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REPLY TO THE COMMENTS ON EPISTEMIC AMBITIONS OF THE CRIMINAL TRIAL: TRUTH, PROOF AND RIGHTS

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ABSTRACT: This article sets out to reply to the comments by Antony Duff, Sabine Gless, John Jackson and Thomas Weigend on my article «Epistemic Ambitions of the Criminal Trial». It begins by examining the various positions of the commentators to the question of the aim(s) of the criminal trial before going on to consider the limits of instrumentalist and proceduralist approaches and to re-examine the right-based conception of trials. It concludes by considering the implications of this account of criminal trials.

KEYWORDS: Criminal proceedings; criminal evidence; human rights; truth.

1. THE PURPOSE OF CRIMINAL PROCEEDINGS

The aim(s) of criminal proceedings, the form that these proceedings should take and the role of proof of guilt in this enterprise is contested. This is well illustrated by the various positions taken by the four commentators on *The Epistemic Ambitions of the Criminal Trial* (Summers, 2023). For Antony Duff (2023, p. 159):

> 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 the 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 by the procedure through which that verdict was reached

It follows from this that in thinking about the purpose of criminal trials, outcome cannot be separated from process:

> 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 truth's central aim (p. 160).

John Jackson (2023) might be understood as subscribing to this type of account of criminal trials to the extent that he agrees that «justified punishment depends on the fact-finder establishing true belief for distinct reasons following a particular process» (p. 184). He notes that «a guilty verdict is more than a statement of belief about the defendant's conduct; it is a speech act that licences punishment requiring fact-finders to justify their verdict by appropriate reasons in the context of a fair process» (p. 185).

Sabine Gless (2023) indicates sympathy with the reluctance to endorse the separation of outcome and procedure in her acknowledgment that it is «right» that «to legally believe also requires compliance with the concept of a "fair trial"» (p. 171). She might be understood as advocating for this on rule consequentialist grounds, though, when she writes that «a dichotomy of "true accuracy" and "fair evidentiary proceedings" is blurry as exclusionary rules also uphold accuracy of and trust in fact-finding» (p. 171). Finally, Thomas Weigend (2023) is deeply sceptical of arguments which insist on the union of outcome and process in the conceptualisation of the aims of criminal trials. He sees criminal trials as aiming at «the resolution of the social conflict engendered by the suspicion that a crime was committed» (p. 198). While he agrees that «evidence law is not merely instrumental towards finding the "truth" but is rooted in specific value judgments on how a fair process is to be conducted in a State recognizing human rights», he would «prefer to keep apart» process and outcome rather than see them united in a «thick» vision of «legal truth»[1]. A criminal judgment must be «right» but, for Weigend, this «rightness» should not be equated with «truth». One obvious question, here, is how this rightness is to be understood. Weigend's position is closely linked to his vision of the aim of the criminal trial as allowing for the establishment of an accurate verdict. When he questions, for instance, how the notion that belief will be «warranted» only if the procedure complied with certain rules designed to guarantee «fairness» is related to the «truth» of

[1] Weigend (2023, p. 190): «I would prefer to keep apart the two prongs of Summers' "thick" concept of truth. I do so not only for the sake of clarity but also because I think that there exists a certain tension between the search for an accurate result and procedural fairness—a tension which would be obscured by treating all preconditions of a just judgment as aspects of one comprehensive concept of legal truth».

the fact-finder's belief, it is clear that he is referring to the narrow belief in the guilt of the accused[2].

We can see, that for Weigend and maybe also for Gless, the truth that is to be established in the criminal trial is principally (wholly?) tied up in the (accuracy of the) decision on the guilt of the accused, while for Duff and presumably also Jackson, the truth of the verdict reflects something more than just the accuracy of the decision on guilt narrowly conceived. The disagreement here, which seems to take on an almost ideological dimension, is of central importance to the discussion of the issue of proof in criminal trials. It is also connected to fundamental questions about the point of theorising about criminal trials. Weigend (2023) is critical of what he sees as a (doomed!) «attempt to assemble substantive and procedural requirements under a common conceptual roof» (p. 198), but his vision of the truth of criminal trials as focused on the accuracy of the verdict might be seen as simply too narrow, not least because it is unable to account for matters of fundamental importance to criminal trials, such as the participation of the accused in criminal proceedings[3]. Criminal proceedings clearly have more than just instrumental value.

