

# Liberalism and the Criminal Trial

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## Abstract

This article offers a sketch of two aspects of a liberal theory of the criminal trial. It does so by examining the criminal court first as an institution of the liberal state and second as a liberal institution of the state. Part II proposes a conception of the adversarial trial primarily as a process of holding the executive to account on its request for conviction and punishment. In some jurisdictions, the perceived need for a strong system of checks and balances has led to an expansion of the judicial role to include oversight of the executive in its exercise of investigatory powers. This expansion is resisted in other jurisdictions where a more restrictive view is taken of the court's political responsibility. Part III considers how liberal principles are reflected in the common law form of criminal proceedings; it examines the importance of a 'fair trial' or 'due process'; and, it proposes an understanding of the trial not merely as a means of bringing criminals to justice but, more importantly, as a matter of doing justice to the accused.

## I Introduction

A system of criminal law enforcement can in theory exist without criminal courts. After all, defenders of preventive detention like to cite its effectiveness in combating crime:<sup>1</sup> no less than the then Attorney-General (and now Chief Justice) of Singapore has said in a public lecture that '[d]etention without trial is the most efficient and most effective form of crime control that can be devised'.<sup>2</sup> Why not let the exception be the rule and do away with criminal trials altogether? This can be done without giving up the concept of a conviction; for instance, we could vest in the executive branch of government not only the authority to charge citizens for offences but also to declare them guilty as charged. Let there be an official avenue for publicising their findings and verdicts; would this not take care of the business of expressing and reinforcing the norms of criminal law?<sup>3</sup>

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<sup>1</sup> Recently, in defending another five-year extension of the statute allowing detention without trial (*Criminal Law (Temporary Provisions) Act* (Singapore, cap 67, 2000 rev ed) ('CLTPA')), the Senior Minister of State for Home Affairs, Ho Peng Kee told the Singapore Parliament: 'The CLTPA has proven to be an effective tool in suppressing serious crimes, secret societies and drug trafficking.' (*Singapore Parliamentary Debates* (13 February 2009) vol 85 at col 3276).

<sup>2</sup> Chan Sek Keong, 'The Criminal Process — The Singapore Model' (1996) 17 *Singapore Law Review* 431, 439.

<sup>3</sup> The 'exemption from prosecution' procedure under China's old *Criminal Procedure Law* (People's Republic of China) National People's Congress, 1979, in effect although not in name, allowed determination of guilt by the procuracy. This procedure was abolished in 1996: see generally Human Rights First, *Opening to Reform? An Analysis of China's Revised Criminal Procedure Law* (October 1996) <<http://www.humanrightsfirst.org/pdf/HRFopening-to-reform-hrf-rep.pdf>> 43–5; see also Hualing Fu,

The judicial system consumes vast resources. Dealing with criminals would be much cheaper if we dispensed with the need for a trial. It would also be a lot faster. Legal proceedings are not designed to make the administration of penal law more efficient.<sup>4</sup> The opposite seems to be true. For example, the orality principle is a substantial hurdle for the prosecution because witnesses are often reluctant to testify openly for fear of reprisals,<sup>5</sup> and allegedly ‘pro-accused’ rules of evidence and procedure encumber the quest to get offenders behind bars. Do we conduct a trial out of the abundance of caution, only for the sake of accuracy, another filter for error in guilt determination? Say the police conclude at the end of their investigation that the accused has committed an offence. Having looked at the investigation file and the gathered evidence, the public prosecutor agrees with that conclusion. Is the trial about asking the court to second- (or third-) guess the police and the public prosecutor, somewhat like asking for another medical opinion, just to be on the safe side? For sure, the court does play a useful epistemic role; introducing a neutral and independent party to vet the evidence, so to speak, may go some way to counteract the well known problem of police ‘tunnel vision’ that distorts the evidence-gathering process. But, so I will argue, much more than epistemic prudence is at stake. We pay the price for a system of criminal trial because we fear the alternative, quite literally, a police state. Allan rightly observes that ‘[t]he right to due process, or fair trial, ... is ... the most fundamental constitutional right of all, intrinsic to the idea of the rule of law’.<sup>6</sup>

Liberty is the core commitment of liberalism. One aspect of liberty is private; on one conception, this is ‘the liberty of a citizen to do what he or she wishes under the law, and the aspiration to keep government interference with individual liberty as small as possible’.<sup>7</sup> Distrust of concentrated political power results in the perceived need for institutionalised checks and balances within the structures of government. Liberty also has a public dimension; according to Holmes, this is the ‘liberty of citizens to examine and criticise their government’.<sup>8</sup> Public liberty demands that the ‘factual premises for the government’s resort of coercion and force’ be laid out and tested in some adversarial process.<sup>9</sup> According to Holmes, while private liberty protects individual autonomy, public liberty protects collective rationality.<sup>10</sup> An enabling condition for public liberty is ‘a form of accountable polity’ in which, as Zuckert puts it, ‘rulers are held strictly responsible or accountable to those over whom they exercise power’.<sup>11</sup> The institution of a criminal trial, I suggest, is a facet of this ‘form of accountable polity’;<sup>12</sup> it is based on the demand that the executive justifies its call for criminal censure and punishment in an open proceeding wherein the accused has the

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<sup>4</sup> ‘Comparative Criminal Law and Enforcement: China’ in Joshua Dressler (ed), *Encyclopedia of Crime and Justice* (Macmillan, 2nd ed, 2001) 172, 177.

<sup>4</sup> Rachel E Barkow, ‘Separation of Powers and the Criminal Law’ (2006) 58 *Stanford Law Review* 989, 1031.

<sup>5</sup> This was a major reason put forward by the Singapore Ministry of Home Affairs to explain the need for detention without trial under the CLTPA: Singapore Ministry of Home Affairs, ‘The Criminal Law (Temporary Provisions) Act Booklets’ (Press Release, 1 September 2006), 5, 15, 16.

<sup>6</sup> TRS Allan, ‘Review of Richard Bellamy, “Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy”’ (2008) 67 *Cambridge Law Journal* 423, 425.

<sup>7</sup> Michael P Zuckert, ‘The Virtuous Polity, the Accountable Polity: Liberty and Responsibility in *The Federalist*’ (1992) 22(1) *Publius* 123, 124.

<sup>8</sup> Stephen Holmes, ‘Conclusion’ in Daniel Farber (ed), *Security v Liberty — Conflicts between Civil Liberties and National Security in American History* (Russell Sage, 2008) 204, 216–17.

<sup>9</sup> *Ibid* 216–17.

<sup>10</sup> *Ibid* 216.

<sup>11</sup> Zuckert, above n 7, 124.

<sup>12</sup> *Ibid*.

right of challenge, and the adequacy of the proffered justification is (or should ideally be) judged by the jury representing the citizenry.

Discussion of the separation of powers and the political system of checks and balances is typically conducted in the realms of constitutional and administrative law, focusing on topics such as judicial review.<sup>13</sup> We tend not to notice that the court carries out its constitutional function in day-to-day criminal proceedings; indeed, safeguards are most needed in this context because, as Barkow rightly observes, the 'state poses no greater threat to individual liberty than when it proceeds in a criminal action. Those proceedings, after all, are the means by which the state assumes the power to remove liberty and even life.'<sup>14</sup> Fundamental to liberalism is the belief that freedom is normatively basic, and so the onus is on the state to justify the limitation whenever it seeks to curtail the liberty of its citizens.<sup>15</sup>

In a liberal democracy, the separation of powers within the criminal justice system is reflected in the separation of investigatory, prosecutorial and adjudicative functions. The enforcement of criminal law involves a wide range of state activities that occur, broadly speaking, in a sequence of possible stages. They include the police patrolling of streets, investigation of complaints, arrest and interrogation of suspects, collation of evidence, evaluation of investigation papers by the public prosecutor, exercise of prosecutorial discretion, selection and drafting of the charges to prefer, preliminary appearance in court and taking of a plea, application for bail, conduct of a criminal trial, delivery of a verdict, process of mitigation and sentencing, imprisonment (or, possibly, execution) of the person convicted, organisation of prison training, implementation of anti-recidivism programmes and provision of post-release assistance in social reintegration.

