PART V

Individual Rights in Criminal Procedure

15

The Procedural Rights (and Responsibilities) of the Guilty

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1. Introduction

Article 6 of the European Convention on Human Rights declares the 'Right to a fair trial', and defines various specific rights that give more determinate content to the idea of a fair trial; Article 6(3) specifies the 'minimum rights' that accused persons must enjoy:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.[1]

These rights are to be enjoyed by all defendants, whether innocent or guilty, but my concern here is with the grounds on which the guilty should enjoy them, and with the kind of wrong suffered by a guilty person who is denied these rights.

I begin (Section 2) by criticising a familiar instrumental view of criminal trials, as a process that aims simply to establish the truth about whether this person committed this offence. On this view, the denial of these rights wrongs innocent

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[1] We could equally begin with the 'due process' rights derived from the Fourteenth Amendment to the US Constitution.

defendants regardless of whether they are convicted, but does not wrong guilty defendants. If we abandon a purely instrumentalist account, in favour of one that either sets non-instrumental side-constraints on the trial, or adds an independent aim to do with, for instance, the respect that is due to all defendants, we can see how any defendant, innocent or guilty, is wronged if denied these procedural rights. But a guilty defendant who is denied such rights is still not wronged by being convicted: the court still reaches a just, correct verdict, even if it does so by improper means, or by means that frustrate another of the trial's aims. I then (Section 3) offer an alternative conception of criminal trials, as a process that calls an accused person to answer a charge of wrongdoing. On this view, a guilty person who is convicted by a trial that denies his procedural rights is wronged by the conviction itself; we cannot now say that the court reached a just verdict. On this account, procedural rights such as those enumerated in the ECHR enable defendants to play the active role in their trial that they are called on to play. They thus also, I will argue (Section 4), enable defendants to discharge their civic responsibilities: for in a just system of law in a decent society, those accused of crimes not only have a right to take part in their trial. They have a civic responsibility to do so – to answer to their fellows for their alleged wrongdoing. Fair trial rights thus belong to all defendants, innocent or guilty, on just the same basis; if they are denied, both the trial and its verdict are unjust.

Before proceeding, I should note three caveats. First, though my account of criminal trials is set in 'adversarial' terms, I hope that it can also apply, with minor modifications, to 'inquisitorial' systems (and the ECHR 'minimum rights' apply to both adversarial and inquisitorial systems).

Second, this is a normative account of what criminal trials ought to be – not a description of trials as they operate in our existing systems. If it is not to be a philosopher's mere fantasy, it must be related to existing practices: it must be a persuasive 'rational reconstruction' of those practices, in terms of values that can be discerned in them (see MacCormick 1990). But the fact that it is not accurate as a description of those practices as they now operate does not undermine it. It rather shows how defective our existing practices are in the light of the values they should serve.

Third, it is an account of what criminal trials ought to be in a reasonably just system of law in a reasonably just society; a different account is needed of the rights and responsibilities of defendants in unjust societies with unjust laws. This might seem to make the account even less relevant to our present practices. But it is important to develop such idealising accounts of what criminal law and trials should be in the kind of society that we should aspire to build – both as a distant goal towards which we can aspire, and as a model against which we can criticise our current institutions and practices.[2]

[2] The account is idealising, but not wholly idealised. It envisages a society much better than our own, but not a utopia of perfect beings who would have no need of criminal law.

2. Instrumentalism and the Procedural Rights of the Guilty

Some of those who appear in criminal courts as defendants are factually innocent: they did not commit the crime(s) with which they are charged. In a decently efficient system there will be relatively few such defendants because only those against whom there is strong evidence will be prosecuted; but there will be some. Some of these innocent defendants will be convicted: there will be few in a system that recognises the importance of avoiding the unjust conviction of innocent persons; but in any human, therefore fallible, system there will be some. Innocents who are convicted are wronged, even if the trial was impeccably fair and respected all their procedural rights, and no one is to blame for their conviction: the court, and the polity in whose name it acts, wrongs them, albeit unintentionally and non-culpably. If their conviction was due to violations of their procedural rights, for instance if they were not given adequate time to prepare a defence, they are doubly wronged, by their conviction and by this denial of rights. They are also wronged if they are denied their procedural rights, even if they are acquitted: they do not suffer the injustice of being convicted, but they still suffer that procedural injustice.

