lack of professional training. I am grateful to Dudley Knowles and Victor Tadros, whose comments on this paper encouraged me to rewrite substantial parts of a previous version of this chapter.


* I am grateful to Dudley Knowles and Victor Tadros, whose comments on this paper encouraged me to rewrite substantial parts of a previous version of this chapter.
criminal trials (the most serious cases and those with difficult evidence procedure) in the hands of lay judges without the guidance of a professional judge. Therefore, a mixed system including lay persons and professional judges could be recommendable or even necessary.

Before I analyse the ‘democratic accountability’—approach, a brief description of the German court system is useful. Lay participation is not mentioned in the German Constitution (the Grundgesetz). The Supreme Court permits the involvement of lay judges in different court branches; however, it does not demand such inclusion. On the level of court organisation, the German legal system is still strongly influenced by the idea of lay participation. Juries were abolished in 1924, but criminal courts today include lay judges presiding at the trial together with the professional judges (they are called Schöffen). Only minor offences before the lower courts (Amtsgerichte) are heard by a single professional judge. For any other offence, the lower courts sit with two lay judges and one professional judge. In the higher courts which deal with serious crimes (Landgerichte) two lay judges and two or three professional judges decide. Lay judges have similar rights and duties to the professional judges. Usually they remain passive in the courtroom, but they can and sometimes do ask questions. Lay judges participate in the adjudication of guilt and in sentencing decisions, and their vote is crucial: any decision to the defendant’s disadvantage requires a two-thirds majority. Thus the lay judges can outvote their professional colleagues. One has to add: they could in theory—in practice, the professional judge will most likely use his or her authority to suppress any such idea through the course of the deliberative process after the judges have retreated to their room. Many professional judges perceive the need to co-operate with the Schöffen as tiresome, and they have been successful in restricting their influence. For example, lay judges are denied the opportunity to read the court files, while for the professional judges a thorough examination of the files is essential when preparing for a trial. Also, lay judges do not participate in the drafting of the written verdict or sign it. But despite such discrimination between professional and lay judges in the day-to-day work of the courts, German law allows lay judges an influential role.

6 S 25 Gerichtsverfassungsgesetz.
7 S 28, 29 Gerichtsverfassungsgesetz.
8 S 76 Gerichtsverfassungsgesetz.
9 S 263 Strafprozessordnung.
There is little support for lay participation among German criminal theorists, however. There are voices relating the work of lay judges to democracy. But these are mainly to be found in brochures produced for the benefit of lay judges\(^\text{11}\) and occasionally in political speeches praising the merits of our judicial system. Within serious theoretical work, enthusiasm for lay participation is rare. A colleague from Munich University concludes that the only reason for retaining the institution of lay judges is the fact that we already have them.\(^\text{12}\) Hardly anybody sees lay participation as an important feature of democracy or as an essential element for the justification of criminal trials. For many decades writers have either half-heartedly defended lay participation or have proposed its abolition.\(^\text{13}\)

2. THE STRONG CLAIM: LAY PARTICIPATION IS A NECESSARY CONDITION FOR LEGITIMATE VERDICTS

If one examines lay participation in criminal trials, it is helpful to differentiate between two claims: first, one could defend the *strong claim* that lay participation is a *necessary condition* for a *legitimate conviction* (or a legitimate acquittal) in any democratic state. According to this view, lay participation is crucial as the ‘democratic backbone’ of court proceedings in that it *supports and authorises the outcome*. This would be to suggest that a trial without lay participation would pose a serious problem because the final decision would lack a proper democratic foundation.\(^\text{14}\) Or a *weaker claim* could be made, according to which lay participation is *useful or valuable*—but not a necessary condition for the legitimacy of the verdict. Let me start with the strong claim.


\(^\text{14}\) The strong claim does not have many advocates in Germany; it is mostly rejected: Volk, n 12 above, 373–4; Windel, n 13 above, at 295; P Rieß in P Rieß (ed), *Die Strafprozeßordnung und das Gerichtsverfassungsgesetz: Großkommentar, Band 1* (25th edn, Berlin and New York, de Gruyter, 1999), Einl. I Rn. 30; U Benz, *Zur Rolle der Laienrichter im Strafprozess* (Lübeck, Schmidt-Römhild, 1982) 208–9.
Democratic Accountability—Why Only in Some Trials?

One could argue that lay participation must be guaranteed as an indispensable requirement for legitimate verdicts in a truly democratic state. To make this argument, however, it would have to be explained why for example in the English system lay participation is not mandatory. Why should the individual defendant be able to decide whether to demand or to refuse a trial before a jury? If a trial before a professional judge without lay participation is incompatible with the principle of democracy, how could procedures without a jury be reconciled with the strong claim? In Germany, the participation of lay judges is not a matter of the defendants’ choice. Lay participation is necessary in trials dealing with more serious accusations, minor cases are heard by one professional judge. This kind of dividing line between trials with and trials without lay participation is not necessarily an argument against the strong claim that democracy requires lay persons to decide in criminal trials. If the strong claim were supported in principle, one might nevertheless limit lay participation to serious cases, eg to decisions of great consequences in terms of sentence severity. If, however, the defendant has a choice even when confronted with serious indictments, this suggests a different explanation. The idea is that one can involve ‘one’s peers’ or choose not to do so. Behind this option stands the defendant’s personal interest in enhancing her chances of acquittal; lay participation serves as a protective mechanism. From this perspective, a ‘democratic backbone’ would be needed for convictions; acquittals without lay participation would not pose difficulties. The demand for lay participation as a device to protect the rights and interests of the defendant has historical roots to which I will turn next.

The Historical Background

The historical support for the claim that ‘lay participation is necessary to protect defendants’ is impressive. For someone living in Germany in the nineteenth century, the combination of ‘democracy’ and ‘lay participation in criminal trials’ was immediately convincing (at least for the nineteenth-century liberal). It was part of the fight for a democratic society to demand lay participation in the criminal justice system which did not exist at that time. The draft of a German constitution proposed by the assembly in the Paulskirche in Frankfurt, dating from 1848, included this demand. The introduction of lay participation into the

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15 If the defendant pleads guilty, there is no jury trial (see J Sprack, *Emmins on Criminal Procedure*, 9th edn, Oxford, Oxford University Press, 2002, 246). For offences ‘triable either way’ he can opt to be tried by a jury or accept a summary trial at the magistrates’ court (ibid 110). For the difference in Scottish Law, see P Duff, ‘The Defendant’s Right to Trial by Jury: A Neighbour’s View’ [2000] *Crim L Rev* 85.
Organisation of the Courts Act (Gerichtsverfassungsgesetz) in 1877 was seen as a victory of the democratic movement.\(^{16}\)

But what does the fact that historically a relationship was drawn between ‘lay participation’ and ‘democracy’ tell us? Does this prove a necessary link between the two? This is not the case if one takes a closer look at the matter. The goals assembled under the heading ‘democracy’ were aimed at overcoming deficiencies in the organisation of state authority. The demand for lay participation can be traced back to obvious problems with the judiciary. Judges in the nineteenth century were dependent servants of the ruling sovereign. They did not closely resemble the modern image of a judge, nor did their position resemble that of a modern civil servant. Their position depended entirely on the monarchs’ administration and on their goodwill. If a verdict did not please the monarch or influential persons in his environment, they could remove the judge from office and income or inflict criminal punishment on him.\(^{17}\) Under such conditions, it is not surprising that judges were attentive to the wishes of the royal court. The demand for lay participation forcefully proposed in the nineteenth century must be seen against this background. It was a direct response to the unjust and unfair treatment that defendants had to expect from professional judges. Lay participation was a means of protection against arbitrariness and despotism exercised by sovereigns through judges who were dependent on them.\(^{18}\)

A crucial conclusion that was drawn from the nineteenth-century abuses was that the judiciary had to be organised as a third power distinct from other branches of state authority. The ending of the unity of monarchs’ administration and the judiciary and the implementation of a separation of powers are of central importance for an enlightened state. Independence of the judiciary is firmly entrenched in every modern constitution. The historical movement for lay participation fought for a state organised according to the principles of a Rechtsstaat. This goal has been reached in Western European countries. Independence of judges from direct interference and personal, financial independence have been achieved. Consequently, general distrust of professional judges, based on deficiencies of the state organisation, is no longer warranted. Thus, the need to control and restrict professional judges, which historically was the motivation behind the campaign for lay participation, no longer exists.\(^{19}\)

The view that defendants have to be protected against arbitrary decisions by professional judges has lost credibility. Of course, judges remain fallible, that is, prone to individual biases and prejudices like any human being making decisions. But such weaknesses can hardly be eliminated by shifting responsibility to jurors and lay judges. It is unlikely that they will be less susceptible to biases and

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\(^{16}\) For the historical development, see H Rüping, ‘Funktionen der Laienrichter im Strafverfahren’ [1976] Juristische Rundschau 269–70; Benz, n 14 above, 44 ff.; Spona, n 10 above, 4 ff.

\(^{17}\) For the position of judges in 19th-century Germany see Spona, n 10 above, 14 ff.; Benz, n 13 above, 44.

\(^{18}\) Spona, n 10 above, 17; Benz, n 14 above, 208.

\(^{19}\) Rieß, n 14 above.
prejudices. On the contrary, experience can foster a more critical stance, whereas lack of experience and education are not conclusive to self reflection. Lay people are in some instances more competent to evaluate factual circumstances—if they are closer to the social background of offenders (and victims) than many judges are. But a gain in terms of social experience is not necessarily a gain in terms of unbiased judgement. It may be in the interest of the defendant to let peers with ‘friendly biases’ decide. But this cannot be a normative criterion as long as the search for truth remains a central objective of criminal trials. It must be sufficient that professional judges are insulated as much as possible against external pressure. Remaining imperfections on the level of individual psychology deserve attention when decisions about training and recruitment of judges are made. Rather than trying to compensate for the individual biases of professional judges with lay persons’ biases, improvements should be sought with respect to the composition of the judiciary. This has to begin with adequate scholarships and funding to attract a wide spectrum of law students. Furthermore, access to judicial positions has to be organised in a way to admit a diversity of social backgrounds and experiences. Insofar as this is not achieved, it is understandable that criminal lawyers favour lay participation as a short-term remedy. Within a judicial system dominated by professional judges with somewhat homogenous personal backgrounds, lay participation might be seen as a counterbalance. However, if one thinks about the organisation of criminal trials from a theoretical perspective, it is doubtful whether this is the best solution in order to minimize biases and prejudices.

(iii) The Meaning of Democracy Today

The question remains whether—*independent of the historical background*—the moral significance of lay participation could be derived from the principle of democracy. As I have just argued, that is not the case if one uses the term ‘democratic movement’ as a general term for the nineteenth-century efforts to fight the evils resulting from the absolute power of monarchs. In this general sense, the democratic movement encompasses claims which belong to the notion of *Rechtsstaat*, like the separation of powers. But perhaps the necessity of lay

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20 For this point, see B Schäfer and O Wiegand, ‘It’s Good to Talk—Speaking Rights and the Jury’, this volume; M Redmayne, ‘Principled Jury Reform’, this volume.

21 If one thinks about the necessity to control state power which goes astray it would not be the judiciary that immediately springs to mind in modern times. Abuse happens, but mainly in the administrative branch of state power. In Germany, corruption has been a topic for discussions about implementing better systems of control. Whether lay participation (eg in decision-making bodies composed of civil servants and lay persons) would be a remedy cannot be discussed in detail here. It seems doubtful. The 19th-century notion that decent citizens control professional judges assumed diverse interests. With respect to corruption, it would not be likely that control could be achieved through lay participation. The inducement to obtain some money “on the side” works for lay persons as well as for civil servants.
participation in criminal trials could be derived from the principle of democracy in a more contemporary sense? One could argue that in a truly democratic state decisions (or at least important decisions) need democratic authorisation. It would not matter if the trial’s outcome were a conviction or an acquittal. Lay persons would not participate in the defendant’s interest but be necessary in the public interest—to guarantee the democratic foundation for criminal punishment, because criminal punishment is a central exercise of state power.

This thesis leads to two questions. First, can democratic authorisation be achieved through lay participation? Secondly, does every important question require immediate democratic legitimation? I will not dwell extensively on the second point as I hope to show that the ‘strong claim’ can be refuted because lay participation is not sufficient to make the decision a ‘democratic decision’. It would be too simplistic to equate lay participation with a ‘democratic’ trial. It is not obvious that the mere involvement of a few persons without legal training makes the outcome more democratic. If ‘democracy’ is to be more than a nice catchword, one needs to pay closer attention to the requirements stemming from this principle. Unfortunately, it is not possible to start with a clear definition of ‘democracy’. The word is used in an ambiguous way. As in the nineteenth-century discourses, in contemporary political debates it is sometimes introduced as a general heading which circumscribes a widely shared picture of a ‘good state’ in contrast to totalitarian states. Democracy in this extensive sense encompasses values essential for a satisfyingly organised society (liberty, equality, fairness, etc).22 However, such a rich picture of the ideal ‘democratic state’ is not very useful for analytical purposes. At least some of the ambiguity can be reduced if the term ‘democracy’ is used to describe certain organisational structures and not a bunch of values that distinguish legitimate from totalitarian states.

The starting point for analysis is the common translation of the Greek words *demos* and *kratos*, that is ‘the rule of the people’. However, this yields a rather vague starting point because it remains open what kind of ‘rule of the people’ is required to call a state ‘democratic’. ‘The rule of the people’ might result in either plebiscitarian or representative democracy. At first glance, lay participation could be a way to implement plebiscitarian democracy into the criminal trial. One might argue that both in a jury system and in the German system of lay judges ‘the people’ themselves participate directly and are responsible at least for finding the defendant guilty and perhaps for the sentence as well (as is the case in Germany). It is, however, doubtful whether laypeople in the deciding body can secure plebiscitarian democracy. Can the term ‘the people’ really be used to describe the two lay judges sitting on the judges’ bench or 12 (or 15) jurors? The answer must be no. It is only a small number of individuals who

decide, not an assembly which could plausibly constitute ‘the people’. It can be left open who ‘the people’ are (all citizens in the country? members of the ‘local community’, whatever that is?). In any case, a plebiscitarian mode of democracy requires more than the inclusion of a few lay persons. One would need a majority opinion based on a voting procedure open to any member of the relevant group.

Consequently, if the participation of a very limited number of lay persons is an instrument of democracy it can only be as an instance of representative democracy. This leads to the question what makes lay judges or jurors representative? To answer this, one might suggest similarity. Those sitting in court represent, one could argue, all citizens if their opinions and their social backgrounds resemble a cross-section of society as a whole. The assumption is that those constituting ‘the public’ have to accept decisions as ‘rule by the people’ provided that the actual decision-makers are ‘like themselves’. Problems result if similarity cannot be achieved. The available data for Germany suggest that the social characteristics of lay judges are comparable to those of professional judges, but are not representative of the population as a whole.23 But even if this difficulty could be overcome, a second problem remains: the problem of numbers. Even if all lay judges assembled for example on the court lists for the state of Bavaria provide a representative sample of the Bavarian population as a whole, the two persons sitting in an individual case do not. If Mr Hinterhuber and Ms Niedermair decide, one cannot claim that they actually represent the community as a whole. They may have found their way onto the list of lay judges because of their profession, age, race and gender, after it has been determined that in these characteristics the list mirrors the ‘Bavarian people’. In making their decisions, however, Mr Hinterhuber and Ms Niedermair will rely on their personal, idiosyncratic view of the criminal justice system and the world in general. Democratic legitimation through similarity presumes that those deciding (not always, of course, but with a certain degree of reliability) take the ‘typical stance’ which those they represent expect them to take. Two lay persons sitting on the judges’ bench do not reliably represent ‘the sovereignty of the people’. The similarity model provides a rather weak foundation for the claim that lay participation is necessary, and that would be the case even if great efforts were made when selecting the pool of jurors or lay judges. A representative decision would require a much larger number of decision-makers for each individual case. With 12 or 15 jurors, the situation is somewhat better than with two lay judges. But even then, the opinions of 12 or 15 women and men cannot yield a truly representative picture of what ‘the people’ would opt for in any particular case.

23 Spona, n 10 above, 92 ff; Volk, n 12 above, 375. It would be hard to achieve a more careful selection of lay judges: the mode in which they are chosen in Germany is complicated and not suited to establishing a pool of lay judges closely mirroring society: see Windel, n 13 above, 301 ff.
The deficiencies of the ‘representation through similarity’—model may invite the conclusion that a stronger democratic foundation is necessary. The classical picture of representative democracy looks like this: those who are represented have the right to elect those representing them. Even if voters are surprised by acts of their representatives, they have made a choice and they may express disapproval in future elections. ‘Representation through vote’ could be applied not just to Parliament, but also to the judicial branch, as it is, for example, in the United States. From this point of view, combining professional and lay judges only disguises the lack of genuine representative democracy as long as both groups and most importantly, professional judges are not elected by the people. To implement a ‘representation through vote’ approach could also have another substantial advantage. It could provide democratic legitimation without the drawback of having people exercising judicial powers who lack legal training and sufficient experience. Voters could choose from qualified lawyers.

However, this would inevitably create conflicts between two important goals: ‘democracy’ on one hand, Rechtsstaat on the other hand. For every gain in terms of democratic legitimacy, a toll in form of judicial dependence would need to be paid. Elected judges are not independent. They have to take into account what the public thinks about specific sentences if they wish to have a stable and lasting career. A prudential judge needs to anticipate public reactions and to act accordingly. One might argue that adapting outcomes to the perceived wishes of the public is the essence of democracy. However, this is problematic in criminal trials, especially given the dominant ‘get tough on crime’ mood displayed by the population or at least by the media. As a judge would not be in a position to determine actual opinions in the population, he or she would need to rely on the popular media to obtain an approximation of ‘the public’s needs’. At least occasionally a judge who depends on her prospects for re-election would be tempted to modify a sentence against her professional judgement. The danger this poses is substantial. Judicial independence as part of the Rechtsstaat is too important to sacrifice for a model of representative judges. This point leads back to a question which I asked at the beginning of this paragraph: does every important decision in a democratic state require direct democratic legitimation? With respect to the tension between the goal of democracy and the goal of Rechtsstaat, there are reasons for limiting democratic involvement to questions concerning the content of abstract laws and rules. Decisions concerning individual cases, especially criminal cases which stir the emotions, are better left to professional judges who are emotionally detached and independent from public pressure.

To conclude this section: lay participation in criminal trials is not a version of decision-making according to the rules of either representative or plebiscitarian

24 In Germany, the Socialist parties at the beginning of the 20th century opted for elected judges in order to get the proletarian perspective into the courts which were markedly anti-socialist: Ruping, n 16 above, 270.
democracy. This refutes the strong claim that the outcome of a criminal trial is only legitimate if there is a ‘democratic backbone’. Convictions or acquittals do not lack legitimacy if they are imposed by professional judges without lay participation.

3. THE WEAK CLAIM: LAY PARTICIPATION IS VALUABLE

Lay participation is not a necessary requirement for legitimate verdicts because democracy cannot be achieved in the criminal trial; it is not possible to justify the outcome by the significance of democracy. However, weaker claims about appropriate procedures remain to be examined. One could argue that lay participation has merits, and therefore that it should be part of a decent criminal justice system, albeit that the principle of democracy does not demand it for legitimate outcomes. Involvement of lay persons either may be useful for the criminal justice system in a functional way or it might promote or express normative values. Lay participation may serve ends which are valuable and which may justify its retention. Democracy reappears—not to support the trial’s outcome but as an argument why certain modes of organising trials may be more in accordance with a normative framework than others.

(i) Increased Public Trust

German criminal lawyers who argue in favour of lay participation typically point to beneficial effects, not for individual actors, but for the legal system. The inclusion of lay judges is said to enhance the public’s trust in the criminal justice system.25 At first sight, this may sound convincing. But, like many arguments pointing to social psychology, it is hard to substantiate. How are we to substantiate the alleged increase in public trust? One possibility would be to count on the positive experiences of lay judges, which they communicate to their families, friends and neighbours, etc. However, there are objections to the hypothesis that personal participation and increased public trust are linked. Serving as a juror or lay judge will sometimes be frustrating, which will influence the individual’s perception of the criminal justice system and consequently the narrative which the juror or lay judge communicates. Furthermore, it does not seem likely that public perceptions of the criminal trial are simply products of such personal accounts. Stories lay judges may spread at family celebrations or in their local pubs are less influential than the picture of criminal trials portrayed in the media. Public trust in the legal system depends to a large extent both on the media coverage of real trials and on fictional crime stories. In Germany, the majority of people do not even know about the existence of lay

25 Schreiber, n 10 above, 952. See Rieß, n 14 above, for a more sceptical view.
judges. But even if many of those constituting ‘the public’ knew about the existence of lay judges in Germany, the thesis that such knowledge is important to generate trust in criminal courts barely survives critical examination. The argument would presuppose a certain level of distrust of professional judges. If the public trusted professional judges both to examine the facts competently and to apply the law in a proper way, it would not perceive a need for lay persons’ assistance. In Germany, there are no data to support the hypothesis that the work of professional judges is regarded as inadequate. On the contrary, compared with other institutions representing the state, courts enjoy a remarkably high degree of trust. It is unlikely that the esteem expressed for the courts is due to, or depends on, the integration of lay judges. The situation may be different in the United Kingdom and the United States. Juries have a more visible role in the criminal justice system and are popularly portrayed in numerous books and films. If juries are perceived as essential for the legal culture, and I presume this is the case, it is plausible that they become an important indication of a ‘good legal system’ for the citizens. Consequently, abolishing lay participation may cause discontent, and it makes sense to claim that the existence of the jury is useful to secure public trust in the criminal justice system. However, one must bear in mind that this is an argument based on social psychology, not on normative reasoning. It may be useful to have juries because their popularity helps to strengthen public support for the legal system as a whole. This does not establish that normative principles require lay participation.

(ii) Active Citizens

There is a further argument that might be used to support lay participation in criminal trials. I will call this the ‘active citizenship’ argument. It relates the lay participation to democracy along the following lines: having citizens engaged in the administration of state power is important in a democratic system; democracy needs citizens who are active participants rather than passive subordinates; therefore one should organise state institutions in a way that allows opportunities for lay participation. This could be formulated as a functional claim (the system runs more smoothly with competent and responsible citizens), but also as

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28 See, eg, Limbach, n 11 above, 55.
a normative reason (participation is valuable as such, as it expresses commitment

to the ideal of the citizen in a democratic state). In contrast with the argument
discussed above, the ‘active citizenship’ argument does not authorise final deci-
sions in criminal trials, but rather makes procedures more appropriate or more

in accordance with fundamental values.

The ‘active citizenship’ argument seems convincing at first glance, especially

if one considers the normative side. On a closer look, however, some doubts

remain. If citizens’ commitment and active participation are to be promoted,
such participation ought to be primarily voluntary. Putting citizens under an
obligation to fulfil functions of the state does not come as close to the ideal of
active citizens. This would mean that lay participation in criminal trials ought

best to be voluntary. However, this would also have its drawbacks. The ques-
tion is whether lay judges and jurors who are chosen on the basis of voluntary
applications compromise other important normative values.²⁹ In contrast with
the rhetoric of active citizenship, in real life not everybody can afford to spend
time in court. Only rather small subgroups of the population with sufficient

spare time could realistically be expected to take the role of juror or lay judge

on a voluntary basis. They would hardly be representative of ‘the people’; they
might be far removed from the social background of the offender and thus
heghten his perception of alienation. In the worst case they might not even be

well suited to the truth-finding task of the trial. Therefore, although voluntary

activities in general should be encouraged, it would need further examination
whether this applies to lay participation in criminal trials. If lay participation is

not voluntary, other difficulties arise. Extending the notion of ‘active citizen-

ship’ to participation in criminal trials, which is mandatory and time-

consuming, conflicts with individual interests citizens have. The interest in
deciding for oneself how to balance personal pursuits and commitment to tasks
fulfilled for the community is a legitimate interest. Respect for autonomy

requires the right not to be bothered with assignments for the sake of the public
and the right to have tasks delegated to specialised professionals paid by the
state. Therefore, the notion of ‘active citizenship’ is not a strong foundation for
lay participation in criminal trials.

(iii) Influence on the Development of Law

In his comment to this paper, Victor Tadros made a further suggestion as to
how lay participation may be connected to democracy. Lay participation allows
different people to affect how the criminal law develops and is applied to cases.
This is not just a claim about ‘public trust’, but a normative claim relating lay
participation to democracy. Rule of the people, so the line of reasoning goes,

²⁹ In Germany, lay judges are chosen from lists handed in by political representatives on the local
level (see for details Windel, n 13 above, 302–3). The persons on these lists consent to be included.
should not be restricted to parliamentary proceedings creating statutes but also be extended to the judicial development of legal norms. Although true representation of ‘the people’ cannot be achieved with a limited number of jurors or lay judges, Tadros argues that it is still preferable in a democratic state to have at least some lay persons involved. In contrast with the argument I have discussed as the ‘strong claim’, Tadros’s argument does not require lay participation to legitimate the outcome of any particular trial as democratic. He connects the creation of law as a process (with all of its consequences beyond the individual conviction) with the principle of democracy.

This is an important argument, especially for common law systems. If the content of legal norms is not decided by elected members of parliament but through individual court decisions, these norms lack immediate democratic authorisation. The plea to have at least a few people take responsibility alongside professional judges (even if democratic decision making, strictly speaking is not possible) is understandable. In a civil law system, on the other hand, laws are passed by parliament. The development of law is the task of those elected by the people. However, one has to take into consideration the fact that, even in civil law systems, law is not identical with statutes. There are gaps in the statutes (for example, many important elements of the general part of criminal law are not defined in the Penal Code) and vague or broad legal terms within statutes need to be defined. Thus, law is also partly shaped by judicial work even if a bulk of statutes exists.

Does this mean that in the common law system as well as in civil law jurisdictions the principle of democracy calls for lay participation? There are indeed reasons supporting Tadros’ line of argument. The development of law should be based on a careful, balanced evaluation of conflicting standards and values. Leaving these considerations to professional judges can exclude voices which could express differing, but legitimate, interests and bring in other normative perspectives completing the picture. One could opt for lay participation in criminal trials, so that the process of law-making allows the inclusion of diverse views. However, there are objections to the thesis that lay participation is valuable on these grounds. The advantages of including different people have to be weighed against disadvantages. Laypeople will not only bring in different views about questions of normative relevance, but it is also likely that they will add stronger emotional components. These may be emotions favouring the particular defendant or emotions operating to her disadvantage. Either way, this would be an unwanted input. To develop legal norms requires the setting aside of strong emotions, the evaluation of the law’s significance as far as possible with rationality and detachment, and the estimation of the effects of legal change. It seems plausible that professional judges are better at controlling emotions than lay people. Of course, like every human being they are not immune to emotional reactions, but education and experience help judges to recognise those reactions and to achieve a somewhat more detached stance over time. Lay judges’ opinions, especially the punitive views they sometimes express, can become an
obstacle in the effort to reach sensible agreement. 30 Also, law-making requires skill and knowledge, for example to foresee the consequences that a particular decision can have for the interpretation of other legal norms and for future cases. Consequently, although lay participation may introduce more diversity into the development of legal norms, it bears risks for the quality and the consistency of the legal system which results from this process.

(iv) Local Values

Another argument in favour of juries (or lay judges) emphasises specific local practices and local legal customs which have not been fully appreciated by a national or federal law-maker (or which are even incompatible with the evaluation by a national parliament). 31 The ‘local value’ argument has its strongest persuasive force in very large states with populations not united by a shared national identity or a shared cultural background. If historical or political contingencies have thrown together heterogeneous groups in one state (as it was the case in the former Soviet Union) which are governed by uniform statutes, the resulting conflicts between local cultures and the federal or national legal system can be ameliorated by allowing some compromises when controversial norms are applied. Under such circumstances, juries or lay judges may give voice to local values which have been neglected by the central parliament. If the state’s population is too diverse to achieve consent about legal norms, but uniform statutes exist, it may be a compromise in practice to allow ‘diluted’ application. However, one has to bear in mind that these are awkward solutions for coping with an imperfect mode of state organisation in order to help groups which are powerless on the national or federal level. A central state which is too large should be reorganised according to the principle of federalism and delegate law-making to local parliaments in areas of diverging cultural backgrounds. If one thinks about the criminal trial on a theoretical level, its role should not be to compensate shortcomings in the law-making process. Furthermore, it is not even compelling to introduce lay participation to give weight to local values: if the professional judges were appointed on a local level, they could seek compromises when federal or national law clashed with the local culture.

The ‘local values’ argument could also be applied to smaller and traditionally more homogenous states like most Western European states—it retains some plausibility as cultural differences have grown with processes of immigration. ‘Local values’ do not, in that context, refer in a strict sense to geographic distri-

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30 I remember (in my legal training) deliberations in the judges’ chamber where one of the lay judges expressed the view that all drug dealers should get life imprisonment. The lay judge tried to apply his view to the case in question (where a pound of cocaine had been sold) and he had almost convinced his fellow lay judge before the professional judge managed to control the situation.

butions of larger groups in parts of the country, but mainly to values shared by minorities in terms of ethnic origin (and possibly also to values characteristic of social classes). But the argument that minority values can be introduced into the criminal trial by lay persons does not only raise questions about their capability for law-making, which I discussed in the preceding section. More importantly, the argument leads to difficulties if such so-called ‘local values’ run contrary to acknowledged normative values. It is not possible to discuss such conflicts extensively here. In most cases where there are manifest differences, it would not be warranted to let ‘local values’ override an established normative framework, especially if the latter is written down in a constitution. Central principles like gender equality, equal treatment of different religions (and of religious beliefs versus atheism or indifference), autonomy and personal responsibility, etc. should not be challenged with reference to ‘local values’. Also, even if fundamental normative values do not stand in the way, deviation from the terms of a statute is problematic. For such deviation would violate the principle of equal application of the law. One could only seriously consider letting local values affect a trial’s outcome if a legal norm is sufficiently flexible and if there are no conflicts with fundamental normative principles. And, even if one makes this concession, it does not substantiate an urgent need to let lay persons decide. If relevant ‘local values’ are unknown to the judge, it is for the interested party to describe them and demand that they are taken into account.

(v) Defendants’ Autonomy

In ‘The Criminal Trial and the Legitimation of Punishment’ Markus Dubber outlines another argument that might be used to defend the participation of lay persons in criminal trials, in the context of the use of the jury in the US. This argument is based not on the principle of democracy but rather on that of autonomy. The legitimacy of the trial’s outcome presupposes, so Dubber claims, that the proceedings reflect the defendant’s autonomy. Despite the (in most cases) obvious lack of actual consent, the defendant must be able to see the act of criminal punishment as an act of self-government. This requires that the persons who are responsible for convictions must represent her, and this role of representative is to be taken by the jury. Other than the widespread notion discussed above, from this perspective the jury’s role is not to be a representative of the public, but of the defendant. Dubber argues that ‘the diminution of lay participation in the United States, Germany, and elsewhere reflects the gradual but continuous disappearance of concern for the legitimacy of state punishment’.

32 In RA Duff et al, n 31 above, 85.
33 M Dubber, n 32, at 96–7; Dubber, n 4 above, 591–2.
34 N 4 above, 602.
The notion of ‘representation through similarity’ cannot be applied in the context of this argument. If one consciously chose lay persons who in their social background, opinions and attitudes were as similar as possible to those of the defendant, conflict both with the truth-finding goal of the criminal trial and the equal application of the law could arise. Dubber refers to empathy as the factor linking the representative to the represented and as the foundation of self-government. However, too much empathy with the defendant obviously blurs the assessment of facts as well as running counter to fair legal evaluation. Thus, the concept of ‘representative’ must be taken to a more abstract level, which Dubber describes as being a member of a ‘community of justice’. He assumes that a hypothetical or idealistic ‘community of justice’ exists between the jury and the defendant despite a factual non-similarity between the actual persons. However, if one does not see representation as a matter of actual social and psychological similarities, it remains unclear why the defendant should see jurors or lay judges as members of ‘his community’. Why should a verdict by professional judges without lay participation be perceived as a heteronomous decision, while the decision of a jury could be labelled ‘self-government’ or autonomous? If lay participants are not ‘peers with a friendly bias’ or at least ‘similar peers’, it remains unclear how a merely hypothetical ‘community of justice’ could make the sentence an act of self-government. If the only basis of the ‘community of justice’ is the lay status of the jury members, this implies a rather suspicious, even hostile, attitude towards state organs. It may be true that in reality many offenders distrust state officials more than the lay persons acting in court. However, as a normative claim, it is not obvious that a mere fiction of ‘self-government’ should make convictions more legitimate than conviction by professional judges—provided, the judiciary is organised according to the principles of a Rechtsstaat. As important as autonomy and self-government are for the creation of penal norms, it might be more honest to admit that the actual infliction of criminal punishment cannot be derived from these values. Conviction and sentencing are judgments by others. Seeing them as crucial parts of the communication with the defendant or, more specifically, of the process of blaming the defendant, requires that proper standards of communication are met. These standards of communication (amongst other criteria) also have to be compatible with the (adult) offender’s status as an autonomous being. But it seems artificial to stretch the notion of autonomy further and to see actual blame itself as an autonomous act of the defendant.

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35 Supra n 32, at 97.
36 Dubber does not draw this conclusion. He leaves open the question whether juries are indispensable: see Dubber, n 32 above, 100.
37 I have argued above that election of judges is problematic and not in accordance with the principle of ‘Rechtsstaat’. Therefore, the idea of establishing a ‘community of justice’ besides the professional judge is understandable in the US-system.
(vi) Lay Participation to Counterbalance Habits of Professional Judges

In the German literature, one finds another line of reasoning. It runs like this: a court consisting solely of professional judges tends to develop negative professional habits, specifically a technical or esoteric use of language. Lay judges could be a counterweight: the arguments of professional judges have to pass two tests: they must be both plausible and capable of being understood by persons without legal training. This argument has persuasive power if one considers how judicial careers are made in Germany. Judges choose their profession at a relatively young age; the decision to become a judge has to be taken shortly after passing the law exams. At a later stage in life, even with excellent grades and rich experience as a practising lawyer, one is considered too old to become a judge. Early entry into the judicial rank fosters developments I have just described. To rely in legal discourse on language rather far removed from ordinary language is characteristic for legal teaching. In contact with clients, legal counsel are forced to express themselves in a more understandable way. Such efforts are also recommended for professional judges.

It could thus be useful to integrate lay persons into the system because the necessity to communicate properly is more urgent if the professional judge has to convince lay colleagues. (I am not sure how far this argument is applicable to the judiciary in countries where the habit of esoteric legal language and the sense of judges as a ‘separate class’ among lawyers is less pronounced.) This argument could be formulated as a normative one—appropriate communication not only affects the contentment of defendants and others appearing in court, but communication aiming at mutual understanding is an essential normative function of the trial. Thus the role of lay persons could be defended as a means to promote language understandable by non-lawyers. This argument does not point to the immediate consequences of the participation of lay persons, but rather to the consequential effects that they may have. Of all the arguments discussed, this seems to be the most convincing. Whether the ideal of improved communication through lay participation can be realised in practice is another question. This would rest on lay participants not merely passively accepting what happens around them—as it is often the case in practice.

See Schreiber, n 10 above, 951; Benz, n 14 above, 210–11.

