
Due Process

LUCIA ZEDNER* AND CARL-FRIEDRICH STUCKENBERG**

I Introduction

‘Due process’ is a central concept in Anglo-American criminal justice that safeguards the rights of those subject to the criminal process and guides state officials, vital to the authority of the criminal law and the legitimacy of the legal system.¹ Comparison reveals what is distinctive about Anglo-American and German conceptions of due process, and how far their development is the product of their legal history and local legal culture. As Galligan observes of dispute over ‘whether the adversarial nature of the trial at common law is to be preferred to the more inquisitorial procedures of continental Europe ... the real debate in comparing the two approaches is not about which will lead to more correct outcomes, but rather what values are relevant’.² Comparative analysis permits a better understanding of what is distinctive in the respective systems.³ It reveals what commonalities exist and to what extent international developments, not least the important jurisprudence on the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR),⁴ foster convergence among signatory states.

* I am grateful to participants at Gordon Seminar on Criminal Law, University of Glasgow (2017) and the Anglo-German Dialogue on Current Issues in Criminal Law Seminar, Oxford (2017), in particular, Kai Ambos, Carl-Friedrich Stuckenberg and Alec Walen, and to Andrew Ashworth and Carolyn Hoyle for their insightful comments on earlier versions.

** I am indebted to Lucia Zedner and Heike Jung for helpful suggestions.

¹ Dubber observes, ‘The process of criminal law, as law, is shaped by what process is due to the persons that populate it’. Dubber, ‘Criminal Trial’ (2004), 92.

² Galligan, *Due Process* (1997), 62–3.

³ Ramraj, ‘Due Process’ (2004), 495.

⁴ Goss, *Criminal Fair Trial Rights* (2014).

II Due Process in England and Wales

Due process is a central concept in the common law world, albeit more clearly articulated in the United States, where the constitutional guarantees of the Fifth Amendment have generated a large jurisprudence on the subject.⁵ In England and Wales, due process is less well-defined⁶ and, as *Ward* acknowledges, ‘the terms procedural justice, procedural due process, procedural fairness, procedural rights and the “rule of law” are often used interchangeably’.⁷ This chapter examines what is distinctive about due process, what role it plays in pre-trial and trial processes, and also how it relates to other analogous concepts and values.

The chapter first explores the founding reasons and historical origins of due process, the obligations it imposes and the guarantees it provides. It considers the various sources of contemporary due process values, principles and rights, most importantly, those derived from human rights conventions. It reflects critically upon recent developments in Anglo-American scholarship, especially the claim that ‘procedural justice’ is essential to the legitimisation of state power. It then considers appeals for a more fully articulated conception of substantive due process attentive to the content of criminal law as well as procedural laws. It suggests that due process sets aspirational standards that the criminal justice system cannot always attain. So the chapter goes on to consider failings of due process, provisions for appeal against miscarriages of justice and wrongful convictions, for rectification and restitution. It concludes by considering the claim that the articulation of due process in the pre-trial and trial phases needs to be matched by a stronger elaboration of protections post-trial.

1 *Due Process and the Citizen–State Relationship*

Due process provides a necessary check on the exercise of state power over its citizens essential to the citizen–state relationship. It is a central tenet of political theory that the state’s authority to criminalise derives partly from its duty to protect the public and provide security. This duty arises from a hypothesised social contract under which citizens cede the right to self-protection to the state in return for which it provides social

⁵ Orth, *Due Process of Law* (1968).

⁶ Marshall, ‘Due Process in England’ (1977), 69.

⁷ Ward, ‘Transforming “Summary Justice”’ (2015), 345.

order and public protection.⁸ Yet the institutions of the criminal law, policing and punishment accord immense coercive power to the state that itself threatens individual security. Police stop and search, arrest, and detention are serious intrusions on individual liberty that would constitute criminal acts of assault, theft and false imprisonment were they not performed in accordance with the rules of criminal procedure. The protections afforded by the principles and values of due process are designed to safeguard citizens against the threat that the untrammelled exercise of state coercive power might otherwise pose. Issacharoff suggests the 'due process principle can be understood in two different ways: as a guarantee creating a distinct set of rights among the citizenry, or as a constraint designed to prevent arbitrary government'.⁹ Arguably, these are not in the alternative, as he suggests, rather each is a necessary complement of the other. The requirement that rules be administered through the courts in line with established legal principles provides both positive protections and negative limits that act as a powerful shield against the overreaching of state power. Yet, the scope of due process is by no means confined to these twin roles of protection and restraint: drilling down into the origins, character and values of due process reveals it to be a more complex phenomenon than that of sword and shield.

Due process underpins the very authority of the state to enact and enforce the criminal law. As one of us has argued elsewhere, 'criminal law is not only, or even primarily, a means by which to classify wrongdoing: it is also the authorisation of a particular response by the state'.¹⁰ This authorisation is not without limits: only where officials abide by due process and uphold the right to a fair trial can state authority to promulgate and enforce the criminal law be upheld. Due process is integral to the legitimacy of the law, underlying state authority to criminalise and punish.¹¹ It is more central to criminal law theory than generally acknowledged in that it stipulates the manner in which criminal cases are prosecuted, it is a necessary condition of legitimate enforcement and also of the sanctions that follow.¹² Ristroph reflects, 'what is the subject of criminal law theory, if not the arc from crime to punishment'¹³ and calls

⁸ Hobbes, *Leviathan* (2008).

⁹ Issacharoff, *Civil Procedure* (2012).

¹⁰ Zedner, 'Arbitrary Government' (2017), 91. See also Ashworth and Redmayne, *Criminal Process* (2010), at 22.

¹¹ See Ristroph, 'Crime to Punishment' (2018).

¹² Dubber, 'Criminal Trial' (2004), 91–2; Duff et al., *Trial on Trial* (2007), 51.

¹³ Ristroph, 'Crime to Punishment' (2018), 307.

for a more holistic account of the relationship between criminal law, process, and punishment, to which this chapter seeks to contribute.

Due process values are commonly articulated as a set of norms intrinsic to criminal procedure, not least, accordance with the rule of law, the presumption of innocence and fair trial. Some values are internal, inherent to the operation of a just criminal process, others are externally imposed by law; some values are jurisdictionally specific, others supra-national.¹⁴ Today due process is vested in positive rights elaborated in human rights conventions, incorporated into domestic law, and developed through the jurisprudence of the courts to protect citizens and non-citizens.¹⁵ Through the articulation of and adherence to these values and rights, due process provides reassurance to the public that justice is not only done but also seen to be done. This, it is argued, contributes to perceptions of the legitimacy of the criminal process, public compliance with the criminal law (see further Section II.6 below) and to confidence in the fairness and justice of resulting outcomes.

The additional protection of due process is especially important in common law systems, where every decision by police, lawyers, magistrates and judges is mediated through the exercise of discretion.¹⁶ In England, the ability of the police and criminal justice officials to exercise discretion is defended on the grounds that decisions must be made where rules are ambiguous and right answers elusive. In the common law world, the exercise of discretion is often regarded as an important safeguard against the unwarranted exercise of state power, rather than a feature of it. Yet, while discretion is seen as a means to mitigate rigid enforcement of otherwise potentially oppressive or unjust rules,¹⁷ it also opens the door to the improper exercise of power by officials, to bias and racial prejudice.¹⁸ A primary role of due process is to guide and limit official discretion, but this requires that the state itself fund the structures and procedures that enable access to justice, legal defence and redress. As a former President of the UK Supreme Court argued, 'unless a right to due process in criminal proceedings, a right to protection against abuses or excesses of the state, or a right against

¹⁴ Ashworth and Redmayne, *Criminal Process* (2010), 26 ff.; Emmerson et al., *Human Rights* (2012).

¹⁵ Cole, 'Basic Rights' (2007), 2541–8.

¹⁶ Galligan, *Due Process* (1997), at 65; Hawkins, *Law as Last Resort*, 424–7.

¹⁷ Zedner, *Criminal Justice* (2004), 129–32.

¹⁸ Phillips and Bowling, 'Ethnicities, Racism, Crime and Criminal Justice' (2017), 190–212.

another citizen, is enforceable, it might as well not exist'.¹⁹ It is in this complex context, in which power is exerted and must also be constrained by the self-same actors and institutions, that the profound challenges of due process should be understood.

2 *The Historical Development of Due Process*

The historical origins of due process in England lie in Magna Carta (1215), which pledged that the basic rights of citizens shall not be infringed other than through the legal process,²⁰ and the 1354 Liberty of Subject Act (28 Edward 3), which decreed:

No man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.²¹

These famous historic provisions established the requirement of procedural regularity as an essential facet of good governance and prescribed the form of investigative and trial processes that were widely acknowledged as a vital guard against abuse of sovereign power. Due process is central to the history of the common law, ensuring the pivotal role of the courts and judiciary in articulating the requirements of procedural fairness.

Due process spoke even more powerfully to those in eighteenth-century America seeking to assert procedural protections against British imperial rule. In colonial and post-independence America, constitutional protections against sovereign power were more energetically pursued than in England.²² Due process was articulated primarily through US constitutional law:²³ the Due Process Clause incorporated in the Fifth Amendment to the Constitution was intended as 'a negative limitation on what the state may do to its citizenry'.²⁴ This constitutional entrenchment ensured that due process rights are much more developed in the

¹⁹ Neuberger, 'Justice' (2013).

²⁰ Chapter 39 Magna Carta, translation into modern English by the British Library. See <http://www.bl.uk/learning/timeline/item95692.html>.

²¹ See <http://oll.libertyfund.org/quotes/536>; See further the 1368 Observance of Due Process of Law Act (42 Edward 3), see <http://www.legislation.gov.uk/aep/Edw3/42/3/section/III>.

²² Galligan asserts, 'the concept of due process of law is to modern English lawyers an American doctrine': Galligan, *Due Process* (1997), 170, 172, see also 178–9.

²³ Dubber, 'Criminal Trial' (2004).

²⁴ Issacharoff, *Civil Procedure* (2012), 1.

United States, where they are the subject of a richer jurisprudence than any other single family of rights.²⁵

Fast-forward two centuries and a due process revolution led by the Warren Court in 1960s America galvanised the legally protected rights of defendants, by holding that the Constitution mandated publicly funded counsel for indigent defendants, clear explanation of defendants' rights and right to counsel. Packer famously identified due process as one of two models of the criminal process (the other being the consequentialist model of crime control), which recognised that the exercise of 'power is always subject to abuse' and must be checked by the 'obstacle course' of defendants' rights.²⁶ Although subject to sustained critique,²⁷ Packer's influential work placed due process squarely on the agenda of legal scholars.²⁸ Issacharoff observes, 'the concept of due process as a constraint on the exercise of governmental power retained its vitality', not least as a restraint 'on the penal powers of the state'.²⁹ Precisely what is 'due' in due process continues to be contested,³⁰ and as yet there has been no systematic exploration of exactly what due process requires on either side of the Atlantic.³¹ Notwithstanding this lack of clarity and despite concern that the rhetoric of due process may be misused to legitimate crime control – McBarnet famously claimed, 'due process is *for* crime control'³² – it continues to be regarded throughout the common law world as a vital restraint on the exercise of sovereign power.

3 *Due Process Values, Principles and Rights*

The criminal process differs significantly in form and approach, by jurisdiction and as between accusatorial and inquisitorial systems.³³ Some core values are nigh universal, especially where externally imposed by human rights conventions or charters of rights, yet others are

²⁵ Nickel, 'Process Rights' (2007), 244.

²⁶ Packer, *Criminal Sanction* (1968), 166.

