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THE EPISTEMIC AMBITIONS OF THE CRIMINAL TRIAL: TRUTH, PROOF, AND RIGHTS

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ABSTRACT: This paper sets out to examine the epistemic ambitions of the criminal trial. It argues for an understanding of criminal evidence and proof which is inextricably connected to the demands of justified punishment and fair trials in the rule of law. Criminal trials must prioritise the individual rights of the accused, but they also define more generally the manner in which those subject to the law are to be treated in order to engender public acceptance of the verdict. In this sense, it is sceptical of instrumental accounts of criminal adjudication and, in particular, of the feasibility of any sort of separation of outcome and process. It subscribes instead to the notion that (true) belief in the necessity of imposing punishment in the rule of law will only be warranted if it is based on appropriate reasons, understood as reasons which are formed following a distinct type of process.

KEYWORDS: criminal evidence, procedure; human rights, punishment.

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«To relate with some reality the events of that afternoon would be difficult and perhaps unrighteous.»
Jorge Luis Borges, Emma Zunz, p. 164.

«Glauben können sie in der Kirche. Was wir brauchen sind Beweise.»
Jasmin Winterstein, *Tatort Mainz: In seinen Augen***.**

1. INTRODUCTION

Any discussion of the epistemic ambitions of the criminal trial must examine not just the aims of the law of procedure and those of evidence but also the expectations governing the relationship between adjudication and proof. It is usual for the goal of the trial process to be characterized as focused on «truth»: the aim is to establish whether a disputed claim—in the criminal context, the prosecution's assertion that the accused is guilty of the commission of a crime—is true or not[1]. Criminal trials are seen as instrumentally valuable in that they enable the determination of those who can be held liable for and punished for their crimes[2]. The rules of evidence are designed to facilitate this exercise. According to the «rationalist tradition of evidence scholarship», the «rectitude of the decision» lies at the heart of adjudication and «the pursuit of the truth as a means of justice under the law is to be pursued by rational means» (Twining, 2006, p. 199). On what might be described as the received view, the instrumental characterisation of the trial is mirrored by a Lockean or «veritist» conception of epistemic value, understood in terms of a high degree of confidence in the accuracy or inaccuracy of the probative facts[3].

A direct consequence of this conception of evidence and procedure is the expectation that proceedings are designed to maximise the likelihood of accurate outcomes. Factfinders are expected to follow those procedures which are most likely to result in accurate outcomes, because following such procedures makes it more likely that the outcomes will in fact be accurate[4]. Many, if not all, instrumental accounts of the criminal trial also accept the importance of other values or goals, but these are seen as

[1] See *e. g*. Nance (2021, p. 90).

[2] It is important to stress that this is not, of course, the only instrumental account of the criminal trial. Other important accounts include those which characterize the criminal trial as a forum for resolving disputes, see *e. g.* Weigend (2003, p. 157).

[3] See *e. g.* Ashworth and Redmayne (2010, p. 299) referring to the role of the trial as «primarily, to make accurate decisions». On veritism, see Goldmann (2015, p. 131); Goldmann (2002, p. 5): «The cardinal value, or underlying motif, is something like true or accurate belief».

[4] See also Duff *et al.*, (2007, p. 89).

secondary to the principal aim of the trial as understood in terms of allowing the fact finder to establish the truth, framed in terms of the rectitude or accuracy of the verdict[5]. Rules which limit the use of evidence in pursuit of other values are characterised as «side constraints» on the process of proof, as promoting values which are essentially «extrinsic» and which (potentially at least) interfere with the principal (proper) epistemic ambitions of the trial. Even those accounts which clearly argue for an understanding of criminal trials as following multiple aims, such as Roxin and Schünemann's vision of criminal trials as equally committed to the aims of truth finding, procedural fairness and restoring the peace (2017, p. 2), seem to accept the characterisation of fairness as extrinsic to the matter of truth finding. The suggestion is that, in some circumstances, procedural rules may require the prohibition on the use of what might be understood as evidence of probative value, even if this is at the expense of the truth. The symmetry between the epistemic and procedural aims of the trial is disturbed—albeit necessarily, perhaps[6]—in the pursuit of these «other» goals. Whereas rules of evidence support «rationality» and accuracy, «exclusionary type» rules, which guarantee other values like procedural fairness, constitute departures from these values. Much of the discussion in evidence law focuses on the extent to which such rules serve or interfere with the aim of accuracy and, in the context of comparative evidence law, on consideration of the extent to which systems following the common law or civilian law traditions are better placed to meet accuracy's demands.

It is useful at the outset to highlight four aspects of this standard account of evidence and procedure which are particularly important for the consideration of the epistemic ambitions of the criminal trial. First, there is recognition of the fact that the aims of the law of evidence are closely tied to the values or aims of legal adjudication more broadly. Second, evidential principles are seen as common to all forms of legal adjudication; it is not considered necessary to distinguish between different types of proceedings, reflecting a vision of evidential decision making as a matter of logic and «rationality». Third, legal adjudication is understood as capable of being divided into a process involving «accurate outcomes» as distinct from «fair procedure». Fourth, «truth» is characterised in terms of a high degree of confidence in the accuracy (or inaccuracy) of probative facts.

This conceptualisation of legal evidence and procedure has come under pressure, however, from the rights-based regulation of criminal evidence and procedure law developed by the European Court of Human Rights (ECtHR). This vision of legal adjudication calls into question the feasibility of the separation of process and outcome. In addition, the ECtHR has insisted on the establishment of a distinct norma-

[5] Even the most committed instrumentalists accept that other values will also play a role in shaping trials, but reject the suggestion that these are significant enough to have an impact on truth finding aim, see *e. g.* Laudan, (2008); for discussion see Duff et *al.* (2007, p. 63).

[6] Scepticism about prohibiting reliance on evidence in pursuit of other goals precisely is famously expressed in the Benthamite notion that to exclude evidence is to exclude justice (Bentham, 1827, p. 34).

tive framework for criminal adjudication, thereby demonstrating that there is something special about the process of fact finding in criminal cases. This is important. If it is accepted that any theory of evidence will necessarily depend on the underlying theory of adjudication, and there is a long tradition from Bentham to Twining of assuming that this is in fact the case (Twining, 2006, p. 30; Postema, 1977, p. 1393 ff.), then there seems to be space for a distinct theory of criminal evidence and proof.

This paper sets out to examine the epistemic ambitions of the criminal trial at first instance. It argues for an understanding of criminal evidence and proof which is inextricably connected to the demands of justified punishment and fair trials in the rule of law. Criminal trials must prioritise the individual rights of the accused, but they also define more generally the manner in which those subject to the law are to be treated in order to engender public acceptance of the verdict. In this sense, it is sceptical of purely instrumental accounts of criminal adjudication and, in particular, of the feasibility of any sort of separation of outcome and process. It subscribes instead to the notion that (true) belief in the necessity of imposing punishment in the rule of law will only be warranted if it is based on appropriate reasons, understood as reasons which are formed following a distinct type of process.