Of course, it would be unfair to German judges to state that they all resort to incomprehensible language. Many are well aware of the fact that communication is essential for their performance. However, one has to distinguish between individual persons’ efforts and the idea that lay participation might counteract some structural deficiencies produced by the way the German judiciary works.

Windel, n 13 above, 300, more sceptically points to the fact that lay judges are not involved when the reasons given for a certain sentence outcome are written; see also Volk, n 12 above, 387.

But see for a similar argument Redmayne, n 20 above.

4. CONCLUSION

In a German text, it has been commented that lay judges ‘look good’ in a democratic system.\(^{43}\) That suggests that there are no reasons beyond a pleasant façade to have lay persons in the courts. This rather critical remark expresses reservations about the necessity of lay participation, reservations which are widespread in Germany. Indeed, a sceptical stance towards enthusiastic appraisals of lay participation in criminal trials is justified. One cannot corroborate the strong claim that the legitimacy of a criminal trial’s outcome requires democratic underpinning in the form of lay participation. Lay judges and juries do not introduce plebiscitarian elements into the trial, nor do they convince as a feature of representative democracy. Very small numbers of lay persons can not represent ‘the people’. They may claim to present ‘the view of the community’, but in fact they express their personal views—which may or may not be identical to the decision one would obtain through a general vote on the matter in question.

Before rejecting the concept of lay participation, however, one has to pay attention to arguments which support weaker claims defending the desirability of lay participation. These go back to the premise that a criminal trial ought to be organised in a way which gives weight to central normative principles like democracy or autonomy. The problem with most of these arguments is that there are also important counter-arguments. One reason given for lay participation is to encourage active citizenship (rather than passive subordinates)—but difficulties arise: it is questionable whether lay judges and jurors who participate eagerly, that is voluntarily, are well suited to their task. Arguing for lay participation because lay persons bring different values and attitudes into the process of law-making also invites objections. One can raise doubts about lay persons’ ability to take on the difficult task of creating legal norms (which requires knowledge and lack of emotional commitment). The idea that lay persons voice ‘local values’ leads to the question whether ‘local values’ ought to override the conflicting normative framework (in most cases, this would not be an appropriate result). To stress the defendants’ autonomy and capacity for self-government and the need to have a jury as their representative utilises a highly abstract concept of self-government and implies distrust of the state which weakens the position of the judiciary. In the end, one argument in favour of lay participation remains: having to co-operate with lay colleagues compels professional judges to use language which is understandable by everybody. Here, the difficulty is in realising this idea in practice. In a society in which lay judges have low esteem, such as Germany, they play only a marginal role in the day-to-day work of the courts and despite all idealistic rhetoric, the professional judges will not strive to communicate effectively with them, but rather ignore their presence.

\(^{43}\) Volk, n 12 above, 373.
as much as possible. Only with strong cultural support for the idea of lay participation will the legal system grant them influence.

This highlights an important point: lay persons in courts have symbolic meaning. The degree of support for this institution expresses, more or less explicitly, distrust of the state and professional judges as state officials. The desire to control state organs through lay persons is a cultural phenomenon. Differences between German writers and those from English-speaking countries concerning the significance of lay participation stem from different ways of seeing the relationship between the state and its citizens. Germans are more inclined to let professional judges do their job. Distrust is more frequently expressed about the work of lay judges.44 From this perspective, it is easier to feel comfortable with decisions made by people who are professionally trained. Trust in the work of the judiciary is trust in education and professional standards. The contrasting Anglo-American point of view is a symptom of a more profound underlying distrust both of lawyers and of power exercised by the state. The role of juries and lay judges from this perspective is predominantly of symbolic significance: their existence signifies that ‘state officials are not allowed to make important decisions on their own’. In the end, the prevailing attitudes towards the state and the degree of trust professional judges enjoy will determine both the continuing existence of lay participation and the actual influence lay persons have in criminal trials.

44 See for example Schreiber, n 10 above, 952.
Judgment and Calling to Account: 
Truths, Trials and Reconciliations

SCOTT VEITCH*

To see no difference between political and other offenses is the sure mark of an excited or stupid head.
—Lord Cockburn

1. INTRODUCTION

In August 1793 Thomas Muir, Scotland’s would-be Tom Paine, along with a number of others, was indicted for sedition at the High Court in Edinburgh. As a leader of the Friends of the People Convention he had been instrumental in publicising two claims which sought to address the abuses of the British constitutional order: a right to equal representation of the People in Parliament, and the right of the People to the frequent election of their representatives. These claims were to be pursued by petition to the Parliament through a public, non-violent, legal campaign; to all of which Muir attested during the proceedings. At the close of the trial, having heard evidence and speeches, including an eloquent defence of the justice of the Convention’s cause by Muir, an advocate who was defending himself, the Lord Justice Clerk (Braxfield) summed up the case to the jury. In what was a brief statement, he made two observations of particular note: first, that ‘the British Constitution is the best that ever was since the creation of the world, and it is not possible to make it better’, and, secondly, that despite recent events in France—with whose leaders Muir had had some connection (‘His Lordship said, he never liked the French all his days, but now he hated them’)—‘[w]hat right had they [the British

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rabble] to representation? He [the judge] could have told them that the Parliament would never listen to their petition. How could they think of it? A Government in every country should be just like a Corporation, and in this country it is made up the landed interest, which alone has a right to be represented. The actions of Muir and his ‘Friends’ were, he said, intended to ‘promote a spirit of revolt, and if what was demanded was not given, to take it by force’. His Lordship, he now concluded emphatically, ‘had not the smallest doubt that the Jury were like himself, convinced of the pannel’s guilt, and desired them to return such verdict as would do them honour’.2

This they duly did. Muir was sentenced to 14 years’ transportation, as were several co-accused. Others were not so lucky. In this, Scotland’s ‘Age of Enlightenment’, Robert Watt and David Downie, found guilty of high treason, were sentenced in the following terms, by the Lord President: ‘You are to be taken from the bar to the place from whence you came, and from thence to be drawn upon a hurdle to the place of execution, there to be hanged by the neck, but not until you are dead; for you are then to be taken down, your heart to be cut out, and your bowels burned before your face, your heads and limbs separated from your bodies, and held up to public view, and your bodies shall remain at the disposal of His Majesty; and the Lord have mercy on your souls!’3

With such an attitude being displayed by the courts, well might they have sought the mercy of the Almighty! This was an unfair trial in an unjust society. The court, through these trials and punishments, upheld the status quo—of property, privilege and inequality—of the constitutional order.

And yet if punishments are no longer so bloody, is the basic institutional role of the courts so different today? Despite the emergence of a right to a fair trial, ours is still a society based on property, privilege and inequality, albeit in mutated form from Muir’s time. So what is the meaning of a ‘fair trial’ in an unjust society?

In this essay I will look at aspects of the institutional setting and presuppositions of the trial, specifically through the lens of the actions of political dissidents brought within the jurisdiction of the criminal justice system. Such trials tend to constitute a small proportion of offences tried in British society. But they remain nonetheless highly significant for two kinds of reasons: first, because they constitute an important test case concerning the relations between, on the one hand, criminal justice and punishment, and on the other between citizens and the state. Secondly, and more importantly, they have historically constituted one of the most emphatic ways in which progress against inequality and injustice has occurred. A great number of the struggles and causes that have delivered benefits to all citizens in this country, and in many others—from political representation and gender equality to freedom from racial discrimination and workers’ rights—have usually required the willingness at some point of a

2 P Mackenzie: Trial of Thomas Muir (Glasgow, Muir, Gowans, & Co, 1837) 44–5.
3 Trial of William Skirving (no author) (Glasgow, Muir, Gowans & Co, 1836) App, 95.
number of men and women to put their heads, so to speak, in the noose of the
criminal law. Breaching the law for principled political reasons has been, and
will no doubt continue to be, an important engine for social change; and one
through which a large number will often stand to gain from the sacrifice of
others in terms of an augmentation of their equality and dignity. Trials, in part
because of their dramatic potential, but more because they are the symbolic and
actual site of the application of the constituted power of the state, are, and are
likely to continue to be, a central element in such struggles and the responses to
them.

Trials of this type tend to make visible what ordinarily remains hidden: the
terms on which people are called to account and the conditions to which they
must submit for the judgment of the courts. These terms and conditions are chal-
lenged in such cases, and a purported moral-legal continuum between offence,
trial and punishment (except from the point of view of the state) tends to become
unsettled. (Indeed one could give, in such instances, an equally plausible narrative
to the trial process that situated it not within a moral continuum for principled
attribution, but rather in a security continuum—police, intelligence services,
prosecution bureaucracy, state, defence of the realm—for that may be, more
accurately, the political trial’s decisive locus.) The political dissident does not
usually seek—nor is willing to accept—being morally tutored by his or her trial
or punishment; on the contrary, conviction, and sometimes even punishment,
may in some circumstances be celebrated as a tactical victory by the accused.

I will argue that the political trial undermines the coherence of an ideal of the
trial process as a communicative forum. Moreover it undermines a normative
approach to the trial that would seek to maintain that there is a singular coher-
ence in the trial’s rationale. Where the limits of the communicative potential of
the trial process are established, where the raw energy of the state’s political
determination is exposed, and where the inability of the trial to capture and con-
tain the meaning of the very process itself is laid bare through the basic incom-
mensurability of political claims, then it is indicative of the fact that the province
of the trial cannot be singularly determined. One need not agree with the lusty
phrasing of Lord Cockburn’s insight to realise that trials involving a dimension
of political dissidence require an acknowledgment of the importance of the
accused’s political self-understanding that necessarily challenges us to reassess a
more conventional, if sophisticated, account of the trial as a whole. In all this,
the distance between a centripetal teleology of legal judgment resulting in pun-
ishment and the radical centrifugal underdeterminacy of calling to account is of
the essence.

2. A COMPARISON

In order to reflect on the themes of judgment and calling to account in the con-
text of the trial, it will be illuminating, I hope, to compare some other ways in
which these issues have been addressed, both conceptually and practically. In recent times truth commissions have come to play a prominent role in countries coming to terms with traumatic pasts. These institutions, while they vary a good deal among themselves, usually have in common a legal component in their formation and practice that acknowledges the need to engage with questions of justice, truth and responsibility, more commonly dealt with in a criminal justice system. But they are also different from conventional legal proceedings in their stated aims and methods—less procedurally formalistic, less rights-based, more open to dialogue, to wider participation, etc. For these reasons, their designation as ‘quasi-legal’ seems appropriate.

Here I will use a part of the South African Truth and Reconciliation Commission (TRC) as comparator, namely the amnesty committee. Its aim, like that of the TRC generally, was captured by the title of the 1995 Act which established it: the Promotion of National Unity and Reconciliation. In order to facilitate this goal, the TRC’s mandate was to establish as ‘complete a picture as possible of the causes, nature and extent of the gross violations of human rights’ in the apartheid era.4 Only through the revelation of truth was the road to reconciliation thought conceivable, and the amnesty committee’s work was integral to this.

A good deal of work has been done on this,5 and what I present of it here is not new. But I will reconsider it for two reasons: first, it is to date the most sophisticated effort to provide transparently for amnesties only under detailed, legally defined conditions which applicants had to meet. In its justification and its processes it engaged in a thoughtful, meaningful and public way with the issues of judgment and calling to account, the outcome being described in the TRC Report as ‘amnesty with a considerable degree of accountability built in to it’.6 Secondly, although often considered under the umbrella term of ‘transitional justice’, truth commissions generally, and the work of the South African amnesty committee particularly in its theoretical underpinnings, arguably expose, rather than simply mark an exception to, the underlying conditions and presuppositions of the ‘normal’ justice system, especially concerning questions about the attribution of wrongdoing and the consequences of such attribution, issues closely connected with conventional trials. Though clearly in one sense transitional, the temporal, political, legal or economic aspects released in large-scale transitions for practical engagement and analysis are nonetheless captured

6 TRC Final Report, n 4 above, i, 118.
in small or less obvious moments, each with their own potential, in non-transitional situations.

Here I will summarily set out some features of the TRC amnesty process to which I will return at different points by way of comparison. First some legal criteria drawn from the 1995 Act:

- Applications had to be made to the committee by the person seeking amnesty; i.e., participation was voluntary, not coerced.
- Only individuals, not groups, could apply for amnesty, and applicants had to apply for amnesty for each offence committed.
- Full disclosure of all the relevant information was required of the applicant.
- Applicants had to demonstrate that the ‘act, omission, or offence’ in question was ‘associated with a political objective’.
- Factors to be taken into account in assessing this included: the applicant’s motive; the context of the act; the act’s objective and its proportionality to its objective; whether the applicant acted under the orders, authority or with the approval of the political movement of which he or she was a member. It is worth noting that the legal conditions for granting amnesty required no demonstration of contrition or moral culpability by the applicant, nor any forgiveness on behalf of the victims or their relatives (although occasionally such attitudes were expressed).
- Acts not associated with a political objective included those for personal gain or out of ‘personal malice, ill-will or spite’ towards a victim.
- The result of a successful application led either to the expunging of the applicant’s criminal record of the offence or to immunity from prosecution or civil suit for that act in the future.

In one sense the amnesty process was, to use a photographic metaphor, like a negative image of the print: everything was its opposite: full confession meant success; guilt meant freedom. For those, relatively few, who were already ‘free’ it meant the security of knowing that, although now publicly seen as responsible, they could not be called to account legally for any acts for which amnesty had been granted. The reason for this was paramount, and was seen as a major incentive for those responsible for human rights violations to come forward: the ‘acts, omissions, or offences’ in which they had participated would otherwise have remained in a state of potential; ‘the way was left open for conventional criminal trials, where the prosecuting authority decided that there were sufficient grounds for prosecution’.7 In other words, the amnesty process did its work in the shadow of the criminal law. (As it has turned out, very few prosecutions for apartheid era crimes—from failed applications or against those who did not apply for amnesty at all—seem likely to be brought, suggesting that many people gambled successfully in keeping quiet about their involvement in human rights abuses, in particular major figures in the apartheid government, police and security services.)

The rationales behind the amnesty process were widely analysed and

7 Ibid, 119.
debated, and even subject to Constitutional Court scrutiny and approval. One key rationale was that ascertaining ‘a complete a picture as possible’ of the abuses of the apartheid era would be considerably hampered by using criminal trials. Instead the amnesty committee’s work would allow an institutional space for information to emerge from those who were most knowledgeable but at the same time least likely to speak out; ie, the perpetrators themselves. Moreover, given the practical constraints (an already overloaded and under-resourced criminal justice system, difficulties in procuring evidence or its destruction, the complexities and cost of prosecuting ‘political crimes’8) as well as the political balance of forces at the time, large-scale trials were not a realistic option. Accordingly, as the TRC saw it, the choice was not simply between trials—or corrective justice—and no justice, between punishment and impunity, but between ‘more or less full disclosure; the option of hearing as many cases as possible against the possibility of a small number of trials revealing, at best, information only directly relevant to specific charges’.9 

This, says Graeme Simpson, suggests that the TRC had two poles of truth between which it located its own activities with regard to calling to account: legal truth, an ‘uncomplicated “formal truth” arrived at by courts concerned only with the narrow set of facts which will enable them to “judge” the guilt or innocence of the accused’; and ‘sociological or historical truth which, unlike the law, treats contradiction and wider social influence as inherent and fundamental to complex truth, rather than as dysfunctional’.10

In ascertaining individual accountability the amnesty committee sought to counter the claim that this was a lesser form of justice than that which could have been achieved through prosecution and punishment. Instead it directly linked the truths it could achieve as part of its mandate to a broader endeavour for reconciliation and social justice in the new democracy, and rooted the legitimacy of its particular endeavours within a theory of restorative justice that emphasised the need for reparation rather than retaliation. Restorative justice emphasised ‘a respect for human life and dignity’ and was, noted the TRC, a process which, amongst other things, ‘aims at healing and the restoration of all concerned—of victims in the first place, but also offenders, their families and the larger community’, encouraging ‘victims, offenders and the community to be directly involved in resolving conflict, with the state and legal professionals acting as facilitators’.11

It was in this context, then, that the work of the TRC amnesty committee

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8 TRC Final Report, n 4 above, i, 122–3.
9 Ibid, 122.
10 “Tell no lies, claim no easy victories”: A brief evaluation of South Africa’s TRC’ (1998) available at www.csvr.org.za. The TRC in its final report (n 4 above) in fact defined four notions of truth: factual or forensic truth; personal or narrative truth; social or dialogue truth, and healing and restorative truth.
11 TRC Final Report, n 4 above, i, 126.
contributed to redressing the injustices of the past for the sake of a shared, reconciled future. I will not say more on this just now but will, as I have said, come back to it as seems appropriate. But before coming to the trial I will take one final detour, since some criticisms made of the TRC’s approach may shed light on the general conditions and presuppositions through which attribution and calling to account are linked to the operation, and legitimacy, of forums in which these matters are pursued.

3. WHAT THE TRC DIDN’T SEE

There are three arguments worth noting.

The first is that the TRC, in concentrating on gross human rights violations in the conflict, excluded the enormity of the mundane violence of the apartheid system that affected all oppressed people. Those truths could not properly be acknowledged. According to Mahmood Mamdani, ‘The TRC’s version of truth was established through narrow lenses, crafted to reflect the experience of a tiny minority: on the one hand, perpetrators, being state-agents; and, on the other, victims, being political activists . . . [Yet] between 1960 and 1982 an estimated 3.5 million people were forcibly removed, their communities shattered, their families dispossessed and their livelihoods destroyed . . . These 3.5 million victims comprise faceless communities, not individual activists. They constitute a social catastrophe, not merely a political dilemma. Were these removals not gross violations within the terms of reference set by the law? Why, then, did the TRC not include these people among “victims”?’

Mamdani then raises the key issue concerning the relation between law and the practices of injustice: ‘[W]hat happens when the crime is legal, when criminals can enthusiastically enforce the law? Perhaps the greatest moral compromise the TRC made was to embrace the legal fetishism of apartheid. In doing so, it made little distinction between what is legal and what is legitimate, between law and right.’

Mamdani’s point is to expose the way in which the truths of experience are intimately linked to social, and specifically institutional, structures, and to show that when the ‘narrow lenses’ of what he identifies as the ‘legal fetish’ are worn,
then what can be seen is only a diminished truth. In other words, even in a process as ostensibly open to dialogue, participation and the need to address political context as the TRC purportedly was, it was unable to crack open the relation between legal form and injustice in a way that would begin to do justice to the reality of people’s lived experience. What chance, it could be asked, would a trial process have had? More prophetically, he adds, it is precisely such an attitude towards the law which allows, largely through the constitutionally enshrined protection of property rights, the ongoing inequalities of contemporary South Africa to be sustained by being legitimised by a democratic constitutional order committed to the rule of law. That the complicity between law and injustice had continued was given profound expression by one of South Africa’s most prominent human rights lawyers and now a senior figure in the judiciary. In his own submission to the TRC hearing into the legal profession, he acknowledged the judiciary’s role in these terms: ‘[o]ur social system is democratic, and its political institutions now, fortunately, representative. But we live in a society still distinguished by extremes of dispossession. As a judge . . . I am nevertheless party to the injustices that still exist in our society; and my role in the enforcement of a system that contains injustices necessarily makes me complicit in them.’

The second argument is offered by Colin Bundy, who takes Mamdani as his point of departure. He highlights the way in which the TRC, by ‘individualising victimhood surrendered the task of comprehending the social nature of dispossession’. The TRC, he said, ‘could not come to terms with the underlying structures and processes that have determined our identities and patterned our society. Because of its mandate, we may run the risk of defining a new order as one in which police may no longer enjoy impunity to torture opponents of the government, but fail to specify that ordinary citizens should not be poor and illiterate and powerless, or be pushed around by state officials and employers.’

In this sense, the amnesty process, for all it needed the legal category of ‘political objective’ to distinguish political actors from genuine ‘criminals’, was no more able to transcend the individualising nature of calling to account than could the ‘normal’ criminal process. Its own political foundations, conditioned through the content of legal categories, meant it was powerless to escape an individualised sense of accountability, which is why it was unable to do justice to the reality of the broader experience of the repressive force of apartheid. While there may have been transitional political reasons for this, it again highlighted the unease, not only that the TRC itself was playing out a political role with which it found itself unable or unwilling critically to come to terms, but also that the introduction of democratic values and fair procedures in the criminal justice system in no way operated to address the structural conditions

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13 E Cameron, quoted in Dyzenhaus, n 5 above, 174.
of the legacy (and in particular the race-related material legacy) of apartheid. Given the ongoing consequences of dispossession grounded in the intimate link between identity and injustice, it was as likely to hamper social reconciliation as it was to facilitate it.

The third argument is offered by Du Bois, who has argued that, in addition to these problems, the TRC’s approach was conceptually destined to fail insofar as it sought to legitimize a new approach to dealing with the past. There is, he suggests, no ‘third way’ between ‘victor’s justice and victor’s mercy’. In questioning the link between truth and justice that saw justice (as restorative justice) follow from the discovery of truth, he argues instead that in a scenario such as South Africa’s transition to democracy, ‘a choice has to be made between the past and the future, between impunity and punishment’, concluding that ‘the only viable and legitimate option is to pursue victor’s justice: correcting the injustices of the pre-democratic order by holding those liable who violated the human rights fought for’.15

In other words, Du Bois saw it as necessary to treat as separate the search for truth—and in particular social and healing truth—and the need to call to account, and punish, apartheid’s perpetrators. Truth, he said, followed on from justice, not the other way around. The truths achieved through trials might well be limited (in all the ways identified by the TRC itself, though not, crucially he argues, in their forensic testability). But only by holding to account those responsible for apartheid era violations, through findings of guilt and passing down of sentences, could there be public acknowledgement of the seriousness of the crimes committed. That this would be conceptually distinct from the broader search for truth and reconciliation was merely indicative of the moral, political and practical limitations of the trial.

4. TRIALS AND TRUTHS

At this point let me change perspective. It will be instructive now to consider a general statement about the ideal of the trial and its location in the criminal justice system. But in order to follow on from the preceding discussion, I want to consider whether a general ideal of the trial can be defended or whether more attention needs to be paid to the kinds of offence coming before the court. In linking to the question already raised in the South African context about the relation of law to politics, albeit this time without a specific temporal dimension, I want to consider an example that might suggest an unsettling of the justificatory continuum between offence, trial and punishment. This concerns activities of an explicitly political nature which are criminalised, either as such or in terms of subsidiary criminal law categories. I have in mind here trials...

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involving those participating, say, in campaigns of civil disobedience (which may be prosecuted under a range of legal categories: breach of the peace, criminal obstruction, property offences, offences under statute) or offences such as sedition or politically-motivated breaches of official secrets.

There turn out to be in these cases, in a curious though usually unobserved way, certain close parallels to the legal criteria found in the TRC amnesty process, parallels which are, in fact, significant in the context of establishing a fuller understanding of the trial. So, actors in civil disobedience cases will often voluntarily place themselves in a position to be brought before a tribunal; they too will be willing publicly to acknowledge—and to give full disclosure of—their activities; and they will see their activities as being expressly ‘related to a political objective’ and certainly not motivated by concerns for personal gain. Yet in crucial senses, these claims will be picked up on in different ways by the criminal justice system, and it is the significance of this which I will explore shortly. But it is worth pointing out that the reason these politically-motivated activities should be seen as particularly important, central rather than exceptional, is because they tend to show up the often more deeply hidden, though normalised, foundations of the criminal trial in a society’s legal order. Their exceptionality is only that they break apart the alleged logic of a single, coherent purpose for the trial-punishment nexus.

But first to the trial itself. On one, very sophisticated reading of the ideal of the trial, the relations between personality, attribution, criminal process and punishment have been outlined as follows.

The purposes of punishment ‘are strictly continuous with those of the criminal law and the criminal trial (and with those of moral blame). It addresses the criminal as a rational moral agent, seeking his understanding and his assent; it aims to bring him not merely to obey the law, but to accept its requirements as being justified: to recognise the wrongness of what he has done, to make his own the condemnation which his conviction expresses, and to guide his future conduct in the light of the relevant moral reasons which the law, his trial and his punishment all offer him for obeying the law. It treats him not merely as a passive victim or subject on whom suffering is to be imposed, but as a moral agent with whom we are engaged in a communicative process of argument and persuasion—it seeks his participation, not merely his submission: for its aim is that he should come to make the punishment, and the repentant understanding which it expresses, his own.’

In this ideal scenario, the law expresses the common good of the community which itself operates to recognise all citizens as autonomous and rational agents.

At this point, I want to consider whether trials with an expressly political dimension can be justifiably subsumed under this ideal, or whether they destabilise the continuum of legitimacy that might be required to justify punishment.

consequent on a legal attribution of guilt. There are a number of issues to be analysed here.

First, in such cases, from the legal point of view, who is being tried does not seem separable from the question of what is being tried. And yet it is precisely here that, from the accused’s perspective, the singular notion of the agent of civil disobedience necessarily splits up according to different categories of understanding. That is, it is not simply the (moral) person who is being tried, but that person under a criminal law category description. And it is of the utmost significance to note that in such cases the application of that category may preclude retrieving a rational sense of self-understanding on behalf of the moral person of the accused when it is applied to them, largely since their self-understanding is generated through the application of an opposing category. Put slightly less abstractly: just as it was for the amnesty applicants, the political objective of the agent will explain their reasons for action, whereas the action’s criminality will not.17 The ‘criminal’ person and the politically-motivated ‘moral’ person remain distinct. The gap between the two (from the perspective of the accused) cannot be bridged: that is precisely the point of their motivation to break the law. Yet there is a key difference with the amnesty process. In that process, the mens rea of the offence is aligned to the political objective of the action, the criminal legal understanding of the mens rea is dropped, and punishment or its possibility is revoked (at least in a successful application). But in the ‘normal’ criminal justice scenario the reverse is true: the political understanding of the accused is re-aligned to a criminal category, and the political understanding itself is, at least for the legal system (but not, of course for the actor), dropped.

Accordingly, participation in a communicative process geared towards ‘argument and persuasion’ is precisely what the system-specific use of the criminal law is designed not to achieve. What the political dissident sees as principled truth, the law sees as criminal. This is not a promising context for argument and persuasion.

Secondly, a finding of guilt at the end of the trial process will not be met with a persuasive claim that the guilty person accept some need for ‘repentant understanding’. For in order for this to make sense, the trial process itself would have to take on features of a communicative forum that would allow engagement between the parties—defence, prosecution and judge (at the least)—to be genuine, not just an institutional charade. Imagine such a possibility however: one where the law allowed the plea of political conscience to be raised in court as a defence to a criminal charge.18 The court would then have an obligation to engage in a dialogue assessing the truth of the conscientious convictions of the

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17 It is possible that there is a further distinction here: that the actor’s motivation to disobey the law may be recognisably engaged with by both the actor and court, particularly at the sentencing stage; but I will not say more on this here—the point being emphasised is more concerned with the incommensurability of identity descriptions (in the South African context of the anti-apartheid activist, say, ‘Never a terrorist, always a freedom fighter’).
accused, which would necessarily involve engaging the political cause according to which the accused understood their actions. Only that would seem to correspond to the condition that the ‘criminal’ be addressed as a ‘rational moral agent’, since their rational moral agency (unless it is to be totally denigrated or usurped) must engage with what the agent counts as rational and moral. Now, aside from pragmatic concerns—of the kind ‘everyone might try it on’: petty theft as revolutionary repossession, say—there is a more serious conceptual question to be asked: in what sense would such a dialogue amount to a legal trial? Again, by way of comparison, it is significant that even the TRC—whose procedures were far more open to providing a forum for dialogue—would not engage in assessing the moral attitudes of an amnesty applicant (remorse, contrition, etc), either during or at the conclusion of the hearing, as an aspect of assessing the legality of the application. Such an engagement was thought—understandably—to be only possible beyond the legal arena, and could not be arrogated by the amnesty committee.

In the kind of case we are considering, the communicative potential of a trial as a forum for genuine dialogue might be thought to be limited for a number of more general reasons. First, technically, trials are the embodiment of constituted, not constituent, power. The court is obliged to act in such a way as to support, or at least not undermine, the constituted order and all the political and material conditions that it presupposes and promotes. This seems so obvious as to be trivial. Why wouldn’t it? Why shouldn’t it? To do otherwise would be to undermine its very authority: the court necessarily carries with it the commitment to the overall social ordering within which its constitutional authority is granted. This is the political condition of the court, and the trial, within which their claims to impartiality or objectivity are always to be situated.

Yet, even at this stage, it is important to emphasise that the accused is called to account on certain terms that are non-negotiable. This is exposed most explicitly, and with more devastating consequences, in colonial societies, albeit ones constitutionally committed to democracy and the rule of law. (It is important to acknowledge that this is not an extreme case, but the normal, everyday operation of such a system.) Thus in Australia, for example, what I have termed the ‘political and material’ conditions that a court presupposes and cannot address without undermining its own authority operate to the exclusion of alternative understandings, not just of political claims, but of the very ideas of law and identity themselves. In a 1994 case, for example, the issue was raised before the High Court whether activities carried out by an aboriginal commun-

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18 John Rawls very briefly touches on a similar possibility where ‘a legal system in which conscientious belief that the law is unjust is accepted as a defense for noncompliance’, though he adds without further argument: ‘as things are, such a scheme would presumably be unstable even in a state of near justice.’ See A Theory of Justice (Oxford, Oxford University Press, 1999) 322.

19 For a different approach to this issue, which uses discourse theory as a standard against which to measure the trial’s communicative potential, see E Christodoulidis, ‘The Objection that Cannot be heard’ in RA Duff et al, The Trial on Trial, Volume 1 (Oxford, Hart Publishing, 2005).
ity might be understood as operating according to their own customary legal ordering in juxtaposition to the criminal law. In response to this claim, the court held that ‘[i]t is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle . . . English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it.’ In other words, any alternative—political or legal—claim to viewing the link between identity and law as based on different rational self-understandings (of the aboriginal community’s own integrity and normative ordering) could not be allowed; the force and (particularised) universality of the dominant legal system could alone set the terms of engagement and calling to account. The commonplace virtue of equality before the law has, ironically enough, that discriminatory, identity-based, exclusionary understanding built in to it.

A quick glance at the judicial oath in this country confirms something similar: judges swear that they will ‘well and truly serve our sovereign, Her Majesty Queen Elizabeth’. Here already, we have an overt commitment to an inegalitarian, monarchical society, to a protestant monarch who is head of the Church of England, to a unionist state, etc. These features are again so commonplace as to appear perfectly normal to many (which of course is part of their power). But, as is well known, for certain political (eg republican, anti-unionist) actors, ‘acceptance’—real, attributed or imposed—of that foundational jurisdiction of the court and any sentence it imposes can only come in the form of a request to accept that constitutional order, to be reconciled to the way these things are in ‘our’ law and society; a request that may not be given acceptance for the very reason that that would negate the actor’s self-understanding as a rational agent.

Just as it is for the activist accused, so it is for the court: truth is related to identity, and hence what Mandani identified as the ‘narrow lenses’ suggest that the communicative potential is definitionally limited. Again, in one sense, this seems uncontroversial. But it does require that the normative underpinning of the trial ought to be seen clearly for what it is: a commitment to a certain form of social relations as defined according to the legal and material constitution of the society, which precludes, again by definition, alternative understandings of that constitutional ordering from appearing as legally acceptable. This is why the legal demand in the trial is for an assessment of breach of the criminal law, not for an understanding of the political background to the situation. But it is also why the activist’s self-understanding can make sense only insofar as it rejects the attribution of criminality as an index of the ‘wrongness’ of their acts.

20 Walker v State of New South Wales [1994] ALR 231, per Mason CJ. Cf in a civil law context Coe v The Commonwealth (The Wiradjuri Claim) (1993) 68 ALJR 110, where Mason CJ held that proceedings brought with an explicit political intention (as the court so designated this case) ‘are brought for an improper purpose and constitute an abuse of process where the purpose of bringing them is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond what the law offers’.
which in turn makes their criminal guilt unavailable for communicative negotiation towards an understanding of it as a redemptive penance.

This leads to the third observation: it has been suggested that what might redeem the legitimacy of the politics of this scenario is that the political accused must use other forums for changing the law, not the trial process. The commitment to the separation of powers moreover argues that this is the stance the court is obligated to take, rather than engage it its own law-generating tasks. But where this is the case, for the reasons just explained, two consequences would seem to be confirmed: first, the trial cannot be an engine for generating genuine communicative dialogue oriented towards rational self-understanding of all the participants involved, since it is now acknowledged that the appropriate forum for that kind of discussion resides elsewhere, in the political realm. Secondly, neither is it the case that the trial process can be persuasively thought of as a forum for the request for ‘repentant understanding’, given that the accused’s participation in the process is based on the fact that they have, in their view, nothing to repent. Quite the opposite in fact: in their view, they have committed acts (often in the sure knowledge of serious legal consequences) on the ground that they are morally justified in so doing, and hence to treat the outcome of the case as a reason for accepting moral blameworthiness would be straightforwardly incoherent. Not only, then, can an acceptance of the ‘wrongness of what he has done’ appear as nothing other than implausible for the accused, but the request that he ‘make his own the condemnation which his conviction expresses’ makes little or no sense to them. Arguably, beyond a political re-education and re-integration programme as a fitting punishment, it is hard to imagine how the moral imagination of the accused might be engaged in a reformatory way.

This in turn leads to a more general concern. Let us assume, for a moment, an ideal scenario where, reasonably uncontroversially, the forum and procedures required for the ideal legitimacy continuum are best imagined as a democratic political system. In this case the trial process would be legitimated by the existence of the democratic forum where any aggrieved parties could readily bring their complaints and try to have a law with which they disagreed changed. Such a political system would ‘serve the common good’ of a genuine community ‘united by shared values and mutual concern and respect’. Only where such conditions were met, again according to Duff, ‘can the claim, on which the trial itself depends, be maintained that the defendant has an obligation to obey the law, and to accept the authority of the court’,21 with all that follows from this in terms of the meaning of legitimate punishment.

Now this, it seems to me, involves a vision of a community that is not just utopian, but problematic even as an ideal. I say this not simply in a normative sense, but one internal to the relation between politics, trials and the law. On one reading, for such a community, acts of civil disobedience would not need to

21 Duff, n 16 above, 292, 138.
be outlawed through the application of criminal categories, but would rather be unnecessary. A society that achieved a genuine community which pursued the common good through democratic deliberation would not be in need of any criminal law sanctions for politically-motivated disagreements which brought the community into line since, by definition, the ‘proper’ deliberative forum would alone fulfil that need. To that extent, the trial would in fact no longer be necessary for any such calling to account: acts of disobedience would be treated as mistakes rather than matters of genuine political conscience in need of legal trial and sanction. At least as traditionally understood, trials of that kind would be redundant. But then the converse of an earlier question comes to suggest itself: in what sense would this be a political community? Does a society committed to a common good in which conflict became manageable rather than genuine not sound as persuasive as those of the ‘politics’ of twentieth century communist societies? Is it not too far fetched to see this scenario as in fact the end of politics?

As it was in Thomas Muir’s time, the trial today might best be understood, at least through paying attention to overtly political matters of contestation, as standing as a watchman for the political system and its social and material conditions. Even in a democracy it necessarily and simultaneously both patrols, as a matter of jurisdictional practice, the limits of the political through the application of legal categories, and symbolically exults in the meaning of the dominant constitutional order (if not quite in the grand terms of Muir’s judge). Trials in that sense are a key part of another continuum, namely, to use Bourdieu’s phrase, of the division of the labour of domination. In fact this is even more true today when, as has often been said, the trial rather than the punishment has become the key institution where people are called to account, and—in Durkheim’s sense—the community’s values are activated.

