Understanding the Criminal Trial: A Response to HL Ho

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Abstract

Within academic circles, the criminal trial has become the subject of a significant amount of scrutiny by legal theorists, criminologists, historians and philosophers. This has produced a rich vein of analysis, enlivening debates about the role of the criminal trial in the broader context of the criminal justice system, and in its relationship to criminal law, evidence and procedure. HL Ho's liberal theory analysis of the trial is a thoughtful and thought-provoking intervention into this field. In this article, by way of response to Ho, I engage with his argument somewhat indirectly — by examining the insights generated by socio-historical studies of the criminal trial. Harnessing these disciplinary resources in the quest to understand the criminal trial produces a different picture of criminal trial process, one in which the tensions between its different parts and its profoundly coercive character is evident.

I Introduction

The criminal trial forms the locus of much academic, political and popular attention. Within academic circles, the criminal trial is the subject of significant interest by legal theorists, criminologists, historians and legal philosophers, among others. This interest has generated a rich vein of critical analysis, producing sophisticated accounts of the trial itself and enlivening debates about the role of the criminal trial in the broader context of the criminal justice system, as well as the interaction between criminal law doctrines, evidence and procedure. This is a dynamic field of legal scholarship, one traversed by a range of theoretical and methodological approaches.

In 'Liberalism and the Criminal Trial', HL Ho offers a thoughtful and thought-provoking liberal theory analysis of the criminal trial in the common law system. As Ho notes, legal discussion about the core features of a liberal political system — notably, the separation of powers — usually takes place in relation to constitutional and administrative law. But, Ho points out that, in criminal proceedings, the court carries out its constitutional function on a day-to-day basis.[1] In the criminal justice context, the separation of powers is reflected in the separation of investigatory, prosecutorial and adjudicative functions. Although the criminal trial is only one stage in a sequence of possible stages of state involvement in criminal justice, it is, as Ho suggests, a highly significant stage. Ho argues that

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[1] Hock Lai Ho, 'Liberalism and the Criminal Trial' (2010) 32 *Sydney Law Review* 269.

its chief significance lies in the fact that the trial involves the executive seeking an 'official declaration of guilt' from an independent body, upon receipt of which the executive makes a further request for punishment. The trial is, in Ho's terms, a 'make or break point': 'an acquittal sets the accused free from the clutches of state machinery; without a conviction, the process of enforcement is brought to an immediate halt and cannot be moved forward to the next phase'.[2] With a conviction, the state is entitled to request punishment for the accused.

Ho approaches the criminal trial from two perspectives, one in which the criminal court is understood as an institution of the liberal state and the other in which the court is understood as a liberal institution of the state. Ho's overall argument is that the criminal trial process should be thought about not merely as a means of 'bringing criminals to justice' but as 'a matter of doing justice to the accused', an altogether more robust standard. In his article in the previous issue of this journal, Ho pursues this argument along three lines. First, he argues for a conception of the adversarial criminal trial as 'primarily' a process of holding the executive to account on its request for conviction and punishment of an individual accused. This follows from Ho's starting point that the 'constitutive function' of the criminal court is oversight of the executive branch of government in the exercise of its criminal law powers. Second, turning from the rationale for the existence of the court to the legitimacy of its verdicts, Ho argues that a verdict's legitimacy (a concept he defines with reference to both sociological and jurisprudential scholarship) depends on the trial process itself — on how the trial was conducted, and in the quality of the interaction between the state and the accused. Third, according to Ho, it is possible to detect liberal principles in some key aspects of the common law criminal procedure, such as the value of a fair trial and 'due process'. On this tripartite basis, Ho makes a case for the value of liberal political theory in mounting an analytic assessment of the criminal trial.

Liberalism has individual freedom at its heart: in Ho's words, 'liberty is the core commitment of liberalism'.[3] For Ho, as for other liberal theorists, liberty has both a public and a private aspect; it is the former that demands that rulers must be accountable to those over whom they exercise power. Enabling this public liberty requires institutions and practices which openly demand accountability on the part of the executive — and a criminal trial by a criminal court represents one such open demand on the executive.[4] Turning from the external aspect of the trial to its internal aspect, as a key tenet of liberalism is the cardinal place of the individual citizen in the political community, it is not surprising that a liberal theory of the trial would advocate for the centrality of the role of the accused in his or her trial. Ho seeks to enumerate the liberal features of the criminal trial in the adversarial process present in common law systems.[5] Ho's argument is a nuanced one, and he is careful to avoid proffering a single theory to account for the criminal trial *in toto*.

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2 Ibid.

3 Ibid.

4 Ibid.

5 Of course, as Paul Roberts has noted in the context of the English criminal trial, as liberalism is the official philosophy of all Western states, there *should* be recognisable traces of liberal values in English criminal procedural law and practice — and, by extension, in systems (such as that of Singapore and NSW) which inherited the English model: see Paul Roberts, 'Subjects, Objects and Values in Criminal Adjudication' in Antony Duff et al (eds), *The Trial on Trial Vol 2: Judgment and Calling to Account* (Hart Publishing, 2006) 40 (emphasis added).

