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Version  Post-print/accepted manuscript


Publisher's Statement  Reproduced from The Trial on Trial: “Dubber, Markus D., The Criminal Trial and the Legitimation of Punishment. THE TRIAL ON TRIAL, R.A. Duff et al. eds., 2004.”

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The Criminal Trial and the Legitimation of Punishment

Markus Dirk Dubber*

Whatever else it might be, a theory of the trial is also part of a theory of the practice of punishment as a whole. By the theory of a practice I mean (also) an attempt to legitimize it, i.e., to develop—or at least to identify—relevant legitimizing principles and to match the practice against these principles.

Now the practice of punishment can be divided, for analytical purposes, into three aspects, each of which requires legitimation if the practice as a whole is to be legitimized. The three aspects of punishment are the definition of criminal norms (the realm of substantive criminal law), followed by their application, which itself is divided into their imposition (the realm of criminal procedure, or the criminal process narrowly speaking) and their infliction (the realm of prison—or correction—law or, more correctly, the law of punishment execution). The trial is one of the procedural means by which criminal norms are imposed. It is not the only imposition procedure, nor even the most common, though it may be the most significant. It certainly is the most visible, and the most studied, which is not to say that it is also the most theorized.

A theory of the trial thus would form part of a theory of the imposition of criminal norms, which in turn belongs to a theory of the practice of punishment, which in turn must find its place within a theory of law (given that punishment is a law practice), which in turn fits into a theory of state governance (of which law is but one mode; police is another2).

For purposes of this paper, I will take for granted that the fundamental principle of legitimacy in a modern democratic state is autonomy, or self-determination (self-government, if you prefer). The goal of this paper is to illuminate those features of the criminal process narrowly speaking that reflect the principle of autonomy. Its goal is not to account for every feature of the criminal process, though I do think that its main, perhaps even its essential, features are comprehensible in terms of the principle of autonomy.

1. Theories of the Criminal Process and Constitutional Law

This essay is written from an American perspective. Now one might think that this perspective would easily yield a comprehensive and well worked out theory of the criminal process. After all, American constitutional law, the traditional repository of

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* Thanks to Lindsay Farmer and Paul Roberts for helpful comments and suggestions.
1 These analytic distinctions carry no normative significance. In fact, the task of legitimation consists partly of overcoming the normative significance ascribed to them, as persons move closer to the inflictive end of the criminal process. For instance, one might attempt to render the infliction of punishment consistent with the principle of autonomy by breaking down the distinction between persons who are under a criminal sentence of some form, and those who aren’t (yet). Cf. M D Dubber, ‘Reforming American Penal Law,’ 90 J Crim L & Criminology 49, 50 (1999).
theoretical sophistication in American legal doctrine, has lavished attention on the criminal process for decades. The study of American criminal procedure is synonymous with the study of constitutional criminal procedure.

This wasn’t always so. Until the 1960s, criminal procedure had considerable difficulty finding a home in American legal education and scholarship. It was taught as an appendix to two other, established, subjects, criminal law and constitutional law. Criminal procedure attracted little attention until the U.S. Supreme Court, under Chief Justice Earl Warren, took it upon itself to reform the American criminal process (particularly in the Southern States), by means of the federal constitution. The federal bill of rights was applied to the states, and therefore to state criminal processes, and by the 1970s, criminal procedure had emerged as a respectable, self-standing subject.

Soon there was so much law on criminal procedure that it could no longer fit into the introductory criminal law class (which itself was struggling to keep up with developments triggered by the Model Penal Code of 1962) and there was so much constitutional law on criminal procedure that already bulging casebooks on constitutional law could not find room for it either. And so classes on criminal procedure, as constitutional criminal procedure, began to appear in American law schools. Eventually, the body of constitutional jurisprudence about the fourth, fifth, and sixth (and a little bit of the eighth) amendments grew so large, criminal procedure professors decided a single course would no longer do. Today, criminal procedure is often taught in three courses, one dealing with the early parts of the process (investigation), one addressing its latter parts (prosecution and adjudication), plus a third one (survey) that covers the criminal process in its entirety.

Few people can remember when American criminal procedure was not a species of constitutional law. And yet, despite this overabundance of constitutional procedural jurisprudence, the American criminal process is oddly undertheorized. Here the contrast to substantive criminal law is instructive. The substantive criminal law, everyone agrees, is grossly underconstitutionalized, particularly if compared with its sister discipline of criminal procedure. While the Supreme Court lavished attention on the criminal process, it remained strangely untouched by the constitutional constraints on the state’s power to define the norms whose application it so vigilantly scrutinized. This is puzzling, to say the least for, as Henry Hart asked rhetorically long ago, just as the Warren Court was beginning its constitutional criminal procedure revolution. “What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?”