The trial makes only a brief appearance in this overall scheme. But it is a highly significant stage in controlling the use by the executive branch of its formidable coercive powers on citizens. At a crucial point in the enforcement process, the executive will need to seek from the court, as an independent body, an official declaration of guilt against the accused, and upon obtaining a guilty verdict it will further make the request for judicial authorisation and direction for punishment. When the case reaches the stage of the trial, what has hitherto been more or less shrouded in secrecy is thrust into the open, laid bare to public gaze. The time has come for the executive to present evidence and reasoned arguments in an open forum to support clearly specified charges, and to have its case subjected to challenge and scrutiny. This is the make-or-break point. An acquittal frees the accused from the clutches of the state machinery; without a conviction, the process of enforcement is brought to an immediate halt and cannot be moved forward to the next phase.

Conviction and punishment, however necessary, are harmful.<sup>16</sup> The state cannot arbitrarily and without good justification inflict such harm on its citizens. Part II proposes a

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<sup>13</sup> See generally Jeremy Horder, 'Rationalising Judicial Review in Criminal Proceedings' (2008) 13(4) *Judicial Review* 207.

<sup>14</sup> Barkow, above n 4, 995.

<sup>15</sup> Gerald Gaus and Shane D Courtland, 'Liberalism' (2008) *Stanford Encyclopedia of Philosophy* [1.1] <<http://plato.stanford.edu/entries/liberalism/>> at 21 May 2010.

<sup>16</sup> See, eg, Sherman J Clark, 'The Courage of Our Convictions' (1999) 97 *Michigan Law Review* 2381, 2403-4: 'Even if [a conviction] is right in a given case, fully justified under the best moral reasoning, it remains disturbing'; see also Jeffrie G Murphy, 'Moral Epistemology, the Retributive Emotions, and the "Clumsy Moral Philosophy" of Jesus Christ' in Susan A Bandes (ed), *The Passions of Law* (NYU Press, 1999) 149,

theory of the adversarial model of the criminal trial as primarily a process of holding the executive to account on its request for conviction and punishment.<sup>17</sup> The court is the political institution responsible for examining the justification put forward by the executive in support of this request. It must be satisfied that the executive has identified the real culprit. On a broader view, the function of the criminal court goes beyond this to encompass oversight of the conduct of criminal investigation.<sup>18</sup> The rationale for the existence of the criminal court as a political institution is one thing; the legitimacy of the particular verdict it produces is another. The legitimacy of a particular verdict depends on how the trial was conducted, on the quality of the interaction between the state and the accused in the process by which the outcome was reached. Part III considers how liberal principles are reflected in the common law form of criminal proceedings, examines the value of a 'fair trial' or 'due process' in the liberal tradition, and proposes an understanding of the trial not merely as a means of bringing criminals to justice but, more importantly, as a matter of doing justice to the accused.

## II The Criminal Trial as an Institution of a Liberal State

The criminal trial is often portrayed as 'a search for the truth'.<sup>19</sup> It is more accurately seen as a process of calling upon the executive to account for its request to have a citizen officially condemned and punished for an offence. This conception of the trial is reflected in the presumption of innocence and in the common law doctrine that places on the prosecution the burden of proving guilt. In *Woolmington v DPP*,<sup>20</sup> the House of Lords famously described this principle as the 'golden thread' that runs 'throughout the web of the ... Criminal Law'.<sup>21</sup> The executive has to prove that the accused is guilty as charged, bearing the onus of establishing beyond reasonable doubt the elements of the crime and, subject to insanity and statutory exceptions, of disproving any defence that has been raised. At common law, the accused does not carry the burden of disproving the ingredients of the crime. Indeed, the accused is not even required, generally speaking, to prove the elements of the defence upon which he or she wishes to rely.<sup>22</sup>

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160–1: 'in punishing, we should act with caution, regret, humility, and with a vivid realization that we are involved in a fallible and finite human institution — one that is necessary but regrettable'.

<sup>17</sup> The extent to which the theory applies to continental or civilian legal systems will not be addressed.

<sup>18</sup> While the present discussion focuses on the role of the trial court as an institutional check on the executive enforcement of criminal law, it should be noted that it is not only during the trial that the judiciary plays this role. As observed by a majority of the Supreme Court of Canada in *Application under s 83.28 of the Criminal Code* [2004] 2 SCR 248 [86]:

Judges routinely play a role in criminal investigation by way of measures such as the authorization of wire taps ... search warrants ... and in applications for DNA warrants ... The thrust of these proceedings is their investigatory purpose, and the common underlying thread is the role of the judge in ensuring that such information is gathered in a proper manner. The place of the judiciary in such investigative contexts is to act as a check against state excess.

<sup>19</sup> See, eg, *R v Nikolovski* [1996] 3 SCR 1197, 1206 (Cory J): 'The ultimate aim of any trial ... must be to seek and to ascertain the truth'; see also *Tehan v US*, 383 US 406, 416 (1966): 'The basic purpose of a trial is the determination of truth'.

<sup>20</sup> [1935] AC 462.

<sup>21</sup> *Ibid* 481.

<sup>22</sup> Thus, speaking of the presumption of innocence, Murnaghan J in the Irish case of *McGowan v Carville* [1960] IR 330, 345 described it as a 'cardinal principle of the administration of the criminal law' that 'there is no onus

It is for the police to search for the truth. Their search should be over by the time the case reaches the court. If the executive does not think it has found the truth, it should not be bringing a prosecution.<sup>23</sup> By the time of the trial, the moment has come when the executive must produce the evidential basis for, and publicly justify, its assertion that the citizen is guilty as charged and thus deserving of the punishment that it is seeking to inflict on him or her. It is not enough that the executive believes or asserts that the citizen is guilty, nor is it enough that he or she is in fact guilty; the court must deliver an acquittal, and let the citizen go free, unless the executive succeeds in demonstrating his or her guilt in a proper manner.<sup>24</sup> Rational argument must be advanced on sufficiently strong evidence, and the prosecution's case must be able to withstand rigorous challenge by the defence and scrutiny by the fact-finder. This is the substance of the maxim that justice must not only be done (in the outcome of the trial) but must also be seen to be done (by calling on the executive to openly explain and support its accusations against a citizen).

It is uncontroversial that the criminal court has supervision over this central aspect of the application of the criminal law. The question here is whether the law enforcement is *correctly targeted*. Has the person caught by the police in fact committed the crime with which he or she is charged? On a narrow view, this is the only oversight that the court has over the criminal justice process. The court must not be distracted by any police misconduct in the investigation of the case. Such misconduct should be dealt with separately at a different legal proceeding or before a different body, such as the various independent and statutorily created commissions we find in Australia.<sup>25</sup> It is outside the remit of the court trying a citizen for an offence to attempt to regulate police investigation, much less to punish officers for any errant behaviour while on the job. Stemming from this philosophy are such well worn sentiments as the following: the 'supervision of police conduct is not ... a function of the courts',<sup>26</sup> it 'is no part of a judge's function to exercise disciplinary powers over the police',<sup>27</sup> the 'role of the judge is confined to the forensic process',<sup>28</sup> and the 'judge's control of the criminal process begins and ends with the trial'.<sup>29</sup>

The narrow view does not require judges to ignore all aspects of pre-trial investigative improprieties. But judicial intervention is allowed only on bases that have to do with protecting interests in, for example, the accuracy of the verdict or its public

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on a person charged with an offence to prove his innocence, the onus at all times being on the State to prove his guilt'.