What precisely is that injustice, if it is inflicted despite their acquittal? A tempting answer is that they are wronged because the procedural violations exposed them to an unjustified risk of being mistakenly convicted: I wrong you if I expose you to an unjustified risk of harm, even if that harm does not ensue (Oberdiek 2017). A viable criminal process cannot be guaranteed *never* to convict an innocent person: the only way to ensure that would be to convict no one. But if we take seriously the right not to be convicted if innocent, and recognise that it is much more important to avoid convicting the innocent than it is to convict the guilty, we can so design our criminal process that we minimise, as far as is reasonably possible, the risk that an innocent will be convicted. The presumption of innocence, which places the burden of proof on the prosecution, and the weight of that burden (to prove guilt 'beyond reasonable doubt'), serve that aim; so do the rights specified in Article 6(3), which enhance an innocent accused's ability to rebut the charges that she faces.[3]

This account of the wrong reflects an instrumental view of the criminal trial. Its function is to identify those who are eligible for punishment because they have committed a crime; it must, accordingly, aim to establish as far as is practicable whether this person committed this crime, although its procedures should weight the scales in favour of the accused. Or, we can say, given the importance of protecting the innocent against conviction, it should aim to establish whether it can be *known* ('beyond reasonable doubt'), that this person committed this crime.

[3] For different versions of this kind of view, see Dworkin 1985: ch 3; Alexander 1998; Wellman 2017: ch 5.

This implies that a trial that acquits a guilty person has not failed to achieve its aim, if the acquittal results from the lack of proof of guilt: it is regrettable that a guilty person escapes justice, but the trial succeeds in its aim of convicting those, and only those, whose guilt is proved and thus known. A 'Not guilty' verdict does not declare the defendant innocent: it declares that she has not been proved guilty, and that the presumption of innocence has therefore not been defeated.

So we have an explanation of why the innocent should enjoy the 'fair trial' rights, and why they are wronged if they are denied those rights even if they are ultimately acquitted. But what of defendants who are in fact guilty? They are not wronged if they are convicted after a fair trial: for being guilty, they have no right not to be convicted. Suppose, however, that one is convicted after a trial at which he was denied his fair trial rights: perhaps he was denied the assistance of counsel or was not given time to prepare a defence. Is he wronged? It seems not. For on the instrumentalist view, the wrong consists in exposing the accused to an unjustified risk of being mistakenly convicted: but if the accused is guilty, his conviction cannot be mistaken. No matter what procedures are or are not followed at his trial, he can face no risk of being mistakenly convicted, and the denial of his procedural rights does not expose him to such a risk. Those who deny him his procedural rights, or the court that allows such a denial, do wrong, because they fail to follow procedural rules that are designed to protect the innocent and thus, *for all they know*, expose an innocent to an unjustified risk of conviction.[4] His conviction should also be overturned on appeal as 'unsafe' (unless perhaps the appeal court can be sure that he would have been convicted even had all his procedural rights been respected), because the court should uphold the system of rules that protect the innocent against mistaken conviction. But *he* is not wronged. Rather, if his conviction is overturned on appeal, he is the lucky beneficiary of a process that is designed to protect not him, but the innocent; his legal right to have his conviction overturned does not reflect a genuine moral or political right – it is parasitic on the genuine rights of the innocent.[5]

Some are undisturbed by this implication of an instrumentalist account (e.g. Wellman 2017: 96–98): the guilty have no right not to be convicted, since conviction would be an accurate verdict; so they have no right to procedures that protect them against conviction or help them to avoid it.[6] Others, however, are disturbed by this, and think that even the guilty are wronged if denied their legal procedural rights (e.g. Dworkin 1985: 103): but wherein lies the wrong? One suggestion is that fairness is not simply a matter of taking adequate steps

[4] More precisely, for all they are formally allowed to know they are exposing an innocent to this risk: they must formally presume the accused to be innocent until his guilt is proved in court, whatever they might informally believe or even know about his guilt.

[5] Compare Amar 1996: 1133: 'The Constitution seeks to protect the innocent. The guilty … receive procedural protection only as an incidental and unavoidable by-product of protecting the innocent.'

