Theoretical Foundations of Criminal Trial Procedure

Paul Roberts

The International Library of Essays on Criminal Law

Theoretical Foundations of Criminal Trial Procedure

Edited by

Paul Roberts

University of Nottingham, UK
and University of New South Wales, Australia

ASHGATE

Published by
Ashgate Publishing Limited
Wey Court East
Union Road
Farnham
Surrey GU9 7PT
England

Ashgate Publishing Company
110 Cherry Street
Suite 3-1
Burlington, VT 05401-3818
USA

www.ashgate.com

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library.

The Library of Congress has cataloged the printed edition as follows: 2014942667

ISBN 9781409466055

MIX
Paper from responsible sources
FSC® C013985

Printed in the United Kingdom by Henry Ling Limited,
at the Dorset Press, Dorchester, DT1 1HD

Acknowledgements

Ashgate would like to thank our researchers and the contributing authors who provided copies, along with the following for their permission to reprint copyright material.

The American Anthropological Association for the essay: Robert Burns, Marianne Constable, Justin Richland and Winnifred Sullivan (2008), 'Analyzing the Trial: Interdisciplinary Methods', *Political and Legal Anthropology Review*, **31**, pp. 303–29. Reproduced by permission of the American Anthropological Association. Copyright © 2008 by the American Anthropological Association. All rights reserved.

The *American Criminal Law Review* for the essay: Akhil Reed Amar (1996), 'The Future of Constitutional Criminal Procedure', *American Criminal Law Review*, **33**, pp. 1123–40. Copyright © 1996 *American Criminal Law Review*, reprinted with permission of the publisher.

The *Cardozo Journal of International and Comparative Law* for the essay: Oscar G. Chase (1997), 'Legal Processes and National Culture', *Cardozo Journal of International and Comparative Law*, **5**, pp. 1–24.

The *Georgia Law Review* for the essay: Robert P. Burns (1997), 'Some Realism (and Idealism) About the Trial', *Georgia Law Review*, **31**, pp. 715–69.

Hart Publishing Ltd for the essays: Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (2007), 'Introduction: Theorising the Criminal Trial', *The Trial on Trial*, Vol. 3: *Towards a Normative Theory of the Criminal Trial*, Oxford: Hart, pp. 1–14. Copyright © 2007 Duff, Antony; Farmer, Lindsay; Marshall, Sandra; Paul Roberts (2006), 'Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication', in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial*, Vol. 2: *Judgment and Calling to Account*, Oxford: Hart, pp. 37–64.

The Harvard International Law Club, Harvard Law School for the essay: Jeremy Peterson (2007), 'Unpacking Show Trials: Situating the Trial of Saddam Hussein', *Harvard International Law Journal*, **48**, pp. 257–92.

Harvard Law Review Publishing Association for the essays: James B. Thayer (1898), 'The Present and Future of the Law of Evidence', *Harvard Law Review*, **12**, pp. 71–94; Lon L. Fuller (1978), 'The Forms and Limits of Adjudication', *Harvard Law Review*, **92**, pp. 353–409.

Oxford University Press for the essays: William Twining (2003), 'Evidence as a Multi-disciplinary Subject', *Law, Probability and Risk*, **2**, pp. 91–107. Copyright © 2003 Oxford University Press. All rights reserved; Susan Haack (2004), 'Epistemology Legalized: Or, Truth, Justice, and the American Way', *American Journal of Jurisprudence*, **49**, pp. 43–61.

Publisher's Note

The material in this volume has been reproduced using the facsimile method. This means we can retain the original pagination to facilitate easy and correct citation of the original essays. It also explains the variety of typefaces, page layouts and numbering.

Series Preface

This series, consisting of six volumes, brings together some of the most significant and influential writings to have been published in the field of criminal law, criminal procedure, and criminal justice in the last century or so. Individually, each volume illuminates many of the key debates that have ebbed and flowed in the field; collectively, they provide the conceptual, theoretical, and structural tools we need to understand how contemporary criminal law works. That understanding is further advanced by the fact that each volume begins with a synthetic introduction which places the selected essays in their context and explores the connections and contrasts between them.

The Theoretical and Philosophical Foundations of Criminal Law (David Dolinko) includes 19 path-breaking essays on criminal law theory. These essays consider demanding questions such as: What conduct should and should not be criminalised? What authority does the state have to respond to various criminal wrong doings by inflicting intentional harm on perpetrators in the form of criminal punishment? What role do the concepts of individual 'choice', 'capacity' and 'character' play in the ascription of moral and criminal responsibility? What is the relevance of mental state to culpability judgement and how should this judgement change when we have full information about the reasons someone had for acting as they did? What liability should be imposed on people for the crimes they seek to bring about but fail? and, more generally, What place should luck and happenstance have in the criminal law?

In *The Structure and Limits of Criminal Law* (Paul H. Robinson) a further 19 essays confront a series of important foundational questions regarding how we should best understand the architecture of the criminal law: Is it possible to construct a single, unified, conceptual framework into which all criminal law rules fit? if it is, What value does such a framework have? Can we identify a set of necessary and sufficient conditions for criminal liability? and, if we can, What are the proper limits of these doctrines and how should they be expressed?