Recent media and professional attention focused on ‘the right to a fair trial’ as brought in through the incorporation of the European Convention on Human Rights (ECHR) would seem to confirm this shift in public priority. But this latter point also flags up something significant about the new conditions within which the trial must be understood today. The often neglected importance of the ECHR Article 6 and 7 guarantees about fair trials and punishments is that they provide procedural safeguards that attempt in some coherent sense to instantiate at the level of the criminal law and criminal justice system a form of procedural justice which corresponds to the legitimacy of procedural democracy at the level of the political sphere (which in this form can alone be successful in doing the legitimating work required in a post-metaphysical society). However, just as procedural fairness does not equate with substantive justice, nor a fair hearing mean a fair dialogue, neither does procedural fairness mean a just outcome: as has been pointed out, the ‘right under the ECHR arti-

22 These articles are concerned with the right to a fair trial and the principle of no punishment without a law.
cle 6 is to “fairness” rather than to “justice”. Thus the important commitment to a procedurally fair process is the same one that at a political level acknowledges that it holds out no special commitment to a just society. (There is no right to that kind of justice in the ECHR!) The right to a fair trial is therefore perfectly consistent and compatible with the reality of social injustice in a democratic polity.

This is the point that Cameron and Bundy made in the context of a democratic South Africa. But does this really suggest that the meaning of a fair trial in an unjust society is similar in effect to that of an unfair trial in an unjust society? In one crucial sense, yes. The trial is the keystone of political order, a political order committed to certain forms of social and economic ordering which necessarily, through its legal categories and institutions, pre-ordain the meaning of what counts will count as truth, identity and acceptable meanings of legitimacy. It is on these, at some crucial stage, non-negotiable terms that individuals are called to account and judged by the trial process. The trial is at the pinnacle—real and symbolic—of the constituted political and material order that, as a jurisdictional matter and through the deployment of criminal law categories, it must police and enforce, even in a democracy. Where this is so it is inescapably complicit in the injustices of the social and economic relations that exist in the wider society. That, it seems to me, is a crucial part of the trial’s rationale, and informs its normative underpinning. That is why it is deeply political, but also why it is not a place where politics can take place.

This is not to suggest that procedural safeguards and protections for the accused are irrelevant; on the contrary, these do make an enormous difference to those accused of offences (as we can see today when the state seeks to do away with some of them). But these do not for an instant make any difference to the normative underpinning of the trial as upholder of the realm. The court’s constituted power as constituted power is not in any qualitative sense lessened by procedural guarantees: to the extent that these protections are dropped, the state’s power may be augmented, or more efficiently delivered. But the court’s, and the trial’s, foundational political role, remains the same.

5. CONCLUSION

One of the many remarkable things about South Africa’s amnesty process was that it showed that the link between responsibility—even for gross human rights violations—and the demand for punishment and moral culpability is a contingent, not a necessary, one. Indeed for those anti-apartheid activists who were in jail for offences against the apartheid order, the granting of amnesty to them was an acknowledgement that they had made the right choice in breaking the

law of the established political order. Unwilling to accept the designation ‘criminal’, their accountability lay to a different set of ideals, and it was the genius of the amnesty process to recognise that these were now correct. Of course, even an institution as ‘quasi-legal’, as flexible and open to dialogue as the TRC was could not address the underlying material problems of the society. A fortiori, we might say, with criminal trials: their function betrays an in-built asymmetry according to which we can understand the parasitic nature of the trial on the constituted order and its material underpinnings: that is, that it upholds and promotes that order, but is powerless to address its injustices.

The case of the civil disobedient in democracies shares some characteristics with that of the TRC amnesty scenario. The morally- or politically-inspired breach of the law and the willingness of the offender to come before the law at once demand a risk on behalf of the actor and show up the limits of the trial process as a site of communicative exchange: the civil disobedient’s rational self-understanding refuses to be usurped by the law’s preconditioned truths and available identities as established by the constitutional order. Indeed the potential for such a refusal is, we might say, part of the aspiration of, part of what is political about, democracy. One can be judged by law, but that determination does not, in such cases, cross over to engage the moral culpability of the actor. That is exactly why they act as they do. And if this is so, then we might want to re-assess, even lower the aspirations, of what a singular normative theory of the trial can do.

This is not to say that one of the purposes of trials and punishments cannot be understood in this ‘strictly continuous’ moral way: the racist, rapist and child-killer come to mind as cases where this may be legitimate. Rather it is to say that when it comes to political trials of the kind I have been referring to, this same moral continuum between offence, trial and punishment, whose ultimate destination lies in the engagement of the moral repentance of the offender, is no longer persuasive as a normative ideal. Here we have reached a point where an alternative account is required.

Should Thomas Muir have repented his actions? Should the anti-poll tax protestors have repented theirs? Should anti-nuclear protestors, who seek to rid the earth of the threat of extinction repent their minor offences in the face of that overwhelming threat? Should they be reconciled to the constitutional authority that accuses, condemns and imprisons them, and learn to make that authority’s punishment their own? Must they accept the truths and definitions of that authority? If our historical sense jars at such interpretations, it is at least in part because we know that criminal trials have been, are, and will likely continue to be, places where the moral imagination of some exceeds and soars above the institutional demand and its diminished truths.
The Political Trial and Reconciliation

BERT VAN ROERMUND*

1. A NOTE ON TERMINOLOGY

WAT IS IT that makes us call a trial or (more generally) a legal procedure ‘political’, other than the possibility of dramatising political action ‘as if’ it were a legal procedure (for instance, the Russell Tribunal or the Brussels Tribunal)? I can think of four reasons:

(a) the political impact of the outcome (for instance the European Court of Human Rights (ECtHR) in the Paula Marckx case;1 the US Supreme Court having to decide on the vote in Florida in the Gore-Bush campaign in 2000);

(b) the political setting of the case (for instance the trial of Volkert van der G, who murdered the Dutch politician, Pim Fortuyn, in 2002 from political motives, as contrasted with the trial of Mijailo Mijailović, who murdered the Swedish minister, Anna Lindh, in 2003 without political motives);

(c) the political nature of the acts under investigation (for instance the Avis Consultatif of 9 July 2004 by the International Court of Justice (The Hague) about Israel’s constructing a ‘security wall’ on Palestinian territory; the Milošević trial; the trial of Socrates);

(d) the political set-up of the procedure (the ‘trial’ of Marinus van der Lubbe, who was executed in 1934 for allegedly starting the Reichstag fire; the ‘trial’ of the deposed Romanian dictator Nicolae Ceausescu in 1989).

In ordinary language a trial becomes political in the specific, indeed alarming, sense (d) when it can be argued, that, in one way or another, some or all magistrates try to abuse the form of the trial so as to become judge in their own cause. Such is the case when, for instance, the prosecution transforms into persecution

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1 Marckx v Belgium (1979–80) 2 EHRR 330, introducing, according to judge Sir Gerald Fitzmaurice (partly dissenting), ‘a whole new code of family law’. I am grateful to Harry Willekens for pointing me to this case.
(for instance, of a political opponent of the regime or the members of a dissident group); or when the court turns into the courtesan of the executive (for instance, by interpreting rules in exclusive accordance with a political programme); or when the procedure pre-empts the process (so that the peremptory voice of the criminal law will decide what would otherwise be subject to political contestation). What makes these tactics abusive is that they arguably deny the claim inherent in each and every trial, to wit that it takes place only by virtue of the political will to solve even the most radical antagonisms of (ultimately) political wills by referring them to the authoritative decision of a third person. If such is the case, the nature of the trial itself is at stake, not the impact, the input or the conditions.

Obviously, calling a trial ‘political’ for reasons of type (d) may find its roots in other reasons, in particular of type (c). For instance, one of the reasons we think of Socrates’ trial as a political set-up is that we cannot imagine his pursuit of truth to count as a political act (though Socrates himself could!). When political acts are at issue, there is a fair chance that the trial will be regarded as a political set-up, either by the persons on trial and their advocates, or by the public at large, or by what Adam Smith called ‘the impartial spectator’. Moreover, it is extremely difficult to delineate the category of a ‘political act’ in statutory terms. In post-Apartheid South Africa, the CODESA legislator went to great pains in the effort to restrict amnesty to cases of political acts. Thus, Article 18(1) of the Promotion of National Unity and Reconciliation Act² (governing applications for granting amnesty) required that the application be related to ‘any act, omission or offence on the grounds that it is an act associated with a political objective’. In Article 20(2) this was specified and clarified: specified with regard to places and times,³ and clarified with regard to intentions and conditions. In particular it ruled that the act must have been committed by a member of a publicly known political organisation or movement in bona fide support of its cause, or by any employee of the state (organs or services) in the course of and within the scope of fulfilling his duties in countering acts by such organisations or movements. Then Article 20(3) explicitly ruled that ‘Whether a particular act, omission or offence is an act with a political objective, shall be decided with reference to the following criteria: (a) the motive of the person who committed the act, omission or offence; (b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto; (c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence’, etc, etc. Explicitly excluded were acts for personal gain or out of personal malice, ill-will

² No 34 of 1995; hereinafter PNUR Act.
³ Applicants could apply for amnesty for any act, omission or offence associated with a political objective committed between 1 Mar 1960 and 6 Dec 1993. The cut-off date was later extended to 11 May 1994. The final date for the submission of applications was 30 Sept 1997.
or spite. The latter were referred to criminal proceedings. In the hearings and decisions of the Amnesty Committee one finds clear evidence that these demarcations gave rise to various and serious disputes. And so, by implication, does the characterisation of a trial as ‘a political set-up’.

Acknowledging these practical and empirical difficulties throughout, I would like to raise a conceptual question. Can a trial under the rule of law be defined, in the final analysis, in purely legal terms, or do political terms inevitably crop up in such a definition? If the former, how does law succeed in ruling out all political terms? If the latter, does this mean that a trial is always a political set-up in the sense explained above? Perhaps political trials in sense (d) tell us something about the concepts of law and politics as we see them in their interrelations. Far from dismissing them as nonsensical, we may come to value them as unexpected windows opening up to a complex world of discourse that would otherwise remain hidden behind the everyday business of criminal procedure. They allow us to detect the political element in any trial, and to appreciate the reconciliatory role of the trial; two basic conceptual parameters for the normative assessment of criminal procedure.

2. THE CONSTITUTIONALIST VIEW

Underlying (d) is a well-received view, which I have already hinted at: a political trial is an oxymoron. It is precisely because of the political will to rule out the clash of political wills that the trial can play a role in the administration of justice; and it is precisely by virtue of this conceptual constraint that we can criticised trials that are more or less overtly ‘political’. The predicate ‘political’ here is meant to characterise those complexes of thought, speech and action in a certain society that purport to effectuate power over that society and to compete with similar complexes. To bring such complexes under the authoritative ruling of a third power, able and willing to account for its ruling in terms of grounds that are freely acknowledged by the members of society, amounts to establishing a legal order. The trial is part and parcel of this enterprise. It is meant to provide ex ante a procedure for generating authoritative decisions in cases of serious infringement, by any member or body, of the norms set within the framework of the legal order in question. As consistency requires that the procedure of the trial be in accordance with the constitutive basis of the legal order itself, it cannot allow political powers to play a decisive role in courtroom

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5 Weigend, elsewhere in this volume, asks why you would prefer to have a trial if (it appears ex post that) you can have a bargain? Responding to this question is an important mode of what I will call ‘intercepting institutional logic’ (below, sect. 4) in everyday legal practice. But the concept of law answers a different question: what would you prefer if you can’t have a bargain?
proceedings. There is, thus, an important conceptual distinction to be drawn between a trial on political matters and a trial that is itself part of politics. With Paul Kahn one might say that the courtroom is a ‘political theatre’, but this in itself does not make it the ‘theatre of politics’. We need this clear-cut distinction in actual practice, when we decide to prosecute political criminals, but not by purely political methods.

I propose to call this line of reasoning ‘the constitutionalist view’ (CV). It is in fact obliquely demonstrated by the very title of this project, The Trial on Trial. One of the tokens of the word ‘trial’ in this title is meant to be metaphorical, and it is well worth asking what aspect of the trial that is brought to trial is ‘transferred to’? the trial that it is brought to. Indeed, the ‘trial’ to which the trial is brought here is an open and free discussion that seeks a critical understanding of the sense a trial has in our legal system and in our society at large. CV holds that, in principle, this is also the concept of trial that is characteristic of law. Even the criminal trial exemplifies what Habermas—updating the Kantian metaphor of Vernunft as a High Tribunal—would call ‘reason’, ie the intersubjective process of argument-based mutual understanding in matters of civic responsibility. This procedural form is supposed to warrant a reasonable outcome precisely in so far as it delineates a power-free space from which the exercise of power can be critically judged. Of course, the ‘form’ is not a pure form; it is rather a content of greater importance than the antagonisms that create the conflict. The partisans on either side of the dispute consent to a background of shared opinions or preferences of a more fundamental nature, giving rise to a procedure. Thus they commit themselves to detailing this procedure by well-defined roles, procedures, terms and places, grounds of evidence and rules for fiction, protocols and forms, as well as specific vocabulary and semantics, that can all be defined as functions of the higher order opinions and preferences mentioned above. For instance, the rule that children can be excused from testifying against their parents can be explained by a generalised order of preferences in which the members of a society by and large prefer to protect loyalty in family relations over truth in criminal matters. Once they have created this realm by a contractual step, they are bound by its norms. They can no longer deviate from

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7 As Aristotle would say; see Poetics XXI, 7.

8 On the communicative function of the trial see RA Duff, Punishment Communication and Community (New York, OUP, 2001); E Christodoulis, ‘The Objection that Cannot be Heard, Communication and Legitimacy in the Courtroom’ in A Duff et al, The Trial on Trial, Volume 1 (Oxford, Hart Publishing, 2004) 179 at 195 criticises the Habermasian view, picturing it very well as the ‘discursive redemption of the trial’. I am in sympathy with the main part of his argument, but will argue a few worries in the remainder of this paper.

9 For instance, ‘I am neither male nor female’ makes as little sense in a court of law as does Chomsky’s ‘Colourless green ideas sleep furiously’ in ordinary language.
the norms without, in fact, renouncing their contractual step. Once you make a
law together, you can no longer break it on your own without disqualifying
yourself as a law-maker. It this view, the expression ‘political trial’ is utterly
oxymoronic.

3. THE CRITIQUE OF THE CONSTITUTIONALIST VIEW

It will readily be granted that various alternative approaches and emphases
gather under the flag of the ‘Constitutionalist View’. Some will stress the ‘con-
sensualist’ elements in it, others the ‘communicative’ elements, still others the
‘formal’, the ‘procedural’ or the ‘rational’ elements. But the crucial property of
CV as a model of thought is that the agents involved give up their respective
political stances and agree to step onto some middle ground that is considered
to be not just ‘similar’ but actually ‘shared’ from all of their private perspectives
and, by that very token, non-political. Alas, it is this very contractual essence
that makes CV also vulnerable to a specific line of critique. Contractual models
for law are fine, as long as they manage to conceal one problem: one cannot use
the social contract to determine who are to be parties to the social contract.
That has to be determined first, before one can make sense of expressions like
‘the agents involved’, or ‘common wealth’, or ‘public security’. There is a clas-
sical Münchhausen trilemma10 here. If a meta-contract is required, the problem
is pushed into an infinite regress. If a property different from contract is decisive,
it is not contract that is at the basis of the legal order, and the theory becomes
self-contradictory. If we assume that the parties to the social contract are ‘just
there’ as a mater of fact, we let the problem slip into a form of dogmatism. In
any case, CV will not get off the ground as long as the membership issue is not
solved by conceptual means. Moreover, the problem is a general one. One can-
not generate the rules of a legal system by applying the rules of the legal system
for the same reason as one cannot open or close a dialogue by dialogue.
Inversely, the political will to get rid of any antagonism of political wills only
announces the possibility of new antagonisms. In short, and with Waldenfels,11
the act of ordering is to be seen as conceptually prior to the order it brings about
from the vantage point of the order brought about.12 As a constitutive act it
therefore evades the order it constitutes, whilst nonetheless governing this very
order. To the extent, then, that a legal order is founded by a political act or

10 H Albert, Traktat über kritische Vernunft (5th edn, Tübingen, Mohr, 1991) 15.
11 Cf B Waldenfels, Order in the Twilight (Athens, Ohio, Ohio University Press, 1996) ch4, and
Verfremdung der Moderne. Phänomenologische Grenzgänge (Göttingen, Wallstein Verlag, 2001)
132 ff.
12 The addition about the viewpoint in crucial. The agent who brings about the order does not
necessarily share the viewpoint of the agents acting in the order brought about. This is why
Rousseau, in the Social Contract II, 7, can say that, from the perspective of the Lawgiver, ‘il faudrait
que l’effet pût devenir la cause, que l’esprit social qui doit être l’ouvrage de l’institution présidât à
l’institution même, et que les hommes fussent avant les lois ce qu’ils doivent devenir par elles’: ie the
Founder must anticipate the order yet to be founded as already founded.
process, its roots in politics make themselves felt whenever its officials or sub-
jects refer to its conceptual genealogy, in spite of the fact that these roots are cut 
of in terms of its causal genealogy. By implication, the phrase ‘political trial’ is a 
pleonasm rather than an oxymoron. In a certain sense, this critique says, a trial 
is political by definition.

I think that this insight is basically sound enough. All legal trials are political, 
and have at their cores a political element that remains alien to the law of which 
they are an institution. Indeed, here is a non-legal element at the heart of law as 
such, which spills over to the trial. Or, in the words of Emilio Christodoulidis, 
there is always an objection in the courtroom that cannot be heard. The perti-
nence of this observation is easily misunderstood. First, this primordial act is 
not an event in history. Rather it is an act performed in each and every actual 
scheme of thought that makes use of discursive elements like ‘together’, ‘common’, ‘public’, ‘general’, ‘people’, ‘citizen’, ‘border’, etc, as well as their 
equivalents and their counterparts. Few will deny that a criminal trial—a basic 
metonymy for law in general—is dependent on the frequent use of such discurs-
ive elements. They are crucial, for instance, in upholding a concept of obliga-
tion that is dependent, neither on individual consent in incidental cases nor on 
agreement secured by a suitable process of non-coercive argument, but on rea-
sons that are pre-established as counting in support of a certain course of action 
within a certain polity. To the extent that, indeed, this simple preposition 
‘within’ makes no sense for the members of the polity without an outside that is 
kept in sight as the outside, the trial is dependent on ‘an objection that cannot 
be heard’. Secondly, it would be mistaken to infer from this that such an objec-
tion should be heard. What it says is that the trial, as the pars pro toto of the 
legal order, should bear testimony to its double bind: it is dependent on author-
ity yet to be established as always already established. It conveys that the admin-
istration of justice (to give ‘everyone’ his or her due) cannot even begin without 
some primordial, unjustified act of collective self-inclusion that is constitutive of 
‘the polity’.13 But it remains to be seen exactly what the conceptual implications 
of this critique are. To try to do that, we should concentrate on the sophisticated 
rather than on the naïve versions of the argument. The argument does not nec-
essarily amount to the view that every trial is replete with fraud; that it serves 
the political powers that be; that judges act in bad faith if they pretend to be 
independent of those powers, and legal subjects are misled if they believe that 
access to justice, equality of arms, the presumption of innocence, etc transcend 
the political power play; in short, that all law is victors’ justice since, at the end 
of the day, it is imposed by those who have got power sufficiently dominant to 
енact and enforce it. I call this view naïve because it favours a concept of power 
that (a) does not differentiate between political and other modes of exercising

13 For a similar argument regarding the polity of the European Union, see H Lindahl, ‘Acquiring 
a Community: The Aquis and the Institution of Legal Order’ (2003) 9 ELJ 433, and ‘Inside and 
Outside the EU’s “Area of Freedom, Security and Justice”: Reflexive Identity and the Unity of Legal 
power; (b) does not take into account the symbolic dimension of (in particular political) power; (c) is predicated on what Kelsen called ‘a manicheism under the guise of state theory’,14 ie a sheer dualism between power and law.

A more sophisticated account of the political element in the trial reveals it to us as an implication of the paradox of sovereignty,15 which has been formulated in a number of ways. Foucault, for instance, in his Genoa lectures on power,16 observed that the concept of sovereignty purports to express both the political power that enacts law and the law that restrains power. In the Anglo-American debates, the very same question is often discussed as the riddle of conventionalism in legal theory. How can the rule of recognition be explained in terms referring to the behaviour of officials, when the rule is needed to determine who are officials in the first place?17 Thus the problem is not one of those paradoxes that can flourish only in the idiolects of postmodern circles. Nor is it confined, for that matter, to the discourse of theoretical puzzles. It is a problem of harsh politico-legal reality.18

In Homo Sacer, Agamben explains how this dilemma is only the shadow cast by a fundamental logic underlying the idea of a legal order. Drawing on Carl Schmitt’s famous or infamous definition of sovereignty,19 he renders the dilemma of sovereignty as follows:

the sovereign, having the legal power to suspend the validity of the law, legally places himself outside the law. This means that the paradox can also be formulated in this way: ‘the law is outside itself’, or: ‘I, the sovereign, who am outside the law, declare that there is nothing outside the law [che non c’è un fuori legge].’20

15 This is also the key in which Christodoulidis, n 8 above, puts the problem.
17 Cf J Coleman, The Practice of Principle. In Defence of a Pragmatist Approach to Legal Theory (Oxford, OUP, 2001) 100–1: ‘[c]an one explain the possibility of law without assuming the possibility of law?’ Coleman proposes to solve the riddle by accounting for the congruity between practice and attitude. Officials, he says, are ‘in a sense’ officials in virtue of a rule of recognition they generally comply with. But they are not officials prior to it, in either the factual or the logical sense. ‘Their behavior makes the rule possible; but it is the rule that makes them officials.’
18 One will remember one of the two questions that were prominent in the UN procedures dealing with the Kosovo crisis: if the international community intervenes in a national state S (like Yugoslavia) to enforce compliance with international legal standards in S (though in violation of internationally accepted rules that empower it to take such action), can it still claim to act within the realm of international law? The answer has remained unclear until the present day.
19 Cf C Schmitt, Politische Theologie. Vier Kapitel zur Lehre von der Souveränität (2nd edn, Munich, Dunker & Humblot, 1934) 14: ‘[t]he sovereign stands outside the juridical order and, nevertheless, belongs to it, since it is up to him to decide if the constitution is to be suspended in toto.’ (Agamben’s translation, slightly imprecise).
20 G Agamben, Homo Sacer: Sovereign Power and Bare Life (trans D Heller-Roazen, Stanford, Cal, Stanford University Press, 1998); 15. The Italian original reads: that there is no ‘outside the law’.
Schmitt’s thesis is not just that law requires an agent outside the legal order who casts it into the mould of a bounded polity before it can begin its career as a system of law. In particular Schmitt is not of the opinion that sovereign power is a causal precondition for bootstrapping a legal order, a power exercised only for the sake of submitting itself to what it intended to bring about. His is a conceptual thesis, and it conceives of the internal–external distinction in a complicated way. It says that ‘having a sovereign’, as a predicate of a legal order, is ascribed to it ‘at the same time’ as intrinsically belonging to that order and as necessarily apart from it, ie not belonging to it. That is to say, the exclusion of a power constitutive of it is infinitely recaptured within the legal order, whereas its inclusion is constantly postponed. This is why Agamben can say that the legal order is always ‘suspended’; suspended by making an exception to the rule, suspended by distinguishing a case from a precedent, suspended by seizing jurisdiction where there is none.

At this point, the sophisticated view on the political character of the trial becomes vulnerable to a crucial objection. Schmitt argues his phrase ‘at the same time’ from an external point of view in the theoretical sense of the word ‘external’: it is a reflective observation made by ‘the philosopher’ who stays, as it were, aside from the political realm so that he can monitor both sides of the boundaries that define the polity. His is a vantage point external to the internal–external distinction. But note that he can only make us understand the predicates ‘internal’ and ‘external’ if he acknowledges that the distinction is drawn from within the polity in a primordial way. The external position of the philosopher is not to be confused with the position characterised as ‘external’ by the political agents in society. The distinction they draw between ‘inside’ and ‘outside’ is drawn from the vantage point of the inside. There is a preference in the difference here, in the sense that one of the terms of the distinction governs their relationship. This preference can be discerned in the temporal dimensions implied in the definition of sovereignty: the sovereign is never inside and outside the legal order ‘at the same time’. He is outside the legal order only ‘in retrospect’, in a past that was never a present, just as he is always inside the legal order ‘in prospect’, anticipating the community as a bounded whole in a future that will never be a present either. The asylum seeker, who is the conceptual antipode of the sovereign, has exactly the opposite temporal connotations: she or he is outside the legal order from the prospective point of view, but inside in hindsight, when ‘after all’ she or he has ‘always’ been ‘one of us’.

4. RECONCILIATION AS A POLITICS OF INTERCEPTION

Schmitt’s fallacy is a common one, and it unites many contractual and non-contractual theories of law. It is characteristic of most of these theories that they

22 M Merleau-Ponty, Phénoménologie de la perception (Paris, Gallimard, 1945) 280.
conceive of law from an abstract point of view. The abstraction goes in three steps. First, one imagines a ‘world without law’ as the negative counterpart of the world we are familiar with. In classical philosophy, such a world is often referred to as ‘the state of nature’. Secondly, one relates the agents in this world without law to a point of view beyond it, a point of view that would be of interest to all interests involved. This point of view truly embodies a meta-interest and, thus, a theory pertaining to the practical first-order interests. Thirdly, one ascribes to the agents the ability to transform this theory into an overriding practical interest.

The Hobbesian model—much admired by Schmitt in spite of crucial differences—is a case in point, and it is paradigmatic of many modern alternatives. Hobbes argued that human individuals can unite in spite of their conflicting interests or ‘motions’ (their ‘warre’), if and when they acknowledge that they have one motion in common: the desire to be left in peace as far as the undisturbed pursuit of their needs is concerned. But from which viewpoint are they able to acknowledge this desire as common between them? Hobbes is deeply suspicious of both the Platonic and the Aristotelian solution to this basic problem of ‘political anthropology’. The former solution argues on the basis of mimesis: human agents are able to imagine themselves as detached from the polis and to (re-)commit themselves to its ideal form for all the good things it will bring to them. The latter argues on the basis of phronesis: a form of practical reasonableness that enables agents to work out provisional solutions for their conflicts by piecemeal negotiations prior to any authoritative warrant. For Hobbes, both solutions are unacceptable, as they are ultimately based on the idea of an all-embracing cosmos governing both sound imagination (mimesis) and sound sense (phronesis). He rejects the view of Antiquity that the polis is an application of this logos, and that its order is there, to be gradually discovered by human beings in their specific situations: always a puzzle, but never a problem. The polis becomes a problem in the radical sense of an aporia when, in Modernity, homogeneity is no longer something given as a guarantee of reason (‘nature’), but rather a contingent fact to be proven by reason. Then, as Hobbes argues, the relationships between human beings can no longer be defined by reference to the polis; rather the polis has to be defined by reference to the properties of individuals, ie their needs and interests. So much being established, Hobbes submits that the transition to a state of law can still be made, because the crucial horizontal acknowledgement of interests between the agents involved can rest on a vertical insight into their overarching interest in peace. Theirs is a ‘scientific’ insight that derives from the overall point of view of philosophy, and which he supposes to be available to these agents. Only by taking this viewpoint of the ‘divine Legislator’ (Rousseau), the ‘impartial spectator’ (Adam Smith) or ‘the veil of ignorance’ (Rawls) are the agents able to see what their common interest is. This is how they come to think of their common interest as a shared interest. But note that this in fact boils down to giving up the point of departure from which the whole idea of the state of nature emerged in
the first place: that there is no higher order insight into a common wealth for the agents. The bottom line of all these models is that legal subjects are philosophers, and that a philosophical account of law is directly available and valid for them qua legal subjects. Inversely, all these models presuppose, in the final analysis, the legal status of their philosophising subjects. Strange as it may sound, whether one calls them ‘combatants’ (Hobbes) or ‘prisoners’ (modern game theory), they are implicitly conceived of as subjects before the law, that is, as legal subjects. The very presupposition of their interests being ‘theirs’, the very picture of the walls of their cells separating them and warranting their existence as individuals is neither more nor less than the concept of law tucked away in the hat of the model that is going to produce it. They are subjects before the law in the double sense of the word. First, they are considered to be accountable in virtue of a normative rule: their common, though not shared, interest. Secondly, they are supposed to be accountable well in advance of the legal order they are in the process of establishing.

From a practical point of view, the opposite of a world governed by the rule of law is not any world without law (ie war), but this specific world without law that is a world of oppression and injustice. Political oppression is different from war from the point of view of those involved. War presupposes (a number of) polities in (virtually) violent conflict, ultimately a conflict on the proper meaning of the rule of law that, by necessity, suspends the workings of the rule of law. Political oppression, however, works within the presupposition of there being one polity under the rule of law. Its violence is accompanied by the claim that, by virtue of the rule of law, the interests of some members of this polity are indifferent to what will count as the interest of the whole. It is characteristic of oppression that the oppressors require the oppressed to consent to their being systematically ignored in the name of the law. If the members of such a polity are to make the transition from oppression to the rule of law, what is required is not a third person viewpoint, but reconciliation between victims and perpetrators.

Reconciliation, in my view,23 is a political rather than a moral concept. It points to forgiveness, surely, but the pointing itself is a political gesture. However, what is characteristic of reconciliation, on the conceptual level, is that it founds the political not on self-inclusion, and the demand for identity that self-inclusion entails, but rather on the interception of such a demand. By ‘interception’ I mean that it acknowledges self-inclusion as a necessary predicate of constituent political power, rebutting the claim that this necessity already entails a nuclear form of justice. Contrary to what one might expect, and in spite of the ‘re-’, it undercuts the idea of a primordial community that has to be restored, for the simple reason that such community between oppressor and oppressed cannot be thought of from either viewpoint. It tries to picture politics.

23 For further argument, see B von Roermund, ‘Rubbing Off and Rubbing On: The Grammar of Reconciliation’ in E Christodoulidis and Veitch (eds), n 6 above, 175.
as different from what Lacoue-Labarthe and Nancy called ‘the will to figure’, ie a programme to hypostatise the need for self-inclusion in a set of ontologically grounded properties and call this ‘identity’, ie ‘an essence in common’.

In a similar vein Andrew Schaap notes that, in a process of reconciliation, community cannot be presupposed because the politics of reconciliation turns precisely on the question of belonging:

If reconciliation is to be understood politically [therefore], it is better thought of in terms of revolution rather than restoration. As such, reconciliation would not begin with the recollection of a prior state of harmony (whether ideal or real) in terms of which our present alienation might be understood. Rather it would begin with the invocation of a ‘we’ (that exists only as potentiality) as the basis of a new political order.

With Hannah Arendt, Schaap stresses that the question for those who want to start such a new order in reconciliation with their former oppressors is ‘how to restart time within an inexorable time continuum’. In other words, reconciliation as a political enterprise aims at intercepting what is at the very heart of politics, even the politics of reconciliation itself: the self-inclusion of the polity by reference to an essence in common, projected in a realm beyond society, with reference to which legitimate power over society can be exercised. It is not enough that one acknowledges the symbolic character of this representation, as Lefort has argued. In order to intercept it, one needs political agents letting some claim count against the very identity of the polity they represent, even if the claim is made by those who have no power to enforce it. To acknowledge a truth counting against oneself without being forced to do so is what Gadamer called openness.

24 Sparks adequately phrases the question reconciliation poses in practice, though he himself gives it a purely philosophical context: ‘[i]s there something that would allow the political to be thought outside of the “will to figure”? Can the political be thought, finally, in a way which would disrupt what Lacoue-Labarthe and Nancy have called “the destiny of metaphysical politics”? To rethink the political beyond the identity principle of the figure; to rethink the political as the non-figure of the “Narcissus” which does not panic and shares (perforce the French partage) its lack of identity: such would be, then, Lacoue-Labarthe and Nancy’s aim in Retreating the Political.’ Cf S Sparks, ‘Editor’s Introduction: Politica Ficta’ in P Lacoue-Labarthe and J-L Nancy (eds), Retreating the Political (London, Routledge, 1997) xiv at xxv. The political is characterised as ‘an understanding of the political as the will—and that is also to say the imperative—to realise an essence-in-common (a community even) on the basis of a figure of that in-common. It is this realisation that identifies a community as and with itself, in which case the figure would be seen as the identity principle of the community; and this whether it be a matter of a “we”, “the people”, “spiritual or religious type”, “the nation”, “humanity”, “project”, “destiny”, etc.’ at xxiv.


27 For an example of a politics of reconciliation remaining tributary to the logic of politics, in particular the logic of representation, see my analysis of Babwhala Mhlauli’s statement before the TRC, n 23 above, passim.


can register is in ‘a voice that speaks against itself, opposes itself, finds its own mandate problematic’.\(^{30}\) It is only by acknowledging reconciliation as the precondition for law in this sense that one can come to appreciate the reconciliatory elements in law itself.

5. RECONCILIATION, RITUAL AND PROCEDURE

Although reconciliation is a precondition for law as ‘the retreat of the political’, the anticipation of this precondition being fulfilled is the only way to attain its fulfilment. To invoke a ‘we’ that exist only as potentiality requires, as Arendt has argued,\(^{31}\) defining a space in which this not-yet-community can actually appear. For potentiality can be experienced only obliquely from actuality. What is needed, then, is a space where perpetrators and victims are invited to enter, where it remains to be seen who is a perpetrator and who is a victim, where nothing counts as settled unless it is established in the terms defined within that space. This is, by necessity, an institutionalised space.\(^{32}\) It is a space not provided by law; rather it is law itself, understood as space.\(^{33}\) The trial is the metonymy of that space. Hence the institutional arrangements of equality of arms, standardised vocabulary, regimented speech turns, rules of evidence and proof, checked moves within restricted spatio-temporal area and final discretion.

Christodoulidis has forcefully argued\(^{34}\) that this leads us to a new version of the aporia of sovereignty. On the one hand a legal constitution facilitates the political by setting ‘joint boundaries’ that allow adversaries to find the terms and the means to reconcile. On the other hand, it frustrates (as Arendt seems to ignore at times) the potential character of the community invoked ‘by setting the thresholds of valid dissensus, the when and how of possible conflict’. By staging political conflict as internal to the constituency, it removes any potential threat to the unity of the polity, thus pushing its fragility and contingency out of sight and substituting a full-blown ‘essence in common’ for it. Exit potentiality. But perhaps the aporia can be solved by pointing to the ambiguous character of law as an institution, or even of institutions in general. What can preserve the potential character of the community invoked is not the conventional but rather the ritual dimension of institutions. Institutions are not exhausted by their conven-

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\(^{31}\) See again Schaap, n 25 above, 87ff.

\(^{32}\) Cf. Geary, n 30 above, 49: ‘[i]n some ways, though, the voice that will concern us is an institutional voice, a voice that has chosen to speak for other voices, a voice with a mandate.’