Indeed, like a number of other scholars of evidence and procedure, he is aware that the now-popular form of the criminal trial is in a significant way a product of what one writer has referred to as 'historical accidents, sectional interests, social deference and political inertia'.[6] Indeed, the historical development of the common law trial system cannot be explained with a unitary set of values. Sensibly, Ho allows for a range of other influences on the particular contours of the trial (for example, those procedures that have their genesis in the conception of the trial as primarily a fact-finding exercise). But, at base, Ho holds that certain 'defining features' of the criminal trial are reflective of liberal principles.

In seeking to develop a theory of the criminal trial, Ho seems to be cognisant of the dangers of the type of analysis that does not see the import of the temporal and geographical location in which the trial takes place or of the socio-political functions of the criminal trial. Ho examines several different rules and principles (including open justice, due process, the right to silence and abuse of process) in a way which demonstrates his impressive familiarity with the specifics of common law legal process in a number of jurisdictions. Taken as a whole, however, his argument is mounted at the level of the criminal trial in a largely generic common law legal system, and is thus located above the whys and wherefores of a particular jurisdiction. Yet, there is a case to be made for a further fine-tuning of a theory of the criminal trial that takes these matters seriously. Without this, it seems to me that Ho discounts the possibility (and, in practice, the reality) of tensions between the various components of the criminal trial to which he refers. In addition, his account of the criminal trial as a liberal 'event' embedded in a liberal institution (the court) discounts the profoundly coercive character of the trial and the usual outcome of conviction: punishment.

In this article, by way of response to Ho, I engage with his argument somewhat indirectly — by examining the insights generated by socio-historical studies of the criminal trial. While I follow a different disciplinary tradition from Ho's political theory tradition, I proceed on the basis that harnessing different methodological resources to the task of understanding the criminal trial is a useful in developing a comprehensive account of it. Within the confines of this article responding to Ho's work, of course I am not able to offer a complete socio-historical account of the criminal trial. My argument is that these studies helpfully illuminate aspects of the trial that might otherwise be occluded, suggesting that it is necessary to think about criminal trials — in the plural — and to acknowledge that their place in state systems has changed over time and place. This approach also suggests that the purposes of trials and the legitimacy of trial verdicts is contingent and variable and dependent on a range of structural and institutional factors which remain somewhat opaque in an account painted in the broad brush strokes of political liberalism.

The insights about the criminal trial generated by socio-historical studies are multiple. Here, I identify just three. First, criminal trials come in a variety of formats (such as summary trial versus trials by jury), and the forms taken by the criminal trial have varied over time. Second, the institutional framework of the trial — and specifically, the rise of an elaborate administrative framework comprising a prosecutorial system — forms an independent layer in the criminal trial process.

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[6] Ibid 39.

Third, with the rise of institutional practices such as plea-bargaining or charge negotiation (features that stretch across jurisdictional divides[7]), the formal criminal trial now plays a symbolic role that far outstrips its practical significance.

Before advancing further, I offer a few comments to explain what I take socio-historical studies to entail. These studies take seriously the institutional conditions under which trials take place and verdicts are issued. Like the broader field of critical inquiry of which it is a part, this genre of legal studies situates relevant doctrinal, evidentiary and procedural developments within their particular social, historical and institutional contexts.[8] This approach evidences a commitment to examining law as a social phenomenon,[9] which means that the development of conceptual frameworks is itself the object of study.[10] As Markus Dirk Dubber has written in advocating an historical analysis of law, this approach seeks to 'understand principles and practices in their relation to other principles and practices' and is concerned to test the legitimacy of the law.[11] And as Nicola Lacey has argued with respect to criminal responsibility and criminalisation, the scholarly research agenda benefits from appreciation of historical and social scientific as well as legal and philosophical scholarship.[12] The benefits of this body of scholarship to a study of criminal process are several. On what has been called the level of weak historical argument,[13] an historical analysis exposes the major changes in criminal trial process that have taken place in the common law world over time, including the demise of the exculpatory trial (whereby the responsibility of the defendant was assumed) and the development of the adversarial trial, the regularisation of prosecution and defence, the growth of summary jurisdiction, the rise of imprisonment as the pre-eminent form of punishment, the large-scale abrogation of capital punishment and a burgeoning of the number of criminal offences.[14] On another level, and more significantly, a socio-

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7 For a sophisticated discussion of the process of 'translating' plea-bargaining, see Maximo Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure' (2004) 45 *Harvard International Law Journal* 1.

8 Thus, in a particular temporal and spatial context, the colonial context of criminal justice may be relevant. For an example of a nuanced study of the operation of the criminal law in a colonial context, see Martin Wiener, 'Criminal Law at the Fault Line of Imperial Authority: Interracial Homicide Trials in British India' in Markus Dubber and Lindsay Farmer (eds), *Modern Histories of Crime and Punishment* (Stanford University Press, 2007) 252.

9 Nicola Lacey, 'Philosophical Foundations of the Common Law: Social not Metaphysical' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 2001) 17, 19.

10 Lacey, 'Philosophy, History and Criminal Law Theory' (1998) 1 *Buffalo Criminal Law Review* 295, 311.

11 Dubber, 'Historical Analysis of Law' (1998) 16(1) *Law and History Review* 159, 160–2. See also Dubber and Farmer, 'Introduction: Regarding Criminal Law Historically' in Dubber and Farmer, above n 8, 1.

12 See Lacey, 'Space, Time and Function: Intersecting Principles of Responsibility Across the Terrain of Criminal Justice' (2007) 1 *Criminal Law and Philosophy* 233 and 'Historicising Criminalisation: Conceptual and Empirical Issues' (2009) 72 *Modern Law Review* 936.