In the volume on *The Codification of Criminal Law* (Michael Bohlander and Daley Birkett) issues concerning the development of criminal codes are considered by another 24 essayists. The apparently simple question 'What is a criminal code?' turns out to be frustratingly difficult to answer, as is the question whether it is sensible for every country to adopt one. Most authors in this volume, whether approaching the topic from a theoretical, historical, or comparative perspective, answer the latter question in the affirmative. But a few are more sceptical. For them, whatever approach is taken, the promised benefits of full codification – simplicity, accessibility and comprehensibility – will always remain tantalisingly out of reach or be undermined or negated by the likely loss of flexibility and responsiveness that codification brings.

Concern with human rights has been present in one form or another in all human societies since time immemorial. Yet, despite these deep roots, the notion that every human being is a rights-bearer by virtue of their humanity, and that certain of these rights are universal and inalienable, has been taken up in the last 100 or so years in a way that has no parallel in any previous historical period. This explosion of interest in human rights thinking raises

difficult questions for the doctrines, rules, and principles of criminal law, criminal procedure, and criminal justice. It creates tensions between the instrumental aims of crime reduction and public safety embraced by all criminal justice systems and the protection and safeguards that human rights discourse seeks to achieve. So how are these tensions to be eased? This is the key question that lies at the heart of the 14 essays included in *Criminal Law and Human Rights* (P.H.P.H.M.C. van Kempen). Through the lens of human rights discourse, central criminal law conundrums are considered: What are the implications of the right to be presumed innocent? How should the conflict between the right to liberty and the use of preventive detention be resolved? How should the protection we offer to privacy affect the way criminal investigations are conducted? What is the impact of human rights protection on the scope of legitimate criminalisation? and What is its impact on the doctrines, principles, and rules of substantive criminal law, criminal procedure, and sentencing?

In *Theoretical Foundations of Criminal Trial Procedure* (Paul Roberts) 19 essays are gathered together with a focus on the criminal trial and its theoretical underpinnings. The reflection in these pieces embraces the detail of the trial process and the law of evidence as well as discussing the values that ought to be honoured in criminal trials, casting light on these issues through case analysis, the use of interdisciplinary methods, and insights drawn from international comparisons.

Finally, in the volume of essays on *Expert Evidence and Scientific Proof in Criminal Trials* (Paul Roberts), 26 essays focus on the role that science plays in the modern criminal trial. Here abstract discussions of the concepts of truth, fallibility, and authority nestle side by side with analyses of data collected from interviews and psychological experiments, including the use of mock juries, discussion of major decided cases, surveys of solutions found in other legal systems, and consideration of practical questions such as the admissibility of scientific evidence in criminal trials and issues regarding how expert evidence and scientific proof are portrayed in the media and on television.

Taken as a whole, the volumes in this series serve up more than 100 essays written by leading scholars in the field of criminal law, criminal procedure, and criminal justice. Reading or re-reading them will inform (and, I trust, entertain) both the novice reader and the expert alike. But, whatever their distinction and significance, no set of essays can – or should – mark the end of debate in these important areas. My hope, therefore, is that this series will spark yet more intellectual inquiry which will continue to advance our knowledge and understanding of these fields, something which becomes more of a necessity as each day passes.

STEPHEN SHUTE,
Head of the School of Law, Politics and Sociology, University of Sussex, UK
Series Editor

Introduction

Disciplining Criminal Trial Procedure

The essays reproduced in this volume explore the 'theoretical foundations' of 'criminal trial procedure'. This is a precise, but also fundamentally question-begging, description of the book's scope and ambitions. Viewed in isolation, each of the components of its title might be regarded as conceptually problematic. There are well-rehearsed difficulties, for example, in separating 'trials' from 'pre-trial' proceedings, partly because the trial/pre-trial dichotomy is an artefact of institutional procedural traditions and different legal systems draw the line in different places, for reasons that seem to them compelling but would not necessarily be viewed as logical by foreign observers.

Differentiating 'criminal' from non-criminal legal proceedings likewise presents formidable conceptual challenges, at least if we want to go beyond the positivistic truism that a trial is a *criminal* trial whenever it is so designated in law. This kind of answer might have satisfied past generations of jurists (Williams, 1955; Smith and Hogan, 1965, ch. 2; Card, 1984, ch. 1; now see Lamond, 2007) but it is self-evidently incomplete under contemporary conditions of cosmopolitan legality, in which supra-national tribunals (such as the European Court of Human Rights and the EU Court of Justice) as well as apex domestic courts are routinely confronted with competing normative orders and are sometimes obliged to choose between ostensibly applicable, yet conflicting, legal standards.[1] In comparable situations of normative conflict, there is no alternative but to reach for some extra-institutional criterion to differentiate penal proceedings from other types of legal process. This might be found, for example, in the powerful set of ideas that criminal trials paradigmatically impose *censure* on *morally culpable* wrongdoers for serious *public wrongs* (see, for example, Duff, 2007; Simester and von Hirsch, 2011; von Hirsch, 1993). (Other tempting criteria of differentiation, such as the notion that criminal adjudication always has more serious consequences for the participants than civil law matters or the – true, but ultimately inconsequential – observation that only criminal proceedings can result in imprisonment, quickly encounter fatal counterexamples.) And again, there are significant comparative variations: 'strict liability offences' appear especially problematic to common lawyers, for example, partly because we lack the civilian jurist's concept of the administrative offence (Spencer and Pedain, 2005).