In making the case for a distinct understanding of proof in criminal cases, it begins by considering the distinctiveness of decision making in legal adjudication. It argues that trials are not merely justified but are also defined by the nature of the participation afforded to the parties to the proceedings. This calls into question the characterisation of procedural rules as extrinsic to the decision-making process. In addition, it gives rise to a number of questions, not least regarding the relevance of the correctness of the verdict and more generally the conceptualisation of a «successful outcome». Consideration of the relationship between proof and process allows for an analysis of the extent to which the reasonableness of the verdict will depend on the nature of the regulation of the proceedings at issue. This discussion provides the basis for an examination of the distinct regulation of criminal proceedings and of the relevance of this for the regulation of proof in criminal trials.

2. TRUTH, PROOF, AND ADJUDICATION IN THE RULE OF LAW

2.1. Truth in Legal Adjudication

Legal adjudication differs from other forms of decision making, such as that achieved by negotiation or by the holding of elections, principally with regard to the procedure followed and the extent and nature of the participation of those involved (Fuller and Williams, 1978, p. 363). Adjudication in the rule of law is essentially *defined* by the distinct institutional framework in which it operates. It implies a certain institutional setting involving proceedings supervised by a judge. Its defining characteristic is the «particular form of participation that it accords to the affected

party», namely an «institutionally protected opportunity to present proofs and arguments for a decision in his favor» (Fuller, 1960, p. 2). An important implication of this is that adjudication must take place within a «framework of accepted or imposed standards of decision before the litigant's participation in the decision can be meaningful» (p. 5). Meaningful participation thus demands acceptance of pre-existing or pre-determined «principles» which regulate how the court will determine the case: «Just as the judge cannot be impartial in a vacuum, so the litigant cannot join issue with his opponent in a vacuum. Communication and persuasion pre-suppose some shared context of principle» (p. 6).

Unsurprisingly, perhaps, this understanding of legal adjudication aligns closely with the vision of fair trials set out in Article 6 ECHR. A trial, by definition, is a public forum supervised by an independent and impartial authority, at which evidence and arguments are heard in pursuance of a verdict[7]. At the same time, the ECtHR has interpreted the notion of fairness in Article 6(1) ECHR principally in terms of the participatory rights of the parties to present their case at a public hearing in front of an independent and impartial judge. The parties are to have an adequate opportunity to present their case—including their evidence—under conditions which do not put them at a substantial disadvantage vis-à-vis their opponent[8]. There is thus some overlap between the definition and the justification of the trial. Indeed, there is an important sense in which a process, which does not meet the core definitional elements of the trial, is to be understood not just as unfair but essentially as not «legal», as failing to meet the defining characteristics of legal adjudication. It might be tempting to skip over this point as self-evident, particularly in the context of European jurisdictions which claim firm commitment to the rule of law. And yet, there are several examples of proceedings in Europe, which are of considerable important in practice, which seem to fail this fundamental test. Swiss plea-bargaining proceedings, for instance, allow for the imposition of punishment (including up to six months' imprisonment) by prosecutors following proceedings which do not guarantee any sort of automatic judicial supervision of the decision and substantially restrict the right to be heard[9].

Trial proceedings are principally governed by the demands of fairness, but this notion operates within the distinct institutional framework implied by the rule of law[10]. Underpinning this conception of legal adjudication is some sort of normative

[7] See also Jaconelli (2003, p. 26-29), who argues that processes that are properly called trials contain some «inner essence» which «transcend particular times, places and cultures», notably commitment to independence and impartiality, publicity and some sort of internal rationality.

[8] *Dombo Beheer v Netherlands*, 27 October 1993, Series A no 274, § 33; For an overview of Article 6(1) ECHR, see Frowein and Peukert (2022); Harris *et al.* (2018).

[9] That such proceedings account for almost 90% of all criminal judgments seems to call into question the lawfulness and the legitimacy of the entire system of punishment, see further *Summers* (2022a, ch. 5).

[10] The Preamble to the ECHR is instructive in this regard. It reaffirms a «profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintai-

consensus on the underlying values. Of central importance in this regard is the link between respect for individuals and fair procedures. The rights-based regulation of process in Article 6 ECHR suggests that procedures will be fair if they lead to fair treatment; the nature of this treatment will be determined in accordance with the relevant legal standards governing the different types of process[11]. This type of «dignitarian» account, which emphasises the intrinsic, non-instrumental value of procedures to upholding an individual's dignity, is susceptible to criticism that it fails to explain why the «absence of a hearing entails an injustice or "moral harm", which is in some sense distinct from that entailed by an accurate substantive decision» (Dworkin, 1986, p. 101-103). Equally, any suggestion that outcome is essentially irrelevant, providing that the procedures followed are appropriate or fair, seems intuitively wrong. One (common) response to this type of criticism is to switch to, or adopt, a broadly instrumental position according to which «accurate decisions themselves constitute an important element of fair treatment, which in turn constitutes an important element of respect for persons»[12]. This approach might be criticised, though, as paying insufficient attention to the intrinsic importance of the fair treatment of individuals in the rule of law and in particular to an individual's legitimate normative expectations to be treated in accordance with distinct legal standards.

Legal proceedings must do justice to individual autonomy, but they must also be capable of engendering public acceptance in both the process and the verdict. The significance of the legal verdict extends beyond the immediate case at issue, in that it also carries the weight of legitimising the system of legal adjudication more broadly. This highlights the importance of ensuring that the verdict is capable of securing general acceptance and suggests some sort of commitment to a commonly understood conception of reason. In reaching a verdict, the factfinder is not just asserting that he or she believes that the claim being asserted is true but is also asserting that everyone who believes otherwise is wrong[13]. The legal verdict—and with it the idea of truth or true belief on which it rests—should thus be seen as distinctive in the way it calls to be justified. In the «post-metaphysical» age, the legitimacy of law rests on notions of rationality and reason[14] which are secured principally through the manner in which

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ned on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend» and refers to the resolve of the States «as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration».

[11] For consideration of the prescriptive regulation of different types of criminal procedures see Summers (2022b).

[12] See *e. g.* Galligan (1996, p. 78).

[13] For consideration of the unconditional meaning of truth claims, see Habermas (1998, 14 ff.) and in particular his discussion of Pierce.

[14] For consideration of the distinction between reasonableness and rationality, see Sibley (1953, p. 554); von Wright (1993, p. 173): «The reasonable, is, of course, also rational—but the "merely rational" is not always reasonable»; see also Alexy (2009, p. 6) discussing reasonableness and practical rationality; and Mahlmann (2009).

legal decisions are reached. Reason in legal adjudication is guaranteed in large part by the manner in which information is gathered and processed rather than through any sort of commitment to the subjective belief of the factfinder.