Duff (2023, p. 160), unsurprisingly in view of his pioneering work on trials and punishment[4], endorses the idea that criminal proceedings aim at more than just the accuracy of the verdict. Such accounts, which see inherent value in criminal proceedings, face difficulties of their own, not least in explaining why particular procedures should be followed. Of central importance here, is the issue of the fact-finder's belief and specifically its relationship to knowledge or as Duff puts it:

> We need to know why, if not for the sake of truth [in the sense presumably of the accuracy of the verdict on guilt], a criminal court should make knowledge its aim, and what this has to do with the accused's role in a trial (p. 161).

Duff (2023, p. 162) is sceptical about the idea that the right to effective participation is best grounded in concerns about avoiding wrongful convictions. Instead, he finds the answer to this question in his vision of criminal trials as a forum which 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 excise, 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 (p. 167).

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[2] Weigend (2023, p. 191): «It is not quite clear to me what she would require for a "warranted true belief", but it seems she regards such a belief as "warranted" only if the previous procedure complied with certain rules designed to guarantee fairness. But how is that requirement related to the "true" element of the fact-finder's belief».

[3] For detailed discussion, Duff *et al.* (2007).

[4] See inter alia Duff (1986; 2009; 2018).

He illustrates this in his reflections on the importance of the ensuring the fitness of the accused to plead (p. 162 ff.). It might be questioned, though, how this idea of being afforded the opportunity to offer an exculpatory answer to the charge differs from the obligation to afford the accused the right to be heard—the opportunity to respond to the prosecution's case—which lies at the centre of the rights based regulation of criminal trials.

It is legitimate at this point, perhaps, to wonder whether these differences matter? Is this not an overly theoretical discussion of limited practical relevance? We all agree, after all, that accurate verdicts and fair proceedings are important. Weigend (2023), for instance, does not dispute that convictions will be wrongful if the fact-finder's belief in the guilt in the accused is not formed in the correct way. He agrees that verdicts must be accurate and emerge from fair proceedings (p. 198). It is important to note, though, that the ways in which criminal trials are conceptualised have significant consequences in practice. According to Weigend, the «inadmissibility of relevant evidence, which impedes the criminal courts' task to determine guilt and innocence based on the true facts», must be regarded as an «exception» to the commitment to the rule of law. He writes that: «To the extent that procedural fairness and respect for personal privacy limit the evidence available to the finder of fact, these concerns prevent the court from completely elucidating the substantive truth» (p. 197). This idea of some sort of substantive truth which is discoverable outside of the process of legal adjudication impacts on the manner in which evidential rules are designed and interpreted by the court, often leading to restrictions on prohibitions on the use of evidence or reliance on «problematic» evidence in the service of «truth» and to the idea of «criminals» escaping justice on technicalities. Weigend is bothered by the «amalgamation of epistemological and procedural elements in a single term» (p. 196), but the idea that there exists some sort of real truth which stands outside process seems to do disservice to the idea of (criminal) legal adjudication and the fundamental principles on which this is based.

2. PROCEDURALISM AND PROOF OF GUILT IN CRIMINAL TRIALS

Underpinning the various views on criminal proof are (unsurprisingly) differences in the conceptualisation of theories of truth. Weigend (2023, p. 190) agrees that «[s]tate punishment should not be left to the intuition of some wise old judge but needs to be based on a rational process of collecting and evaluating evidence» but he is sceptical of the relationship between process and truth[5]. He notes that while

> Summers also mentions that a criminal judgment must be «correctly inferred from its premises» […] she seems to require more than a proper correspondence between the trial evidence and

[5] Weigend (2023, p. 191): «Surely truth in any everyday sense cannot depend on the fairness of the process by which this belief has been formed […] But Summers would probably respond that her idea of procedural truth differs from St. Thomas Aquinas' concept truth as adequation *intellectus et rei*».

> the contents of the judgment when she speaks of the need that «the conclusion of the factfinder constitutes warranted true belief in the rule of law» (p. 191).

Correspondence—the idea of truth as corresponding to reality—is a deceptively common-sense notion[6]. Even leaving aside the theoretical and philosophical complexities of correspondence, though, it seems clear that the belief of the fact-finder in a criminal trial poses certain difficulties which are inherent in the nature of criminal trials. The belief in the guilt of an accused in the context of criminal proceedings in the rule of law is quite different from a belief such as that it is raining in Zurich. The belief in the guilt of an accused in a criminal trial is defined by its normativity and as such does not fit well with an idea of truth as correspondence which suggests an understanding of inquiries as «asocial and amoral»[7].

