The Criminal Trial: Where Law Meets Justice?

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"Qui si convien lasciare ogni sospetto, ogni vilta convien che qui sia morta"

[Here must all distrust be left, all cowardice must here be dead].

-Inscription at the entrance to hell, Dante Alighieri's Divine Comedy.

What is justice? In the same way that introductory quotations may be deemed as cliché and uncreative, beginning a paper with a question is often indicative of an attempt to reframe a topic in a manner to suit one's own tangential purpose. In the circumstances before us, however, I think that this approach is rather apt – or rather, somewhat necessary. From the first day of law school, we are taught of the form of the law in our society, and how we, as future lawyers, should pursue our endeavours without ever losing sight of its interaction with justice. Indeed, adorning the walls of this law building, and scrawled onto several desks, is the grand proclamation of our faculty: "We Are Where Law Meets Justice". Yet, apart from the daunting compulsory theoretical courses we must take on the issue, it seems that these precepts are held to be unquestionably axiomatic. Is what we actually do, or what we claim to be doing, itself congruent with such lofty ideals?

This article will confront the assumptions that underlie much of what we preach and furthermore demonstrate, through an examination of the criminal trial, how the nexus between the formal law and substantive justice provides a rather opaque arena, of contested meaning and appropriated experience. However, before we can truly understand the implications of the form and function of the modern trial,

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we must first step back and briefly look at the historical roots of our current method.

I. TEMPORA MUNTANTUR, NOS ET MUTAMUR IN ILLIS

[The times are changed, and we too are changed in them]

The emergence of the judicial logic paralleling that which we today hold can perhaps be observed in 17th Century English procedure. In the centuries prior, the English criminal trial derived its substantive principles through the evocation of ecclesiastical doctrine. Consequently, the role of the parties and procedures employed were conceptualised in a manner consistent with these religious rubrics, with little attention given to evidence or witness testimony.[1] Insofar the outcome of such proceedings was deemed as just, or the form of the proceeding itself as legitimate, ultimate justification was provided with reference to divine portent.[2] It was only with the ushering in of the age of enlightenment that a departure from these ecclesiastical bases was possible and, from a socio-legal perspective, the form and substance of modern criminal law could truly gestate.

II. LEGES HUMANAE NASCUNTAR, VIVUNT, ET MORIUNTUR

[Laws of man are born, live, and die]

At the crux of this transformation was the refinement of the adversarial trial and the bases upon which the adopted procedures were legitimated. Although the initial differences in ecclesiastical and secular trials should not be overstated,[3] there was a distinctly new emphasis placed on according greater recognition to the individuals directly affected by the process.[4] Consequently, in order to arrive at an outcome acceptable in the eyes of those whom the criminal law supervises, the adversarial system developed mechanisms and structures to implement the principles of this new 'enlightened' method. For instance, whereas the right to defence counsel in 16th Century England was restricted to certain types of offences,[5] a statutory delineation of counsel roles and responsibilities was consolidated in the early 1800s.[6] In terms of the substantive bases from which these reforms were premised, the adoption of rational procedure in the search for the truth, as opposed to the outcome itself, constituted the teleological drive.[7]

This post-enlightenment reliance on substantive rationality further transformed the logic through which the manner and form of the trial was justified – the truth, quite apart from being the incontestable display of God's will, was, practically speaking, the ideal end toward which a properly structured criminal trial strived.[8]

III. VERITAS NUMQUAM PERIT

[Truth never perishes]

In terms of the purposes of the criminal trial, to what extent does the modern process maintain a focus on the ascertainment of the truth? Rather than the trial adopting a form congruent with this purpose, we have before us a system of rules and structures designed to maintain a degree of fairness to be accorded to the accused. The trial is no longer about truth per se,[9] but rather something of a political framework within which the rights of the accused are protected against the interests of the state. Consequently, the question before the trier of fact is not to be understood with reference to the overarching truth of the contestation, but whether the prosecution has adequately discharged their legal burden of proof.[10] Although the ideals underlying contemporary jurisprudence – ˚such as the golden thread, and the concepts within which they are embodied (e.g. Blackstone's ratio) – provide a theoretical basis for legitimation of legal form, their incorporation into procedure, via means such as a requisite legal threshold,[11] signifies the disjunction between their purportedly self-evident nature and the method for their practical enactment.