A third area of conceptual uncertainty concerns the notion of a 'theoretical foundation'. What is meant by 'theory'? Is theory understood as embracing, or in contradistinction to, 'practice'? (I strongly prefer the former interpretation.) In what sense are theoretical considerations *foundational*? Foundational *to what*?

Without wishing to trivialize these methodological complexities, there is no need to treat them as major obstacles to progress at the outset. Readers will have a core, common-

[1] For tasters from this smorgasbord, see, for example, Giannoulopoulos (2013), Jackson and Summers (2012), Roberts (2012b) and Slaughter (2000).

sense notion of what a 'criminal trial' is, and that will suffice to get the ball rolling. Vague impressions and unreflective presuppositions can be, and hopefully will be, refined as the exposition proceeds, through critical engagement with the essays reproduced in this volume and briefly introduced and contextualized in the following pages. The idea of 'theoretical foundations' is likewise intended in its idiomatic, non-technical sense. 'Theories' are typically *general* and *synthesizing*, and consequently inevitably somewhat reductive in extrapolating from the messier realities of life. Theories are also deliberately *selective*, in seeking to highlight matters of particular importance. This book seeks to highlight factors that do or should figure prominently either in *explaining* criminal trial procedure or in its *normative justification* (or in both enterprises simultaneously). The first dimension of that endeavour is essentially an exercise in sociolegal or doctrinal description; its second dimension is a (modest) contribution to applied political morality. The best theories are *methodologically self-aware*, whether or not they are also pluralistic in their methods and perspectives. So many of the essays reproduced in this volume are concerned with method, in one way or another, but – as I hope to demonstrate – not in the sterile fashion that references to 'legal methodology' may conjure for some readers. William Twining has suggested that a serviceable conception of Jurisprudence would be that division of legal scholarship that concerns itself with the general, theoretical part of Law as a discipline.[2] If we were to adapt Twining's pithy definition to the present project, we might equivalently describe it as a Jurisprudence of Criminal Trial Procedure.

Rather more needs to be said, by way of initial orientation, about the idea of Criminal Trial Procedure as a legal disciplinary specialism. It is tolerably clear that 'Criminal Trial Procedure' must be that subdivision of 'Criminal Procedure' concerned specifically with the trial stage of criminal proceedings. Thus, questions of charging, bail, disclosure, witness warnings and preparation, plea and venue hearings, discontinuance and so forth are part of Criminal Procedure, but not of Criminal *Trial* Procedure. Even then, it is easy to think of topics – such as the drafting of indictments, committal proceedings, plea-bargaining or judicial rulings on abuse of process submissions or admissibility challenges on the *voire dire* – which arguably straddle the pre-trial/trial divide. More fundamentally, *common lawyers do not share a unified conception of criminal procedure as a legal subject or disciplinary specialism* (for elucidation, see Roberts, 2011b). Criminal Procedure is not generally taught as a university-level subject by UK law schools. It is relegated to professional training courses and on-the-job experience, as if it concerned only the sort of 'legal plumbing' tasks that criminal practitioners must know to conduct criminal litigation on a day-to-day basis but which rarely merit sustained intellectual inquiry or critical reflection. The inferior pedagogic status of criminal procedure seemingly equates it with prosaic formalities such as filling in the correct official forms and adhering to courtroom etiquette.

Of course, this is only a partial, and as it stands quite misleading, description of criminal procedure teaching in the UK. It would be very strange indeed if a set of legal rules, doctrines and principles regulating the relationship between the individual and the state in criminal proceedings – laws which, in other words, stand sentinel at the gates of political liberty and

[2] '[J]urisprudence is the theoretical part of law as a discipline with a number of jobs or functions to perform to contribute to its health. A theoretical question is no more and no less than a question posed at a relatively high level of abstraction' (Twining, 2009, p. 21).

personal freedom – received no attention whatsoever in British legal education. The truth is that they are parcelled out piecemeal to a variety of other legal subjects. Some aspects of criminal procedure, including those with the longest historical pedigree such as the law regulating police search and seizure[3] and the jury's prerogative to return a general verdict as the exclusive arbiter of fact in criminal trials,[4] fall within the ambit of Constitutional Law. Certain specialist matters (for example the scope and exercise of prosecutorial discretion[5]) may be covered by Judicial Review or Administrative Law, where these are taught as separate subjects. Elective courses on Criminal Justice or Criminology often encompass procedural aspects of policing, criminal investigations, trials or appeals, though not necessarily in any great doctrinal detail. At a stretch, one could find points of intersection between criminal procedure and Contract Law, Torts, Employment Law, EU Law and so on; albeit that considerable exertion would probably be required to track down any of these exotica in courses actually taught to law students. By far the most significant repository of procedural law, however, is that taxonomic curiosity known to common lawyers (but unknown to other juristic traditions) as the Law of Evidence.