²⁷ Feeley, *Process* (1979); McBarnet, 'False Dichotomies' (1978); MacDonald, 'Criminal Justice' (2008).

²⁸ Dubber, 'Criminal Trial' (2004), 86.

²⁹ Issacharoff, *Civil Procedure* (2012), ch. 1 'Due Process'.

³⁰ Hyman, 'The Little Word "Due"' (2005).

³¹ Dworkin offers a powerful critique of the failure to specify what due process requires in Dworkin, *A Matter of Principle* (1985), ch. 3 'Principle, Policy, Procedure'.

³² McBarnet, *Conviction* (1983), 156.

³³ Damaška, *The Faces of Justice and State Authority* (1986); An insightful review of comparative scholarship is, Roberts, 'Comparative Criminal Justice' (2008).

jurisdictionally specific. The development of rights has been significantly strengthened by the enactment of successive human rights covenants and conventions, within and by which due process rights are protected. For example, Articles 6–15 of the United Nations' International Covenant on Civil and Political Rights (ICCPR) elaborates a full panoply of due process rights. Even more important in both England and Germany is the ECHR, incorporated into UK domestic law under the Human Rights Act 1998. The ECHR sets out fundamental rights of due process across several articles. The right to a fair trial under Article 6 ECHR is most important, but other significant provisions include: the right to life (Art. 2); prohibition on torture, inhuman and degrading treatment (Art. 3); right to liberty and security of person (Art. 5); requirement of non-retrospectivity (Art. 7); right to private and family life (Art. 8); and the right against discrimination (Art. 14). So well developed is the jurisprudence of the Strasbourg Court, particularly regarding Article 6, that human rights are now integral to the modern articulation of due process.³⁴ This section identifies the most important of these norms and rights. It goes on to discuss those that appear system specific in order to consider the implications for due process of significant divergence in its content between jurisdictions.

The core tenets of due process are those that apply at some level or in some form to all Western liberal legal systems, irrespective of differences in their articulation or approach. A founding principle, in that it underpins much of what follows, is the presumption of innocence and the corresponding burden of proof on the prosecution. This presumption can be traced back to the Roman Law rule of evidence set down in the Digest of Justinian as *ei incumbit probatio qui dicit, non qui negat* ('proof lies on him who asserts, not on him who denies').³⁵ The presumption of innocence accords the defendant the right to be considered innocent until proven guilty and, with some important exceptions, places the burden of proving guilt upon the accuser. Firmly established at common law in England,³⁶ and in Germany by Article 20(3) of the *Grundgesetz* (GG), the presumption of innocence now enjoys the formal protection of Article 6(2) ECHR. Article 6(2) stipulates, 'Everyone charged with a

³⁴ See Goss, *Criminal Fair Trial Rights* (2014).

³⁵ Digest of Justinian (22.3).

³⁶ Long before the Human Rights Act 1998, in *Woolmington v. DPP* [1935] AC 462 Viscount Sankey LC famously referred to the presumption of innocence as the 'golden thread' running through the web of English criminal law.

criminal offence shall be presumed innocent until proved guilty according to law.' This separate specification of the presumption of innocence signifies it is not simply subsumed within the general right to a fair trial,³⁷ but should be understood as an important precept in its own right.³⁸ Thus, the English Crown Prosecution Service must prove the case 'beyond all reasonable doubt' in the minds of judge or jury before a finding of guilt can be reached.

Common law lawyers think of the presumption of innocence, the requirement of proof beyond all reasonable doubt, and the accompanying privilege against self-incrimination as jewels in the crown of due process. In practice, they are subject to important limitations: some criminal offences impose reverse burdens of proof on the defence,³⁹ and limits to the right to silence penalise non-disclosure of evidence later relied upon by the defendant at trial.⁴⁰ The widespread practice of plea bargaining further erodes these protections by offering incentives to plead guilty before trial by way of substantial and, therefore, controversial, sentence discounts.⁴¹ In English magistrates' courts, which hear roughly 97 per cent of all criminal cases, the rate of guilty plea is well over 90 per cent,⁴² strongly suggesting that pressure to plead guilty undercuts the right of the defendant to contest the charge at trial.

The significant incentives offered defendants to plead guilty have been criticised for creating an irreconcilable conflict with the right to a fair trial,⁴³ a core value in the common law world long before the ECHR and whose articulation in Article 6 has been the subject of an extensive jurisprudence.⁴⁴ Article 6(1) reads:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

³⁷ Stumer, *Presumption of Innocence* (2010), 95–8.

³⁸ Goss, *Criminal Fair Trial Rights* (2014), 79–86.

³⁹ Emmerson et al., *Human Rights* (2012), ch. 15; *R v. Lambert* [2001] UKHL 37 held that where a reverse burden could be construed as an 'evidential' burden it did not breach Art. 6(2).

⁴⁰ *R v. Ibrahim* [2008] EWCA Crim. 880.

⁴¹ Ashworth and Horder, *Principles of Criminal Law* (2013), 293; Darbyshire, 'Plea Bargaining' (2000).

⁴² Weigend notes that in 2013 only 10% of cases with a known suspect were disposed of by trial in Germany. Weigend, 'No News is Good News' (2016), 92–3.

⁴³ Ashworth and Redmayne, *Criminal Process* (2010), 310 ff.

⁴⁴ Emmerson et al., *Human Rights* (2012).

Article 6(3) sets out the minimum rights associated with the conduct of the trial, including the right to be informed of the nature and cause of the accusation, to have adequate time and facilities for preparation of a defence, to legal assistance (which is to be given freely if justice so requires), to examine witnesses, and to an interpreter if needed. Timeliness is also an important facet of the right to a fair trial, deriving from the old legal adage that ‘justice delayed is justice denied’. In England, the requirement of timeliness can be traced back at least to Magna Carta (1215), clause 40, which reads, ‘To no one will we sell, to no one will we refuse or delay, right or justice.’⁴⁵ Today timeliness, like many other due process values, is recognised to be a mutable concept: what constitutes a timely resolution may be contingent on the nature and complexity of the case,⁴⁶ availability of witnesses and adequacy of public resources. Although the right ‘to be informed promptly . . . of the nature and cause of the accusation’ is enshrined in Article 6(3)(a), the timeliness of the process and trial is not similarly protected and may stand in tension with the right under Article 6(3)(b) ‘to have adequate time and facilities for the preparation of his defence’. As Ashworth and Redmayne observe, ‘a problem with rights-based accounts of the criminal process is that rights may conflict with each other or with other social values’.⁴⁷ Countervailing pressures to ensure efficiency and economy in the trial process, and to reduce the burden that going to trial places on victims and witnesses, may clash with fair trial rights for defendants. This is not to dismiss the importance of these rights but rather to acknowledge conflicting interests and the complex environment in which they are realised.

Significantly, Article 6 is by far the most commonly contested of all the Convention rights. Goss records that from 1959 to 2009 more than half the judgments of the European Court of Human Rights that found a violation related to Article 6.⁴⁸ Although this has since fallen to 23 per cent, Article 6 remains the most contested Convention right.⁴⁹ Whether this attests to the court’s determination to uphold the right to a fair trial, the difficulty of establishing what fairness demands, or the frequency of violations and appeals is a question beyond the scope of this chapter.

⁴⁵ See http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_40.

⁴⁶ A complex fraud trial may take considerably longer to resolve than a simple theft.

⁴⁷ Ashworth and Redmayne, *Criminal Process* (2010), 36.

⁴⁸ Goss, *Criminal Fair Trial Rights* (2014), 1.

⁴⁹ See Council of Europe, *Facts and Figures* (2017), 7.

Nonetheless, the extensive Strasbourg jurisprudence suggests how important the right to a fair trial is for those caught up in the criminal process but also how contested it remains.

Beyond the core presumption of innocence and right to a fair trial the values of due process are even more disputed. For example, the principle of proportionality underpins human rights by requiring that any restrictions on individual liberties must be proportionate. However, the test for proportionality has been disputed in domestic and European courts. The resultant jurisprudence establishes that interference in a right must have strong justification; it must be strictly limited to what is needed to achieve the legitimate ends of public policy; and burdens on the individual must not be so severe that they outweigh the putative benefit to the community.⁵⁰ In Germany, under the *Rechtsstaat* principle, proportionality requires that the state must use the least burdensome means necessary to achieve a legitimate objective.⁵¹ Similarly, in the UK, proportionality is held to require that there be no 'less onerous means of achieving the same aim', and there be due regard to the nature of the right involved, the seriousness of the interference with that right, and 'the nature of the justification for that interference'.⁵²

Respect for dignity underpins all rights but it too is disputed. At a minimum, it should require that defendants are not subject to degrading treatment while in custody or under interrogation and that they are not subject to aggressive questioning in court.⁵³ Those caught up in the criminal process should be treated with respect and their rights and interests regarded.⁵⁴ A fair trial requires an opportunity for all parties to present their case, equality of arms, financial assistance to ensure adequate legal representation, a public hearing and timely resolution. Yet here again, how these principles are interpreted and applied in practice varies significantly from one jurisdiction to another. A hearing

⁵⁰ *ZZ v. Secretary of State for the Home Department* [2013] EUECJ C-300/11 (available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011CJ0300&from=EN>); and *Pham v. SSHD* [2015] UKSC 19 (available at <https://www.supremecourt.uk/cases/docs/uksc-2013-0150-judgment.pdf>).

⁵¹ Bohlander, *Principles of German Criminal Procedure* (2012), 22.

⁵² *Pham v. SSHD* [2015] UKSC 19, at § 40 and § 117.

⁵³ Roberts, 'Theorising Procedural Tradition' (2006).

⁵⁴ The English police *Code of Ethics* requires the police to 'act with self-control and tolerance, treating members of the public with respect and courtesy' and 'remain composed and respectful, even in the face of provocation'. College of Policing, *Code of Ethics* (2014), S.2.1: 6.

may be deemed to require the right to confrontation under the principle of orality, or may be satisfied by paper proceedings.⁵⁵ The commitment to equality of arms and legal aid varies by country, over time, and according to state budgets.⁵⁶ And the openness of the hearing, the right of public attendance and press reporting may be limited by countervailing rights, not least the claimant's right to privacy or the public to security.⁵⁷ The values of consistency and certainty are also commonly regarded as important facets of due process. Ultimately, as Allan argues,

The justice of the verdict is internally related to the justice of the procedures which produce it: it derives, not simply from the fact that the defendant committed the offence but from the fact that the charge has been proved by a rational process of argument in which the defendant was invited to engage.⁵⁸

The idea that the right to a fair trial applies only to suspects and defendants has been challenged by those who suggest the right should be enjoyed by all participants in the trial process, not least victims and witnesses.⁵⁹ This more expansive conception of due process suggests that all parties should benefit from the protections of humane, rights-respecting procedures: a view that extends due process well beyond the rights currently articulated by human rights conventions. Although victims' rights were recognised as early as the 1980s,⁶⁰ they have yet to result in any amendment to the ECHR, which leaves victims and witnesses without the justiciable rights protections enjoyed by defendants. The reluctance to incorporate rights for victims and witnesses may derive partly from populist claims that they could be secured only at the expense of defendants' rights. Certainly, the need for a 'rebalancing' of the interests of parties is a recurrent theme in debates about criminal justice and procedural reform.⁶¹ Yet to suggest that

⁵⁵ Shipley, 'Due Process Rights' (2008), 48 ff.

⁵⁶ Wilmot-Smith, 'Necessity or Ideology?' (2014).

⁵⁷ Zedner, 'Criminal Justice in the Service of Security' (2016), 159–61.

