

Introduction—The Human Rights Revolution in Criminal Evidence and Procedure

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1. HUMAN RIGHTS REVOLUTION

THIS VOLUME EXPLORES the impact, in theory and practice, of the on-going ‘human rights revolution’ on the law of criminal evidence and procedure in a variety of common law jurisdictions. Human rights legislation, case-law and principles are transforming criminal evidence and procedure across the common law world. However, there is marked diversity not only—as one would expect—in the technical doctrinal adaptations improvised by individual legal systems, but also in the pace and extent of human rights-inspired innovation. Some jurisdictions, such as Canada and New Zealand, already have several decades’ experience in reviewing and sometimes adjusting their criminal procedures to the dictates of human rights norms, especially the right to a fair trial. Others, for example the State of Victoria and the Australian Capital Territory, are just embarking upon similar legislative experiments.¹ Another group of jurisdictions, notably including the Republic of South Africa and Hong Kong, have embraced international fair trial standards as part of reformed and rededicated constitutional frameworks. In the United Kingdom’s criminal law jurisdictions, the Human Rights Act 1998 has now been in force for over a decade. Its impact on criminal procedure and evidence has already been profound, and the process of transformation is by no means complete. A striking feature of these developments has been the growing influence of the Strasbourg-based European Court of Human Rights on the domestic criminal procedure jurisprudence of England and Wales, Scotland and Northern Ireland.

Domestic legal systems, under the tutelage of international legality, have embarked upon what are, in effect, high-stakes practical experiments in criminal procedure reform. Lawyers and judges in practice have been presented

¹ See generally, J Gans, T Henning, J Hunter and K Warner, *Criminal Process and Human Rights* (Sydney, Federation Press, 2011).

with new opportunities and confronted with unfamiliar challenges in criminal adjudication. Legal scholarship can and should play its part in theorising these novel juridical configurations and helping to make sense of them, partly—though by no means exclusively—in order to contribute to rational policy-making, law reform and the administration of criminal justice.

There have, of course, been comparable earlier step-changes and seismic events in the historical evolution of common law criminal procedure, such as the adoption of trial by jury,² the creation of modern police forces,³ the development of adversarial cross-examination⁴ and the (surprisingly late) decision to allow the accused to testify under oath in his own defence.⁵ But it is fair to say that the advent of human rights arguments and principles in routine criminal litigation is one of the most significant jurisprudential developments affecting common law adjudication for many decades, and calling it a ‘revolution’ does not seem hyperbolic. Pressing new questions arise, for theorists and practitioners alike, when we are required to re-envision criminal procedure through the lens of human rights law and principles of adjudication,⁶ including questions concerning normative sources, hierarchy, scope and content, transmission, adaptation, institutional competence and practical implementation. To formulate some of these questions more precisely:

- What are the source(s) of criminal procedure-related human rights in particular jurisdictions? Supra-national, transnational, indigenous, or some blended mixture? By what legal mechanisms have supra-national and/or transnational and/or foreign law norms been received? How have these migrations been effected and justified in accordance with local conceptions of valid legal sources and constitutional traditions? How effectively have such transmissions and translations been implemented in practice?
- What is the content of pertinent human rights norms, especially the ‘right to a fair trial’? How, if at all, does the terminology, conceptual structure or scope of human rights differ from established common law procedural traditions? Have standard definitions and approaches been imported wholesale from outside the jurisdiction, or have adaptations been made to accommodate local conditions? How have different legal systems balanced generality and specificity (with corresponding allocations of institutional responsibility for normative development)?

² JB Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston, MA, Little, Brown & Co, 1898) Part I; N Vidmar (ed), *World Jury Systems* (Oxford, OUP, 2000).

³ C Emsley, ‘The Birth and Development of the Police’ in T Newburn (ed), *Handbook of Policing*, 2nd edn (Cullompton, Willan, 2008).

⁴ JH Langbein, *The Origins of Adversary Criminal Trial* (Oxford, OUP, 2003); DJA Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800–1865* (Oxford, OUP, 1999).

⁵ C Tapper, ‘The Meaning of s.1(f)(i) of the Criminal Evidence Act 1898’ in CFH Tapper (ed), *Crime, Proof and Punishment* (London, Butterworths, 1981).

⁶ C Gearty, *Principles of Human Rights Adjudication* (Oxford, OUP, 2004).

- What have jurisdictions learnt from international or comparative experience, for example, in addressing drafting or interpretative controversies? Why, how, and how effectively were such controversies resolved?
- Which particular issues or topics in criminal procedure and evidence have been, or are likely to be, most affected by the reception of human rights norms? Why have these particular issues and topics (and not others) become notable successes or pressure points?
- Has the advent of human rights considerations achieved any notable successes in the reform or improvement of criminal procedure? In those jurisdictions still contemplating human rights legislation, which improvements are expected or promised by human rights advocates?
- Has human rights legislation created particular problems or difficulties for criminal procedure? Are there identifiable points of normative conflict or institutional resistance to the reception of human rights standards, especially those standards deriving from supra-national, transnational or foreign law influences? How are these conflicts playing out in particular legal systems?
- Are there intrinsic or symbolic dimensions to local debates and institutional developments that manifest in particular ways, or is the impact of human rights norms on criminal evidence and procedure simply a question of instrumental effects?
- How does human rights legislation interact with other primary sources of criminal evidence, including piecemeal legislation addressing evidentiary topics and more systematic codification of procedural law (to the extent that such instruments exist in particular jurisdictions)?
- To what extent has human rights legislation introduced, or facilitated, institutional realignments in the distribution of powers and responsibility for developing and implementing procedural norms (eg from trial to appellate courts, or vice versa; from ordinary law to more-or-less entrenched constitutional law; from domestic to international law, etc)?
- To what extent do any or all of the foregoing questions call for systematic reconsideration of the nature of evidentiary and other procedural norms at the doctrinal or micro-jurisprudential levels, or—by extension—urge fundamental rethinking about the Law of (Criminal) Evidence as a discrete, institutionally-differentiated and coherent discipline (eg as an identifiable module in law school curricula, as an ‘essentially common law subject’, or as exclusively a matter for regulation by state authorities)?⁷

⁷ See further, P Roberts, ‘Groundwork for a Jurisprudence of Criminal Procedure’ in RA Duff and SP Green (eds), *Philosophical Foundations of Criminal Law* (New York, OUP, 2011); P Roberts and M Redmayne (eds), *Innovations in Evidence and Proof* (Oxford, Hart Publishing, 2007); W Twining, *Rethinking Evidence*, 2nd edn (Cambridge, CUP, 2006).

By exploring these, and related, questions in depth across a number of differently-situated common law jurisdictions, the essays in this volume shed new light on the nature, extent and diverse implications of existing and contemplated interactions between human rights legislation and the law and practice of criminal procedure. A particular brand of distinctively common law comparativism is key to this enterprise, as we conceive it.