Instead of adding up to a comprehensive view of the criminal process, driven by defined aims and structured by principles, norms, and rules, the avalanche of constitutional law has buried theorizing about the American criminal process. Rather than highlighting the foundations of the criminal process, the Court’s constitutional jurisprudence has kept them from view. Today the casuistry of constitutional criminal procedure is so byzantine, it is difficult to teach—and think about—the subject as something other than a marvelously intricate, and gnarly, construct of precedent shaped by successive Supreme Courts and shifting majorities.

Substantive criminal law, by contrast, is largely untouched by constitutional jurisprudence, but thrives as a subject of theoretical inquiry. While the Supreme Court

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has shown virtually no constitutional interest in such subjects as the basic requirements of criminal liability, including actus reus, mens rea, justifications, and excuses, commentators continue to debate them with great energy and at considerable length.

The point here is not, of course, to suggest that there is anything wrong with thinking about what constraints constitutional law might place on the criminal process. It’s just that limiting thinking about procedural principles to constitutional jurisprudence runs the risk of obscuring as much as it illuminates. In Germany, for example, it may well be a good idea, as many commentators there suggest, to shift the emphasis from statutory interpretation of the comprehensive, but conceptually barren, Code of Criminal Procedure to constitutional jurisprudence. The United States Supreme Court, however, has at the very least illustrated how a constitutional jurisprudence of the criminal process originating in a commendable urge to remedy the worst abuses in practice can disintegrate into unprincipled patchwork.

2. Process Without Trial

The bad news is, then, that the American literature has precious little to contribute to a British theory of the trial. The good news is, however, that the theoretical emptiness of American constitutional criminal procedure clears the way to a broader Anglo-American theory of the trial that rests not on constitutional law, but on another, older, common denominator, the common law.

For it turns out that one is more likely to find jurisprudential explorations of the nature of the criminal process in the preconstitutional era of American criminal procedure, when courts spoke in terms not of constitutional rights, but of common law rights. Not that the foundations of common law rights—other than their precedential pedigree—were plumbed with particular care, but at least judges had to render basic decisions without the crutch of constitutional provisions. For instance, the nature of the criminal process—and of legal processes in general—arose regularly when courts were forced to consider the results of various, and increasingly common, “summary” proceedings that did away with certain rights associated with a proper criminal trial under the common law.

Consider, to take an early English example, summary proceedings under the 1823 Master and Servant Act. The Act authorized local justices of the peace after an informal hearing to commit workers to the house of correction for breaches of their labor agreements, including quitting, temporary absence, or being neglectful or disobedient at work (“any other Misconduct or Misdemeanour”). The hearing had none of the hallmarks of common law protections associated with a criminal trial. Warrants of commitment were loosely drawn (failing to identify, for example, the occupation of the worker, a crucial condition of jurisdiction under the Act), the evidence supporting the

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5 As the highest federal court, the Court has not been able to avoid addressing some of these questions as a matter of statutory interpretation. See, e.g., Morissette v. United States, 342 US 246 (1952) (mens rea).
adjudication need not be set out, nor need the evidence be given under oath or in the presence of the accused, who also had no right to cross-examine witnesses against him. When commitments under the Act were brought before common law courts under writs of habeas corpus, the judges often took the magistrates to task for failing to honor the common law rights of the accused, and parliament for promulgating an act that “is drawn as, I am sorry to say, most of them are, imperfectly and loosely . . . .” Ultimately the legitimacy of these summary proceedings turned on a number of formal distinctions. A criminal trial, after all, was not required if the proceeding wasn’t criminal. The earliest distinction that separated criminal proceedings—and therefore trial—from other less formal ones, focused on the form of the adjudication resulting from them. As Robert Steinfeld reports, eighteenth century English cases held that “if a justice’s adjudication result in an ‘order’ rather than a ‘conviction,’ even if the order result in ‘severe penalties’ as order frequently did, it was not necessary for the justice to adhere to the formalities required for a conviction.” So, if an adjudication under the Master and Servant Act was classified as an order, rather than a conviction, then the conviction would not have to identify the basis of jurisdictions, for instance. That’s exactly what the common law courts decided—“commitments” were “orders,” and not “convictions.” Thus, an adjudication could be informal as long as the magistrate didn’t make the mistake of mischaracterizing it as a conviction, even if the commitment itself presumed a prior conviction.

At bottom, the informal hearings under the Master and Servant Act did not require a trial because they were not criminal. And they were not criminal because they were not designed to punish, but to discipline. The “commitment” after all was to the “house of correction.” They were a means for enforcing obedience among workmen or, to use the language of labor law, to compel specific performance.