13 See Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64 *Modern Law Review* 350, 357.

14 For a discussion of more recent developments in criminal law and process in the UK, see Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy* 1. Ashworth and Zedner argue that changes in contemporary criminal law and procedure and use of trials reflect changing relationship between state and citizen and changes in the nature of the state itself (jostling among the different manifestations of the authoritarian state, the preventative state and the regulatory state). For these scholars, these changes have profound normative implications for a liberal theory of criminal law: they argue that a re-articulation of such a theory should require that,

historical analysis of the criminal trial opens the way for a *historicised* account that incorporates the principles and practices of criminal law, evidence and procedure that enmesh in the adjudicative process at particular junctures.

This article comprises two parts, each of which deals with an aspect of the criminal trial identified and discussed by Ho; the role of the state and the role of the accused. This demarcation cuts across Ho's two-part approach to the trial as an institution of the liberal state and the trial as a liberal institution, but I adopt it because it permits me to tease out the particular aspects of Ho's argument with which I wish to engage. In each of these parts, I will examine the insights flowing from socio-historical studies as a complement to (and critique of) the political theory analysis developed by Ho. In so doing, I am concerned to enlarge the disciplinary resources available to the study of the criminal trial. In addition, I seek to expose some aspects of the criminal trial — notably, its tensions between its different parts and its coercive character — that might be eclipsed in other accounts.

II The Role of the State

As is oft-rehearsed, in a liberal or constitutional democracy, the separation of powers — between the executive, the legislature and the judiciary — encodes a system of checks and balances. In this way, the courts represent a limit on the power of the executive. For Ho, this means that the requirement that an accused be tried as part of a system of criminal law enforcement represents a 'demand that the executive openly justify its call for criminal censure and punishment' (and also means that the accused should be given fair opportunity to challenge that justification, 'the adequacy of which should ideally be judged by a representative group of fellow citizens').[15] The trial is the public moment at which the executive is called to account for its request for conviction and punishment — following a myriad of far less public processes of investigation, for instance. Thus, for Ho, the principle of open justice — the requirement that, as a usual matter, a trial should be held in public — is a specific instance of the broader imperative of the criminal trial.[16] If the executive is being held to account via the trial process, then the executive also owes certain duties to the accused who is being prosecuted. Ho advocates a view of the liberal trial that is not just instrumentalist — the trial as the means of establishing guilt and legitimising the verdict — but also intrinsic — the trial as a means of doing justice to the accused person. For Ho, doing justice to an accused person is a political obligation owed by the state to the citizens it seeks to punish.

By way of support for the idea that the executive is being called to justify its call for censure and punishment through the trial, Ho points to two 'basic' features

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where conduct is criminal and consequences are punitive, the protections of criminal procedure and trial should be upheld.

[15] Ho, above n 1. As Allan has put it in relation to judicial independence, 'standing aloof from the executive, the court's independence may not only inspire confidence in its impartiality … but it obliges ministers and governmental agencies to account for their decisions in terms that the ordinary person can understand': see TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) 9–10.

[16] As Mike Redmayne has pointed out in his analysis of the project of Duff and colleagues, this requirement is not restricted to criminal trials: see Mike Redmayne, 'Theorizing the Criminal Trial' (2009) 12 *New Criminal Law Review* 287, 290.

of the criminal trial: the common law duty on the prosecution to prove the elements of the offence beyond reasonable doubt and the presumption of innocence. In relation to the former, Ho points out that, 'generally speaking', the obligation on the prosecution even extends to facts constitutive of the defence on which the defendant seeks to rely. For Ho, the presumption of innocence is not a statement of fact but a statement of political value, underpinned by a demand for government accountability in its execution of the criminal law.[17] According to Ho, the core practical importance of the presumption of innocence lies in its instruction not to assume that the 'the police have probably caught the right person' — the accused cannot be convicted unless the prosecutor can satisfy the court that he or she is guilty as charged.[18] Thus, as a 'central pillar of the liberal framework', the presumption puts 'protective distance' between government and citizens.[19]

If Ho regards these aspects of the trial process as 'basic' or fundamental, then he would be likely to be concerned about what seem to be increasingly common incursions into the practical strength of the duty on the prosecution to prove the elements of the offence beyond reasonable doubt and the presumption of innocence. It is notable that the creation of new criminal offences over recent years — a popular legislative pastime in a number of common law jurisdictions — has been accompanied by changes to the applicable laws of evidence and procedure. Examples of these incursions may be found in many common law jurisdictions. For instance, the *Crimes (Criminal Organisations Control) Act 2009* (NSW) proscribes 'criminal organisations' and here, even though a breach of a control order is a criminal offence, the crucial stage of taking evidence and deciding the terms of the order occurs in the civil context, where the standard of proof is the balance of probabilities.[20] Another example is provided by anti-terrorism laws, perhaps the most high-profile offenders against these 'basic' principles in the current era. These laws typically proscribe membership of listed organisations, criminalise individuals who associate with members of such organisations, place burdens on the accused as opposed to requiring that the prosecution prove all points in their case, and provide for the use of secret evidence at trial.[21]

Yet even if these particular examples of the relative vulnerability of 'basic' principles might also be decried by Ho, there seems to be a broader and more systemic limitation on the idea that the executive is being called to justify its call for censure and punishment through the criminal trial. This relates to what happens when, to use Ho's terms, the executive is not successful in the call for conviction and punishment. If, as Antony Duff and colleagues have argued, the process of calling to account (or holding to account, in Ho's terminology) involves at least two parties; the question then arises as to who or what holds the executive to account?[22]

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17 Ho, above n 1.