\(^{33}\) I acknowledge that the space metaphor has been proposed by a number of authors (among others, Foqué, ’t Hart, Hildebrandt, Christodoulidis, Schaap), in widely varying senses, and that it is not very specific without extensive comment.

tional achievements, functions or grounds; they are rooted in a form of magic (sometimes aptly called ‘poetics’) that offers us a glimpse of a world that we actually never entered or will enter. They hold the promise of a community that is not only counterfactual but even counternormative, in the sense not only that it cannot be realised, but also that it should not be realised, in spite of the fact that it guides our action and we (already) seem to live in it. In none of these senses can it be said to be a function of the actual world. If an institution were merely conventional, we could easily cut loose from it, namely by agreeing to do so. The ritual element, however, explains why it is difficult to cut loose from it, even if we were quite willing to do so. ‘A ritual is a circle of operations in which an action, now protected against the disruptions of an outside world, may grow to an event.’ It is a gesture of receptivity towards what cannot be achieved by intended action but can come to us nevertheless. It is this ritual element of opening up a world of potentialities that must have fascinated JL Austin when for the first time he was struck by ‘performative language’. Apparently, creative performance and institutionalisation are not opposites in all respects. Institutions are obliquely expressive of ‘the coming community’. Thus, as it cannot build on a pre-established community (constituency, demos) and a corresponding constitution (legal order; rule of law), reconciliation is referred to a procedure in which community-as-potentiality is upheld. The addressee of its ritual is ‘the population’ rather than ‘the people’, or rather the people qua population. It is much more an exercise in serving the leitoos than the demos. It is a form of leitourgia rather than demo-kratia. But note that this dynamics does not appear in isolation from the institution, and that it is not available apart from its conventional dimension. It only appears as a function of withholding or intercepting the conventional aspects of the institution ‘law’, ie of disrupting the law’s institutional logic as merely conventional.

6. RECONCILIATION AND LAW

In order to catch a glimpse of the intricate relationship between the criminal trial, politics and reconciliation in practice, let us focus now on what has

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35 It is no coincidence that Schaap, n 25 above, 94–7 concentrates on promising.
36 For instance, perfect transparency of arguments and motives as definitional of Habermas’ ‘ideal dialogue’ is not an ideal at all in the normative sense that we should try and realise it. It would destroy all communication by destroying the need for it.
37 The Dutch poet, A Roland Holst as quoted by C Verhoeven, Rondom de leegte (Utrecht, Ambo, 1967) 14.
38 In ‘Other Minds’ (published as early as 1946) JL Austin, Philosophical Papers (2nd edn by JO Urmson and GJ Warnock, Oxford, OUP, 1970) 103: ‘utterance of obviously ritual phrases’; he left this track later on to concentrate on the rule-governed character of performatives. Searle (in JR Searle, Speech Acts: An Essay in the Philosophy of Language (Cambridge, Cambridge UP, 1969) was only interested in the conventional aspects of performatives language.
39 In a different context I pointed to Hans Haacke’s installation ‘Der Bevölkerung’ (To the Population) in the new Reichstag in Berlin.
become, in recent decades, the archetype of redress for state violations through reconciliatory processes: South Africa’s TRC experience. The conceptual account of how reconciliation addresses ‘the political’ explains to a considerable extent, I submit, the ambiguous relationship the TRC maintained with law, and the incipient new legal order in South Africa with the TRC. As the TRC Report acknowledges, on the one hand the tasks and activities of the TRC were backed up by formal law, while on the other hand it had authority to keep law at bay (in particular by granting amnesty). Moreover, on the one hand it conducted law-like procedures, while on the other it ignored basic principles of criminal procedure. But, most of it all, it had to anticipate the rule of law situation that it was supposed to bring about in the first place. Let me explain.

The TRC was linked to and backed up by formal law in a variety of ways. First, it was inaugurated as a ‘juristic person’ (PNUR Act, Article 2(1)). Secondly, its commissions had legal powers conferred on them by the State (PNUR Act, Article 5), and its decisions had direct legal effect. For instance, it had the power to summon individuals and institutions, the power to conduct all sorts of investigations, as well as the power to grant amnesty. It would have been difficult to persuade perpetrators to make full disclosure of their crimes had reconciliation not entailed individual amnesty for those who did. Reconciliation and acquittal go hand in hand. Thirdly, its success partly depended on formal law being by and large effective. This effectiveness was established prior to the launching of even the idea of such procedures, by a most risky process of negotiation and compromise between ‘black and white powers’, in the face of an all-out civil war. Fourthly, criminal law was held in reserve to deal with those perpetrators to whom the Commission could grant no amnesty. Fourthly, the TRC conformed to some basic supranational principles of the law of criminal procedure: judicial independence, impartiality, respect for victims, etc. Sixthly, the various Committees within the TRC differed greatly in their proximity to legal procedure. In particular, one should not underestimate the amount of formal law that came with the goal of judging amnesty applications. The Amnesty Committee had to work almost like a court of law, which caused enormous delay and criticism. Last but not least, consequences in terms of reparations were foreseen. Although many people believe that the TRC should have had full competence here, and although this became the greatest problem and frustration of the TRC process, the initial intention shows at least a basic sense of justice that is at the bottom of law.

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40 Cf Moon, n 25 above, 186.
41 One example of how difficult that is is this: on 7 Oct 2003 it was announced by the South African Justice Ministry that the 5 policemen responsible for the killing of Steve Biko (1977) would no longer be prosecuted because of insufficient evidence.
43 In South Africa the government is unwilling to co-operate in this respect, taking the view that all black people suffered from apartheid and that it would be unjust to pay only a few of them. Also,
In spite of all these dependences on and inclinations towards formal law, the TRC’s mode of operating deviated from formal law to a considerable extent. In particular, it depended far less on the conventional aspects of the legal institution than formal law can ever afford to do. First of all, its explicit purpose was not to bring perpetrators to justice, but to lend dignity to the victims by listening to the victimised survivors as they told their stories in their own vocabulary, thus acknowledging the singularity of their suffering rather than the factuality of the crimes. According to Krog, this is the most underestimated accomplishment of the TRC.44 Kader Asmal confirms45 that, unlike many truth commissions preceding it, the South African TRC was not solely concerned with granting amnesty to perpetrators of human rights abuses: it also gave a voice to the victims and provided for reparation to and rehabilitation of victims. Or, in Krog’s words, suffering has no colour: when it comes to suffering the distinction between first and second rank citizens becomes foolish and inhuman.46 The purpose was also to lend humanness to the perpetrators, to give them ‘the frontispiece of man’ (Locke47) rather than demonising them.48 Then, secondly, there was no pre-set language or language game in the strict sense, as positive law usually requires (though there was a set of constraints).49 The hearings were about stories, not about cases. Discussion was not the primary format of the proceedings. The rules of evidence were rather loose. There were no ‘doctrines’ or ‘dogmas’ to apply (eg *nullum crimen*) nor precedents to refer to. Thirdly, some important legal principles (eg *nemo tenetur*, the prohibition of self-incrimination) were set aside. On the contrary, the whole idea of the TRC’s Amnesty Committee was based upon perpetrators making full and honest disclosure of all the facts and circumstances pertaining to the crime, if they were to apply for amnesty. Fourthly, the TRC was far more deeply entrenched in the local communities and interwoven with local culture than modern law usually is. Also, it was profoundly inspired by a specific—quasi-intercultural—conception of morality: the mix of *ubuntu*, on the one hand, and Christian ideas on mercy, forgiveness, compassion and redemption in reconciliation, on the other. Surely *ubuntu* refers to a sense of belonging that is radically at odds with ‘the
identity principle of community'\textsuperscript{50}. We cannot even be sure whether *ubuntu* has
to do with 'morality' in the western sense, as it builds on a political economy of
sharing 'life' as humans, even over generations and among other living beings,
rather than on a conception of individual perfection in living one's life, as is the
case in Christendom. Krog asserts that reconciliation in the South African key
was in fact not based on mysterious Jewish–Christian ideology at all, but on sur-
vival 'instinct', lived out by ongoing negotiations and trade-offs between vari-
ous groups, circling around each other in a process of articulating and adjusting
new identities. One should not underestimate the forces that come immediately
to distort our understanding of what Krog describes as 'survival'. While we
would be inclined to translate it as a 'struggle' for life, *ubuntu* evokes the quiet
vitality that combines trust in and faithfulness to human life as it is intertwined
with infinitely more life that individual humans can live.

In her Postscript to the Dutch version of *Country of My Skull*,\textsuperscript{51} reflecting
upon the lessons that are to be learnt from the TRC adventures, Krog makes no
secret of what has already transpired in the incisive analyses that form the body
of the book: the radical ambivalence of the reconciliation process in South
Africa. She advises that if a Truth and Reconciliation Commission is to be
installed, a country should be clear about what it expects from it.\textsuperscript{52} Should it
attribute moral responsibility for serious crimes? Should it find a way of getting
rid of the old conflicts? Should it lend dignity to the victims? Should it grant
amnesty? Should it find out about as many facts as it possibly can? Should it
deliver an official historiography of the sufferings of the past? Should it con-
tribute to establishing a culture of respect for human rights? One cannot do
everything, but what one chooses as purposes should find a basis in a large part
of society and be communicated as such.

Although a best practices approach makes sense from a theoretical perspec-
tive, the political history and the actual situation in a specific country will deter-
mine which elements of reconciliation will (have to) dominate in the processes
and which will (have to) play a more modest role. Characteristic of the South
African situation after Apartheid, certainly, was the possibility of distributing
particular individuals over two groups: oppressor and oppressed. Rooted as the
situation was in four centuries of colonial exploitation, it was clear at least that
there had been these antagonist groups, even if it was not always easy to decide
whether a specific individual belonged to either of these groups, and even if it
had to be admitted that some of the oppressed used oppressive methods to lib-
erate themselves from the oppressors. The situation is completely different in,
for instance, Sierra Leone, Liberia or Congo. Here the problem is that, more
often than not, people were both perpetrators and victims of political violence.

\textsuperscript{50} Cf among others MB Ramose, *African Philosophy Through Ubuntu* (Harare, Mond Books,
1999) in particular chs 3 and 6.

\textsuperscript{51} See n 42 above; the Postscript actually begins at 351.

\textsuperscript{52} Cf ibid, 367.
In Peru and East-Timor the situation is different again. But these practical differences are all variations on a more general theme: a legal order and a process of reconciliation are mutually conditional.

7. RECONCILIATION IN THE TRIAL

What are the implications of all this for the everyday criminal trial, given the fact that a purely constitutional view misses out on the political element that is at the core of every trial? A recent interview in a Dutch national newspaper quoted the former vice-president of the South African Truth and Reconciliation Commission (TRC), Alex Boraine, as saying that many countries in transition from large-scale political oppression to the rule of law yearn for new ways of reconciling and doing justice. The core of his explanation was (I paraphrase) that traditional administration of justice by trial is bound to fail in situations where (a) political crimes in the form of large-scale atrocities were a structural part of the former oppressor’s regime and (b) their victims established a new regime that will have to deal with the representatives of the old regime within one and the same society. For a number of reasons, he says, the institutional settings of trials are simply not capable of accomplishing this.

What are Boraine’s main problems with formal trials under the specific conditions mentioned? I summarise them as follows:

(1) These trials focus on perpetrators rather than victims, and on the relationship between perpetrators and the state rather than between perpetrators and victims. Thus, the victims do not register as the ones to whom justice is to be done, but for the modes in which they can function to bring the perpetrators to justice.

(2) Criminal trials against those indicted of political crimes do not involve the large group between victims and perpetrators, ie the beneficiaries and consenters—more important for an oppressive regime than any other group. These groups often stay outside the scope of legal procedure altogether, and individuals belonging to them can often continue their business as usual under the new regime.

(3) Trials aim at retribution rather than reconciliation, thus perpetuating the circle of violence. They do little in pursuit of ‘restorative justice’, in particular when it comes to redistributing resources and offering new chances to victims.

(4) If national courts conduct the trials, the fresh political situation often makes them too vulnerable to instability and corruption to fulfil their role adequately.

If international tribunals are involved, trials often take place far away from where the crimes were committed, far from the societies involved, where lawyers conduct sophisticated legal debates in languages the former victims do not understand. They make absolutely no contribution, in these situations, to civil peace. On the contrary, they alienate people, who cannot now see justice being done, from a shared commitment to the rule of law.

Trials last too long and are too costly. If we look at the performance of international tribunals like the Hague tribunal for the former Yugoslavia or the Arusha tribunal for Rwanda we find that in 12 years about one billion dollars was spent in return for a few dozen sentences. Furthermore, with a few exceptions, the persons indicted were not the ones who were really responsible for the specifically political character of the crimes that were committed.

With the possible exception of (4), these points may sound familiar to the criminal lawyer as a thumbnail critique of the trial in general. It is costly and cumbersome, it ignores restorative justice, it alienates people from the law and it misses out on the political context of the crime committed. Obviously, it is the last point that becomes all-important in the specific circumstances of transitional justice to which Boraine is referring. A full-blown legal order can afford, up to a point, to abstract from the political aspects of a case and translate them into pure legal categories, with all the alienating and costly sophistication it takes, because it can safely assume that these aspects are taken care of by other subsystems in the society, eg free elections, separation of powers, shared cultural and moral values, transferred by the educational system, and a fairly egalitarian division of capital, labour and knowledge. If these conditions obtain it becomes tempting to bring individual suspects to justice in the way legal orders normally do, not only for economic or other functional reasons, but also for moral reasons. It is this conventional freewheeling of ‘institutional logic’ that we should try to resist. Every criminal trial can be arranged in such a way that the voice that speaks also speaks against itself and its mandate. It may acknowledge the victim, it may lend a human face to the suspect, it may tune to local culture and language, it may elicit reparations rather than impose punishment, and it may even address those who think they could benefit from the crime by remaining silent. Thus, I submit that it is possible to use the high political profile of administering justice in transitional periods as a magnifying glass that allows us to see better what happens in the world of routine criminal procedure.
That the atrocities of perpetrators should describe legally recognised crimes, and that perpetrators should have to answer for their conduct in courts of criminal law are hardly controversial claims. Granted, one might argue about form, venue and procedure: about whether, for example, domestic institutions are to be preferred over international tribunals; about whether it is proper to impose capital punishment upon those who grossly violate international humanitarian law; about whether continental or Anglo-American norms of procedure better develop the aims of the trial; or about whether it is wise or fair to try an individual for crimes committed half a century before. One might even argue about the wisdom of trying perpetrators in light of specific conditions ‘on the ground’—whether, for example, the interests of transitional democracy or negotiated settlement counsel in favour of reliance on a South African-style ‘Truth and Reconciliation Commission’ over a perpetrator trial. Still, the deeper logic and normative appeal of trying perpetrators is generally accepted as self-evident.

At its most basic, the perpetrator trial is seen as a fundamental requirement of justice itself. The concept of justice, in turn, might be said to include at the very least the idea that impunity is a wrong, both in itself—as a violation of the fundamental moral norm that no one should benefit from his or her wrongdoing—and instrumentally, inasmuch as unpunished crimes serve to destabilise the ever-precarious balance of domestic and international power. This latter idea often finds expression in the notion that criminal trials, as impersonal acts of state or internationally sanctioned retribution, serve to break the cycles of revenge that often erupt in spasms of mass atrocity. This notion, in turn, is related to the idea of reconciliation—that criminal trials, by providing victims with a venue for expressing their pain and by conferring public recognition upon the suppressed history of their victimisation, serve to reconcile an afflicted

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1 The literature on this subject is large. For a helpful overview, see R Teitel, Transitional Justice (Oxford, OUP, 2000).
people to the sufficiency of a legal response to its woes. This idea is closely related to the pedagogic aim of the trial, that perpetrator proceedings can serve as tools of historical instruction. For example, Robert Kempner, a leading war crimes prosecutor, described the Nuremberg trials as ‘the greatest history seminar ever held’. The Eichmann, Barbie and Papon trials likewise aimed to use the courtroom both to clarify the historical record and to teach history lessons.

Broadly speaking, we can describe these multiple purposes of the high-level perpetrator trial as sharing a common feature: they are all didactic in nature, pushing the trial in the direction of serving as a tool of instruction. In a sense, all criminal trials are didactic in two critical ways. First, they strive to demonstrate the truth of the charges brought against the accused. Secondly, they seek to demonstrate the legitimacy of the process by which the first goal is pursued. The shibboleth, ‘justice must be seen, to be done’, captures this basic insight. All criminal trials, in this regard, can be seen as normative demonstrations of the efficacy and legitimacy of the rule of law.

That said, I want to insist that the term ‘perpetrator trial’ defines its own specialised sub-breed of the criminal trial. Here the didactic function or quality of the trial is not an incidental feature of the inevitable process of proving charges or upholding well-accepted and largely uncontested social norms. Instead, the didactic purpose of the trial lies at the very heart of the proceeding. Given that such trials invariably follow in the wake of episodes of mass atrocity, political upheaval and horrific social dislocation, courts are invariably thrust into the position of both looking into the larger sweep of history and making visible the efficacy of the law as a tool of such inquiry. If all trials are meant publicly to project the sober norms of the rule of law, perpetrator trials are burdened with the task of actively reimposing such norms in spaces in which rule-based legality has been either radically evacuated or perverted. In part because of their explicitly didactic nature, in part because of the circumstances surrounding their staging, high-level perpetrator trials are by their very terms anomalous, unusual legal events, and, as such, will invariably invite challenges to their legitimacy. They are trials which, by their very nature, place law—as a tool of deterrence, reconciliation, pedagogy and justice—on trial. If staged in an international court,

2 Reconciliation is mentioned as a declared purpose of both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC). To understand how the trial can further the end of reconciliation, it is important, I believe, to distinguish two possible meanings of the concept. First, ‘to reconcile’ has a transitive meaning as captured in the expression, ‘the neighbours reconciled their differences’. Here the idea is that two feuding or antagonistic parties have learned to put aside their past problems. This, I would argue, is the meaning of the term as it applies to the South African Truth and Reconciliation Commission. But ‘to reconcile’ also has a second, call it intransitive, meaning, as in the phrase, ‘he became reconciled to his fate’. It is this second, intransitive, meaning that is at work in perpetrator trials. In this regard, such trials play a legally insular, or even self-legitimating function: they serve to reconcile a people to the adequacy or sufficiency of a legal response to their sufferings.

3 Quoted in I Buruma, The Wages of Guilt: Memories of War in Germany and Japan (New York, Meridien, 1994) 142. Kempner was referring to both the trial of the major war criminals and the subsequent trials of Nazi criminals before American courts.
such a trial may invite the charge of serving the ends of victor’s justice or of hav-<ref>

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having been orchestrated at the behest of a select group of powerful nations (such as NATO), or, alternatively, of being hopelessly removed from the region in which the crimes occurred. If conducted by a domestic national court, a trial may be attacked as a partisan tool, insufficiently removed from the crimes it is asked to judge.

Compounding these legitimation problems is the fact that the multiple purposes of the didactic trial often pull courts in different directions. For example, the clarification of the historical record and the teaching of history lessons are obviously related, though importantly distinct: the former is largely descriptive and explanatory, while the latter is ineluctably normative. The distinction is important inasmuch as collective memory may have little to do with historical accuracy. The bombing of Hiroshima is remembered in the United States as a life-saving act born of military necessity, though the consensus among historians challenges this view. President Bush recently memorialised the victims of United Airlines Flight 93, recalling their heroic act of crashing their hijacked aircraft into a Pennsylvania field in order to save 1600 Pennsylvania Avenue—this notwithstanding the conclusion of the 9–11 Commission that the hijackers crashed the plane after the passengers mutinied. Trials, too, particularly those burdened with the legacy of traumatic history, often succeed at shaping the terms of collective memory precisely by demonstrating—intentionally or not—a relaxed fidelity to the historical record. By this I do not mean to suggest that falsehoods are consciously inserted into the historical narrative told at trial, though this, of course, may occur. Rather, the point is one of interpretation, nuance, emphasis and sympathetic imagination. Victims become, in the hagiography of the prosecution, exemplars of an unsustainable innocence, while perpetrators come to embody an evil of mythic proportions. Over time, trials may find themselves subject to the very forces to which they once contributed. The Nuremberg trial, currently celebrating its sixtieth anniversary, has been hailed by many as a path-breaking proceeding about the Holocaust, notwithstanding the fact that the Nazis’ crimes against the Jews of Europe played a largely ancillary role in the trial before the International Military Tribunal (IMT).

To take another example, the desire to make visible the workings of the rule of law may pull a court in a very different direction from, say, the impulse to teach history and to honour the memory of victims and survivors. The former impulse, I would argue, pushes the court in the direction of sobriety, while the latter gestures toward spectacle. Writing about the Nuremberg trial, which she attended as a journalist, Rebecca West famously described the proceeding as a ‘citadel of boredom’.4 The Croatian journalist Slavenka Drakulić recently described the International Criminal Tribunal for the Former Yugoslavia (ICTY) in similar terms—‘painstakingly slow and boring’.5 Yet in a certain

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respect the very dullness of these proceedings can be seen as an achievement. If one of the purposes of the perpetrator trial is to reintroduce norms of legality into a radically lawless space, the very dryness of the proceeding can be construed as a triumph of legal sobriety over lawless chaos. Granted, the Nuremberg trial might have been characterised by a supererogatory dullness. Justice Robert Jackson, the chief Allied prosecutor, considered it essential for the Tribunal to establish an unassailable factual record of Nazi atrocities, and so the prosecution tactically limited the use of ‘soft evidence’—eyewitness testimony—in favour of ‘hard evidence’: trial by document. By privileging historical document over personal testimony, Jackson aimed to ‘establish incredible events by credible evidence’; these written documents, however, had to be read into the record at trial, slowing the trial terribly.6 Even Sir Norman Birkett, the British alternate judge on the Tribunal, bemoaned the ‘shocking waste of time’.7 In other respects, however, the dullness of the Nuremberg trial can be viewed as structural rather than idiosyncratic. Perpetrator trials—involving the adjudication of international crimes—will almost invariably have a multilingual complexion. The odd time-lags as faceless interpreters recast questions into another tongue and then retrieve and translate the answers; the stumblings to find proper equivalent terms; the mistimed interventions by judges and lawyers—these qualities cannot be viewed as passing or contingent qualities of perpetrator trials. On the contrary, they must be seen as structural elements of proceedings characterised by their own peculiar and signature lugubrious tempo.

If such trials raise novel topics for theoreticians of law—is it possible to speak of a jurisprudence of boredom?8—they also refocus attention on the meaning of the spectacle in law. If certain legal actors, principally judges, aspire to sobriety, others, in particular prosecutors, often push proceedings in the direction of drama. The prosecution at the Eichmann trial structured the state’s case around survivor testimony in a conscious effort to rectify the missteps of Nuremberg and to inject drama into the proceeding. Thus the decision to rely on the voice and demeanour of the survivor witness was not, in the first instance, born of an evidentiary strategy—Attorney General Hausner later openly acknowledged that the prosecution could easily have presented its case relying exclusively on written documents9—but of the didactic ambition of capturing the imagination and conscience of a domestic Israeli and world audience. That the trial took place in a municipal theatre hastily retrofitted to serve as a courtroom only underscores the complex ways in which an explicitly didactic logic informed the trial’s staging.

8 For an insightful discussion, see R Reichman, ‘Committed to Memory: Rebecca West’s Nuremberg’ in A Sarat, L Douglas and M Umphrey (eds), *Law and Catastrophe* (Palo Alto, Cal, Stanford University Press, 2006).
These tensions—between the teaching of history and the teaching of history lessons; between the longing for sobriety and the dramatic impulse—have led some to insist that the just didactic trial is something of an oxymoron. In her famous critique of the Eichmann trial, Hannah Arendt argued that the ‘purpose of a trial is to render justice, and nothing else’.10 We must be wary, Arendt insisted, of subjecting the perpetrator trial to so-called ‘extra-legal’ pressures, lest these pressures distort the solemn dictates of justice and turn the trial into a legal sham, a show trial in the old Stalinist sense. Clearly this concern is important, yet in my mind it is overstated. No one, I believe, would deny that the core responsibility of a criminal trial is to resolve the question of guilt in a procedurally fair manner. To insist, however, as Arendt does, that the sole purpose of a trial is to render justice, and nothing else, defends a crabbed and unnecessarily restrictive vision of the trial form. Particularly in high-profile perpetrator trials—which by their very nature will attract intense media attention—it is unrealistic to expect, and silly to demand, that the trial be conducted as an ordinary exercise of the criminal law. The question, then, is not whether the trial should be used for these larger ends, but how to use it responsibly.

This claim leads us to consider the arguments of other scholars, such as Martha Minow, Michael Marrus and Mark Osiel, who have levelled a critique that is the obverse of Arendt’s.11 Here the argument is not that didactic trials fail to do justice to the accused. Rather, it is that didactic trials fail to do justice to history. The law, it is argued, fails to lead to a productive engagement with the most disturbing and foundational issues raised by traumatic history, issues more satisfactorily explored through discourses of history, philosophy, literature, theology or psychoanalysis—or through alternative fora, such as truth commissions. This is a claim I find more pressing, and I am chiefly concerned with it in my own on-going studies of perpetrator trials.12 Yet at the same time as I am painfully aware of the limits of law, I also find myself appreciative of the creative labours of the legal imagination to master the problems of representation and judgement posed by episodes of mass atrocity and genocide. Let me briefly consider some of the structural constraints that scholars often say limit the usefulness of the didactic trial as a tool for exploring traumatic history.

The first are procedural or evidentiary. Here it is argued that the formal procedures that constrain the production of knowledge in a criminal trial render this instrument a flawed tool for clarifying and comprehending traumatic history. Certainly I would agree that the rules of evidence and trial procedure limit the utility of the trial as a tool of historical representation. Yet the Nuremberg

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and Eichmann trials provide important examples of criminal proceedings that were governed by unusual rules of evidence designed to permit the use of hearsay and to embrace a more capacious notion of relevance. These unorthodoxies permitted survivor testimonies to assume a more fluid narrative form, quite different from the fractured, tutored testimony produced at standard adversarial trials. Did such an approach compromise the fairness of these trials? I would say no. These trials protected rights of confrontation of witnesses and other core procedures foundational to a concept of trial fairness. Bars against hearsay and rules controlling relevance, by contrast, can be seen as devices tailored for a jury system, and thus relaxing their application may serve the trial’s didactic ends without eroding principles of fairness. In this regard, these trials came to look more like hybrid tribunals, combining elements of Anglo-American and continental jurisprudence, thus anticipating some of the procedural arrangements that govern the ICTY and the ICC. This is not to deny that history and law are governed by differing epistemological and evidentiary conventions; yet, it is easy to over-exaggerate the differences. After all, history and law remain deeply committed to the notion of reliable proof, even if what counts as such differs across the disciplines. Many historians, it should be noted, remain indebted to law’s power as a fact-finding tool. Many of the path-breaking early histories of the Holocaust, most notably Raul Hilberg’s magisterial The Destruction of the European Jews, could not have been written without the astonishing documentary archive gathered at Nuremberg. More recently, Daniel Goldhagen’s Hitler’s Willing Executioners and Christopher Browning’s Ordinary Men drew largely on depositions and other documents assembled through the labour of German prosecutors.

A second argument insists that didactic trials distort history, inasmuch as a complex and refractory historical record must be encapsulated to fit restrictive legal categories. Thus one prominent historian has observed, ‘the shape of the stories told in trials . . . follows the definition of the crimes with which the accused are charged, rather than an impartial assessment of the events themselves’. The famous trial of the Auschwitz guards that began in Frankfurt in 1963 provided a particularly vivid, if not egregious, example of this problem, as the atrocities committed by the defendants at Auschwitz had to be pigeonholed into the legal concept of ‘murder’, the most serious criminal offence that the guards could be charged with under German law at the time. The law of

16 Marrus, n 11 above, 48.
17 A Rückerl, NS-Verbrechen vor Gericht: Versuch einer Vergangenheitsbewältigung (Heidelberg, CF Müller Juristischer Verlag, 1984). Although the Federal Republic had criminalised genocide in the early 1950s, the application of the genocide law to Nazi crimes was held to fall foul of ex post facto prohibitions.
murder, however, was restrictively defined in German law—limited to killings born of ‘thirst of blood (Mordlust), satisfaction of . . . sexual desires, avarice or other base motives in a malicious or brutal manner’. Inasmuch as German prosecutors had to prove that individual defendants had been motivated by such special factors as Mordlust, this requirement had the regrettable consequence of transforming the everyday horrors and killings of Auschwitz into the ‘normal’, against which the particularly malicious or brutal conduct of certain guards or functionaries could be measured.18

However, if the trial of the Auschwitz guards offers a particularly troubling example of law shoehorning complex history into restrictive legal categories, other trials remind us of law’s bold attempts to shape concepts of criminal wrongdoing adequate to the task of naming and condemning radical transgressions. In this regard, two critical legal innovations stand out, the concepts of genocide and the crime against humanity. It is not within the scope of the present essay to review the evolution of these ideas;19 nor do I mean to ignore the serious problems associated with their first adumbrations in the Charter of the IMT at Nuremberg.20 These critical problems notwithstanding, the idea of genocide and the concept of crimes against humanity must be seen as attempts on the part of the law to shape novel concepts adequate to the task of naming and condemning unprecedented atrocities. These concepts have demonstrated their importance not simply as legal terms of art that have made possible the advent of the perpetrator trial; they have also proved their value as terms of cultural meaning. Admittedly, the clash between legal and cultural usages of these terms may make for confusion. The refusal of the United Nations Commission of Inquiry to characterise the atrocities in the Darfur region of Sudan as genocide aroused considerable outrage among many commentators. Part of the problem, however, can be traced to the different registers of meaning of the concept of genocide. The term ‘genocide’ has entered popular parlance as a powerful vehicle for expressing profound outrage at horrific atrocities. That such atrocities have been perpetrated in Darfur cannot be denied. The UN Commission of Inquiry, by contrast, was concerned with the investigation of crimes, not with the expression of outrage; ‘genocide’, for the Commission, referred to acts that satisfy the definition framed in the Genocide Convention of 1948, acts that could form the basis of international trials. This is not to suggest that the Commission was correct in withholding the designation; the Darfur controversy does, however, remind us of the power of legal terms to filter into popular consciousness. Thus, far from being static or insular, we find legal

20 Suffice it to say that genocide was mentioned only fleetingly in the indictment, and then as a kind of war crime; and crimes against humanity were deemed justiciable only if committed by the Nazis in furtherance of their war aims. See Douglas, n 12 above, 38–64.
discourse supplying a necessary vernacular for the naming and condemnation of horrific crimes. It is law that has delivered the terms and concepts that have helped to fill the conceptual and representational vacuum left by acts of extreme atrocity.

The concepts produced by law must, moreover, be seen as highly plastic and adaptable, an observation that challenges a third common criticism of the didactic trial. A number of scholars argue that we should eschew justice as pedagogy, inasmuch as the picture of the past that emerges from a didactic trial threatens to become the Official History, fixed and refractory to the movement of historiography.21 These scholars argue that ‘while judgments of courts are fixed, . . . historiography moves’.22 By way of response, one should first note that the sense of fixedness—the closure of the trial—describes one of the most profound attractions of the trial as a response to traumatic history. Trials are riveting cultural dramas because stories receive resolution in judgment and narratives find emphatic closure in juridically-sanctioned violence—an advantage that trials arguably hold over truth commissions.23 The dramatic closure offered by trials thus frames and adds meaning to shared narrative, a process that was clearly at work in the Eichmann trial, where many witnesses testified that they were sustained by the hope that their bleak tale of survival might someday serve as legally probative evidence.

That said, it does not follow that the picture of history presented in any specific trial is fixed by the fact that a trial court must render an unequivocal verdict. On the most obvious level, legal judgment can be set aside by appeal, thus changing our understanding of the past enshrined at trial.24 On a deeper and more interesting level, legal judgment can be revised through a complex process of renegotiation. Particularly in the case of traumatic or sensational history, it seems the law often only reaches a satisfactory result and understanding

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21 In addition to the important arguments of Marrus, also of interest are M Minow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence (Boston, Mass, Beacon Press, 1998); and T Todorov, ‘Letter from Paris: The Papon Trial’ in R Golsan (ed), The Papon Affair: Memory and Justice on Trial (New York, Routledge, 2000).

22 Marrus, n 11 above, 45.

23 This, of course, is not to claim the superiority of trials over truth commissions as tools for ‘calling to account’; indeed, it would be foolish to do so. In certain cases, trials may be more appropriate; in other cases, not. Context is all. Nor should we see trials and truth commissions as mutually exclusive alternatives; the two may work in tandem, with one supplementing the work of the other.

24 Perhaps the best example of this in the context of Holocaust trials was the Israeli Supreme Court’s decision to throw out Ivan Demjanjuk’s 1987 conviction. Demjanjuk had been extradited to Israel from the United States, tried by a Jerusalem court, and was sentenced to death for engaging in sadistic practices while serving as a guard at Treblinka. The Supreme Court quashed the conviction once evidence emerged that Demjanjuk had served not at Treblinka but at Sobibor, a less well known, though equally murderous, death camp. At the time, observers lamented the Supreme Court’s decision as an insult to the sacral memory of survivors (who had apparently misidentified Demjanjuk) and as giving succour to Holocaust deniers. See Y Sheftel, Show Trial: The Conspiracy to Convict John Demjanjuk as ‘Ivan the Terrible’ (trans H Watzman, London, Victor Gollancz, 1994) 342.
through a processing of revisiting or re-trying the contested events. At times, civil trials may offer a more satisfactory treatment and resolution of matters incompletely or badly handled in criminal trials; in the United States, the Bernard Goetz and OJ Simpson cases supply examples of this renegotiation of history in a civil proceeding. Indeed, when we speak of the didactic trial, the individual trial, as a discrete legal event, is perhaps the wrong frame of reference. Instead, attention must be paid to ways in which specific trials revisit and revise their juridical precursors, and in so doing participate in, and contribute to, an evolving juridical understanding of traumatic history. In this regard, we can understand the Eichmann trial as a revision of Nuremberg. By placing the Holocaust at the legal forefront of the trial, and by satisfying the testimonial need of survivor-witnesses, the Eichmann trial offered a far more comprehensive and, from the perspective of the survivors, more satisfying treatment of the traumatic history presented in incomplete fashion at Nuremberg. The French experience is also instructive, inasmuch as the very definition of crimes against humanity—and the role that the Vichy state played in the perpetration of these crimes—importantly changed from the Barbie trial to the Touvier trial to the Papon trial. Trials before the ICTY, such as the Foca case, have similarly led to a redefinition of the meaning of crimes against humanity, expanding them to now include the crime of rape. And with the expansion of the legal category comes a broadening of the historical narrative that can be told through the law.