The process of adjudication takes on central importance, not just in defining the criteria according to which proceedings are to be understood as fair but also in relation to establishing what constitutes a «successful outcome».[15] If it is accepted, for instance, that trials in the rule of law are by definition to be supervised by an impartial judge, then a verdict issued by a non-impartial authority will not have succeeded as a legal verdict (and will also not be fair). This highlights the difficulty (or perhaps even the impossibility) of separating matters of procedure from the verdict itself.

The relationship between process and outcome is illustrated too by the case law of the ECtHR on the obligation to provide reasons for the verdict. The ECtHR has held that the «proper administration of justice» requires that «judgments of courts and tribunals should adequately state the reasons on which they are based»[16]. The giving of reasons is of fundamental importance to treating individuals with dignity and allowing them to determine whether or not an exercise of authority is in fact justified[17]. This requirement to give reasons might be seen as purely procedural in nature, as demanding simply that the reasons be provided, but not implying anything about the reasons themselves. In its early case law, the ECtHR seemed to take this type of approach, noting that it was «not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention»[18]. The focus was very much on the existence of reasons; the right was to a «reasoned» not a «reasonable» judgment. And yet, the purpose of the obligation to provide reasons must be to allow some sort of control of the «reasonableness» of the decision. This inevitably lends the requirement a «substantive» element and emphasises the connection to lawfulness or legality. If the reasons provided are unintelligible, the refusal to acknowledge the impact of this on the fairness of the trial would call into question the sense of the requirement. It would also call into question the ability of the verdict to meet the demands of legitimacy inherent in the notion of legal adjudication.

It is unsurprising, thus, that the ECtHR has since read a «substantive» element into this obligation to give reasons. This is framed in terms of ensuring that the individual «and indeed the public» is able to «understand the verdict» and is described as a «vital safeguard against arbitrariness»[19]. Legal verdicts—regardless of whether they involve the determination of civil rights or obligations or of a criminal charge—must

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[15] See also Duff *et al*. (2007, p. 89): «The rightness of the outcome—of the verdict—is not […] simply a matter of accuracy, but also of the process through which it was reached».

[16] *Moreira Ferreira v Portugal (No 2)* [GC], 19867/12, 11 July 2017, § 84.

[17] See for discussion Allan (1998, p. 500).

[18] *Ruiz Garcia v Spain*, judgment of 31 December 1999, Reports 1999-I, § 28.

[19] *Lhermitte v Belgium* [GC], no 34238/09, ECHR 2016, § 66 and 67.

be free from arbitrariness. The ECtHR has explained this in terms of the rule of law: «One of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle. Even in the context of interpreting and applying domestic law, where the Court leaves the national authorities very wide discretion, it always does so, expressly or implicitly, subject to a prohibition of arbitrariness»[20]. Judicial decisions will be qualified as arbitrary if they are manifestly «unreasonable»[21]. This will be the case, for instance, if they are based on a «manifest factual or legal error committed by the domestic court, resulting in a "denial of justice"»[22].

The aim of legal adjudication might thus be framed in terms of enabling a determination of the truth of a disputed claim. The notion of truth in this context, however, is specific to legal adjudication, not least because the legal verdict carries expectations, which do not apply to other epistemic endeavours. The true belief of the factfinder in the claim asserted can only be lawfully established in a particular institutional context in which the rights of the parties are sufficiently protected. In addition, this process encompasses an important substantive element. The determination of the «unreasonableness» of a verdict necessarily suggests some sort of normative consensus on the notion of reason. This relates closely to the idea of correspondence or «match» between «our statements about the world and the world itself»[23]. True belief in legal proceedings might thus be characterised in terms of ensuring that the factfinder believes in the right way. This is not to dispute the central importance of truth in legal adjudication. It is not so much that the aim of truth is believing in the right way, regardless of whether the «right way» reliably leads to signficant truth[24], but rather that true belief in the rule of law is in some sense defined by this process. Legal truth as embodied in the verdict is a normative concept and should be conceptualised as indivisible from the process of adjudication.

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[20] See *e. g. Al-Dulimi and Montana Management Inc v Switzerland* [GC], no 5809/08, ECHR 2016, § 145; *García Ruiz v Spain* [GC], no 30544/96, ECHR 1999-I, § 28-29; *Storck v Germany*, no 61603/00, ECHR 2005-V, § 98.

[21] An example is *Khamidov v Russia*, no 72118/01, 15 November 2007. In this case, the ECtHR referred to the fact that it was «perplexed» by the findings of the domestic court and could not see how they «could be reconciled with the abundant evidence to the contrary». This led the ECtHR to conclude that the «unreasonableness» of the domestic courts finding was «so striking and palpable», that its decisions were to be deemed «grossly arbitrary».

[22] See *e. g. Moreira Ferreira v Portugal (no 2)* [GC], no 19867/12, ECHR 2017 § 85; *Navalnyy and Ofitserov v Russia*, nos 28671/14 and 46632/13, 23 February 2016, § 119; *Navalnyy v Russia* [GC], nos 29580/12, 36847/12, 11252/13, 12317/13, 43746/14, 15 November 2018, § 83; *Paixão Moreira Sá Fernandes v Portugal*, no 78108/14, § 72.

[23] See Damaška (1997, p. 37), who notes that: «Failing this assumption, a trap door opens from under all Western evidentiary systems».

[24] Nor indeed some sort of rule consequentialist approach which characterises *acquiring truth in the right way* as the aim of belief.

2.2. The Standard and Sufficiency of Proof

This overview of truth in legal adjudication highlights not just the importance of the factfinder believing in the right way but also that, according to the ECtHR, this process entails at the very least a prohibition on manifest unreasonableness. This in turn involves an appeal to some substantive component of reason. Of central importance is determination of when true belief in the claim asserted might be considered to have been established. This focuses attention on the regulation of the standard and sufficiency of proof. Legal proof is undoubtedly an epistemic endeavour in that it is concerned with the establishment of the existence or non-existence of facts «to the satisfaction of a legal tribunal» charged with the determination of the matter in issue[25]. This has led to a significant body of literature dedicated to legal epistemology and to the idea not just of some sort of correspondence between epistemic and legal norms, but also of «legal verdicts as susceptible to evaluation by the very same normative categories used to assess beliefs»[26].

Belief is a psychological state and aims at truth in the sense that to believe *that p* is to believe *that p* is true[27]. There are obvious parallels between the forming of factual beliefs in everyday life and in the legal context[28]. The factfinder in legal proceedings—like an individual engaged in factual deliberations in everyday life—might be said to be concerned with the establishment of true belief. Nevertheless, there might be said to be some important differences[29]. Just as legal evidence clearly differs from «the ordinary concept of evidence» (Ho, 2021) and from notions of evidence discussed in the philosophical literature[30], so too might the belief of the factfinder in legal proceedings be said to differ from that established in other contexts.