18 Ibid.

19 Ibid.

20 *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 32.

21 See, for example, *Criminal Code* (Cth) pt 5.3. For a discussion of Commonwealth anti-terrorism legislation, see Michael Head, 'Counter-Terrorism Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 666.

22 Duff et al. state categorically that it is not the defendant, pointing out that 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 that, while there may be scope for debate about the meaning of the norms that the trial is to apply, that scope is 'very limited': see Duff et al, 'Introduction: Judgment and Calling to Account' in Duff et al (eds), above n 5, 6.

If an accused is acquitted in a criminal trial, the state's claim that he or she was guilty which, for Ho, is necessarily implied in the process of prosecution, is defeated. If the accused believes that his or her prosecution was prompted by illegitimate motives (such as party political motives), a separate legal proceeding is required – there is nothing in the criminal trial itself beyond the acquittal that vindicates the accused.[23] A separate proceeding must be commenced to achieve compensation or other restitution. This suggests that 'doing justice to the accused' within the context of a criminal trial is a somewhat fraught task. This in turn suggests that, in Ho's account, there seems to be something of a slippage between the role of the court and the role of the trial, with some of the power of the former attributed to the latter.[24]

There is a final aspect of the issue of the role of the state in the criminal trial which I wish to mention. In advocating a conception of the adversarial criminal trial as a process of holding the executive to account on its request for conviction and punishment of an individual accused, Ho foregrounds the role of the prosecutor as the representative of the state. But, in his scheme, prosecutorial decision-making practices remain opaque. Although he acknowledges that investigation, prosecution and adjudication are separated within the criminal justice system, in Ho's analysis, there seems to be a close if not unmediated relationship between the state and the prosecution in relation to a criminal offence.[25] While it may be accurate to see the prosecutor as the representative of the state from the perspective of political theory, taking the institutional context of the criminal justice system seriously requires recognition of the distinct position of prosecutors and the (at least partially) independent decision to prosecute. Prosecutors in most jurisdictions have a range of options in relation to any one instance of what police have identified as criminal behaviour, including setting the charges, discontinuing a prosecution, offering and accepting a plea bargain and nominating the way in which the trial will proceed (summarily or on indictment).[26] Beyond case disposition, prosecutors can have a

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[23] Acquittals are notoriously ambiguous; they may indicate that there was insufficient evidence to convict the accused beyond reasonable doubt, that he or she had a complete defence or even that the jury, if present, handed down a perverse verdict.

[24] Taken broadly, the court has a range of powers that extend beyond the criminal trial. These powers relate to interlocutory proceedings and sentencing, as well as appeals and committals, for instance. But, if these are to be considered, the relevant scholarly focus is the criminal court as an institution, rather than the trial as a particular event or a step among other criminal processes.

[25] In terms of the historical development of the adversarial trial, the rise of an elaborate administrative framework for criminal justice altered the prosecution process significantly: see generally JM Beattie, *Crime and the Courts in England 1660–1800* (Clarendon Press, 1986). In the seventeenth and eighteenth centuries, prosecutions were brought by victims and pre-trial process remained 'chancy' and 'largely informal', in Keith Smith's words: see Keith Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800–1957* (Clarendon Press, 1998) 42.

[26] In NSW, the Office of the Director of Public Prosecutions ('ODPP') exercises structured discretion in relation to prosecutions, under the broad umbrella of whether it is in the public interest that a matter be prosecuted: see *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, issued pursuant to the *Director of Public Prosecutions Act 1986* (NSW) s 13. For a discussion of the role of prosecutors in the US Federal system, in which the author argues that it is more accurate to speak of prosecutorial power than prosecutorial discretion, see Geraldine Szott Moohr, 'Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model' (2005) 8 *Buffalo Criminal Law Review* 165. The significance of the role of the prosecution in the adversarial system means that it might be argued that the trial is a process in which the *prosecutor* is called to account — to make out an accusation made against the defendant, to account for the decision to pursue a prosecution and perhaps the use

role in policy making, evident, for instance, in recent developments regarding the prosecution of assisted suicide in England and Wales.[27] Reflecting on these options regarding case disposition and policy development, and recalling the small slice of criminal charges that go to trial, suggests that the prosecution and prosecutorial decision-making should be regarded as a distinct layer within the criminal justice system, problematising any ready arguments based on their handmaid status.