[6] See Nozick 1974: 107: 'An unreliable punisher violates no right of the guilty person; but still he may not punish him.'

to guard against inaccurate verdicts – that we owe more than this to defendants, whether innocent or guilty. To say, for instance, that the trial 'seeks to determine whether or not a person has committed a particular criminal offence and to do so fairly' (Campbell, Ashworth and Redmayne 2019: 24) implies that there is more to fairness than attempts to ensure accuracy. That 'more' might then be expressed in terms of dignity: we owe it to defendants to treat them with the respect, the dignity, that we owe to all human beings. One implication of this is that a court should not determine the defendant's fate without giving her the chance to be heard ('*audi alteram partem*'); the Article 6(3) rights serve to enable defendants to exercise that right to be heard (see e.g. Tribe 2000: 666; Allan 2001: 77–87; Crummey 2020). We need not engage with the details of this kind of view, or with the precise meanings of such notions as 'dignity' and 'respect', here; we need only notice two ways in which such a conception of fairness could be incorporated into a primarily instrumental conception of the criminal trial as aimed at determining truth, and their implications for the rights of the guilty.

We could say, first, that although the justifying aim of the trial is to reach an accurate verdict (an aim that is achieved by convicting the guilty, even if their procedural rights are violated), our pursuit of that aim is subject to non-instrumental side-constraints, which rule out certain means even if they are effective in achieving the aim.[7] A plausible side-constraint is that the trial procedures must not violate the defendant's dignity, or deny her a fair chance to be heard in a process which can have such drastic effects on her life; but procedures that violate the rights enumerated in ECHR Article 6(3) do precisely that, and are therefore ruled out whether or not they contribute to the aim of accurate fact-finding.[8] Or we could instead argue that such respect for defendants' rights is 'not merely a side-constraint on the pursuit of accuracy', but 'a concomitant aim of criminal process' alongside the goal of accuracy (Campbell, Ashworth and Redmayne 2019: 46). One reason for making this a 'concomitant aim' rather than a side-constraint might be that this will give it more obvious importance ('not *merely* a side-constraint'). It is not clear that this is necessary, since side-constraints can be important; indeed, they can set strict constraints on our pursuit of our consequential ends. Another, better reason might be that this makes clear that the law and the court must not just allow, but enable and assist, defendants to be heard. Side-constraints, as their name suggests, are typically negative in content: they preclude certain kinds of means, such as measures that positively silence the accused; but it is not clear that they would require more active measures to assist

[7] Compare a familiar account of punishment (Hart 1968: ch 1): its justifying aim is the effective prevention or deterrence of crime; but a non-instrumental side-constraint of justice is that we must not pursue that aim by punishing known innocents, even if their punishment would enhance the law's deterrent or preventive efficacy.

[8] It is worth noting that this kind of account of the right to be heard applies to a wide range of procedures that have significant impacts on people's lives – the right is not peculiar to, it has no particular significance in, the criminal trial. I'll argue in what follows that the right to be heard in one's criminal trial does have a special significance, connected to the aim of a criminal trial.

her. By contrast, if we make such respect for the right to be heard a positive aim, it will be more obvious that it should not merely forbid interference with, or the placing of barriers in the way of, being heard, but also require the kinds of positive assistance that Art. 6(3) specifies.

However, whether the right to be heard generates ('merely') a side-constraint on the trial, or a positive 'concomitant aim', this kind of account still separates the aim of determining whether the defendant committed the crime charged (accuracy) from the demand that his right to be heard be respected: a trial that denies a defendant his Article 6 rights might still (perhaps by luck) reach an accurate verdict, and thus successfully achieve, even if not *the* aim of the trial, at least one of its essential aims; which implies that whilst the defendant can properly complain of procedural injustice, and say that he has been wronged by that injustice, he cannot complain that the verdict is unjust, or that it wrongs him. For the verdict still expresses an accurate judgment on his guilt, which is at least a crucial part of what it is meant to do: he *is* guilty and cannot be wronged by an accurate judgment that he is – even if he is wronged by the procedure that led to that judgment.