A fourth set of criticisms directed at the didactic trial focuses on what we may describe as the essential subject matter of these trials. Here it is claimed that criminal trials, of necessity, occupy themselves with the specific actions of a discrete defendant or group of defendants. In so doing, trials necessarily exaggerate the roles of individuals in events of greater historical sweep and compass. By focusing on the actions of individuals, the law overlooks and mischaracterises the larger forces—political, ideological, military, bureaucratic—that inform the dark logic of genocide. Didactic trials thus allegedly create an odd disconnect between the magnitude of the crimes adjudicated and the solitary individual in the dock—a disconnect that can only be overcome by demonising the defendant. This, indeed, is a crucial aspect of Arendt’s critique of the Eichmann trial. At worst, then, genocide trials threaten to transform the defendant into something of a scapegoat, creating a false sense of legal closure and historical reckoning, as other perpetrators go unpunished and history remains unexamined and undigested. This is the gist of Geoffrey Robertson’s criticism of the trial of Dusan Tadic by the ICTY. While acknowledging that Tadic was ‘a licensed thug, a freelance torturer’, Robertson insists that the defendant, as a low-level perpetrator, ‘takes on a symbolic capacity, a scapegoat almost, for the community of which

26 See LN Sadat, ‘The Legal Legacy of Maurice Papon,’ in Golsan, n 21 above.
he was part. His punishment is less an example of individual responsibility than collective guilt.27

This criticism is hardly trivial, and here I will confine myself to two responses. First, it is important to distinguish between the notion of collective guilt which unfairly blames an entire nation or a people for the acts of specific groups, and the notion of collective guilt that rightly recognises the corporate nature of mass atrocities—that such acts, to be successful, require extensive technical assistance, bureaucratic organisation and logistical support. Indeed, the criticism that the legal process is incapable of addressing the corporate dimension of genocide is overstated. Nuremberg, for example, was not simply a trial of 22 individuals. Also on trial were a number of Nazi organisations, including the entire Gestapo. Robert Jackson, the lead prosecutor for the Allies, melodramatically insisted that, ‘[i]t would be a greater catastrophe to acquit these organisations than it would be to acquit the entire twenty-two individual defendants in the box’.28

Secondly, I think we should be very careful about describing an architect or even a low-level perpetrator of genocide as a scapegoat. A scapegoat is an innocent creature saddled with undeserved guilt. Wrongdoing has been displaced upon the scapegoat. An architect or accomplice or perpetrator is not, however, an innocent creature, and does not become a scapegoat when asked to answer in law for crimes orchestrated by more prominent individuals or facilitated by groups or collectives. Here wrongdoing has not been displaced, but condensed in the figure of the perpetrator.29 It seems odd, then, to criticise perpetrator trials for performing a ‘symbolic function’. In a way, all criminal trials can be said to play this symbolic function, inasmuch as only a small percentage of those who violate norms of social order ever find themselves in the dock at a criminal trial. It is well accepted that trials of organised crime figures will invariably focus on the conduct of a few. Obviously, the goal is to go after the leaders of a criminal organisation. At times, however, circumstances may conspire to force prosecutors to settle for underlings. The compromises may be unfortunate, but they are not therefore unjust. In either case—the trial of the underling or the architect—the trial remains a symbolic act. But symbolic gestures are not to be shunned because they are selective. On the contrary, that is their justification and a source of their potency.

Yet even if one were to acknowledge the limitations of the didactic trial, one must ask what follows. Here I would respond, very little. It is one thing to agree that the most nuanced renderings of the past issue from the pen of the professional historian, another to conclude, therefore, that didactic trials have no

28 Quoted in Douglas, n 12 above, 88.
29 And it should be noted that this process of condensation—using the crimes of the perpetrator to tell a story of greater historical sweep—cuts both ways. As the Milošević trial has made abundantly clear, once history is brought into the courtroom, it does not simply serve at the behest of the prosecution.
valuable role to play as a tool of instruction in the wake of episodes of mass
atrocities. So I will gladly concede that such trials are not well equipped to render
history in its complexity; nor are they structured self-consciously to acknowledge
the limitations of their representation of the past. In this respect, these trials are a bit
like television dramas—though, again, we should recall the limits of this analogy.
Television dramas, even those occasional mini-series that seek to do justice to a topic
of history, tend to be controlled by the logic of entertainment. By contrast, a peculiar
mix of sobriety and spectacle will always characterise didactic trials. That said, the
analogy to TV, however imperfectly drawn, supplies for many commentators a potent
justification for not using law to teach history—the last thing we want is the kind of
trivial caricature of the past supplied by network television. Yet here I am reminded
of the debates that surrounded the broadcast of the NBC mini-series Holocaust: the
Story of the Family Weiss on German television some 25 years ago. Before the series
was aired, numerous historians bemoaned the ‘hollywoodification’ of the
Holocaust, the dreadful trivialisation of traumatic history into digestible bits of
television drama.30 Amid the protests and hand-wringing the series was broad-
cast and, to the shock of the pundits, it occasioned a critical moment of national
collective reckoning, stimulating a new generation of Germans to its own
Vergangenheitsbewältigung—wrestling with the meaning of their collective
past. Almost two decades earlier, the Eichmann trial served a similar purpose in
Israel. By turning the history of the Nazi campaign of extermination into a legal
drama broadcast live on Israeli radio and televised around the world, the trial
permitted survivors to transform acts of tragic witnessing enveloped in silence
and shame into potent juridical acts. Indeed, the Eichmann trial served in cru-
cial respects to create the Holocaust.31 By this I mean the trial importantly
served to transform cultural understandings of Nazi genocide. No longer simply
a horrific episode of mass killing, the Holocaust emerged from the Eichmann
trial as an emblematic act of the twentieth century—no longer continuous with
the history that preceded it, but radically disruptive of it.

If, as I have tried to suggest, the interests of justice, conventionally conceived,
and the didactic uses of a trial are not inherently antagonistic, this is not to deny
the risks that attend the staging of the high-profile perpetrator trial. The legal
theorist Otto Kirchheimer located at the heart of every just criminal trial an ele-
ment of ‘irreducible risk’—the possibility that the trial conclude in an acquittal.
Absent this aspect of risk, the trial threatens to degenerate into a sham, a legal

30 For a discussion of the reception of the mini-series, particularly in the United States, see
31 See Douglas, supra n 12 above.
Obviously prosecutors will try to master this risk, but they may not engage in practices that would predetermine the outcome. Keeping in mind Kirchheimer’s insight, I believe it is important to note that, as we move from the ordinary criminal trial to the didactic perpetrator trial, the risks multiply. In the case of the perpetrator trial, conventional prosecutorial success—winning a conviction—does not necessarily translate into the didactic success of the proceeding. Here I should add that prosecutorial success does not necessarily require conviction of all defendants on all charges. Nuremberg concluded in the acquittal of three of the 21 defendants present (Martin Bormann, the twenty-second defendent, was tried in absentia), and though the acquittals were controversial at the time, one can say with hindsight that they importantly served to legitimate the IMT—by demonstrating the tribunal’s independence and neutrality. Still, a perpetrator trial that unravels entirely—for example, the Israeli prosecution of Ivan ‘the Terrible’ Demjanjuk—will invariably be considered a didactic disaster. A prosecutorial failure cannot help but be seen as a didactic failure as well—unless the didactic goal is solely to make visible the sober logic of procedural justice, which as I have tried to suggest is usually but one goal amongst others.

However, if prosecutorial success is generally a necessary condition for didactic success, it is not sufficient. A perpetrator trial can succeed in our first sense—end in a conviction—yet fail in the second, as a didactic exercise. This will most often happen, I believe, in cases in which the defence puts history on trial. So far I have considered the didactic trial as an affair of the prosecution; the didactic trial of the defence is, however, a far more problematic and destabilising affair. A didactic trial staged by the prosecution must remain ever mindful of the basic need to secure a conviction while respecting the conventional requirements of due process. The didactic trial of the defence is burdened with no such reciprocal obligation. In these cases, we often encounter a defendant less interested in acquittal than in martyrdom, intent upon hijacking history toward this end. In such cases, the defence attorney—or the defendant mounting a pro se defence—acts less like a conventional advocate, focusing on the conduct of the accused, than as a radical historical revisionist. Here we think of Jacques Vergès and his ‘trial of rupture’, threatened though only incompletely delivered in his defence of Klaus Barbie,33 and of Slobodan Milosevic, who, alas, has been quite effective in taking history hostage in the Hague. In such cases (and one worries that the future trial of Saddam Hussein might supply another example), the perpetrator trial turns into a revisionist, even negationist, spectacle, as the disputed terms of history come to the fore of the legal proceeding. Courts can, of course, muzzle disruptive defendants, but it is hardly surprising that judges have on the whole proved reluctant to do so in high-profile per-

petrator trials. Inasmuch as didactic trials are, as I have argued, anomalous proceedings, we should hardly be surprised to find judges struggling to demonstrate legitimacy by bending over backwards to accommodate even the most tendentious displays by the defence—a phenomenon vividly on display in the Milosevic trial.

The risk of subversion by the defence thus remains a substantial risk of didactic trials. The Eichmann trial remains instructive in this regard, if only as a counter-example. Much has been written about the character of Adolf Eichmann. For some—most notably Raul Hilberg—Eichmann was a zealous and brilliant technocrat of death; for others, such as Arendt, he was a completely replaceable cog, a dreary exemplar of the banality of evil. But whatever our take on the issue, it is clear that Eichmann contributed to making his trial a success. Through his submissive behaviour and obedience, Eichmann curiously helped to legitimate the court that sentenced him to death. Gabriel Bach, an assistant prosecutor at the Eichmann trial and later a Justice on the Israeli Supreme Court, recalls as his sharpest and proudest memory of the trial the moment that Eichmann rose to his feet and stood as the judges entered the court for the first time.34 On one hand, Bach’s sense of pride can be easily understood—here we have the once-powerful SS officer—a key player in the effort to destroy the Jewish people—humbly submitting to the authority of a Jewish court. And yet the defendant’s gesture must be seen as more than an act of submission to superior power; it is also an act that acknowledges the authority of the force arraigned against him—an acknowledgement that Milosevic has tenaciously refused to tender in the Hague. Yet, memorable as Eichmann’s gesture may have been, it was also entirely consistent with his character: the very craven obedience to authority that arguably made him a morally ungrounded perpetrator of genocide also made him into a model defendant.

If the Israeli court had the good fortune to have an obedient defendant—and by that I do not mean co-operative: Eichmann’s answers routinely mixed bona fide candour with infuriating obfuscation—in other regards, the trial created its own success. Most crucially, the prosecution and the judges serendipitously struck a balance between the conventional legal interests of justice and the didactic purposes of the trial. As I have mentioned, the Eichmann prosecution sought not simply to win a conviction, but also to use the trial as a tool of instruction and commemoration. In its written judgment, however, the court largely ignored the didactic ambitions of the prosecution and focused narrowly on the materiality of the evidence as it applied to the charges brought against the accused. This is as it should be. This dialectic, in which the prosecution presented its case in broadly didactic terms while the court hewed to its juridical function conventionally conceived, permitted the trial to succeed as both an exercise in collective pedagogy and an instrument of legal justice. Here the balance between spectacle and sobriety was largely, if fortuitously, maintained.

34 Gabriel Bach, in conversation with the author.
By way of conclusion, I think it is also important for us to bear in mind that the success of the didactic trial can only be measured over a broad space and time. Such trials play before multiple audiences: the victims clamouring for justice; the perpetrators, wrapped in their own misplaced sense of aggrievement and victimisation; a legal community, both locally and abroad; and a larger international community watching with periodic spasms of interest amid long stretches of indifference. The multiple and far-flung audiences of the didactic trial raise important concerns about what might be described as the ‘spatiality’ of justice, a matter which has gained increasing salience as legal scholars and actors weigh international tribunals against domestic courts as the most efficacious tools for dealing with mass atrocities. Here I will confine myself to two observations. Many of the most famous photographs associated with the Eichmann trial, at least at the time of its staging, were not the images of the man in the glass booth. Rather, they were shots of the spectators at the trial reacting to the testimonial drama in the courtroom: expressions of grief, disbelief, anger, horror. If, at the Eichmann trial, the glass booth made the defendant into a specimen for display and scrutiny, the spectators were organically part of the proceedings. Their gasps, snickers, whispers and occasional violent outbursts were part of the trial, and constituted a crucial point of primary reception for the journalists following the case. Contrast this to the organization of space and spectatorship at the Milosevic trial in the Hague. There it is the court itself that sits in the glass booth, sealed from the gallery of spectators by sheets of glass thick enough to repel rocket propelled grenades. The glass is also soundproof. The only sounds that the spectator can hear are those broadcast over the headsets made available to each observer; the court is likewise sealed from any sounds from the spectators. As a consequence, there is no interaction between the court and the spectators—usually no more than a handful, though on occasion they fill the gallery. For the observer, the feeling is akin to watching an elaborate psychology experiment through one-way glass: the spectator cannot suppress the feeling that he or she is entirely invisible to the Tribunal. The spectator gallery is supplied with TV monitors that track the proceedings; one finds oneself watching the monitors instead of the courtroom—as powerful a trope as any for the formal removal of the court from the region in which the crimes took place. This element of spatial displacement must, I believe, undercut the didactic value of the trial, particularly in terms of its contemporaneous reception. That said, we must remember that perpetrator trials play before multiple audiences, each of which will perceive the trial differently and will measure its success by different standards. Perhaps more to the point, these perceptions will also transform over the years, as the dynamics of space yield to the imponderables of time.

In part this is a consequence of the fact that it is very difficult to predict what aspects of a trial will live on in collective memory. In the United States, the OJ Simpson murder trial is remembered in an ungrammatical ditty: ‘If the glove don’t fit, you must acquit’. The Nuremberg trial remains remembered in the American popular imagination through the vehicle of the famous Hollywood
movie, *Judgment at Nuremberg*, which, in fact, had nothing to do with the trial before the IMT. In Israel, the Eichmann trial is powerfully associated with the collapse on the stand of Yehiel Dinur, also known as Katzetnik, a sequence captured on film and ritually rebroadcast on Israeli television on Yom Hashoah, the national day of Holocaust remembrance. These moments of collective memory can all be described as juridically unstable, in that they evade the sober ordering strategies deployed by courts at the time of trial. They remind us that, regardless of the power of courts to control difficult proceedings and to submit refractory histories to legal judgment, they are unable to control the way in which the trial will itself become a cultural artifact and an article of collective memory.

If, however, the workings of time refuse to submit to juridical control, it does not mean that such instabilities are necessarily deleterious. At the time of its staging, the Nuremberg trial aroused utter indifference in the vast majority of Germans. In the 1950s, Germans viewed the trial with contempt, as an exercise in victor’s justice.35 (In particular, Germans vilified Nuremberg for treating ‘aggressive war’ as an international crime.) Now, however, the trial is generally viewed in Germany with respect—both as an event that prodded Germans to a collective reckoning with their troubled past, and as a vital contribution to the developing body of international law. And today it is German jurists who have taken the lead in codifying ‘aggressive war’ as a crime to be judged before the fledgling ICC,36 the court that the US continues shamefully to boycott. And so success must be measured over a broad space and time. Just as the didactic trial must struggle to do justice to history, history also takes time to do justice to the trial.

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35 For an excellent study of the politics of collective memory of the Nuremberg trial in Germany see N Frei, *Vergangenheitspolitik: die Anfänge der Bundesrepublik und die NS-Vergangenheit* (Munich, Beck, 1996).

36 I am grateful to David Scheffer for pointing this out.
LONG TIME AGO, the trial was regarded as the apex of the criminal process. And this concept still exists—in popular fiction as well as in the consciousness of the non-lawyer population, largely based on fiction. In the reality of the criminal process, trials—in the sense of a courtroom drama leading to the determination of the guilt or innocence of the accused—are not exactly an endangered species but have become a minority phenomenon.¹ Even in a paradigmatic 'civil law' system such as Germany, in 2001 only 15.6 per cent of cases with a known suspect were disposed of by trial.² And even in many of those cases which eventually reach a court, there is very little drama involved. More often than not, the trial consists of a perfunctory recapitulation of the results of the police investigation and/or the defendant’s terse confession. ‘Contested’ trials—the stuff of which courtroom novels and movies are made—are rare. And they often end abruptly, when the defence lawyer, who has previously made frequent objections and has aggressively questioned prosecution witnesses, suddenly gets up and reads, on behalf of the defendant, a brief statement conceding the crucial facts of the prosecution case. Not surprisingly, many legal scholars have in recent years shifted their focus from the trial to issues of pre-trial procedure and of sanctioning without trial.³ The trial has become an accident in the smooth administration of criminal justice.

¹ It may be characteristic that in the comparative work edited by C Bradley, Criminal Procedure. A Worldwide Study (Durham, NC, Carolina Academic Press, 2000), national reports deal mostly with police and pre-trial procedures. For a strong indictment of Anglo-American trials in their present form, see W Pizzi, Trials without Truth (New York, New York University Press, 1999); for a

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² In 2001, German prosecutor offices dealt with approx 3.5 million cases with known suspects. 34% of these cases were dismissed for lack of sufficient evidence to convict, 27% were dismissed without sanction as petty violations, and in 7% the prosecutor dismissed the case when the suspect made a payment to the state or a charitable organisation. In 16.4% of all cases, a conviction was obtained through a written (penal order) procedure, and only in 15.6% of the cases did the prosecutor file a formal accusation leading to a trial. See Statistisches Bundesamt Fachserie 10 Reihe 2, Gerichte und Staatsanwaltschaften 2001 (2003) 140.

³ It may be characteristic that in the comparative work edited by C Bradley, Criminal Procedure. A Worldwide Study (Durham, NC, Carolina Academic Press, 2000), national reports deal mostly with police and pre-trial procedures. For a strong indictment of Anglo-American trials in their present form, see W Pizzi, Trials without Truth (New York, New York University Press, 1999); for a
Will trials survive? Or will they become the dinosaurs of criminal procedure, eventually extinguished because they no longer fit into an environment geared toward efficient crime control rather than a dramatic presentation of guilt and punishment? My hypothesis is that trials, even old-style trials, will survive, albeit in small numbers, but that their function may change. I will make my argument in three steps, asking (1) are trials necessary?; (2) are trials useful?; and (3) will trials survive? Most of what I will have to say is based on recent developments in Continental Europe. This is due not only to the fact that I am more familiar with civil law systems but also to the observation that the civil law process is in a state of rapid change, whereas the balance between trial and non-trial processes in the common law systems appears relatively stable.

1. ARE TRIALS NECESSARY?

*Nulla poena sine processu*—The state cannot punish its citizens without having determined guilt in proper proceedings. This maxim by itself guarantees the existence of criminal trials, because proper proceedings in criminal matters imply an official and public fact-finding before an impartial tribunal. Or so it seems. But on closer inspection, the most prominent catalogue of criminal defendants’ rights, the European Convention on Human Rights (ECHR), does not guarantee everyone accused of a criminal offence a fair trial, but only exhorts the state to presume an accused person innocent ‘until proved guilty according to law’ (Article 6(2) ECHR) without specifying how that proof can be made. And although everyone is entitled to a fair and public hearing on criminal charges against him (Article 6(1) ECHR), nowhere is it said that this ‘hearing’ must take the form of a trial, that is, of an extensive presentation of ‘live’ evidence in court. It is thus a fair process but not necessarily a trial that is needed to establish the connection between crime and punishment.

Would it then be possible to impose punishment in the same way that the state sanctions parking violations, that is, in a streamlined written administrative procedure, perhaps providing for some sort of public hearing on the defendant’s demand to satisfy the requirements of the ECHR? We should not be too quick to answer that question in the negative. On the European Continent, criminal justice has for centuries effectively been administered without a public trial on the substance.\(^4\) This is not to say that there was no orderly process. On the contrary—the ancient inquisitorial process as it was practised far into the century—still had a place in modern law.\(^5\) The question of how to establish guilt is a separate one.

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The nineteenth century had elaborate rules and procedures. But there was no trial except for a formalised hearing at the very end of the process, when all relevant factual issues had been resolved, all legal conclusions were drawn and the judgment had been written. The final judgement day (entlicher Rechtstag) was not much more than the formal pronouncement of the verdict and sentence. It may be significant, however, that even when the final judgement day had deteriorated into a mere spectacle, this formality was not completely abandoned—perhaps it was retained as a faint memory of the times when judgments obtained legitimacy only through the assent of the people.

It may thus not be too speculative to posit that there is, even on the historical record, a social need for something at least looking like a public trial in (serious) criminal matters. At least in cases involving imprisonment, the expression of official moral censure and the imposition of the most severe sanctions at the state’s disposal cannot be reduced to the dispatch of a bureaucratic written form. In the especially sensitive area of criminal justice, a pronouncement can claim legitimacy only when justice has been seen to be done; and the public trial, with its drama of accusation, defence and eventual judgement, with its live presentation of the ‘facts’, seems tailor-made to serve this function.

The ‘reformed’ Continental criminal process of the nineteenth century, which until today has defined the structure of the proceedings in most European legal systems, had the trial as its defining element. The notion of a public and oral trial as the core of the process had been borrowed from England, and it fits perfectly with several of the popular reform demands of the era: because criminal justice was not only a means of social control but also one of the most formidable instruments in the struggle for political power, criminal justice was no longer to be a secret matter dispensed by dependent functionaries of the sovereign. On the contrary, the people were said to have not only a right to hear, see and control the decisive phase of the criminal process but also to participate (as jurors or lay assessors) in its administration.

The historical development suggests that criminal trials are a social and a normative necessity. Had one told a jurist 100 years ago that criminal justice could be dispensed without trial, he would have shaken his head in horror and disbelief. But that was before the advent of the paper trail. Through the nineteenth and the greater part of the twentieth centuries, criminal trials were fairly brief and simple matters. In theft, burglary, assault or even murder cases, many defendants made confessions in open court (or had confessed to the police), thereby reducing the trial to little more than a sentencing hearing. Even when

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5 See the elaborate procedural rules of Constitutio Criminalis Carolina of 1530.
6 Cf W Schild, ‘Der “entliche Rechtstag” als das Theater des Rechts’ in P Landau and F-C Schroeder (eds), Strafrecht, Strafprozess und Rezeption (Frankfurt-am-Main, Klostermann, 1985) 119.
7 Cf ibid, 136–43.
8 See, eg, HA Zachariae, Die Gebrechen und die Reform des deutschen Strafverfahrens (Göttingen, Dietersche Buchhandlung, 1846); P-P Alber, Die Geschichte der Öffentlichkeit im deutschen Strafverfahren (Berlin, Duncker & Humblot, 1974) 99 ff, with further references.
there was no confession, the facts were relatively easy to establish. There may have been a handful of witnesses to be heard, a few objects to be produced as real evidence and perhaps the odd document to be read, and that was enough to enable the court to pass judgement.

These open-and-shut cases hardly make it into today’s criminal courts. Most of them are resolved by prosecutorial decisions to dismiss or to divert, or are adjudicated on by way of an abbreviated (often written) procedure. The cases that contemporary criminal courts spend their trial time on are of a different calibre and require a different type of proof-taking: white collar crime, drug offences, homicide and sexual assault, serious property offences committed by repeat offenders. In the greater part of these cases, (eye) witness testimony is of limited relevance. Typically, the issues to be resolved by the court require a tedious presentation of voluminous documentary evidence, an assessment of the admissibility and/or reliability of evidence acquired surreptitiously (wiretaps, hidden microphones, undercover agents, police informers), an evaluation of conflicting expert opinion, or all of these. The classical trial format, with its emphasis on the availability of all the evidence on a given day and in a form easily digestible for lay jurors, is ill-suited to the presentation of the kind of evidence needed in contemporary trials. This is not to say that ‘modern’ evidence could not be adapted to fit the trial format—but what emerges then is often an awkward compromise between the requirements of that format for directly visible and audible evidence on the one hand and the particularities of, for example, scientific expert evidence or the documentation of a paper trail on the other. The trial, especially the Anglo-American trial and the trial of those many systems that have borrowed from the common law system,9 is perfectly designed for nineteenth century evidence, but it risks losing or distorting the kind of evidence relevant in many twenty-first-century cases.

Oddly, it appears that the structure of the ancient inquisitorial process may be more suitable to the ‘modern’ type of evidence. Documents, scientific and psychological expert evidence and the results of secret surveillance do not easily lend themselves to ‘live’ presentation in court and to adversarial cross-examination. For these types of evidence, the protracted but thorough and careful compilation of a written record by means of a magisterial investigation, subject to challenge and discussion by all parties, seems a more adequate form

9 Competing trial formats, eg those of France or the Netherlands, place little emphasis on direct presentation of the evidence at the trial, and rely more on the discussion of evidence documented in the dossier of the case, which is compiled by an investigating magistrate or the police in a procedure reminiscent of the ancient inquisitorial process. With regard to the French tribunal correctionnel, where most offences are tried, art. 427 Code of Criminal Procedure explicitly provides that, ‘offences can be proved by any mode of proof’; for an English-language account see RS Frase, France, in C Bradley (ed), Criminal Procedure (note 3, supra), 169–78. For a comparative account of the Dutch system of taking evidence at the trial, see A Beijer, C Cobley and A Klip, ‘Witness Evidence, Article 6 of the European Convention on Human Rights and the Principle of Open Justice’, in P Fennell et al (eds), Criminal Justice in Europe: A Comparative Study (Oxford, Clarendon Press, 1995) 283. The French and Dutch systems seem to adapt more easily to the ‘modern’ types of evidence.
of proof-taking. Regardless of the merits of a nostalgic return to a defunct procedural system, what can hardly be denied is the fact that today’s system of proof-taking by trial, modelled after the Anglo-American paradigm, is less than ideal for resolving the issues and conflicts facing contemporary criminal courts. This lack of functionality may be one reason why trials are on the decline.

Full trials have long been a minority phenomenon in those legal systems which provide for the possibility of pleading guilty. In these systems, the majority of defendants do not contest their guilt in court, and in many cases they plead guilty because they have been led to expect (through an express bargain or through information about the court’s sentencing practice) a lesser sentence as a reward for their co-operation.

But the days of the public trial may be numbered in other systems as well. In recent years, we have witnessed a growing trend in civil law jurisdictions toward various forms of punishment without trial, usually based on the accused’s submission or consent. Examples of legislative recognition of sentences negotiated between prosecution and defence (and ratified by the court without trial) are the Italian ‘application of punishment on the request of the parties’ (applicazione della pena sulla riquiesta delle parti, popularly known as patteggiamento) as well as the Polish options for the prosecutor and the accused to make a joint sentence proposal and for the defendant to propose a defined sanction to the court. Only recently, France has introduced into its Code of Criminal Procedure the option of pleading guilty (plaider coupable), thus extending earlier forms of consensual disposition like the composition (involving a voluntary payment or other obligation on the part of the suspect in

10 One could establish publicity of the process by making the record accessible to all, eg, on the internet.

11 For an insightful study of recent ‘institutional transformations’ in common law systems’ civil and criminal procedure law, much along the lines sketched here, see M Damaska, Evidence Law Adrift (New Haven, Conn, Yale University Press, 1997) 125 ff.


15 According to the Code of Criminal Procedure, art. 335 (2003), the prosecutor and the suspect can, at the conclusion of the pre-trial investigation, jointly propose to the court a sentence of up to 10 years imprisonment. If the court has no doubt about the relevant facts, it can sentence the defendant accordingly without a trial; the court can in that case impose a significantly reduced sentence (art. 343).

16 In cases of less serious offences, the Code of Criminal Procedure, art. 387 permits the defendant, before the end of his interrogation by the court, to propose a sentence. If the court determines that the facts are clear and that a full trial is not necessary, it sentences the defendant in accordance with his proposal. The court can also require the defendant to adapt his proposition to the court’s idea of an appropriate sentence.
exchange for the prosecutor’s dismissal of criminal charges\textsuperscript{17} to offences carrying penalties of imprisonment of up to five years.\textsuperscript{18}

And those are only some of the countries that have by legislation emulated the common law practices of pleading guilty and/or determining in advance, by plea bargain, the exact outcome of the process. Other jurisdictions, for example, Austria and Germany, have for years indulged in similar practices without legal authority. In 1997, the German Federal Court of Appeal officially recognised this practice and at the same time attempted to set certain limits in order to contain a practice that has fast grown out of control.\textsuperscript{19} Within a short time, negotiated judgments have become an indispensable element of German criminal justice. In a 2003 decision, the Federal Court of Appeal declared: ‘We regard negotiated judgments, if handled according to the rules, as an indispensable procedural device for disposing of criminal proceedings within a reasonable time frame.’\textsuperscript{20}

Two things are fascinating about this trend toward ‘consensual’ criminal judgments without judicial fact-finding, that is, without a trial in a traditional sense: its speed and its universality. As recently as in the 1970s, practices of negotiating or bargaining in criminal matters were simply unheard of on the European continent, except in rare reports about the strange ways in which justice is administered in the United States of America. For a defence lawyer to approach a prosecutor or even a judge and to insinuate a ‘deal’ would have been regarded not only as utterly inappropriate but also as potentially criminal. Within a period of less than 30 years, the picture has changed completely—today it would probably be regarded as a violation of a defence lawyer’s duty toward his client not to attempt to obtain a deal favourable to the defendant.

The bargaining virus seems to be particularly infectious. It has spread across the boundaries of legal systems which have traditionally had (and still have) little interchange; and—like any good virus—the bargaining bug has managed to adapt to each individual environment with ease. Procedures differ significantly,
for example, between the Italian *patteggiamento* and the French *plaidier coupable*, but the general idea and the practical results are the same: the accused saves the justice system the trouble of proving his guilt, and he is rewarded for his co-operation with a more lenient sentence than he would otherwise have had to expect. Another remarkable similarity is the nonchalance with which practitioners and courts have swept aside the objections that have been raised against the new practices by procedural theorists: the lack of a reliable factual basis for the verdict and sentence; the dubious relevance of a guilty plea or a confession to the sentence; the coercion implicit in the typical *quid pro quo* of bargaining; the inequalities caused by the influence of the quality, skill and assertiveness of the defence lawyer—to name only a few.21

The detached observer is primarily interested in the reasons for the quick and ubiquitous victory of negotiated criminal justice. These reasons are far from clear. The most popular explanation is that shortcuts to conviction and sentence are necessary because the system is too overburdened to grant a full trial in all cases. But this thesis has little evidence to support it—the time and location of system changes from trial to non-trial adjudication are not related to significant increases in case input.22 This is especially true for countries where the introduction of bargained case dispositions did not result from overburdened courts’ search for an outlet but was the product of comprehensive legislative reform.23 Other explanations indicate factors that have certainly facilitated the advance of negotiated justice but cannot be solely responsible for it. Such factors are—in civil law systems—the emergence of a more assertive, self-confident and knowledgeable defence bar,24 the continuous expansion of the criminal law,25 and the increase of complex cases that cannot easily be resolved with the type of evidence suitable to the trial format (as explained above). All these factors undoubtedly have worked together to de-establish the structure of the

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23 That was the case in Italy (see Criminal Procedure Act, arts. 444–8) and Spain (see Criminal Procedure Act, arts. 655 and 688).


traditional trial. But that structure would have been flexible enough to accommodate the new developments if its ideological basis had been stable.

Yet that has not been the case. The systemic emphasis on adjudication by trial was based on certain core values, that is, a necessity to determine the ‘truth’ \(^{26}\) in a public procedure that provides for input from all sides concerned, and the insistence on judgements that are ‘just’ because the decision-maker has, to the best of his ability, gathered and considered all relevant facts and related them to the applicable legal prescriptions. These values have not been strong enough, in many Continental systems, to withstand the onslaught of functionalism and efficiency orientation. \(^{27}\) From an economic and efficiency point of view, the symbolistic ritual of the public trial is costly, time consuming and in many respects simply wasteful. And the greater the emphasis on efficiency, the greater the pressure to abandon the trial in favour of quicker and less onerous solutions. The decline of the trial can thus be explained as one of many emanations of a general tendency of modern societies to reduce cost and to increase system efficiency.

This system-oriented analysis easily translates to the individual level. For each participant in the courtroom triangle—prosecutor, defence lawyer, judge—avoiding a trial means saving time; at the same time, striking a good deal increases a lawyer’s reputation in the criminal justice community and/or provides financial rewards. This is true even for defence lawyers, contrary to the popular assumption that they have most to gain by showing their prowess as trial advocates. Given the fact that the great majority of trials end in the defendant’s conviction, that is, a defeat of the defence, a defence lawyer has a much better chance of demonstrating his professional skill by presenting the defendant with a (seemingly) favourable ‘deal’ as a result of his influence with the judge or prosecutor. \(^{28}\) It is thus the professional interest of the lawyers involved that may be primarily responsible for the universal success of negotiated dispositions in criminal matters. This does not bode well for the future of the trial. If the presumptive actors in the courtroom drama find it unsuitable to their personal interests to participate, how can the trial survive?

Before we lose all hope, there is one further actor to be considered. We have seen in our brief historical retrospective that criminal justice needs to satisfy not only its immediate participants but also its audience. The general public (in

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\(^{26}\) Because it is implausible to expect that a trial or any other judicial process leads to a full, comprehensive and accurate recognition of all relevant facts, the assumption that the truth can be ‘found’ in the criminal process is misguided. I therefore put quotation marks around the word ‘truth’. For a more detailed argument and further references on this large topic, see T Weigend, ‘Is the Criminal Process about Truth? A German Perspective’ (2003) 26 Harvard J Law & Public Policy 157.

\(^{27}\) See A Eser, ‘Entwicklung des Strafverfahrensrechts in Europa’ 108 Zeitschrift für die gesamte Strafrechtswissenschaft 25. For a defence of traditional procedural values, see T Weigend, ‘Unverzichtbares im Strafverfahrenrecht’ 113 Zeitschrift für die gesamte Strafrechtswissenschaft 271.

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modern societies represented and informed by the media) might accept criminal judgements only when there has been at least the semblance of an honest search for the ‘truth’—and public trials may be a good, perhaps an indispensable means to symbolise that search for the ‘truth.’ Which leads us to the next question:

2. ARE TRIALS USEFUL?

We have so far approached our subject from a quasi-empirical perspective and have found that (a) there was a time when criminal justice did quite well without anything approaching our modern concept of a trial and (b) many legal systems are moving toward a situation where trials in criminal cases are the exception rather than the rule. We may now switch to a normative perspective, asking what purposes a trial might serve and whether achieving these purposes makes the survival of the trial necessary, regardless of the empirical diagnosis.

In many legal systems, the trial provides a forum for debating the legal issues of a case. And certainly a forum is needed where points of law can be raised, presented and discussed. But however impressive courtroom oratory on legal matters may be (especially to a lay audience), and however helpful the trial format may be for clarifying points of law through the confrontation of conflicting views—surely an ad hoc oral debate is not the optimal way to resolve legal questions which require careful research and detached, informed deliberation rather than spur-of-the-moment argument.

A court hearing can also have the function of analysing the defendant’s personality and rehabilitative prospects with a view to determining the sanction most appropriate to his individual needs. Regardless of whether this function is integrated into a comprehensive trial (as in most Continental legal systems) or left to a separate sentencing hearing (as in common law jurisdictions), its practical relevance in most cases is negligible. Two interrelated factors are responsible for this state of affairs: In contrast to the hopes of twentieth-century reformers adhering to a medical model of crime and sanctioning, criminal penalties have very little to offer by way of effective rehabilitation.29 For that reason, the choice of sanction in any individual case largely depends on the circumstances and gravity of the offence (including prior offences committed by the defendant), and there is very little input into the sentencing decision from factors related to the offender’s personality.30 Exploring the defendant’s

30 On efforts in various countries to streamline sentencing decisions using a small number of factors, see M Tonry, ‘Punishment Policies and Patterns in Western Countries’ in M Tonry and RS Frase (eds), Sentencing and Sanctions in Western Countries (New York, OUP, 2001) 3 at 20–4.
personality therefore has become a negligible aspect of most court proceedings in criminal matters.\textsuperscript{31}

Systems differ with respect to the role they afford victims of crime in court hearings. Whereas in some jurisdictions victims are virtually excluded from the trial except in their capacity as witnesses, in a growing number of countries the victim has a formal role at the trial, as a civil claimant demanding monetary damages, as in France\textsuperscript{32} and Italy,\textsuperscript{33} as an ‘auxiliary prosecutor’, as with some offences in Germany,\textsuperscript{34} or as a participant in sentencing hearings, as in some US jurisdictions.\textsuperscript{35} Yet even where the victim has a comparatively well-protected position at the trial, he never plays a leading role. Since criminal justice has been taken out of the hands of the private victim by the modern state,\textsuperscript{36} the trial is not meant to provide a forum for the victim to state his case or to obtain redress for the immaterial damage he has suffered.