Adopting this more differentiated approach to the actors and institutions in a criminal justice system permits a more fine-tuned analysis of criminal process, one that encompasses less public pre-trial practices, and one which conceptualises institutions and actors in what might be called a thicker way. As David Garland has argued in his sociological account of the contemporary 'culture of control' characterising late modern democracies, different actors — politicians, administrators and community representatives — respond to crime in different ways. According to Garland, administrative decisions (such as those made by prosecution agencies) are 'shaped by two agendas, one internal, the other imposed from the outside, and it is the administrators' job to pursue their organisational tasks in ways that at least appear to accord with the concerns of their political masters'.[28] More specifically, it is possible to argue that prosecutors have come now to occupy a place of hitherto unknown significance in adversarial criminal process. Indeed, William Stuntz has argued in the American context, with the burgeoning of criminal offences, the actions of police and prosecutors have become crucial in determining which offences and which individuals will be investigated and prosecuted.[29] According to Stuntz, positioned between legislators as the supremely authoritative voice on criminal law, and prosecutors with a significant amount of discretion as to process (to accept pleas, for instance), courts are relatively powerless.[30] Dubber has gone further to argue that the ubiquity of plea-bargaining in the American criminal justice system is symptomatic of a crisis in modern criminal process, in which informal and non-public arrangements have overtaken public trials in the imposition of punishment.[31]

The subject of the relationship between pre-trial and trial processes raises the issue of the legitimacy of criminal justice practices. Ho discusses legitimacy in

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of public resources to this end. This possibility is canvassed by Duff et al, above n 22.

27 See the Crown Prosecution Service's Policy for Prosecutors in Respect of cases of Encouraging or Assisting Suicide, available at <http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html> at 14 August 2010. For discussion, see Michael Hirst, 'Assisted Suicide after Purdy: The Unresolved Issue' [2009] *Criminal Law Review* 870.

28 David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 111.

29 See William J Stuntz, 'The Pathological Politics of Criminal Law' (2001) 100 *Michigan Law Review* 505. Stuntz argues that, in relation to the substantive criminal law, there is a 'tacit cooperation' between prosecutors and legislators, each of whom benefits from the creation of more crimes and a broader approach to criminal liability, and the marginalisation of judges, who alone are likely to prefer narrow liability rules than broader ones.

30 Ibid 510. Stuntz has also argued that, when the focus is broadened to include other criminal justice institutions, such as police and prisons, the picture is even darker. According to Stuntz, perverse constitutional incentives affecting the amount of protection actors in the criminal justice receive (and other factors, such as spending), prisoners receive less protection than defendants, who in turn receive less than suspects: see William J Stuntz, 'The Political Constitution of Criminal Justice' (2006) 119 *Harvard Law Review* 780.

31 See Markus Dubber, 'American Plea Bargains, German Lay Judges and the Crisis of Criminal Procedure' (1996–97) 49 *Stanford Law Review* 547.

detail (with reference to a range of sociological and other scholarship), but confines his analysis to the status of the trial verdict. However, it might be argued that, if the formal criminal trial by jury now plays a more symbolic than practical function, the legitimacy of criminal justice processes may turn on practices other than the verdict. In this respect, practices allied to the criminal trial — including pre-trial and post-trial practices and procedures relating to investigation and sentencing — which continue to be far less public and accountable than the trial itself have come to be crucially significant. Mindful of the increasingly stressed process operating in jurisdictions such as NSW, for instance, it may be argued that the legitimacy of the criminal justice system as a whole is in a somewhat perilous state. And, in relation to legitimacy, as George Fletcher has argued in relation to the criminal law, the problem of legitimacy is an area in which the political interweaves with the moral,[32] which in turn suggests that the rather thorny issue of legitimacy of penal justice institutions and practices is not likely to be entirely captured by a liberal political analysis.

If criminal process in the current era appears to be highly differentiated from within, what does it look like from outside? Here too, there is an argument that criminal law and process plays a more nuanced role than Ho's analysis might be taken to suggest. To appreciate this requires looking at criminal law and process not through the prism of liberalism but through the altogether thicker socio-historical conceptions of the state. Here, the analysis is of late modernity or neo-liberalism, in which scholars have examined criminal justice in a wider framework of the role of the state. In this context, criminal justice has come to be conceptualised as a mode of governance. A number of commentators have noted the overarching trend toward increasingly punitive and populist penal policies in place in a number of jurisdictions, facilitated by 'law and order' political rhetoric and widespread fear of crime.[33] Nicola Lacey has offered a persuasive analysis of the relevance of politico-economic structures for criminal justice systems which allows for consideration of the specific contours of particular capitalist democracies in any analysis.[34] Lacey argues that different types of capitalist economies provide structural incentives for more or less inclusionary criminal justice systems. According to Lacey, in two-party liberal market economies, such as that of Australia, 'the unmediated responsiveness of politics to popular opinion in the adversarial context of the two-party system makes it harder for governments to resist a ratcheting up of penal severity'.[35] This argument suggests that the political nature of criminal law and process must be understood not just as a matter of constitutionality, but also as a matter of particular democratic institutions and popular and party politics.

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[32] See George Fletcher, *The Grammar of Criminal Law: American, Comparative and International, Volume One: Foundations* (Oxford University Press, 2007) 182–9. Fletcher argues that liberalism, among other political theories, requires a moral judgment about what the individual deserves punishment. I discuss punishment below.

[33] See, for example, David Garland, above n 28.

[34] See Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge University Press, 2008).

[35] Ibid 76.