I have no knock-down argument against this kind of view, which has obvious attractions. It recognises, unlike a purely instrumentalist account, that both innocent and guilty defendants are wronged if they are denied their fair trial rights: but it also insists, as does an instrumentalist, that a trial that convicts an actually guilty person gets *something* right, even if its procedures are badly flawed. Surely we can say, if the defendant's guilt is later independently established, 'But at least he was guilty, so the right verdict was reached'; surely we can recognise that, although he suffers an injustice, it is a far less serious injustice than that suffered by an innocent who is convicted at a trial that denies her procedural rights. However, I think that this kind of view still fails to do justice to the defendant's status as a participant in the trial, and to the character of the trial as a process that should seek to engage with, rather than just pass judgment on, the defendant. Were I convicted after a trial at which I was denied a fair hearing, I would still want to protest the verdict even if I knew myself to be guilty: I would still want to deny that the verdict was one that I ought to accept, since – I would claim – it would not have been justified, in particular justified to me, by the process that led to it. The kind of qualified instrumentalist view sketched above still separates the verdict from the trial process that leads to it, as an outcome whose truth and justice can be independently judged; but it is that separation that I would deny.

To explain this objection, I offer a different view of criminal trials that rejects this separation of verdict from procedure: the conviction of a defendant who is denied his procedural rights is intrinsically unwarranted, regardless of whether he is guilty. We cannot, on this view, say that the trial achieved the, or a, right end, albeit by improper means: for the 'means' are not separable from the 'end'. I will develop this account in two stages. First (in Section 3), I will explain why the criminal trial, as a process of determining and ascribing responsibility, must

enable the accused to answer the charge that he faces. Second (in Section 4) I will explain why in a decent society, defendants have a civic duty to answer the charges that they face, so that the kinds of right specified in ECHR Article 6(3) are rights that enable defendants to discharge that duty: the right to be heard at one's trial brings with it a correlative duty to speak – to answer for oneself to one's fellow citizens.

3. The Criminal Trial as a Calling to Account[9]

We should see the criminal trial, I suggest, not simply as an inquiry about an accused person that aims to establish whether she committed an offence, but as a process in which she is to be an active participant: a process that calls her to answer to a charge of criminal wrongdoing, and to answer for that wrongdoing if it is proved against her. In an adversarial trial, the accused is first called to make a formal answer to the charge by pleading 'Guilty' or 'Not guilty'; though she is not forced to enter a plea, or punished for refusing to do so, it is expected of her. It is then, of course, for the prosecution to prove that she committed the offence, not for her to prove that she did not – though if the prosecution adduces strong evidence that she committed it, she might have to rebut that evidence if she is to avoid conviction; but if it is proved (or she admits) that she committed the offence, she is called to answer for that offence (she is held responsible for it). She can still avoid conviction, by offering a defence – an answer that exculpates her by showing that her commission of the offence was justified or excusable. But it is now up to her to answer, either by admitting her guilt or by offering a defence; and if she fails to offer an exculpatory answer that suffices at least to create a reasonable doubt about her guilt, she will be convicted – held formally and culpably liable for the offence.

(I do not suggest that this is the only plausible non-instrumentalist conception of the trial, or the only conception that provides a firmer grounding for fair trial rights as rights that belong on the same basis to both innocent and guilty defendants, and that shows the guilty to be wronged by their conviction if they were denied those rights. For one obvious instance, some theorists portray the trial as a process of holding to account, but argue that it is the state, rather than the defendant, that is called to account:[10] on such a view, all defendants have the same claim to fair trial rights, since such rights help them to call the state to account. Now criminal trials should indeed hold the state to account for its attempt to

[9] See Duff et al 2007; Duff 2018a: ch 5. It is important to bear in mind the points noted at the end of Section 1 about the normative, idealising character of this account.

[10] See e.g. Ho 2010, 2016; Owusu-Bempah 2018. Owusu-Bempah argues that defendants should therefore not be obligated to play any active role in the trial process; as will become clear in Section 4, although defendants in a just system of law have, in my view, a civic duty to take part in their trial, this should not be made a legal duty.

secure the conviction and punishment of the defendant – for this use of the coercive power of the criminal law; but this is an implication of, rather than an alternative to, the account I sketch here. That is, the manifest form of the trial is a process in which the defendant is called to account – formally called to answer to the charge. But calling to account, which is a form of holding responsible, must be reciprocal: if we call you to account, to answer, to us, we must be ready to answer to you (Duff 2018b): that is why a trial that calls a defendant to account must be a process in which the state is also held to account.)