⁵⁸ Allan, *Constitutional Justice* (2003), 81; See also Allan, 'Procedural Fairness' (1998).

⁵⁹ Roach, 'Criminal Process' (1999), 695 ff.; Hunter et al., *Integrity* (2016), 20.

⁶⁰ E.g. in the Council of Europe, *The Position of the Victim the Framework of Criminal Law and Procedure* (1985) and the UN's *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985). They are set out in national victims' codes and charters, such as the UK Victims' Code (available at www.victimsupport.org.uk/help-and-support/your-rights/victims%E2%80%99-code).

⁶¹ See e.g. Home Office, *Justice for All* (2002); Jackson, 'Justice for All – Putting Victims at the Heart of Criminal Justice?' (2003); Home Office, *Rebalancing the Criminal Justice System* (2006).

rights are somehow tradable, that to protect the rights of one party necessarily infringes on the rights and interests of the other, or that fundamental rights can be 'balanced', is deeply problematic.⁶² The idea of balancing suggests an inevitable tension between competing interests in the trial process. Yet all parties have a common interest in ensuring a fair trial respectful of the rights of all, in avoiding miscarriages of justice and averting wrongful convictions.⁶³ Roach has expounded a persuasive account of due process and victims' rights in the Canadian context,⁶⁴ but the literature on victims' rights in England has yet to elaborate a way to protect victims' interests without infringing the due process rights of defendants.⁶⁵ An inclusive account of the criminal process respectful of the rights of all participants remains elusive.

Precisely what due process otherwise requires is far from settled and varies by jurisdiction and over time.⁶⁶ The independence and impartiality of the judiciary, for example, is a common core value, but what exactly this means and how it is to be attained differs according to the manner of judicial appointment, conditions of service, terms of tenure, freedom from political interference, the appearance and actuality of independent, disinterested adjudication and, in some parts of the world, even the physical safety of the judiciary.⁶⁷ In short, although there are common values and growing convergence on the rights underpinning the criminal process, at least in countries signatory to the ECHR, their elucidation varies over time and by jurisdiction, under the margin of appreciation allowed for domestic interpretation of Convention rights.⁶⁸

A greater source of variation still are those due process principles and values that are system specific. Take the central goal of establishing the truth of what has occurred. In common law systems, like England, the primary means of establishing truth is the trial at which competing accounts of the case, presented by prosecution and defence, are subject

⁶² Ashworth and Redmayne, *Criminal Process* (2010), 41–5. Waldron, 'Security and Liberty' (2003).

⁶³ Roach, 'Wrongful Convictions' (2010).

⁶⁴ Roach, *Due Process* (1999).

⁶⁵ Ashworth, 'Rights and Criminal Procedure' (2000).

⁶⁶ Damaška, *The Faces of Justice and State Authority* (1986).

⁶⁷ At the extreme, judicial independence may be compromised by threats to life e.g. the assassination of Judge Falcone in Sicily in 1992 by the Corleonesi mafia. See Follain, *Vendetta* (2012).

⁶⁸ Ashworth and Redmayne, *Criminal Process* (2010), 21.

to cross-examination by either side. Hodgson observes, ‘within the common law tradition, legal truth is seen as something which is contingent, existing not so much as an objective absolute but as the most plausible or likely account’.⁶⁹ Adversarial justice pits rival versions of the truth against each other in open court and relies on the judgement of judge or jury as to which is most persuasive. Integral to the fairness of this contest are the principles of equality of arms between parties and of orality, which upholds the accused’s right to confront witnesses in court and to test and challenge evidence, whether in person or with the assistance of legal counsel. The English reliance on lay participation, both trial by jury in the Crown Court and adjudication by lay magistrates in the lower courts, is identified by Ashworth and Redmayne as a jurisdictionally specific ‘external value’.⁷⁰ It is open to debate whether lay participation is better thought of as a due process value, as a politically important means of ensuring democratic accountability and citizen engagement, or rather as a largely contingent consequence of the historical development of the English criminal process.⁷¹ Other system-specific due process values prominent in common law conceptions of due process include the principles of integrity⁷² and respect for persons and principles of transparency and accountability that underlie exclusionary rules – for example, against improperly obtained evidence⁷³ – and that militate strongly against secrecy or resort to closed trial proceedings.⁷⁴ Of course, integrity, transparency and accountability are not the sole preserve of the common law tradition. However, the jurisdictional peculiarities of their articulation are a product of local legal culture and history.

⁶⁹ Hodgson, ‘Inquisitorial and Adversarial Procedure’ (2006), 225.

⁷⁰ Ashworth and Redmayne, *Criminal Process* (2010), 27.

⁷¹ A fascinating account by a German jurist of the peculiarities of lay participation in the English criminal process is Hörnle, ‘Democratic Accountability’ (2006).

⁷² Integrity is a fundamental and well-established concept in English criminal procedure frequently invoked by the courts to justify departure from law, exclusion of evidence, and the decision to stay legal proceedings to ensure that justice is done. Hunter et al. suggest that, ‘to some extent, “integrity” might be invoked as a proxy, synonym or placeholder for other, familiar, procedural values such as “fairness”, “due process”, “natural justice” or “judicial legitimacy”’, but they note that it also refers to the vital role of judicial discretion in ‘protecting the moral integrity and legitimacy of the adjudicative process’. Hunter et al., *Integrity* (2016), 5.

⁷³ E.g. as a result of undercover policing or entrapment, see e.g. Redmayne, ‘Exploring Entrapment’ (2012).

⁷⁴ Closed trial hearings nonetheless occur. Kelman, ‘Closed Trials’ (2016); Zedner, ‘Criminal Justice in the Service of Security’ (2016), 159–61.

4 *Theorising Due Process*

The history of scholarly debates about due process is too extensive to permit full coverage here. Instead, this section focuses on recent Anglo-American debates about 'procedural justice' and legitimacy before going on to propose a thicker, substantive account of due process.

(a) 'Procedural Justice' and the Public Legitimation of State Power

The flourishing of Anglo-American interest in 'procedural justice' appears to signal a renewal of academic interest in due process. It is, however, open to question how much this literature has to do with procedure or justice. Arguably, 'procedural justice' is less about the justice of the legal process than public perceptions of its legitimacy, which induce them to obey the law.⁷⁵ Paradoxically, it may be that research on procedural justice diminishes the significance of due process insofar as it seeks to translate normative questions into empirical, even instrumental ones about inducing compliance. What began primarily as an empirical enquiry into 'why people obey the law' has developed into a larger claim that authority is legitimate when its audience believe decision-making to be so.⁷⁶ This perspectival definition of 'procedural justice' has prompted a body of research that examines under what conditions citizens perceive they are being treated fairly and with respect by legal officials.⁷⁷ Its central contention is that where the public deem the exercise of legal authority to be legitimate, they are more likely to comply. As an empirical account of compliance, this is relatively uncontroversial. It is more problematic to claim that 'legitimacy is to be found where there is a positive *recognition* by citizens of the powerholder's *moral right* to exercise that power'.⁷⁸ Whether or not citizens regard the exercise of state power as legitimate evidently relies upon their subjective judgement of the validity of state authority in general and of individual decisions by criminal justice officials in particular. Yet to gauge legitimacy by reference to public perception alone provides no

⁷⁵ Tyler, *Why People Obey the Law* (1990).

⁷⁶ Bottoms and Tankebe, 'Beyond Procedural Justice' (2012).

⁷⁷ Tankebe and Liebling (eds.), *Legitimacy and Criminal Justice* (2013); Bradford, 'Policing and Social Identity' (2014); Meares et al., 'Lawful or Fair?' (2016); For an overview, see Tyler et al., 'Psychology of Procedural Justice' (2014).

⁷⁸ Bottoms and Tankebe, 'Beyond Procedural Justice' (2012), 107.

independent metric by which to evaluate the justice of the procedures and decision-making. As Tyler freely acknowledges, '[a]s a psychological model, the model does not address normative issues concerning whether people ought to defer to legal authorities and generally obey the law'.⁷⁹ The procedural justice literature thus says more about what factors inform public perceptions of legitimacy than about what values ought to guide and constrain the criminal process.⁸⁰ To this extent, procedural justice appears to have less relevance for due process than its label might suggest.

In the UK, the idea that the legitimacy of the legal process depends upon external normative criteria of validity has similarly been contested by Beetham,⁸¹ who takes the view that 'power is legitimate if it is *acknowledged as rightful* by those involved'.⁸² He regards legitimacy as derived from the social belief system and opinions of the relevant public and identifies three criteria of legitimacy: conformity to legal rules, concordance between those rules and shared beliefs, and public expression of consent. However, this approach does not acknowledge that if the rules are in substance unjust, procedural conformity alone will not be productive of justice. Nor does it recognise that the 'shared beliefs' with which rules must accord may themselves be problematic. Concordance between rules and beliefs may encourage compliance, but if the rules are unfair or the public hold unjust beliefs, fit between them is hardly conducive to justice.

In these accounts of procedural justice, expressed consent is deemed to be a constituent part of the legitimation process. Yet, consent may derive from something other than recognition of the legitimacy of the law and legal process or of the moral right of the state to exercise coercive power. As Bottoms and Tankebe observe, 'there is a difficulty . . . in ascertaining whether the consent is true normative consent or something less'.⁸³ Consent may be less an expression of legitimation than a tactical decision to comply with state officials, whether for instrumental reasons, deference to the authority of officials or capitulation to state power. For those arrested by the police or held in detention, compliance may depend more on perceptions of what best serves their self-interest. Research by Meares

⁷⁹ Tyler, 'Procedural Justice' (2003), 285.

⁸⁰ An important exception is Bottoms and Tankebe, 'Beyond Procedural Justice' (2012).

⁸¹ Beetham, *Legitimation of Power* (1991).

⁸² *Ibid.*, 8.

⁸³ Bottoms and Tankebe, 'Beyond Procedural Justice' (2012), 117.

et al. suggests that, rather than being shaped by assessments of procedural fairness, public evaluations of appropriate police behaviour are 'largely shaped by . . . evaluations about the demeanor of the officers during their interactions with them'.⁸⁴ Such findings suggest that procedural justice may be less about justice than public appreciation of the civility and respect shown them by the police.

It may be that procedural justice is better understood as pursuing a different enquiry that, despite its name, has little to do with procedure or justice and more with ensuring the effectiveness of the legal system by maximising public deference and cooperation.⁸⁵ Procedural justice privileges the appearances of legitimacy and prioritises popular perception over a detached normative account of what due process *ought* substantively to entail. More is required if it is to serve as an external check on state power. If legitimacy is not merely to lie in the perception of citizens, a fully developed normative account of what due process should entail is needed.

(b) Substantive Due Process

A thicker conception of due process would engage with the substance of the laws, measures and practices that make up the criminal process. A purely formalistic conception of due process requires only adherence to principles of procedural fairness and reasonableness. At a minimum, this requires that the exercise of police power is governed by law, that procedural rules are passed by parliament, and limitations on or deprivations of liberty are formally and prospectively authorised by law.⁸⁶ However, as we have seen, formal adherence to procedural rules alone will not necessarily protect citizens against unjust or unfair laws. Substantive due process concerns itself also with the content of procedural rules,⁸⁷ to ensure that these enshrine substantive principles of justice, equality of treatment, dignity and respect for persons, and defence of individual autonomy (consistent with the autonomy of others).⁸⁸

⁸⁴ Meares et al., 'Lawful or Fair?' (2016), 300.

⁸⁵ Tyler, 'Procedural Justice' (2003), 283.

⁸⁶ Ramraj, 'Due Process' (2004), 496–7.