III The Role of the Accused

With liberal political theory's emphasis on the place of the individual citizen in a polity, it is not surprising to find the attention paid to the legal subject in a liberal theory of law. For instance, following Lon Fuller, TRS Allan has argued that the law must be justified to the citizen, to be shown to be 'worthy of his assent', through fair hearings, for example. According to Allan, fair procedures have an intrinsic value, in that they facilitate 'a moral dialogue between citizen and state'.[36] The corollary in the criminal trial context is the relationship between the accused (archetypally, but of course not always, a citizen and so-labelled temporarily) and the state. Ho argues that the criminal trial should be understood not merely as a means of 'bringing criminals to justice' but, more importantly, as 'a matter of doing justice to the accused'. For Ho, a liberal theory of the criminal trial means that rules of procedure should do more than promote the accuracy of verdict: it also means that the idea of criminal justice entails a view of what a person deserves by virtue of their status.[37] In Ho's words:

> 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.[38]

One of the procedural pay-offs of this idea of the person in virtue of their status as an accused is that recognising that the autonomy of the accused means that he or she cannot be forced to participate in the trial, but must have the right to do so. And, as Ho observes, this is a general rule of evidence in common law criminal law systems. Thus, in a criminal trial, the accused has what Dubber has referred to as 'rights of active autonomy' (such as the right to question witnesses and present evidence) as well as 'rights of passive autonomy' (such as the right not to testify).[39]

Other scholars of the criminal trial have reached similar conclusions about the central place of the accused in it. Duff and colleagues have developed a theory in which the criminal trial is, in essence, a moral enterprise. According to Duff and colleagues, the trial is a communicative process in which the accused is called to answer an allegation of wrongdoing and to account for that wrongdoing should it be made out.[40] As Duff has argued elsewhere, the criminal trial process includes the defendant's right to participate and must be understood not just in instrumental terms but in normative ones.[41] On Duff's account, the criminal trial process is one

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36 Allan, above n 15, 271.

37 Similarly, in relation to the adversary process, Allan argues that it is not just a matter of efficient dispute resolution, but of reconciling parties to the outcome: see ibid 8. For Allan, this is of particular importance in the field of public law, of which criminal law is a species.

38 Ho, above n 1.

39 See Dubber, 'Legitimating Penal Law' (2006–7) 28 *Cardozo Law Review* 2597, 2610.

40 See Duff et al (eds), *Trial on Trial Vol 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2007). This is connected to Duff's argument about criminal responsibility, which he argues should be understood as answerability: see Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing, 2007).

41 Duff, 'Fitness to Plead and Fair Trials: A Challenge' [1994] *Criminal Law Review* 419, 420–1. As a result of this view, for Duff, the significance of provisions on unfitness to plead lies in the fact that there is 'something inherently inappropriate in trying and convicting someone who can understand

in which the defendant is meant to respond as a 'rational and responsible agent'.[42] According to Duff, the accused must possess 'basic cognitive and intellectual capacities' and, beyond this, must understand the normative dimension of the trial — he or she must be able to understand what it means 'to be charged with and condemned for' a crime.[43]

It would be inaccurate, however, to over-emphasise the degree to which the accused is, in a practical sense, a freely consenting participant in his or her own trial. Since the development of the adversary trial, the participation of the accused in his or her trial has been reinforced by a range of coercive measures. Historical analysis indicates that, as trial by jury came to provide an alternative to trial by ordeal in the medieval era, the result was a perception that trial by jury was a 'consensual proceeding that the defendant had a right to decline'.[44] However, the development of court processes in this era which required a defendant to enter a plea in response to a charge, for instance, was backed up by the practice of *peine forte et dure*, in which weights were pressed on the defendant's chest in order to force him or her to enter a plea.[45] In the early modern period, the vast majority of criminal trials functioned to formalise a funding of guilt (and to decide the sanction).[46] Thus, the criminal trial was largely an exculpatory one, whereby the defendant's responsibility was assumed rather than an object of inquiry for the court,[47] and, where, 'if any assumption was made in court about the prisoner himself, it was not that he was innocent until the case against him was proved … but that if he were innocent he ought to be able to demonstrate it for the jury'.[48] As the adversary trial developed, the accused's participation has come to be reinforced by a range of other less physical but nonetheless coercive measures which continue in the current era, including bail laws and contempt of court provisions.

Beyond the specific issue of participation, it is possible to question the capacity of the criminal trial to uphold the rights of the accused. Ho does not discuss the limits on the capacity of the criminal trial to 'do justice to the accused' but it must be acknowledged that the capacity of the criminal trial process to advance the interests of the accused is limited. On a theoretical level, it must be recalled that the criminal trial is Janus-faced. One perspective on this has been offered by Mireille Hildebrandt who has referred to the 'double instrumentality' of

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neither the trial nor the verdict', over and above concerns like the risk of convicting the innocent: see Antony Duff, *Trials and Punishments* (Cambridge University Press, 1986) 30–1.

42 Duff, *Trials and Punishments* (Cambridge University Press, 1986) 35.

43 Duff, 'Fitness to Plead and Fair Trials: A Challenge' [1994] *Criminal Law Review* 419, 422.

44 John Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (University of Chicago Press, 1977) 75. In this era, individuals could avoid trial by ordeal by electing trial by jury. Langbein has argued that, even after trial by jury lost its exceptional character, it retained its consensual element. At this point, the criminal trial was gradually coming to replace 'lynch justice', whereby someone caught 'redhanded' was executed summarily: John Langbein, *The Origins of the Adversary Criminal Trial* (Oxford University Press, 2003) 65.

45 Beattie, above n 25, 337; Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime*, above n 44, 76. In the early stages of the development of the criminal trial, if a defendant was tried, he or she faced what John Langbein has called the 'accused speaks' or altercation trial. The 'accused speaks' trial involved 'large numbers of felony defendants, many of them transparently guilty', who were 'processed rapidly in jury trials' notable for the absence of counsel: see Langbein, *The Origins of the Adversary Criminal Trial*, above n 44, 25 and, more generally, 10–66.