The Master and Servant Act belongs to a class of disciplinary measures that has enjoyed a long tradition in English law and that continues to flourish in contemporary English, and American, law. The paradigm of these police measures is vagrancy. As Robert Shoemaker has pointed out, discussing seventeenth century English law, “[m]ost authors of manuals believed that justices outside sessions had the power to commit a broad range of offenders to houses of correction . . . for custodial, but not punitive, purposes.” It was, for instance, that “in the specific case of idle persons who lived above their station . . . offenders could be committed by an individual justice to a house

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8 Id. 154-55.
9 Id. at 155 (quoting Re John Gray and Hugh Blaney, 24 L.J. (n.s.) (mag. cases) 26 (1844), 29).
10 Id. at 155 n.206 (citing Dominus Rex v. Lloyd, 2 Strange 996, 93 Eng Rep 992 (8 Geo II), 993, Rex v. Bissez, Sayer, 303, 96 Eng Rep 888 (1756), 889).
of correction to be put to lard labor, but they could not be punished [whipped] until the case was tried at sessions.”  

American courts’ struggles with police measures closely resembled those of their English colleagues, both in form, and in result. One of the most articulate expressions of judicial attitudes toward non-criminal, administrative, sanctions imposed without a trial and its attendant protections appears in *United States v. Hing Quong Chow*, a 1892 federal case addressing the then-nascent regime of policing immigration through sanctions that were on their face indistinguishable from criminal punishment. The statute in question provided that “any Chinese person, or person of Chinese descent, arrested under the provisions of this act or the acts hereby extended, shall be adjudged to be unlawfully within the United States, unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.” Furthermore, “any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States . . . .” Quashing the indictment as not setting out a true crime, the judge explained that the statute, as it seems to me, deals with the coming in of Chinese as a police matter, and is the re-enacting and continuing of what might be termed a “quarantine against Chinese.” They are treated as would be infected merchandise, and the imprisonment is not a punishment for a crime, but a means of keeping a damaging individual safely till he can be sent away. In a summary manner, and as a political matter, this coming in is to be prevented. The matter is dealt with as political, and not criminal.  

The statute was political, not criminal, because it provided for what the English courts would have termed an order, and a commitment more specifically, rather than a conviction. Unlike the English statutes, however, this American immigration statute explicitly, and clumsily, invoked the term “conviction,” ordinarily a telltale sign of a criminal statute, and of a trial. So the judge was forced to look beneath outward appearances and excavate the true meaning of the statutory terms.  

The words used are those which are ordinarily found in criminal statutes; but the intent of congress is, as it seems to me, unmistakable. What is termed “being convicted and adjudged” means “found,” “decided” by the commissioner, representing not the criminal law, but the political department of the government.  

Although the statute was perhaps unartfully phrased, the informal process set out for its application made it clear that it could not, and therefore was not, a criminal statute defining crimes chargeable by indictment.  

By section 4 it is this finding [of being unlawfully in the U.S.] which is to be followed by the consequence which, it is urged, authorizes a sentence under a criminal law. I cannot believe this was the intent of congress. A reversal of the presumption of conduct or presence being lawful might be introduced into procedures which were political in character, and assimilated to those relating to quarantine; but it seems to me well-nigh

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14 Id.  
15 *United States v. Hing Quong Chow*, 53 F 233 at 234 (ED La 1892).  
16 Id. at 234.
impossible that congress should have intended that in proceedings in their nature criminal there should be the presumption of guilt, and that the accused should be found guilty unless he proves himself to be innocent. The whole proceeding of keeping out of the country a class of persons deemed by the sovereign to be injurious to the state, to be effective of its object, must be summary in its methods, and political in its character. It could have no place in the criminal law, with its forms and rights and delays.\footnote{Id.}

Now, as I’ve argued elsewhere, the distinction between “political” and “criminal” matters spelled out in \textit{Hing Quong Chow} and invoked, though generally less explicitly, in many other American cases dealing with summary proceedings reflects a more fundamental distinction between two modes of governance, police and law.\footnote{M D Dubber, ‘Polizei-Recht-Strafrecht,’ in C Prittwitz et al. (eds.), Festschrift für Klaus Lüderssen zum 70. Geburtstag 179 (Baden-Baden, Nomos, 2002); see also M D Dubber, The Police Power: Patriarchy and the Foundations of Criminal Law (New York, Columbia University Press, forthcoming).} Police here is understood in the sense of the “power to police,” which itself derives from the patriarchal power of the householder and, later on, the quasi-patriarchal power of the king. As such, police is the heteronomous management of inferiors by quasi-householders (the ancient Greek art of “economics”). Law, by contrast, is autonomous government of citizens by citizens (the realm of “politics”).