<sup>23</sup> As Lord Ritchie-Calder said during a debate on the Criminal Law Revision Committee 11<sup>th</sup> report, 'every innocent person who is brought to trial represents a failure of the police to do their preliminary work properly; ... every acquittal is itself a miscarriage of justice'. (United Kingdom, *Parliamentary Debates*, House of Lords, 14 February 1973, vol 338, col 1619).

<sup>24</sup> For Holmes, the presumption of innocence is a legal right that 'contribute[s] to a democratic culture of justification ... Before criminally punishing an individual, the executive must give reasons why such punishment is deserved before a judicial tribunal that can refuse consent': Stephen Holmes, 'In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror' (2009) 97(2) *California Law Review* 301, 332.

<sup>25</sup> These include the Crime and Misconduct Commission in Queensland which was set up under the *Crimes and Misconduct Act 2001* (Qld) and the Police Integrity Commission of New South Wales which was created under the *Police Integrity Commission Act 1996* (NSW).

<sup>26</sup> *Ridgeway v The Queen* (1995) 184 CLR 19, 91 (McHugh J) ('*Ridgeway*').

<sup>27</sup> *R v Sang* [1980] 1 AC 402, 436 (Lord Diplock). Previously, Canadian courts adopted the same attitude: see, eg, *A-G for Quebec v Begin* [1955] SCR 593, 602 (Fautaux J): 'illegality tainting the method of obtaining the evidence does not affect per se the admissibility of ... evidence in the trial'.

<sup>28</sup> *R v Sang* [1980] 1 AC 402, 454–5 (Lord Scarman).

<sup>29</sup> *Ibid.*

acceptability or the fairness of the trial proceedings (in relation to which how the evidence was obtained is of itself deemed irrelevant). When the court acts on any of these latter bases, it can claim to be merely keeping its own house in order; there is no intrusion into the executive sphere.

A ‘more majestic conception’<sup>30</sup> of the court’s role includes the further responsibility of scrutinising other aspects of the enforcement of criminal law. The judiciary has the duty not only to ensure that the enforcement is *correctly targeted* (as above) but also to ensure that it was *properly conducted*.<sup>31</sup> The focus is now no longer only on the action and guilt of the accused; the criminal court should look into how the executive had deployed its powers against him or her prior to the trial. On this broader view, the court’s duty includes the supervision of police conduct. In the United States Supreme Court case of *Sherman v US*,<sup>32</sup> Justice Frankfurter endorsed this expansive conception of the judicial function when he argued that it is the role of the court, in the exercise of its ‘supervisory jurisdiction’, to ‘formulat[e] standards for the administration of criminal justice’.<sup>33</sup> It is not unknown for the judiciary to lay down general standards of police conduct. Two prominent examples are the *Judges’ Rules* in the United Kingdom<sup>34</sup> and the requirement to give *Miranda* warnings before conducting custodial interrogation in the United States.<sup>35</sup> At other times, the court responds to investigative impropriety in a particular case with a view to influencing police conduct generally in the future. For example, in the United States, the prevailing rationale for the ‘exclusionary rule’,<sup>36</sup> which allows the exclusion of evidence obtained in violation of constitutional rights, is general deterrence of such violations.<sup>37</sup> The judiciary in some

<sup>30</sup> This phrase was used by Stevens J to describe his interpretation of the purpose of the Fourth Amendment to the United States Constitution: *Arizona v Evans*, 514 US 1, 18 (1995).

<sup>31</sup> Under French criminal procedure, which is followed in Spain, the Netherlands and Belgium, in some cases the judiciary takes over investigation at the second phase of the pre-trial stage. The ‘power of the examining magistrate to order searches, seizures and telephone interceptions as well as to interrogate the defendant is far wider than that of the police’: Richard Volger, ‘Criminal Procedure in France’ in Richard Vogler and Barbara Huber (eds), *Criminal Procedure in Europe* (Duncker and Humblot, 2008) 171, 205. This *instruction* procedure serves ‘as a democratic check on police and prosecution investigation’: Gerhard OW Mueller and Fré Le Poole-Griffiths, *Comparative Criminal Procedure* (NYU Press, 1<sup>st</sup> ed, 1969) 36.

<sup>32</sup> 356 US 369 (1958).

<sup>33</sup> *Ibid* 381 (Frankfurter J).

<sup>34</sup> The first set of *Judges’ Rules* were drawn up in 1912 ‘at the request of the Home Secretary ... as guides for police officers’: *R v Voisin* [1918] 1 KB 531, 539; see also *People v Cummins* [1972] IR 312, 323; *Peart v R* [2006] 1 WLR 970, 972.

<sup>35</sup> *Miranda v Arizona*, 384 US 436 (1966). Bradley notes that:

The warnings need not be given in any particular form as long as they reasonably inform the suspect of his rights. Those rights are: that the suspect has a right to remain silent; that anything he does say may be used against him; that he has a right to counsel; and, if he cannot afford to hire one, a lawyer will be appointed to represent him.

Craig M Bradley, *Criminal Procedure — A Worldwide Study* (Carolina Academic Press, 2<sup>nd</sup> ed, 2007) 533.

<sup>36</sup> The leading case is *Mapp v Ohio*, 367 US 643 (1961). On the scope of and exceptions to this rule, see Russell L Weaver et al, *Principles of Criminal Procedure* (St Paul, 3<sup>rd</sup> ed, 2008) and Joshua Dressler, *Understanding Criminal Procedure — Volume 1: Investigation* (LexisNexis, 4<sup>th</sup> ed, 2006). The majority of the present bench of the Supreme Court of the United States appears unsympathetic to the exclusionary rule, as evident in its narrow reading of the rule in recent cases: see, eg, *Hudson v Michigan*, 547 US 586 (2006) and *Herring v US*, 129 S Ct 695 (2009).

<sup>37</sup> See, eg, *Illinois v Krull*, 480 US 340, 347 (1987), quoting from *United States v Calandra*, 414 US 338, 347 (1974): the ‘prime purpose’ of the exclusionary rule is to deter ‘future unlawful police conduct’; see also *Pennsylvania Board of Probation and Parole v Scott*, 524 US 357, 363 (1998), where the exclusionary rule was described as ‘a judicially created means of deterring illegal searches and seizures’.

countries, fearful of the criticism of violating the separation of powers and meddling in the affairs of the executive, declines to accept this broader role in the absence of clear legislative mandate.<sup>38</sup> Against this position, it has been argued that the branches of the criminal justice system are so structurally and normatively integrated that the infringement of any of its underpinning values by one branch (the police) cannot be ignored by another (the criminal court) without disrupting that normative unity.<sup>39</sup> The court must not be seen to be complicit in police improprieties and in appropriate cases must respond to them in a manner vigorous enough to protect the repute of the criminal justice system as a whole.<sup>40</sup> The question of police misconduct in the investigation of a crime allegedly committed by the accused cannot (always) be decoupled from the question of whether the prosecution should be allowed to obtain the conviction that it is seeking from the court.

The narrow and broad conceptions of judicial power compete for dominance in many areas of procedural law, such as the admissibility of confessions and illegally obtained evidence. A topic that is less well explored in this connection is state entrapment. In the discussion that follows, we will see how the two conceptions shape and are used to justify different judicial responses to state entrapment in three common law jurisdictions: Singapore, England and Australia. In *Law Society of Singapore v Tan Guat Neo Phyllis*,<sup>41</sup> the Singapore High Court (sitting as a court of three judges) took the view that state entrapment was generally irrelevant at the trial proper. While the entrapment may constitute an abuse of executive power, prosecution of the entrapped is not an abuse of the legal process that calls for a permanent stay of proceedings. According to the court:

[T]he true nature of abuse in state entrapment cases is the abuse of state power ... by state agents deliberately breaking the law to instigate the accused to commit an offence which he otherwise would not have committed and then prosecuting him for that offence. The nature of the abuse is not directed at the process of the courts, whose function is to determine the guilt or otherwise of the accused on the evidence produced before the court ... [T]he invocation of the court process *for the bona fide prosecution of criminals* ... is not an abuse of process, even though the evidence against the

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<sup>38</sup> The court is explicitly empowered to exclude evidence obtained in violation of constitutionally protected rights where its admission, in the case of Canada, would 'bring the administration of justice into disrepute' (s 24(2), *Canada Act 1982* c 11 sch B pt I ('*Canadian Charter of Rights and Freedoms*')) and, in the case of South Africa, would 'be detrimental to the administration of justice': s 35(5), *Constitution of the Republic of South Africa*. Although s 78(1) of the *Police and Criminal Evidence Act 1984* (UK) c 60 is widely drafted, the English judiciary has been remarkably restrained in applying this provision: see Andrew Choo, *Evidence* (Oxford University Press, 2<sup>nd</sup> ed, 2009) ch 7.