2. COMMON LAW COMPARATIVISM

Comparative methodology barely calls for extended justification in an era of globalisation and increasingly cosmopolitan law. Tangible traces of cosmopolitan legality are everywhere to be seen: in the institutions of regional governance, such as the (EU) European Council and Commission⁸ and the (Council of Europe's) European Court of Human Rights;⁹ in unprecedented efforts to implement international criminal law through novel creations such as the UN ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), culminating in the historic achievement of a permanent International Criminal Court;¹⁰ and in the pervasive discourses and institutionalised practices of human rights law itself. Small wonder that comparative law specialists are now proclaiming—albeit not for the first time—that their day has truly dawned.¹¹

The essays in this volume explore human rights-related developments in criminal procedure law in most of the world's leading common law jurisdictions, including Australia (especially where its uniform Evidence Acts apply), Canada, England and Wales, Hong Kong, Malaysia, New Zealand, Northern Ireland, the Republic of Ireland, Scotland, Singapore, South Africa, and the United States.¹² A project with this geographical coverage cannot fail to be 'comparative' in the literal sense, if only implicitly; just like the common law itself. Extending beyond merely geographical juxtaposition, our aim has been to pioneer an approach to comparative legal analysis which departs from Comparative Law studies in their more conventional mould.

⁸ P Craig and G de Búrca, *EU Law: Text, Cases and Materials*, 4th edn (Oxford, OUP, 2008) chs 1, 2 and 11.

⁹ A Mowbray, *Cases and Materials on the European Convention on Human Rights*, 2nd edn (Oxford, OUP, 2007) chs 1–2.

¹⁰ A Cassese, *International Criminal Law*, 2nd edn (Oxford, OUP, 2008) Part III; R Cryer, *Prosecuting International Crimes* (Cambridge, CUP, 2005).

¹¹ See eg E Özücü, 'Developing Comparative Law' in E Özücü and D Nelken (eds), *Comparative Law—A Handbook* (Oxford, Hart Publishing, 2007); G Samuel, 'Comparative Law as a Core Subject' (2001) 21 *Legal Studies* 444; B Markesinis, 'Comparative Law—A Subject in Search of an Audience' (1990) 53 *Modern Law Review* 1.

¹² Significant gaps, which we hope can be filled out in future work, include the Indian subcontinent and sub-Saharan Africa.

In the field of criminal justice, self-consciously ‘comparative’ perspectives typically compare and contrast common law adversarial systems with their ‘inquisitorial’ counterparts in western European jurisdictions such as France, Italy and Germany.¹³ The approach adopted in this volume is at once narrower than conventional legal comparativism, in being confined to common law jurisdictions, but also broader and deeper, in extending its critical gaze beyond western Europe and North America and, crucially, in tracing the impact of generalised normative standards, such as the right to a fair trial, into the doctrinal details and the practical realities of criminal litigation in different legal systems. We think details matter, in law and life. Even if legal systems within and beyond the common law family are increasingly being shaped by a global law of human rights, each jurisdiction will continue to make its own juridical accommodations between the demands of universal legal standards and local procedural traditions.

Our ‘common law comparativism’ is a serious attempt to make meaningful and insightful comparisons between the criminal procedure laws and evidentiary practices in a variety of common law jurisdictions, each of which is simultaneously in the process of being transformed—to a greater or lesser extent—by the on-going human rights revolution, alongside other cross-cutting transnational and cosmopolitan influences. Local doctrinal and institutional developments tend to be obscured by the convenient Comparative Law conceit that there is some abstract entity known as *the* adversarial system, which in a few reductive stereotypes and handy generalisations supposedly encapsulates the procedural laws and practices of every English-speaking jurisdiction in the world. In critical—but hopefully productive—engagement with orthodox Comparative Law scholarship, this volume brings together leading academic proceduralists from five continents whose work combines intimate knowledge of criminal evidence and procedure in their own jurisdictions with a keen interest in comparative inquiries and perspectives. In addition to the self-evident importance of its subject-matter, our topical focus on the intersection between human rights law and criminal evidence is intended to showcase common law comparativism as a contribution to the methodological resources of comparative criminal justice scholarship, another tool to help us get to grips with the

¹³ See eg R Lempert, ‘Anglo-American and Continental Systems: Marsupials and Mammals of the Law’ in J Jackson, M Langer and P Tillers (eds), *Crime, Procedure and Evidence in A Comparative and International Context* (Oxford, Hart Publishing, 2008); WT Pizzi, *Trials Without Truth* (New York, NYU Press, 1999); R Vogler and B Huber (eds), *Criminal Procedure in Europe* (Berlin, Duncker and Humblot, 2008); P Fennell, C Harding, N Jörg and B Swart (eds), *Criminal Justice in Europe: A Comparative Study* (Oxford, OUP, 1995); MR Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven, CT, Yale UP, 1986). Additional procedural models or ‘families’ of legal systems are sometimes incorporated into the analysis: cf PL Reichel, *Comparative Criminal Justice Systems*, 3rd edn (Upper Saddle River, NJ, Prentice Hall, 2002); R Vogler, *A World View of Criminal Justice* (Aldershot, Ashgate, 2005).

dynamic, multi-level, cosmopolitan legal environments which constitute today's reality for legal practitioners, commentators and theorists.

In limiting our focus to selected common law jurisdictions we do not mean to imply that similar methodological principles cannot profitably be extended beyond the common law family, for example to Islamic or Asian legal systems, as well as to members of the civilian juristic world. To the contrary, this is precisely how further follow-up studies ideally should proceed. Our restricted focus is unabashedly pragmatic: in order to achieve a level of doctrinal and conceptual sophistication that is frequently missing both from general works on human rights law and from comparative studies of criminal procedure, whilst keeping the present volume at reasonable length, we needed to reduce the number of variables in play—to hold constant much that common law jurisdictions naturally share as a set of baseline assumptions, so that significant contrasts between them can be teased out and apprehended more vividly. Deliberately limiting the geographical scope and legal-cultural variation of our inquiry is a methodological gambit intended to open up fresh perspectives and facilitate lines of inquiry which will hopefully deepen and enrich existing scholarship in criminal procedure, human rights, and comparative law. Far from purporting to be the last word on the subject, this volume will have succeeded best if it generates further critical debate and encourages follow-up studies adapting our methodology to a greater variety of procedural and institutional contexts.

3. REIMAGINING COMMON LAW PROCEDURAL TRADITIONS

Each of the contributions to this volume grapples with the impact of human rights law on criminal evidence and procedure, from a range of doctrinal, institutional, and jurisdictional perspectives. Apart from inviting contributors to address the core theme and outlining some of the basic questions regarding the relationship between criminal procedure and human rights posed in this Introduction, our editorial instructions were sparse and non-prescriptive. Contributors chose their own topics and general approach. Some opted to undertake general surveys of relevant doctrinal or institutional developments in their own jurisdictions, whilst others narrowed their focus to particular procedural or evidentiary topics such as the exclusion of improperly obtained evidence, the privilege against self-incrimination, the presumption of innocence, hearsay, confrontation and witness evidence. The range of topics canvassed is testament to the expansionist ambitions of contemporary human rights legislation. Even in jurisdictions with comparatively limited experience of directly applicable human rights norms, this volume's central themes were recognised as chiming with common law adjudication's familiar epistemic preoccupations and normative aspirations,

traditionally expressed in terms of procedural due process, the common law judge's duty to ensure trial fairness, the burden and criminal standard of proof, and the protection of the innocent from wrongful conviction.