The basic contrast in \textit{Hing Quong Chow} between the political (police) and criminal (crime) thus itself reflects a more fundamental tension between two basic modes of governance that turn on different notions of the subject and object of government, and their relationship. It is, at bottom, the distinction between \textit{Polizeistaat} (later renamed, focusing on its benign aspect, \textit{Wohlfahrtsstaat} or \textit{Sozialstaat}) and \textit{Rechtsstaat}.

Within this framework of police and law, crime and punishment appear as phenomena of criminal law, itself a species of law. The criminal process, in turn, is the procedural aspect of criminal law, governing the imposition of criminal legal norms. And the trial is one component of the criminal process thus conceived.\footnote{Here I think it’s important not to confuse the trial with the criminal process. As even a casual observer of the American criminal process can attest, only a very small percentage—less than 10%—of all criminal cases are resolved by trial. That’s not to say that the trial isn’t worth careful study as a social phenomenon with meaning beyond its actual occurrence, see, e.g., R Burns, A Theory of the Trial (Princeton, Princeton University Press, 1999), just that a theory of the criminal process in general, and even of the trial in particular, needs to account of non-trial criminal processes as well.}

One would expect that the principles of criminal law in general, and of the criminal trial in particular, would derive from, or at least fit with, the conception of law as governance through equal self-government—as opposed to hierarchical other-government. The criminal process, and therefore the criminal trial, thus would be concerned with respecting, and affirming, the status of each of its participants as persons capable of self-government, rather than as objects to be processed.

The police process, by contrast, would be governed by other considerations, if not principles. Given its origins in the notion of patriarchal household governance, or traditional economics, these aims might include efficiency or, more generally, the maximization of “economic” resources.\footnote{This distinction resembles Herbert Packer’s distinction between the Due Process and Crime Control Models of the criminal process. H L Packer, The Limits of the Criminal Sanction (Stanford, Stanford University Press, 1968).} The process of criminal law, as law, is shaped by what process is due to the persons that populate it. The process of disposition, as
police, has no similar concerns of “due process” for the simple reason that it does not conceptualize its participants as persons, but rather as elements of cases to be processed.

3. Autonomy in the Criminal Process

In the law of the imposition of criminal norms in general, and of the criminal trial in particular, we find a host of manifestations of autonomy in current law that, however, aren’t always recognized as such. At the outset, it might be useful to distinguish between two types of autonomy, active and passive. Criminal procedure rights manifest both active and passive autonomy, where active autonomy is the freedom to participate in the process, and passive autonomy the freedom not to, or more generally, the freedom not to be interfered with, often referred to in American constitutional jurisprudence (somewhat misleadingly) as “the right of privacy.”

The first, and most basic, requirement of autonomy in the criminal process is that the defendant must be “competent.” Without the ability to understand the nature of the criminal process and the charges against her, or the ability to cooperate with her representatives in that process, she cannot participate in it, and thereby make it her own.

This basic requirement of competence is traditionally labelled as “competence to stand trial.” It’s important to recognize, however, that it is a requirement that runs through the entire criminal process. Competence to stand trial is but one (impositional) manifestation of the general competence to participate in the criminal process, i.e., to be not merely the object of the criminal process, but its subject as well. No incompetent defendant can enter a plea, can be convicted (assuming he was found competent to stand trial), sentenced, or “punished.” The most dramatic instance of the requirement of (executional) competence, in fact, is not competence to stand trial, but competence to be punished by death, i.e., to be “executed,” literally speaking. An incompetent defendant is a defendant whose capacity for self-determination is compromised to such a degree and in such a way that she could not be anything more than an object of inquiry that passively undergoes processing and eventual labelling, or in the case of capital punishment, slaughter.

In sum, an incompetent defendant is incapable of exercising either active or passive autonomy. She would not only fail to participate in the criminal process, but would be incapable of doing so.