An important issue in this regard is the suggestion that it makes little sense to reconstruct the propositional attitude of the factfinder in legal proceedings implied in formulating *that p* is true in terms of belief (or other particularly successful kinds of belief like knowledge)[31]. This rests on the argument that legal truth (or proof) is not concerned with the factfinder's belief in the propositions deemed proven but rather with his or her acceptance of the propositions: «In all those cases in which the judge can or must decide on the facts of the case contrary to what he or she believes, we

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[25] See *e. g.* Twining (2006, p. 193). See also Pardo (2010, p. 37 ff.).

[26] See Ross (2022).

[27] For discussion, see Williams (1973, p. 136).

[28] Here we are only concerned with factual belief and not, *e. g.,* moral or religious beliefs.

[29] See notably Ross (2021, p. 3).

[30] Kelly (2016, § 4): «The accounts of evidence that have been advanced by philosophers stand in at least some *prima facie* tension with much that is said and thought about evidence outside of philosophy»

[31] See Ferrer Beltrán (2006, p. 293), relying on Cohen (1989, p. 368): «To accept *that p* is to have or adopt a policy of deeming, positing, or postulating that p; that is, of going along with that proposition… as a premise in some or all contexts […] Accepting is thus a mental act»; see also Cohen (2000).

still cannot say that the judge is declaring as proven something that he or she knows or believes he or she knows» (Ferrer Beltrán, 2006, p. 303)[32]. This author refers to the following example to illustrate the problem in criminal trials: «There are many cases in which, in fact, judges pronounce sentences contrary to their beliefs, not only as a result of the application of legal premises but also in determining the factual premises of their reasonings. It is not difficult to imagine in this sense that a judge or jury may have the conviction that A has carried out the deed that led to him being accused of crime Y, but that in the light of the evidence brought to trial, the principle of the presumption of innocence must be applied» (p. 297).

There seems to be something in this argument, but equally it might be said to take insufficient account of the normative asymmetry in the formation of belief in legal proceedings. The factfinder in criminal trials, for instance, is not equally interested in establishing belief in the guilt and in the innocence of the accused. The question to be determined is solely whether the factfinder believes that the accused is guilty. This does not necessitate any belief in relation to the individual's innocence. These may be opposite propositions but in the *legal* context they do not (necessarily) negate each other: the truth of one does not necessitate the falsehood of the other[33]. In criminal adjudication, there is no normative expectation that acquittals meet the standards for warranted true belief that the accused is innocent[34]. In this sense, warranted (legal) true belief that the accused is not guilty does not imply anything about the factfinder's (subjective) belief in the innocence of the accused.

In any event, there can be little doubt that the subjective belief of the factfinder is insufficient to meet the requirement of warranted true belief in the context of legal adjudication[35]. This is guaranteed, as we have seen, by the way the evidence is gathered and processed, rather than in some sort of commitment to the subjective belief of the fact finder. The legal factfinder is bound by the normative demands of adjudication in the rule of law.

Factual beliefs can be based on evidence and the content of the belief can be «probabilified or supported by certain evidential propositions» (Williams, 1973, p. 141). In this type of case, the rationality of the belief is related to the relationship between the belief and the evidence[36]. It is a feature of inductive, evidential argument, though, that such determinations will admit degrees: «Probable evidence is essentia-

[32] This reflects the type of situation envisaged by Moore that to say in the first person, «I believe *that p*, but p is not true» is a paradox, because «I believe *that p*' itself carries in general a claim *that p* is in fact true». For discussion, see Williams (1973, p. 137).

[33] In other contexts, of course, this may not be the case. See the entertaining discussion of FT (2022): «I'm Freudian enough to think the assertion "I love you" doesn't automatically make the assertion "I hate you" untrue».

[34] See also Ross (2022).

[35] As is clearly demonstrated by Ferrer Beltrán (2006, p. 293).

[36] *Ibid*: «In this sense of somebody's actual belief being based upon his belief in certain evidential propositions, we have a statement of form "A believes *that p* because he believes *that q* […] Where the

lly distinguished from demonstrative by this, that it admits degrees; and all Variety of them, from the highest moral Certainty, to the very lowest presumption» (Butler, 1736: 361). In this sense, it will often be a case of «more or less and not simply of yes-or-no» (Rescher and Joynt, 1959, p. 562). This emphasises the relationship between probability and belief, the scope for error and the relevance of the legal standard of proof. Of central importance here is the determination of when the legal factfinder might be said to be justified in accepting a belief as true[37]. Much of the weight of the justification of true belief in legal adjudication is carried the standard of proof and the underlying conception of reason. This is sometimes expressed in terms of statistical or mathematical probabilities (such as more than 50% certainty in the civil context) but is probably better understood in more general terms as a standard of belief regarding the truth of the facts at issue (Wright, 1988; Taruffo, 2003, p. 658).

Commitment to a standard of proof underlines the fact that a legal verdict pursues some epistemic goal and that a «legal verdict that fails to acknowledge this goal misses its mark and fails, regardless of the particular beliefs or acts of acceptance that comprise or underline it» (Pardo, 2010, p. 40). The fact that the true belief of the legal factfinder is warranted obviously does not preclude fallibility in this belief[38]. Verdicts will not always be correct, but equally, it is important that verdicts are not wrong too often: «[B]elievers want to acquire true beliefs and avoid false ones» (Littlejohn, 2020, p. 5262). The law should «care about truth or the avoidance of error» (Enoch *et al.*, 2012, p. 212).

If there is consensus that the law of evidence must be concerned with matters of truth, there is less agreement about whether the law should worry about epistemological debates about the justification of true belief. The question, in particular, is whether there is any need for the establishment of any sort of epistemic property beyond some degree of confidence in the accuracy (or inaccuracy) of the claim. Enoch *et al.* have framed the issue in the following terms: why, they ask, should we «ever sacrifice accuracy to ensure that legal verdicts possess some additional epistemic property?» (p. 212)[39].

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connexion between *p* and *q* is a rational connexion that is to say, *q* really is some sort of evidence for *p*, then we can also say "*p* because of *q*"».

[37] Kim (1988) notes that justification «is the only specifically epistemic component in the classic tripartite conception of knowledge. Neither belief nor truth is a specifically epistemic notion: belief is a psychological concept and truth a semantical-metaphysical one» (p. 383). For an argument on the importance of separating the criteria substantiating true belief and its justification, see Goldmann (1979, p. 90).

[38] On fallibility of human decision making, see Keil (2019).