⁸⁷ 'Substantive' here thus goes beyond the American conception of 'substantive due process' that permits courts to protect certain fundamental rights from government interference, even if the rights are not specifically protected under the US Constitution.

⁸⁸ Braithwaite and Pettit, *Not Just Deserts* (1990), 61–9.

A thicker account of substantive due process still might require, as Ramraj suggests, regard not only to the content of the due process rights but also to 'the need for coherence, consistency, and predictability in the substantive criminal law'.⁸⁹ Ramraj argues that substantive due process is the only plausible response to the indeterminacy and inconsistency of the criminal law. To test his theory, he considers claims that indeterminacy may be inherent in criminal law (following the legal realist claim that the rhetoric of legality masks the extra-legal, political reasons for criminalisation), the product of its historical development (for example, as a result of the inconsistency of case law) or the consequence of systemic factors (not least that criminal law is a mixture of common law and statutory principles).⁹⁰ He suggests that substantive due process relies upon 'the articulation of a unifying theory of criminal law'⁹¹ and concludes that 'a normative theory of criminal fault entrenched in a constitutional doctrine of substantive due process provides the best possible response to the claim of indeterminacy of criminal doctrine'.⁹² In short, ensuring procedural fairness alone does not suffice: only an account that has regard for the legitimacy of the procedures in play, and importantly also for the laws that they are called upon to uphold, will be productive of substantive due process.

Some UK scholars are likewise sceptical of purely formal or procedural accounts of due process. Allan observes, 'When the rule of law is conceived as a formal or procedural principle, there are no implicit legal limits to the scope of coercive state authority.'⁹³ Instead, he argues:

the demands of due process are inextricably bound up, in practice, with the law's permissible content: the exercise of administrative discretion must respect the citizen's fundamental rights and the limits of legitimate government.⁹⁴

Allan conceives due process not as a purely procedural device nor even as a shield against abuse of state power. Rather it is integrally linked to a defensible substantive account of the content of law. Just as the criminal law defends the domain of individual liberty against predation by private citizens, so the criminal process sets 'the proper limits of state authority'

⁸⁹ Ramraj, 'Due Process' (2004), 516.

⁹⁰ *Ibid.*, 516–23.

⁹¹ *Ibid.*, 524.

⁹² *Ibid.*

⁹³ Allan, 'The Rule of Law' (2016), 215.

⁹⁴ *Ibid.*, 219.

in accordance with ‘a scheme of governance that, correctly interpreted, accords each individual the freedom that his human dignity demands’.⁹⁵ Tadros goes further to contend that procedure alone will not help if the substance of the law is unjust, so we need not only a right to a fair trial but a right to a fair criminal law.⁹⁶ His claim calls for closer attention to the inseparable relationship between criminal law and criminal process largely lacking from legal scholarship to-date.⁹⁷ As Roberts observes:

[T]o the best of my knowledge, there has never been any grand conspiracy to keep Criminal Law Theory pure and uncontaminated by criminal procedure scholarship. Procedural issues have simply been ignored by the vast majority of card-carrying criminal law theorists.⁹⁸

A substantive account of due process would rectify this oversight by recognising that the justice of the process is indivisible from the justice of the criminal law – and vice versa.⁹⁹

5 *Evasions and Erosions of Due Process*

This chapter has sought to elaborate due process values and principles largely in the abstract, but there are obvious hazards to normative theorising divorced from the messy realities of everyday practice. To do so risks valorising idealised accounts of due process that pay insufficient regard to the limits and frailties of criminal justice institutions and processes, human apathy, prejudice and capacity for error. In practice, the criminal process rarely maintains the high standards set for it. Part of the problem is the malleability of laws: inhibitory rules designed to limit the power of criminal justice officials may encourage adaptive behaviour or even subversion, and supposedly restrictive rules may in practice be enabling.¹⁰⁰ Diversion, on-the-spot fines, plea bargaining, resort to summary proceedings and online trial proceedings further

⁹⁵ *Ibid.*, 220.

⁹⁶ Tadros, ‘A Human Right to a Fair Criminal Law’ (2010).

⁹⁷ Though see Ristroph, ‘Crime to Punishment’ (2018).

⁹⁸ Roberts, ‘Jurisprudence of Criminal Procedure’ (2011).

⁹⁹ Building on the work of one of the foremost British criminal lawyers, Glanville Williams, I have defended an account of the legitimacy of the criminal law that is closely bound up with the integrity of the criminal process. See Zedner, ‘Arbitrary Government’ (2017), 90–3.

¹⁰⁰ Sanders et al., *Criminal Justice* (2010), at 67–8. One of us has argued, ‘Laws that purport to curb abuses of police powers also provide the authority for the exercise of that power. Rules that appear to restrict the exercise of police power, invariably allow the police to

undermine the core institutions and processes by which due process is conventionally upheld.¹⁰¹ Inadequate resources and cuts to financial Legal Aid limit access to justice.¹⁰² Competing demands and priorities undermine due process by encouraging aberrant practices like non-disclosure of evidence by the prosecution.¹⁰³ A further hazard is the side-stepping of due process occasioned by resort to civil and administrative proceedings, for example use of preventive orders at one end of the scale¹⁰⁴ and deferred prosecution agreements with major companies at the other.¹⁰⁵ Much less common in the UK, but of growing concern, is resort to closed proceedings and secret trials in cases involving terrorism and national security.¹⁰⁶

More mundane but all too common are the errors and abuses that occur when criminal justice officials – subject to the influence and exigencies of their professional or ‘canteen’ culture,¹⁰⁷ political pressures and populist demands – depart from or subvert due process. Acknowledging the risk of evasion and error places a premium on setting due process norms and instituting limits and safeguards designed to protect against possible miscarriages of justice, to avert wrongful convictions¹⁰⁸ and to rectify those that occur. Ashworth and Redmayne recognise an ‘error preference’, that ‘all else being equal, of the errors that criminal courts make, more will involve acquitting the guilty than convicting the innocent’.¹⁰⁹ The error preference is a historically important safeguard of the criminal process, most famously articulated by the eighteenth-century English jurist William Blackstone in the dictum, ‘[i]t is better that ten guilty persons escape than that one innocent suffer’.¹¹⁰ This maxim stands behind many facets of due process and the procedural

stop, question, search, restrain, arrest and detain within the parameters set out in the rules.’ Zedner, ‘Arbitrary Government’ (2017), 99.

¹⁰¹ Ward, ‘Transforming “Summary Justice”’ (2015); Wilmot-Smith, ‘Necessity or Ideology?’ (2014); Ashworth and Zedner, ‘Defending the Criminal Law’ (2008).

¹⁰² See e.g. www.lawsociety.org.uk/news/stories/justice-select-committee-hears-societys-evidence-on-legal-aid-cuts/; Hoyle and Sato, *Reasons to Doubt* (2018), ch. 14.

¹⁰³ Hoyle and Sato, *Reasons to Doubt* (2018), ch. 14.

¹⁰⁴ Zedner, ‘Seeking Security by Eroding Rights’ (2007).

¹⁰⁵ Garrett, *Too Big to Jail* (2016).

¹⁰⁶ Zedner, ‘Criminal Justice in the Service of Security’ (2016), 159–61.

¹⁰⁷ Chan, ‘Changing Police Culture’ (1996); Waddington, ‘Police (Canteen) Sub-Culture’ (1999).

¹⁰⁸ Roach, ‘Wrongful Convictions’ (2010); Hoyle, ‘Victims of the State’ (2016).

¹⁰⁹ Ashworth and Redmayne, *Criminal Process* (2010), 25.

¹¹⁰ Blackstone, *Commentaries on the Laws of England* (1753).

hurdles it erects, including the burden of proof on the prosecution and the sufficiency of evidence test, which requires 'there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge before proceeding to prosecution'.¹¹¹ Due process does not stop at conviction but also informs the requirement for post-trial procedures and institutions that permit review, enable appeal against wrongful convictions and rectify abuse of state power.

No process is infallible and a fuller account of due process necessitates adequate arrangements for review of possible miscarriages of justice and state-funded redress for those found to have been wrongfully convicted and punished.¹¹² Acknowledging the inevitability of error also requires that there be provision for training, guidance, and supervision of officials to ensure they understand the principles which bind them.¹¹³ Anticipating error also has implications for the manner in which the pre-trial and trial processes are conducted. Contrast the duty on German judges to give reasons with the fact that the English jury is not required to give reasons for its verdict, which leaves English appeal courts with insufficient information about the grounds for conviction to judge its probity. Whereas in England it is necessary to seek leave to appeal from the Crown Court,¹¹⁴ in Germany there is an automatic right to appeal the trial verdict, which gives due weight to the 'error preference' by ensuring that the verdict can be challenged.¹¹⁵ The error preference would also endorse a stronger commitment to rectification, including better legal assistance and material support for those appealing their conviction or sentence, and stronger powers for independent review, redress and compensation.¹¹⁶

¹¹¹ See www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html.

¹¹² E.g. the UK Criminal Cases Review Commission (www.ccrcc.gov.uk/); See, Hoyle and Sato, *Reasons to Doubt* (2018).

¹¹³ Dworkin, *A Matter of Principle* (1985), ch. 3.

¹¹⁴ If leave to appeal is denied, an application can be made to the Criminal Cases Review Commission to review the conviction (or sentence). If the Commission believes there is a 'real possibility' the Court of Appeal will find the conviction to be unsafe, the Court is obliged to hear any case the Commission refers (Criminal Appeal Act 1995, s. 13(1)(a)). However, the Commission refers only a small proportion (between 1–4%) of c.1,400 applications each year back to the Court of Appeal. Hoyle and Sato, *Reasons to Doubt* (2018), ch. 2.

¹¹⁵ Although it should be noted that the prosecution in Germany also has a right to appeal against acquittal.

¹¹⁶ Hoyle, 'Victims of the State' (2016).

6 Conclusion

This chapter has considered the meanings, role and tensions within due process in the English system and observed points of difference and divergence in the German system. It has not considered the extent to which adversarial and inquisitorial conceptions of due process may be converging.¹¹⁷ Even if procedural convergence is occurring, for now at least, due process retains salient and distinctive meanings, character and significance in the common law tradition that appear to have no exact equivalent in the German system.

Due process remains at the heart of the English criminal process where it plays a vital role in curtailing discretion and limiting the arbitrary exercise of power by state officials and protects the rights and interests of those subject to policing and prosecution. Due process requires that the form and structures of the criminal process conform to values of justice and fairness and to fundamental rights, and that the content of laws regulating institutions, agents and processes abide by these values. Due process is essential to the legitimacy of the criminal justice system and thus to the criminal law itself. Yet the standards it sets are not unproblematic. Dworkin asks if it follows that 'each citizen ... has a right to the most accurate procedures possible to test his guilt or innocence, no matter how expensive these procedures might be to the community as a whole'.¹¹⁸ Recognising that an infallible criminal process would be inordinately expensive and likely unattainable, and that evasion and abuse inevitably occur, due process needs to be extended beyond the pre-trial and trial phases. Practical provision for post-trial review of possible miscarriages, and for rectification and redress of injustice needs to be accompanied by a much more fully elaborated framework of due process rights and principles.

Even if due process, as currently formulated, sets an impossibly high standard that no criminal justice system can hope to attain, it still has a vital role as a normative framework for decision-making. Perfect compliance may be unobtainable, but it remains an important aspiration by which to set standards that can be calibrated to accord with the gravity of the threatened infringement of individual liberty.¹¹⁹ The greater the

¹¹⁷ McEwan, 'Ritual, Fairness and Truth' (2004), 51–2; Ashworth and Redmayne, *Criminal Process* (2010), 417 ff.; Shipley, 'Due Process Rights' (2008).