Thus, a balancing act is inherent in any analysis of a 'just' outcome, a process that involves the weighing of fair procedure with the social recognition of criminality. However, whilst these societal demands may be examined in terms of the starting point of our inquiry (i.e. those behaviours to which we label 'criminal'), they further extend to the expected outcome of the criminal trial.[12] Where the outcome of the trial is not congruent with these expectations, allegations of 'injustice' will oft be levied against those involved in its determination – an injustice with a meaning quite distinct from its legal counterpart. Whereas the legal recognition of a 'miscarriage' of justice is derived with reference to rules and analyses that are, in turn, derived from the normative principles of contemporary criminal law,[13] the legitimacy that society ascribes to the outcome of a criminal trial is defined primarily in terms of their culturally, as opposed to epistomologically, determined beliefs and prejudices.[14]

Consequently, public considerations of purpose (that is, that the criminal law exists to punish criminal wrongdoers) may serve to undermine the *legal* conceptualisations thereof.[15] This, in turn, has the potential to threaten the theoretical foundations upon which the legal institution relies so heavily for its claim to legitimacy. Quite apart from existing in an apolitical, secular, and purely legal social vacuum, the modern criminal trial operates within a society of individuals who make demands of the law. Demands based not on understandings of legal principle or precedent, but their own idiosyncratic experiences of the world, which, consequently, influences the form of the trial independently of what any substantive notions of 'justice' may require.[16] Whilst the sporting character of the adversarial trial had been present since the early days of William Garrow,[17] the modern criminal trial has been transformed into a theatrical performance, with the script, cast, and plot all understood primarily with reference to culturally determined understandings.[18]

> “...a balancing act is inherent in any analysis of a ‘just’ outcome, a process that involves the weighing of fair procedure with the social recognition of criminality”

IV. DEUS EX MACHINA

[God from the machine]

This theatrical character leads to the further transformation of the individuals involved in the proceedings, which holds significant implications for their existence as individuals and, in the case of the victim and the accused, the importance attached to their experiences. First of all, if adopting this dramaturgical analysis, the performance itself requires the characters to adopt a requisite form with corresponding roles and responsibilities. We have the prosecutor, a figure symbolically representative of the state, whose conduct requires a temperament and dispassion consistent with the role of a model litigant.[19] Representing the accused is the defence, whose role is also governed by a script set forth by the law.[20] So crucial is this actor that the State aids in their provision in some instances where an accused is otherwise unable to enlist one.[21] However, it is the status ascribed to the witnesses and victims of the proceedings that I find most disconcerting – as potentially otherwise unwilling participants in the proceedings, the law often makes demands of them for the purpose of maintaining the construction of legal narrative. True, certain structural safeguards exist in order to protect those who may be vulnerable,[22] but is this itself not a tacit assertion that the legal outcome exists in a stratum beyond the existential experiences of the individuals involved?[23] Experiences that derive their meaning not from the normative epistemic principles that shape the law, but the cultural norms and narratives that influence the manner in which meaning is extracted from the trial?[24]

It is the complexity of this trial process, a complexity predicated on the implementation of juridical principles, that may serve to compromise the public’s faith in the very same principles.[25] Further, it serves to highlight the additional tension between a ‘just’ outcome as perceived by the public, and a ‘just’ outcome as determined by the law – a tension that is derived from the cultural/epistemic distinction discussed previously. Indeed, it was during one of my court observations that I found myself at the edge of this disjunction. On the screen before the court was a 16 year old girl who was allegedly sexually assaulted by the accused.[26] Mr Defence, careful not to overstep the boundaries stipulated by the law,[27] began his cross-examination. Question after question, he lodged a carefully designed attack to undermine the credibility of the victim’s testimony. Question after question, the effect of such inquisition began to take a physically observable toll on the victim. Finally, she had enough. She walked off screen, and refused to continue. We were later informed that due to concerns for the complainant’s well-being, the ODPP decided not to continue with the prosecution. The accused was acquitted.