[39] The authors continue: «Let us emphasize that to insist that law should after all care about knowledge is (pretty much) to be willing to pay a price in accuracy. Indeed, excluding statistical evidence amounts to excluding (what is often) good, genuinely probative evidence. And this means that the legal value of knowledge—if it has a legal value, and if that value is what grounds the differential treatment of statistical and individual evidence—sometimes outweighs the value of accuracy; that, in other words, in order to make sure that courts based their ruling on knowledge, we are willing to tole-

Framing the issue in these terms seems to presuppose that a successful outcome is to be measured principally in terms of an accurate determination of the facts. If one accepts the instrumental account of trials as focused on the determination of a claim in a specific case, then this seems to call into question the relevance of additional «epistemic properties», not least because the determination of the success of the outcome is determined in terms of accuracy. If, though, one sees the purpose of adjudication in the rule of law in terms of the intrinsic value of process to upholding a person's dignity by ensuring a certain type of treatment, then the success of the outcome cannot be characterised as sufficiently guaranteed by the factfinder's true belief in the accuracy or inaccuracy of the probative facts. True belief will only be warranted if the factfinder believes in the right way. The verdict must be «rational» in the sense that its conclusion must be «correctly inferred from its premises» [40], but it must also meet the broader (moral and epistemic) demands of reason in legal adjudication. Here there seems to be space for consideration of other epistemic concerns, of the sort of justification or evidence which will be required to ensure that the conclusion of the factfinder constitutes warranted true belief in the rule of law [41]. There is a tendency, connected to the focus on the logic of proof as a matter of «rationality» and «rectitude», to treat evidential and epistemic concerns as common to all types of legal fact finding (Ho, 2008, p. 86). In view of the fact, though, that the regulation of proof is tied to the regulation of the type of proceedings at issue, the reasonableness of the verdict, and the right of an individual to a substantive outcome, will necessarily depend on the nature of the proceedings. It is necessary, thus, to first consider the distinctiveness of criminal adjudication. This will allow for specific consideration of the regulation of criminal evidence and proof.

3. TRUTH, PROOF AND RIGHTS IN CRIMINAL ADJUDICATION

3.1. The Distinctiveness of Criminal Adjudication

Criminal proceedings are subject to a distinct regulatory framework. Before considering why this is the case, it is useful to illustrate this point by briefly considering some differences in the human rights regulation of civil and criminal proceedings [42]. The regulation of criminal proceedings differs expressly from that applicable to civil

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rate more mistakes than we otherwise would have to, and indeed a higher probability of mistake on this or that specific case. This just seems utterly implausible». In their opinion, while probability-weighted expected values are meaningful, complicated epistemic properties are essentially irrelevant. For discussion, see Kaplan (1968); Ross (2022).

[40] For discussion, see Picinali (2013, p. 859; 2021, p. 717).

[41] For an overview of the various positions, see Pardo (2010, p. 40).

[42] For an overview of the regulation of human rights in criminal proceedings, see Meyer (2019); Jackson and Summers (2012); Trechsel (2005).

proceedings in several important respects. First, the right to be heard in Article 6(1) ECHR is expressly bolstered in criminal cases by the various rights set out in Article 6(3) ECHR, namely the right to information on the charge, to sufficient time to prepare, to the assistance of counsel or an interpreter if necessary, and to question witnesses. While the ECtHR has confirmed that these rights may also apply *mutatis mutandis* in civil proceedings[43], it has stressed that the requirements inherent in the concept of «fair hearing» are not the same in cases involving civil proceedings as in those concerning the determination of a criminal charge[44]. In a similar sense, the ECtHR has indicated that the duty to give reasons is more onerous in criminal cases and that the courts are to employ more rigorous scrutiny in assessing arbitrariness[45].

Second, the ECtHR has read into the right to be heard in criminal cases, the right to remain silent and to respect for the privilege against self-incrimination. It has repeatedly underscored the central importance of these guarantees, referring to them as lying at the heart of the notion of fair procedure under Article 6 ECHR[46]. Those accused of criminal offences can be compelled to attend the proceedings, but there can be no expectation of any sort of active participation. The ECtHR has expressly linked the right not to incriminate oneself with the presumption of innocence[47].

Third, according to Article 6(2) ECHR, the accused is to be presumed innocent until proven guilty according to law. Article 6(2) ECHR «requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the

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[43] See *e. g. Albert and Le Compte v Belgium*, 10 February 1982, Series A no 58, § 39.

[44] See *e. g. Albert and Le Compte v Belgium*, 10 February 1982, Series A no 58, § 32.

[45] See *e. g. Berhani v Albania*, no 847/05, 27 May 2010, § 12, where the ECtHR undertook a detailed evaluation of the evidence considered by the national courts before holding that the decision to convict the accused of murder was to be understood as manifestly unreasonable. The ECtHR has considered a large number of cases in this regard on jury trials: see *e. g. Taxquet v Belgium* [GC], no 926/05, ECHR 2010-VI; *Agnelet v France*, no 61198/08, 10 January 2013; *Fraumens v France*, no 30010/10, 10 January 2013; *and Oulahcene v France*, no 44446/10, 10 January 2013; *Lhermitte v Belgium*, [GC], no 34238/09, ECHR 2016, § 68: Sufficient safeguards must exist to enable an accused to understand the guilty verdict against them and to understand the reasons for receiving a heavier sentence on appeal than a co-defendant (see *Voica v France*, no 60995/09, 10 January 2013), the lack of differentiation between certain constituent elements of the alleged offence (see *Legillon v France*, no 53406/10, 10 January 2013), or the reasons for a conviction when the defendant had denied the offence *Bodein v France*, no 40014/10, 13 November 2014). See also *Ruiz Torija v Spain* and *Hiro Balani v Spain*, judgments of 9 December 1994, Series A nos. 303-A and 303-B, § 29, and § 27; *Higgins and Others v France*, judgment of 19 February 1998, Reports 1998-I, § 42; *Khamidov v Russia*, no 72118/01, 15 November 2007, § 107; *Ajdarić v Croatia*, no 20883/09, § 47-52, 13 December 2011; and Anđelković v Serbia, no 1401/08, 9 April 2013, § 26-29.

[46] *John Murray v UK* [GC], 8 February 1996, Reports 1996-I, § 45; *Bykov v Russia* [GC], no 4378/02, 10 March 2009, § 82.

[47] *Saunders v UK* [GC], 17 December 1996, Reports 1996-VI, § 68: «The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence in Article 6(2) ECHR».

preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him»[48]. There is considerable disagreement about the scope of the presumption of innocence. Some suggest that there is consensus only as regards the core element of the guarantee, namely the protection of the *in dubio pro reo* principle[49]. To the extent, though, that *in dubio pro reo* might be said to regulate both the burden and the standard of proof, it is questionable whether there can be said to be agreement even on this point[50]. It is widely acknowledged that the burden of proving the charge lies on the State. There is less agreement about whether the presumption of innocence encompasses a standard of proof requirement. There are indications in the case law that the presumption of innocence will be violated if «it can be established from the judgment that the court convicted the accused despite lingering doubts as to his or her guilt»[51]. Trechsel (2005) notes that the proposal during the drafting process of Article 6(2) ECHR that the words 'beyond reasonable doubt' be added to 'qualify the standard of proof' 'was (rightly) rejected because it was felt that this was already implied by the words "presumed innocent until proved guilty"' (p. 154). Picinali (2021), on the other hand, has argued that the presumption of innocence should be understood as encompassing exclusively a rule on the burden of proof (p. 709). He suggests that while the received view of the presumption of innocence is that it is designed to protect the innocent from the improper use of State power and wrongful conviction, it is better conceptualised as stemming from a prior requirement of rationality—namely the principle of inertia in argumentation (Picinali, 2021 p. 710).

