

WHAT'S SO SPECIAL ABOUT THE CRIMINAL TRIAL? A COMMENT ON SARAH SUMMERS «EPISTEMIC AMBITIONS OF THE CRIMINAL TRIAL: TRUTH, PROOF, AND RIGHTS»

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ABSTRACT: This paper offers some further support to Sarah Summers' argument, in «The Epistemic Ambitions of the Criminal Trial: Truth, Proof, and Rights», that we cannot separate process from outcome in the criminal trial—that the justification and legitimacy of the verdict (especially of a conviction) depends crucially on the procedure through which it was reached. Intuitive support for this view is found by considering the case of a guilty person who is convicted after a trial that denied him the opportunity or means for «effective participation»; further support is found in the provisions made for those who are «unfit to plead», those who lack the capacities necessary for effective participation in their trial. A firmer grounding for this view is then found in a theory of the criminal trial as a process through which alleged public wrongdoers are called to account—a process in which they should be active participants.

KEYWORDS: criminal trials, process and outcome, fitness to plead, calling to account.

SUMMARY: 1. INTRODUCTION—. 2. FITNESS TO PLEAD—. 3. THE CRIMINAL TRIAL AS A CALLING TO ANSWER—. BIBLIOGRAPHY.

1. INTRODUCTION

The central argument of Sarah Summers' interesting paper is that we cannot separate «outcome» from «process» in our account of the proper aims and structure of criminal trials. We should not say, for instance, as instrumentalists say, that the trial's proper aim is a true or accurate verdict, and that the various rules and principles that govern the trial's procedures are to be rationalised either instrumentally, as provisions that make an accurate verdict more likely, or in terms of side-constraints that are independent of the trial's central aim¹.

The aim of criminal adjudication in the rule of law should be understood in terms of enabling the establishment of a kind of truth, which is to be determined in line with the substantive and procedural distinct requirements governing justified punishment and fair process. (Summers, 2023, p. 267).

Summers is, I think, absolutely right in this argument: the justification, the legitimacy, even (we might say) the truth of the verdict reached in a criminal trial is determined not just by the truth of a proposition it contains about the guilt of the accused person (in a guilty verdict, the proposition that he committed the offence with which he was charged), but on the procedure through which that verdict was reached. In this response to her paper, I will therefore not be trying to undermine her argument, but will offer further support for it, and sketch the way in which it can be more firmly grounded in a distinctive conception of the criminal trial. I will begin, in this section, by clarifying what I take to be her central claim, and by offering some intuitive support for it. In s. 2, I will suggest that we can make progress by considering the law's treatment of those who are judged to be «unfit to plead»—those who lack the capacities necessary for participation in one's trial; and in s. 3 I will sketch an account of the trial as a process through which responsible agents are called to answer for their alleged crimes—and in which the justice of the procedure is therefore integral to the justifiability of the outcome.

To begin with a little clarification. At some points Summers (2023, p. 266-267) puts her central claim in the language of knowledge: «state authorities are only entitled to hold an individual liable and impose punishment if they know that the accused committed the offence». Now if the aim of the trial is knowledge rather than merely true belief, this certainly connects outcome to process: a belief can be true whatever the process through which it was formed, and however irrational that process might have been; but I can be said to know that *p* only if my belief or assertion that *p* is grounded in some appropriate reasons². However, first, this is not yet enough to provide an alternative to an instrumentalist picture, since an instrumen-

¹ This model of a side-constrained instrumentalism is familiar in penal theory: see *e. g.* Hart (1968).

² Hence the familiar philosophical analysis of knowledge as justified true belief; we need not engage here with the problems that that analysis faces (see Ichikawa and Steup [2018]), since any plausible account of knowledge makes its justificatory grounding crucial.

talist can offer her own account of why the trial (the court that must reach a verdict) should aim for knowledge: this, she can argue, is the instrumentally most efficient and reliable way to aim at truth. Second, we still need to know why, if not for the sake of truth, a criminal court should make knowledge its aim, and what this has to do with the accused's role in a trial. We might say that

[t]he State is under an obligation from fairness and equality to ensure that it does not impose on any individual a greater risk of harm (such as the harm of being wrongfully convicted or punished) than it imposes on other individuals (p. 265);

but it is not yet clear how such a demand that we convict and punish someone only if we (the court) can claim to know that he is guilty grounds the various rights to effective participation that are central to the right to a fair trial under ECHR Article 6³.