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21 This is not to say that the criminal process, or for that matter the trial, is in fact solely, or even primarily, based on the concept of autonomy. The idea is instead to highlight some characteristics of the process that make sense if viewed in this light and that might feature in a theory of the criminal process, and of the criminal trial, built more consistently on the legitimating concept of autonomy.
22 Nothing much turns on this distinction. Passive autonomy isn’t preferable to, or antecedent to, active autonomy, nor vice versa. What matters for my present purpose—to illuminate the place of autonomy in the criminal process—is that both active and passive autonomy are varieties of autonomy, not that they are active or passive. (The analytical distinction between passive and active autonomy thus shouldn’t be confused with Isaiah Berlin’s distinction between negative and positive liberty. See Isaiah Berlin, ‘Two Concepts of Liberty,’ in Four Essays on Liberty (London, Oxford University Press, 1969).)
23 The freedom not to participate finds expression not only in particular procedural rights (like the right to remain silent), but also in the right to waive those rights, or—as in the case of fourth amendment protections—to consent to state conduct that would otherwise violate them.
24 See Ford v. Wainwright, 477 US 399 (1986) (competence to be executed requires “comprehending the reasons for the penalty [and] its implication”).
25 For clinical competence tests, see, e.g., K Heilbrun & D Dematteo, Forensic Mental Health Assessment: A Casebook (New York, Oxford University Press, 2002).
Prime examples of passive autonomy protections include the fourth amendment’s protection against “unreasonable searches and seizures,” which the Supreme Court has read as protecting “expectations of privacy,” and the fifth amendment’s privilege against compelled self-incrimination. Note, however, that the passive self-incrimination privilege also has an active flipside, the right to incriminate oneself, whether outside the trial (most dramatically, in the form of a “confession”) or during it (in the form of testimony). It is often overlooked that *Miranda v. Arizona,* for example, was a case not about confessions, but about coerced confessions. The Court was careful to point out that it did not mean to preclude a suspect from “talk[ing] to the police without the benefit of warnings and counsel.” Otherwise, to protect the suspect’s passive autonomy—by deterring police from obtaining coerced confessions—the Court would have interfered with her active autonomy—by preventing her from making a voluntary confession.

It’s useful to remind ourselves at this point that until late in the nineteenth century, “criminal defendants in this country, as at common law, were considered to be disqualified from giving sworn testimony at their own trial by reason of their interest as a party to the case.” Continental criminal procedure to this day disqualifies defendants from testifying under oath. German criminal procedure law, for instance, categorically exempts the defendant from the oath requirement, along with children and the insane.

That’s not to say, of course, that continental criminal procedure precludes the accused from testifying, or confessing, altogether, anymore than American criminal procedure. After all the act of confession, most dramatically if it occurs in open court, can be regarded as the ultimate exercise of the accused’s active autonomy, in that she literally applies the relevant provisions of the criminal law to herself, even as a procedural distinction between confession and conviction remains in all legal systems, along with a requirement that self-imposed punishment be executed by a third party.

Contrast the right to testify with the *requirement* of a confession for conviction, which gave rise to torture as an evidence gathering tool. The right to enter a plea, unknown in continental criminal procedure, also should be seen in contrast to the requirement of a confession. The defendant in the American criminal process has the option of ending the proceedings against her by entering a plea, an option that is unavailable to continental defendants who, even after having struck a deal with the judge (the prosecutor tends not to play much of a role in negotiations), must go through the

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28 U.S. const. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself”).
30 Id. at 478.
32 StPO § 60. Discretionary exemptions—determined by the presiding judge—apply to youths (17-18 year-olds), the victim and her relatives, the defendant’s relatives, and witnesses with a prior perjury conviction. StPO § 61.
ordinary—though now shortened—criminal process, including the interrogation by the presiding judge and a public confession in open court.\textsuperscript{35} The availability of pleas—as opposed to confessions followed by conviction—doesn’t just have passive significance, however, by allowing the defendant to opt out of the full-fledged process. It also empowers the defendant to participate in the resolution of the process through plea negotiations.\textsuperscript{36} Whether plea negotiations are autonomy enhancing or limiting in fact depends crucially on the distribution of power among those doing the negotiating. As a matter of fact, the American prosecutor (often aided by the defense attorney and the judge) enjoys such enormous, and virtually unchecked, power that plea negotiations, again as a matter of fact, are autonomy limiting. To render plea bargaining consistent with the principle of autonomy would require a concerted effort to level the playing field, either by equipping the defendant with greater rights in the process (for example, by establishing meaningful voluntariness review) or limiting the prosecutor’s power (for example, by constraining her charging discretion or reducing the level, and range, of penalties), or both.\textsuperscript{37} Without these reforms, plea bargaining remains a convenient mechanism for the mass processing of cases driven by the superior power of the state, rather than a legal procedure for the adjudication of persons.

The sixth amendment right to counsel likewise has an active and a passive, autonomy-enhancing, side. Passively, it works, indirectly, to put meat on the bones of the privilege against self-incrimination.\textsuperscript{38} Actively, it enables the defendant to participate fully, though indirectly, in a lawyer-dominated process that disposes of “her” case. At the same time, however, the defendant has the right to participate directly, pro se, and take her chances as a laywoman among trained jurisprudes.