<sup>39</sup> The concept of integrity is often used in support of this position: see, eg, Andrew Ashworth, 'Testing Fidelity to Legal Values: Official Involvement and Criminal Justice' in Stephen Shute and Andrew Perry Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford University Press, 2002) 299.

<sup>40</sup> See, eg, s 24(2) of the *Canadian Charter of Rights and Freedoms* which allows exclusion of evidence obtained in violation of Charter rights or freedoms where its admission 'would bring the administration of justice into disrepute'. The 'administration of justice' was interpreted by the Canadian Supreme Court in *R v Grant* [2009] SCC 32 [67] to encompass 'the processes by which those who break the law are investigated, charged and tried'. In that case, the court also stated, at [72], that the administration of justice would be brought into disrepute where 'the courts ... effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct'.

<sup>41</sup> [2008] 2 SLR(R) 239 ('*Tan Guat Neo Phyllis*'). The approach to entrapment enunciated in this case was followed by the High Court in *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR 411. See also *Wong Keng Leong Rayney v Law Society of Singapore* [2007] 4 SLR(R) 377; *Law Society of Singapore v Liew Boon Kwee James* [2008] SLR(R) 336; *Law Society of Singapore v Bay Puay Joo Lilian* [2008] SLR(R) 316.

accused may have been obtained by state entrapment or illegally by law enforcement officers.<sup>42</sup>

In this passage, judicial non-intervention is defended on a narrow view of the court's function. Its proper task goes no further than to 'determine the guilt or otherwise of the accused on the evidence produced before the court'. On this narrow view, any abuse of executive power in instigating the accused to commit the crime, short of negating any of its elements (which entrapment does not do) or constituting a substantive defence (which entrapment of itself is not),<sup>43</sup> is irrelevant at the trial.<sup>44</sup>

Previously, English law took a similar position.<sup>45</sup> But there has recently been a dramatic growth in the doctrine of 'abuse of process', resulting from a dramatic change in the conception of the court's political role.<sup>46</sup> In the seminal case of *R v Horseferry Road Magistrates' Court, Ex parte Bennett*,<sup>47</sup> the British police had colluded with their foreign counterpart to have the accused arrested in South Africa and forcibly returned to England so that he could be tried there. When the challenge to the court's jurisdiction finally reached the House of Lords, the respondent argued that:

the role of the judge is confined to the forensic process. The judge ... is concerned to see that the accused has a fair trial ... but the wider issues of the rule of law and the behaviour of those charged with its enforcement, be they police or prosecuting authority, are not the concern of the judiciary unless they impinge directly on the trial process.<sup>48</sup>

Lord Griffiths rejected this argument unequivocally. It was not suggested that the accused would not get a fair trial in England.<sup>49</sup> Thus:

if the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.<sup>50</sup>

In a clear declaration of judicial willingness to step up to this constitutional duty, Lord Griffiths immediately continued:

<sup>42</sup> *Tan Guat Neo Phyllis* [2008] 2 SLR 239 [138] (emphasis in original).

<sup>43</sup> The way in which an entrapment is carried out may, in exceptional circumstances, allow the accused to rely on an independent defence such as duress: see, eg, ML Friedland, 'Controlling Entrapment' (1982) 32 *University of Toronto Law Journal* 1, 16–17.

<sup>44</sup> Another line of reasoning for not granting a stay, which will not be discussed here, was based on a reading of the scope of prosecutorial discretion constitutionally vested in the Attorney-General: *Tan Guat Neo Phyllis* [2008] 2 SLR 239 [143].

<sup>45</sup> See, eg, *R v Sang* [1980] AC 402.

<sup>46</sup> See generally Andrew Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Oxford University Press, 2<sup>nd</sup> ed, 2008); see also Jonathan Rogers, 'The Boundaries of Abuse of Process in Criminal Trials' (2008) 61 *Current Legal Problems* 289.

<sup>47</sup> [1994] 1 AC 42 ('*Bennett*').

<sup>48</sup> *Ibid* 59.

<sup>49</sup> According to Allan, this concession takes an overly narrow view of what constitutes a 'fair trial': TRS Allan, *Constitutional Justice — A Liberal Theory of the Rule of Law* (Oxford University Press, 1<sup>st</sup> ed, 2001) 273.

<sup>50</sup> *Bennett* [1994] 1 AC 42, 61–2.

I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should ... express its disapproval by refusing to act upon it.<sup>51</sup>

Since then, the English judiciary has reaffirmed and discharged the declared responsibility in a number of areas,<sup>52</sup> including that under discussion, state entrapment. In *R v Looseley, Re Attorney-General's Reference (No 3 of 2000)*,<sup>53</sup> the House of Lords held that a criminal court could, in the exercise of its inherent power, grant a permanent stay of proceedings where the accused had been entrapped by the police into committing the crime charged. Many of the justifications offered were of a political nature; for instance the stay was supported on the professed basis that it was necessary to prevent the abuse of executive power,<sup>54</sup> protect the citizen from state oppression<sup>55</sup> and maintain the rule of law.<sup>56</sup> In the very first paragraph of the leading judgment, Lord Nicholls gave the following endorsement of the broader conception of the function of the criminal court:

It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. *The role of the courts is to stand between the state and its citizens and make sure this does not happen.*<sup>57</sup>

In England, entrapment is not a defence. So, in granting a stay, the court is letting free a person whom it acknowledges is guilty as charged. This is because the court disapproves of what the police had done in the case. The House of Lords, probably anxious to avoid the impression of political overreaching, explained the stay on the theory that the court was merely protecting its own process from executive abuse. However, as was pointed out by the Singapore High Court in *Tan Guat Neo Phyllis*,<sup>58</sup> that entrapment is an abuse of executive power does not mean it is therefore an abuse of the legal process to prosecute the entrapped. The truth of the matter is that the English court, *qua* criminal court,<sup>59</sup> took upon

<sup>51</sup> Ibid 62.

<sup>52</sup> A high profile example is the ruling on exclusion of evidence obtained by torture in *A v Home Secretary (No 2)* [2006] 2 AC 221.

<sup>53</sup> [2001] 1 WLR 2060 [37] ('*Looseley*').

<sup>54</sup> Ibid [40] (Lord Hoffmann): 'The stay is sometimes said to be on the ground that the proceedings are an abuse of process, but Lord Griffiths [in *Bennett* [42]] described the jurisdiction more broadly and ... more accurately ... as a jurisdiction to prevent abuse of executive power'.

<sup>55</sup> *Looseley* [2001] 1 WLR 2060 [1] (Lord Nicholls).

<sup>56</sup> Ibid [19] (Lord Nicholls).

<sup>57</sup> Ibid [1] (Lord Nicholls) (emphasis added).

<sup>58</sup> [2008] 2 SLR 239..