Fourth, leaving aside the proper scope of the presumption of innocence, the values underpinning legal adjudication and in particular the commitment to reason imply some standard of proof. That this takes on particular importance in the criminal law context is illustrated by the relationship between the presumption of innocence and legality[52]. In *Salabiaku*, the ECtHR held that the presumption of innocence as an element of the «right to a fair trial» was «intended to enshrine the fundamental prin-

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[48] *Barberà, Messengué and Jabardo v Spain*, 6 December 1988, Series A no 146, § 77.

[49] Roxin and Schünemann (2017 p. 69) «Der sachliche Gehalt der in Art. 6 II EMRK positivierten, aber bereits aus dem Rechtsstaatsprinzip folgenden Unschuldsvermutung ist—von dem Kernbestand des In dubio-Satzes abgesehen—bis heute umstritten».

[50] See *e. g.* Picinali (2021); Roberts (2002). For discussion of the similarities of the substantive and procedural accounts, see Farmer (2018, 71 f.).

[51] Trechsel (2005, p. 174) referring to *Vilborg Yrsa Sigurðardóttir v Iceland*, no 32451/96, 30 May 2000, § 10: «It cannot be seen from the facts of the case and the statements described in the… judgment… that she is more likely to be innocent than guilty».

[52] See *e. g.* BVerfGE 82, 106, 114: «Die Unschuldsvermutung ist eine besondere Ausprägung des Rechtsstaatsprinzips».

ciple of the rule of law»[53]. The presumption of innocence and the prohibition on punishment without law are linked by the common commitment to «lawfulness» and the idea of law as a constraint on State power[54]. Article 7(1) ECHR prohibits the imposition of punishment in the absence of law, while according to Article 6(2) ECHR a person is to be presumed innocent until «proved guilty by law»[55]. The express prohibition on punishment in the absence of law in Article 7(1) ECHR emphasises the particular importance of legality in the criminal context. State punishment in the rule of law will only be justified if it is imposed on a culpable individual for a clearly and prospectively defined prior criminal act or omission[56]. This explains why «the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases»[57].

Finally, the obligation on the State to ensure that trials are fair, and that punishment is justified, might be said to give rise to an obligation on the State to avoid wrongful convictions. The extent of this obligation is controversial. It is sometimes said that there will be a «miscarriage of justice whenever an innocent man is convicted» (Williams, 1980, p. 104) and there can be little doubt that people have a «profound right not to be convicted of crimes of which they are innocent» (Dworkin, 1985, p. 72 f.). This gives rise to difficult questions, though, as regards what to do in situations of uncertainty as to guilt or innocence, about whether individuals have a right to a particular level of certainty, and the extent to which procedures must be established to maximise certainty in decision making (p. 79 ff.). Dworkin (1985) puts it like this: «If people are not entitled to the most accurate trials possible, hang the cost, then to what level of accuracy are they entitled?» (73 f.). The regulation of trials and punishment in the rule of law suggests an alternative understanding of miscarriages of justice, though, which is less focused on matters of accuracy. A conviction will be wrongful whenever the factfinder's belief in the guilt of the accused is not formed in the correct way. There will be a miscarriage of justice whenever a conviction is imposed in proceedings which do not meet the standards for the establishment of warranted (legal) belief in the guilt of the accused. Seen in this light there is no contradiction between the right not to be wrongfully convicted and the right to fair procedures which run the risk of a conviction[58].

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[53] *Salabiaku v France*, Series A no 141-A, 7 October 1988, § 28.

[54] See also BVerfGE 9, 167, 169: «Es ist im modernen Strafrecht selbstverständlich, daß eine Bestrafung Schuld voraussetzt (BGHSt 2, 194) und daß dem Täter Tat und Schuld nachgewiesen werden müssen».

[55] See also Trechsel (2005). There was some discussion in the early case law as to whether this should be taken to imply that the reliance on unlawfully obtained evidence would automatically violate the presumption of innocence. In *Schenk v Switzerland*, judgment of 12 July 1988, Series A no 140, § 50, the ECtHR signalled that the lawfulness referred to in Art 6(2) ECHR was the lawfulness of the conviction or the process and not the lawfulness of individual pieces of evidence.

[56] See Summers (2022a, ch. 2); Duff *et al.* (2007, p. 89-91); Littlejohn (2020, p. 5275-76).

[57] *Dombo Beheer v Netherlands* [GC], no 14448/88, 27 October 1993, § 32.

[58] See the criticism of Galligan (1996, p. 118).

The distinct regulatory framework reflects recognition of the fact that criminal proceedings raise normative issues which differ from those that arise in other types of proceedings, such as those involving the determination of civil rights and obligations. The State assumes responsibility on behalf of the victim and society more broadly for holding offenders accountable and imposing punishment. The distinctiveness of criminal adjudication stems in part from the power of the State and in particular the State monopoly on the prosecution and punishment of crime. States are afforded considerable space to define conduct as criminal and to impose sanctions. At the same time, the State is subject to obligations which both impose limits on, and in certain cases require, the prosecution and punishment of certain types of behaviour[59]. Criminal trials are distinctive because they allow for the attribution of liability and the imposition of punishment for behaviour labelled as of public concern[60].

3.2. The Standard and Sufficiency of Proof in Criminal Adjudication

Any conception of the success of the verdict framed in terms of accuracy will be too narrow because it fails to account for the importance of process[61]. Nevertheless, there can be little doubt that confidence in the veracity of the verdict is important to the legal notion of warranted true belief[62]. True belief in legal adjudication implies, as we have seen, commitment to substantive as well as procedural guarantees and in particular to a normative standard of proof. There is a plausible empirical claim that the standard of proof is higher in criminal cases than civil cases[63]. This reflects fundamental differences in the regulatory frameworks of the various types of legal proceedings. In cases involving the determination of civil rights and obligations, for instance, the State's obligation is principally to ensure that the right of access to court

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[59] See Lazarus (2012, p. 137): «Any account that seeks to capture adequately the relationship between the criminal law, justice and human rights will have to account for the ambiguity that human rights present: both as limiting coercion by the state and requiring it».

[60] Chiao's (2016) understanding of the criminal law as «supporting the possibility of the rule of law—a collective life under stable public institutions—by providing crucial support to shared attitudes of reciprocity» (p. 138) is helpful in this regard. See also Professor Goldstein's suggestion that «one purpose of the criminal law ought to be to protect as much deviant behavior as society can tolerate» (Griffiths,1970, p. 367).