This leaves two (interrelated) functions for the criminal trial: finding the truth about a criminal incident\textsuperscript{37} and education of the public. Proponents of the adversarial mode of trial have proudly asserted that examination and cross-examination of witnesses is the best engine ever invented to determine the truth.\textsuperscript{38} But the claim that public trials are an optimal way of determining the correctness of opposing versions of ‘what really happened’ is not limited to proponents of the adversarial mode; in fact, adherents of the inquisitorial system likewise claim that their type of trial, that is, a thorough investigation by one or more detached and neutral judges, is a superior method of attaining the same goal.\textsuperscript{39} In civil law procedural theory, the ‘formal’ concept of truth associated

\textsuperscript{31} There are of course cases in which the defendant’s sanity or mental state is of central importance, but these form only a small minority of all cases reaching the courts.
\textsuperscript{33} See Italian Code of Criminal Procedure, arts 74–95.
\textsuperscript{34} See German Code of Criminal Procedure 395–406c.
\textsuperscript{35} For a critical account of the ‘Victims’ Rights’ movement in the US, see MD Dubber,\textit{Victims in the War on Crime} (New York University Press, 2002); a collection of comparative essays by American and German authors can be found in (1999) \textit{3 Buffalo Criminal L Rev}, no. 1 (‘Victims and the Criminal Law: American and German Perspectives’).
\textsuperscript{36} On historical aspects of victim participation, cf T Weigend, \textit{Deliktsopfer und Strafverfahren} (Berlin, Duncker & Humblot 1989) 79–95; on the idea of a reconciliation between civil and criminal law in the interest of the victim, see S Walther, \textit{Vom Rechtsbruch zum Realkonflikt} (Berlin, Duncker & Humblot 2000) 207 ff.
\textsuperscript{38} Cf JH Wigmore, \textit{Evidence in Trials at Common Law} (4th edn, Boston Mass, Little Brown and Co, 1974) V, sect 1367: Cross-examination ‘takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth.’
with the common law system is frequently contrasted with the ‘substantive’ truth supposedly to be discovered through judicial inquisition.40

Even a superficial look at the reality of criminal trials must, however, raise doubts about the optimistic claims of proponents of either trial mode. In those (relatively few) cases in which a serious contest between differing versions of the ‘truth’ exists, judges or jurors will frequently not be confident of having learned the ‘true truth’ when the trial is over; they will indeed be relieved to be able to rely on burden-of-proof rules enabling them to deliver a verdict even though there remains reasonable doubt about either side’s proposed version of the relevant facts.

Nor is this surprising. The situation of a criminal investigation and trial is in fact one of the scenarios where it is least likely for those who possess relevant information to divulge that information completely and accurately. This obviously applies to the defendant, who in the great majority of cases (that is, when he is not completely innocent of the charges) has a massive interest in concealing the truth, or at least in spinning the facts in a way most favourable to him. But similar selfish interests often inform the evidence of seemingly neutral witnesses as well: they may have strong personal ties to the side of the victim or of the offender; they may have good reason to shape their testimony so that it serves their own purposes, for example, to conceal their involvement in the offence or otherwise dishonourable or cowardly conduct; or they may simply try to protect their privacy or to keep professional or personal secrets. Other types of evidence—with the possible exception of real evidence to be personally inspected by the trier of fact—are not much more reliable. Documents can be forged, manipulated and presented selectively; and the risk of manipulation increases with the relevance of a document for the outcome of the case. Experts’ opinions are notoriously difficult to comprehend, so that conflicts of opinion between experts cannot be resolved rationally by the court. And scientific evidence often defies interpretation by lay persons, so that the problems inherent in expert witness evidence also affect this seemingly reliable type of evidence.

Typical features of criminal trials exacerbate these problems. Most legal systems encourage trials to be conducted in one big sweep and discourage long-drawn-out proceedings. And most legal systems (especially those of the common law tradition) require ‘direct’ evidence to be offered at the trial and reject substitutes, such as written protocols of witness interrogations conducted previously.41 The combination of these two rules means that evidence that is not physically available at the day of the trial will be practically excluded from

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41 This is also true in civil law systems; see, eg, German Code of Criminal Procedure, s 250 prohibiting (with several exceptions) replacement of oral with written evidence. See also the jurisprudence of the European Court of Human Rights on the defendant’s right to confront prosecution witnesses (Art 6(3)(d) ECHR), severely limiting the admissibility of critical hearsay evidence; Kostovski v Netherlands, 20 Nov 1989, Series A No 166; van Mechelen v Netherlands, 23 Apr 1997, Reports 1997-III.
the court’s consideration. This inevitably entails the loss of large amounts of potentially relevant evidence, and thus a severe emaciation of the information available to the court. If finding the whole truth were in fact the ultimate objective of the criminal process, the ancient inquisitorial style of processing criminal cases might be superior; an investigation without temporal limits would make it possible to preserve information available only temporarily and to combine it with evidence appearing at a later date.

Theoretically, it is possible to transfer this feature into our modern procedural structure by abandoning the ‘here and now’ rule of trial evidence and by permitting the results of the pre-trial investigation to be preserved and introduced at the trial in ‘canned’ form (as videotapes, documentary or hearsay evidence). This strategy, which reflects practice in a number of civil law systems,42 broadens the evidentiary basis of the court’s judgement but seriously diminishes the relevance of the trial.43 Rather than forming the sole locus of the court’s fact-finding, the trial in this system signifies only one (final) phase of a long-drawn-out investigation and loses its special character; the trial may even deteriorate into a perfunctory recapitulation of the results of the pre-trial investigation without any ‘live’ testimony at all.

Such sweeping devaluation of the trial however, does not reflect actual practice in the majority of legal systems. In these systems, the trial remains as a rather awkward means of finding the ‘truth’. But perhaps the trial, as an important symbol of justice, serves the purpose of educating the public? It is difficult to say whether that is true. Members of the public do not usually attend trials; their image of criminal trials is derived from the media, and it is most likely to be a mixture of (little) fact and (much) fiction. The widespread interest in crime, justice and punishment, evidenced by the popularity of crime novels as well as TV detective series and court programmes, is not necessarily fuelled by an urge on the part of the public democratically to control the exercise of the state’s punitive power; its source is probably a rather prurient interest in one’s fellow man’s—or woman’s—evil deeds. Yet there may exist a residual vague interest

42 In France, it is customary in lower courts (tribunaux correctionnels) to read into the record transcripts of witnesses’ statements made to the police rather than hearing the witnesses at the trial, and even in the cour d’assises the presiding judge can read the transcript of earlier testimony of an absent witness; G Stefani, G Levasseur and B Bouloc, Procédure pénale (18th edn 2001) 797–8; H Barth, ‘Frankreich’, in W Perron (ed), Die Beweisaufnahme im Strafverfahrensrecht des Auslands (1995) 89 at 107–8, 112–13. In the Netherlands, art. 344 sec. 2 Code of Criminal Procedure provides that the defendant can be convicted on the sole basis of the police protocol; on trial practice in the Netherlands (where there is often no witness testimony) see I van de Reyt, ‘Niederlande’ in W Perron, above 283 at 299–305.

43 Another problem with the ‘integrated’ approach is a potential conflict with the defendant’s right to confront prosecution witnesses: if pre-trial testimony—which is often taken outside the defendant’s presence—can easily become the (sole) basis of the judgement; the defendant may not have a chance to challenge the credibility and accuracy of that testimony. This problem can be solved (only) by allowing the suspect to confront witnesses in the course of the pre-trial investigation. For a recent discussion of German and ECHR jurisprudence on this issue, see S Walther, ‘Zur Frage eines Rechts des Beschuldigten auf “Konfrontation von Belastungszeugen”,’ (2003) 130 Goldhammer’s Archiv für Strafrecht 204.
in seeing criminal justice done, not behind closed doors, but at a place (at least potentially) accessible to everyone.44 This would militate in favour of retaining trials. They may be necessary as the public’s window on the most awesome display of state power vis-à-vis the individual. Yet a sceptic may ask whether today’s trials, even in contested cases, properly serve this function. Do they make visible the determinative issues of a criminal case—or do they conceal them? This question relates back to the truth-finding function of trials: trials can educate the public only to the extent that the participants at the trial in fact strive to find the ‘truth’, and not to present a scripted display of one-sided information. In the worst case, trials mislead the public not only about the issues of the case they pretend to present but also about their own purpose.

Our investigation has led us to a rather disillusioned account of possible trial functions. The trial format is inadequate for debating legal issues; the personality of the offender is insignificant in most cases; truth is of limited relevance for the outcome of the case and might better be determined by alternative methods; and the public is not terribly interested in ‘real’ trials, and probably rightly so.

It is thus with some trepidation that we approach the ultimate question.

3. WILL THE TRIAL SURVIVE?

If we wish to look into the crystal ball, it may be helpful to distinguish between contested and uncontested cases. This distinction is not as easy to make as it seems at first blush because the character of a case can at any time change from hotly contested to consensual. But we can begin by looking at the clear-cut, paradigmatic procedural situations and approach the more problematic oscillating cases later. In the paradigmatic ‘contested case’, the defendant, seeking acquittal, denies that he or she is the offender or objects to crucial elements of the prosecution case. In the paradigmatic ‘uncontested case’, by contrast, the defendant makes a full confession or does not seriously deny the material elements of the prosecution case.

(i) Contested Cases

Parties as well as the public have one minimal expectation of criminal proceedings: they should produce an outcome that can be acknowledged as ‘just’. Because substantive criteria for determining what is just are difficult to come by, especially when there is no consensus on the relevant facts of a case, procedure must serve as a substitute. An outcome has a good chance of being accepted as ‘just’ when two conditions are fulfilled: first, the outcome is the result of a

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44 A guarantee of public trials is part of Art 6(1) ECHR—that guarantee, however, is a right of the defendant, not of the public; cf Axen v Germany, ECtHR, Series A No 72, 8 Dec. 1983, n 25.
procedure regarded as fair, offering all parties an opportunity to be heard; and secondly, the outcome is based on an ostensible bona fide attempt on the part of the decision-makers to arrive at a judgement based on ‘true’ facts and a correct application of the law. If the second of these conditions has not been met, the judgement will appear to be an outcome based on emotion, on undue influence or simply on chance, and will in any event fail to persuade the public because of its apparent arbitrariness. If these premises are correct, an honest and credible search for ‘the truth’ is an indispensable requirement for an adequate resolution of contested cases. We have seen, however, that a trial is not necessarily the ideal mechanism for searching for and finding the ‘truth’. As has been pointed out above, an administrative-style ‘inquisitorial’ investigation potentially provides a broader information base for the judgement because it enables the investigator to take his time in collecting the evidence and places lesser emphasis on the least reliable and most volatile form of evidence, that is, live witness testimony. The participation rights of the parties, including the right to be heard, the right to present evidence and the right to confront adverse witnesses, would of course have to be scrupulously respected even in an investigatory, non-trial process of proof-taking. That process should be conducted by an objective magistrate, not by the public prosecutor. If the investigation, through active involvement of the parties, obtains the indicia of reliability, it would be conceivable to then dispense with a trial altogether and to permit the judgement to be based on the record of the investigation. A procedure of this type exists in Italy, where the accused can elect to have his case adjudicated, by a single judge, on the basis of the record of the investigation conducted by the prosecutor; in return for his waiver of a full trial, the accused receives a sentence discount (giudizio abbreviato). It is an open question whether the broad-scale introduction of a thorough investigation with input from the parties—and, to the extent practicable, from the victim—would eventually replace the trial as we know it. Assuming that an investigation provides a better chance to determine the ‘truth’, one might be tempted to think that the courtroom drama involved in a trial might become obsolete. Yet even when an impartial investigation has taken place, a trial could serve several purposes. A trial could be the appropriate forum for reviewing the legality of the investigation if one side objects to the way it has been conducted. A trial could provide the necessary element of publicity if the investigation has been conducted behind closed doors. And a trial could afford the defence a ‘second chance’ when it is dissatisfied with the judge’s decision at the end of the investigation.

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45 This does not necessarily mean that a court cannot accept parties’ stipulations of facts. The joint offer of a stipulation means that the relevant facts are not contested; hence the decision-maker can assume that they are not untrue.

46 The judge holds a hearing at which additional evidence can be presented by the defence; Code of Criminal Procedure, art. 441bis sec. 5 (2003).

The form and substance of a trial would depend on which of these—or other—functions one regards as dominant. If the emphasis is on providing the defence with a ‘second chance’, it might be preferable to hold the trial, with all the imponderables inherent in presenting ‘live’ evidence, before a court with a strong lay element. The idea of the trial could then be to control the result of the rational, well-ordered fact-finding process of the investigation by a less rational procedure with the aleatory elements associated with jury trial. Only if both methods of looking at the ‘truth’ lead to a verdict of guilty, one might argue, can we be certain that the defendant deserves to be convicted. The option of demanding confirmation of the results of the investigation through the traditional trial process would have two additional advantages: the defence would not be compelled to co-operate in the investigation process, but could opt for letting the prosecution build its case and then to present its own version to an unbiased court with a strong lay component; and one could retain the public display of a search for the truth and for justice, one of the most attractive features of the traditional trial. Criminal justice would thus be prevented from becoming a secret procedure hidden from the critical eyes of the public.

In a hybrid system as briefly outlined here, the critical question would be how the cases that go to trial should be selected. This question leads us to the second alternative to be considered.

(ii) Uncontested Cases

When the defendant pleads guilty to the charges, makes a comprehensive confession or otherwise concedes the prosecution case without raising a valid defence, most legal systems today provide for a full trial only in exceptional cases, for example, when there is reason to believe that the defendant’s confession is false or when the personality of the defendant needs to be explored, for example because there are doubts as to his sanity. Normally, however, the court will treat the defendant’s declaration that he does not contest the prosecution case as a substitute or a sufficient basis for a finding that the facts alleged by the prosecution are true, and the remainder of the proceedings will primarily concern the appropriate sanction.

Things may be different when the defendant’s declaration does not reflect his spontaneous decision to acknowledge his guilt but is the result of prior negotiation among the parties, possibly including the court. If that is the case, an observer of the proceedings may have reason to doubt the voluntariness and/or the factual accuracy of the defendant’s inculpatory statement. A trial, or a hearing resembling a trial, may have the function of shielding the ‘deal’ against the suspicion that it is the result of undue pressure on the defendant or that the defendant’s admission is too far removed from the ‘true’ facts of the case. Because any negotiated outcome bears the potential of manipulation, a mini-trial may be needed to establish its full credibility. A hearing on a negotiated
admission of guilt might cover several issues: Does the defendant understand what he has been charged with? Does he know what sanction to expect? How did he arrive at the decision to admit guilt? What were the alternatives pointed out to him? And, most importantly, are there sufficient factual indicia suggesting that the defendant actually committed (at least) the offence he is admitting to? If these issues are discussed in open court—as they are in plea hearings in many United States jurisdictions—and if the prosecution presents at least some evidence in support of its claims, then a negotiated judgement might become more inherently reliable and might gain sufficient legitimacy in the eyes of the public.

The choice between a full trial, even in addition to a thorough ‘pre-trial’ investigation, the mini-trial associated with a negotiated admission of guilt, and no trial at all should always be the defendant’s. This implies that there must not be a penalty attached to electing a trial—a perennial conundrum of any legal system relying on the defendant’s consent to take shortcuts to conviction. But that is a different story that cannot be told here.

4. CONCLUSION

Trials will survive in spite of the universal advance of ‘consensual’ dispositions. An honest and careful search for the ‘truth’ will still be needed whenever there is serious disagreement about crucial facts of the case. As a mechanism for determining the ‘truth’, the trial suffers from internal flaws; its insistence on having all the evidence available on a single ‘day in court’ impedes a thorough elucidation of the facts, especially because the relevance of (eye) witness testimony has diminished with respect to proving modern forms of crime. Yet even if the substance of the truth-finding function were shifted to today’s ‘pre-trial’ investigation and if provisional judgements based on the results of the ‘pre-trial’ investigation became available, the trial could retain a residual function as a control mechanism for testing the plausibility of a guilty verdict. This also applies, in a somewhat reduced form, to negotiated admissions of guilt. In these cases, a mini-trial on the circumstances giving rise to the defendant’s decision not to contest the charges and on the factual basis of these charges may enhance the legitimacy of a verdict based on negotiation between the parties, possibly including the court. Although the criminal trial as we know it will not disappear from the system of criminal justice, it may lose its central position and become an infrequent exception to the rule of administrative or consensual disposing of criminal cases.
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Conceptions of the Trial in Inquisitorial and Adversarial Procedure

JACQUELINE HODGSON

1. INTRODUCTION

This chapter will compare and contrast aspects of the rituals and procedures which take place in the (mainly lower ranking) criminal courts in England and Wales and in France, highlighting some of the problems in extracting core normative principles for the conduct and functioning of criminal trials across different jurisdictions. Rooted in an inquisitorial procedural tradition, the trial in France is different from that in England and Wales: the courtroom players are not the same and those that appear to be similar (judge, prosecutor and defence) enjoy a different professional status and role from their broad counterparts in the more adversarial tradition that exists in England and Wales. Any explanation of the trial must also necessarily be linked to the pre-trial phase: the ways in which the case is investigated and evidence gathered will impact on the ways in which it is then scrutinised by the court, just as the nature of the trial process will itself influence the way in which evidence is prepared during the pre-trial phase. These distinctions are part of a wider difference in the process and function of the trial in the two jurisdictions: between the French model of a state-centred, unified inquiry into ‘the truth’, centring upon the pre-trial investigation, and that in England and Wales of a legally regulated debate between the parties, with the trial as its centrepiece.

The adversarial model is characterised by two opposing parties gathering, selecting and presenting evidence for trial. The court has an adjudicative rather than inquisitorial role.

1 This paper examines only two Western European jurisdictions. There are, of course, a variety of social and political as well as legal aspects to the trial, and the norms and concepts of justice that exist in (informal and formal) modes of trial in countries such as Japan, Africa or the South Pacific Region may well be quite different from those in Britain or in France. See also, eg, C Geertz, Local Knowledge. Further Essays in Interpretive Anthropology (New York, Basic Books, 1983); JL Comaroff and S Roberts, The Cultural Logic of Dispute in an African Context (Chicago and London, University of Chicago Press, 1981).

2 The objective of both procedural models is the discovery of ‘the truth’, but this is understood and constructed in different ways, as discussed below.
than an investigating function; it has no mission to go beyond the evidence presented by the partisan parties (or, increasingly, their representatives), either to seek out further information or to verify the probity of that offered. That is the task of the parties themselves. Accuser and accused therefore play a central role in adversarial procedure both in the trial and the pre-trial phase, controlling the nature of the evidence on which the court will base its decision. This is demonstrated in the defendant’s decision to enter a guilty plea, which has the effect of short-circuiting the court’s fact-finding role; the defendant’s public admission becomes a formal judicial finding of guilt without the need for any further judicial scrutiny. The inquisitorial model, on the other hand, entrusts the investigation and trial of criminal offences, not to individual and opposing parties, but to a central judicial authority whose role it is to act in the wider public interest. Representing the interests neither of the prosecution nor the defence, the judicial investigator is charged with investigating evidence which exculpates, as well as incriminates, the suspect in the wider search for the truth. Investigation before and at trial is thus a public, rather than a private, function, the responsibility of the state rather than the citizen; in this, the defence plays a subordinate role to the overall public interest-oriented investigative function of the magistrat. Justice is not at the disposal of the parties; there are no pleas of ‘guilty’ or ‘not guilty’. An accused who admits the charges against her will still have her case heard by the court (though clearly in a more abbreviated form than in instances where the charges are contested), as it remains the responsibility of the court to satisfy itself that the offence has been fully investigated and the case against the accused made out.

These two procedures have been characterised as being concerned with truth (the inquisitorial model, with its wide ranging pre-trial investigative powers) and proof (the adversarial model, dependent on the evidence presented by the parties). Although relying upon different methods of legal proof,

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3 Whilst the court will not challenge the probity of evidence on its own initiative, it is responsible for the application of evidential rules and standards, e.g., to ensure that confession evidence conforms to the Police and Criminal Evidence Act 1984 s76.

4 A clear contradiction between the defendant’s plea of guilty and any mitigation put forward which suggests a defence to the charges is likely to cause the court to invite the accused to reconsider her plea. This is a rare occurrence in practice, as most defendants are represented. This in turn underlines the importance of the pre-trial defence role, as the defence lawyer’s assessment of the case is generally accepted by the court without question.

5 A Garapon, Bien Juger: Essai sur le rituel judiciaire (Paris, Odile Jacob, 1997) at 170, describes this as ‘a kind of public monopoly on truth’.

6 Arguably, the 2004 reform (Perben II) has introduced a guilty plea procedure into the French criminal process. Avoiding the need for a trial, the comparution sur reconnaissance préalable de culpabilité permits the procureur (the public prosecutor) and the accused to agree on a reduced sentence of up to one year’s imprisonment in exchange for a formal admission. This has been widely criticised as moving away from the inquisitorial ideal. For further discussion of this and other recent reforms, see J Hodgson, French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France (Oxford, Hart Publishing, 2005) ch 2.

7 See, e.g., the analysis of J Frank, Courts on Trial (Princeton, NJ, Princeton University Press, 1949). He is extremely critical of the adversarial trial method, which he likens to throwing pepper into the eyes of a surgeon (at 85). Both inquisitorial and adversarial models are, of course, concerned
Jackson has argued that both models work within the same epistemological tradition, seeking to arrive at 'the truth' using the classic scientific method of proof: conclusions are reached by observation and experience using what might be termed a broadly empiricist approach. Others link these differences in procedure to the wider structures of law and of political authority that, historically, have evolved in different ways. Damaska, for example, characterised the differences between the two traditions as hierarchical and co-ordinate models of criminal procedure. In addition to the employment of a different methodology for arriving at the truth, it might also be argued that each procedure reflects a different understanding of what that legal truth is. Within the state-centred inquisitorial tradition, an objective truth is assumed to exist and its discovery is paramount. This cannot be left to the vagaries of the parties themselves and the success or otherwise of their efforts. Instead, a central enquiry is conducted by a juge or magistrat, invested with wide powers and constrained by few rules of evidence. This model places most emphasis on the pre-trial stage, the trial serving more as a confirmation of what has already been judicially established, rather than the principal site of argument and fact-finding. Within the common law tradition, legal truth is seen as something which is contingent, existing not so much as an objective absolute but as the most plausible or likely account, established after the elimination of doubt. Here, the emphasis is on the trial as the site of fact finding, where each party presents its 'side' of the case and cross-examines that of its opponent. Strict rules of evidence enable the court to ensure the reliability of what is presented with proof and with truth, but the different procedures (judge- and party-centred respectively) place a different emphasis on investigation, trial and rules of evidence.

10 The hierarchical model (representing inquisitorial procedure) relies upon hierarchical controls to ensure certainty and uniformity, keeping the exercise of individual discretion to a minimum in order to satisfy the ‘strong demands . . . for the ordering, systematization and simplification of the normative universe’ (Damaska 1975, n 9 above, at 485). The co-ordinate model (representing adversarial procedure) is more a process of checks and balances with less emphasis on pre-determined rules and technical decision-making. For further discussion of these features, see J Hodgson, ‘Hierarchy, Bureaucracy and Ideology in French Criminal Justice: Some Empirical Observations’ (2002) 29 JLaw & Soc 227.
11 Thus, Garapon (n 5 above) notes that, although alien to the common lawyer, the mental incapacity of the accused is not necessarily a bar to her trial, because the court’s principal role is not as a fact-finding forum. He argues (at 160–1) that the objective of the trial is not so much juridical as the symbolic duplication of a decision already taken, or an event that has already happened, in order to provide it with greater social meaning—that is, it has a ceremonial, ‘confirmatory’ or symbolic function. This is also explored by T Weigend, ‘Why have a Trial when you can have a Bargain? A Mildly Pessimistic Outlook On the Future of the Criminal Trial’, this volume.
12 As Lord Devlin put it, ‘Trial by jury is not an instrument of getting at the truth; it is a process designed to make it as sure as possible that no innocent man is convicted:’ quoted in MS Ball, ‘The Play’s the Thing: An Unscientific Reflection on Courts under the Rubric of Theater’ (1973) 28 Stanford L Rev 81, at 86.
to it, given the partisan rather than judicial nature of the investigation.\(^{13}\) Thus, the contrasting procedural traditions that have evolved in the two jurisdictions embody not only a different distribution of power between the protagonists within the courtroom (discussed further below), but also a different sense of the trial itself. In France, it may be seen as the celebration of a state-centred order and unity; in England and Wales, concerned more with the protection of individual rights, it is the setting in which difference is played out.\(^{14}\)

### 2. THE IMPORTANCE OF RITUAL IN THE CRIMINAL TRIAL

Although evolving out of different procedural traditions, the trial in both jurisdictions can be seen as a dramatic production, a ceremony or a ritual to be played out.\(^{15}\) Although parts of the trial appear ritualistic, in that they appear to follow a formula and recitation devoid of real meaning, the performance of the trial event can be seen as a form of ritual in a less negative sense. Whether confirming the earlier collection of case data through judicial investigation or acting as the central focus of enquiry and proof, the trial can be seen as an important process (or ritual), during which the state’s exercise of its legitimate monopoly on violence is open to public scrutiny. The cast of players is similar in each: there is a prosecutor, a defence lawyer, the accused, the public, various ‘officials’, and either a bench of three judges or a single judge sitting alone. In the Crown Court and the cour d’assises\(^{16}\) (both of which try the more serious cases), there is also a jury. However, whilst there is a degree of functional equivalence between these protagonists, their roles, and the rituals and procedures through which they are played out, are not the same. Before going on to examine the part played by the key legal actors, I will consider briefly some of the broader ritualistic aspects of the trial to which they are linked: setting, costumes and language.

\(^{13}\) The importance of rules of evidence is striking to the French observer, for whom the common law appears to constitute the rules of the game, rather than the incarnation of an idealised function as in France. See Garapon, n 5 above, at 150. The ways in which both procedures respect the accused’s right to examine or have examined witnesses against her under Art 6(3)(d) ECHR is interesting in this respect.

\(^{14}\) Ibid, at 150. He also (at 161) describes the different types of cathartic effect produced by the trial. Whilst accusatorial procedure aggravates the conflict, inquisitorial procedure stimulates consensus and protects against division. Symbolically, it also annuls the horror of the crime, reaffirming the superiority of the law and soothing the pain of the victims.


\(^{16}\) The tribunal correctionnelle is the middle-ranking court that tries délits, which account for most cases. Trial is by either a single judge or a president and two assesseurs. The cour d’assises tries the most serious criminal cases, crimes, with three judges (a president and two assesseurs) and nine lay jurors. Together, these 12 determine both verdict and sentence. The tribunal de police deals with the most minor offences, contraventions, and a single judge sits.
A ritual requires a designated space in which it can be performed. In the case of the trial, this is the courtroom, the architecture of which differs between the two jurisdictions. In France, typically, the prosecutor (le procureur) is placed on a raised platform to the right of the three judges, whilst the defence lawyer (l’avocat) stands on the floor alongside or behind the accused. In England and Wales, the judge or magistrates also sit at an elevated level, but the prosecutor occupies a less privileged position at floor level (together with the defence lawyer), whilst the accused is separately encased in the dock. These differences in judicial architecture are significant and denote the different status attributed to each actor. In England and Wales, both prosecution and defence share the same professional status, but in France, both the trial judge and the procureur are part of the professional career-trained judiciary, the magistrature. As well as being a prosecutor, therefore, the procureur also enjoys a judicial status, and so sits at the same level as (though apart from) the judge. As an avocat, the defence lawyer does not share this judicial status and is something of a professional outsider among the repeat players of the criminal trial. She therefore occupies a space literally below that of the magistrats.

As well as the architecture of the courtroom, the costumes worn by the protagonists are also an important part of the courtroom ritual. The status of those appearing in the two criminal courts in England and Wales is not the same and neither is their dress: whilst the judge and barristers appearing in the Crown Court wear a wig and gown, solicitors and magistrates in the magistrates’ court (where the procedure is generally less formal) do not. In France, a gown is worn by the judge, the lawyer and the procureur, both in the tribunal correctionnelle and the cour d’assises: the status (though not the seniority) of the protagonists is the same in both courts. The uniform of the gown is significant. It is not simply a remnant of tradition: it marks out and sets apart the person who wears it. Thus, the (ungowned) English magistrate is a lay person, a member of the local community whose appeal is in judging the accused as a peer. The French juge and the English Crown Court judge, on the other hand, are members of the professional judiciary and their robe signifies a status that demands respect and which differentiates them from the accused in particular. Garapon argues that the gown serves to clothe the judge in two senses: it covers the physical body of the person and, symbolically, it is part of the ritual that transforms the social

17 In the Crown Court, some more senior barristers also sit as judges, as do some solicitors in the magistrates’ court.
18 During the pre-trial phase, she is the judicial officer responsible for the supervision and direction of the police investigation, the juge d’instruction becoming involved only in the more serious cases which are likely to be tried in the cour d’assises.
20 n 5 above, at 83–5.
subject into ‘a judge’. Like a mask, it gives, the appearance of becoming someone or something else. It both purifies and protects:

The violence of crime can lead to that of repression: the role of the ritual is to mark out acceptable violence, that which is pure, by establishing unequivocally the separation between ‘this type’ and ‘that type’. The ritual authorises the practise of legitimate violence, leaving unsoiled the hands of the person inflicting it.21

The robe allows its wearer to exercise power as a judge, separated and protected from the subjective responsibilities of individual action. This is also emphasised in the way that the judge describes her role. The following example from a trial hearing in France during my own research is typical:

It is not my decision, it is the law . . . I have to ask you all of this to clarify things, because it is the law . . . it is my duty.

This separation can be seen in a negative sense as shielding the judge from the realities and the consequences of her function. Writing in the nineteenth century, Tocqueville,22 for example, questioned whether the judge would behave in the same way, divested of the protection of the gown and dressed simply as an ordinary citizen.23 This depersonalisation of the individual may also be experienced in a positive way, however. In taking conflict out of its ordinary context and placing it in a designated time and space, in creating a distance between legal subjects where debate is not between the parties, but their representatives (whose existence is defined relative to their exterior function), the courtroom ritual has the potential to allow competing but equally legitimate discourses.24

As with all rituals, language is also an important part of the trial.25 Particular meanings are ascribed to specific words which, in order to be valid and effective, must be spoken at precise moments during the procedure. There is an almost magical quality to these phrases which, like a spell or incantation, produce a

21 n 5 above, at 83.
23 See also Arendt (H Arendt, Juger, Sur la Philosophie Politique de Kant (Paris, Seuil, 1991), discussed in Garapon, n 5 above, at 314–6) on the separation of the judge from the external realities of her senses, closing her eyes being the ultimate act of ‘impartial’ judgment. D Soulez Larivière, ‘Psychologe du Magistrat, Institution Judiciaire et Fantasmes Collectifs’ (1995) 74 Pouvoirs 41, at 53 has also criticised the professional ideology and self-image of the judiciary in similar terms. He describes them as a ‘fantasy’ which serves to reinforce the distance between the *juger* and the rest of society, emphasising a sense of belonging to something separate and apart. In this sense, he argues that the independence of the *juger* is not a positive attribute, but, rather, represents an inability to identify with the accused and a ‘freedom to exercise power whilst sheltering behind a legal logic which recodes reality’. See further Hodgson, n10 above.
24 See Garapon, n 5 above, at 90–1. This is perhaps less true in the criminal trial, where the representatives (the *procureur* and the *avocat*) are not of equal status.
25 It is also an important aspect of the expression of the law itself, offences being defined in obscure language (property is ‘appropriated’; ‘grievous bodily harm’ is caused to a person) or very particular meanings being attached to words such as ‘reckless’ in their legal context(s). On legal language and text, its power and significance see P Goodrich, *Reading the Law* (Oxford, Basil Blackwell, 1986) and *Languages of Law* (London, Weidenfeld and Nicolson, 1990) ch 6.
given set of consequences once uttered. In France, there is a clear order and procedure that must be respected, but the words which must be used are not fixed. In England and Wales, the language of the criminal trial is more ritualistic: the court clerk will question the defendant as to her identity and plea, using a formula of words. The accused must respond in the prescribed terms before the procedure can progress: when asked whether she understands the charges, she must say 'yes' before the process can continue; when asked to enter a plea, she must say 'guilty' or 'not guilty'—phrases with apparently equivalent meaning such as 'yes I did it', will not conjure the spell. Observational research has demonstrated the extent to which these exchanges operate as an empty ritual that satisfies the procedural requirements of the law, rather than a more positive ceremonial rite as part of a discourse which has any meaning for the accused. As discussed below, the 'lawyerisation' of the trial has exacerbated this further. On numerous occasions in my own research, when asked by the court clerk whether she understood the charge, the accused turned to her lawyer, who, in full view of the court, mouthed 'yes'; the defendant then repeated, 'yes'. In other instances, we observed defendants going into court, apparently to enter a guilty plea, only to discover that this had already been done on the previous occasion. The solicitor had failed to read the file with sufficient care and, tellingly the client was unaware of the significance of the previous hearing and the formal admission of guilt that she had made.

3. REPEAT PLAYERS: JUDGES, PROSECUTORS AND DEFENCE LAWYERS IN INQUISITORIAL AND ADVERSARIAL PROCEDURE

In theorising the nature of the trial, can we speak of the judicial or the prosecution role and be sure that this is understood and practised in the same way in England and Wales, in France, or in Japan? Despite the alluring simplicity of their similar titles, the answer must be 'no'. Apart from the linguistic difficulties of translation, who these legal actors are and what they do is rooted in the

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26 See also the examples cited in P Carlen, Magistrates’ Justice (London, Martin Robertson, 1976) at 115–6 and in D McBarnet, Conviction (London, Macmillan, 1983). The word ‘guilt’ is itself interesting, given its generally ambiguous meaning outside the legal context, where it tends to connote feelings of remorse. One can, of course, be legally guilty whilst feeling no guilt or remorse whatsoever. Although other commentators have pondered this, I am indebted to my daughter Ella for pointing out afresh this linguistic anomaly.


