the trial on trial

VOLUME TWO

judgment and calling to account

EDITED BY ANTONY DUFF, LINDSAY FARMER,
SANDRA MARSHALL AND VICTOR TADROS

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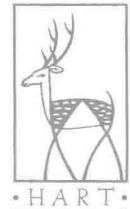

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Preface

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

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

RAD/LF/SEM/VT

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Contents

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Introduction: Judgment and Calling to Account

ANTONY DUFF, LINDSAY FARMER,
SANDRA MARSHALL AND VICTOR TADROS

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

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

[1] 'Introduction: Towards a Normative Theory of the Criminal Trial', in *The Trial on Trial 1: Truth and Due Process* (Oxford, Hart Publishing, 2004) 1.

[2] See B van Roermund, 'The Political Trial and Reconciliation', in this volume, 173, at 176.

[3] See the discussion of the religious origins of the trial in R Fenn, *Liturgies and Trials. The Secularisation of Religious Language* (Oxford, Blackwell, 1982).

[4] See, eg, C Hitchens, *The Trial of Henry Kissinger* (London, Verso Books, 2001).

that their actions or properties will be judged against some more or less determinate standard. This raises a first, large problem for a project that aims to put 'the trial on trial'. We have to ask both what it is that is to be put on trial or to the test, and what the appropriate standards or criteria are against which it is to be tested and judged.

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

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

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

[6] For discussion see, eg, P Duff, 'Changing Conceptions of the Scottish Criminal Trial: The Duty to Agree Uncontroversial Evidence', H Jung, 'Nothing But the Truth? Some Facts, Impressions and Confessions about Truth in Criminal Procedure', and J McEwan, 'Ritual, Fairness and Truth: The Adversarial and Inquisitorial Models of Criminal Trial', all in *The Trial on Trial 1*, n 1 above; and J Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure', in this volume.

[7] See L Douglas, 'Perpetrator Proceedings and Didactic Trials', in this volume.

[8] See B van Roermund, 'The Political Trial and Reconciliation', and S Veitch, 'Judgment and Calling to Account: Truths, Trials, and Reconciliations', in this volume.

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

[10] Questions that are pressed by van Roermund, Douglas and Veitch in this volume, and to which we return below.

The second question, about the standards or criteria against which the criminal trial is to be tested, goes to the heart of our project, since it requires us to ask about the proper purposes of criminal trials, and about the values (moral, political, social, economic?) by which they should be structured and in terms of which they should therefore be judged. The first volume of papers from the project tackled some key aspects of this question.[11] It focused particularly on the central but problematic role of truth in the criminal trial— on the extent to which the trial is, and ought to be, aimed at establishing the truth, as well as on what the object of the enquiry ought to be. It also dealt with some central structural features of the trial, in particular those that fall under the heading of 'due process'. This volume takes up some of the same themes (as is inevitable in a project of this kind), but shifts the focus onto the idea that trials serve or should serve to call alleged wrongdoers to account, and to subject them to an appropriate kind of judgment. Volume III, which is being co-written by the four lead researchers, will build on these papers, and the various discussions we have had during the project, to try to develop a more complete normative theory of—or at least an adequate normative perspective on—the criminal trial. In the remainder of this Introduction, we will comment briefly on the two main themes of this volume, and on how the various papers connect to them. We begin with 'calling to account', as a slogan that points, we believe, to a key feature of the criminal trial as a distinctive kind of institution, before turning to 'judgment' as that which is supposed to emerge from, and to be justified by, the process of calling a defendant to account.

1. CALLING TO ACCOUNT

To say that the trial is a procedure through which alleged wrongdoers are called to account for their alleged wrongdoings is partly to deny that we should see it simply as a procedure for either establishing the truth of what happened in the past (whether this person committed this offence) or determining what is to happen in the future (whether this person should be liable to criminal punishment, or to some other mode of coercive official treatment). It is to give the defendant a central, and at least ideally an active, role in the trial—as the person to whom the criminal charge is addressed; who is summoned to answer that charge, and to answer for his conduct if it is proved to be criminal; and who is expected to accept responsibility for what he has done, and to accept the condemnation that a conviction expresses if his guilt is proved.[12] It is, in other words, to begin not with a purely instrumental view of the trial, but with an approach that centres on the communicative and symbolic aims and functions of the trial procedure.