[61] See *e. g.* Duff *et al.* (2007, p. 90): «The justice of the outcome is not wholly independent of the justice of the procedures».

[62] See also Pardo (2010, p. 43): «On the one hand, there is an obvious sense in which we care about the truth or falsity of legal verdicts. Justice requires truth, and false verdicts are a form of injustice; this, after all, is why we care about proof and evidence in the first place. So it seems, in this sense, absurd to reject truth as the goal or the aim of proof».

[63] In common law systems, for instance, the standard of proof is said to be «proof beyond reasonable doubt» rather than the «balance of probabilities» or «preponderance of the evidence» standard applicable in civil cases. See Taruffo (2003, 659 ff.). In countries following the civilian tradition, the commitment to in *dubio pro reo* is of course specific to criminal proceedings.

is practical and effective and to ensure equality between the private parties to the proceedings. A high standard of proof might well make it (too) difficult for a party to assert their civil rights[64]. This explains the «more likely than not» type standard in such cases.

In the context of criminal adjudication, the obligations on the State are radically different. Punishment will only be justified if it is imposed by a factfinder who is warranted in believing, following a distinct process, that the accused is in fact culpable of a *prior* criminal act or omission. Of particular importance in this regard is the «backwards-looking» nature of the imposition of punishment. State punishment will only be justified in the sense of Article 7(1) ECHR if the sanctions imposed are imposed on a culpable individual *for,* in the sense of *as a response to,* the prior act of wrongdoing. Justified punishment therefore depends on the factfinder establishing true belief for distinct reasons following a particular process[65]. Punishment imposed for the wrong reasons is both wrongful and unlawful. Here the State is under an obligation to take proper account of the imbalance which derives from the conception of crime and punishment as matters reserved to the State. This is reflected in the stringent procedural requirements, the express commitment to legality and the more robust standard of proof.

The higher standard of proof is usually considered in consequentialist terms as a response to recognition that wrongful convictions are more problematic than wrongful acquittals and that it serves to guarantee a higher degree of confidence in the accuracy of the conviction[66]. An alternative justification, however, can be derived from the distinctiveness of criminal proceedings and in particular the State imposition of punishment. 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[67]. A standard of proof which requires a high standard of belief, such as that «beyond a reasonable doubt», has more potential to meet the requirement of standardised or equal application across all cases than the fuzzier «more likely or not» type standards.

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[64] In *Khamidov v Russia*, no 72118/01, 15 November 2007 for instance, the ECtHR referred to the fact that «the domestic courts in fact set an extreme and unattainable standard of proof for the applicant so that his claim could not, in any event, have had even the slightest prospect of success».

[65] See Littlejohn (2020, p. 5255): «Although the justification of an action does not typically depend upon the justification of any particular set out beliefs […] there are some acts that can only be justified if the agent can be guided by the right kids of reasons […] Punishment is an example». This rests on the claim that, «[t]o bring in a "Guilty" verdict is […] not just to make a bare factual or detached claim about the defendant's conduct; it is to condemn the defendant for having committed a wrong» (Duff *et al.*, 2007, p. 90).

[66] For considerations see Picinali (2013).

[67] Dworkin (1985, p. 82) discussing the obligation to ensure that no decision deliberately imposes «on any citizen a much greater risk of moral harm than it imposes on any other».

Conceptualising the stricter standard of belief in these terms highlights the relevance of the legal epistemological discussion on the justification of true belief and the scope for consideration of goals accuracy. Fair treatment in criminal proceedings encompasses both procedural and substantive rights and invokes epistemic goals which are stricter than those which apply to other types of proceedings, such as those involving the determination of civil rights and obligations. Ross (2022) has outlined a vision of (criminal) legal doxasticism according to which: «Guilty verdicts are appropriate only if full belief in guilt would possess a specific rationality-conferring property, given admissible evidence»(p. 5). The question then is what sort of «specific rationality-conferring property» or epistemic support beyond belief is necessary[68]. Duff *et al.* (2007) have argued that only knowledge will do, «for what a verdict of "Guilty" means is not simply that the defendant committed the offence, but that we, the factfinders, know that he committed it; and whilst the former claim is indeed true in this case, the latter is not»; «proof beyond reasonable doubt is thus part of the very purpose of the trial, rather than (as on the instrumentalist view) a means to the end of truth: conviction is appropriate only if the factfinder knows that the defendant is guilty» (p. 89). Littlejohn (2020) takes a similar position, arguing that there is good reason to call into question the depiction of the decision problem as one about decision under risk, not least because there is no uncertainty about which outcome is objectively best (p. 5275)[69]. He argues that the epistemic value in criminal trials ought to be understood not simply in terms of the probability of guilt or innocence but rather in terms of knowledge and failed attempts at knowing (p. 5275 f.). This suggests that «justification of (full) beliefs concerning a defendant's guilt require more than grounds that would warrant a high degree of confidence in the defendant's guilt» (p. 5275 f.). The State will only be justified in convicting the accused and imposing punishment if it knows that the defendant is guilty.

The rule of law account of trials and punishment supports these views. The requirement that criminal evidence be gathered and evaluated in a distinct process, designed to ensure fair treatment by guaranteeing individual rights, means that the success of the verdict cannot be framed simply in terms of accuracy of outcome. The attribution of liability and imposition of punishment inherent in the criminal verdict will only be fair if imposed for the right reasons. This notion of process implies commitment not just to procedural but also to certain substantive guarantees, including a commitment to a robust standard of proof. The State authorities are only entitled to hold an individual liable and impose punishment if they know that the accused committed the offence.

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[68] Ross (2002 p. 21) is skeptical about reliance on complicated epistemic concepts such as sensitivity, normalcy and safety and seems to support a «folk notion of belief».

[69] According to his «gnostic decision-matrix», which does not simply distinguish between guilt and innocence but accounts for known guilt, unknown guilt, and innocence, «the norm that tells us to maximize expected value tells us that we shouldn't punish».

4. CONCLUSIONS: THE EPISTEMIC AMBITIONS OF THE CRIMINAL TRIAL

Any account of criminal evidence and proof must be situated with a broader theory of criminal adjudication. Criticism of the narrow instrumental focus of standard accounts of criminal adjudication seems well placed (Duff *et al*., 2007, 62 ff.). The problem, though, might be seen to be less the focus on fairness[70] and more the tendency to rely on an overly proceduralist conception of the process of prosecution and punishment. Any (solely) proceduralist theory of criminal adjudication is likely to be too narrow to capture the distinctiveness of criminal proceedings. The rule of law account of criminal adjudication must, however, be understood as encompassing substantive as well as procedural requirements. This calls into question the necessity or desirability of appealing to other concepts such as integrity to justify a coherent theory of criminal evidence and procedure[71].