46 Langbein, *The Origins of the Adversary Criminal Trial*, above n 44, 59.

47 Lacey, above n 13, 369.

48 Beattie, above n 25, 341.

the criminal trial in a democratic constitutional state. As she explains, a fair trial entails the identification of a defendant as an offender and thereby censures him or her for the offence, and at the same time also restricts the way in which the state can exercise its *ius puniendi* (against certain individuals only).[49] More generally, it must be recalled that the same system that protects the accused is charged with censuring him or her for his or her conduct through the process of conviction and punishment.[50]

On a practical level, in the current era, it has been argued that the rights of accused are under renewed threat. For instance, the practical strength of the idea that the accused has a right to participate in his or her own trial might be questioned. In the adversarial criminal trial, the accused is now all but silenced — a situation that has been contrasted with that of the inquisitorial system.[51] In terms of the development of the trial in the common law world, the silencing of the accused is the result of what John Langbein has called the 'lawyerisation' of the criminal trial process in England and Wales from the eighteenth century.[52] The 'lawyerisation' of criminal trial process was a positive force in that it was a key engine for the growth of the rights of the accused in the development of the adversary trial. A relatively comprehensive set of defendant rights gradually developed over the course of the nineteenth century, when a number of reforms to criminal procedure significantly affected the structure of criminal trials.[53] As Martin Wiener has persuasively argued, this was the result of a democratic concern for uniformity in the administration of criminal law.[54] However, as Lindsay Farmer has observed, the primary aim of the various reforms to criminal trial process was to expedite the criminal process with concern about the rights of the accused merely a secondary consideration.[55] In the current era, it might be argued that the success of the 'lawyerisation' of the trial has gone too far. In a strong critique of

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49 See Mireille Hildebrandt, 'Trial and 'Fair Trial': From Peer to Subject to Citizen' in Duff et al (eds), *The Trial on Trial Vol 2: Judgment and Calling to Account* (Hart Publishing, 2006) 25.

50 On this point, and as part of a larger argument about the ideological dimension of the formalisation of the modern criminal law, see generally Alan Norrie, *Crime Reason and History: A Critical Introduction to Criminal Law* (Butterworths, 2001).

51 See Jacqueline Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' in Duff et al (eds), *The Trial on Trial Vol 2: Judgment and Calling to Account* (2006) 235–9. For close analyses of recent developments in criminal trial process in inquisitorial system, see various contributions to John Jackson, Maximo Langer, and Peter Tillers (eds), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaska* (Hart Publishing, 2008).

52 Langbein, *The Origins of the Adversary Criminal Trial*, above n 44, 145. In his account of the 'lawyer-free' or 'accused speaks' trial that preceded the adversary trial, Langbein chronicles the factors, such as the absence of defence counsel and the rapidity of jury trials, which compelled the defendant to speak, 'either to hang himself or to clear himself' (36). As Langbein notes, in the 'accused speaks' criminal trial, the defendant was an informational resource for the court (36).

53 In the UK, these reforms included the introduction of defence counsel in felony trials (*Prisoners' Counsel Act 1836*, 6 & 7 Will IV, c 114), the creation of public prosecutors (*Prosecution of Offences Act 1879*, 42 & 43 Vict., c 22), and the introduction of a limited appeal system in criminal cases (*Crown Cases Act 1848*, 11 & 12 Vict, c 43) and the defendant's right to give evidence at the end of the century (*Criminal Evidence Act 1898*, 61 & 62 Vict., c 36). See generally David Cairns, *Advocacy and the Making of the Adversarial Criminal Trial, 1800–1865* (1998) 169–76; Clive Emsley, *Crime and Society in England 1750-1900* (2005) 183–211.

54 Wiener, *Reconstructing the Criminal: Culture, Law and Policy in England, 1830–1914* (1990). For discussion, see Lacey, above n 13.

55 Farmer, 'Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833–45' (2000) 18 *Law and History Review* 397, 413.

American criminal justice, Alexandra Natapoff has argued that criminal defendants have been profoundly silenced (and disempowered) by a range of practices adopted by a range of actors — prosecutors, judges, and defence counsel — entailed in the adversary process (including plea bargaining). For Natapoff, this pervasive silencing has compromised the rights of individuals, the effectiveness and legitimacy of the system and the democratic principles that underlie it.[56]

What is the role of judges in protecting the accused? If the criminal court is to be understood as an institution of the liberal state and a liberal institution, as in Ho's analysis, this means that the role of judges may be thought to have an outward-looking and an inward-looking dimension. This dual aspect of the judicial role is captured by the idea that, as Ho writes, the court lives up to basic aspirations of 'constitutional liberalism' (such as judicial independence, for instance), meaning that 'the criminal trial should embody liberal democracy'.[57] This also means that, in relation to 'executive improprieties in enforcing criminal law' (for example, state entrapment), the court does not have standing to condemn a citizen for the offence with which they are charged (thus, the court must grant a stay on a proceeding because the executive does not come with clean hands).[58] In relation to the role of the jury, Ho points to jury trials as one of the liberal credentials of a criminal trial, along with open justice. Ho holds that, while the practice of the jury trial has been criticised, as an ideal, 'its democratic roots are clear' because trial by jury is trial by peers, and thus by the norms of the community.[59]