28 The French word magistrat is frequently translated as ‘magistrate’. Whilst both words share a common origin, the English magistrate is an unpaid lay judge whilst the French career trained magistrature includes the public prosecutor, the juge d’instruction and the trial judge. The idea of the procureur having a judicial status as a magistrat is alien to the common lawyer, given her hierarchical accountability to the Minister of Justice and the largely non-adjudicatory nature of her role.
procedure within which they exist. Salas, for example, identifies a discernible ‘transnational core of judicial competences’ which centres around the judge as guarantor of individual liberties, but there is a range of tasks which might be understood to be properly within the judicial function, including investigation, adjudication and the authorisation of coercive measures. To lawyers in the common law world, the judicial function centres upon the adjudication of issues, primarily at trial. This is distinct from the two phases of investigation and of prosecution (which must themselves be kept separate), and is reflected in the relatively passive, ‘umpireal’ role of the trial judge. In France, however, historically the functions of investigation, prosecution and trial were dominated by a single individual (the lieutenant criminel under the grande ordonnance of 1670). These functions have been separated out gradually, but they remain bound together structurally and ideologically through the professional training and status of the magistrat. The judicial function is therefore a more broadly defined concept, encompassing as it does the trial judge, the juge d'instruction and the procureur. The extent to which this respects the separation of powers is a point of tension. Most criticism has been levelled at the blurring of investigative and judicial functions during the pre-trial instruction, but the distinction between the judicial and investigative roles at trial is also less clear-cut than in England and Wales. Anchored in the inquisitorial model within which, historically, the same person investigated, prosecuted and tried the accused, the court’s function is not simply to pass judgment on the evidence presented by the parties, but to conduct its own enquiries into the case in order to satisfy itself of the guilt or innocence of the accused.

The French model does, however, differentiate between an adjudicatory and an investigative judicial role, what Salas has termed a secondary and a dominant function. A distinction is made within the magistrature between the standing judiciary (the parquet) and the sitting judiciary (the juge d'instruction and the trial judge). Whilst the parquet is responsible for the investigation and prosecution of cases and works within a hierarchy headed by the Minister of Justice, the sitting judiciary is independent of this form of executive control. Only the

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29 The procedure is itself part of the wider social, historical and political context in which the trial exists.


31 Increasingly, the judge may also be required to rule in pre-trial hearings (eg under the Criminal Proceedings and Investigations Act 1996), and there are a number of coercive powers, the exercise of which requires judicial authorisation.

32 The Delmas-Marty Commission (M Delmas-Marty, La mise en état des affaires pénales: Rapport de la Commission Justice pénale et Droits de l'homme (Paris, La Documentation Française, 1991) at 178 pointed to the tension created between the judge’s investigative role and, in particular, the questioning of the accused, and the requirement that the judge remain an impartial arbiter.

33 This may be through questioning the defendant directly or requiring that further investigations be carried out.

34 N 30 above, at 491.

35 The collective term for procureurs who are also known as the Ministère public.
sitting judiciary may try a case and perform the adjudicative role undertaken by the judge in England and Wales and most, but not all, coercive measures which impinge directly on the liberty of the individual, such as remands in custody and telephone tapping, are also authorised by this form of judge. However, whilst investigation is the responsibility of a magistrat, in practice it is carried out by the police under the supervision of either the procureur or the juge d'instruction. And, significantly, one of the most intrusive infringements of an individual’s liberty—the detention of a suspect (and until recently, a witness) in police custody without charge—is authorised not by the sitting judiciary, but by the police, overseen (in the vast majority of cases) by the procureur.36

In both jurisdictions, the trial judge’s role includes that of adjudication, to determine the culpability of the accused and to pass sentence after a finding of guilt, but the process by which evidence is gathered, presented and evaluated differs. In England and Wales, the case is judged on the basis of the evidence presented by the parties—the defence and the Crown Prosecution Service (CPS). The judge takes a passive rather than an active or directive role, leaving the presentation and testing of evidence to the parties. Acting as her advocate, the defence lawyer represents the interests of the accused, presenting the defence case and testing out that of the prosecution.37

In order to make up this investigative information deficit, the court relies upon the defence to present the accused’s version of events, to cross-examine that of the prosecution and to challenge any procedural irregularities. Through the process of each ‘side’ presenting its case and interrogating that of its opponent, the aspiration is that the veracity of claims will be tested and any reasonable doubt eliminated or confirmed.

However, whilst adversarial procedure depends upon (and indeed grew out of) an active defence role at trial, this is not the case in France. Both the trial and

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37 There is a whole literature devoted to the sociology of the legal profession and the lawyer’s role as translator, advocate, mystifier, double agent, etc. For a brief discussion of this see McConville et al, n 27 above, at 47–50.

38 This is also significant, given that the judge will have a copy of the prosecution file to read in preparation for the trial. On the prosecution case as a police construction see generally M McConville, A Sanders, and R Leng, The Case for the Prosecution (London, Routledge, 1991). Recent legislation requires the CPS to work more closely with the police, as prosecutors rather than police will now decide whether or not to charge a suspect in cases other than those involving minor offences.
the pre-trial processes have at their heart the judicially supervised investigation, the defence playing a diminished role compared with that in England and Wales. The procureur and defence avocat are not considered two equal and opposing sides, whose contributions are of equal weight. As a magistrat the procureur represents the wider public interest, both in prosecuting and at the pre-trial stage, by ensuring the protection of defence rights as well as the effectiveness of the investigation. She is regarded in more neutral terms than either the defence avocat or her counterpart in the CPS. In short, whilst the procureur is part of the judiciary, the avocat represents only the (comparatively narrow) interests of the accused. In comparison with England and Wales, this defines differently both the courtroom roles of prosecution and defence and the status of their contribution to the trial. Whilst the evidence presented by the procureur is considered the case against the defendant the result of a judicially supervised investigation, the arguments of the defence avocat represent only the interests of the accused. The court operates on a presumption of innocence, but in practice becomes difficult to displace, given the judicial weight which attaches to it, particularly in the cour d'assises where the case will have been investigated in much greater depth over a period of months or even years, by the juge d'instruction.39

The importance of the pre-trial judicial investigation as the principal site of fact finding and the heavy reliance placed upon written evidence at trial both militate towards the structural exclusion of the accused and her ability to shape the case once it has reached the courtroom. It is important, therefore, to consider the place of the accused at trial relative to her pre-trial role. If the accused is able to contribute to and contest parts of the judicially supervised enquiry before trial, this in turn will impact upon the expectation we might have of the nature of her role at trial. The focus of French pre-trial defence rights is the instruction, during which procedure the defence avocat has been afforded a significant role since 1897. The reform of that year allowed her to be present during the judicial questioning of her client and to have access to the case dossier 24 hours before each such interrogation. More recently, and under the growing influence of the European Convention on Human Rights (ECHR), defence rights have been strengthened further.40 During the instruction, for example, the major legislative reform of June 2000 amended article 82–1 of the Code of Criminal Procedure (CCP) to allow both the suspect and the victim41 to request that the juge d'instruction carry out any investigations which they consider will assist in the discovery of the truth, in the same way that the procureur is able to.

39 Here, there is a stronger sense of the trial confirming the earlier judicial investigation, and the acquittal rate in the cour d'assises is very much lower than that in the Crown Court, at well under 10%.

40 At trial, eg, unrepresented defendants are now ensured access to the evidence in the case in the same way as those who are represented, and the court will now hear representations from defence lawyers representing those absent without excuse.

41 The victim has the right to constitute herself as a civil party in the case and to claim compensation at trial. The role of the victim as a ‘party’ in the case underlines the different and wider interests represented by the procureur.
The juge d'instruction may refuse, but she must give written reasons and her refusal is subject to appeal. In this way, the French model of defence participation is not through a separate and independent line of enquiry, but through a dialogue with the magistrat in order to influence the construction and content of the all-important dossier, the judicial investigation that will form the centerpiece of the trial.

Whilst this offers the potential for the defence lawyer to play a greater part in the conduct of the instruction, and therefore for her presence to be felt in the dossier presented at trial, there are a number of obstacles to the realisation of this role in practice. First, the avocat engages with the enquiry through the magistrat, who is then able to mediate and control the influence which the defence has upon the case, and so the dossier. Defence lawyers in my own research and that of Field and West were left in no doubt as to who was in charge of the case and attempts to engage directly with issues during the judicial interrogation of the suspect, for example, were met with short shrift. Secondly, the professional culture of the avocat is not to challenge, but to accept, the pre-trial domination of the magistrat, accepting the subsidiary nature of the defence role within the inquisitorial model. The dominant defence culture is one of 're-reading' the dossier in a way that is most favourable to the client, rather than engaging in the outright challenge of issues or evidence which go to culpability:

There was wide agreement across a wide variety of avocats and magistrates as to the ‘core’ defence function—even our most adversarial lawyers saw this as establishing the client’s account and offering an alternative ‘reading’ of the case on the basis of the elements already established in the dossier. Even for the minority of more ‘adversarial’ French defence lawyers, the establishment of a wholly separate defence case was considered risky.

Neither can these deficiencies readily be made good at trial. In England and Wales, the defence may seek to dispute evidence produced by the police, bringing its own witnesses to contradict the prosecution case or alleging police malpractice. To do this within an inquisitorial procedure (without channelling such claims through the pre-trial enquiry) where investigations are understood to be judicially supervised is to challenge the integrity of the judiciary itself. Furthermore, in its subsidiary role, the status of the defence in France as a party to the proceedings is inferior to that of the magistrat, and the lawyer is trusted less than the (judicially supervised) police. This places a clear constraint on her

42 Gilbert Azibert, president of the Chambre d'instruction in Paris, argues that this change is fundamental: ‘[t]hat means that a criminal lawyer who now knows how to do his job can participate in the conduct of the information. It is the beginning of an accusatorial system’: L Greilsamer and D Schneidermann, Où vont les juges? (Paris, Fayard, 2002) 193.
44 Ibid, 280. Only the most adversarial specialist lawyer in their study sought to qualify this by adding that proactive work on the raw material of the dossier may be required if the police and juge d'instruction had not done their job properly.
ability to engage in any form of proactive defence. For example, when I asked whether the defence would call witnesses independently at trial, a juge d'instruction told me:

The lawyer can produce a witness statement, yes, but that has less validity than if the statement was taken by a police officer because we do not know the circumstances. It could have been taken with a gun to the witness’ head. If taken by the police, we know that it was taken under proper conditions.45

However, if defence participation is difficult in the paradigm model of instruction, it is almost impossible in the 93 per cent of cases in which the police investigation is supervised by the procureur. Other than a 30-minute consultation with her client during the period of police detention, the garde à vue (GAV), there is no formal role for the defence during these enquiries, meaning that, in practice, the bulk of dossiers tried by the court are constructed with little or no defence input. Furthermore, the distant and bureaucratic nature of the procureur’s supervision of investigations means that they remain, essentially, a police construction.46 This makes problematic a trial procedure that is based upon the premise that a judicial investigation has taken place and which limits the role of the defence accordingly. This is likely to be further exacerbated by the increasing use of rapid trial procedures such as comparution immédiate47 and the recently introduced ‘guilty plea’ procedure,48 both of which depend upon the presence of a defence lawyer at court in order to demonstrate the protection of the accused. Avocats in these hearings are likely to be duty lawyers, who are young and often inexperienced, with little interest in criminal work, and who will have seen the accused for only a short time before the hearing.49

The very poor rates of pay under criminal legal aid in France mean that there are few criminal specialists and defendants experience a high degree of discontinuous representation. Those who have been lucky enough to receive custodial legal advice will usually have been seen by a duty lawyer. On appearing in court, they will be represented again by a (different) duty lawyer. Furthermore, the procureur is now permitted to negotiate directly with suspects during their GAV (where interrogations are conducted in the absence of a defence lawyer or a tape recorder, and suspects are not told of their right to silence) to propose an alternative to prosecution or a sentence in exchange for a ‘plea’ of guilty. This

45 This view was also supported in Field and West’s study, n 43 above, at 296–7, in which lawyers told them that they would not generally interview defence witnesses for fear of tainting their testimony.
46 See Hodgson n 36 and n 10 above.
47 An expedited procedure in which cases with a maximum sentence of between one and 10 years’ imprisonment, which the procureur considers ready for trial, are dealt with immediately the decision to prosecute has been made—ie at the close of the GAV.
48 Introduced in legislation in early 2004, this has been considered controversial as contradicting the inquisitorial ideal, representing an unwelcome step towards an adversarial procedure.
49 Duty lawyers are generally acting as such as a required part of their training, rather than through any interest or aptitude.
raises real concerns about the protection of the rights of the defence in such procedures.

4. THE ACCUSED

Who is the accused in the criminal trial? In contrast to the judge, prosecutor and defence lawyer, the accused is a novice in the courtroom ritual. Like all those present, she is assigned a physical space which she must inhabit and a temporal space during which she may speak. But whilst she is apparently at the centre of a production that takes place around her, the accused is strangely disempowered. Lawyers and judges are the ‘repeat players’, the legal actors who know the language and procedures of the process and who play the leading roles, while the accused must content herself with, at most, a walk-on part. Her status as separate from and ‘other’ to the professional protagonists is underlined by her appearance, her isolation and her inability to participate on equal terms with those conducting her trial. Whilst the ‘professional’ players are addressed only in terms of their status and have the mask of their function behind which to hide, the accused is subjected to a form of public dissection. She is afforded no privacy; her identity and biography are referred to repeatedly in open court, her character discussed, and people who to her are anonymous strangers address her by name. In this way, the courtroom ritual is itself part of the process that constructs the individual as the accused.

Although one of the two parties gathering, selecting and presenting evidence at court, the accused often plays very little part in her own trial in England and Wales. In most instances the defendant is represented and the trial is played out before her by the lawyers acting for each side. The judge will rarely address the accused directly, except to announce the verdict or sentence. In France, although the parties play a subordinate role to that of the judge, paradoxically, the accused is very much more present in the courtroom procedure. She is questioned by the judge at the outset and invited to respond at various points to the evidence presented and, although she is not obliged to speak, the structure of the trial is such that dialogue with the judge is difficult to avoid. This is true during both the trial and the pre-trial stage within an inquisitorial tradition that places the judge at the centre of the investigation. During the instruction investigation the model of defence participation is that of a dialogue with the juge. In this way, the defence case is not mounted in contradiction to that of the

50 The accused, of course, does not wear a gown, and may appear directly from police custody, unshaven and without clean clothes.

51 In France, the general background and previous convictions of the accused are part of the information before the court. In England and Wales, any attack on the character or credibility of a prosecution witness will result in the character of the accused (ie any previous convictions) being put before the court. Otherwise, this information is only considered by the court at the sentencing stage.

prosecution (which in turn is based upon that of the investigating juge), but rather it emerges as part of the judicial enquiry. At trial in the tribunal correctionnel, the prosecution outlines the case against the accused, who is then invited to comment on various parts of the evidence. The judge will often ask some quite simple questions to be sure that she understands the position fully. Standing in front of the person who is to determine your culpability and punishment, it is almost impossible not to respond to their questions.

Furthermore, the trial judge is the principal interlocutor; she asks the prosecutor to outline the case, then, before hearing the defence lawyer, she calls the accused in order to question her about the central accusations in a straightforward and almost conversational way, such that engagement with the process is almost inevitable. In many instances the judge adopts a moralising tone and the defendant is asked to explain her actions, to engage with the consequences of what she has done. For example, in one case of driving with excess alcohol the judge asked the accused:

You are the father of a family and you want to find yourself killing a child? What would you say if someone came to tell you that your child had been killed by a drunk driver?

In most cases before the tribunal correctionnel this questioning is fairly brief, but in more serious or complicated matters the accused is questioned more closely on the dossier. For example, in a case of possession and supply of heroin, the prosecutor provided a brief summary of how the defendant was named, arrested and searched and then set out his previous convictions over the last two years. The judge then asked the accused what he had to say about this, whether he admitted the offence, how he proposed to stop his drug use, where he sold the heroin, in what quantities and for how much money. The prosecutor then requested a sentence of 18 months’ imprisonment, followed by the defence lawyer’s speech in mitigation before the defendant was finally asked if he had anything to add. The case was dealt with in no more than 10 or 15 minutes.

In a second case that morning (concerning the importation of 100g of cocaine) the procedure was more lengthy. The defendant admitted possessing and importing drugs, but denied intending to sell them in France. He was asked whether the drugs were for his own personal use, who suggested importing the drugs, how he met this person, where he got the money from to buy the drugs given his precarious employment situation, the nature of his drug use, the nature of the business he claimed to work in and so on. The prosecutor also posed some questions to the accused before setting out his arguments supporting the guilt of the accused and requesting a sentence of two years’ imprisonment.

The defendant’s role in the process is thus understood in different ways in the two procedures. As Spencer\(^5^3\) describes it:

In an inquisitorial system the defendant is expected to contribute to the discovery of the truth, while in an accusatorial system his guilt must be established objectively and by evidence exterior to him.

To the common lawyer, this direct judicial questioning of the accused may seem overbearing. In England and Wales, the defendant is protected from such interrogation and is not questioned directly unless she chooses to take the stand to give evidence. However, questioning of the accused in an adversarial process is very different from judicial questioning in France. It is not conducted by a neutral party, designed to clarify matters or to give the accused the opportunity to explain herself, but rather by a partisan player whose concern is not with the truth, but with the construction of a case that undercuts that of the accused.

However, it is important to remember that the judge’s questioning of the accused in France is based upon the case dossier. In the most serious and complex cases, investigation is by the juge d’instruction and the defence has clearly-defined opportunities to participate during the pre-trial phase. Some of these cases will then come before the middle-ranking tribunal correctionnel, but many will go before the cour d’assises which allows the defence lawyer a greater role in questioning witnesses at trial. The vast majority of cases before the tribunal correctionnel have been investigated by the police, overseen by the procureur. Here, there is no opportunity for defence input beyond the statement to the police of the accused herself. In this way, the dossier on the basis of which the judge questions the defendant is largely a police construction; ‘supervision’ or ‘oversight’ by the procureur is minimal, distant and largely retrospective. This is important in understanding the judge’s interaction with the accused: in some instances, questioning is designed to clarify the facts; in others, it is to shore up the police-constructed prosecution case. The defendant’s autonomy may be enhanced through participation which enables her account to emerge more clearly, but not through judicial questioning that seeks only to repeat or to reinforce the accusation against her.

This difference in the role of the accused is part of the different ways in which the investigation and trial are configured towards the common aim of fact-finding in the two jurisdictions and, in particular, the central role played by the defence advocate in adversarial criminal procedure. French criminal procedure has retained a purer version of what Langbein\textsuperscript{54} terms the ‘accused speaks’ model of trial, but the ‘lawyerisation’ of criminal justice in England and Wales has all but silenced the accused completely. Whilst French criminal procedure has grown up around the strongly centralised power of the judge, it is the accuser and accused who have dominated procedure in England and Wales, the judge overseeing rather than participating directly in the contest. The need for defence representation to ‘even up’ the contest became clear in the eighteenth

century, as the prosecution role came increasingly to be performed by lawyers and the tactics used to gain convictions became increasingly dubious. Dependent on the Crown, the judiciary was too weak to intervene and, instead, allowed defence lawyers to examine and cross-examine witnesses in order that the reliability of evidence could be tested. With lawyers came rules of evidence, and the nature and objective of the trial shifted from a hearing that centred upon the defendant’s account to one which largely silenced her voice, as counsel focused upon the enforcement of the prosecutorial burdens of production and proof. The relative invisibility of the accused in the English trial, compared with that of her counterpart in France, was noted in 1820 by the French observer, Cottu, who remarked upon the wholly passive role played by the English defendant, such that ‘his hat stuck on a pole might without inconvenience be his substitute at the trial’. As lawyers came to replace those they represented, truth was no longer understood as a set of facts discovered or revealed through the accounts of the parties, but was now demonstrated to the court through the legal arguments of counsel.

The arguments of those opposing a greater role for defence lawyers in eighteenth- and nineteenth-century England are the same as those advanced both now and over 300 years ago in France: that the lawyer will undermine the truth-seeking function of the trial and benefit only the wealthy. However, supporters of defence representation were concerned less with benefiting the accused

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56 The professional ‘thief takers’ were a particular problem: men and women who would testify against the accused in exchange for immunity or reward.

57 Lawyers were first allowed a role under the 1696 Treason Trials Act, after a number of spectacular miscarriages of justice in which the Crown’s interests had been protected with excessive zeal. See Langbein, n 55 above.

58 The extent to which the growth in evidentiary rules either encouraged, or was the result of, the ‘lawyerisation’ of the trial is unclear. Landsman, n 55 above, at 602 argues that the new rules of evidence encouraged the involvement of lawyers; Beattie (1986, n 55 above, at 362–76; 1991, n 55 above, at 233, that they were a consequence of lawyers’ involvement; and Langbein, n 54 above, ch 4, that they were a (misguided) judicial creation, designed to remedy the ills of an unsystematic and corrupt pre-trial process.

59 Quoted in Langbein, n 54 above, at 6.

60 In debating the Ordinance of 1670 which, to a large extent, established inquisitorial procedure in France, it was said of defence counsel: ‘we know how fertile these kinds of counsel are in finding openings to frame conflicts of jurisdiction, how they often scheme to discover nullities in the proceedings and to give birth to an infinitude of side issues. It is therefore peculiarly in the interests of the wealthy that counsel is granted’: Pussort, quoted in A Esmein, *A History of Continental Criminal Procedure with special reference to France* (New York, Augustus M Kelley, 1913, reprinted 1968), Editorial Preface p xxix.
than with the efficient disposal of cases. The provision of fair representation would allow the court to dispense with the need for complex fictions and discretionary mercy and so be more professional and effective in uncovering the truth, and, therefore, it was argued, in obtaining verdicts of guilt. In short, the introduction of defence counsel was intended as a means of professionally managing cases in order to facilitate the court in convicting defendants—the very criticism levelled against current defence practice, in which lawyers are insufficiently adversarial.61

In practice, this professionalisation of justice has been of benefit to defendants, but it has also served to marginalise the accused, particularly in the magistrates’ court where most cases are heard. The ‘accused speaks’ trial has been replaced by a ‘lawyer speaks’ mitigation hearing in which the defendant is marginalised by the ‘protection’ of her lawyer. The defendant’s own advocate thus becomes part of the process which transforms her from subject to object, part of the courtroom ritual which constructs ‘the accused’. The nature of this ritual has been likened to a ‘degradation ceremony’ by Bankowski and Mungham:62

the defendant comes to the courts as a case, a problem, not as an individual. Thereafter his identity is publicly co-opted by those who seek either to defend or attack him. Quite frequently details of his personal biography are discussed openly in court—but without reference to him. He is of interest only as a ‘case’. The ‘case’, in turn, becomes the object of negotiation among the leading players in the courtroom. The defendant, although formally the focus of the bargaining is, in practice, excluded from participating. He is ‘represented’ and must wait patiently for the outcome of the deliberations of others.63

The participation of the accused threatens to upset the smooth running of the ritual, and so she is replaced, wherever possible, by her lawyer. Any unavoidable involvement is minimised and carefully controlled. As the clients were repeatedly told in one firm observed in my own research, ‘it’s just name, address, date of birth and I’ll do the rest’.64 In another example, the solicitor told the client:

You’ll go in and they’ll ask you which court you want to be tried in and they’ll warn you that the magistrates can send you to Crown Court for sentencing anyway. You say ‘magistrates’ court’. They ask you your plea, you say ‘guilty’ and then leave all the talking to me.65

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61 See, eg, McConville et al, n 27 above. For some evidence of improvement in the area of custodial legal advice at least, see L Bridges and S Choongh, Improving Police Station Legal Advice: The Impact of the Accreditation Scheme for Police Station Legal Advisers (London, The Law Society & The Legal Aid Board, 1998).
63 Ibid, at 88.
64 McConville et al, n 27 above, at 172.
65 Ibid, at 172.
5. CONCLUSION

Whilst the functions of prosecution, defence and trial exist in both jurisdictions, the ways in which these tasks are defined and understood by, and distributed between, legal actors is not the same in inquisitorial and adversarial procedure. Much depends upon the relationship between trial and pre-trial, the nature of the ‘truth’ that is sought through the process of investigation and trial, and who is responsible for the establishment of that ‘truth’. One juge d'instruction in my own French research reflected on the differences between the two systems, in their procedures and in the nature of the material dealt with by the criminal courts:

It seems to me that in the English system . . . you can perhaps challenge the evidence, you can debate it, you can question the witnesses yourself, summon them to court. In France, that is not really the case. It is in the hands of the judge . . . everything has usually happened before the trial . . . everything is pretty well decided, the die is virtually cast. . . . Everything depends on the conception of justice that you have. Here, we have a very state-centred conception. Justice is created by the state. We have to recreate what the parties do not say, research, establish the balance. In your country, you start from this absolute ideal that the parties are equal. It is for them to bring you the truth and you accept it. In your country, the judge stands back, he is very reluctant to intervene. Here, he can ask for additional information if he considers that the parties have not provided him with enough. In your country, it’s completely different. It is part of history. . . . In your country, the criminal law is restricted to that which offends against public order. Here, the scope is much broader. There is that, but there is also the regulation of social affairs. . . . The history of our countries brings a different approach. Here, we criminalise more. Once there is a threat to the state, which binds together the national collective, we want to repress it. In your country, it is about things that threaten the individual. It is a fundamental difference.

This provides an interesting tension when attempting to derive a normative account of the trial, as any normative principles would have to be able to accommodate and transcend a variety of legal cultures and procedures and to take account of the different place which the trial might occupy within the wider criminal process. When comparing France and England and Wales, this tension is exemplified in the differing constructions of the defence role and the balance between the trial and pre-trial phases.66 In England and Wales, the defence is a key player responsible for bringing relevant information before the court and probing the reliability of the prosecution case. The trial is the focus of this, the moment at which a neutral judge will adjudicate on the competing claims of prosecution and defence. In France, the pre-trial process functions more as a form of pre-judgment, a process of information gathering and filtering where the claims of both prosecution and defence will be scrutinised as part of the

66 On this see further Hodgson, n 6 above, ch 4.
judicial (or judicially supervised) enquiry. In this way, the trial is not the main focus for the determination of facts and the credibility of evidence, but rather functions as the confirmation of an earlier set of data-collecting moments.67 One might argue that it is during the crucial pre-trial investigation that defence participation is most important.

Given these different theoretical procedural constructions of the trial and the defence, is it meaningful to speak of a single unified defence role at trial? Or do we need to think in more functional terms to pull us away from a single and perhaps unrepresentative model? What do we mean by the requirement for an effective defence at trial? If we mean by this the right to present the accused’s case and to have the opportunity to challenge and to verify that of the prosecution, it may be that to consider only the trial role of the defence is unduly limiting. What is the function of the trial in the construction of this normative theory of the trial? In whose procedural image is it fashioned? Given the centrality of the pre-trial process in determining both issues of fact and evidence, we might ask, not where does the process of trial end, but where does it begin?68 Once we unpick the different functions and status of the key courtroom players, it becomes more difficult to speak of ‘the trial’ in a way that makes sense across jurisdictions.

The problematic prescription of rights and roles across jurisdictions can also be seen in the interpretation and application of the broad and open-ended terms of international instruments such as the ECHR. Article 6 ECHR, for example, guarantees the accused the right to defence assistance, but it does not stipulate what this means, what role the defence can or should play. At what point during the police investigation should the suspect in police custody be allowed legal advice, for example? For how long? And should the lawyer be present during the police interrogation of her client?69 These have been tricky issues to negotiate in the recent European Union (EU) Commission Framework Decision, which seeks to ensure that all suspects held in police custody in the EU benefit from the same protection, implementing more effectively the guarantees of Article 6 ECHR.70 In England and Wales, defence assistance implies extensive lawyer-client consultation and the presence of the lawyer during all police interrogations. For France, the role of the lawyer in attending those held in GAV is one of moral support, and so is limited to a 30-minute consultation.

67 This is demonstrated by the fact that the sentence given is inevitably the same or slightly less than that requested by the prosecution.
69 In France, the lawyer has been allowed access to the suspect held in police detention since 1993. Until 2000, this was only permitted 20 hours into detention. She may now attend from the start of the detention period, but the consultation period remains limited to 30 minutes and she may not be present during the interrogation of her client.
Lawyers are there to help their clients and to ensure the proper conduct of the garde à vue, but not to start getting involved in the case.71

One might also interrogate how, for example, the defendant’s right to examine or have examined witnesses against her (Article 6(3)(e) ECHR) is respected in the two procedures. Recent reform in England and Wales makes it easier to admit the evidence of those who cannot testify at trial,72 despite the fact that such evidence may have been taken by the police, and the associated problems of case construction. In France, it is unclear that defence participation in the pre-trial investigation is a sufficient substitute for the opportunity to hear live evidence, especially given the police (rather than judicial) dominance of investigations in practice.

The different legal histories and cultures of the two jurisdictions mean that each has a different conception of investigation and of trial. Thus, the role that the defence, prosecution or judge might properly be expected to play in a criminal procedure based upon judicial investigation before and at trial will be different from one where the police enquiry lacks any independent control or oversight and the parties themselves are responsible for the selection and presentation of evidence.

71 Interview with the then Justice Minister, Mme, Guigou in Le Monde, 15 Dec 1999.
1. INTRODUCTION

This paper is an attempt to build a better understanding of criminal trials and criminal appeals by utilising a specific theoretical perspective, in particular, to move beyond a view of the trial that treats it as a machine that connects criminal law to punishment. Such a view of the trial encourages a particular kind of normative analysis, one that is quite passive. Dynamic analysis is located either side of the machine: what you put in, and what you get out. Both criminal law and punishment are thus examined from the perspective of their relationship with each other: does the punishment fit the crime; does the model of responsibility implicit in ‘serious’ criminal offences (murder, theft, etc) match the concept of punishment (treatment, rehabilitation, expiation, incarceration, deterrence, restitution, etc)? The trial as a machine links the two. The simple part of this link is identified through ideas of truth: did those individuals commit the crimes with which they were charged? The normative thrust of this aspect of the link leads one to consider the processes of trial from the perspective of their reliability as a truth-seeking device. Reforms draw upon social processes associated with the generation of truth, most notably science. So long as one does not buy into the (supposedly) utilitarian acceptance that deterrence could be normatively separated from factual guilt, the idea of the trial as a search for truth (however plausible or implausible that might be in practice) cannot be abandoned. The claims of the criminal trial that it involves a search for truth are easily understood outside the legal system (one reason why such store is placed on convictions when discussing why those who have committed crimes should be punished). This is its strength, in terms of law’s claim

* Law Department, LSE.

1 A suggestion that most utilitarian philosophers strongly reject, see TLS Sprigge, ‘A Utilitarian Reply to Dr McCloskey’ (1965) 8 Inquiry 264.
to legitimacy, and a weakness, as a source of endless critique on the manner in
which trial falls below science or even journalism as a method for establishing
truth.

In attempting to theorise the criminal trial, especially from the viewpoint
of the criminal appeal, this paper draws upon systems theory, most notably as set
out in the work of Niklas Luhmann. This theory allows us to consider the legal
system, like other subsystems (or, as Luhmann would call them, function sys-
tems) in society such as the media, science, economy and politics, as something
that has a real existence through its communications. The theory considers
modern society to be a functionally differentiated society, with different sub-
systems maintaining their independence from each other through their different
communications. This is not the place to set out an exhaustive presentation of
the theory. Rather, we will utilise such parts of the theory as are relevant to our
present level of analysis in order to re-think the nature of the criminal trial and
criminal appeal, and the role played by such notions as finality, truth and rights
within those processes.

2. TRUTH WITHIN CRIMINAL TRIALS: THE INEVITABILITY OF A
TRUTH DEFICIT

The relevance of truth, as a symbolic value within the trial, linking the criminal
law and punishment, points in turn to the problem of finality. The processes of
law cannot offer what the link appears to represent: routinely to know a unique
event. Worse still, there is little in legal processes that can withstand compari-
sion with the processes of science, which is the area of social life that can most
persuasively claim to identify truth. And, even if legal processes can persuas-
vively claim to seek truth, the need to produce convictions with finite resources
opens every conviction up to the possibility of re-examination, not only on the
basis of new evidence, but also re-interpretation of the original evidence.

Given that, what symbolic resource within law allows the issue of finality to
be tackled? We suggest that the resource in question is the idea of rights. Rights
talk enables a conviction to be anchored within the legal system. A review of a
conviction (an appeal) is not an open enquiry into whether a particular defend-
ant committed a particular crime. It is both more and less than this. It is more,
in that a defendant’s right to have an unsafe conviction quashed is not limited

2 The theory is by no means easily accessible. For the uninitiated, our ‘Introduction’ to
3 And, even within science, this possibility is subjected to severe critique and scepticism
represented in the broad strand of arguments that are known as ‘Underdeterminism’ (see L Lauden
‘Underdeterminism’ in E Craig (ed), Routledge Encyclopaedia of Philosophy (London, Routledge,
1998), available at www.rep.routledge.com/article/Q112.) What this position denies is that it is ever
possible for evidence to guide choice between rival theories, even after significant amounts of test-
ing or, to use the scientific equivalent of legal testing, trials. The etymology of the word trial in these
different subsystems is very similar.
to the question whether she or he was factually guilty. Her/his rights, understood overall as a right to a fair trial, have to be considered as well. It is also less, in that the presentation of evidence at trial and its re-examination on appeal are never conducted in a totally open manner. Evidence at appeal is always assessed in terms of its likely impact on a trial. It has to be filtered into an appeal decision by reference to the manner and ways in which it would have been introduced at trial, and thus has to be assessed against the background of other evidence that was introduced in the same way, ie through legal processes. These legal processes are routine and stable. They, and not the circumstances unique to every trial, are what make the trial a legal process. And, whatever the symbolic claims made about the contribution of legal procedures to the attainment of truth, the most consistent basis for their normative stability is simply the fact that they offer standards of what is appropriate. In normative terms: they are what the participants have a right to expect.

What is the nature of these rights, which allow the legal system (as we will demonstrate) to operate on a stable basis? We offer a potentially radical interpretation. Rights, here, are not values borrowed from outside the legal system—taken from politics, or philosophy, or journalism. They are reflexive, and exist only within the legal system. They are simply the inevitable outcome of legal decisions and legal distinctions, and they have their most recognisable general existence in extrapolating from the enterprise called legal doctrine. The trial processes itself as a series of decisions. What makes those decisions stable is the practice of reflecting on them, and deciding on what basis they were considered to be appropriate. This process can generate doctrine. And such doctrine may be understood as the embodiment of outside values, such as human rights. But the nature of the decisions made and the subsequent reflection, is always a local decision and a local reflection. The rights that can be generated in this manner remain, inevitably, parochial, and the doctrines, which seek to articulate the basis, extent and justification for those rights, must remain incoherent, and endlessly contestable.

(i) An Example

Before enlarging on a sociological theory that could explain the nature of the ‘truth deficit’ (as identified above) within criminal justice, and the role played by rights in compensating for that deficit, we wish to provide a particularly stark example: the case of Sally Clark. We used this case in an earlier publication to illustrate the inability of different systems (in this case the mass media and the legal system) to communicate with each other, rather than about each other.4 Our use of this example here is somewhat different. We invite the reader to view

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the case of Sally Clark as an example of the legal system avoiding a paradox.
The paradox in question is the fact that the legal system has to do what it cannot do: ‘know’ the facts of a unique event. The paradox is exacerbated because the legal system has no way of knowing the facts relating to any criminal offence, or indeed any facts, except by reference to its own procedures. At this stage this might be characterised as a ‘pure’ due process approach (however, what we intend to show is that law includes processes that prevent it from settling into something which can be described simply in these terms). If the reader is convinced, or at least intrigued, by our identification of the truth deficiency in law, and the manner in which that deficiency is compensated for by rights, then we invite him or her to consider the nature of those rights and the processes which generate them.