Either directly, or indirectly, the accused also has the right to participate in the impositional process by assembling evidence, through investigation and “discovery”, and introducing it, in whatever form, as inanimate objects or records, or as “live testimony” by herself or another “witness,” or an “expert.” In fact, the accused has a constitutional right to state assistance in this regard, in particular “to have compulsory process for obtaining witnesses in his favor.”\textsuperscript{39} By contrast, the accused in the continental process has no such right of production. She instead has the right of petition. Only the court has the right, and the duty, to assemble and introduce evidence, either upon its own motion or upon motion by one of the parties.\textsuperscript{40}

In this regard it should be noted, however, that German criminal procedure extends the right to question witnesses not only to defense counsel, but also to the defendant herself. In general, defendants in German criminal trials enjoy the same, parallel, procedural rights as their counsel, including the right to file motions, to question witnesses, to comment on the evidence, and to make a closing statement.\textsuperscript{41} That’s not to say that they exercise these rights. The ordinary German criminal trial continues to be dominated by the presiding judge, regardless of what procedural rights might be extended.

\textsuperscript{36} Id. at 603-05.
\textsuperscript{37} See id. at 591-601.
\textsuperscript{39} U.S. const. amend. VI.
\textsuperscript{41} Id. at 570-73.
in theory to other process participants, including not only the defendant and her attorney, but also the prosecutor and other professional, or lay, judges on the panel, if any.\textsuperscript{42}

In the American criminal process, the accused not only has the right to assemble and introduce her own evidence, but also to participate in the introduction of evidence by the \textit{state}. In particular, the accused has the right “to be confronted with the witnesses against him,” and to subject them to “cross-examination.”\textsuperscript{43} Once again, the accused has the right to participate—or not to participate—in the assembly of evidence, through submitting to interrogation, “cross-examination,” and supplying other, non-testimonial, evidence to the state.

\section*{4. Empathy and Indirect Autonomy}

Several rights pertain to the selection of those who sit in judgment of the criminal defendant, i.e., those who are charged with applying criminal norms to him.\textsuperscript{44} The defendant, after all, doesn’t literally convict himself. Here the criminal process relies on what one might call \textit{constructive} autonomy, or indirect self-government.

To see how indirect autonomy works, we need to introduce an enabling concept, empathy, or mutual roletaking.\textsuperscript{45} In American political theory as in modern political theory more generally, the consent of the governed, including the punished (and the taxed), is crucial, but it needn’t be direct. The modern system of government is that of a representative, not a direct, democracy. The participation of the governed in their government is mediated through the transferal of the right of consent from the individual person to another, who acts as her substitute, agent, or representative. In the sphere of legislation, that representative is the legislator.

In the sphere of adjudication, that representative is the jury, first and foremost, but also the judge and, given the prevalence of plea bargaining in American criminal law, the prosecutor, at least in jurisdictions where these officials are elected.\textsuperscript{46} (Here another factual legitimacy deficit of plea bargaining becomes apparent. Not only is the prosecutor more powerful than the defendant. She also does not perceive herself as the defendant’s representative, grand statutory proclamations about the duty of prosecutors to serve the public—including the defendant—notwithstanding. Instead, the modern prosecutor, if she thinks of herself as representing anyone in particular, regards herself as the representative of the \textit{victim}, who is constructed in sharp contrast to the defendant, with radically incompatible interests, and (“victims’”) rights.\textsuperscript{47}).

Punishment raises the problem of representation with particular urgency for two related, reasons. The unique intensity of the state sanction of punishment places a unique strain on any attempt to legitimate its threatened, and actual, employment. At the same time, actual consent on the part of the object of the sanction is particularly unlikely.

\textsuperscript{42} Id. at 580-91.
\textsuperscript{43} U.S. const. amend. VI.
\textsuperscript{44} For analogous rights in continental criminal procedure, see M D Dubber, ‘American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure,’ 49 Stan L Rev 547 at 571-72 (1997).
\textsuperscript{45} For further discussion of the role of empathy in modern law, see M D Dubber, Law’s Empathy: The Sense of Justice and the Life of the Law (New York, New York University Press, forthcoming).
\textsuperscript{47} See generally M D Dubber, Victims in the War on Crime: The Use and Abuse of Victims’ Rights (New York, New York University Press, 2002).
Nowhere is merely constructive consent less appropriate, and yet at the same time more necessary. Put another way, nowhere is the danger of hypocrisy greater than in the attempt to legitimate punishment as self-government, and yet nowhere is the need for that very legitimation more acute.

The precise nature of the relationship between representative and represented has been as contested as the best method for institutionalizing it ever since the foundation of the American republic. In general, however, it’s clear that—as a phenomenon—the representative relationship presumes a mutual identification between governor and governed. For representative self-government to work, the self of the representative and the represented must, if they cannot merge (through direct democracy), become so closely connected that one can easily take the position of the other. As none other than James Madison put it in the Federalist Papers, “it is particularly essential that the [legislative] branch . . . should have an immediate dependence on, and an intimate sympathy with, the people.”