What is so curious about a unified Law of Evidence, applicable to all kinds of legal proceedings? The pioneers of the subject, from Bentham and Stephen to Wigmore and Cross, evidently believed that elucidating a comprehensive Law of Evidence was a legitimate and worthwhile enterprise: and the fact that civilian jurists have always sharply differentiated Criminal Procedure from Civil Procedure, in itself, supplies no refutation. A unified Law of Evidence makes sense as an enterprise of (small 'c') codifying the legal rules governing the processes of judicial proof. Substantive laws, of crimes, torts, contracts or whatever, do not apply themselves. They are applied through (legal) institutional processes designed for that purpose, and those processes themselves must assuredly strive to be rational and compliant with the rule of law. Rational adjudication will proceed, not on the basis of hunch, intuition, visceral prejudice or unsubstantiated allegations, but on the solid foundation of *proof* by reliable *evidence* to a demanding epistemic standard. This body of procedural or 'adjectival' (Bentham's term) legal rules, which is clearly distinct and severable from the substantive laws that courts apply, presents a tangible and plausibly coherent object for comprehensive legal study, through a unified Law of Evidence.

Epistemic considerations are at the core of criminal procedure, and there should be no doubting their significance and value. These issues are taken up, in particular, in Part III of this volume. Yet treating applied epistemology as the unifying thread of a coherent Law of Evidence comes at an exorbitant price. For one thing, it immediately creates an uneasy and intermittently unstable division between 'evidence' and 'procedure', predictably

---

[3] *Entick* v. *Carrington* (1765) 2 Wils 275, 95 ER 807.

[4] *Bushell's Case* (1670) Vaughan 135, 149–50; 124 ER 1006 ('if it be demanded, what is the fact? the Judge cannot answer it: if it be asked, what is the law in the case, the jury cannot answer it … [T]he jury find not (as in a special verdict) the fact of every case by it self, leaving the law to the Courts, but find for the plaintiff or defendant upon the issue to be tryed, wherein they resolve both law and fact complicately, and not the fact by it self … The legal verdict of the jury to be recorded, is finding for the plaintiff or defendant, what they answer, if asked questions concerning some particular fact, is not of their verdict essentially, nor are they bound to agree in such particulars').

[5] *R (Gujra)* v. *Crown Prosecution Service* [2013] 1 AC 484, [2012] UKSC 52; *R* v. *A (RJ)* [2012] 2 Cr App R 8, [2012] EWCA Crim 434; *R* v. *DPP ex parte Manning* [2001] QB 330 (Admin).

marginalizing criminal procedure's less evidentiary dimensions. This is especially confusing in those areas of Evidence doctrine which operate in tandem with procedural rules, such as the law pertaining to memory refreshing and other aspects of witness testimony (sometimes described compendiously as the rules regulating 'the course of the trial'; see, for example, Heydon and Ockelton, 1996, ch. 20; Malek *et al.*, 2013, chs 10 and 11; Tapper, 2010, ch. 6). More fundamentally, focusing primarily on epistemic considerations tends to distract attention from evaluative concerns, and in a way that reverses the proper order of normative priorities in criminal adjudication. Two, related, points should be stressed. First, a moment's reflection will confirm that criminal procedure's underpinning values and rationales are quite different from the procedural values animating civil litigation. Far from being minor variations or trivial appendages on normative uniformity, the presumption of innocence, the criminal standard of proof, the prosecutor's special ethical responsibilities as a 'minister of justice', the accused's privilege against self-incrimination, the exclusion of improperly obtained prosecution evidence and many other doctrines that have *no application whatever to civil proceedings* constitute the normative core of criminal (trial) procedure. Second, the orthodox legal position in England and Wales is absolutely unequivocal: accurate fact-finding and other epistemic considerations must serve the 'overriding objective' of achieving justice in criminal adjudication.[6] In other words, epistemology plays second fiddle to normative criteria of penal justice in criminal trials. (Interestingly, the same methodological priority is adopted by civil litigation as well, though a different – non-penal – conception of justice prevails in that context (Zuckerman, 2013, ch. 1).)

For our purposes, the essential point is this: epistemology may be *capable* of providing a coherent conceptual foundation for a unified Law of Evidence, but adopting this approach to the subject matter produces deep normative incoherence. Even if it were true (and I am not convinced that it is) that our grasp of the epistemology of adjudicative fact-finding would be harmed by disaggregating the Law of Evidence into separate legal subjects of Criminal Procedure and Civil Procedure, criminal procedural law itself advertises and insists upon the priority of normative over epistemic considerations. There is nothing to stop criminal proceduralists from drawing on civil litigation for the purposes of gaining comparative insight into the epistemological – or any other shared – dimensions of legal trials.