Contributors' choices of focus and approach themselves reflect the state of contemporary debates surrounding the impact of human rights principles in particular legal systems, at least as understood by individual contributors. Some essays are highly selective in extracting illustrations from a wealth of local experience. Other essays are more panoptic, generic or speculative in anticipating future developments. Whilst judicial practice in some jurisdictions is acutely conscious of the cosmopolitan character of modern human rights jurisprudence, the case-law of other jurisdictions betrays more insular tendencies and constrained horizons.

The essays that follow have been loosely grouped around five broad themes, to provide a coherent narrative that unfolds logically from one chapter to the next: (a) human rights in constitutional criminal procedure; (b) improperly obtained evidence; (c) human rights and criminal proof; (d) hearsay and confrontation; and (e) fair trials for all. However, the attentive reader will discover many additional parallels and points of contrast operating within and extending beyond this convenient functional division of topics and approaches.

4. HUMAN RIGHTS IN CONSTITUTIONAL CRIMINAL PROCEDURE

PJ Schwikkard in Chapter 1 refracts our central questions through the lens of a constitutional legal framework, in effect reframing the question in terms of whether South African experience supports our hypothesis of a human rights revolution in criminal procedure. As a classic example of a 'mixed' legal system, South African law is fertile and well-trodden ground for the comparativist. It also, at first blush, appears to exemplify the vaunted human rights revolution. Post-Apartheid South Africa adopted a modern Constitution incorporating a justiciable Bill of Rights which, in turn, is supervised by a model Constitutional Court committed to progressively rights-protective principles of interpretation. Schwikkard shows how South Africa's distinctively comprehensive conception of the constitutional right to a fair trial has infused a range of familiar procedural rights and evidentiary doctrines, including the presumption of innocence, the privilege against self-incrimination and the right to silence, the closely related rights to legal representation and to adequate time and facilities to prepare a defence, access to physical samples, confessions, hearsay, equality and dignity in the treatment of sexual assault complainants, and the admissibility of evidence obtained in breach of constitutional rights. The breadth of constitutional oversight in criminal proceedings is impressive, but Schwikkard enters two significant reservations.

First, the courts have not always succeeded in translating broad principles of constitutional interpretation into progressive rulings on the scope of particular procedural rights. Secondly, there is a difference between fine-sounding paper rights and their implementation in practice—the notorious gap between ‘the law in the books’ and ‘the law in action’. Notably, South African law’s commitment to fair trials is circumscribed in practice by fiscal constraint, most obviously in the statutory proviso that free legal assistance is available to the accused only ‘if substantial injustice would otherwise result’.¹⁴ It is for these reasons that Schwikkard can muster only ‘muted celebrations’ for an incomplete rights revolution in South African criminal procedure.

There are many striking parallels between Schwikkard’s account of constitutional procedural reform in South Africa and Simon Young’s review, in Chapter 2, of related developments in the criminal procedure law of Hong Kong SAR. Hong Kong, too, has undergone major constitutional upheaval in recent memory, both preceding and following the British colonial administration’s handover to China in 1997. As in South Africa, Hong Kong’s principal constitutional instruments have been strongly influenced by international human rights law, originally through the text of the Hong Kong Bill of Rights Ordinance 1991, which borrows heavily from the International Covenant on Civil and Political Rights (ICCPR), as subsequently reinforced by the post-colonial Chinese Basic Law. For over a century, the law of criminal evidence in Hong Kong has developed broadly in line with English common law, under the superintendence of the Privy Council as the final court of appeal, leaving a legacy of common law jurisprudence which, as Young describes, continues to exert significant influence on the reasoning and judgments of the Hong Kong Court of Final Appeal. Yet Hong Kong courts were pioneering the application of human rights principles to criminal proceedings almost a decade in advance of the UK Human Rights Act 1998.

With this distinctively cosmopolitan political history and hybrid legal culture, it should occasion no surprise that Hong Kong courts remain open to a range of international influences on their decision-making. This predisposition is reinforced, as Young explains, by the remarkable institutional innovation of appointing distinguished foreign jurists to sit as Non-Permanent Judges of the Court of Final Appeal. Whilst the broader political context and its evident democratic deficits cannot be discounted, it seems that judicial independence has been preserved and the legacy of the Privy Council in protecting suspects’ and the accused’s due process rights has been upheld and extended in relation to core procedural issues such as the right to silence, the admissibility of confessions and the presumption

¹⁴ Constitution of South Africa, ss 35(2)(c) and 35(3)(g).

of innocence. Young praises the Hong Kong courts' courageous defence of entrenched procedural rights and their willingness to innovate through comparative example, evident in recent citations of ECHR jurisprudence (notwithstanding the ICCPR pedigree of Hong Kong's indigenous Bill of Rights). At the same time, Young cautions that Hong Kong courts tend to view constitutional remedies as pragmatic tools for mediating between individual rights and broader social interests, and this sometimes precipitates fairly conservative rulings. Viewed from an Australian or British perspective, certain aspects of Hong Kong jurisprudence do seem somewhat old-fashioned. For example, there is an almost exclusive preoccupation with the rights of the accused, apparently un-tempered by the concerns for complainants' fair access to justice and witnesses' humane treatment which have risen to prominence in other common law jurisdictions, and in Strasbourg jurisprudence, over the last several decades.¹⁵

By most accounts, Canada occupies the more experienced pole on the continuum of common law systems' engagement with constitutional rights in criminal procedure, having adopted its Charter of Rights and Freedoms back in 1982. In Chapter 3, Christine Boyle and Emma Cunliffe fix their sights on one specific procedural right protected by the Charter, the right to counsel during custodial interrogation. Despite the Charter's pivotal status in Canadian law and legal culture, as the source of 'Canada's ongoing "human rights revolution"',¹⁶ Boyle and Cunliffe are concerned that Canada might actually have become the poor relation in its failure to 'keep up with the common law Joneses', jurisprudentially speaking, regarding their chosen illustration of a constitutional right central to criminal proceedings. By disavowing any general right to counsel during police interrogation, the Supreme Court of Canada in *R v Sinclair*¹⁷ took a more restrictive view of the right to custodial legal advice than currently prevails in England and Wales, the United States, New Zealand, Australia, and in international criminal proceedings before the ICC. Yet Canada has traditionally prided itself on its robust legal protection of procedural rights. What could have precipitated this apparent reversal of fortune?

Boyle and Cunliffe locate the source of the difficulty in the tension between purposive, rights-promoting approaches to constitutional interpretation and more cramped and conservative styles of judicial reasoning. In other fields of law the Canadian Supreme Court has developed progressive interpretational principles, but it has declined to extend this liberality to the specific Charter

¹⁵ P Roberts and A Zuckerman, *Criminal Evidence*, 2nd edn (Oxford, OUP, 2010) ch 10; L Hoyano and C Keenan, *Child Abuse: Law and Policy Across Boundaries* (Oxford, OUP, 2007) chs 8–9; L Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford, OUP, 2001).