<sup>59</sup> That it is within the remit of a criminal court to issue a stay on the basis of entrapment was made clear by the Privy Council in *Panday v Virgil* [2008] 1 AC 1386 1397 [33]. The court held that, should a claim of entrapment be raised, magistrates should themselves decide whether a stay should be granted rather than adjourn the proceedings for a judicial review application to be made in the Divisional Court. Entrapment is an

itself the duty to check police misuse of investigatory power that occurred prior to the trial. Where the abuse was of a nature that undermined the authority of the executive to prosecute (or blame) the entrapped for the crime in question, and hence the authority of the state to condemn him or her through a conviction, a stay of proceedings is, as I have argued more fully elsewhere, the appropriate response.<sup>60</sup> It is a response one would expect of a court that adopts an expansive view of its function and there is no cause for disquiet if we desire, as we should, a sound system of checks and balances in the administration of criminal justice.

The reluctance to embrace openly executive oversight as the proper function of the criminal court led the Australian High Court into similar difficulties in defending its decision in *Ridgeway*.<sup>61</sup> It was held that the judge had discretion, founded in public policy, to exclude evidence of an offence that the police had helped to create. In exercising the discretion, the judge is supposed to weigh the public interest in the conviction and punishment of those guilty of crime against the public interest in maintaining the integrity of the courts and protecting public confidence in the administration of justice.<sup>62</sup> According to the majority in *Ridgeway*,<sup>63</sup> the effect of the exclusion of evidence may justify a stay as the ‘appropriate ultimate relief’.<sup>64</sup> On this reasoning, the stay is granted because it would be ‘oppressive and vexatious’ to allow the case to continue where there is no evidence to support the charge; the stay is not granted because the proceedings in themselves constitute an abuse of legal process.<sup>65</sup>

The majority recognised that this distinction ‘seems artificial’ but thought there was a ‘significant distinction in principle’ between these two grounds for granting a stay.<sup>66</sup> It seems that this artificial distinction was maintained in order to pre-empt criticisms of judicial activism. Notice the care the judges took to show that, in coming to their decision, they were mindful of the separation of powers. They explicitly acknowledged that one ‘principal consideration’ weighing:

against the recognition of a judicial discretion to reject evidence of an offence procured by illegal conduct on the part of law enforcement officers ... lies in the separation ... of executive and judicial functions. The function of determining whether ... a criminal prosecution should be initiated and maintained is essentially that of the Executive. The function of hearing and determining the prosecution ... is that of the courts. Nonetheless, it has long been established that, once a court is seized of criminal proceedings, it has control of them and may, in a variety of circumstances, reject relevant and otherwise admissible evidence on discretionary grounds or temporarily or permanently stay the overall proceedings to prevent abuse of its process. One such discretion is the discretion to exclude unlawfully procured evidence on public policy grounds. That discretion is properly to be seen as an incident of the judicial powers

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issue that ‘should properly be resolved within the criminal process itself rather than by way of a judicial review challenge’: at [34].

<sup>60</sup> Ho Hock Lai, ‘State Entrapment’ (forthcoming in *Legal Studies*).

<sup>61</sup> (1995) 184 CLR 19. That case was decided on the basis of Australian common (or general) law. Uniform evidence legislation has since been implemented throughout Australia: see especially s 138 of the *Evidence Act 1995* (Cth) and of the *Evidence Act 1995* (NSW). On the latter, see *Robinson v Woolworths Ltd* (2005) 64 NSWLR 612.

<sup>62</sup> *Ridgeway* (1995) 184 CLR 19.

<sup>63</sup> (1995) 184 CLR 19.

<sup>64</sup> *Ibid* 40.

<sup>65</sup> *Ibid* 40–1.

<sup>66</sup> *Ibid* 41.

vested in the courts in relation to criminal matters. Neither its existence nor its exercise involves any intrusion into the exclusive sphere of the Executive. Nor, in our view, does the existence or exercise of a judicial discretion to exclude, on public policy grounds, all evidence of an offence or an element of the offence procured by unlawful conduct on the part of law enforcement officers.<sup>67</sup>

The message contained in the preceding passage boils down to the following:

Do not accuse us (judges) of judicial activism. We are not interfering with the exercise of executive power, and we are not telling the police or the prosecutor how to do their jobs. We are merely regulating the admission of evidence and this is indisputably a matter that falls within judicial purview. If the result of the exclusion is that the prosecution must fail, a stay should be granted; the court is perfectly entitled to prevent wastage of its resources.

Despite its denial of 'intrusion into the exclusive sphere ... of the Executive',<sup>68</sup> the court's exclusion of the evidence was manifestly a direct response to state misconduct. In justifying the exclusion of evidence, the court alluded to the ways in which the police and those in higher positions had acted illegally or improperly. Among the factors cited in support of its decision were the following features of the case: 'grave and calculated police criminality; the creation of an actual element of the charged offence; selective prosecution; [and] absence of any real indication of official disapproval or retribution'.<sup>69</sup> Given the view taken that it was not an abuse of legal process to prosecute the entrapped, it is not obvious how allowing the trial to proceed would have undermined the public interest in maintaining the integrity of the court.

The majority was more candid when it grounded exclusion in another aspect of public policy, namely, our interest in 'ensuring the observance [by the executive] of the law and minimum standards of propriety by those entrusted with powers of law enforcement'.<sup>70</sup> On this argument, exclusion of evidence and the consequential stay of proceedings are means of keeping the executive within the proper limits of its policing powers. In a very real sense, the court *was* telling the police and the prosecutor how to do their jobs. Of course, a criminal court should not venture to make policy choices beyond its competence. But, in the context of state entrapment, it should not feel apologetic in treating executive oversight as an aspect of its constitutive function. The trial should be seen as a process in which the executive is called to account on its request that the state convicts a citizen for an offence. Where the citizen was entrapped by the police into committing it, the request should not be entertained. A stay should be granted because the executive does not come with clean hands. The court must reflect on its moral standing to condemn citizens in the name of the state for the crimes with which they are charged. That standing is lacking where the government has

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<sup>67</sup> In a further concession to the separation of powers, the majority pointed out that the legislature had the power to pass a law to overturn the effect of *Ridgeway* (1995) 184 CLR 19, 32–3 (Mason CJ, Deane and Dawson JJ). This invitation was in fact taken up by the legislature, and the *Crimes Amendment (Controlled Operations) Act 1996* (Cth) was passed which amended the *Crimes Act 1914* (Cth) by introducing pt IAB. The validity of the amending legislation was upheld by the High Court of Australia in *Nicholas v The Queen* (1998) 193 CLR 173.

<sup>68</sup> *Ridgeway* (1995) 184 CLR 19, 33.

<sup>69</sup> *Ibid* 42.

<sup>70</sup> *Ibid* 38.

caused the accused to commit the offence and it is of a type that likely he or she would otherwise never have done.<sup>71</sup>

### III The Criminal Trial as a Liberal Institution of the State

Part II of this article considered the political function of the criminal court in a constitutional set-up that features a system of checks and balances among the separate branches of government. From that examination of the court as an *institution of a liberal state*, we now turn to reflect on the court as a *liberal institution of the state*. We will see how principles of liberal democracy are or can be assimilated into the structures of criminal proceedings. It is with the core of those structures in mind that one speaks of ‘due process’ or a ‘fair trial’ (I treat the two phrases as synonymous and expressive of a general idea rather than as terms of art).<sup>72</sup> While due process is important because it legitimises the verdict, it also has intrinsic value: the liberal trial is not merely a method of determining guilt or a means of bringing criminals to justice; it is also a process of doing justice to accused persons, a political obligation owed by the state to the citizens it seeks to censure and punish.

#### A *Liberal Credentials of a Criminal Trial*

I suggested earlier that we view the criminal court as an institutional check on executive enforcement of the criminal law, a role that reflects the polity’s commitment to liberalism and limited government. As I will now argue, the court can discharge that role only if the court itself lives up to basic aspirations of constitutional liberalism. Imagine a legal system where judges lack independence from the executive, and where the accused person is never told of the case against him or her and is denied the right to be heard and to challenge the evidence adduced by the prosecution. Such a court cannot be an effective check on the executive since it is not independent of it, and it can scarcely call itself a protector of the rights of citizens in a liberal democracy when it denies them basic forms of those rights in proceedings before it.