The programmatic argument for preferring normative to epistemic coherence in the disciplinary construction of Criminal Procedure (incorporating the criminal components of the Law of Evidence as traditionally conceived by common lawyers) strikes me as compelling. Criminal Evidence can be conceptualized as a coherent subfield of Criminal Procedure (Roberts and Zuckerman, 2010), but systematic analysis of civil litigation must be undertaken elsewhere. Since textbook writers continue to produce new editions reproducing the old, comprehensive rubric of a unified Law of Evidence,[7] we must infer that not everybody is convinced. However, there is another, more pragmatic reason for revisiting orthodox disciplinary taxonomies, and this really ought to be regarded as clinching, even by those who

[6] Criminal Procedure Rules, r.1: see 'Normative Underpinnings', below.

[7] Many of these books are excellent in other ways. *Phipson* (Malek *et al.*, 2013) and *Cross & Tapper* (Tapper, 2010), are English legal institutions with enormous influence on pedagogy and litigation practice spanning many decades. Figuring prominently among the most intellectually rigorous and theoretically ambitious treatments are Dennis (2013) and Ligertwood and Edmond (2010). As a concise summary for students, Choo (2012) is hard to beat.

are unimpressed by aspirations towards normative coherence. The fact is that the doctrinal law of criminal evidence has lately evolved into an almost entirely separate branch of procedural law, with precious little in common with its civil counterpart. At one time, it made sense to treat significant chapters of evidentiary doctrine as common to all types of litigation. The rule against hearsay (and its manifold exceptions), the law of presumptions and burdens of proof, witness competency and credibility, privilege, collateral finality and the rule against narrative, the rules regulating expert opinion testimony and so forth constituted a solid and substantial core of generic evidentiary law. But this convergence represented a phase in the historical evolution of common law evidence doctrine which has now passed. One way of understanding this transition is to say that a subject which was fashioned, historically, by common law judges responding on a more or less ad hoc basis to the practical challenges of litigation has since been radically restructured through legislation. Parliament has relaxed or abolished evidentiary doctrines on the civil side,[8] while energetically introducing successive waves of new procedural and evidentiary rules applicable only to criminal proceedings. There has been statutory reform of police investigative procedures,[9] radical innovation in the area of 'special measures' for vulnerable and intimidated witnesses[10] and systematic overhaul of hearsay and bad character evidence.[11] Case law remains important, to be sure; and thanks to the indefatigable industry of the Court of Appeal (Criminal Division) and other appellate tribunals it is never in short supply. However, this burgeoning corpus of precedents and judicial guidelines is increasingly preoccupied with points of statutory interpretation confined to criminal litigation, rather than elucidating generic common law evidentiary doctrines. The upshot is that former bedfellows in a capaciously inclusive Law of Evidence have increasingly gone their separate ways, with no realistic prospect of reconciliation.

The practical disaggregation of Evidence law has been in full swing for thirty years or more. Two further developments, which have significantly affected the law of England and Wales only in the last decade or so, have further cemented the break-up. The first is the 'human rights revolution' in English criminal procedure law precipitated by the entry into force of the Human Rights Act 1998 in October 2000 (Roberts and Hunter, 2012). Since that time, traditional evidentiary doctrines and new statutory provisions alike have come under the scrutiny of the European Court of Human Rights (ECtHR) and have been obliged to comply with the Strasbourg Court's extensive 'fair trial' jurisprudence. Although Article 6(1) of the ECHR stipulates criteria of fairness applicable to all types of adjudication (for example the threshold requirement of an 'independent and impartial tribunal constituted by law'), Article 6(2) and – especially – Article 6(3) specify detailed additional procedural requirements for fair *criminal* trials. The institutional wedge between criminal and civil proceedings is thus hammered home at the supra-national level. A second significant development of relatively recent vintage is the introduction of a set of Criminal Procedure Rules (CrimPR) in 2005.

---

[8] Notably abrogating the common law hearsay prohibition: Civil Evidence Act 1995, s.1; facilitating the admissibility of expert (opinion) evidence: Civil Evidence Act 1972; and limiting the privilege against self-incrimination: Civil Evidence Act 1968.

[9] See, for example, Regulation of Investigatory Powers Act 2000, Criminal Procedure and Investigations Act 1996, Police and Criminal Evidence Act 1984 and their related, ever-expanding Codes of Practice.

[10] Youth Justice and Criminal Evidence Act 1999; Coroners and Justice Act 2009.

[11] Criminal Justice Act 2003, ss.98–139.

Subsequently updated at regular intervals, the CrimPR are an exemplar of what I call 'hard-working soft law': their enormous impact on the day-to-day conduct of criminal litigation is belied by their lowly formal status as delegated legislation. Revealingly, for our purposes, the Civil Procedure Rules (CPR) were introduced seven years earlier, following Lord Woolf's extensive review of civil proceedings (Woolf, 1996; Zuckerman, 1999).[12] The advent of the CrimPR might be regarded, in retrospect, as supplying the missing half of the procedural equation. At the operational level of real trials, Criminal Procedure and Civil Procedure are now formally disaggregated. Meanwhile, Law of Evidence textbooks continue to propound a mythical conception of evidentiary law that exists only in commentators' imaginations; or else, they trip over themselves repeating the solecism that criminal evidence represents an 'exception' to supposedly generic evidentiary doctrines. It is high time we dispensed with these threadbare excuses for anachronistic classifications.