¹⁶ Boyle and Cunliffe, 79, below.

¹⁷ [2010] 2 SCR 310.

right litigated in *Sinclair*. Boyle and Cunliffe suggest that Canada's existing constitutional framework would support a more prominent role for foreign law precedents, where the weight of common law authority has reached a 'tipping point', provided always that particular norms and remedies are in keeping with Canada's own constitutional principles and traditions. They advocate, not slavish reversion to the common law norm, but active assimilation of best human rights practice 'as an aspect of Canadianness—a "Made in Canada" approach to common law comparativism'.¹⁸ Chapter 3's blend of indigenous principles of constitutional interpretation and wide-ranging survey of promising international precedents itself exemplifies the common law comparativism which Boyle and Cunliffe commend to Canadian courts.

5. IMPROPERLY OBTAINED EVIDENCE

The four chapters in the next cohort all address, in different ways and for a variety of purposes, the admissibility of improperly obtained evidence in the light of human rights instruments and principles.

Salim Farrar's discussion of the Malaysian law of personal searches in Chapter 4 engages with human rights protections at an elementary juridical level. The Malaysian police are a post-colonial force accustomed to extensive operational discretion, minimal legal accountability and widespread popular support. These social, cultural and institutional conditions breed flagrant police abuses, such as the naked squatting exercises—*ketuk ketampi*—imposed on suspected drugs couriers, which eventually became a national scandal. As Farrar explains, procedural law, or rather its absence, is very much implicated in this permissive institutional environment. Malaysia is not a signatory to the main human rights treaties, and its law of evidence remains in a state of arrested development, more or less as JF Stephen conceived it, in the Evidence Act 1950. The well-known Privy Council case of *Kuruma v R*,¹⁹ which is often cited abroad for the proposition that trial judges retain a discretion at common law to exclude improperly obtained evidence where probative value is exceeded by prejudicial effect, has been interpreted in its native Malaysia to mandate the admissibility of all reliable evidence irrespective of the taint of illegality.²⁰

Despite this inhospitable environment, the human rights revolution has lately reached Malaysian shores. Systematic reform of criminal procedure has been accompanied by a new political commitment to implementing human rights principles in the conduct of criminal investigations. However,

¹⁸ Boyle and Cunliffe, 102, below.

¹⁹ [1955] AC 197 (PC).

²⁰ *Public Prosecutor v Seridaran* [1984] 1 *Malayan Law Journal* 141.

the gap between theory and practice remains predictably wide, as revealed by Farrar's pioneering empirical study of the law and conduct of body searches by the Malaysian police, which drafted his IIUM criminal procedure students into a small army of budding criminological researchers. Echoing some of the conclusions of Schwikkard and Young, Farrar's analysis braids together the interweaving strands of doctrine, law reform, institutional culture and broader political context.

All four variables continue as prominent themes in Chapter 5, where John Jackson presents a comparative retrospective on the exclusion of improperly obtained evidence in the two Irelands, north and south. Marked by political upheaval and seething sectarian conflict, Irish criminal procedure has developed the common law tradition in distinctive and sometimes surprising directions. In Northern Ireland, criminal procedure has struggled to extricate itself from the choke-hold of a 'rule *by law*' mentality fostered by the precarious security situation. More recently, Northern Irish law has followed the path of legislative reform previously taken in England and Wales, with its own local version of section 78 of the Police and Criminal Evidence Act 1984. Article 74 of the Police and Criminal Evidence (NI) Order 1988 elevates fairness-based exclusion beyond the fragile common law position described by Farrar, in relation to Malaysia, in the previous chapter. However, as Jackson observes, 'unfairness' is a notoriously malleable criterion by which to regulate the admissibility of improperly obtained evidence.

In addition to our shared common law heritage (including precedents like *Kuruma*), courts in the Republic of Ireland—in striking contrast to their UK counterparts on both sides of the Irish Sea—have also been able to draw on constitutional provisions when assessing the admissibility of tainted evidence. Constitutional authority has enabled the Irish Supreme Court to announce an automatic rule of exclusion for evidence obtained in violation of constitutional rights.²¹ But Jackson identifies various obstacles in the way of maintaining a purist line. For one thing, the rule itself recognises exceptions to accommodate 'extraordinary excusing circumstances'. For another, a rule prioritising the constitutional rights of the accused over all other competing considerations has attracted political opposition from those advocating greater 'balance' in the administration of criminal justice.²² The Balancing Party has even invoked comparative example, in the form of New Zealand's flexible approach to evidentiary exclusion,²³ in support of relaxing the Irish rule. Once again, we encounter the political dynamics of evidentiary reform, and the Irish debates provide instructive

²¹ *People (DPP) v Kenny* [1990] 2 IR 110.

²² L Campbell, 'Criminal Justice and Penal Populism in Ireland' (2008) 28 *Legal Studies* 559.

²³ *R v Shaheed* (2002) 2 NZLR 377. See R Mahoney, 'Abolition of New Zealand's Prima Facie Exclusionary Rule' [2003] *Criminal Law Review* 607.

contrasts with the broader political context of criminal procedure reform in South Africa, Hong Kong and Malaysia discussed in previous chapters.

In conclusion, Jackson brings his largely historical exegesis right up to date by reviewing relevant jurisprudence of the European Court of Human Rights (which Jackson finds problematic in various respects). This sets the scene for the remaining two chapters in this informal grouping. Andrew Ashworth, in Chapter 6, focuses exclusively on European human rights law, situating his discussion of the Strasbourg Court's evidence-related jurisprudence within the framework of the Convention as a whole. Discerning within the text and structure of the ECHR 'the beginnings of a hierarchy' of rights, Ashworth proceeds to show that the predominant tendency of the Strasbourg Court's Article 6 jurisprudence is to reject (often poorly specified) 'public interest' arguments for diluting the right to a fair trial. But he then notes a partial resurgence of public interest arguments, sugar-coated as requirements of 'proportionality', in a raft of recent rulings dealing with the privilege against self-incrimination and the fairness of evidence obtained in breach of Convention rights. Suspicion of inconsistency and backsliding seems to be confirmed by a growing body of dissent within the Court itself; and perhaps these critical voices will form the majority one day soon. For the time being, Ashworth remains dissatisfied with the standard of normative reasoning in the Court's Article 6 jurisprudence, which too often seems to prioritise pragmatic compromises over principled standard-setting.

Paul Roberts takes up the theme of the quality of judicial reasoning in Chapter 7, not only in relation to the merits of particular decisions but also in terms of the broader ramifications of recent appellate court jurisprudence for Evidence scholarship's principal disciplinary concepts, taxonomies and methods. This chapter focuses on coercion and deception in criminal investigations as factors liable to prompt trial judges to exclude relevant evidence. Close examination of a landmark judgment of the House of Lords on the admissibility of 'foreign torture evidence',²⁴ followed by critical reappraisal of the Strasbourg Court's jurisprudence on police entrapment as a breach of ECHR Article 6, highlights the irreducible roles of moral reasoning and judicial 'discretion' (judgement) in the development and application of procedural law. If modern criminal procedure is an applied field of political morality, argues Roberts,²⁵ it is difficult to see how the Law of Evidence could be reducible to purely epistemic considerations, in either theory or practice.