The claim that the criminal trial has a central place in a liberal polity, and exists to prevent the oppression of a ‘police state’, supposes a form of proceedings that respects certain liberties and rights of citizens. We judge how liberal a political system is in part by how liberal its mode of criminal trial is. It is not only that the criminal trial is a necessary institution of a liberal state (that is, a means of preventing misuse or abuse of executive power and protecting individual liberties from unwarranted state infringement); it is also that the criminal trial should embody liberal democracy by incorporating within its structures basic elements of that political philosophy.<sup>73</sup>

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<sup>71</sup> See Ho, above n 60.

<sup>72</sup> Neither is used in the technical sense that each carries under constitutional and human right texts. In this paper, ‘due process’ does not have the technical legal meaning it carries under, for example, the Fifth Amendment to the United States constitution, and ‘fair trial’ does not refer specifically to the body of legal rights entrenched under, for instance, art 6 of the *European Convention on Human Rights*.

<sup>73</sup> Allan, above n 49, 79:

There is ... an analogy with democratic participation in political affairs: the fairness of legal procedures, providing full opportunity for each party to present his case, provides moral grounds for accepting the outcome, just as the possibility of political action, protected by basic civil and political rights, affords grounds for obedience to duly enacted law.

A trial system may lack liberal credentials in many ways. For instance, it is not a liberal institution if it fails to respect personal autonomy and denies the right of participation. Autonomy is respected by allowing freedom of choice, exhibited in the freedom to plead guilty or not, in the right to silence and the privilege against self-incrimination, in the control one has over the ‘theory of the case’ to advance, trial strategy to pursue, and defence to raise, in the selection of evidence to bring forward (or not) and the questions to ask (or not) of witnesses, and so forth. Participation is enabled by recognising the right to be heard, including the extended right to legal representation and legal professional privilege, and the right to ‘confront witnesses’,<sup>74</sup> and to challenge evidence produced by the prosecution.<sup>75</sup> The value of participation, the ability to control and influence one’s case, lies in the intrinsic value of self-direction (the positive ‘freedom which consists in being one’s own master’),<sup>76</sup> independently of its contribution to the probabilities of reaching the correct verdict. Citizens are not objects to be acted upon and kept away by the state for the sake of public safety and order; they are individuals that bear rights against the state in the process that seeks their conviction and punishment. It is the hallmark of constitutionalism that those rights act as trumps.

Some jurisdictions include among those rights the right (in some cases) to a jury trial. The operational flaws of the jury system have drawn many criticisms, and often rightly so. But as an *ideal*, its democratic roots are clear: theoretically, to be tried by jury is to be tried by one’s peers and hence to be judged, in complex ways, by the norms of his or her community. Jury deliberation, the process of reasoning and discussion by a representative group of citizens in search of a collective judgment on a fellow citizen, has been described as ‘the crucible of democracy’.<sup>77</sup> It has also been remarked that ‘[t]he democratic theory of law would favour the retention of trial by jury as the means whereby the people play a direct, contributory part in the application of the law’.<sup>78</sup> The jury system serves not just community and democratic values; it is also regarded as an important safeguard of personal liberty.<sup>79</sup> It is well-known that juries occasionally refuse to apply a law despite its literal

<sup>74</sup> This is a constitutional right in the United States (*Crawford v Washington*, 541 US 36 (2004)). In *R v Davis* [2008] 1 AC 1128 [5], Lord Bingham held that the right of confrontation was ‘a long-established principle of the English common law’. Soon after this decision, the UK Parliament amended the common law: *The Criminal Evidence (Witness Anonymity) Act 2008* (UK), replaced recently by *Coroners and Justice Act 2009* pt 3, c 2 (UK). There has also been a judicial retreat from a strong recognition of the right: *R v Horncastle* [2010] 2 WLR 47 [55].

<sup>75</sup> A liberal trial is committed to equal treatment; to use a European phrase, there must be ‘equality of arms’. See Gérard Soulier, ‘Equality of Speech, A Principle of a Democracy and of a Criminal Trial’ in Mireille Delmas-Marty (ed), *The Criminal Process and Human Rights — Toward a European Consciousness* (Martinus Nijhoff, 1995) 157, 162: ‘The judicial institution will pacify if everyone believes that they will freely be able to make their cause understood. We see here how the criminal trial and democracy are linked — there is a conflict which must be resolved through speech, based on a principle of equality.’

<sup>76</sup> Isaiah Berlin, ‘Two Concepts of Liberty’ in Michael J Sandel (ed), *Liberalism and Its Critics* (Blackwell, 1984) 13, 23.

<sup>77</sup> Robert P Burns, ‘The Distinctiveness of Trial Narrative’ in Antony Duff et al (eds), *The Trial on Trial (Volume 1) — Truth and Due Process* (Hart, 2004) 157, 177. Lay participation may also take, as it does in Germany, the form of lay judges sitting alongside professional ones: Tatjana Hörnle, ‘Democratic Accountability and Lay Participation in Criminal Trials’ in Antony Duff et al (eds), *The Trial on Trial (Volume 2) — Judgment and Calling to Account* (Hart, 2006) 135, 135. According to Hörnle, lay participation expresses ‘distrust of the state and professional judges as state officials’: at 153.

<sup>78</sup> Geoffrey de Q Walker, *The Rule of Law — Foundations of Constitutional Democracy* (Melbourne University Press, 1<sup>st</sup> ed, 1988) 366.

<sup>79</sup> See, eg, Alfredo Garcia, *The Sixth Amendment in Modern American Jurisprudence — A Critical Perspective* (Greenwood Press, 1<sup>st</sup> ed, 1992) 183: ‘the jury furnishes a check against unbridled abuse by either the

applicability in the case at hand because they find the law illegitimate or its particular application oppressive. Through this power of ‘jury nullification’, ‘juries serve as a popular check on the legislative and executive branches’.<sup>80</sup>

Open justice is guaranteed in many constitutional documents and human rights texts.<sup>81</sup> ‘The holding of criminal proceedings in secret has long been regarded as an instrument of oppressive government.’<sup>82</sup> What is bad about a closed trial is not merely that it allows the government to hide from public knowledge its errors and abuses of power. And what is good about an open trial is not only that it keeps prosecutors and judges on their toes, encourages witnesses to tell the truth, and may result in people coming forward with material information after they have heard reports about the case. It is debatable to what extent these consequential benefits are real. If open justice is as fundamental as it is widely proclaimed to be, its grounding must have a stronger foundation.

There is the possibility of a different, non-instrumental, explanation of the significance of openness. Openness is an intrinsic feature of the liberal conception of the trial: a trial *is* a process of *public* justification. Public, in this context, has two aspects: first, the grounds the executive has for a conviction (in the form of evidential proof and reasoned argument) must be presented in a forum to which the citizenry must be given the right of access — justice must be *seen* to be done —<sup>83</sup> and, second (I would suggest but not argue for it here), the grounds offered by the executive as justification for a guilty verdict must aim at public acceptability, that is to say, they must aim to be acceptable to reasonable citizens as constituting sound and sufficient bases for a conviction.<sup>84</sup> In brief, the insistence on an open trial is an insistence on a condition for the exercise of public liberty, a concept I mentioned in the introduction. The citizenry can examine and evaluate the grounds for the exercise by the state of its coercive powers only if those grounds are presented for public scrutiny.