This has led to a focus on alternatives, whereby procedure has come to take the place of substantive reasons. On this type of account, the «rightness» or «truth» of normative assertions or belief arises from the fact that they are accepted as based on rational reasons (Habermas, 1998). Such proceduralist theories seem to have close affinity with pragmatist ideas according to which truth is in some sense defined by process[8], and which reject theoretical conceptions of truth as of limited assistance in social practices. The point seems to be not that the truth does not exist but that it exists in discussion about the things that matter to us as humans. This is presumably the kind of account that Duff has in mind in his focus on the criminal trial. For Duff, the criminal trial is a «public moral dialogue like that envisaged by Habermas, not something the state does to an accused, but something that is designed for the state, the accused, and his alleged victims to do together» (Cruft, 2011, p. 18).

There are, however, problems with this vision of truth in the context of criminal adjudication. Criminal trials are highly regulated, tightly structured affairs and difficult to reconcile with an idea of environment which might enable genuine, non-coercive discourse. One obvious response to this might be to argue that trials ought to be structured differently to allow for this type of discourse to take place. This, though, would be to fail to recognise the importance of the institutional design of criminal proceedings in the rule of law. In his work on what he has called «the modern reconstructive trial», which emerged in the nineteenth century, Lindsay Farmer (2007, p. 48 ff.), has drawn attention to the changes in what was being reconstructed and the manner in which this was to take place. He notes that the demands for re-

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[6] According to the classical correspondence theory «a statement is true just in case it corresponds to a fact, and false just in case it does not correspond to a fact». Hintikka (2002, p. 238).

[7] See Habermas (1998) for the suggestion that there is no reality that corresponds to an evaluative standard.

[8] See *e. g.* James (1907, p. 97): «The truth of an idea is not a stagnant property inherent in it. Truth *happens* to an idea. It *becomes* true, is *made* true by events. Its verity *is* in fact an event, a process, the process namely of its verifying itself, its veri-*fication.* Its validity is the process of its valid-*ation*». There seem to be parallels too with Putnam's fourth characteristic of pragmatism—the primacy of practice. For discussion, see Hildebrand (2000).

form were motivated by a feeling that the criminal justice system «resembled a lottery in which few offenders were detected, fewer still convicted, and capital punishment was inflicted on those unfortunates who did not have the social resources to make a successful plea for mercy» (p. 45). He has argued that the «transformation in crime and punishment was driven in large part by the desire to make punishment more certain and effective, but it was also concerned with the symbols of legal authority and the legitimacy of criminal justice» (p. 45). The «decline of the scaffold as the symbol of criminal justice and the move to secret punishments» led to a movement whereby the «spectacle of justice thus shifted from the scene of punishment to that of judgment» (p. 46); Farmer affords central importance, here, to the fact that «the case being tested was not only a legal one but was backed by the authority and power of the police». This meant that the testimony of the accused

> was not so much a presentation of an opposing account of the events—as it would have been in an altercation trial—but something to be inserted into the account that had already been organized by the police and prosecution (p. 50).

The criminal trial «was seen as offering a window on society, enabling not only the punishment of individual wrongdoers but also representing the effectiveness of the system in detecting and punishing crime in general» even if «the accused became the subject of the trial only at the cost of a loss of autonomy» (Farmer, 2007, p. 58).

This account of the development of the criminal trial suggests that the focus on providing the accused an appropriate opportunity to challenge the case which had already been *prima facie* established by state investigation authorities. The introduction of defence counsel was of particular relevance in this regard. The assistance of counsel was of essential importance to allowing the prosecution's case to be challenged and thus to the presentation of the system of prosecution and punishment as legitimate. The introduction also allowed for the development of what is alternately characterised as the «right of the accused to remain silent» or more pejoratively as the «silencing of the accused». This idea of the right to be heard is thus very much tied to the idea of rights of the accused as «defence rights». This understanding of criminal trials seems far removed from the idea of criminal trials as designed to foster genuine, non-coercive communication between the State authorities and the accused. Nor is it easy (even in a «decently just society») to reconcile with Duff's (2023, p. 165) suggestion that «someone charged with a crime has a duty to answer the charge in the criminal court».

Post-metaphysical accounts of truth and (legal) process might be seen to be driven by recognition of the importance of conceptualising (legal) decision making as a social practice undertaken by humans. This is of central importance and is clearly highlighted in Gless' (2023, p. 177) consideration of the possibility of robot judges and her conclusion that: «A minimum requirement for every step on this path is a meaningful explanation of the fact-finding and the process to the humans that are involved in the process, as well as to the public, by the court». It seems questionable, though, whether these accounts go far enough in acknowledging the principles on

which they are based: «A procedure such as discourse implies normative premises that cannot themselves be the product of consensus-building procedure, because they constitute the procedure in the first place» (Mahlmann, 2015, p. 445)[9]. This necessitates reliance on other notions, such integrity, which are inevitably criticised though as blurry and difficult to define. This suggests that it is necessary to consider the distinctiveness of the practice of criminal adjudication and the principles on which it is based.