As Ho is arguing at the level of ideals, it is hard to argue against this. However, as a matter of the historical development of the adversary trial, it might be argued that the role of the judge and jury has been a casualty of change. At the start of the eighteenth century, the criminal trial constituted an altercation between the prosecutor (who was commonly the victim of the crime) and the accused.[60] Prosecuting counsel rarely appeared in the criminal courts, and defence counsel was even rarer.[61] Judges dominated criminal trials, being 'fully engaged' in all aspects of the progress of each case and exercising an 'immense influence' on the way the jury received the evidence.[62] Over the course of the century, the trial process altered with features of the adversarial trial such as prosecution and defence counsel,[63] a distinction between fact and law, and the rudiments of laws of evidence and procedure appearing before 1800.[64] The increasing presence of prosecution and defence counsel over the course of the century gave 'more structure to criminal trials' and 'encouraged evidential objections and the recognition of burdens of

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56 See Alexandra Natapoff, 'Speechless: The Silencing of Criminal Defendants' (2005) 80 *New York Law Review* 1449. Natapoff argues that, when the socio-economic standing of most defendants in American criminal justice system is taken into account, the silencing represents a particular instance of the more generalised way in which law silences the disadvantaged: at 1501.

57 Ho, above n 1.

58 Ibid.

59 Ibid.

60 Langbein, *The Origins of the Adversary Criminal Trial*, above n 44, 11, 13.

61 Cairns, above n 53, 29; Emsley, above n 51, 198.

62 Beattie, above n 25, 342–3, 345.

63 Although the latter had a limited role until the nineteenth century: see Cairns, above n 53, 67–97; Langbein, *The Origins of the Adversary Criminal Trial*, above n 44, 107–77.

64 See generally Langbein, *The Origins of the Adversary Criminal Trial*, above n 44; Beattie, above n 25; and Beattie, 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries' (1991) 9(2) *Law and History Review* 221–67.

proof.[65] Accelerating involvement of lawyers meant that judges came to perform the more limited role of 'umpire and trial manager'.[66] The significance of the role of lay evaluators in the criminal trial has likewise varied over time. In the eighteenth century, juries played an 'increasingly constructive' role in mitigating the severity of the 'limited and inflexible nature of punishment' which, until the end of the eighteenth century, mainly consisted of death or transportation.[67] Moving into the current era, we can point to the generalised and rather precipitous decline of jury trials with large-scale expansion of summary jurisdiction and new uses of judge-only trials.[68] Given this, it might be concluded that the power of the judge and jury, as players in the liberal institution of the criminal court, is at something of an historical nadir.

The most significant outcome of the criminal process — punishment — is not given detailed consideration in Ho's analysis. Punishment is depicted as the end product of criminal process in Ho's account and, as such, it remains in a relatively undifferentiated state. But, as the pinnacle of the exercise of state power over citizens, punishment seems to require greater justification than any other aspect of criminal justice.[69] It is the coercive character of the punishment that follows a criminal conviction which makes it problematic from this perspective. Ho may hold that a trial duly conducted has ensured that the state is targeting the right person and that this person must suffer in the name of securing liberty for all.[70] But, as a form of state action, punishment requires a political as well as a moral justification: as Dubber argues, a theory of punishment must do more than justify 'the mere threat of punishment for this or that conduct' — it must also consider substantive criminal law, procedural criminal law and the actual infliction of punishment as well.[71]

IV Conclusion

In his liberal theory of the criminal trial, Ho has argued that the purpose of the criminal trial is to do political justice to accused persons and, as such, the court is a 'bulwark of personal liberty, standing between the powerful executive machinery that enforces criminal law and the citizens whom it is targeting'.[72] This is a laudable ideal and, at the level of liberal political theory, it seems persuasive. Indeed, even if acknowledging that the historical development of criminal process

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65 Cairns, above n 53, 30; see also CJW Allen, *The Law of Evidence in Victorian England* (1997) 149–51; Beattie, above n 25, 362–3.

66 Smith, above n 25, 44.

67 Ibid 45–6. See Lacey 2001, above n 13, for an account of mid-eighteenth century criminal law and process.

68 In England and Wales, for instance, it is now possible for a trial to take place in the Crown court without jury where there is evidence of 'a real and present danger that jury tampering would take place' and where additional measures would not fully succeed in protecting the jury: see *Criminal Justice Act 2003* ss 44 and 46.

69 This is all the more the case in relation to capital punishment. The death penalty continues to exist in a number of jurisdictions, including Singapore, which retains the mandatory death penalty: for discussion, see Roger Hood, *The Death Penalty: A Worldwide Perspective* (Clarendon Press, 3rd ed, 2002) 43–54, 172–6. The significance of this is that there is no separation of conviction and sentencing.

70 For further discussion, see Fletcher, above n 32, 182–9.

71 Dubber, above n 39, 2606–7.

72 Ho, above n 1.

or on-the-ground reality in a particular location makes the picture more abstract than real, it is arguably still vital to point out what forms criminal justice might take in an ideal world. But perhaps it is only possible to appreciate the real-world significance of the critique of those aspects of the criminal trial which do not come up to the liberal ideal by reference to those aspects of criminal process — political, social and historical — that fall outside Ho's sights. In considering precisely these aspects of the criminal process in this article, it may be concluded that both socio-historical and legal and philosophical scholarship must be enlisted in the project of understanding the criminal trial.