We can see what the problem is here by thinking about a case in which an accused person who is indeed guilty of the crime charged is convicted at a trial in which he was not enabled to participate effectively: he was not «informed promptly» of the charges against him; he was not given «adequate time and facilities» to prepare a defence, or provided with appropriate «legal assistance»⁴. Does his conviction wrong him? On an instrumentalist view, the answer must be «No», since these procedural rights serve simply to protect people against the risk of being mistakenly convicted—to ensure the reliability and accuracy of the verdict; but if he is guilty, he cannot face a risk of being mistakenly convicted. The court (those officials who fail to provide him with the means to participate effectively) acts wrongly, since they take a risk of convicting someone who could, for all they yet know, be innocent; his conviction could be overturned on appeal as being unsafe: but if it is in fact accurate, it does not wrong him.

On this view, the guilty person's procedural rights to effective participation are parasitic on the rights of the innocent: the guilty acquire those rights, as it were, on the coattails of the innocent to whom they properly belong. An innocent who is denied the rights of effective participation is indeed wronged—and is wronged even if she is acquitted: for she is subjected to the risk of a mistaken conviction, which wrongs her even if the risk is not actualised⁵. But a guilty person cannot be thus wronged, since he faces no such risk. This should, however, strike us as wrong—as failing to do proper justice to the guilty; my aim in this short paper is to provide some support for this reaction to the implications of an instrumentalist view.

³ See the list of «minimum rights» specified in ECHR Art. 6(3), and Summers (2023, p. 261). On «effective participation», see *e. g.* *Stanford v UK* (1994), *T v UK* (2000), *SC v UK* (2005).

⁴ These are rights specified in ECHR Art. 6(3).

⁵ On being subjected to a risk as a wrong, see Oberdiek (2017).

2. FITNESS TO PLEAD

We can begin to see a better way to ground the right to effective participation, as a right that belongs to the guilty as much as to the innocent, and that is not grounded in a concern to avoid mistaken convictions, by considering the treatment of those who are found to be «unfit to plead». A person might have been sane and fully responsible at the time when he allegedly committed a crime, but fall victim to a serious mental disorder or impairment before he can be brought to trial—an impairment such that he cannot now understand the trial or the charge against him, or instruct his legal representative, or play any role in the trial (such as offering a defence, or questioning witnesses). In many legal systems, such a person must not be tried: if he is found unfit to plead, his trial is barred⁶. But why should his trial not proceed? It is true that it will sometimes be hard to determine the guilt of an accused who can take no part in the trial: perhaps he would be able to offer an alibi, or give an explanation of his conduct that at least creates a doubt about his guilt. But this is not always true: at least sometimes conclusive proof of the accused's guilt (including, of course, information he provided or a confession he made before falling ill) will be available even without his participation in the trial; provision could also be made for cases in which it is true by allowing the trial to proceed while warning the court to consider whether the accused's inability to give evidence creates some reasonable doubt about his guilt. Furthermore, the defendant's unfitness to plead does not completely bar a legal inquiry into whether he is guilty: whilst an unfit defendant cannot be tried, an inquiry is still held, the kind of evidence that would have figured in a trial is led and examined, and the jury must then determine «whether they are satisfied [...] that [the accused] did the act or made the omission charged against him as the offence». If they are thus satisfied, he cannot be convicted⁷: the jury «make[s] a finding that the accused did the act or made the omission charged against him as the offence», and the court can then impose a hospital order, or a guardianship order or a supervision and treatment order, or discharge the defendant⁸.

⁶ I will take the provisions in English law as my example here: see Sprack and Engelhardt-Sprack (2019): ch. 17.36 for the current law; also the Law Commission's recommendations for reform (Law Commission, 2016), which have not (yet) been enacted by the government; and Bevan and Ormerod (2018). Fitness to plead has, of course, a distinctive significance in more «adversarial» systems, but it is also a necessary condition of a criminal trial in civil law systems: for useful discussions of these provisions, see Mackay and Brookbanks (2018).

⁷ But if they are not thus satisfied, he must be acquitted. The Law Commission (2016, vol. 2, Draft Bill: clause 10) also suggests allowing for the special verdict of «not guilty by reason of insanity» if it is proved that he committed the offence but satisfied the criteria for an insanity defence.