## **B Due Process and the Legitimacy of the Verdict**

Why would we want the trial to have liberal features of the types just described? To put this in another way: what is good about due process? One common attempt to find the answer seeks it in the legitimising effect. As a state institution, the criminal court will, as a practical if not conceptual necessity, claim legitimacy of its powers, acts and impositions: it will necessarily claim political authority to hear criminal cases, make findings of fact, issue verdicts, and mete out punishment.<sup>85</sup> Legitimacy as a sociological term refers to a state of public belief that is conducive to stable, effective and efficient governance. Typical

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prosecution or the court’, citing *Patton v US*, 281 US 276, 296–7 (1930), where the Supreme Court of the United States noted that ‘trial by jury in criminal cases ... uniformly was regarded a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against oppressive power of the King and the arbitrary or partial judgment of the court’.

<sup>80</sup> Thom Brooks, ‘The Right to Trial by Jury’ (2004) 21(2) *Journal of Applied Philosophy* 197, 199; see also Thom Brooks, ‘A Defence of Jury Nullification’ (2004) 10(4) *Res Publica* 401, 418.

<sup>81</sup> For a list of the relevant provisions, see Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press, 1<sup>st</sup> ed, 2002) 4–5.

<sup>82</sup> Joseph Jaconelli, ‘Rights Theories and Public Trial’ (1997) 14(2) *Journal of Applied Philosophy* 169, 169.

<sup>83</sup> There are practical limits as to how many citizens the courtroom can accommodate, and ills of excessive publicity have led to the exclusion of certain modes of reporting such as television coverage.

<sup>84</sup> See Stephen Macedo, *Liberal Virtues — Citizenship, Virtue, and Community in Liberal Constitutionalism* (Clarendon Press, 1<sup>st</sup> ed, 1991).

<sup>85</sup> Raymond Geuss, *History and Illusion in Politics* (Cambridge University Press, 2001) 31.

expression of its instrumental value can be found in the following statements by a leading social psychologist:

Because they are interested in securing compliance with the law, legal authorities want to establish and maintain conditions that lead the public generally to accept their decisions and policies.<sup>86</sup>

[P]ublic confidence in the legal system and public support for it — the legitimacy accorded legal officials by members of the public — is an important precursor to public acceptance of legal rules and decisions.<sup>87</sup>

Legitimacy has an alternative meaning, a normative aspect. I will use it in a sense which involves personal evaluation and commitment by the speaker. When a system is evaluated as illegitimate in this sense, the ‘speaker ... is not saying people *believe* that the system is unjust or unworthy of adherence, but rather that it really *is* unjust or unworthy of adherence’.<sup>88</sup> Habermas, for instance, uses legitimacy in this way when he defines it as meaning ‘that there are good arguments for a political order’s claim to be recognised as right and just; a legitimate order deserves recognition. *Legitimacy means a political order’s worthiness to be recognized*’.<sup>89</sup>

The same may be said of a verdict: its legitimacy means its worthiness to be recognised or, equivalently for our purposes, its moral weight, normative acceptability, rightful authority or some such notion. The degree to which a verdict is worthy of recognition depends on the extent to which the trial has features of the kinds outlined in the previous section. For instance, the legitimacy of a verdict, its claim to recognition, is seriously eroded when it is the result of a secret process; such a verdict calls for blind trust rather than reasoned acceptance.<sup>90</sup> Also, the moral weight of a conviction depends partly but crucially on the quality of the interaction between state and citizen in the process by which the latter is found guilty.<sup>91</sup> Where the accused is treated unfairly at the trial, the state’s right to expect him or her, and the citizenry in general, to accept the resulting conviction is somehow undermined.

Due process or a fair trial is a necessary but not a sufficient condition for a verdict that can rightfully claim authority. Consider this puzzle posed by Resnick:

If I find myself rotting in prison, totally innocent, yet duly convicted and sentenced for a crime I did not commit, how can the fact that I have been accorded all my procedural

<sup>86</sup> Tom R Tyler, *Why People Obey the Law* (Yale University Press, 1<sup>st</sup> ed, 1990) 19.

<sup>87</sup> *Ibid* 26.

<sup>88</sup> Alan Hyde, ‘The Concept of Legitimation in the Sociology of Law’ (1983) *Wisconsin Law Review* 379, 381 (emphasis in original).

<sup>89</sup> Jürgen Habermas, *Communication and the Evolution of Society* (Beacon Press, 1<sup>st</sup> ed, 1979) 178 (emphasis in original).

<sup>90</sup> As Lord Phillips observed in *Home Secretary v AF [No 3]* [2009] 3 WLR 74, [63], albeit in a different context, ‘if the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust.’

<sup>91</sup> See generally Alan John Simmons, ‘Justification and Legitimacy’ (1999) 109(4) *Ethics* 739, 752.

rights make any difference to me? I have been deprived of my liberty; whether or not this has been done with all the niceties of due process seems irrelevant.<sup>92</sup>

This passage, as Resnick rightly observes, assumes that due process is a *sufficient* condition for justice, that so long as due process is followed, justice is done. This assumption is flawed because due process is not a sufficient condition for justice. It is a *necessary* condition. If a person is denied due process, the person is thereby unjustly treated. In the above example, the person suffers an injustice, not because he was denied due process (we are assuming otherwise), but because he has been punished for a crime he did not commit. His treatment is, in this plain sense, undeserved.

A more challenging problem is raised by Resnick's alternative poser: 'why should we consider an outcome unjust simply because it has not been achieved by means of due process?'<sup>93</sup> Suppose the prosecution was allowed to rely on a confession the police had beaten out of the accused. The latter is found guilty on the basis of the confession alone. He cannot be said to have received a fair trial. But how exactly was he denied due process, and how did this make his conviction unjust?

In one sense, due process requires that the method used to determine guilt is accurate. Procedure should be adopted that 'maximizes correct outcomes and minimizes the errors'.<sup>94</sup> A forced confession is a kind of evidence that is generally and manifestly unreliable. It violates due process to use against the accused evidence of a kind that is generally and manifestly unreliable. This failure of due process leads to an unjust outcome, understood as a guilty verdict that carries an unacceptable risk of error. But this is not all that there is to be said.

The failure of due process is *in itself* a wrong; it is not wrong merely because it increases the risk of injustice in the outcome. The trial, so I have argued, should be understood as a process of calling on the executive to provide a strong enough case in support of its assertion that the accused is guilty as charged. A conviction is not justified – not publicly demonstrated to be deserved – where the evidence adduced at the trial fails to provide sufficient reason for that acceptance. In our example, a guilty verdict is reached by a process (specifically reliance by the state on a kind of evidence) that cannot rationally support the conviction. The lack of due process is more than an epistemic shortcoming; it is *of itself* a form of political injustice, where one is publicly condemned by the state for committing a crime without the state having properly shown adequate justification for the condemnation. There is a failure, or a falling short, of the state's duty of accountability. This wrong is independent of the accuracy of the verdict.

Resnick is clearly right that 'due process also involves the justice of the procedure itself'.<sup>95</sup> But, while he accepts that 'the criterion for determining whether a particular

<sup>92</sup> David Resnick, 'Due Process and Procedural Justice' in J Roland Pennock and John W Chapman (eds), *Due Process* (New York University Press, 1977) 206, 207.

<sup>93</sup> *Ibid* 212.

<sup>94</sup> *Ibid* 217.

<sup>95</sup> *Ibid* 217. More fully, Resnick states, at 217–18, that:

[W]e do not evaluate the justice of a procedure merely in terms of its ability to achieve correct outcomes. Due process is supposed to express our feeling that convictions ought not to be obtained in ways that offend our sense of justice; fidelity to the ideal of due process shows our deep commitment to the values of fair play and fair treatment.

procedural practice is unjust is distinct from those entailed by the concept of just outcome',<sup>96</sup> he sees process as bearing on outcome: 'Since we feel that just results ought to be achieved by just means ... if unjust means are employed an outcome becomes tainted with injustice'.<sup>97</sup>

How does an unjust procedure taint the outcome? On the most straightforward reading, 'outcome' refers to the verdict. Other possibilities exist. 'Outcome' can also refer to the acceptance of the verdict or its communicative function. It may well be that if the trial is conducted unjustly, the person who is convicted will be less likely to accept the verdict in the sense that he or she will be less likely to reconcile himself or herself with it. This is an empirical claim about human psychology. Another argument is premised on the suggestion that the purpose of the trial is to engage in a moral dialogue with the accused, aimed at getting the person to see the wrong he or she has done.<sup>98</sup> Any injustice which occurs during the trial is likely to ruin the spirit of this dialogue. In that event, so it is said, the court loses full moral standing to condemn the accused. On either reasoning, denial of due process is undesirable because it brings about something bad; on the first, the failure to act justly will undermine the acceptance of the verdict and, on the second, it will defeat the communicative purpose of the trial.