Sally Clark was a solicitor, married to another solicitor, who was convicted in 1999 of the murder of two of her infant children. The trial depended heavily upon medical evidence on the cause of death, in particular, the appropriate interpretation of autopsy findings. Thus, this was not a case dependent on the kind of ‘soft’ evidence that can be expected to cause problems for finality: identification, confessions, biased witnesses, etc. Instead, the trial was dominated by science. However, science did not produce hard, if that means firm, conclusions. Instead the trial was occupied with disputes over the interpretation of medical findings that it was difficult (or more likely impossible) for the jury or appeal court to resolve. The prosecution experts testified that they were satisfied that the deaths were due to physical injuries which, in the absence of any suggestion that any person other than the defendant had the opportunity to inflict these, indicated that she was guilty of murder. The defence witnesses were not satisfied that the findings justified a conclusion that the cause of death was physical injury. If their opinion were accepted, there could not be a conviction. How could such disputed scientific evidence result in closure? The answer is reflexive: the jury convicted. Whatever the impossibilities of knowing how Sally Clark’s children died, when the jury convicted, she was guilty.5 If this were to be re-examined within law, it would be in terms of whether she had had her right to a fair trial.6

At the second appeal, the judges accepted that a test result on one of the babies following its death, but prior to her trial, was not disclosed to the defence. This was a breach of Sally Clark’s rights. But an appeal has never been

5 Namely, by convicting, the jury must be taken to have resolved the dispute over the scientific evidence.
6 Of course this pattern is regularly repeated. For a more recent example, note the Court of Appeal’s decision of 16 July 2004 to quash the conviction of Siôn Jenkins and order a retrial. One of the conditions of Siôn Jenkins’ bail pending the retrial is that the website, Justice for Siôn Jenkins, is taken off the internet [http://www.guardian.co.uk/crime/article/0,2763,1274473,00.html]. The basis of such a retrial is to give the defendant his right to have new scientific evidence (which is both complicated and contested) considered by a new jury, in the context of all the other evidence. If a conviction results, its finality will remain contingent, and different from the finality that science can produce for itself.
just about rights. There has always been a need, now understood through the
formula ‘unsafe’, to consider such issues as non-disclosure associated with the
value of truth: the factual guilt of the appellant.7 But at the appeal the Court of
Appeal still did not have simple facts. They had an expert for the appellant
saying that the missing test result pointed to a likely cause of death that had no
connection with any injuries resulting from any possible actions of the appel-
licant. And they had an ‘equally eminent’ Crown expert saying that the missing
test results had nothing to do with the death of the child. How then could the
appeal court judges give effect to the value of truth, under these conditions?
How could they add their understanding of this evidence to the hypothetical
understanding of a jury who would have been unlikely in any case to have
understood fully the earlier evidence? And what resource allows them, as appeal
court judges, to decide such a matter for themselves, especially as, unlike a jury,
they are required to give reasons?8

The answer is, primarily, rights. Not human rights or philosophical rights,
but reflexive legal rights, observed through the lens of doctrine. The Court of
Appeal dealt with the disputed medical evidence by extrapolating from legal
document. First, relying on Pendleton,9 the Court stated that it needed only to ask
itself whether the new evidence of the defence, if given at trial, might have
influenced the jury’s verdict. Then, developing this approach, it took the view
that the jury would be entitled to accept the evidence of one medical expert over
another, as long as the preferred evidence came from a respectable medical
assessment. As the new defence evidence met this standard, the presence of
conflicting and equally respectable medical evidence was held not to be legally
relevant. In this way the Court, applying law, dissolved the conflicting medical
evidence. Not only that, it did so with a doctrine that, applied to trials, would
make it impossible to proceed with a prosecution reliant on scientific evidence
whenever the defence could find a credible scientific expert witness to support
its case. But, necessarily, this doctrine does not apply to trials; it only applies to
new evidence on appeal. Thus, while the appeal court avoids having to decide
what it cannot decide (which of two scientific witnesses to believe) by simply

7 The exact relationship, in its statutory formula, between what have in the past been separate
grounds for appeal (eg material irregularity, on the one hand, and miscarriage of justice on the
other), but united through the proviso (‘Provided that the Court may, notwithstanding that they are
of the opinion that the point raised in the appeal might be decided in favour of the appellant, dis-
miss the appeal if they consider that no substantial miscarriage of justice has actually occurred’:
Criminal Appeal Act 1907, s 4(1)) is now united in the one ground of appeal: ‘unsafe’. However, this
eone ground then leaves open the interpretation of the relationship between these different notions,
a relationship which remains contested and uncertain (see Chalkley and Jeffries [1998] 2 Cr App R
79; Mullen [1999] 2 Cr App R 143; Togher, Parsons and others [2001] 1 Cr App R 457). Informed
commentators suggest means of reconciling these apparently conflicting authorities. (See, in particu-
lar, I Dennis, ‘Fair Trials and Safe Convictions’ [2003] Current Legal Problems 211; N Taylor and
argument we present here is that there are reasons why such reconciliation cannot be achieved.

8 We have tried to explore these questions in R Nobles and D Schiff, Understanding Miscarriages

9 [2002] 1 Cr App R 34.
accepting the defence witness, juries will have to continue to deal with exactly the same sorts of questions, without the benefit of any such presumption.10

3. HOW DO RIGHTS AND TRUTH OPERATE WITHIN THE CRIMINAL JUSTICE PROCESS? A SYSTEMS THEORY ANALYSIS

(i) Part One: the Implications of Thinking about Law’s Evolution

In the Sally Clark case closure, at both trial and appeal, was achieved through a process that is articulated in terms of rights. In order to try to understand the nature of this discourse in the criminal justice process, and the role that it plays, we turn to systems theory. The first issue that can inform our understanding of criminal justice, and most particularly the relationship between trial and appeal, is that the legal system, like all systems, can develop only through a method of adapting: it evolves. This is not just a biological metaphor. We are conscious of this evolution all of the time. Indeed, much legal scholarship is involved with ‘updating’ the law: new statutes, regulations and appeal court decisions. This scholarship involves seeing how what is new alters what was there before. Those who seek to change law (legislative draftsmen, Court of Appeal judges) have to consider this process as well, to identify how their legal communications will alter the possibilities of what can constitute legal communication. They need to have regard to what exists, and how it will be changed, when making communications that alter the possibilities of what can be legal or illegal. Thus, what exists provides a restraint on such processes. It is a restraint because, in order to change the law with any degree of specificity, we have to leave most of the existing law in place: to assume that most of the law will continue to be the same.

10 Although, following the later case of Angela Cannings [2004] 2 Cr App R 7, at 32, the jury will not have to address this sort of question when the defendant’s guilt turns exclusively, or almost exclusively, on expert evidence on which experts disagree:

‘With unexplained infant deaths, however, as this judgment has demonstrated, in many important respects we are still at the frontiers of knowledge. Necessarily, further research is needed, and fortunately, thanks to the dedication of the medical profession, it is continuing. All this suggests that, for the time being, where a full investigation into two or more sudden unexplained deaths in the same family is followed by a serious disagreement between reputable experts about the cause of death, and a body of such expert opinion concludes that natural causes, whether explained or unexplained, cannot be excluded as a reasonable (and not a fanciful) possibility, the prosecution of a parent or parents for murder should not be started, or continued, unless there is additional cogent evidence, extraneous to the expert evidence, (such as we have exemplified in Paragraph 10) which tends to support the conclusion that the infant, or where there is more than one death, one of the infants, was deliberately harmed. In cases like the present, if the outcome of the trial depends exclusively or almost exclusively on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed.’
Let us consider the nature of this restraint in the context of criminal appeals, and the problems associated with finality. The question of finality is conventionally understood as the need to stop revisiting decisions given finite resources. However, the finality that has to be held in place at the level of appeal is not simply the ability to avoid revisiting decisions. It is the ability to maintain the stability of trial processes. Consider the threat to the processes of the criminal trial posed by the impossibility of knowing what actually happened in millions of situations. Consider this threat not simply as one of legitimacy (the concern that law’s inadequacies will be exposed), but from the consequences if law made immediate responses to improve its procedures on every occasion when the opportunity presented itself (such as every criminal appeal). This threat is, understandably, resisted. This resistance takes the form of an assumption that these trial procedures ‘work’, an assumption that can be described as deference. From outside the legal system, where the criminal trial is often described as a ‘game’, with little connection to the task of attaining the truth, the deference of an appeal court may seem perverse, or corrupt. But accepting that trial procedures have not worked, but need to be reformed, gives the appeal court the responsibility of reconstituting the trial process. A change in the structure of law, such as an appeal court precedent, has to be integrated into what already exists. A direction to the lower courts to ‘be just’ will not do this. Nor is it easy to present an improvement to the trial process alongside the admission that what remains is just hopeless. Thus, even when reforms are announced, the attitude which might be described as deference is not abandoned; it is just removed from a small part of the existing system. Applying this to our Sally Clark case example, the Court of Appeal did not announce that juries and appeal court judges were an inadequate mechanism for deciding cases involving disputed scientific evidence, or that scientific evidence could only be used in cases where there was unanimity amongst scientists as to its meaning and significance. Instead, it left juries to continue to deal with scientific evidence at trial and appeal courts able to resist reassessing that evidence except in circumstances like those of Clark, where ‘new’ evidence becomes available that was not available at trial. Thus the appeal court can both admit to its own inability to decide between equally qualified and diametrically opposed medical opinion, and leave existing trial procedures unaltered.

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11 Thus taking ‘Underdeterminism’ (see n 3 above) seriously.
12 The resistance to losing the ability to speak meaningfully and routinely about trial procedures as correct or incorrect is more important because it is routine, than because of resistance due to class, or professional interest motivations.
13 Indeed, the assumption that the processes ‘work’ may even screen out so many cases from review that one needs outside bodies such as the Criminal Cases Review Commission to find additional work for appeal courts to do.
14 We have explored the nature of deference in appeals, in the light of current reform proposals to appeal processes in ‘The Right to Appeal and Workable Systems of Justice’ (2002) 65 MLR 676.
15 Later developments have still left trial processes unchanged, although now some cases will not reach trial. See the Attorney-General’s statement (20 Jan 2004, Cols. 907–8) that followed and echoed the Angela Cannings case (n 10 above).
Thinking about the legal system in terms of its evolution leads not only to an understanding of the necessity for restraint, but to an awareness that different kinds of communications have different possibilities for generating further communications. Some things that are done by legislatures or appeal courts generate no further developments in the legal system, while others provide new foundations from which new types of legal development occur. Again, legal scholars are aware of this, although they usually limit themselves to identifying and writing about areas which have demonstrated their evolutionary potential (where the action is), and have not usually given much thought to the conditions which create the possibilities of legal development in one area rather than another. For example, decisions to stay proceedings in cases involving significant breaches of law by the police or other investigative bodies seem to have generated a new sub-field of criminal justice: the law concerning abuse of process.\footnote{See AL-T Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Oxford, OUP, 1993); and for further development, advancing a concept of ‘system integrity’, see A Ashworth, ‘Testing Fidelity to Legal values: Official Involvement and Criminal Justice’ (2000) 63 ML Rev 633.}

Returning again to Sally Clark’s case, the Court’s use of the Pendleton decision was not only an application of a case, but also a development of doctrine. As such, it provides not only a means of resolving a particular problem that may arise in a future appeal, but a communication that might also provide a basis for deciding other new evidence issues. It has an evolutionary potential. By contrast, other statements contained within the Sally Clark judgment, such as the admission that the misleading statistical evidence provided at the trial might well have had a major effect on the jury’s verdict, have no such evolutionary potential.\footnote{See R Nobles and D Schiff, ‘Misleading Statistics in Criminal Trials’ (2005) 2 Significance.}

Here the Court acknowledged the fallibility of juries as fact-finders, but said nothing that might change either its own procedures or those at trial.

Understanding that law evolves, and thinking about how law evolves, provides a radical new basis from which to explore the role played by legal discourse, most particularly rights-talk and truth-talk, within criminal justice processes. Return for a moment to our claim that the criminal justice process suffers from a truth deficit, which is compensated for with rights. Legal procedures cannot duplicate the procedures whereby science generates its truths. Nevertheless, the legal system manages to create its own ‘truths’ (that x did y), using scientific evidence, even in situations where science would be unable to come to a specific conclusion. Instead of a scientific truth, that x did y, we have a jury conviction that implies this. The conviction will have been constructed through legal procedures: charges, pleading, examination and cross-examination, directions to a jury, summing up, burden of proof, etc. These procedures will have their own history, they will have evolved, and they will continue to evolve. In this evolutionary process, and applying systems theory, the suggestion that there is a truth deficit is actually two claims. First, externally (by which we mean compared to processes within other subsystems that claim to reveal truth, such as science or investigative journalism) the procedures of law.
will inevitably be different, which means that they will be found wanting. Secondly, within law, a discourse of truth does not provide the dominant basis for the stability and change (which together amount to evolution) exhibited by law. Add these two claims together and we can offer a radical proposition: that the evolution of criminal justice occurs using a discourse of rights that systematically subverts attempts to make the trial into what other systems can recognise as a mechanism for seeking the truth.

(ii) Part Two: the Mechanisms for Evolution, with Particular Reference to Appeals

Luhmann acknowledges that courts have played, and continue to play, a crucial, indeed central, part in the evolution of the legal system. Courts have the task of making decisions about what is legal/illegal. And in deciding what is legal and illegal, they have to make constant reference to what has already been coded legal or illegal: the existing law. In reaching decisions, and having regard to what has already been decided (whether by courts, or the legislature), courts have to do something that seems like a moral value, but is actually no more than a consequence of having to decide what is legal by reference to what has already been decided. The apparent moral value here is equality, but it is the formal equality of treating like cases alike. In terms of systems theory this involves a process of observation. Courts observe decisions in order to decide what they represent, so as to decide what the necessity to treat like cases alike requires. This process is not a licence for each court to decide for itself what the whole legal landscape of cases represents. The process is made stable and manageable because of the presence of large amounts of what systems theory calls ‘redundancy’. Courts do not reinvent their whole legal landscape, because, if they did so, they would have no basis on which to make a decision as to what is legal or illegal. The attitude of deference exhibited by appeal courts towards trial courts is simply one example of a much more widespread phenomenon. To maintain a basis on which to speak objectively about the legality of the matter that needs to be decided, one has to show deference to most of the existing legal communications as to what constitutes existing law.

In the area of criminal justice, as with any other area of law, the process of observation carried out within the courts (but not only within courts) requires and generates more general levels of discourse. In terms of the theory these are self-descriptions. The most general of these self-descriptions, which represent

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18 See in general Luhmann, n 2 above, ch 7 and, in particular, Pt VI; see also, ibid, ch 6, and in particular Pt III.
19 Ibid, ch 8, and in particular, Pt II.
the attempt to describe the whole of law, is jurisprudence. But the self-description that arises within the courts, dealing with the area of law known as criminal justice, is dominated by a discourse made up of references to rights and truth. Now, and this is directed to the extent, internally, of the truth deficit, the dominant self-description, contributing to the stabilisation (the redundancy of most legal communication) and change (the possibilities for varieties which lead to new stable communications of criminal justice) is inevitably one of rights, rather than truth. Just as the appeal courts cannot just tell the trial courts to ‘be just’, so too they cannot instruct them just to ‘find truth’. Instead, they must not only show deference to the existing procedures of trial courts; they must also insist that the trial courts themselves continue to show suitable deference to existing trial procedures. Trial courts and appeal courts articulate this deference in terms of what defendants are entitled to expect, ie, in terms of rights.21

At the most general level the discourse of rights and truth, which guides legal decisions, can appear to collapse into a single discourse. Every defendant has a right to the truth. This is simply an expression of the acceptance that someone who is factually innocent cannot be punished as factually guilty. At the level of appeals, one example of this right is the doctrine of lurking doubt.22 Within the trial evidence is admissible if it is relevant and has probative value. Does the example of a right to the truth show that any attempt to describe a different role for rights from for truth within criminal justice is misconceived, or that they both amount to the same thing? This is not so, as becomes clear as soon as we think of evolution. The right of a person who is innocent to have his or her conviction overturned on appeal, even without new evidence, the so-called ‘lurking doubt’ doctrine, is not something that has generated further doctrine, or is likely to. The ability of an appeal court to quash a conviction despite the defendant suffering from no breach of his or her rights, and the consequent acceptance that trial procedures remain fallible, can only be used in an ad hoc manner and extremely exceptionally. The assumption that trial procedures work, that the assemblage of rights that make up a trial, routinely achieves a correct verdict cannot operate alongside a widespread free-ranging recognition of fallibility. Nor, if the conditions that lead to mistakes can be identified, does this develop the doctrine. For, if such identification leads to new rights, the lurking doubt doctrine remains, as it was before, an exception to the acceptability of a conviction fully in accordance with a defendant’s rights.23

21 Namely, that convicted persons have, or have not, had their rights.
22 Classically formulated by Lord Widgery in Cooper (1968) 53 Cr App R 82.
23 This doctrine is flirted with by the Court of Appeal, but is never stable as a legal communication. As a legal communication it has the character of an ad hoc and ad hominem argument. Judges now consistently suppress such arguments, although there always remain exceptions (see Luhmann, n 2 above, 248–9 and if 54) A similar doctrine is that of ‘exceptional circumstances’ as set out in the Criminal Appeal Act 1995, s 13(2) and consequently s 14(5)—see its interpretation in Poole and Mills v R [2004] 1 Cr App R 7. However ‘lurking doubt’ has a considerable degree of stability within the communications of investigative journalists, as lurking doubt is a crucial ingredient of their communications as newsworthy.
Similar attributes apply to ideas of relevant and probative evidence. The right to admit such evidence is a right, but the content of this right has less stability than the right itself. What is probative and relevant will vary from case to case. Thus the right to present evidence that is relevant and probative is not a right with stable content in the same way as, for example, the right to cross-examine witnesses, the right not to give evidence in one’s own defence, the rights which follow from pleading guilty, etc. These rights, often described as procedural because they generate the stable procedures of trials, give the trial its separate identity. As such, they are also the basis of its evolution. The trial, as an identifiable part of the legal system, does not change or evolve when cases arise which involve new kinds of evidence. Such trials may generate novel communications, but novelty is not the same thing as evolution. Evolution occurs when the legal system generates communications that provide new structures, new existing law that is the starting point for any further evolution. To use Sally Clark’s case again, the chief prosecution expert witness, Sir Roy Meadow, had developed a new kind of controversial medical evidence as to the cause of death of babies. The first trial where this evidence was presented did not represent an evolutionary change to trial practice or the legal system. Nor did the trial or legal system evolve when this evidence was presented in a large number of cases. But a shift in doctrine on how contested new scientific evidence is to be treated on appeal, which occurred at Sally Clark’s second appeal, was an evolutionary change: it changed the legal communications that can be made on appeal.24

By focusing on evolution, seeing the identity of the trial as that which evolves, and showing that what evolve within the law are procedural rights, not a general commitment to truth, or the specific or general kinds of evidence which establish law’s truths, one can further elaborate the role played by rights. First, seeking truth is not unique to law. What, however, are unique to law are the procedures into which this search is inserted. Cross-examination, summing up, randomly chosen juries who decide facts in the process of rendering a verdict in terms of guilt and innocence; these are procedures that are not replicated in the other systems that communicate about truth, such as science and the media. These procedures allow truth to be constructed as a ‘case’. The focus on truth is always from a position established within legal procedures. Scientists do not present their findings in the manner in which they would present them to their peers (refereed journals), but in oral evidence. Laypeople do not simply tell their stories. Unreliable (which means unlikely to make a good impression giving oral testimony) witnesses will not be called. Each side will avoid offering inconsistent narratives, leaving the jury to choose between the case of the prosecution and defence. Considerations of truth are involved in all of the decisions that accompany the use of legal procedures. But these moments are always located

24 The Attorney General’s statement following Cannings (see nn 10 and 15 above) represents a similar evolutionary change, and an example which shows that evolution is not limited to court precedents.
within structures constituted as rights. Those rights create localities that are local, technical and parochial. Thus, it is not possible for the unity of the process (the trial and any appeal) to be described successfully (e.g. by comparison with science) as a search for truth.

Secondly, the dominance of rights, rather than truth, within the evolution of law’s structures is understandable when we consider how difficult it is to review (secondary observation) legal decisions by reference to ideas of truth. The truth sought by counsel when questioning a witness is a tactical truth: a contribution to a persuasive narrative. This decision cannot be reviewed in the manner that science reviews contributions to truth: by undertaking to replicate the results in further tests. Intervention to correct mistakes requires a judgment as to what counsel’s case ought to have been, and how that case could have been better presented. Even contemporaneous correction is difficult: an intervention which to a judge appears to improve counsel’s case (on the basis that the judge knows counsel’s case better than counsel him- or herself) still leaves counsel to carry on after the intervention, with his/her forensic credibility dented. This is not to say that corrections based on considerations of truth cannot and do not occur, but they do not, within legal procedures, allow for structures and corrections orientated around ideas of truth. Instead we have understanding organised around a discourse of rights: the defendant has chosen counsel, counsel has chosen which witnesses to call and what questions to ask, the defendant has chosen how to plead, etc. Secondary observation constructs the trial as a process made up of legitimate choices or rights, and corrections or errors as breaches of those rights.

The value that steers the construction of legal procedures, the equality that comes from the need to treat like cases alike, articulates these procedures in terms of entitlements, and generates a discourse of defendants’ rights.

Does this lead us to view the trial as a matter of pure procedure, so that the truth of any conviction is simply the fact that a conviction occurred?—No, for at least two reasons. First, the evolutionary perspective of systems theory does not allow for an idea of pure procedure. Pure procedure suggests an entirely static model of the trial: the trial is what it is, and its outcomes are simply the result of what it is. Such a statement fails to take account of the process of evolution. The practices of secondary observation, looking at decisions as to what has been found to be legal or illegal to decide what they mean in terms of treating like cases alike, with a view to making further decisions, are not a static process. One does not have a single, uniform and static view of what has been decided, not only in the legal system as a whole, but also even in a sub-area such as criminal procedure. This is not, according to Luhmann, just because human opinions differ. More fundamentally it is because such secondary observations occur routinely in situations where there is more than one way to typify what has been decided, and what should be decided now. Because new decisions have to be taken, those decisions provide a new landscape, new decisions that have to be accounted for in a process of treating like cases alike. And these new decisions, which always could have been different, have the
potential to destabilise or alter the understanding of what constitutes the current law of criminal procedure. Thus procedure is never ‘pure’; it is always evolving. Every trial offers the potential for a breach of rights, and what those rights are and what a breach of them may constitute is not only a matter for judgment by reference to the existing law, but also for the law’s capacity to evolve. In this sense criminal procedure, like any area of law, is always more than what ‘is’, if that ‘is’ is taken as the sum total of procedural decisions taken in the course of trials. The processes that order the law, the need to treat like cases alike, generates a discourse of law as the expression of rights, and this discourse is never simply an exact statement of the decisions that have been taken. It always operates as a guide not only to what, within those decisions, represents the existing law, but to how that law may be developed. Hence, even rights discourse cannot lead to the truth of a conviction being a matter of ‘pure’ due process, since what that process is cannot be articulated without reference to ideas that have the capacity to develop it.

A second reason why the truth of a conviction is never a matter of ‘pure’ process is that trials routinely involve breaches of rights. While the discourse of rights deals with the seriousness of rights partially in terms of a hierarchy of rights, this is not sufficient in itself to allow adjudication on breaches. Thus while the right of a defendant not to give evidence might be considered a more important right than the right to an adjournment when a witness is unable to attend, such a hierarchical arrangement of rights is not itself sufficient. At moments of decision in the trial and at appeal (when considering whether a conviction would be unsafe), breaches of rights are evaluated for their materiality in terms of their likely consequence for the task of presenting a persuasive ‘case’ to the jury. Such cross-referencing to the concept of a case, which involves the measurement of incommensurate values (rights and truth), does not allow trial procedures to be satisfactorily explained, either by outside systems or at moments when the legal system explains itself to itself, as a mechanism for the achievement of truth. And, as we have argued earlier, even where such cross-referencing produces an evolution in the trial, that evolution is inevitably going to take the form of a new right.

4. WHY LEGAL RIGHTS ARE NOT MORAL RIGHTS

While we have argued that the ‘truth’ represented by the trial is really a process better understood and described by reference to a discourse of rights, we need to qualify our argument by pointing out that this does not lead to criminal procedure being an expression of morality, or that legal rights can be equated with moral rights or human rights. Rights and truth discourse within systems theory are self-observations on decisions. The contribution of systems theory to the analysis of rights comes from its focus on the processes that rights describe. In particular, rights and truth discourse seek to describe what cannot be described
(in terms of rights and truth, or in any other terms). In Luhmann’s theory, the starting point for any analysis of criminal trials is an acceptance that the development of this part of the legal system is an example of evolution. It has evolved, and continues to evolve. It evolves through a constant coding of matters as legal or illegal. The courts are at the centre of the process of coding, where the application of this code takes the form of decisions. Within this centre, the legal system evolves through decisions for which there are no sufficient reasons, but which still have to be decided. The difficulties faced by the courts in deciding, and the kinds of problems that their reasoning demonstrates, are examples of a more fundamental paradox. Systems theory starts from the premise that there are no inherent reasons for deciding what is legal or illegal, there is only the distinction itself. Nevertheless, this distinction is drawn (things are decided). The mere fact of decision would add no stability (or possibility of evolution). But observations on decisions, most particularly, observations by courts orientated by reference to the equal application of law, create the possibility of greater stability in decisions. In making these observations, law can draw upon all manner of discourses, including moral discourse. But—and this must not be forgotten—what is being compared is not itself part of morality. Equality in the application of this distinction does not equate to the application of the distinction good or bad, as these are known within moral discourse. The application of the legal/illegal distinction is not the application of a moral distinction.

If we apply these insights to attempts to identify the legal values within criminal trial procedure, we may restate the position as follows. Within criminal justice, the stable application of the legal/illegal distinction requires observations of the application of that distinction in terms of the perceived qualities of the activities that are coded as legal and illegal. What are being coded legal and illegal on appeal are earlier applications of the same code at trial. The reasons given for decisions, in so far as they are common law based, are earlier decisions by appeal courts recoding earlier decisions at trial. The evolutionary approach of systems theory, starting with a distinction that has no meaning or value outside itself, points to the inevitable fact that decisions will have been made, in the past, for which there was no sufficient reason for deciding one way or another. Indeed, the very description of these moments as ‘decisions’ presupposes contingency, namely that they might have been taken differently. What makes systems theory radical is the assertion that the irreducibility of the legal/illegal distinction to anything else means that any observation of the application of that distinction which utilises another distinction (good/bad; integrity/lacking in integrity; human rights/denial of human rights)

25 See Luhmann, n 2 above, ch 7, Pts V–VII.
26 ‘Certainly, a decision is always a matter of an alternative, which consists of two and frequently more paths that can be chosen’: ibid, 282.
cannot capture what is being distinguished, or determine the basis of the application of that distinction. 27

Within systems theory, rights and truth, as they are experienced within the legal system, are developments from eigen-values. Eigen-values are the values represented by a system’s operations.28 Law observes its own earlier coding (the application of the legal/illegal distinction). One of the primary eigen-values of law is formal equality. This is the value exhibited by any attempt to construct law’s operation as the treating of like cases alike.29 Both rules and principles exhibit this quality. It is a value exhibited by repetition, by deciding things the same way. But the commitment to equality, which is a necessary accompaniment to observation based on the question ‘why was this legal and that illegal?’, does not dictate the characteristics of decisions which lead some application of the code legal/illegal to be ‘like’ another. Analysis based on the writings of Ronald Dworkin stresses the selection of moral values to account for the application of the legal/illegal code.30 In the context of criminal law, this may lead to accounts of criminal justice based on ideas of integrity, the rule of law, fairness and truth.31

The use of these values to account consistently for legal decisions produces a particular kind of scholarship. If decisions refer, or can be described by reference to, fairness, can future decisions make them fairer? If decisions refer to the value of truth, can future decisions (or legal reforms) make them more scientific? As truth and fairness are incommensurable values, can future decisions achieve

27 This is not a counsel of despair. The incompatibility of the legal/illegal distinction with any value utilised (within observation) to explain the application of that distinction is the basis of law’s ability to function and evolve. And the claim that legal decisions do not express or decide moral or political issues is not one restricted to systems theory. Sunstein has written of law’s ability to work with incompletely theorised agreements (see CR Sunstein, Legal Reasoning and Political Conflict (Oxford, OUP, 1996) ch 2). Having identified the ability of law to decide legal questions without deciding political and moral issues, Sunstein notes all sorts of advantages. Law can respond to incommensurable values, without ever deciding between them. So a decision on the law of abortion does not decide the political and moral issue of the right to life. Indeed, law does not have to resolve, in its decisions, whether the right to life is a moral or a political question. It just has to decide the point that its normative structures have identified as a legal point to be decided. While Sunstein has identified (correctly in our opinion) one of the important attributes of law, systems theory can help us to understand why law exhibits these qualities.

28 ‘[A] value that is constituted by the recursive performance of the system’s own operations and one that cannot be used anywhere else’: Luhmann, n 2 above, 124–5. In terms of formal logic, eigen-values represent an example of the naturalistic fallacy. From the facts of law’s operations, one finds the norms of law’s values. But this fact/value problem dissolves if we consider the operation of self-observation and resultant self-descriptions.

29 R Nobles and D Schiff, ‘Introduction’ to ibid, 23.


31 Examples can be found in this and the previous volume: A Duff, L Farmer, S Marshall and V Tadros (eds), The Trial on Trial Volume I: Truth and Due Process (Oxford, Hart Publishing, 2004); see especially the editors ‘Introduction: Towards a Normative Theory of the Criminal Trial’.
the correct ‘balance’ between them? Systems theory offers some challenging insights into this kind of enterprise. First, the reason that law can appear to combine incommensurable values is that the value contained in the legal/illegal distinction is different from all of them. It can borrow anything, so long as it maintains its own unique code. Secondly, equal applications of the legal/illegal distinction are always local observations on decisions that are recognised by the system as adjacent to the decision in question. Only law can establish the context for any comparison. Law maps out its own internal areas (one of which is criminal law and procedure) and selects the values that allow comparison to be made within those areas. But context does not stop there. Law establishes context within subject areas—decisions on guilty pleas, on excluded evidence, on the staying of trials due to abuse of process, on new evidence, on instructions to juries, on cross-examination, etc, etc. These locations for decisions are not replicated in moral philosophy or science. Any utilisation of fairness or truth within observations made about decisions within these internally constructed locations for decision will not duplicate the meaning of those observations as they are made within the system from which they are borrowed. Borrowing such values in order to apply them in situations that have not been selected by the systems in question, and in order to apply a code (legal/illegal) that is different from the codes (good/bad; true/not true) applied by the systems from which they are taken, cannot produce large-scale consistency across the legal system. While the requirement to treat like cases alike (justice) operates throughout the legal system, what is considered to be alike (consistency) involves only local comparisons. But, so long as internal localities can be identified by the system for itself, this is all that is required for the legal system to continue its operations.

Even within the decision-localities constructed within law one finds inconsistencies in the reasons given for such decisions. Again, once we understand the nature of the operations we are describing, this is not surprising. First, as mentioned before, the idea of an evolving legal system and the nature of decision (that something was decided that could have been decided differently) makes it clear that decisions have to be taken for which there is an ability to decide the matter differently—decisions which are not automatic given the available reasons for decisions. Attempts to observe these decisions by reference to values inevitably involves a description that, unless the decision is simply described as a mistake, may require changes to that description. This makes the enterprise like trying to describe the rules of a card game one is observing (but does not at the start understand) whilst periodically new cards are inserted into the game. The capacity to generate new decisions is part of the capacity to generate new

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32 For a succinct statement of this approach to incommensurable values, see R Nobles and D Schiff, ‘The Never Ending Story: Disguising Tragic Choices in Criminal Justice’ (1997) 60 MLR 293, 297–300.

33 Or, as A Ashworth terms it, ‘system coherence . . . a network of mutually supporting rules and principles’: n 16 above, 635.
localities. Decisions that are not automatic have the capacity to destabilise descriptions within an area of law, and even to change the sense of the geography—of what constitutes a locality. Changes in the sense of locality create new dynamics for the eigen-values represented in self-observation—treating like cases alike. But note that this does not produce a process of globalisation—with areas of law constantly melding into each other, producing ever-greater pressures for system-wide consistency. Sub-areas form, new kinds of decisions occur, small localities break off from larger ones, and allow local reference to values to produce locally consistent decisions.

5. CONCLUSION

Where does this take us? Systems theory would expect inconsistent applications of value across subject areas of law, even though there may be some consistency in the use of values to make observations on decisions within particular kinds of decisions identified by law itself. And we find this. The ability of academics operating at a higher level of generality to point out inconsistency in the application of values taken from other systems has a limited ability to increase the degrees of value consistency within the criminal law. And we find this. Criminal law and its procedure, like other areas of the law, manages to describe itself by reference to incommensurable values, reconciled only by claims about ‘balance’. And we find this. Balance is something more than a unique recalculation of outside values in every case, and something less than a consistent application of law across law as a whole, or even across subject areas within law. And we find this.

The ability of law to be inconsistent in its borrowing of values to identify consistent decisions within localities is not something to be deplored. It is productive. It allows local variation in the use of values. This means that law’s own procedures can be technically varied. For example, the right to appeal against conviction following trial can be different from the right to appeal against conviction following a guilty plea. A uniform justification for appeal in all circumstances would severely limit the ability of law to process appellants or defendants. This seems depressing. But, at the same time, despite the legal

34 The example we have given in this paper, the Sally Clark case, and the consequences of the decision in the Angela Cannings case, represent both new opportunities for consistent/equal decision-making, and at the same time different decision-making (fewer prosecutions) within the legal system, although the inconsistency between the values being expressed in legal processes dealing with crime and those dealing with child welfare is now apparent. The knock-on perturbations (and misreading) of these cases in subsystems apart from the legal system are considerable, and for many disquieting. See the letter signed by 38 doctors working in paediatrics, published in The Guardian, 15 Apr 2004, 25), deploring the media’s ‘biased reporting’ (see Clare Dyer, Legal correspondent, The Guardian, 1) and expressing considerable concern for child protection.

35 See our analysis of the latter procedures in ‘Due Process and Dirty Harry Dilemmas: Criminal Appeals and the Human Rights Act’ (2001) 64 MLR 911 915–17. For the ‘inconsistency’ resulting from these different procedures, see R v Hardy [2003] Crim LR 394, and Ormerod’s commentary.
system’s inability to use moral or scientific values consistently across itself as a system, it does not lose contact with such values. Truth and rights continue to operate within these localities even though they cannot operate in a way which would be regarded as consistent across law, seen from the perspective of the systems in which they usually operate. Law does not become either moral or scientific, nor does it simply retreat to an ‘it is because it is’ position.\(^3\)

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\(^3\) Legal decisions cannot just become ‘it is because it is’ for the very simple reason that the legal/illegal distinction has no content. It is only by identifying differences in the way in which this distinction has been applied (which can only be done using other distinctions—which take their meaning in turn from how they have been applied) that the ‘is’ of law can be established. And this ‘is’, because it borrows values from other systems, is always something different from the mere fact of the decisions being observed and described. So, to the extent that law uses values like truth and rights to explain what it has done, one does something different from state that ‘the law is what it is.’
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