This conception of the criminal trial is grounded in a conception of the role of the criminal law in a democratic republic of free and equal citizens. The law of such a polity is a 'common' law: it belongs to the citizens, who make it and subject themselves to it.[11] The substantive criminal law defines a set of 'public' wrongs: these are wrongs that violate the polity's self-defining values; they therefore concern the whole polity and require a formal, public response. The criminal trial, and the punishments to which it leads, constitute that response. That response should take the form of a calling to account (to answer) because citizens must treat each other, and the law must treat them, as responsible agents – members of the polity who can, and should, answer for their own conduct. The response is required, because a polity that takes its self-defining values seriously will take violations of those values seriously: it will care about wrongs that flout those values, as 'public' wrongs, which require a response. The response must do justice to the victims of such wrongs, recognising that they have been not merely harmed, but wronged; it must also do justice to the perpetrators of such wrongs, recognising their status as responsible members of the political community. We do such justice by calling the perpetrators to public account. They must answer for what they did, not just to their victims, but to their fellow citizens collectively, for violating the values that structure their civic life as a political community. If offenders were, or were properly seen as, enemies or outsiders,[12] we would not owe it to them to respond to their wrongdoing by calling them to account: we would need to find ways of dealing with their crimes and preventing their repetition – ways that were not cruel or inhumane; but we would not need to address them as responsible agents. However, on a more inclusively communitarian view of political community, we should recognise and treat them as responsible fellow members of the polity;[13] one implication of this is that we should hold them responsible, call them to answer, for their wrongdoing. The point here is not just that *if* we are to respond to their crimes, or subject them to coercive treatment because of those crimes, we should do so by a process that calls them to answer and gives them a chance to answer. It is the stronger point that we *should* respond to their crimes in

[11] A 'common' law not as distinct from statute law (much of it will be in statutory form), but as opposed to law that is imposed on subjects by a sovereign: see Postema 1986: chs 1–2; Cotterrell 1995: ch 11.

[12] Compare Jakobs' notorious conception of *Feindstrafrecht*, on which see Ohana 2014.

[13] For such a view see Duff 2018a: chs 3, 5 (and ch 3.3 on those who are guests rather than members).

this way: we owe this to them as well as to their victims and to the polity as a whole. In thus calling them to account we treat them not merely as subjects to whom the law is applied, but as agents – agents, indeed, of the law itself.

This is not to assert a 'legality principle' according to which *every* crime *must* be prosecuted if there is evidence sufficient to prove the offender's guilt (see e.g. Perrodet 2002). Just as, whilst there is good reason to criminalise any public wrong, there are also often better reasons to respond in other ways to a public wrong (see Duff 2018a: ch. 7), so there is always good reason to prosecute any provable commission of a public wrong, but there might sometimes be better reasons to deal with the case in a different way: hence the importance of the 'public interest' test by which English prosecutors must decide whether to prosecute.[14]

Two related points should be noted here. One concerns the very idea of responsible agency: to be a responsible agent is to be an agent who can answer for himself and his conduct; to deny me the opportunity to do so is to deny my standing as a responsible agent (Gardner 2007b). A criminal trial seeks to determine the accused's responsibility for an alleged crime: the indictment accuses him of being culpably responsible for the crime; the prosecution offers evidence that he is thus responsible; a conviction holds him culpably responsible. To hold a person responsible is to call him to answer: but if we are to call someone to answer, we must allow and enable him to answer (and be ready to listen to his answer). The other point concerns citizenship in a democratic polity. Democratic citizens will be active members of the polity, agents of its institutions, including the institutions of the criminal law; an important way to exercise that agency is to answer for one's alleged wrongdoing in a criminal court. These two points are connected because if the polity is in some sense a liberal polity, the recognition of, the respect for, and the exercise of, its members' responsible agency will be central to the values by which it defines itself.

In calling an accused person to answer, we assign her a specific role in the enterprise of the criminal law: she is called to contribute to the enterprise of holding wrongdoers to public account, by answering for her own alleged wrongdoing. But we must then enable her to play the role that she is called on to play. We – our officials and courts – must treat her with the respect due to a responsible agent who is to answer for her conduct; and we must give her a fair chance, and the resources, to answer. Hence the importance of the right to 'effective participation', which the European Court of Human Rights (2022) emphasises in applying Article 6.[15] We can distinguish three dimensions to that right (only two of which are dealt with by Article 6(3)).