Both arguments support the demand that the accused be treated justly and fairly by suggesting that it will further the achievement of an institutional objective. This demand can also be seen as a personal one. In brief, police officers, prosecutors and judges, like everyone else, are subject to morality just because they are human beings. On the virtue-ethical view, the central question of morality is: How should one live?<sup>99</sup> Justice, fairness, and compassion are excellences of character, qualities that make for human flourishing. We should treat the accused with respect, dignity and empathy, and give the person due process, because it should matter to us that we lead honourable lives. This answer seems both simpler and more powerful.

### *C Bringing Criminals to Justice and Doing Justice to Criminals*

No one likes to be hauled before a court and prosecuted for a crime. It is perfectly rational to want to avoid this experience. At the same time, we speak of the right to be tried. It is equally rational to desire to have one's case brought before the court. To be detained without trial is oppressive. The inherent worth of the accused as a person is diminished by being deprived of a voice and denied a hearing in the process of determining his or her guilt.

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<sup>96</sup> Ibid 219.

<sup>97</sup> Ibid.

<sup>98</sup> See, eg, RA Duff, *Trials and Punishments* (Cambridge University Press, 1<sup>st</sup> ed, 1986) 116; see also Allan, above n 49, 81. John Braithwaite and Philip Pettit, *Not Just Deserts – A Republican Theory of Criminal Justice* (Clarendon Press, 1990) 122 similarly argue that 'we should not evaluate trials simply in terms of whether they reach an accurate verdict. Trials are at their best when ... the moral reasoning of the court and the testimony of the victim bring the offender to a posture of remorse, so that both reprobation and reintegration are secured'.

<sup>99</sup> On virtue ethics, see Rosalind Hursthouse, *On Virtue Ethics* (Cambridge University Press, 1<sup>st</sup> ed, 2001), and on virtue ethics and law, see Colin Farrelly and Lawrence B Solum (eds), *Virtue Jurisprudence* (Palgrave Macmillan, 2008) and Amalia Amaya and Ho Hock Lai (eds), *Law, Virtue, and Justice* (forthcoming).

Criminal justice is often thought of as a matter of just desert, of what a person deserves by reason of what he or she has done: those who commit crimes deserve to be convicted and punished. The liberal theory of the criminal trial is of course also concerned with the welfare of the accused: rules of procedure should promote accuracy of verdict. But the theory presses for far more. It further encourages us to think of criminal justice as a matter of what a person deserves in virtue of status. A person, in virtue of being a person, deserves to be treated with dignity; and a person, in virtue of membership of a liberal political community, is entitled to certain rights, reflective of certain forms and standards of respectful treatment by the state when it seeks his or her conviction and punishment. A liberal trial is one that adequately respects the accused as a rational and autonomous moral being, and as the bearer of basic political rights and freedoms. It attempts to engage the accused in a dialogue because he or she is intrinsically worthy of dialogue, employing reasons to justify his or her conviction and sentence that appeal to our collective sense of justice. It is in recognition of the person's autonomy that we do not force him or her to participate at the trial and, at the same time, give that person the cherished right to do so.

On the standard view, the purpose of a criminal trial is to bring criminals to justice. The aim is a verdict that is correct in the outcome, the condemnation of those and only those who have in fact transgressed the specified provision of the criminal law. On the proposed theory, the purpose is much more than to search for the truth and reach the correct verdict; it is to do political justice to accused persons, according them their dues as human beings and citizens. We conduct criminal trials not only with a view to bringing criminals to justice but also because we owe suspected criminals justice. Once we move beyond the 'search for truth' paradigm, we begin to understand why it is important to conduct a trial even when the guilt of the accused is not in serious doubt. That we insist on bringing notorious war criminals before a criminal tribunal, even though it is far simpler just to shoot them in the street, has less to do with doubts about the atrocities that they have perpetuated and more to do with abiding by certain values that define us as a society, the most basic of which must include respect for our common humanity and commitment to the rule of law.<sup>100</sup> As Gaita puts it, 'no criminals are so foul that they may be denied justice'.<sup>101</sup> Every accused person, however heinous the charges, deserves to be treated with dignity and remains worthy of reasoned engagement on the justice of his or her condemnation and punishment; this is 'the most sublime aspect of our legal tradition.'<sup>102</sup>

#### IV Conclusion

From the liberal standpoint, the criminal trial is the political institution that holds the executive to account on its call that a citizen be declared guilty and punished. It is for the executive to satisfy the court, as an independent state institution, that the police have uncovered the truth about a crime; and the accused must be presumed innocent unless and until it is proved beyond reasonable doubt that he or she is guilty as charged. On this view,

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<sup>100</sup> For a discussion of the claim that the manner in which we conduct a criminal trial defines the character of our political community, see Sherman J Clark, "'Who Do You Think You Are?'" The Criminal Trial and Community Character' in Antony Duff et al (eds), *The Trial on Trial (Volume 2) — Judgment and Calling to Account* (Hart, 2006) 83; see also Sherman J Clark, 'The Courage of Our Convictions' (1999) 97 *Michigan Law Review* 2381.

<sup>101</sup> Raimond Gaita, *A Common Humanity – Thinking about Love and Truth and Justice* (Routledge, 2000) 54.

<sup>102</sup> *Ibid* 11.

the court is the bulwark of personal liberty, standing between the powerful executive machinery that enforces criminal law and the citizens whom it is targeting. The relevance of executive improprieties is controversial. In some legal systems, the trial court takes on as its constitutional responsibility the duty to ensure not only that the enforcement was correctly targeted (the executive has caught the right person), but also that there was no unacceptable transgression by the executive of its investigative powers. Whether, and to what extent, the judiciary is prepared to take on this further role is a matter of political choice,<sup>103</sup> and this choice rests ultimately on how strong a system of checks and balances is deemed necessary in the administration of criminal justice.

While one dimension of the liberal theory explains the political function of the court, another dimension imposes demands on the manner in which a criminal trial must be conducted. For instance, the theory requires that the accused be given the right of participation and that the hearing be open to the public. Many of the defining features of the liberal trial are premised on and expressive of respect and concern for the accused, or are reflective of democratic ideals. Where the conduct of a trial falls short in any of these regards, whether or not the failure undermines the accuracy of the verdict, it is, in itself and to various degrees, a failure of justice. We, the citizenry of a liberal democracy, insist that anyone amongst us whom the state seeks to blame and punish for a crime must first be brought before the court. This demand is predicated on our political belief that each of us, if and upon being charged with an offence, has the right to a trial so that the executive will be held to account; the state owes each citizen, as a precondition to the harm it seeks to inflict under criminal law, justice in the form of due process.

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<sup>103</sup> According to one commentator, the 'rights based' approach 'is seen as "Western liberalism" and does not find ready acceptance in Singapore in preference to the community values of safety and security': Chin Tet Yung, 'Rethinking the Evidence Code: Search for Values' (2009) 21 *Singapore Academy of Law Journal* 52, 59, citing Lee Kuan Yew, 'Address by the Honourable The Prime Minister, Mr Lee Kuan Yew' (1990) 2 *Singapore Academy of Law Journal* 155.