¹¹⁸ Dworkin, *A Matter of Principle* (1985), 72.

¹¹⁹ Allan, 'The Rule of Law' (2016), 214.

prospective intrusion, the greater the burden on due process to protect. Recent developments remind us that the adjustment of due process protections can go down as readily as up, particularly when threats are grave. An enduring problem is that public demands for protection against threats to collective security too easily drown out the interest of individuals to be protected against unwarranted exercise of state power.¹²⁰ The role of due process is to counter this tendency by upholding individual rights against unjustified infringement by states claiming to act in the name of public safety or national security. As MacCormick rightly observes ‘no state is properly counted as a law-state unless it succeeds in erecting genuine obstacles to abuse of power’.¹²¹ Due process is precisely such an obstacle.

III ‘Due Process’ in Germany

There is no single legal term in the civil law world that corresponds to the common law notion of ‘due process’, although today, as a result of the jurisprudence of the Strasbourg Court, the concept of ‘fair trial’ (*faïres Verfahren, procédure équitable, giusto processo, proceso equitativo*) comes close as a collective name for the large assortment of heterogeneous requirements which are deemed desirable in the criminal procedure of a liberal, rights-respecting state.

Apart from the common body of law grown out of the ECHR, it is less clear which civil law concepts are the appropriate counterparts to ‘due process’. In German law, some functional equivalents can be identified, mainly *schützende Formen, Justizförmigkeit*, and *faïres, rechtsstaatliches Verfahren*. Despite different historical and conceptual backgrounds, the resulting normative landscape (i.e. the principles and values that govern the criminal process) appears to be fairly similar in English and German law despite the different structure of the respective procedural schemes.

1 *Historical and Conceptual Background*

The emphasis placed in German doctrine since the nineteenth century on ‘Form’ as a means to protect individual liberty in procedural settings is a

¹²⁰ Dworkin, ‘Civil Liberties’ (2003); Zedner, ‘Arbitrary Government’ (2017). On the political context in which erosions of due process occur, see Prime Minister Theresa May’s speech after the 3 Jun. 2017 London Bridge terrorist attack, www.gov.uk/government/speeches/pm-statement-following-london-terror-attack-4-june-2017.

¹²¹ MacCormick, *Institutions of Law* (2007), 205.

direct reaction to past misuses of coercive power, notably the lack of legal restraints of the powers of the inquisitorial judge (a). This emphasis is not a peculiarity of criminal justice but reflects the broader concept of Rechtsstaat as developed in the nineteenth century (b). These historical concepts inform the current Rechtsstaat provision of the German Basic Law (Art. 20(3), Art. 28(1) GG) which has been elaborated by the jurisprudence of the Federal Constitutional Court in light of the ECHR (c).

(a) *Schützende Formen*

From the Middle Ages to the nineteenth century, the ordinary form of criminal procedure (*processus ordinarius*) in the territories of the Holy Roman Empire was the accusatorial trial of Germanic origin. The thirteenth century saw the advent of the inquisitorial procedure, an invention of Pope Innocent III, which was soon adopted as *processus extraordinarius* by secular rulers because of its efficiency. The ordinary accusatorial procedure gradually fell into disuse without ever being completely abolished.¹²²

Although ancient law is often associated with rigid rituals and formalities, this is true mainly for the final proclamation and execution of the penal judgment in the *endlicher Rechtstag*, while the (secular) inquisitorial procedure as such was surprisingly informal because there were few written rules, if any, and at that time, legislation was often poorly drafted. Therefore, many aspects were controversial in the authoritative academic literature and in effect left to the judge's discretion. If there were strict requirements (like the biblical rule¹²³ that proof requires the testimony of two honourable witnesses or a voluntary confession) there were often widely accepted ways to circumvent them. The main objective of the inquisitorial trial was to find the truth, save the defendant's soul and protect the people from God's wrath which was said¹²⁴ to be imminent if crimes went unpunished. Although there were always warnings to be careful in order to avoid convicting an innocent person, effective legal safeguards barely existed; this was also a minor concern because the wrongly convicted innocent would be redeemed in the next world and

¹²² Schmidt, *Einführung* (1965), §§ 65 ff., 70 ff., 104 ff., 185 ff.

¹²³ 5 Moses 17:6; 19:15.

¹²⁴ Carpzov, *Practica Nova* (1635), qu. 101 no. 15: 'Saepe enim ob unius delictum, dum non vindicatur, Deus in universum irascitur populum.'

everything that really counted was eternal salvation. In the fifteenth century, the striving free cities became fond of other, almost completely informal procedures for getting rid of unwanted persons (*landschädliche Leute*). Accordingly, they vehemently protested against the introduction of a more stringently formalised procedure by the 1532 Criminal Ordinance of Emperor Charles V (*Constitutio Criminalis Carolina*), which had only supplementary character but was criticised for pampering wrongdoers.¹²⁵ The rise of absolutism and the police state in the seventeenth and eighteenth century was again characterised by flexible, efficient procedures. A spirit of arbitrariness prevailed and the defendant was almost completely at the mercy of the judge.

The old inquisitorial procedure was swept away first in France by the Revolution of 1789. In the German states, it became clear in the early nineteenth century that criminal procedure had to be reformed somehow and numerous publications treated the question what a new and better procedural scheme should look like, while many practitioners clung to the old 'common law' (*gemeines Recht*, Continental *ius commune*). In a famous book published in 1846, the Göttingen professor Heinrich Albert Zachariae scolded the old inquisitorial procedure for its complete lack of *schützende Formen*¹²⁶ – i.e. protections of the individual defendant in the form of statutory law against arbitrariness. Instead, he wrote, the inner logic of the inquisitorial procedure was that of a police operation which is most effective when it is not hampered by any restrictions at all so that everything which is deemed necessary or expedient can be done. The quote became famous and is still referred to today although it is gradually superseded by constitutional formulas and fair trial rhetoric.¹²⁷

The enlarged version of *schützende Formen* is *Justizförmigkeit*, meaning the requirement to proceed only 'in due form' – namely, in well-defined lawful form: 'Das Mittel der Justizförmigkeit ist seit jeher die prozessuale Form.'¹²⁸ Until today, German courts, textbooks and commentaries insist on *Justiz-* or *Verfahrensförmigkeit* as the epitome of a legitimate criminal procedure.¹²⁹ Another famous quote still popular

¹²⁵ Schmidt, 'Sinn und Notwendigkeit' (1953), 172–3.

¹²⁶ Zachariae, *Gebrechen* (1846), 93, 123 ff.; Zachariae, *Handbuch* (1861), 146.

¹²⁷ Hamm, 'Einsatz' (2001), 82.

¹²⁸ Quoted from the classical exposition by Schmidt, *Lehrkommentar* (1964), mn. 22; see also Rieß, 'Einleitung' (1999), mn. G 20–3.

¹²⁹ See BVerfGE 133, 168 (1999); Roxin and Schünemann, *Strafverfahrensrecht* (2017), § 1 mn. 2–6; Kühne, *Strafprozessrecht* (2015), mn. 1; Wohlers, 'Einleitung' (2018), mn. 39–41, 191.

with defence attorneys today comes from the great jurist Rudolf von Jhering:

Die Form ist immer noch die geschworene Feindin der Willkür, die Zwillingschwester der Freiheit ... Formen sind ... eine Schutzmauer gegen äußere Angriffe, – sie lassen sich nur brechen, nicht biegen.¹³⁰

The underlying idea is that all coercive state action including criminal investigation and prosecution is admissible only on the basis of and strictly in the form prescribed by law (i.e. by *parliamentary statute*). This account is in the vein of ‘negative due process’ because it forms part of the citizen’s *status negativus*, which defends individual liberty against state power (the preservation of liberty is the positive side – these are virtually two sides of the same coin).

(b) *Justizförmigkeit* and the Nineteenth-Century *Rechtsstaat*

This leads us to the nineteenth century-concept of *Rechtsstaat*. Unfortunately, *Rechtsstaat* is one of the most ambivalent terms of German public law.¹³¹ It is controversial whether the concept is analogous to the (no less ambiguous) common law notion of ‘rule of law’.¹³² Though of different origin, the legal effects of both doctrines are often quite similar. What is meant here is the political aspiration of a nomocracy, a ‘government of laws, not of men’ already expressed by Plato and Aristotle and revived in the Enlightenment era – for instance in Montesquieu’s *Esprit des Loix* and the French Declaration of the Rights of Man and of the Citizen of 1789 (Art. 16).¹³³ The idea of a state governed by law and through law reflects the classical liberal ideal and defines the modern citizen–state relationship in which fundamental (natural) rights of the individual are guarded against undue official violation by the architecture of a well-ordered state, a ‘state of reason’ rationally organised so as to promote liberty.¹³⁴ A central component of that liberal state is, next to the

¹³⁰ Von Jhering, *Geist* (1923), 471.

¹³¹ See Loughlin, *Foundations* (2010), 313 n. 5.

¹³² See MacCormick, ‘Der Rechtsstaat’ (1984), 65 ff., who sees no relevant differences; more sceptical Baratta, ‘Zur Entwicklung’ (1979), 6 ff.; for a deeper comparative analysis see Loughlin, *Foundations* (2010), 313–41; Morin, ‘The Rule of Law’ (1992); Grote, ‘Rule of Law’ (1999); Kirste, ‘Philosophical Foundations’ (2014).

¹³³ For references see Baratta, ‘Zur Entwicklung’ (1979), 1 ff.; Grote, ‘Rule of Law’ (1999), 270 ff.; Kirste, ‘Philosophical Foundations’ (2014) and the classical account by Böckenförde, ‘Entstehung und Wandel’ (2016), 143 ff.

¹³⁴ Loughlin, *Foundations* (2010), 317 ff.

separation of powers, the *Vorbehalt des Gesetzes* – that is, the requirement that individual rights, in particular freedom and property, can be infringed only if the legislature, ideally a democratically elected parliament, so permits. Academic writers like Robert von Mohl¹³⁵ coined the term *Rechtsstaat* in the early nineteenth century in contrast to the police state of the absolutist era. *Rechtsstaatlichkeit* denotes the self-restraint of the Leviathan who mistrusts itself in memory of past abuses.

The German states of the early nineteenth century were no democracies but constitutional monarchies at best, so that bourgeois political liberalism had to be content with a more moderate formal or positivist version of the *Rechtsstaat*, which included *Vorrang des Gesetzes* (executive and judiciary are bound to strictly obey the law), *Vorbehalt des Gesetzes*, *Rechtssicherheit* (legal certainty, foreseeability, non-retroactivity), *Bestimmtheit* (clarity of the law), judicial review of coercive state action, etc. *Justizförmigkeit* became the hallmark of the entire public law, especially of administrative law,¹³⁶ in the sense that the meticulous legal accuracy of the judicial process served as a model for the entire machinery of the state. All these restrictions aim to minimise the risks of misuse of power and arbitrariness.

As a consequence, at that time, discretion was regarded as different from and in fact opposed to the application of the law,¹³⁷ namely the permission to decide according to expediency; its natural habitat was and still is administrative law. Because a discretionary decision is not determined by law, it was considered non-legal, even illegal.¹³⁸ Accordingly, because courts were supposed to apply the law (a resonation of Montesquieu's unrealistic ideal of the judge as mere *bouche de la loi*), it seemed impossible to vest a court with discretion (e.g. to drop a case). In this context, a fierce controversy broke out in the 1860s whether a criminal prosecution should be initiated every time a suspicion becomes known (*Legalitätsprinzip*) or only when the prosecutor deems it expedient (*Opportunitätsprinzip*).¹³⁹ The latter principle was thought to lead to inequality and political or social discrimination – in fact, Prussia had abused the discretion of its newly established *Staatsanwälte* for political

¹³⁵ Böckenförde, 'Entstehung und Wandel' (2016), 144 ff. with further references.