3. BEYOND PROCEDURALISM: THE RIGHT TO A DEFENCE

Criminal proceedings in the rule of law differ from other types of legal proceedings, not least because of the role of the State and the State's monopoly on the attribution of liability and imposition of punishment. The State exercises its powers of prosecution and punishment on behalf of the inhabitants of the State. This gives rise to a conceptualisation of criminal trials as a process involving collective «blaming», whereby public wrongs deserving of censure are identified and sanctioned. It is important to keep in mind here too that: «Trials are never exclusively about the identification and punishment of wrongdoers; they are always also about the relation between the legal and social order» (Farmer, 2007, p. 47).

It should come as little surprise, that the normative demands placed on criminal proceedings are unique and thus should not be understood as simply «going beyond» those imposed in the context of other types of legal adjudication. This is illustrated too by the regulation of criminal proceedings in the Universal Declaration on Human Rights (UDHR). During the drafting process and in the context of meetings of the temporary working group established by the Drafting Committee in 1947, Professor Cassin suggested that the UDHR include distinct provisions for criminal and civil cases[10]. In the end, it was decided to set out a general fair trial provision, which became Article 10 UDHR and to create a specific article to regulate the guarantees in criminal proceedings, which subsequently became Article 11 UDHR[11].

Decisions on the guilt of an individual must be made within what Jackson (2023, p. 182) refers to as «a shared normative framework of procedural justice». This is reflected in the human rights regulation which requires not just that procedural rights

[9] *«Ein Verfahren wie der Diskurs impliziert nämlich normative Prämissen, die selbst nicht das Produkt des Verfahrens der Konsensbildung sein können, weil sie dies Verfahren allererst konstituieren»*. See also Mahlmann (2023, p. 291).

[10] See for discussion Weissbrodt and Hallendorff (1999, p. 1069).

[11] Article 11 sets out what might be understood to constitute a right to a defence in criminal proceedings: «1. Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial which he has had all the guarantees necessary for his defense. 2. No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed».

be afforded to individuals in criminal trials (expressed in the idea of fairness) but also in the prohibition on the attribution of criminal liability in the absence of law and culpability (in the narrow sense of *Schuld/ normative attribution*) and in the idea that proof of guilt (including but not limited to proof of culpability) must be established in these proceedings. Taken together these principles amount to a *right to a defence* according to which the aim of the criminal trial is to afford the accused the right to be heard and to respond to the prosecution's case within a particular institutional environment able to meet the demands of justice and equality. The idea of the right to be heard lies at the heart of this idea of legal proceedings and in the criminal context means that liability can only be attributed in proceedings in which the person is able to exercise these rights. This explains why only those who are fit to plead can be held accountable. Of central importance to this idea of the right to a defence is acknowledgement of the importance of avoiding wrongful convictions and of the idea therefore that it is better for a guilty person to be acquitted than for an innocent person to be convicted.

Weigend (2023, p. 191) is unconvinced that there can be said to be «any meaningful substantive connection» between the presumption of innocence and the prohibition on punishment without law[12]. This link, though, seems difficult to refute to the extent that the prohibition on the attribution of criminal liability in the absence of law also embodies a prohibition on the attribution of criminal liability in the absence of culpability (in the sense of *Schuld/ normative attribution*); while the presumption of innocence prevents a finding of guilt (including proof of *culpability*) in the absence of proof in accordance with the law. The link between these principles is evident in the case law of the European Court of Human Rights which has held that the attribution of liability in the absence of proof of *culpability* might violate Article 6(2) ECHR and/ or Article 7(1) ECHR[13].

Weigend (2023, p. 192) suggests, too, that it makes little sense to discuss the burden of proof as being borne by the prosecution in criminal cases in Germany as «this is a matter exclusively relevant for the adversarial criminal process» as «no one bears the burden of proof». This, though, seems to be more a matter of semantics than of principle, at least if the asymmetry in the evaluative treatment of wrongful convictions and wrongful is accepted. The prosecution's failure to provide sufficient evidence will result in an acquittals. There is no getting round the fact that this idea is common to all modern European criminal procedural systems, irrespective of whether one wants to characterise these as inquisitorial or accusatorial in nature.