With some appreciation of the broader intellectual context in which common law ideas of evidence and procedure evolved, we are better equipped to tackle basic questions of disciplinary constitution and taxonomy. Practical developments in Evidence law over the last three decades demand new conceptual thinking. Disciplinary taxonomies that served previous generations of legal scholars and practitioners admirably, and which were innovative and forward-thinking in their day, have been overtaken by events. A sharp distinction between 'evidence' and 'procedure' is often arbitrary in the pejorative sense, and in practice has always tended to be honoured more in the breach. Subsuming the traditional Law of Evidence within discrete fields of Criminal Procedure and Civil Procedure would promote normative coherence and reflect the realities of modern litigation. These classificatory issues are not merely scholars' conceits. The ways in which the law of (criminal) evidence is conceptualized and related to its underlying normative rationales affect advocates' strategic choices and influence judicial rulings on evidentiary admissibility and directions to the jury. Our disciplinary subject matter stands at an historic intellectual crossroads, and must choose which path to take.

The project of *disciplining* criminal trial procedure has two, complementary dimensions, which might be encapsulated as *verb* and *noun*. The discipline (noun) of Criminal (Trial) Procedure is constituted through an active process of disciplinary definition and elucidation which proceeds, in part, by devising classificatory frameworks to marshal, and discipline (verb), relevant institutional materials and resources. The arrangement of essays reproduced in Part I, and indeed the volume as a whole, are intended as modest contributions to disciplinary reinvention. This book focuses exclusively on Criminal Trial Procedure, but without any implication that pre-trial criminal process or civil litigation are any less worthy of detailed study: these topics would merit dedicated volumes of their own. The criminal trial is a mainstay of political morality and an iconic social institution. There have been great variations in criminal trial procedure, through time and across different places and spaces. But no culture, tradition or nationality, to my knowledge, has ever regarded criminal adjudication as trivial or inconsequential. To the contrary, criminal trials deal in guilt and innocence, pain, suffering and loss, good and evil, personal reputation and community mores, censure and punishment, atonement and redemption, life – and death – itself. As I write this Introduction, people around the world are transfixed by televised images from a South African courtroom

[12] The CPR, currently in their seventy-fourth iteration, are housed on the Ministry of Justice website: www.justice.gov.uk/courts/procedure-rules/civil/rules.

where a Paralympic athlete stands accused of murdering his fiancée. In previous years the celebrity criminal defendant might have been Michael Jackson or George Michael, Slobodan Milošević or Saddam Hussein, Rosemary West or Harold Shipman, O.J. Simpson or the Guildford Four, and on it goes. Joseph Kony's indictment to appear before the International Criminal Court (ICC)[13] recently 'went viral' across the internet.[14] Criminal adjudication is a staple of globalized 24-hour media reportage (not to mention its eternal fascination for Hollywood, TV serials and crime thriller writers). Rigorous inquiry into the theoretical foundations of criminal trial procedure, while never out of season, could hardly be more contemporary, or potentially significant, than it appears to be today.

Questions, Concepts, Methods

The first pair of essays, which introduce Part I of this volume, are in many ways an odd couple, but their obvious points of contrast, as well as certain suggestive parallels, are central to our inquiries. Written one hundred years apart, both pieces are exercises in disciplinary stock-taking, in which their respective authors consciously reflect on the current status and future prospects of procedural law. James B. Thayer and Akhil Reed Amar are alike justly hailed as pioneers in their respective fields. Notably, in these essays, they are ostensibly concerned with *different* disciplinary specialisms. Thayer's topic, in Chapter 1, is the Law of Evidence, while in Chapter 2 Amar addresses 'constitutional criminal procedure' which he characterizes as 'a subfield of constitutional law' (p. 27). But as we have already seen, both topics properly (also) belong to the integrated field of Criminal Procedure, wherever else they might be positioned on a comprehensive map of legal disciplinary specialisms.[15]

James Bradley Thayer has been credited as one of the founders of the modern Law of Evidence (Hook, 1993; Swift, 2000; Twining, 1985, chs 3–4, appendix). Although certain common law evidentiary doctrines plainly predate the turn of the twentieth century (Allen, 1997; Langbein, 1996; Landsman, 1990; Whitman, 2008), and while Thayer's understudy Wigmore (1904) was the first to produce an encyclopaedic treatment of the entire subject, Thayer crafted the basic intellectual building blocks of what Twining (1982) calls 'the Rationalist Tradition of Evidence Scholarship' (see also Twining, 1985, ch. 1). The Rationalist Tradition is committed to the proposition that legal fact-finding should be based on reliable evidence and that legal claims should be proved to an appropriate evidential standard; that at least in principle (it is accepted that many things can go awry in practice, and sometimes do), factual disputes in law should be settled through logical processes of inferential reasoning taking full account of pertinent information – that is, 'evidence' – properly bearing on the

[13] *Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005*, ICC-02/04-01/05, available at: www.icc-cpi.int/.