¹³⁶ See e.g. Mayer, *Deutsches Verwaltungsrecht* (1895), 33.

¹³⁷ Very similar to this position, Dicey, *Law of the Constitution* (1958), 202.

¹³⁸ See e.g. Glaser, 'Das Princip der Strafverfolgung' (1883), 532.

¹³⁹ For a detailed account see Dettmar, *Legalität und Opportunität* (2008), 69 ff.

repression.¹⁴⁰ It should be added that the concept of discretion has evolved in the twentieth century. Today, there is no such thing as ‘free’ or unrestricted discretion in German law but only ‘dutiful exercise of discretion’ which is subject to (limited) judicial review.¹⁴¹ In the criminal justice context, justice and expediency have long been viewed as irreconcilable opposites¹⁴² so that, unlike in administrative law, there is, at least among scholars, a general aversion to discretion¹⁴³ and arguments based on expediency, cost efficiency etc.

Justizförmigkeit and rechtsstaatliches Verfahren before 1949 were mainly formal guarantees. But since the aim of the procedural code is to establish the truth and reach a just result, it was also believed that proceedings which faithfully conform to the rules (are *prozeßordnungsgemäß*) are best qualified to achieve these aims in the individual case as well. In this sense the belief in Justizförmigkeit is also a belief in ‘procedural justice’ *avant la lettre*.

(c) *Rechtsstaat* as a Constitutional Principle and its Procedural Implications

The German Basic Law expressly lays down a few specific procedural guarantees, such as the independence of the judiciary (Art. 97(1)), the right to have one’s case adjudicated by a judge predetermined by law (Art. 101(1), cl. 2), the right to be heard in court (*rechtliches Gehör*, Art. 103(1)), the prohibition against double jeopardy (Art. 103(3)) and an array of rights relating to arrest and other forms of deprivation of liberty (Art. 104). All other constitutional requirements regarding criminal procedure must be deduced from individual fundamental rights – which also influence procedural rules if that is necessary to give full effect to the

¹⁴⁰ The majority of academic writers favoured the ‘legality principle’ which became law in 1877 in §§ 152(2), and 170(1) of the *Reichsstrafprozeßordnung* (RStPO). However, it soon became obvious that mandatory prosecution is not feasible because of limited resources and that a selection of cases is unavoidable. The question then shifts to who should select and how. The selection criteria laid down in provisions like §§ 153 ff. StPO are fairly similar to prosecution guidelines in common law countries (like the Code for Crown Prosecutors or the United States Attorneys’ Manual). The German police are still rigidly bound to investigate each and every case pursuant to § 163(1) StPO – and have long found ways not to do this, see Dölling, *Polizeiliche Ermittlungstätigkeit* (1987), 258–65.

¹⁴¹ See Jung, *Strafffreiheit* (1974), 58–63.

¹⁴² E.g. Schmidt, ‘Gerechtigkeit und Zweckmäßigkeit’ (1947).

¹⁴³ See Erb, *Legalität und Opportunität* (1999), 52–67 with further references.

respective right¹⁴⁴ – or from the *Rechtsstaatsprinzip* set out in Article 20(3) GG.

The constitutional Rechtsstaat principle incorporates several strands of the pre-constitutional development. It is regarded as one of the most elementary principles of the constitution and has two aspects.¹⁴⁵ The first is formal (*formeller Rechtsstaat*), containing principles like legality, legal certainty, foreseeability, equal treatment, non-retroactivity (in certain cases; the older *nulla poena sine lege praevia* maxim is a special version of the general rule), reliability, protection of trust (*Vertrauensschutz*) etc., which correspond to Max Weber's notion of 'formal justice',¹⁴⁶ a reliance on abstract rules without regard to the outcome in the individual case. The second is a substantive one (*materieller Rechtsstaat*) which aims at 'substantive justice' (see Max Weber's 'kadi justice') – that is, the just resolution of the individual case.¹⁴⁷ In rare cases, these aspects clash.¹⁴⁸

The Federal Constitutional Court has used the Rechtsstaatsprinzip to acknowledge a variety of unwritten constitutional guarantees like the right to remain silent,¹⁴⁹ the presumption of innocence,¹⁵⁰ and more recently 'fair trial'.¹⁵¹ The combination of Article 20(3) GG with the guarantee of human dignity in Article 1(1) GG, but also with other fundamental rights like Article 2(1) GG (general freedom of action) or Article 5 GG (freedom of speech, freedom of the press), has allowed the formulation of constitutional rules that are not purely formal, thus resembling what has been called 'substantive due process' above. An example is the articulation of the so-called *Subjektstellung des Angeklagten*,¹⁵² which means that, in order to safeguard his autonomy (human

¹⁴⁴ BVerfGE 86, 288, 317; 109, 133, 162; 117, 71, 105. This very important constitutional doctrine is called *Grundrechtsschutz durch Verfahren*, protection of fundamental liberties by procedure, a version of 'procedural due process' not limited to criminal law contexts. E.g. all proceedings concerning deprivation of liberty like civil commitment must guarantee a sufficient level of accuracy in fact-finding.

¹⁴⁵ See Gärditz, 'Art. 20: Rechtsstaatsprinzip' (2018), mn. 3–6.

¹⁴⁶ See Weber, *Wirtschaft und Gesellschaft* (1972), 468–513.

¹⁴⁷ Substantive justice (*materielle Gerechtigkeit*) has a dubious reputation because it was the declared policy of the Nazi regime to favour substantive over formal ('liberal') justice; see Gürtner, 'Der Gedanke der Gerechtigkeit' (1936), 22–3.

¹⁴⁸ Notably in the case of the killings at the former inner-German border which were legal according to East German law but led to convictions of GDR soldiers and political leaders after reunification, BVerfGE 95, 96.

¹⁴⁹ BVerfGE 20, 323, 331; 45, 187, 246; 133, 168, 201.

¹⁵⁰ BVerfGE 19, 342, 347; 74, 358, 371, 133, 168, 202.

¹⁵¹ BVerfGE 38, 105, 111; 122, 248, 271–2; 133, 168, 200–1.

¹⁵² BVerfGE 65, 171, 174–5; 66, 313, 318; 133, 168, 200.

dignity), the defendant must enjoy such procedural rights and privileges as to be able to actively influence the course of the proceedings (e.g. by presenting evidence etc.) instead of being a mere object of a criminal investigation like the former *inquisitus*. With regard to substantive criminal law, the Rechtsstaatsprinzip has been held to enshrine the *Schuldprinzip* (guilt principle)¹⁵³ and the proportionality of punishment (in the sense of ‘just desert’).¹⁵⁴

Although the ECHR has only the hierarchical status of an ordinary statute, the Basic Law has to be interpreted in conformity with international treaties wherever feasible.¹⁵⁵ Therefore, the text of the Convention and the jurisprudence of the Strasbourg Court continue to shape the contents of German constitutional law.

The pervasive modern formula is that there is a constitutional right to a faire, rechtsstaatliches Verfahren. This formula seems to have swallowed the older schützenden Formen and Justizförmigkeit, but the old concepts are still used when informality is the main point of criticism, e.g. with respect to negotiated judgments (now § 257c StPO)¹⁵⁶ or the dismissal of cases after the fulfilment of imposed conditions like payment of money (§ 153a StPO).¹⁵⁷

2 Core Principles and Rules

What exactly is required by the German Rechtsstaatsprinzip and the fair trial guarantee – in other words, which process is constitutionally ‘due’ – cannot be exhaustively enumerated because the Federal Constitutional Court denies that there can be a comprehensive definition and leaves the details to the legislature.¹⁵⁸ With regard to ‘fair trial’, the judges at Karlsruhe have borrowed from their Strasbourg colleagues the approach to look at the totality of the proceedings in order to (miraculously) determine whether they were fair or not.¹⁵⁹ The ‘fair trial’ aspect is treated as a supplementary guarantee which informs the interpretation

¹⁵³ BVerfGE 80, 244, 255; 95, 96, 140; 133, 168, 199.

¹⁵⁴ BVerfGE 45, 187, 259–60; 130, 1, 26; 133, 168, 197–8.

¹⁵⁵ BVerfGE 74, 358, 370; 111, 307, 317; 128, 326, 367.

¹⁵⁶ Stuckenberg, ‘§ 257c StPO’ (2013), mn. 3 with further references.

¹⁵⁷ Stuckenberg, ‘Gründe’ (2016), 383–5 with further references.

¹⁵⁸ BVerfGE 57, 250, 276; 70, 297, 308–9.

¹⁵⁹ BVerfGE 133, 168, 200.

of relevant provisions and comes into play as a distinct rule only if more specific guarantees do not apply.¹⁶⁰

(a) The Constitutional Duty to Prosecute and Punish . . .

With regard to criminal justice, the Rechtsstaat principle is two-sided. On the one side, it requires the establishment and operation of an effective criminal justice system (*funktionstüchtige Strafrechtspflege*),¹⁶¹ because the Rechtsstaat can be realised only if crimes are investigated, prosecuted and sanctioned with just punishment.¹⁶² This is a constitutional duty not left to the state's discretion because the protection of the citizens, the trust placed in state institutions and the principle of equal treatment require that, in principle, criminal laws are executed in each single instance. There are certain recognised exceptions for minor offences, offenses committed abroad etc. where discretion may reign.¹⁶³ Apart from these, there is even a 'constitutional prohibition' that precludes the state from withholding prosecution and punishment in individual cases or groups of cases.¹⁶⁴ Also, criminal justice must not be the object of negotiations so that deals, settlements and agreements in criminal matters are prohibited.¹⁶⁵

(b) . . . in a Constitutional Manner

On the other side, the Rechtsstaat principle protects not only the defendant but all persons (including e.g. witnesses, alleged 'victims', private complainants) involved in a criminal procedure. The task of the criminal trial is, in the eyes of the Federal Constitutional Court, to ensure the realisation of the guilt principle, which in turn requires the search for the substantive, 'real' truth¹⁶⁶ in contrast to 'formal', agreed-upon truth in civil procedure. However, truth must not be sought 'at any cost' but in a way which respects all the other constitutionally protected interests like privacy. If those interests enter into conflict, usually a balance must be struck.¹⁶⁷

¹⁶⁰ For a comprehensive overview see Jahn, 'Fair Trial' (2015).

¹⁶¹ BVerfGE 33, 367, 383; 130, 1, 26; 133, 168, 199–200.

¹⁶² BVerfGE 57, 250, 275; 130, 1, 25–6; 133, 168, 199.

¹⁶³ BVerfGE 133, 168, 225–7.

¹⁶⁴ BVerfGE 46, 214, 223.

¹⁶⁵ BVerfGE 133, 168, 227–8.

¹⁶⁶ BVerfGE 57, 250, 275; 80, 367, 375; 130, 1, 26.

¹⁶⁷ E.g. the evidentiary use of diaries is problematic, BVerfGE 80, 367. For the exclusion of evidence see BVerfGE 113, 29, 61; 125, 260, 339–40; 130, 1, 28.