The aim of criminal adjudication in the rule of law should be understood in terms of enabling the establishment of a distinct kind of truth, which is to be determined in line with the substantive and procedural requirements governing justified punishment and fair process. True belief in the rule of law cannot be separated from the process in which it is established, not least because its justification rests in large part in the way evidence is gathered and processed. The fairness of the process is of intrinsic, non-instrumental value and cannot properly be characterised as a side constraint or as serving only to ensure accurate application of the rules but must instead be seen as integral to criminal adjudication[72]. This, though, is not to deny the relevance of the veracity of the verdict. Legality implies a commitment to reason which is guaranteed in large part by the standard of proof requirement. This takes on particular importance in the context of punishment. The State is only entitled to impose punishment when it can demonstrate to an appropriate standard of proof that an individual is to be held culpable for the commission of a prior criminal act or omission. The stringent nature of the standard reflects both the distinctiveness of the concept of State punishment and the obligation on the State to ensure that an individual is not exposed to a greater risk of being wrongfully convicted or punished than that imposed on other individuals. This all speaks for a vision of criminal adjudication as committed to the more ambitious epistemic goal of knowledge rather than simply a high degree of confidence in the accuracy (or inaccuracy) of the probative facts. Warranted true belief in the necessity of imposing punishment will only be justified if guided by appropriate reasons following a distinct process.

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[70] Duff *et al*. (2007, p. 108): «Perhaps it is a mistake to focus so much on the idea of fairness, as if this was the only, or the only non-truth related, value relevant to the trial and its procedures, so that the question is always whether a given procedure or provision is fair».

[71] For criticism of the resort to integrity, see Holroyd and Picinali (2021).

[72] See Allan (1998).

It is important to stress the relevance of this understanding of truth and proof in criminal adjudication in practice[73]. The characterisation of the epistemic ambitions of the trial in terms of a high degree of confidence in the accuracy or in accuracy of the prosecution's claim means that in the event that this outcome is subsequently called into question, the verdict need not be seen as having failed in reaching its epistemic ambitions. This can have significant legal and procedural consequences.

The issue is well illustrated by the US Supreme Court judgment in *Shinn v Ramirez*[74]. The case involved two men, David Ramirez and Barry Jones, both convicted of murder and sentenced to death. Ramirez argued that poor legal representation had meant that evidence about his intellectual disability and childhood abuse had not been presented to the court, while Jones argued that ineffective assistance of counsel had meant that evidence of his innocence had not been put to the court. It is notable that four federal appeal court judges had held, on account of the new evidence of innocence, that Jones had been wrongfully convicted[75]. The USSC, however, was unmoved. It overturned its earlier position[76], and held that federal courts could not consider evidence of ineffective counsel if that evidence had not been presented to a state court, even if the failure to do so was on account of the ineffectiveness of the legal assistance. The majority referred to the task of deciding «within the limits of human fallibility, the question of guilt or innocence of its citizens» as principally falling to the states and characterised the potential for subsequent intervention by the federal courts as «an affront to the State and its citizens who returned a verdict of guilt after considering the evidence before them. Federal courts, years later, lack the competence and authority to relitigate a State's criminal case»[77].

This case demonstrates the very real practical importance of the different conceptions of the aims and character of legal truth and proof. If the aim of the verdict is to ensure a sufficient degree of confidence in the accuracy (or inaccuracy) of the probative facts, then such verdicts might be regarded as having succeeded, even if they are subsequently called into question. If though, the aim of the verdict is true belief guided by appropriate reasons in the context of a fair process such as to amount to knowledge, then the verdicts clearly failed. The reasons for the imposition on the punishment were flawed in that the factfinder's belief patently did not amount to knowledge that the accused committed the crime. In such circumstances, the verdict is to be regarded as *void ab initio*.

The ECtHR has had to grapple with similar issues in the context of outcome and process. In an important case on the right to confrontation, for instance, it tempered

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[73] See too Littlejohn (2020, 5275): «Readers will undoubtedly want to know why we should think the law ought to care about the difference between punishing someone known to be guilty and punishing someone when there is a high probability of guilt».

[74] *Shinn v Ramirez*, 596 US ___ (2022).

[75] November 29, 2019, the U.S. Court of Appeals for the Ninth Circuit

[76] *Martinez v Ryan*, 566 US 1 (2012),

[77] *Shinn v Ramirez*, 596 US ___ (2022) § 22.

the right to confront witness evidence by introducing an incoherent balancing standard in response to criticism from the UK Supreme Court (UKSC)[78]. The UKSC had determined, after conducting an extensive review of the Strasbourg case law, that the aim of the right to confrontation was essentially to ensure the reliability of the evidence[79]. This was of central importance to its decision to reject the more stringent approach of the Strasbourg court on the regulation of untested witness evidence[80]. The subsequent judgment of the Grand Chamber essentially accepted the interpretation of the UKSC and should be understood as a capitulation to simple instrumentalism[81]. Similar issues of (in)coherence and of a failure to clearly outline the fundamental values underpinning Article 6(1) ECHR have emerged in the context of the ECtHR's «fairness as a whole» doctrine, which has led to frankly inexplicable restrictions on some of the central rights of the accused[82]. Such cases highlight uncertainty in the case law of the ECtHR as to the fundamental principles and values underpinning the rights of the accused and emphasise the importance of engaging with and indeed explaining the intrinsic value of process inherent in Article 6 ECHR and Article 7(1) ECHR.

Finally, it seems important to note that a conception of the legal truth which accentuates the connection between process and outcome seems to provide more space for acknowledgment of the limitations and inherent fallibility of adjudicative factfinding. Facts in the courtroom are in the words of Jerome Frank (1949, p. 22) «twice refracted». The ways in which those involved in the proceedings interpret events or situations will often depend on a number of factors including «prior experience, on the ways in which people have organised their own sense-making and observation, on the patterns that have emerged in the past for them as meaningful in living daily life […] Stories may diverge, then, not because one is true and another false, but rather because they are both self-believed descriptions coming from different points of view informed by different background assumptions about how to make sense of events» (Lane Schepple, 1989, p. 2082). In addition, many aspects of factfinding, such as evaluations of culpability, are highly evaluative in nature, «so that it is not really accurate to say that only truth is at stake» (Summers, 1999 p. 508). Within this context, the regulation of the way evidence is gathered and processed takes on central importance in ensuring the success of legal verdicts generally and of criminal verdicts in particular.

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[78] *Al Khawaja and Tahery v UK* [GC], nos 26766/05 and 22228/06, 15 December 2011.

[79] See *e. g. R v Horncastle and Others* [2009] UKSC 14.

[80] Al-Khawaja and Tahery v UK, nos 26766/05 and 22228/06, 20 January 2009.

[81] For discussion Jackson and Summers (2013).

[82] See *e. g. Ibrahim and Others v UK* [GC], nos 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2006.

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