Sympathy here should not be confused with affection. Instead, following Adam Smith, it should be understood as fellow-feeling, enabled by the ability to put oneself in the other’s shoes, to see things as she would see them. That ability in turn presumes a mutual identification, i.e., a basic sense of identity shared by the representative and the represented. Sympathy differs from affection because, as a cognitive process, it is emotionally neutral. To avoid the confusion between sympathy as a general cognitive mechanism and as a specific emotional effect (often contrasted with antipathy), the less ambiguous term “empathy” is preferable. In contrast to sympathy—literally “feeling-with” (“Mitgefühl” in German), empathy—“feeling-in” (“Einfühlung”)—generally refers to the vicarious experience of another.

Empathy is the mechanism that keeps the self in representative self-government. Without empathy, representative self-government turns into oppressive other-government, mediated self-judgment into immediate other-judgment, and indirect autonomy into direct heteronomy.

5. The Jury

The principle of indirect, or representative, autonomy manifests itself in several features of the criminal process. The most obvious is the institution of the jury. The legitimate core of the idea that the jury manifests the “sense of justice” of the community is that it represents not some community, but also the community of the defendant. Composed of the defendant’s peers, it speaks for the defendant and thereby makes possible a process of vicarious self-government, which respects the defendant’s

48 Federalist No. 52 (emphasis added).
49 A Smith, The Theory of Moral Sentiments (1759); see also D Hume, Enquiry Concerning the Principles of Morals 10.1, 10.5 (1751); Treatise of Human Nature III.iii.1 (1739). To Smith, sympathy was a moral sentiment, a “sense of justice.” Needless to say, it was not a sense of police. Recall that police, in Smith’s view, had nothing to do with justice, and everything with “expediency.” ‘Introduction,’ A Smith, Lectures on Jurisprudence I, 3 (R L Meed et al. eds. Oxford University Press, Oxford 1978) (quoting D Stewart, Account of the Life and Writings of Adam Smith, LL.D.).
autonomy, or capacity for self-government, without forcing the defendant to literally judge himself.\textsuperscript{51}

The challenge of the institution of the jury is to ensure that it functions as a forum of justice—a discourse among moral persons as such—without disregarding its role as a mechanism for indirect, or vicarious, self-judgment. That justice discourse and that vicarious self-judgment are possible only if jurors act on their sense of \textit{justice}. But they can only act on their sense of justice if they identify with one another, and with the defendant, as members of the community of persons, i.e., the moral community.

This is not enough, however. While the \textit{legitimacy} of their judgment is made possible through mutual identification among jurors, and between jurors and defendant, the enterprise of judgment itself only makes sense if the jurors also identify with the \textit{victim} as another fellow moral person.\textsuperscript{52} Without that identification, they will not experience the empathy that motivates them to pass judgment on the offender in the first place; they will not feel the vicarious resentment that turns an otherwise private conflict into a matter of public justice, and therefore of law.

As agents of self-government, jurors must be perceived, must perceive themselves, and—perhaps most important—must perceive the objects of their judgment, the defendant as well as the victim, not as members of this or that substantive community, but as members of a community of justice, i.e., a political community governed by principles of justice.

It’s in this sense that the jury’s representativeness and impartiality are crucial. Each juror must be representative in the sense that she must share, and be conscious of sharing, with the offender and the victim those characteristics that mark all three as subjects and objects of justice judgments. From this point of view, representativeness and impartiality coincide; representativeness implies the juror’s conscious possession of the relevant similarity (namely membership in the community of justice), while impartiality implies the juror’s ability to disregard all other, irrelevant, similarities (such as membership in the same bowling team, or race, or whatever).

To ensure the representativeness of the jury, the defendant has the right to participate in the composition of the jury, through challenging potential jurors who would lack the capacity to empathize with her for one reason or another, notably various types of abstract or particular, such as prejudice or bias.\textsuperscript{53} She also has the right to request the

\textsuperscript{51} It’s this capacity that makes the defendant a person. As a person in this sense, the defendant is entitled to respect, even if she is not \textit{in fact} autonomous, just as a person is entitled to the protection of the criminal law even if she is not in fact autonomous—i.e., incapable of exercising her capacity—for some reason or another (age, disability, imprisonment, extreme poverty, etc.). The legitimacy of criminal law, and of law in general, turns on the extent to which it permits the defendant, as person, to exercise her capacity for autonomy. The challenge of justifying criminal punishment in particular arises from the fact that it interferes with actual autonomy (imprisonment is only the most obvious case), but must do so without negating the personhood—capacity for autonomy—of the punished. See M D Dubber, Victims in the War on Crime: The Use and Abuse of Victims’ Rights 152-60, 253-65 (New York, New York University Press, 2002).