A sub-theme of Roberts's chapter is the increasingly 'cosmopolitan' character of common law evidence and criminal adjudication. The remarkable

²⁴ *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, [2005] UKHL 71.

²⁵ Also see P Roberts, 'Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication' in RA Duff, L Farmer, S Marshall and V Tadros (eds), *The Trial on Trial Volume Two: Judgment and Calling to Account* (Oxford, Hart Publishing, 2006).

influence of European human rights law on evidentiary issues, already highlighted by Jackson and Ashworth, is only the most obvious index of how legal norms, concepts, ideas, ideals and institutions today freely cross all kinds of borders and boundaries, geographical, jurisdictional, cultural, social and political. And like all travellers, as they visit new places they are themselves transformed and are sometimes transformative. Further examples can be found in each of the preceding six chapters and throughout the remainder of the volume.

6. HUMAN RIGHTS AND CRIMINAL PROOF

The next segment of the book contains four chapters exploring various epistemological dimensions of evidence and proof and their relationship with procedural rights. At least some of these traditional criminal procedure rights are also ‘human rights’, but beyond an overlapping normative core there is significant divergence in language, concepts, scope and justificatory rationales.

In Chapter 8, Jeremy Gans presents a detailed case-study of a miscarriage of justice arising from contaminated DNA evidence in the Australian State of Victoria. The problem of enormously powerful scientific evidence, which can also be powerfully misleading when things go wrong, is fundamentally epistemic.²⁶ Evidence which is often treated in the popular imagination as tantamount to conclusive proof of guilt may be a potent source of wrongful convictions.²⁷ Gans shows how routine practices of criminal investigation, prosecution, criminal defence and the trial rules of evidence all conspired in his Victorian *cause célèbre* to keep the fatal evidential defect hidden from view, whilst the apparent probative value of a matching DNA profile was allowed to compensate for what were, in retrospect, quite glaring circumstantial weaknesses in the prosecution’s case. The accused was convicted of a rape that almost certainly never took place. He was ultimately exonerated, but only by dint of good fortune and after serving a year in gaol.

The right not to be wrongfully convicted of a criminal offence is surely one of the most fundamental procedural rights, more basic even than the vaunted right to a fair trial.²⁸ However, international human rights law does not attempt to articulate such a right. Nor does Victoria’s Charter of Human

²⁶ AI Goldman, *Pathways to Knowledge: Private and Public* (New York, OUP, 2002) ch 7.

²⁷ K Roach, ‘Forensic Science and Miscarriages of Justice: Some Lessons from Comparative Experience’ (2009) 50 *Jurimetrics* 67; J Mnookin, ‘Experts and Forensic Evidence’ (2008) 37 *Southwestern University Law Review* 1009; C Walker and R Stockdale, ‘Forensic Evidence’ in C Walker and K Starmer (eds), *Miscarriages of Justice: A Review of Justice in Error* (London, Blackstone Press, 1999); CAG Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (Oxford, OUP, 1994) ch 10.

²⁸ Cf Roberts and Zuckerman, above n 15, 18–22.

Rights and Responsibilities Act 2006 figure very prominently in Gans's story. As a public inquiry later concluded, the most effective remedies for wrongful convictions attributable to scientific evidence are as prosaic as their typical causes: more secure procedures for collecting and storing exhibits in contamination-free environments; improved scientific literacy for police, lawyers and judges; willingness to give serious consideration to alternative hypotheses and potentially exculpatory evidence; vigorous criminal defence. Gans notes that traditional doctrines of evidence law sometimes exacerbate the problem, for example by assiduously seeking to exclude extraneous 'bad character' evidence which if properly investigated might, ironically, lead to the accused's acquittal by exposing critical flaws in the prosecution's proof. Human rights law has no ready solutions, either, for these perennial evidentiary conundrums of probative value and prejudicial effect.

David Hamer confronts another acute epistemic dilemma in Chapter 9. What is to be done when crucial evidence may be missing? The problem is an old one for the courts, as Hamer observes, but it has become particularly pronounced in recent decades in relation to (sometimes, long-) delayed allegations of childhood sexual abuse and associated controversies surrounding recovered/implanted memories and the like.²⁹ The common law's traditional answer is that the accused cannot have a fair trial if the evidence is irremediably stale and incomplete.³⁰ Hamer challenges this orthodoxy. Drawing on a broad survey of common law authorities, his chapter reconsiders both epistemic and non-epistemic arguments for pro-defendant judicial interventions to halt delayed prosecutions. Hamer finds none of these arguments persuasive. Missing evidence distributes forensic disadvantage indiscriminately and epistemic losses are normally allowed to rest where they fall. Normative reconstructions of fair trial rights identify relevant non-epistemic considerations, but fail to explain—to Hamer's satisfaction—why lost evidence should invariably be the prosecution's bad luck. There is a suspicion that, lurking behind routine invocations of traditional procedural rights and their more recent 'human rights' reinterpretations, are the beguiling martial metaphors of an unreconstructed 'fight theory' of adversarial procedure.³¹ Anticipating a theme taken up in later chapters, Hamer insists that the rights and interests of the accused are not the exclusive arbiters of a fair criminal trial.

The second pair of essays comprising the 'human rights and criminal proof' quartet both examine major intersections between the epistemology

²⁹ See P Lewis, *Delayed Prosecution for Childhood Sexual Abuse* (Oxford, OUP, 2006).

³⁰ 'The Crown Court has always had the inherent power to stay criminal proceedings on the grounds of abuse of process. One instance of abuse of process is the bringing of a prosecution so long after the events in issue that a fair trial has become impossible': *R v F (TB)* [2011] 2 Cr App R 13, [2011] EWCA Crim 726, [24].

³¹ EG Thornburg, 'Metaphors Matter: How Images of Battle, Sports and Sex Shape the Adversary System' (1995) 10 *Wisconsin Women's Law Journal* 225.

of judicial fact-finding and the law of criminal procedure. The privilege against self-incrimination and the right to silence are Andrew Choo's focus in Chapter 10. The epistemic legitimacy of drawing adverse inferences from silence has been a long-running preoccupation of the common law.³² As Choo shows, picking up the threads of a discussion introduced by Andrew Ashworth in Chapter 6, much of the post-human rights revolution debate is framed in terms of the 'right not to incriminate oneself' as one strand of the right to a fair trial. Choo's essay probes the legal and conceptual boundaries of the self-incrimination right by exploring the extent of its application to 'pre-existing' documents and physical samples. Finding the jurisprudence of the European Court of Human Rights lacking in conceptual finesse, Choo seeks enlightenment in a comparative survey of statutory provisions and case-law from New Zealand, the United States, Canada, India and the ICTY. His general approach is reminiscent of Boyle and Cunliffe's methodology for 'keeping up with the common law Joneses' in Chapter 3; but Choo reaches a more sceptical conclusion, doubting the existence of any firm international consensus in relation to self-incrimination and silence. The right (or as common lawyers would tend to say, the 'privilege') against self-incrimination may be ensconced in international human rights law, but the analysis developed in this chapter exposes major limitations in its conceptual elucidation and normative rationalisation. Like Jackson and Ashworth before him, Choo is unimpressed by the Strasbourg Court's evasive retreat into rights 'balancing' as a surrogate for meaningful analysis.