(c) A Tentative Inventory

In its plentiful case law, the Federal Constitutional Court has recognised that the Rechtsstaat principle comprises, inter alia,¹⁶⁸ the already mentioned Subjektstellung of the defendant (in conjunction with Art. 1(1) GG). ‘Equality of arms’ is not required but he must have adequate possibilities to defend himself effectively, such as the right to be informed of the charges (in translation if necessary), to have access to the case file, to be represented by counsel of his choice or receive court-appointed counsel if necessary, to be assisted by a translator if needed, to present and challenge evidence, to ask questions and make statements etc.; and of course, as a prerequisite, the defendant must be competent (physically and mentally) to stand trial.

This includes the older concept of the judicial duty of care (*gerichtliche Fürsorgepflicht*) which serves to ensure that the defendant knows his rights and is able to make informed use of them; this applies in particular to the defendant who is not assisted by counsel. This further includes the expressly stated right (Art. 103(1) GG) to be heard before a decision is made (viz. the prohibition of ‘surprise decisions’); the court must demonstrably take into account the defendant’s statements, not only listen to him.

The presumption of innocence is an unwritten constitutional principle. Until proven guilty according to law,¹⁶⁹ the defendant must not be called ‘guilty’ nor be treated as guilty. Here, the Constitutional Court follows closely the Strasbourg precedents. Another unwritten element of the Rechtsstaatsprinzip (in conjunction with Art. 1(1) GG) is the right to remain silent (privilege against self-incrimination). This includes adequate warnings before interrogations and the prohibition to draw negative inferences from any refusal to cooperate. Formally, defendants cannot testify in Germany; if they choose to speak, this is not considered testimony but proof *sui generis*; they are also free to lie. It is controversial whether partial silence may be held against defendants.

¹⁶⁸ For a recent summary see BVerfGE 133, 168, 198–205.

¹⁶⁹ The required level of proof is the inner conviction (Ger. =*Überzeugung*, Fr. =*conviction intime*) of the judge, which is equivalent to ‘proof beyond reasonable doubt’. The – persuasive and evidential – burden of proof is always on the prosecution, and the burden of proof remains on the prosecution in respect of defences (whether justification or excuse) raised by the defendant. Presumptions of guilt were always rare and most remnants have long been abolished; for an overview see Stuckenberg, *Unschuldsvermutung* (1998), 91–100.

The aforementioned duty to seek the truth encompasses the requirement that the court search for and use the 'best possible evidence' (*bestmögliches Beweismittel*).¹⁷⁰ Other elements of the Rechtsstaatsprinzip are the requirement of a speedy trial and compensation for undue delays, the right to a public trial (exceptions apply to protect other vital interests) and the right to independent, impartial and legally predetermined judges; this includes the corresponding right to recuse judges and expert witnesses.

Already the nineteenth-century idea of 'protecting forms' implied that the violation of these forms must have legal consequences, such as it may void the procedure wholly or in part. Hence, the RStPO in 1877 gave every defendant (and the prosecutor as well) the right to appeal (*Revision*) if he claimed to be burdened by a violation of the law. Here, an 'error preference' is the rule. It is sufficient to show the *possibility* that a proven illegality has affected the outcome so that the judgment will be set aside and a retrial will take place. Today, in principle, any deliberate violation of procedural law by police or prosecutor may amount to a *Rechtsstaatswidrigkeit*, a violation of Article 20(3) GG which must (somehow) be remedied. Exclusionary rules are a relatively recent addition to these remedies and remain problematic because the exclusion of evidence hampers the search for truth; the resulting case law has become extremely complicated. It is also conceivable that in cases of severe violations the proceedings are annulled *ex constitutione*.¹⁷¹

A general constitutional principle derived from the Rechtsstaatsprinzip as well as from the 'essence' (*Wesen*) of civil liberties is proportionality (*Verhältnismäßigkeit*). Any infringement by the state of fundamental rights is justified only if it is based on a statute and is 'proportional' in the sense that it serves a legitimate aim and is suitable and necessary to achieve that aim without being excessive. This applies to all procedural burdens like pre-trial detention, searches and seizures, observation, wire-tapping etc. While the proportionality of statutes and individual measures is subject to judicial review, the

¹⁷⁰ Whether this implies a constitutional mandate for the inquisitorial paradigm is unclear. It may still be up to the legislator to decide which type of trial is best fit to elucidate the truth; only consensus-based procedures are constitutionally prohibited. In the 1960s, proposals were unsuccessfully made to switch to a pure accusatorial system in order to give full effect of the presumption of innocence; see Stuckenberg, *Unschuldsvermutung* (1998), 86–7 with further references.

¹⁷¹ Roxin and Schünemann, *Strafverfahrensrecht* (2017), § 21 mn. 20 with further references.

legislature is accorded a wide margin of appreciation as to which measures it deems useful.

Although not exhaustive, this list shows that numerous criminal procedure principles and rules have constitutional status or at least a constitutional foundation in German law. This explains the common phrase that criminal procedure law is ‘applied constitutional law’ and is a good indicator (“Seismograph”) of the actual nature of the citizen–state relationship in a given polity.

Bibliography

- Allan, T. R. S., ‘Procedural Fairness and the Duty of Respect’, *Oxford Journal of Legal Studies*, 18 (1998), 497–515.
- Constitutional Justice: A Liberal Theory of the Rule of Law*, Oxford University Press (2003).
- ‘The Rule of Law’, in Dyzenhaus D. and Thorburn M. (eds.), *Philosophical Foundations of Constitutional Law*, Oxford University Press (2016).
- Ashworth A., ‘Victims’ Rights, Defendants’ Rights and Criminal Procedure’, in Crawford A. and Goodey J. (eds.), *Integrating a Victim Perspective within Criminal Justice*, Aldershot, Ashgate (2000).
- Ashworth A. and Horder J., *The Principles of Criminal Law*, 7th edn, Oxford University Press (2013).
- Ashworth A. and Redmayne M., *The Criminal Process*, 4th edn, Oxford University Press (2010).
- Ashworth A. and Zedner L., ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions’, *Criminal Law and Philosophy*, 2 (2008), 21–51.
- Baratta A., ‘Zur Entwicklung des modernen Rechtsstaatsbegriffs’, in Baer-Kaufert F.-W., Leistner G. and Schwaiger H. (eds.), *Liber Amicorum Bernhard C. H. Aubin*, Straßburg N.P., Engel Verlag (1979), 1–14.
- Beetham D., *The Legitimation of Power*, London, Macmillan (1991).
- Blackstone W., *Commentaries on the Laws of England in Four Books* (1753).
- Böckenförde E.-W., ‘Entstehung und Wandel des Rechtsstaatsbegriffs’, in Böckenförde E.-W. (ed.), *Recht, Staat, Freiheit*, 6th edn, Frankfurt am Main, Suhrkamp (2016), 143–69.
- Bohlander M., *Principles of German Criminal Procedure*, Oxford, Hart (2012).
- Bottoms A. E. and Tankebe J., ‘Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice’, *Journal of Criminal Law & Criminology*, 102 (2012), 119–70.
- Bradford B., ‘Policing and Social Identity: Procedural Justice, Inclusion and Cooperation between Police and Public’, *Policing and Society*, 24 (2014), 22–43.

- Braithwaite J. and Pettit P., *Not Just Deserts: A Republican Theory of Justice*, Oxford University Press (1990).
- Carpzov B., *Practica Nova Imperialis Saxonica Rerum Criminalium*, Wittenberg, Haered. Zachariae Schureri Senior (1635).
- Chan J., 'Changing Police Culture', *British Journal of Criminology*, 36 (1996), 109–34.
- Cole D., 'Against Citizenship as a Predicate for Basic Rights', *Fordham Law*, 75 (2007), 2541–8.
- College of Policing, *Code of Ethics: A Code of Practice for the Principles and Standards of Professional Behaviour for the Policing Profession in England and Wales*, London, College of Policing (2014).
- Council of Europe, *The ECHR in Facts and Figures 2016*, European Court of Human Rights (2017), available at www.echr.coe.int/Documents/Facts_Figures_2016_ENG.pdf.
- Damaška M., *The Faces of Justice and State Authority*, New Haven, Yale University Press (1986).
- Darbyshire P., 'The Mischief of Plea Bargaining and Sentencing Rewards', *Criminal Law Review*, 79 (2000), 895–910.
- Dettmar J. S., *Legalität und Opportunität im Strafprozess*, Berlin, Wissenschafts-Verlag (2008).
- Dicey A. V., *Introduction to the Study of the Law of the Constitution*, 10th edn, London, Macmillan (1958).
- Dölling D., *Polizeiliche Ermittlungstätigkeit und Legalitätsprinzip*, 2 vols. Wiesbaden, BKA-Forschungsreihe (1987), I.
- Dubber M. D., 'The Criminal Trial and the Legitimation of Punishment', in Duff R. A. et al. (eds.), *The Trial on Trial*, 3 vols., Oxford, Hart (2004), I, 85–100.
- Duff R. A. et al., *The Trial on Trial: Towards a Normative Theory of the Criminal Trial*, 3 vols., Oxford, Hart (2007), III.
- Dworkin R., *A Matter of Principle*, Oxford University Press (1985).
- 'Terror and the Attack on Civil Liberties', *The New York Review of Books*, 50 (2003).
- Emmerson B., Ashworth A. and MacDonald A., *Human Rights and Criminal Justice*, 3rd edn, London, Sweet & Maxwell (2012).
- Erb V., *Legalität und Opportunität*, Berlin, Duncker & Humblot (1999).
- Feeley M., *The Process is the Punishment*, New York, Russell Sage Foundation (1979).
- Follain J., *Vendetta: The Mafia, Judge Falcone and the Quest for Justice*, London, Hodder & Stoughton (2012).
- Galligan D. J., *Due Process and Fair Procedures: A Study of Administrative Procedures*, Oxford University Press (1997).
- Gärditz K. F., 'Art. 20, 6. Teil: Rechtsstaatsprinzip', in Kahl W., Waldhof C. and Walter C. (eds.), *Bonner Kommentar zum Grundgesetz*, 25 vols., Heidelberg, C. F. Müller (2018).

- Garrett B., *Too Big to Jail: How Prosecutors Compromise with Corporations*, Harvard University Press (2016).
- Glaser J., 'Das Princip der Strafverfolgung', in Glaser J., *Gesammelte kleinere juristische Schriften – Teil 1: Kleine Schriften über Strafrecht und Strafproceß*, 2nd edn, Vienna, Manz (1883), 521–45.
- Goss R., *Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights*, Oxford, Hart (2014).
- Grote R., 'Rule of Law, Rechtsstaat and "Etat de droit"', in Starck C. (ed.), *Constitutionalism, Universalism and Democracy: A Comparative Analysis*, Baden-Baden, Nomos (1999), 269–306.
- Gürtner F., 'Der Gedanke der Gerechtigkeit in der deutschen Strafrechtserneuerung', in Gürtner F. and Freisler R. (eds.), *Das neue Strafrecht*, Berlin, Decker (1936), 19–31.
- Hamm R., 'Der Einsatz heimlicher Ermittlungsmethoden und der Anspruch auf ein faires Verfahren', *Strafverteidiger* (2001), 81–5.
- Hawkins K., *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency*, Oxford University Press (2002), 424–7.
- Hobbes T., *Leviathan*, Oxford University Press (2008 [1651]).
- Hodgson J., 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure', in Duff R. A. et al. (eds.), *The Trial on Trial*, 3 vols., Oxford, Hart (2006), II, 223–42.
- Home Office, *Justice for All*, London, HMSO (2002).
Rebalancing the Criminal Justice System in Favour of the Law-Abiding Majority: Cutting Crime, Reducing Reoffending and Protecting the Public, London, HMSO (2006).
- Hörnle T., 'Democratic Accountability and Lay Participation in Criminal Trials', in Duff R. A. et al. (eds.), *The Trial on Trial*, 3 vols., Oxford, Hart (2006), II, 135–53.
- Hoyle C., 'Victims of the State: Recognising the Harms Caused by Wrongful Convictions', in Bosworth M., Hoyle C. and Zedner L. (eds.), *Changing Contours of Criminal Justice: Research, Politics and Policy*, Oxford University Press (2016).
- Hoyle C. and Sato M., *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission*, Oxford University Press (2018).
- Hunter J. et al., *The Integrity of Criminal Process: From Theory to Practice*, Oxford, Hart (2016).
- Hyman T., 'The Little Word "Due"', *Akron Law Review*, 38 (2005), 1–51.
- Issacharoff S., *Civil Procedure*, St Paul-Minneapolis, Foundation Press (2012).
- Jackson J., 'Justice for All – Putting Victims at the Heart of Criminal Justice?', *Journal of Law and Society*, 30 (2003), 309–26.
- Jahn M., 'Fair trial als strafprozessuales Leitprinzip im Mehrebenensystem', *Zeitschrift für die gesamte Strafrechtswissenschaft*, 127 (2015), 549–615.