\textsuperscript{52} See M D Dubber, Victims in the War on Crime: The Use and Abuse of Victims’ Rights 193-200 (New York, New York University Press, 2002)

\textsuperscript{53} In continental criminal procedure, there is no directly analogous right. There of course can be exactly analogous right if there is no jury. But that’s not the point. The representativeness of the adjudicatory body, however composed, is thought to be sufficiently guaranteed by the adherence to a uniform, and nondiscriminatory, process for the selection and assignment of lay judges, who sit with professional judges on mixed panels and who are appointed for several years, rather than assembled for a particular trial. Challenges against the composition of the court thus are based on perceived deviations from this, rather cumbersome, selection process. See M D Dubber, ‘American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure,’ 49 Stan L. Rev 547 at 588-89 (1997). Once the court has
removal (recusal) of the judge, on similar grounds.\textsuperscript{54} At the same time, the defendant does not have the right to adjudicators who are predisposed in her favor. Relatives of the victim and of the defendant alike are barred from adjudication—and so are the victim and the defendant herself. While relatives, or friends, might well be able to identify with the victim and the defendant, respectively, that identification would not be relevant in the legal process because it would be based on characteristics of the defendant other than her status as a person, i.e., as an object of justice.

The jury in this sense is the paradigmatic community of justice. Here individuals motivated by their sense of justice (\textit{Rechtsgefühl\textsuperscript{55}}) discuss what principles of justice apply to a particular case and how they might be applied. The jury’s verdict is the outcome of that discourse. It’s binding on the defendant—and the victim—because it represents the result they would have reached had they participated in the deliberation as moral persons, abstracting from accidental characteristics such personal preferences and membership in substantive communities. The defendant—and the victim—feel themselves represented by the jury, and its verdict, and accept the verdict as \textit{just}, insofar as they recognize the jury as fellow persons who recognized them as persons in return.

6. A Contextual Theory of the Criminal Trial

Perhaps we can do without a jury. (The Germans do.) Perhaps we can do without a trial. (We do, in the vast majority of cases.) Perhaps autonomy can manifest itself in proceedings before a mixed panel of professional and lay judges,\textsuperscript{56} or even in bench trials without any lay participation whatsoever. Perhaps what we need to do is forget about the jury, and about the trial, altogether and focus instead on the legitimacy of the jury- and trialless criminal process as it operates in fact. Perhaps plea bargaining can be reformed to render it consistent with autonomy, by legalizing prosecutorial discretion, or by insisting on the representativeness of prosecutors vis-à-vis the defendant, and not merely “the community,” or more recently the victim. Elected prosecutors, or judges for that matter, clearly aren’t the answer, especially if the political community is confused with the community of actual and potential victims.

At any rate, a theory of the trial—and a theory of the jury—must arise from an analysis of the trial within the context of the practice of punishment as a whole. It’s particularly easy to fall into an asystemic approach to the trial if one focuses on Anglo-

\textsuperscript{54} The right to request a change of venue belongs here as well. A defendant is entitled to venue change when the presumption of representativeness that ordinarily attaches to adjudicators drawn from the locus of the crime does not hold. That presumption of course is itself questionable given the mobility of modern society. Offenders are no longer as likely to live in the political community where the crime was committed as they once were. This also means, of course, that the notion of jurors as the defendant’s peers, drawn from his vicinage, largely survives as a fiction, but an important fiction, because it properly shifts the inquiry from the level of judgment from intercommunal (neighborly) sympathy to interpersonal empathy.

\textsuperscript{55} \text{See M Bihler, Rechtsgefühl, System und Wertung: Ein Beitrag zur Psychologie der Rechtsgewinnung (Munich, C H Beck, 1979).}

\textsuperscript{56} I’m not so sure. The role of lay judges in German criminal trials is irrelevant at best, and hypocritical at worst. See M D Dubber, ‘American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure,’ 49 Stan L Rev 547 at 571-72 (1997).
American trials, which have been regarded—and celebrated—as the heart and soul of the common law criminal process for centuries, even as both the common law and the trial have given way to statutes, plea bargaining, bench trials, and summary proceedings. German criminal law provides a useful contrast. There the procedural analogue of the trial bears the prosaic, and functional, title of *Hauptverfahren* (or, more precisely, *Hauptverhandlung*), that has none of the trial’s mysterious uniqueness, nor its medieval sword wielding connotations. (*Hauptverfahren* simply means “main proceeding,” as distinguished from *Vor- and Zwischenverfahren*, or preliminary and intermediate proceeding, which precede it.) Properly contextualized, a theory of the trial can make a crucial contribution to the still unfinished business of legitimizing the practice of punishment as that state action most desperately in need of legitimation.