[11] *The Trial on Trial I*, n 1 above.

[12] For a sketch of this conception of the trial, see RA Duff, *Trials and Punishments* (Cambridge, Cambridge University Press, 1986), ch 4.

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

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

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

[13] For different aspects of this question, see, eg, the papers by Clark, Douglas, van Roermund and Veitch, this volume.

[14] P Roberts, 'Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication', in this volume.

[15] M Hildebrandt, 'Trial and "Fair Trial": From Peer to Subject to Citizen', in this volume.

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

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

[16] Van Roermund, this volume, 185–9.

[17] Veitch, this volume, 158–61.

[18] See E Girling, M Smith and R Sparks, 'The Trial and its Alternatives as Speech Situations', in this volume, on the rituals and conversational dynamics of apology.

[19] See A Ashworth and M Redmayne, *The Criminal Process* (3rd ed, Oxford, Oxford University Press, 2005), at 89–99.

[20] See, eg, Criminal Justice and Public Order Act 1994, ss 34–7; Criminal Procedure and Investigation Act 1996, s 5.

[21] Though a failure to plead is treated as a not guilty plea: Criminal Law Act 1967, s 6(1)(c).

and their freedom of conscience against the state's potentially oppressive power. Another part of the answer might be that defendants are called to account only when the prosecution has established a prima facie case against them in a public court, one which either judge or jury could regard as proving their guilt beyond reasonable doubt. It is only at this point that they have something to account or answer for, ie that they committed the crime charged; and if the prosecution has discharged that burden the defendant must then either offer an exculpatory account of the actions in question or accept conviction and punishment.

The second problem is deeper and more serious. If the defendant is called to account as both an addressee and an addressor of the norms by which she is judged, what can we say to or about the defendant who rejects those norms, or who does not recognise herself as belonging to the 'we' who claim to be their addressors? This question is raised most obviously by trials of avowedly 'political' offenders who reject the law under which they are tried or the regime whose law it is:[22] but if we accept van Roermund's argument in this volume that there is an ineliminable political dimension to every trial, or Veitch's argument in this volume about the impossibility of fair trials in unfair societies, the question becomes acutely problematic for all trials, because we can no longer assume that the defendants who appear in our courts can be plausibly portrayed as both addressors and addressees of the law's norms.

This issue also leads us back to the first question about calling to account: that of who is being called to account by whom. One important feature of many informal extra-legal procedures is that calling to account is a two-way process: the person who is called to account can respond by calling the accuser to account—a response that the accuser cannot condemn as improper. Now we could see the trial as a procedure in which the prosecutor, as well as the defendant, is in one way called to account: the prosecutor is called to make good the accusation against the defendant, to account publicly (we might say) for the decision to pursue the case, and is liable to formal or informal criticism if the charge proves to be ill-founded or frivolous.[23] But our criminal trials are not procedures through which defendants can call the state or the political community to account: defendants are not allowed to argue that the laws under which they are tried lack legitimacy, or that the state lacks the right or the moral authority to try them; and whilst there is some scope for argument about the meaning of the norms that the trial is to apply (a point emphasised by Hildebrandt), that scope is very limited. Sometimes defendants can in fact have political arguments heard: magistrates have sometimes allowed politically

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

[23] See, eg, Sir Willian Macpherson's Report, *The Stephen Lawrence Inquiry* (Cm 4262–I; London, TSO, 1999); and the reports by Sir Anthony Campbell and Dr Raj Jandoo on the 1998 murder of Surjit Singh Chhokar in 1998, available at http://www.scottish.parliament.uk.

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

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

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

[24] See *Lord Advocate's Reference (No 1 of 2000)* 2001 SCCR 297 for an example of this tension being played out between lower and higher courts.

[25] See Duff, n 12 above, at 135–9; for a critical response, see Veitch in this volume, 164–70.

[26] SJ Clark, '"Who Do You Think You Are?": The Criminal Trial and Community Character', in this volume; he also draws on the meaning of the 'Miranda' rule that suspects must be reminded of their rights.

[27] We should also think about the roles of other players in the trial, and of what is due to them (as well as of what is expected of them)—a point that Paul Roberts emphasises in this volume.