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[12] «I am not convinced that there is a meaningful substantive connection between that presumption and the so-called principle of legality (as expressed by the maxim *nulla poena poene sine lege*)».

[13] Contrast for instance *GIEM SRL and Others v Italy* [GC] App nos 1828/ 06, 34163/ 07, and 19029/ 11, 28 June 2018 (violation of Art 7 ECHR) and *AP, MP and TP and EL, RL and JO- L v Switzerland*, 29 Aug 1997, Reports 1997- V (violation of Article 6(2) ECHR).

4. THE RIGHT TO A DEFENCE AND PROOF OF GUILT

Why should a criminal court «make knowledge its aim and what this has to do with the accused's role in the trial?» (Duff, 2023, p. 161). Duff notes that it is the commitment to knowledge which 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 reasons (p. 160).

Jackson (2023, p. 185) agrees that justified punishment depends on the fact-finder establishing true belief for distinct reasons following a particular process but notes that «it is not altogether clear why the epistemic support required beyond belief must be knowledge». Duff meanwhile suggests that we might say that:

> The 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 (Summers, 2023, p. 265, drawing on Dworkin, 1985, p. 82).
>
> 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 6 (Duff, 2023, p. 161).

The principle that it is better that a guilty person be acquitted than that an innocent person be convicted is an expression of the notion that the State is only entitled to convict a person of a criminal offence «if it is known that he is guilty of that offence» (Tadros and Tierney, 2004, p. 402). The criminal court must make knowledge its aim in order to do justice to the right to a defence. A verdict will only succeed if the verdict was founded on appropriate reasons following a process during which the accused had the opportunity to be heard and to respond to the prosecution's case. Jackson sets out an example of a case in which a defendant is convicted on evidence that is tainted or unreliable and questions why if the defendant was in fact guilty the conviction should be viewed as «wrongful in rule of law terms» (Jackson, 2023, p. 185, discussing an example from Duff *et al.*, 2007, p. 91). The problem here, though, is that the verdict was based on fortuitously true beliefs that did not constitute knowledge and is thus incompatible with the idea of the right to a defence.

Weigend (2023, p. 193) is worried that the «knowledge» standard is «difficult to apply to a complex subject matter such as a person being guilty of a crime». «Can a judge ever know (*i. e.* be completely certain)», he asks, «that defendant D at a certain time and place hit and injured V, and was not justified by self-defence when he did so?». But he seems here to be making too many demands of knowledge. As Tadros and Tierney (2004, p. 402, citing McDowell, 1998) note: «Knowing *p* does not imply that the knower is 100 per cent certain of *p*. I may know that the world is

round without being 100 per cent certain that the world is round»[14]. Adherence to the knowledge requirement does not imply any sort of commitment to infallibility. Someone might be justified in claiming that they know something even if they are in fact wrong… «The standard of knowledge does not entail that there will be no wrongful convictions» (p. 402).

5. CONCLUSIONS AND IMPLICATIONS

Criminal trials might be understood to contain «some inner essence» (Jaconelli, 2003, p. 18) but there can be little doubt that they have taken on different forms at different times. This account of criminal trials as designed to enable the right to a defence is grounded in an understanding of criminal trials in the rule of law which has its roots in the political developments of the nineteenth century. In this sense it is perhaps narrower than Duff *et al.* (2007) vision of criminal trials as a process of calling to answer. It has the advantage, however, of being more closely aligned with the practice of criminal proceedings and punishment. Acceptance of this type of account of criminal proceedings might give rise, as Jackson (2023, p. 186) suggestions, to a number of implications in practice. The issue of reconciling jury verdicts with an obligation to give reasons is of perennial concern and needs to be considered carefully depending on the regulation in each particular jurisdiction. Jackson is also certainly right to draw attention to the implications for the regulation of summary or abridged proceedings, which is a matter of very real concern (p. 186). His suggestion that pretrial judges could be used to prepare judgments based on pretrial evidence, however, seems *prima facie* difficult to reconcile with the right to a defence (p. 187). Gless (2023) meanwhile looks to the future and to a possible role for robots in legal adjudication. She argues convincingly that fact-finding is a human process and states that as long as robots cannot explain their beliefs, they cannot assist criminal proofs (p. 172, 177). This underscores the idea of truth finding in criminal trials as a human exercise, as, in the words of Gless, a process which allows for «meaningful explanation of the fact-finding and the process to the humans that are involved in the process, as well as to the public, by the court» (p. 177).

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[14] Tadros and Tierney citing McDowell for the idea that it is thus preferable to conceptualise knowledge in qualitative rather than quantitative terms.

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