⁸ See Criminal Procedure (Insanity) Act 1964 ss 4A–5A; see also the provisions for an «alternative finding procedure» proposed in Law Commission, 2016, vol. 2, Draft Bill, clauses 9, 57–60. A hospital order sends the person to a psychiatric institution, under conditions similar to those for people who are compulsorily admitted to hospital through a civil process, but the court can also impose a «restriction order», which sets constraints on the person's release from hospital (and thus makes his detention even more like a term of imprisonment): see Mental Health Act 1983, ss. 2–6, 37–42.

Thus even if an accused person lacks the capacities necessary to understand or participate in the proceedings, this does not bar the court from determining, and claiming to know, that he committed the crime with which he was charged, or from imposing burdensome coercive measures on him as a result of such a determination: why then should it bar convicting him; why should that process not count as a criminal trial?

Part of the answer might be that we cannot legitimately *punish* someone who is incapable of understanding what is being done to him as a punishment—which is why even a country as punitive as the USA refrains from executing someone who has become seriously mentally disordered since his crime⁹. But that cannot be the whole answer, since it does not show why an unfit defendant should not be convicted but then spared punishment. We still need to ask what the crucial difference is meant to be between a criminal trial and the «alternative finding procedure» that is thought to be appropriate for the unfit defendant. In both cases, we can say, the court should strive for an accurate finding, given the importance of the issue at stake and the severity of the consequences for a defendant who is found to have committed the crime; in both cases, it should aim for knowledge—an aim that might, but need not be, frustrated if the accused person cannot participate in the proceedings. Why should the right to effective participation, and the possession of the capacities necessary to exercise that right, be crucial to the criminal trial, but not to this alternative kind of inquiry?¹⁰

Another part of the answer to this question might be that a criminal conviction is not just a finding of fact—that this person committed this crime. A conviction does not just describe, but condemns or censures: in finding the accused guilty, the court condemns his action as a criminal wrong, and censures him as the perpetrator of that wrong. But we cannot properly censure someone who cannot understand the censure for what it is: censure directed at such a non-comprehending recipient is a travesty. This would explain why someone who lacks the capacity to understand his trial cannot properly be convicted, and therefore cannot properly be tried, since a trial is apt to lead to a conviction¹¹; but it does not explain why his «effective participation», the rights that enable such participation and the capacities required to exercise those rights, should be crucial to the legitimacy of the trial.

To see why the capacity and the opportunity for effective participation should matter so much to the legitimacy of the criminal trial (to see why someone who lacks that capacity or is denied that opportunity is wronged even if he is convicted of a crime that he did commit), we must look more carefully at the accused person's role

⁹ See *Ford v Wainwright* (1986).

¹⁰ This question echoes a running theme in Summers' paper: what is it about criminal trials that distinguishes them from other kinds of legal process and adjudication?

¹¹ It would also help to explain why he cannot be punished, if punishment is understood in part as seeking to communicate to the offender the censure he deserves.

not just as the object of an inquiry that the court conducts into his allegedly criminal conduct, nor just as the passive recipient of the censorial messages that conviction and punishment are intended to convey, but as an active participant in this process.

3. THE CRIMINAL TRIAL AS A CALLING TO ANSWER

In adversarial systems such as those of England or the US, criminal trials formally begin with the charge being put to the defendant, who is then expected to enter a formal response, a plea of «Guilty» or «Not Guilty»¹². She can of course enter a plea only if she is present at the trial, and it is indeed a general requirement that accused persons be present for their trial; any who fail to attend can be arrested and brought to court¹³. This might seem to be important only for adversarial trials, and not for more «inquisitorial» procedures in which there is no requirement for a formal plea, but even then the presence and participation of the accused is important: in German law, for instance, the accused is required to be present for the trial, and is invited to make a statement in response to the indictment¹⁴. Why should this be so crucial to a criminal trial, given that it will not always be necessary to establishing the truth?

Here is one plausible answer: that the criminal trial is not simply an inquiry that seeks to establish the truth about whether the accused person committed this alleged crime (an inquiry of which he could be the passive object); it is a process through which a person is called to answer an accusation of public wrongdoing (wrongdoing that is public in the sense that it is defined by the criminal law as a wrong that is the business of the whole polity [Duff, 2018, chs 2.6, 4]). More precisely, he is called initially to answer *to* the accusation by entering a plea of «Not Guilty» or «Guilty»; if the prosecution offers persuasive evidence of his guilt, if he has a «case to answer»¹⁵, he then needs to offer an answer to that evidence in order to create at least a reasonable doubt as to his guilt; and if the prosecution proves, or he admits, that he committed the offence, he is called to answer *for* that commission—either by offering an

¹² That expectation was once a stringent demand; an accused who refused to enter a plea was subjected to the «*peine forte et dure*» to extract a plea from him (see McKenzie, 2005). It is not now a legal requirement—if the defendant refuses to enter a plea, a not guilty plea is entered on his behalf; but he is still asked, and is normatively expected, to plead.