First, the accused must have the *capacity* to participate in his trial: he must be 'fit to be tried'. If, for instance, he has succumbed since the alleged offence

[14] See Crown Prosecution Service 2018: s 4: even when there is 'sufficient evidence to provide a realistic prospect of conviction', the prosecutor must 'consider whether a prosecution is required in the public interest'.

[15] See European Court of Human Rights 2022: paras 153–8, and the cases cited there.

to a mental disorder so severe that he cannot understand the trial or take part in it, he cannot now be tried – even if he was sane and responsible at the time of the offence, and even if his guilt could be conclusively proved without his participation (see Sprack and Engelhardt-Sprack 2019: para 17.36).[16] For if an accused lacks the capacities required for answering a criminal charge in a criminal court, we cannot properly call him to answer; his trial would be a travesty.[17]

Second, the accused must be given a fair *opportunity* to participate, to answer to the charge: she must be informed of the charge, in a language she can understand,[18] allowed time to prepare a defence, allowed to put her defence to the court and to examine witnesses. For if we are to call a person to answer, we must give her an opportunity to do so: it would be a travesty to call her to answer, but then proceed to judgment without giving her a chance to answer. We must also, of course, be ready to listen to her answer: the court must attend carefully to any defence, or mitigation, that she offers.

Third, the accused must be given the *resources* necessary to make use of that opportunity – to answer to the charge, and to defend himself if that is the form his answer takes. Hence, for instance, the rights to legal assistance, to an interpreter, to detailed information, to time to prepare a defence, to obtain the attendance of witnesses, specified in ECHR Article 6(3): information and time are crucial resources, and the law's assistance may be needed to secure the attendance of witnesses. The ancient joke that both the millionaire and the pauper have the right to stay in an expensive hotel (though only the millionaire has the resources to do so) applies here. If the right to effective participation is to be enjoyed by all citizens as equals under the law, it must be not just a negative right not to be actively hindered from participating, but a positive right to be enabled to participate, which involves providing essential resources for those who might otherwise lack them.

It is important to emphasise that on this account the right to effective participation matters not just because accused persons must have a chance to defend themselves and thus avoid conviction. It matters because they must be enabled to answer the charge as responsible citizens who are called to account by their fellows; and this matters even (perhaps especially) if their answer will be 'Guilty as charged'. For some defendants will want to plead guilty – and not merely as part of a coercive plea bargain that makes their actual guilt or innocence irrelevant; they will want to admit their wrongdoing. But such admissions of guilt, as formal confessions of wrongdoing, can have value only if they are based on an understanding of the charge and its implications.

[16] For a comparative survey, see Mackay and Brookbanks 2018.

[17] Which is not to say that there is nothing we can properly do about or with him in the light of his alleged crime. See, for instance, the provisions in English law for unfit defendants: Criminal Procedure (Insanity) Act 1964 ss 4A–5A.

[18] Which is to say not just that the charge must be put to her in her native language or a language in which she is reasonably fluent, but that it must be expressed through concepts that she can be expected to understand: the law must be normatively accessible to those whom it claims to bind.

If an accused lacks the necessary capacity to answer the charge, or is denied the opportunity or resources to answer, his trial and conviction are unjust – even if he is provably guilty. For to convict him would be to say that he has failed to answer the charge, failed to offer an answer that exculpates him; but if he was denied a fair opportunity to answer or the resources to make use of that opportunity, or he lacks the capacity to do so, he has not *failed* to answer. A polity that calls an accused to answer, through its criminal courts, must allow and enable him to answer; it owes him that as a responsible agent. The denial of fair trial rights therefore delegitimises his conviction, even if a conviction would be 'safe', in the sense of 'empirically reliable', without his participation. We cannot now say, as we could say on the instrumentalist views discussed in Section 2, that at least the court reached 'the right verdict' in convicting an actually guilty defendant through a process flawed by breaches of fair trial rights. For the aim of the trial is not simply to establish the truth about whether the accused committed the offence charged (were that the aim a right, i.e. true, verdict could indeed be reached by a process that denied the accused's fair trial rights). It is to call the accused person to answer the charge, so that what makes a verdict 'right' is that it expresses a justified judgment on whether the accused provided an exculpatory answer to that charge; thus whatever the truth of the charge, a verdict of 'Guilty', which is a judgment that he failed to offer such an answer, is unjustified if he was not allowed and enabled to answer.