In Chapter 11, Hock Lai Ho revisits one of common law Evidence's great epistemic foundations, the burden and standard of proof. Here, again, the human rights revolution has made its linguistic and conceptual mark, by inviting us now to think in the more comprehensively normative terms of 'the presumption of innocence'.³³ And there is also a significant comparative dimension to this telling evolution of jurisprudential concepts and language. As Ho observes, if the presumption of innocence is to be regarded as a universal human right it can hardly be tied to peculiarly common law conceptions of evidence and procedure. These initial promptings launch Ho into a thorough-going reappraisal of the normative foundations of the presumption of innocence, adopting a distinctively 'jurisprudential' style of analysis (similar to Roberts's approach in Chapter 7) which seeks to integrate legal doctrine with its deeper philosophical rationales.

³² See eg *Wiedemann v Walpole* [1891] 2 QB 534 (CA).

³³ Also see P Roberts, 'Criminal Procedure, the Presumption of Innocence and Judicial Reasoning under the Human Rights Act' in H Fenwick, G Phillipson and R Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge, CUP, 2007); A Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Oxford, Hart Publishing, 2010).

There is an obvious sense in which the criminal trial serves epistemic functions, as a critical inquiry into past events to facilitate just punishment of the guilty—and only them. Yet the criminal standard of proof beyond reasonable doubt clearly implies that at least some of those acquitted will be factually guilty, not truly innocent. Should we infer that the trial has been an epistemic failure every time the guilty escape their just deserts owing to lack of adequate proof? Not at all, insists Ho. We should instead recognise that implicit in our traditions of presuming innocence at trial, in defiance of the probative odds (assuming that the police and the prosecution are honest and professionally competent), is a much richer conception of criminal adjudication reflecting a constitutional balance of state power and individual rights and liberties. So we should not be surprised if authoritarian regimes denounce the presumption of innocence: this takes us back to the broader political context of procedural law highlighted by Schwikkard, Young, Farrar and Jackson in the book's opening chapters. But Ho is also at pains to stress the challenges for liberal polities of a serious commitment to the political morality of criminal adjudication. Political corporatism ('communitarianism') in the 'fight against crime', allied with the insidious logic of 'relative ease of proof', can all too easily lead to the erosion of essential procedural guarantees. Thus, the presumption of innocence becomes peppered with proliferating reverse-onus provisions, like a structural oak beam eaten away by death watch beetle.

7. HEARSAY AND CONFRONTATION

The next trio of essays can be grouped together because they all address aspects of the law of hearsay; though in many ways they simply extend the discussion developed in the previous quartet. The hearsay prohibition is one of the most recognisable and characteristic features of common law evidence, and its traditional rationale is predominantly epistemic. Hearsay evidence has been declared inadmissible in common law criminal trials because it is regarded as unreliable, or at least insufficiently reliable to be placed before the jury.³⁴ Once again, the advent of human rights in criminal procedure has inflected traditional common law doctrines; and in this context the human rights revolution has been aided and abetted by the rediscovery—or reinvention—of a common law 'right to confrontation',³⁵ which in the

³⁴ E Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept' (1948) 62 *Harvard Law Review* 177.

³⁵ *R v Davis* [2008] 1 AC 1128, [2008] UKHL 36. Cf *R v Smellie* (1919)14 Cr App R 128 (CCA); *R v X, Y and Z* (1990) 91 Cr App R 36 (CA). And see I Dennis, 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' [2010] *Criminal Law Review* 255.

United States enjoys an explicitly constitutional foundation in the Sixth Amendment ‘Confrontation Clause’.

Mike Redmayne gets the discussion underway in Chapter 12 with a wide-ranging review of arguments pro and con a right to confrontation. Much turns, of course, on the scope of the mooted right, and also on its asserted rationalisations. Taking his cue from the seemingly interminable ‘*Al-Khawaja* saga’³⁶ and the US Supreme Court’s vigorous reassertion of an independent constitutional right to confrontation in *Crawford v Washington*,³⁷ Redmayne methodically works his way through the leading epistemic and non-epistemic rationales thought to justify a strong confrontation right (proceeding much as Hamer did in Chapter 9 in relation to delayed prosecutions). None of these popular rationales stands up particularly well to Redmayne’s unflinching close scrutiny. If the Strasbourg Court’s conception of confrontation is essentially epistemic, it is hard to see (revisiting the jurisdictional worries expressed by Roberts in Chapter 7) how the Court’s institutional position could legitimise an inflexible rule of inadmissibility for ‘sole or decisive’ evidence on the authority of ECHR Article 6—even if the specific objections raised by the UK Supreme Court in *Horncastle*³⁸ could be answered satisfactorily, from a purely epistemic point of view. But Redmayne is equally unimpressed by the non-epistemic rationales currently on offer: dignity, tradition, ‘something deep in human nature’ are all at best, he thinks, over-stated as explanatory rationales for existing doctrinal preferences and, under the pressure of sustained critique, are quickly reduced to rhetorical wishful thinking. Redmayne’s rather pessimistic conclusions are sobering. Perhaps human rights ‘are largely useless as a protection against false conviction’³⁹ (as Gans had already warned us in Chapter 8), and the best that can be said for a ‘human right’ to confrontation is that it is not quite as conceptually vapid or normatively precarious as its related juridical alternatives.

In Chapter 13, Craig Callen revisits the right to confrontation and the presumption of innocence, in direct dialogue with both Redmayne and Ho. Callen argues for a ‘right to due deliberation’ entailing that fact-finders make appropriately strenuous cognitive efforts to resolve the legal disputes submitted to their determination. In view of the importance of the matters at issue in criminal trials, the cognitive burdens on fact-finders should be commensurately onerous.⁴⁰ ‘Due deliberation’ is not a concept

³⁶ The long-awaited ECtHR Grand Chamber Judgment, following up on *Al-Khawaja and Tahery v UK* (2009) 49 EHRR 1 and *R v Horncastle* [2010] 2 AC 373, [2009] UKSC 14, was finally handed down on 15 December 2011 (when this book was already in press).

³⁷ 541 US 36 (2004).

³⁸ *R v Horncastle* [2010] 2 AC 373, [76]–[108].

³⁹ Redmayne, 307, below.