¹³ This is strictly true, in England, only of trials on indictment; magistrate court trials for more minor offences can more easily proceed in the absence of the accused (see Bail Act [1976, s. 7]; Magistrates' Courts Act [1980, ss. 11-13]). Although even trials on indictment can sometimes proceed in the absence of the accused, courts are extremely reluctant to allow this: see *R v Jones (Anthony)* (2003).

¹⁴ See German Criminal Procedure Code (*Strafprozeßordnung*) §§ 230-236 (including specifications of when a trial can proceed *in absentia*), §243; Bohlander (2012, p. 116-118).

¹⁵ Hence the provision in English law for the defendant to make a submission of «no case to answer» at the end of the prosecution's case; he must be acquitted, without having to offer a defence, if the prosecution has «failed to adduce evidence on which a jury, properly directed by the judge in his summing-up, could properly convict» (*R v Galbraith* [1981]; see Sprack and Engelhardt-Sprack [2019, ch. 20.48]).

exculpatory defence that justifies or excuses his criminal conduct, or by accepting the censure that a conviction expresses. If he is convicted, the court does not just judge that, as a matter of fact and law, he committed the offence charged; it holds him to account for that offence—and it is by now something of a commonplace that an important part of what matters when a crime has been committed is that the perpetrator is called and held to account for it¹⁶.

To call someone to account or answer for an alleged crime is to treat her as a responsible agent: a responsible agent is one who can answer, and who can therefore properly be called to answer, for her conduct—to respond to challenges or to accusations of wrongdoing; central to a criminal trial, as distinct from other kinds of inquiry into a person's past conduct, is that it seeks to hold the accused person responsible. If we ask why this matters, or why we should prefer a system of criminal trials to other kinds of inquiry into those who are suspected of criminal conduct, the answer is that this is crucial to our standing as members of the political community: it is one of the ways in which we are treated, by the law and by our fellows, as responsible beings. Such trials, in which the accused person is to participate as an agent who is called to answer the charge, might or might not be more reliable as ways of establishing the truth about what was done, but that is not what is central to their justification. Rather, just as we owe it to victims of crime to seek, *inter alia*, to hold those who wronged them to account through the criminal process, so we also owe it to each other, in particular to those accused of criminal conduct, to treat them as responsible agents by formally calling them to answer the charges that they face.

We can also say that, in a decently just society, someone charged with a crime has a duty to answer the charge in the criminal court: we owe it to our fellow citizens to answer to them, through the criminal court that speaks and acts in our collective name, for the public wrongs that we commit; and, given the importance of holding wrongdoers to proper account, we owe it to our fellows to answer evidence-backed accusations of wrongdoing even if we know that we are innocent of the charges laid, in order thereby to assist the criminal law in its enterprise of holding public wrongdoers to account. This is not to say that we should, even in a decently just society, have a *legal* duty to answer a charge in this way—to enter a plea, to participate in the trial process. The right of silence, the right to refuse to play any part in one's trial, is on this view still a crucial right that belongs to all defendants, along with the closely associated right not to be required to incriminate oneself¹⁷. For, first, it is important to respect the consciences of those who have principled objections to the trial process to which they have been summoned: such objections cannot save them from being tried, but they should be allowed to express their objections by refusing to play an active part in the trial, since to play such a part, even to enter a plea, would be to recognise the authority of the court. Second, it is anyway obvious that a legal duty

¹⁶ See Duff *et al.* (2007)

¹⁷ See Summers (2023, p. 261).

to take part in one's trial would give yet more power to the State's officials—a power that could all too easily be abused: an accused person already faces familiar kinds of pressure and risks of oppressive treatment; the right of silence offers some protection. Any duty to play an active part in one's trial, to offer an answer to the charge and to answer for one's conduct, will be a purely civic, rather than a legal, duty—a duty that we owe our fellow-citizens, and that we can be criticised for failing to fulfil, but not a duty that should be given the force of law.