A defendant might, of course, refuse to answer: she might refuse to take any part in her trial, perhaps to express her denial of the court's legitimate authority, or to protest against an unjust system of law. That cannot bar her trial or conviction, if the prosecution offers unrebutted evidence that suffices to prove her guilt. For she has been called to answer, has been given the opportunity and offered the resources to answer; she has failed to offer an exculpatory answer, and can be justly held culpably responsible.[19]

4. Duty-Enabling Rights

To talk, as I have talked and as the ECtHR talks, of a right of effective participation in one's trial might suggest that defendants should be able to participate or not, as they choose: if I have a right to *Φ*, or to be allowed and enabled to *Φ*, it is usually up to me whether I *Φ* or not; others may not hinder, and must perhaps assist, my *Φ*-ing, but should not force me to *Φ*. This is, in the end, true of defendants' fair trial rights as *legal* rights, but in a decent society with a just criminal law defendants have a *civic* duty to exercise their right of effective participation. The fair trial rights enumerated in Article 6(3) can therefore be seen as 'duty-enabling'

[19] As long as the court has the standing to try her – the right thus to call her to account: see Duff 2019.

rights: they make it possible for the rights-holders to do, and assist them in doing, what they have a duty to do.[20] The denial of those rights, the failure to satisfy them, is then even more troubling: if the polity demands that a defendant answer for his alleged wrongdoing, insisting that he has a duty to do so, but denies him the opportunity or resources to do so, it commits a particularly egregious wrong against him. I must now explain the basis of this duty to participate, and why it should not be a legal duty whose violation would be criminal.

The duty is grounded in the character of criminal law (in a decent democratic republic) as a common law that belongs to the citizens, and as a law in relation to which citizens should be not merely subjects, but agents. I owe it to my fellow citizens to assist in the shared enterprise of the criminal law. Central to that enterprise is the process through which alleged criminal wrongdoers are called to account – called to answer to the charge of wrongdoing, and to answer for the wrongdoing if it is proved or admitted; if I am formally accused of crime, I ought therefore to play my part in the process and appear in court to answer the charge. The accusation mut be justified: it must not be discriminatory or oppressive; it must be backed by evidence that constitutes a 'case to answer' since, given the burdens that a trial imposes on defendants, I should not be expected to answer ill-founded accusations. But if those conditions are satisfied, I have a civic duty – a duty owed to my fellow citizens in virtue of our shared membership of the polity – to participate in my trial.[21]

I have that civic duty even if I know that I am innocent of the charge. For the process of calling alleged wrongdoers to account will inevitably call some who are actually innocent to answer to a criminal charge, and I have a civic duty to assist that process; and I owe it to my fellow citizens to answer well-founded (even if mistaken) accusations of having committed a public wrong. If I know that I am guilty of the crime charged, I have a stronger duty: I ought to answer for my wrongdoing – I owe this to those I wronged, and to fellow members of the community whose values I violated; and the criminal trial is the forum in which I can formally answer for it as a criminal wrong (there are other fora in which I answer for it as a moral wrong). Further, if I know that I am guilty, I ought to plead 'Guilty': not because a plea of 'Not guilty' would necessarily be perjury (I am not on oath when I plead, and a not guilty plea could be read not as a denial of guilt but as a challenge to the prosecution to prove guilt), but because I ought to answer for my wrongdoing honestly, with an apologetic confession of guilt (Duff 2023).

If we have a civic duty to participate in our trial, we have reason to make it a legal duty, and to criminalise refusals to participate: a violation of a civic duty is a public wrong that concerns the whole polity; and we have reason to criminalise any public wrong (Duff 2018a: chs 6–7). However, reasons, even good reasons,

[20] On duty-enabling rights, see Wenar 2013. The right to participate is therefore a 'mandatory' right: Klepper 1996.