V. ACTA EST FABULA, PLAUDIT!

[The play is over, applaud!]

On the one hand, the legally informed part of me accepted the outcome. The case was before the court, the parties performed their roles, and the conduct of Mr Defence, however vulgar it may be otherwise be perceived, was entirely consistent with the rules of the game. He performed his duties to his client with the diligence and fearlessness required by his role.[28] On the other hand, the layperson in me was furious with such an outcome. How could such an absurd situation be allowed to pass? What kind of system would allow such despicable conduct against a vulnerable complainant who had already suffered so much? It this not an example of manifest injustice?

Insofar as the procedures of the trial are followed, no. Personal biases and socially informed prejudices are not, and must not be, the foundations upon which we justify the operation of the criminal law. Whilst they may be the bases from which the layperson derives meaning from the trial, the theoretical legitimation of the process is, and must be, based on the epistemic principles from which the law itself is borne. Consistency in the law – an ideal central to the emphasised fairness characteristic of our modern trial[29] – requires the outcome be assessed against the rationality inherent in substantive norms and not of the idiosyncratic nature of individual opinion.[30] What, then, do we make of that final link that mediates the implementation of legal theory to the final outcome – the jury? How can we be certain that the verdict that emerges from their deliberations is a reflection of legal principle and not merely a product of 12 culturally determined opinions?

Ultimately, we cannot. The entirety of the criminal trial by jury is built upon the core assumption that jurors are true to their oaths and will follow the directions of the judge.[31] In the words of Lord Mansfeld, although "it is the duty of the judge… to tell the jury to do right… [the jury] have it in their power to do wrong".[32] Although additional mechanisms exist through which the legal system supervises the implementation of principle into practice,[33] one key implication is glaring: the efficacy of our supervisory theory is limited. Whilst the principles of criminal law serve to justify and legitimate the procedural elements and substantive content of the criminal trial, their realisation is entirely dependent not on the computational calculations of legal homunculi, but on the very same humans whom the law purports to represent and protect. In the same manner that previous societies derived legitimacy of legal outcome with reference to religious faith, the integrity of the modern criminal trial rests upon the secular faith we place in the ultimate triers of fact.

VI. CESSANTE RATIONE LEGIS, CESSAT IPSA LEX

[When the reason for the law ceases, the law itself ceases]

What is justice? Lest this article end on a pessimistic note, allow me to confess that that is by no means my intention to be so, nor should the above be read in such a light. We have seen how the form of the trial, its substantive content, and the meaning to which society ascribes, is inextricably contingent upon the socio-historical context in which it takes place. So too are the normative epistemic principles from which law itself derives legitimacy. In terms of contemporary society, there exists a distinct incongruence between the two. On the one hand, the law seeks to impose a framework constructed from rationalised legal doctrine. On the other, those whom the law purports to protect and represent share an understanding derived from dramatically different bases – those of their individual, culturally influenced, and, ultimately, *human* experiences. Where such conflicts manifest in practice, society may lose faith in the integrity of the institutions and, conversely, the criminal law may

lose its focus on the individuals constitutive of that society – the very same individuals the law relies upon for the realisation of its ideals. There is manifest tension here, the significance of which, I must admit, I do not know. All I can do, perhaps all that any advocate of 'justice' can do, is to continue in our works with the proud commitment of a common lawyer. While it takes effort to critically analyse the theoretical flaws of a legal system, it takes Dante's courage to acknowledge these flaws, and nevertheless pursue the ideals that the system represents.