- Jhering R. von, *Geist des römischen Rechts*, 6th edn, Breitkopf und Härtel, Leipzig (1923).
- Jung H., *Strafffreiheit für den Kronzeugen?*, Cologne, Heymanns (1974).
- Kelman D., 'Closed Trials and Secret Allegations: An Analysis of the "Gisting" Requirement', *The Journal of Criminal Law*, 80 (2016), 264–77.
- Kirste S., 'Philosophical Foundations of the Principle of the Legal State (Rechtsstaat) and the Rule of Law', in Silkenat J. R., Hickey Jr. J. E. and Barenboim P. D. (eds.), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, New York, Springer (2014), 29–43.
- Kühne H.-H., *Strafprozessrecht*, 9th edn, Heidelberg, C. F. Müller (2015).
- Loughlin M., *Foundations of Public Law*, Oxford University Press (2010).
- McBarnet D., 'False Dichotomies in Criminal Justice Research', in Baldwin J. and Bottomley A. K. (eds.), *Criminal Justice: Selected Readings*, Oxford, Martin Robertson (1978), 23–34.
- Conviction: Law, the State, and the Construction of Justice*, London, Macmillan (1983).
- McConville M., Sanders A. and Leng R., *The Case for the Prosecution: Police Suspects and the Construction of Criminality*, London, Routledge (1991).
- MacCormick N., 'Der Rechtsstaat und die rule of law', *Juristen-Zeitung*, 39 (1984), 65–70.
- Institutions of Law: An Essay in Legal Theory*, Oxford University Press (2007).
- Macdonald S., 'Constructing a Framework for Criminal Justice Research: Learning from Packer's Mistakes', *New Criminal Law Review*, 11 (2008), 257–311.
- McEwan J., 'Ritual, Fairness and Truth: The Adversarial and Inquisitorial Models of Criminal Trial', in Duff R. A. et al. (eds.), *The Trial on Trial*, 3 vols., Oxford, Hart (2004), I, 51–69.
- Marshall G., 'Due Process in England', in Pennock J. R. and Chapman J. W. (eds.), *Due Process*, New York University Press (1977), 69–92.
- Mayer O., *Deutsches Verwaltungsrecht*, 1st edn, 2 vols. Leipzig, Duncker & Humblot (1895), I.
- Meares T. L., Tyler T. R. and Gardener J., 'Lawful or Fair?: How Cops and Laypeople Perceive Good Policing', *Journal of Criminology and Criminal Law*, 105 (2016), 297–344.
- Morin J.-Y., 'The Rule of Law and the Rechtsstaat Concept: A Comparison', in McWhinney E. (ed.), *Federalism in the Making: Contemporary Canadian and German Constitutionalism, National and Transnational*, Dordrecht, Kluwer (1992), 60–86.
- Neuberger Lord D. E., 'JUSTICE – Justice in an Age of Austerity', available at www.supremecourt.uk/docs/speech-131015.pdf.
- Nickel J. W., 'Due Process Rights and Terrorist Emergencies', *European Journal of Legal Studies*, 1 (2007), 243–64.

- Orth J., *Due Process of Law: A Brief History*, Lawrence, University Press of Kansas (2003).
- Packer H. L., *The Limits of the Criminal Sanction*, Stanford University Press (1968).
- Phillips C. and Bowling B., 'Ethnicities, Racism, Crime and Criminal Justice', in Liebling A., Maruna S. and Mcara L. (eds.), *The Oxford Handbook of Criminology*, Oxford University Press (2017), 190–212.
- Ramraj V. V., 'Four Models of Due Process', *International Journal of Constitutional Law*, 2 (2004), 492–524.
- Redmayne M., 'Exploring Entrapment', in Zedner L. and Roberts J. V. (eds.), *Principles and Values in Criminal Law and Criminal Justice*, Oxford University Press (2012), 157–70.
- Rieß P., 'Einleitung', in Rieß P. (ed.), *Löwe-Rosenberg, Die Strafprozeßordnung und das Gerichtsverfassungsgesetz, Großkommentar*, 25th edn, 8 vols., Berlin, De Gruyter (1999), I.
- Ristroph A., 'The Thin Blue Line from Crime to Punishment', *Brooklyn Law School Legal Studies Research Papers*, 108 (2018), 305–34.
- Roach K., *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice*, University of Toronto Press (1999).
- 'Four Models of the Criminal Process', *The Journal of Criminal Law and Criminology*, 89 (1999), 671–716.
- 'Wrongful Convictions: Adversarial and Inquisitorial Themes', *North Carolina Journal of International Law and Commercial Regulation*, 35 (2010), 388–446.
- Roberts P., 'Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication', in Duff R. A. et al. (eds.), *The Trial on Trial*, Oxford, 3 vols., Hart (2006), II, 37–64.
- 'Comparative Criminal Justice Goes Global', *Oxford Journal of Legal Studies*, 28 (2008), 369–91.
- 'Groundwork for a Jurisprudence of Criminal Procedure', in Duff R. A. and Green S. P. (eds.), *Philosophical Foundations of Criminal Law*, Oxford University Press (2011), 380–408.
- Roxin C. and Schönemann B., *Strafverfahrensrecht*, 29th edn, Munich, C. H. Beck (2017).
- Sanders A., Young R. and Burton M., *Criminal Justice*, 4th edn, Oxford University Press (2010).
- Schmidt E., 'Gerechtigkeit und Zweckmäßigkeit in Geschichte und Gegenwart der Strafrechtspflege', in Schmidt E., *Justitia fundamentum regnorum*, Heidelberg, Schriften der Süddeutschen Juristen-Zeitung (1947), 75–98.
- 'Von Sinn und Notwendigkeit wissenschaftlicher Behandlung des Strafprozeßrechts', *Zeitschrift für die gesamte Strafrechtswissenschaft*, 65 (1953), 161–77.

- Lehrkommentar zur Strafprozeßordnung und zum Gerichtsverfassungsgesetz*, 3 vols., 2nd edn, Göttingen, Vandenhoeck & Rupprecht (1964), I.
- Einführung in die Geschichte der deutschen Strafrechtspflege*, 3rd edn, Göttingen, Vandenhoeck & Rupprecht (1965).
- Shipley D. E., 'Due Process Rights before EU Agencies: The Rights of Defense', *Georgia Journal of International and Comparative Law*, 37 (2008), 1–52.
- Stuckenberg C.-F., *Untersuchungen zur Unschuldsvermutung*, Berlin, De Gruyter (1998).
- '§ 257c StPO', in Erb V., Esser R., Franke U., Graalman-Scheerer K., Hilger H. and Ignor A. (eds.), *Löwe-Rosenberg, Die Strafprozeßordnung und das Gerichtsverfassungsgesetz, Großkommentar*, 26th edn, 13 vols., Berlin, De Gruyter (2013), VI/II.
- 'Gründe für die Abschaffung des § 153a StPO', in Herzog F., Schlothauer R. and Wohlers W. (eds.), *Rechtsstaatlicher Strafprozess und Bürgerrechte, Gedächtnisschrift für Edda Weßlau*, Duncker & Humblot, Berlin (2016), 369–89.
- Stumer A. C., *The Presumption of Innocence*, Oxford, Hart (2010).
- Tadros V., 'A Human Right to a Fair Criminal Law', in Chalmers J. and Leverick F. (eds.), *Essays in Criminal Law in Honour of Sir Gerald Gordon*, Edinburgh University Press (2010), 103–25.
- Tankebe J. and Lieblich A. (eds.), *Legitimacy and Criminal Justice: An International Exploration*, Oxford University Press (2013).
- Tyler T., *Why People Obey the Law*, New Haven, Yale University Press (1990).
- 'Procedural Justice, Legitimacy, and the Effective Rule of Law', *Crime and Justice*, 30 (2003), 283–357.
- Tyler T., Jackson J. and Bradford B., 'Psychology of Procedural Justice and Cooperation', in Bruinsma G. and Weisburd D. (eds.), *Encyclopedia of Criminology and Criminal Justice*, New York, Springer (2014).
- Waddington P. A. J., 'Police (Canteen) Sub-Culture: An Appreciation', *British Journal of Criminology*, 39 (1999), 287–309.
- Waldron J., 'Security and Liberty: The Image of Balance', *Journal of Political Philosophy*, 11 (2003), 191–210.
- Ward J., 'Transforming "Summary Justice" through Police-Led Prosecution and "Virtual Courts": Is "Procedural Due Process" Being Undermined?', *The British Journal of Criminology*, 55 (2015), 341–58.
- Weber M., *Wirtschaft und Gesellschaft*, 5th edn, Mohr Siebeck, Tübingen (1972).
- Weigend T., 'Why Have a Trial when You Can Have a Bargain?', in Duff R. A. et al. (eds.), *The Trial on Trial*, 3 vols., Oxford, Hart (2006), II, 207–22.
- 'No News Is Good News: Criminal Sentencing in Germany since 2000', in Tonry M. (ed.), *Crime and Justice*, 45 (2016), 83–106.
- Wilmot-Smith F., 'Necessity or Ideology?', *The London Review of Books*, 36 (2014), 15–17.

- Wohlers W., 'Einleitung', in Wolter J. (ed.), *Systematischer Kommentar zur Strafprozessordnung*, 10 vols., 5th edn, Cologne, Heymanns (2018), I.
- Zachariae H. A., *Die Gebrechen und die Reform des deutschen Strafverfahrens dargestellt auf der Basis einer consequenten Entwicklung des inquisitorischen und des accusatorischen Prinzips*, Göttingen, Verlag der Dieterich'schen Buchhandlung (1846).
- Handbuch des deutschen Strafprocesses*, 2 vols., Göttingen, Verlag der Dieterich'schen Buchhandlung (1861), I.
- Zedner L., *Criminal Justice*, Oxford University Press (2004).
- 'Seeking Security By Eroding Rights: The Side-Stepping of Due Process', in Goold B. and Lazarus L. (eds.), *Security and Human Rights*, Oxford, Hart (2007).
- 'Criminal Justice in the Service of Security', in Bosworth M., Hoyle C. and Zedner L. (eds.), *The Changing Contours of Criminal Justice*, Oxford University Press (2016).
- 'Security against Arbitrary Government in Criminal Justice', in du Bois-Pedain A., Ulväng M. and Asp P. (eds.), *Criminal Law and the Authority of the State*, Oxford, Hart (2017).