However, whether or not we can properly talk of a civic duty to participate actively in one's trial, such participation is certainly a right that any (competent) accused person must have: it is not equivalent to a right to an accurate or reliable verdict (although we obviously do have such a right); it is the right to be allowed and enabled to answer for myself and for my conduct—a right that is fundamental to my identity and standing as a responsible agent¹⁸. Two things follow from this right. First, I can properly be tried only if I have the capacities necessary to answer the charge: that is why we cannot try someone who is not fit to plead, someone who lacks those capacities, since we cannot properly call someone to answer if we know that she is not capable of answering. Second, I must be allowed, enabled, and helped to answer the charge: I must be given the opportunity to answer, and given access to whatever resources are required if I am to answer effectively—the opportunities and resources required for «effective participation» in the trial; it would be a travesty of justice to call a person to answer a charge of wrongdoing, to expect (even if the law does not require) him to answer, but to fail to enable him to answer—to fail to «inform [him] promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him»; to fail to give him «adequate time and facilities for the preparation of his defence», or to ensure that he has access to proper «legal assistance» and that he can «examine or have examined witnesses against him»; to fail to provide «the free assistance of an interpreter if he cannot understand or speak the language used in court»¹⁹.

It also follows from this account of the criminal trial that an instrumental account of the trial as primarily aimed at establishing the truth is inadequate: the justice and legitimacy of the trial's outcome—of the court's verdict—cannot be separated from the justice of the procedure through which it is reached; a guilty person who is convicted after a trial that denied him the opportunity for effective participation is wronged, the verdict is unjustified, even if we can be sure that his participation would not have secured him an acquittal. For what a conviction claims, on this view, is not just that the accused committed the offence charged; nor just that he is culpable for doing so (that he had no justification or excuse for his criminal conduct);

¹⁸ On the importance of being able to exercise my capacity to answer for myself and my conduct, see Gardner (2007).

¹⁹ These are the «minimum rights» specified in ECHR, Art. 6(3). Such support is especially, but not only, important if we can talk of a civic duty to take part in the trial: for I have a right to such support as I need if I am to be able to discharge my duties (see Wenar, 2013).

nor even just that the court knows this to be true, given the conclusive evidence presented by the prosecution: but that he has failed to provide an exculpatory answer to the charge that he faced, despite the persuasive evidence supporting that charge. That claim, however, is undermined if he lacked the capacity, or was not given a fair opportunity (and the necessary means), to answer the charge.

When an accused is initially indicted, at the beginning of a trial, there is of course no case that she must answer: she is expected to enter a formal plea, but nothing more than that, since it is for the prosecution to prove her guilt²⁰. However, if the prosecution then offers evidence that suffices to constitute a «case to answer», the burden effectively shifts to the accused: for that evidence suffices, if not rebutted, to justify a judgment that, «beyond reasonable doubt», the accused is guilty of the offence charged; it is therefore for the accused either to admit her guilt, or to rebut that evidence—which she can do either by offering countervailing evidence that she did not commit the offence, or by offering evidence of a defence that would justify or excuse its commission. Once she has a case to answer, it is up to her to avoid conviction by answering—by giving the court reason to doubt her guilt, despite the strong evidence of her guilt that the prosecution has offered: that evidence warrants transforming the presumption of innocence into a presumption of proved guilt—but a presumption that she must have a fair opportunity to rebut.

The conviction of someone who was not given that opportunity, who has been denied the opportunity for or the means of effective participation in his trial, might not be «unsafe» as a matter of empirical truth: the prosecution's evidence might be so overwhelmingly persuasive that no rebuttal is possible, and it might be obvious that the accused has no defence. But his conviction is nonetheless unjustified, since it cannot be said that he has *failed* to answer the charge in an exculpatory way: I do not fail to do something if I lack the capacity to do it, or if I am denied the opportunity or the means to do it; and those who deny me that opportunity or those means are anyway singularly ill placed to condemn me for that «failure». That is why we cannot separate outcome from process in the criminal trial.

As I said at the beginning of this paper, my aim has not been to question, or to cast doubt on, Summers' argument that instrumentalists are wrong to separate outcome from process in this context. It has rather been to offer some further support to that argument, by appealing to a conception of the criminal trial that gives the accused an essential active role in the process, as being called to answer an evidence-backed charge of public wrongdoing: what justifies the accused's conviction is not just the truth of the claim that he committed the offence without justification or excuse, but his failure to offer an exculpatory answer to the charge; if he was not given, or lacked the capacity to take advantage of, a fair opportunity to answer it, he cannot be justly convicted.

²⁰ Here again what I describe is the course of an adversarial trial, but I hope that a similar logical structure can be discerned in more inquisitorial proceedings.

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