REFERENCES

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1. Such procedures relied primarily on each of the parties giving a verbal account of their claims, with a religious minister adjudicating. See generally Jill Hunter and Kathryn Cronin, *Evidence, Advocacy, and Ethical Practice: A Criminal Trial Commentary* (Butterworths, 1995).
2. Ibid.
3. Ibid.
4. For example, the *Prisoner's Counsel Act 1836* represented the statutory recognition of the prisoner's right to defence counsel.
5. For example, treason.
6. See generally John M Beattie, 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries' (1991) 9 *Law and History Review* 2, 221.
7. For a discussion of the historical shift in legal form and alternate theoretical perspectives, see Patricia O'Brien, 'Crime and Punishment as Historical Problem' (1978) 11 *Journal of Social History* 4, 508.
8. Mirja Damaska, 'Truth in Adjudication' (1998) 49 *Hastings Law Journal* 289, 294.
9. Thomas Weigand, 'Is the Criminal Process About Truth? A German Perspective' (2003) 26 *Harvard Law Journal of Law and Public Policy* 157, 169.
10. For a discussion as to the status of 'truth ascertainment' as against other purposes, see generally Daniel Givelber, 'Meaningless Acquittals: Do We Reliably Acquit the Innocent?' (1997) 49 *Rutgers Law Review* 1317.
11. That is, the 'beyond reasonable doubt' standard. This standard has been described as seeking 'to come as close to certainty as human knowledge allows': Laurence Tribe, 'An Ounce of Detention: Preventive Justice in the World of John Mitchell' (1970) 56 *Virginia Law Review* 371, 387.
12. Kenneth Nunn, 'The Trial as Text: Allegory, Myth, and Symbol in the Adversarial Criminal Process – A Critique of the Role of the Public Defender and a Proposal for Reform' (1995) 32 *American Criminal Law Review* 743, 745.
13. For example, where flaws in the trial process are of such a character to offend the fairness accorded to the accused, the courts are empowered to direct a more acceptable course of action. See, eg, *Criminal Appeals Act 1912* (NSW) s 6.
14. Nunn, above n 12, 745.
15. Craig Bradley and Joseph Hoffman, 'Public Perception, Justice, and the 'Search for Truth' in Criminal Cases' (1996) 69 *Southern California Law Review* 1267, 1271.
16. Nunn, above n 12, 796.
17. Beattie, above n 6, 248.
18. Nunn, above n 12, 745. I speak here primarily of jury trials, although summary hearings could also be viewed in a similar manner.
19. See *New South Wales Barristers' Rules 2014* (NSW) rr 82–94.
20. *New South Wales Barristers' Rules 2014* (NSW).
21. Such as public defenders.
22. For example, Part 5 of the *Criminal Procedure Act 1986* (NSW) deals with the use of evidence in certain sexual offence proceedings.
23. I concede, however, that certain provisions, such as section 138 of the *Evidence Act 1995* (NSW), acknowledge that '[the] truth, like all good things, may be loved unwisely – may be pursued too keenly – may cost too much': *Pearse v Pearse* (1846) 63 ER 950, 957.
24. Nunn, above n 12, 745.
25. Bradley and Hoffman, above n 15, 1279.
26. In cases involving the sexual assault of minors, arrangements are made for them to be in a room separate from the accused. See *Criminal Procedure Act 1986* (NSW) pt 6 div 4.
27. For example, section 41 of the *Evidence Act 1995* (NSW) governs the exclusion of improper questioning.
28. See *New South Wales Barristers' Rules 2014* (NSW) r 37.
29. See generally Henry Hart Jr, 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems* 3, 401.
30. Weigand, above n 9, 173.
31. *Gilbert v The Queen* (2000) 201 CLR 414, 425.
32. *R v Shipley* (1784) 4 Dougl 73, 99 ER 774, 824.
33. For example, certain trials can be elected to be heard by Judge alone.