⁴⁰ Cf JQ Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven, CT, Yale UP, 2008).

known to international human rights law. It derives, instead, from intense reflection on the nature and values of adjudication informed by cognitive science. Developing a distinctive style of analysis pioneered in previous publications,⁴¹ Callen suggests that interdisciplinary studies of human reasoning, cognitive psychology and linguistics can shed new light on the rationality of familiar procedural rules and litigation practices. His method is powerfully comparative, in demonstrating how diverse legal processes and mechanisms (eg common law rules of admissibility versus civilian jurists' standards for judgment-writing) can be regarded as functional equivalents, in terms of their cognitive implications for effective fact-finding.⁴²

With the benefit of these interdisciplinary inquiries behind him, Callen reconsiders some of the arguments advanced in previous chapters. Ho's substantive reinterpretation of the presumption of innocence specifies a decisional standard in keeping with the mooted right to due deliberation, since criminal juries must consider and reject all plausible explanations of the evidence consistent with innocence before concluding that the accused is guilty beyond reasonable doubt. It is not enough simply to find the prosecution's story somewhat more plausible than the accused's even less convincing reply to the indictment.⁴³ By contrast, Callen thinks that Redmayne may have underestimated the cognitive rationality of legal rules excluding un-confronted hearsay from criminal trials. Should we regard the right to due deliberation as a 'human right'? Callen is agnostic on questions of terminology and classification. If one follows Dworkin in grounding all human rights in the more basic 'right to be treated *as* a human being whose dignity fundamentally matters',⁴⁴ it is certainly plausible to regard due deliberation as a fundamental human right institutionalised in criminal adjudication. But the important thing, Callen stresses, is that the right to due deliberation is recognised, legislated and respected in practice, irrespective of its formal designation as a 'human', 'constitutional' or garden variety procedural right.

Chris Gallavin's comparative analysis of recent legislative reforms in New Zealand, in Chapter 14, completes the trio of hearsay and

⁴¹ Including CR Callen, 'Interdisciplinary and Comparative Perspectives on Hearsay and Confrontation' in P Roberts and M Redmayne (eds), *Innovations in Evidence and Proof* (Oxford, Hart Publishing, 2007); CR Callen, 'Rationality and Relevancy: Conditional Relevancy and Constrained Resources' [2003] *Michigan State Law Review* 1243; CR Callen, 'Simpson, Fuhrman, Grice, and Character Evidence' (1996) 67 *University of Colorado Law Review* 777.

⁴² Also see CR Callen, 'Cognitive Strategies and Models of Fact-finding' in J Jackson, M Langer and P Tillers (eds), *Crime, Procedure and Evidence in A Comparative and International Context* (Oxford, Hart Publishing, 2008); CR Callen, 'Othello Could Not Optimize: Economics, Hearsay and Less Adversary Systems' (2001) 22 *Cardozo Law Review* 1791.

⁴³ Cf RJ Allen, 'Factual Ambiguity and A Theory of Evidence' (1994) 88 *Northwestern University Law Review* 604.

⁴⁴ R Dworkin, *Justice For Hedgehogs* (Cambridge, MA, Harvard UP, 2011) 335.

confrontation-related contributions. The human rights revolution arrived in New Zealand later than in Canada but earlier than in the United Kingdom, with the passage of the New Zealand Bill of Rights Act 1990 (NZBORA). As in South Africa, Hong Kong and Canada, Article 14 of the ICCPR supplied the model for drafting New Zealand's fair trial rights, but the duties and interpretational obligations imposed on New Zealand courts by the NZBORA are considerably weaker than those found in the South African Constitution, the Hong Kong Bill of Rights Ordinance 1991, the Canadian Charter of Rights and Freedoms, or even the UK Human Rights Act 1998. Gallavin consequently soon turns to examine the impact on New Zealand's law of hearsay of other, more discrete, statutory reforms, against the backdrop of the generic right 'to obtain the attendance and examination of witnesses' guaranteed by section 25(f) of the NZBORA.

The law of evidence in New Zealand was systematically modernised and revised by the Evidence Act 2006.⁴⁵ Gallavin focuses on those few sections of the 2006 Act which directly regulate the admissibility of hearsay statements by absent witnesses, ostensibly on grounds of reliability and testability. He is critical of some of the drafting choices reflected in the Act's hearsay provisions, questioning their conceptual coherence and capacity, as criteria of admissibility, to differentiate successfully between reliable and unreliable hearsay. A comparative review of comparable legislation and case-law in Canada, England and Wales, Australia, the United States, and European human rights law indicates that similar difficulties are experienced elsewhere, major doctrinal differences notwithstanding.

On reflection, this discovery should not be surprising. Gallavin is concerned with the basic epistemological building-blocks of criminal adjudication—relevance, reliability, probative value, and evidential sufficiency—and these logical requirements of warranted verdicts are relatively impervious to doctrinal variations across legal jurisdictions. This is why the epistemological issues explored by Gans, Hamer, and Callen, amongst others, are so obviously pertinent to criminal adjudication in general, and cannot be confined to particular legal systems.⁴⁶ But if legal problems are shared, solutions might be, too. Gallavin's foray into (predominantly) common law comparativism enables him to identify several promising directions for reform in the case-law of Canada, the United States, and the ECtHR. Gallavin's essay also implicitly reinforces a recurring theme of many of the preceding chapters: some of the most fundamental issues in the design and implementation

⁴⁵ See C Gallavin, *Evidence* (Wellington, LexisNexis, 2008) esp ch 1.

⁴⁶ Also see P Tillers, 'Are There Universal Principles or Forms of Evidential Inference? Of Inference Networks and Onto-Epistemology' in J Jackson, M Langer and P Tillers (eds), *Crime, Procedure and Evidence in a Comparative and International Context* (Oxford, Hart Publishing, 2008); P Tillers, 'Discussion Paper: The Structure and the Logic of Proof in Trials' (2011) 10 *Law, Probability and Risk* 1.

of fair criminal trials will never be encompassed by generic human rights legislation, or even by detailed codifications of procedural law.

8. FAIR TRIALS FOR ALL

We have already adverted to the tendency of human rights in criminal procedure to focus almost exclusively on the rights of suspects and the accused. This bias is arguably built into specifications of the ‘right to a fair trial’ contained in major international instruments like the ICCPR and the ECHR, which in turn structure human rights adjudication and frame broader policy debates. These instruments were drafted in the shadow of despicable deeds perpetrated by authoritarian regimes in the decades before and after 1945, when nobody needed convincing of the vital importance of robust legal protections for those especially vulnerable to abuses of state power. Whilst the indispensability of procedural rights for suspects and the accused in the administration of criminal justice remains undiminished, contemporary debates have moved on. Today we seek fair trials not only for the accused but, more ambitiously, for *all* the participants in criminal proceedings, including, in particular, complainants and witnesses, who in the past have too often been treated in deplorable ways that betray the ideals of criminal adjudication.