[14] Invisible Children, Inc. 'Kony 2012', invisiblechildren.com/kony/; 'Kony 2012', www.theguardian.com/world/kony-2012.

[15] There is no reason to expect neat or exclusive disciplinary divisions, partly because disciplinary taxonomy is, to some extent, a function of the classifier's purpose and objectives. For example, Criminal Law is plainly Public Law if the alternative classification were 'Private Law'; but there is nothing inherently objectionable or very mysterious about Public Law scholars routinely excluding Criminal Law from the ambit of their subject, as most of them for the most part do.

matters in dispute. Just about every judge, advocate and policymaker, as well as the vast majority of Evidence scholars, in the modern period has been a Rationalist in this elementary sense.[16] In the context of criminal adjudication, the Rationalist Tradition demands that criminal verdicts should be underpinned by adequate epistemic warrant. Without this threshold commitment to truth through proof, most of our established evidentiary practices – including admissibility screening and exclusion of problematic evidence, directed verdicts based on evidential insufficiency (for example judicial rulings of 'no case to answer'), competency requirements and compulsory process, meticulous directions to the jury to encourage them to draw correct inferences and to avoid reasoning fallacies, and appellate scrutiny of trial verdicts (especially appeals examining fresh evidence) – would make little or no sense; expect, perhaps, as ideological mystification (cf. Althouse, 1992; Graham, 1987). A further, still more disturbing, implication would be that legal rights and duties are all essentially illusory – because nobody could reliably vindicate their rights if courts took no notice of evidence of breach, injury, loss, victimization or other actionable wrongdoing. Litigation, and by extension legal rights, would be reduced to a capricious forensic lottery if hard evidence held no currency with adjudicators.

Thayer did not discover or invent these ideas (classical jurists and medieval schoolmen got there first[17]), but he did encapsulate them in precise and resonant formulations which have exerted considerable influence on future generations of scholars and practitioners. Chapter 1 condenses much of the wisdom that Thayer imparted at a more leisurely pace in his well-known *Preliminary Treatise on Evidence at the Common Law* (1898, esp. chs 6 and 12). The greater part of the essay is devoted to a critical review of subsisting evidentiary doctrine and theory. Thayer was evidently incensed by the doctrinal decrepitude of late nineteenth-century Evidence law and did not mince his words in saying so. '[O]ur law of evidence', he wrote, 'is a piece of illogical, but by no means irrational, patchwork, not at all to be admired, nor easily to be found intelligible' (p. 4) which was 'ripe for the hand of the jurist' (p. 5). Thayer prescribed:

> [A] treatment which, beginning with a full historical examination of the subject, and continuing with a criticism of the cases, shall end with a restatement of the existing law, and with suggestions for the course of its future development. Such an undertaking, worthily executed, if it should commend itself to the bench, would need only a slight cooperation from the legislature to give to the law of evidence a consistency, simplicity, and capacity for growth which would make it a far worthier instrument of justice than it is. (p. 5)

We see here Thayer's aspiration, not to ignore or slight common law evidentiary tradition, but to reshape it into a logical, well-ordered, coherent body of law that would better answer to contemporary requirements of justice. It is important to remember that Thayer is writing at a time before modern textbook writers effectively invented, both in structure and detailed content, what future generations of law students would come to recognize as the basic undergraduate legal subjects of Criminal Law, Torts, the Law of Contract, Law of Property,

---

16 Of course, there are theoretical dissentients: see, for example, Nicolson (1994).

17 Honoré (1981, p. 181) ('the Roman achievement in the law of evidence was not inconsiderable. It was coherent and devoted to a single end, truth'), Damaška (1997a); cf. Ho (2004) (emphasizing non-epistemic considerations).

Equity and Trusts, Constitutional Law and so forth (Sheppard, 1997; Sugarman, 1986). The task of the jurist, maintained Thayer, is to identify fundamental principles, to excise 'troublesome remnants of the old doctrine and many ill-instructed decisions' (p. 18), and – above all – to rework evidentiary materials into a rational conceptual framework, with sensible disciplinary boundaries and an intelligible and practically useful internal taxonomy of topics. One of Thayer's bugbears was the infiltration of substantive law doctrines into the adjectival law of proof. He was also exercised by superfluous jargon, and by a failure to differentiate 'a more or less important mistake in practical judgment' (p. 11) (that is, discretionary decision-making) for defects in the law requiring formal remedial attention. Each of these points remains telling to this day. Perhaps Thayer's most enduring contribution to Evidence scholarship, however, was his critical attention to 'the poor notion of legal relevancy, as contrasted with logical relevancy' (p. 10). His own summary of the central tenets of the Rationalist Tradition remains so fresh that it could have been written yesterday, rather than well over a century ago:

> We should have a system of evidence of a character simple, aiming straight at the substance of justice, not nice or refined in its details, not too rigid, easily grasped and easily applied. All this is necessary, because it is for use in the midst of the eager competition of trials, where time is short and decisions must be quickly made … [D]ecisions in the lower court should generally be final … In the rulings of judges at the trial much depends on momentary and fleeting considerations, addressed to the practical sense and discretion of the court, and not well admitting of revision on appeal … In order to make this practicable, the rules of evidence should be simplified; and should take on the general character of principles to guide the sound judgment of the judge, rather than minute rules to bind it. The two leading principles should be brought into conspicuous relief, (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it. (pp. 20–21)

In juxtaposition with the timeless universalism of Thayer's contribution, Akhil Reed Amar's essay (Chapter 2), while written much closer to us in time, may seem parochial and for that reason curiously distant to non-American readers. Amar's primary intended audience is plainly other specialists in US constitutional criminal procedure. His model of comparative insight 'from afar' (p. 39)[18] is astonishingly near-sighted, being preoccupied with other subdisciplinary divisions of US law, such as taxation and torts scholarship. But these superficial contrasts are only skin-deep. In more profound features of aspiration, vision and method, Amar's reflective piece shares a strong genetic resemblance to Thayer's contribution.

Like Thayer, Amar is in the business of self-conscious disciplinary programming, and shares a similar sense of propitious timing, on the eve of a (different) new century. '[T]he present is a particularly ripe moment for a fundamental rethinking of constitutional criminal procedure', declares Amar, 'and for a choice among competing visions' (p. 29). Amar also echoes Thayer in believing that refinements in disciplinary taxonomy and the elucidation of a 'proper methodology of constitutional criminal procedure' (p. 37) have important real-world effects beyond the scholar's study and the law school classroom. When case law lacks 'firm grounding in constitutional text and structure' (p. 29) and 'precedent alone cannot guide the way – even for those Justices who steer by precedent as their polestar – because precedent in this field is so regularly contradictory or perverse' (p. 31), one may confidently anticipate

[18] To be fair, it should be noted that Amar does make passing reference to comparative (English) illustrations, and briefly name-checks feminist and critical race scholarship in his concluding paragraphs.

that offenders will be set free unjustifiably, victims of crimes will be failed by the state's institutions of justice and citizens will be left without effective remedies for violations of their constitutional rights. It is not merely to satisfy scholars' compulsive desire for neat conceptual schemas that Amar diagnoses 'a desperate need for returning to, and rethinking, first principles' (p. 31).

A hallmark of Amar's scholarship is his close attention to US constitutional history and its foundational texts (see, in particular, Amar, 1997, 1998, 2012). In his own words:

> A constitution proclaimed in the name of We the People should be rooted in enduring values that Americans can recognize as *our* values. Truth and the protection of innocence are such values. Virtually everything in the Fourth, Fifth, and Sixth Amendments, properly read, promotes, or at least does not betray, these values. (p. 38)

From the perspective of modern international human rights law, with its universalist aspirations (or its pretensions?) to stipulate global fair trial standards, such a ringing endorsement of idiosyncratic national values may appear to strike a discordant note of insularity or knee-jerk American exceptionalism. However, the importance of inherited procedural tradition should not be underestimated. Amar is perfectly entitled to insist that US citizens should embrace their procedural heritage as an integral part of their own political community's peculiar vision of justice. Taking local procedural traditions seriously is not the same as being completely impervious to international standards or automatically dismissing the wisdom of 'foreign' comparative example, nor is it to be equated with promoting and perpetuating tradition merely for tradition's sake. As Amar explains, '[s]ome of the Founders' basic vision must be "translated" into our legal culture' (p. 43). Just as the forces of globalization are known to generate pluralistic adaptations and myriad 'local resistances' (see, for example, Beck, 2000; Held and McGrew, 2002; and for criminal justice-related examples, Aas, 2013; Godoy, 2004; Hobbs and Dunnighan, 1998; Nelken, 1997), contemporary cosmopolitan legality should be expected to foster a diversity of local procedural traditions within a flexible structural framework of international legal norms, prominently including fair trial standards. For as long as there exist cultural variations in language, cuisine, costume, character and social conventions – that is to say, in round terms, *forever* – global criminal trial procedures will continue to be marked by a diversity of institutional forms and styles. While some of these variations may be largely cosmetic or inconsequential foibles, others reflect deeply-held convictions about the requirements of fair procedure and the character of justice in criminal adjudication. On certain points of institutional design, such as whether serious criminal cases should be decided by lay juries, different procedural traditions may give diametrically opposed answers. What of it? Nobody should be induced to abandon their procedural heritage by the mere realization that others, elsewhere, do criminal adjudication differently.

In addition to continuing the conversation begun by Thayer about how to discipline our discipline (whatever we take that discipline to be), Amar poses, or implies, interesting (methodological) questions of a jurisprudential nature – some of which are revisited in Part IV of this volume. One such question, expressly raised by Amar, concerns the extent to which evidentiary norms should be formally constitutionalized. This is an obvious topic for a US-based scholar, since a large slice of criminal procedure *is* constitutional law in the US. However, the constitutional status of evidentiary doctrines is sometimes asserted even in