Major procedural reforms have been implemented in many common law jurisdictions over the last several decades designed to assist complainants and witnesses to give their best evidence in a humane procedure which treats them with appropriate concern and respect.⁴⁷ Legal conceptions of the ‘right to a fair trial’ have been adjusted accordingly, and human rights law has been instrumental in effecting this realignment.⁴⁸ What might have been a rallying cry for feminist activists in the 1970s is now treated by judges in London, Sydney or Strasbourg as uncontroversial settled law: ‘There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests... taking into account the position of the accused, the victim and his or her family, and the public’.⁴⁹ However, these long overdue gestures towards a more holistic conception of trial fairness have been accompanied by a darker policy undertow. It is a popular misconception, pedalled in lazy political rhetoric and amplified by certain sections of the media, that rights for victims and witnesses must be secured

⁴⁷ See above, n 15.

⁴⁸ J Doak, *Victims’ Rights, Human Rights and Criminal Justice* (Oxford, Hart Publishing, 2008).

⁴⁹ *Attorney General’s Reference (No 3 of 1999)* [2001] 2 AC 91, 118, HL (Lord Steyn). Also see *Doorson v Netherlands* (1996) 22 EHHR 330, [70] (‘principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify’).

at the expense of traditional procedural safeguards, as though justice were a kind of commodity that must be taken from some ('criminals') so that others ('victims') can have more. But victims do not truly get justice when offenders are convicted unfairly, still less if flawed procedures lead to the conviction of the innocent. For lawyers, it is trite that the rights and interests of complainants and witnesses must somehow be accommodated, or 'balanced', with the rights of suspects and the accused. The enduring difficulty lies in translating this truism into practice.

The final pair of essays in this volume boldly venture onto this treacherous terrain. In Chapter 15, Terese Henning and Jill Hunter examine recent reforms in Australian criminal evidence and procedure and critically evaluate some of the accumulating case-law interpreting these statutory provisions. Focusing in particular on the admission of hearsay statements from absent witnesses as an exemplar of broader trends, the discussion picks up many of the doctrinal themes introduced by Chris Gallavin in the preceding chapter. Drawing also on historical and socio-legal materials, Henning and Hunter reconsider some of the factors which deter fearful sexual assault complainants, vulnerable witnesses and the accused from entering the witness-box. Echoing Jeremy Gans's conclusions in Chapter 8, Henning and Hunter find that the broad human rights framework, which is gradually becoming more familiar to Australian courts and jurists, seldom drills down to the prosaic institutional realities of criminal litigation.

On the face of it, section 65 read together with the interpretative Dictionary of the uniform Evidence Acts equips Australian courts with a broadly worded statutory basis for admitting the hearsay statements of any witness, and especially an accused, who is unavailable or unwilling to testify. However, the practical scope of this provision pivots on judicial interpretations of 'unavailability', which in turn are influenced by unarticulated (or at any rate indefensible) conceptions of trustworthiness and restrictive entitlements to testimonial status. Neither complainants nor the accused necessarily benefit from each other's misfortune when testimonial voices are silenced. Henning and Hunter argue that traditional common law practices, legal professional habit and judicial culture are at the root of the problem. The persistence of entrenched attitudes, despite major procedural innovation and reform, perpetuates centuries' old mistrust of certain witnesses. Reiterating Schwikkard's admonition from Chapter 1, Henning and Hunter warn against equating—even sweeping and politically vaunted—legislative reform with any tangible revolution in professional culture, attitudes or practices.

In Chapter 16 Peter Duff reconsiders the Scottish 'rape shield', perhaps the procedural issue *par excellence* where the rights and interests of complainants and vulnerable witnesses are thought to clash with the accused's (human) right to a fair trial. Duff begins by explaining the constitutional position of Scots criminal procedure law within the framework of the UK Human

Rights Act 1998. This is a powerful illustration of legal cosmopolitanism at work *within* a national legal jurisdiction that human rights lawyers tend to regard as a single entity. Scots law was apparently even more resistant than the criminal law of England and Wales to the language and concepts of human rights, prior to the Human Rights Act. The challenges of managing revolutionary legal change in Scotland have been exacerbated by a rather surprising, possibly unintended, but certainly widely resented alteration in the institutional structure of appeals on points of criminal procedure and by some of the jurisprudence it has already produced.⁵⁰

Scottish legislation seeking to protect sexual assault complainants from harassing and demeaning cross-examination on their previous sexual history must now be interpreted within the parameters of this ‘devolved’, human rights-respecting, constitutional framework. Common law comparativism is once again to the fore. Duff notes that Canadian precedents,⁵¹ in particular, have been influential in shaping Scottish rape-shield policy and legislation. However, the tale is not a particularly happy one, from the reformers’ perspective. Legislation has not produced the trial outcomes many anticipated, partly because the accused’s right to a fair trial under ECHR Article 6 implies (as Redmayne, Callen and Gallavin discuss in Chapters 12–14) a right to cross-examine the prosecution’s case. The Scottish courts were obliged to conjure an ‘invisible comma’ into the Scottish rape-shield provision in order to satisfy Article 6.⁵²

However, the core of Duff’s critical analysis is not doctrinal. Drawing on significant empirical data, and mirroring the conclusions of Henning and Hunter in the preceding chapter, Duff diagnoses the source of the problem in traditional legal practices and cultural meanings—specifically, in this instance, in relation to the elusive concept of ‘relevance’. Previous sexual history evidence is often described as ‘irrelevant’ to the matters in issue in criminal trials.⁵³ But irrelevant evidence is *never* admissible in criminal trials: this is an article of faith for common lawyers. And proponents of protective legislation do not generally regard themselves as enemies of fair trials. So it begins to seem puzzling why any dedicated ‘rape shield’ should be needed at all.

The answer, of course, is that the meaning of ‘relevant’ evidence is contextual, perspectival, and—applied to this issue—frequently controversial. As Duff puts it, ‘a radical feminist or a liberal male academic or a traditional Catholic bishop or a reader of “lads’ mags” may have conflicting views about

⁵⁰ Also see PR Ferguson, ‘Repercussions of the Cadder Case: the ECHR’s Fair Trial Provisions and Scottish Criminal Procedure’ [2011] *Criminal Law Review* 743.

⁵¹ Especially the ‘extremely influential’ decision in *R v Seaboyer* [1991] 2 SCR 577.

⁵² *DS v HM Advocate* [2007] UKPC 36, 2007 SLT 1026, [48].

⁵³ See eg A McColgan, ‘Common Law and the Relevance of Sexual History Evidence’ (1996) 16 *Oxford Journal of Legal Studies* 275.

the relevance of a specific piece of sexual history evidence, in the context of a particular case'.⁵⁴ In making admissibility determinations, the trial judge must eschew all partisan perspectives and be guided only by objective considerations that justify the ruling and warrant all parties' rational assent. To be sure, this is a demanding ideal. Beyond comparative legal analysis and broadly framed human rights standards, the matters at issue are irreducibly epistemological. One conclusion, on which all of the essays in this book might be said to converge, is that the human rights revolution in criminal procedure may channel and constrain, but will never displace, the inferential logic of fact-finding and proof in criminal adjudication. It is not hard to imagine, in the light of the analysis and arguments presented in the following chapters, that a progressively expanding and deepening integration of criminal evidence and human rights will continue to play a transformative role in shaping the future of common law procedural traditions.

⁵⁴ Duff, 385, below.