[21] I have such a duty only in a decent polity in which I am treated with the respect and concern due to a citizen, within a criminal process that treats me justly.

might not be conclusive; and we have very good reason not to turn this civic duty into a legal duty. More precisely, we might make it a legal requirement that defendants appear for trial, so that the court can challenge them to answer to the charge:[22] but that would not be a legal duty to participate, since presence in the court room does not amount to participation, and the reasons not to make participation a legal duty do not apply to a legal duty to appear. For, first, the law should respect the consciences of those who have principled objections to the trial process to which they have been summoned. Such objections cannot save them from being tried; but they should be allowed to express their objections by refusing to play an active part in the trial, since to play such a part, even to enter a plea, would be to recognise the authority of the court (by contrast, merely appearing in court need not express such a recognition). Second, a legal duty to take part in one's trial would give yet more power to the state's officials, a power that could all too easily be abused. An accused person already faces familiar kinds of pressure and risks of oppressive treatment; to impose a legal duty to participate would add to that pressure and those risks. Any duty to play an active part in one's trial should be a purely civic, rather than a legal, duty – a duty that we owe our fellow citizens, and that we can be criticised for failing to fulfil, but not a duty that should be given the force of law.

The argument that a civic duty to participate in one's trial should not, even in a just society, be made into a legal duty leads to a larger point – that the right to participate must bring with it a correlative right *not* to participate. Some of the procedural rights that ought to be recognised are precisely rights that have to do with non-participation, rather than with enabling and assisting participation.

A preliminary question is this. I have argued that a civic duty to participate in one's trial should not be made into a legal duty. We should at least have a legal right not to participate: we should not be subject to legal coercion to participate,[23] or be liable to adverse legal consequences if we refuse to do so.[24] But should we also recognise a civic right not to participate – a right to do wrong, we might say, by violating this civic duty?[25] That will depend on what kind of right this would be. If it consisted, for instance, in a right not to be subject to coercive social pressure to participate, and depending how we understand 'coercive', it might be plausible to assert such a right; but if it involved or implied a right not to be criticised for refusing to participate, that would be less plausible.

Whatever our answer to the question about a civic right not to participate, we should at least insist on a legal right not to participate, and the right of silence

[22] See e.g. the English Bail Act 1976, s 7, and the German Criminal Procedure Code (*Strafprozeßordnung*) §§ 230–6: defendants are legally required to appear for trial, and only exceptionally may trials proceed in their absence (see e.g. *Jones (Anthony)* [2003] 1 AC 1.

[23] Contrast the '*peine forte et dure*' to which those who refused to enter a plea were once liable to be subjected in England: see Mckenzie 2005.

[24] Consequences that could consist in conviction for an offence of non-participation; or in allowing or requiring courts to draw adverse inferences from a defendant's refusal to participate.

[25] On a right to do wrong, see Herstein 2012.

is an obvious implication of this. That right involves not just the absence of an enforceable legal duty to participate, but also (if it is to have a substantial rather than largely formal significance) a right not to have adverse inferences drawn from one's silence: it is violated, or seriously undermined, if although remaining silent is not subject to formal legal sanction, courts are entitled to treat it as evidence of guilt.[26] Such a right is important, as a defence against the kinds of oppressive pressure that a legal duty to speak would enable officials to exert, and because we should allow principled dissenters to express their dissent by refusing to take part in their trial. It is, we might say, an important part of what makes a trial 'fair', although it does not figure among the rights specified in ECHR Article 6 as integral to a 'fair trial'. We have (in a decently just society) a civic duty to participate, to answer; but the law must also leave us free to refuse to speak. However, the role of this right in a plausible normative theory of the criminal trial is quite different from the role of the rights to 'effective participation' in one's trial on which I have focused in this chapter. Those rights flow, I have argued, from the proper aim of the trial itself, as a process through which a polity calls alleged wrongdoers to answer for their alleged wrongdoing. By contrast, the right of silence is a right that constrains our pursuit of that aim – we can, through the law, call on the defendant to answer, but should not use the law to enforce that call. The right to effective participation, and the specific rights that give that right more determinate content, are central to a proper normative understanding of the criminal trial; but they do not exhaust the idea of a fair trial, or the procedural rights that defendants should enjoy.

5. Conclusion

This completes my sketch of an argument about the grounding of defendants' procedural rights and responsibilities in the criminal process, in particular the right to effective participation, and the more specific rights declared in ECHR Article 6(3) that spell out some of what is necessary for effective participation. An instrumental account of what grounds such rights, that they serve the aim of achieving accurate verdicts, is, I argued inadequate, and is still inadequate even if we add in non-instrumental side-constraints, or further aims, that have to do with defendants' dignity. A better account portrays the trial as a process that calls alleged criminal wrongdoers to formal public account: we can then see such procedural rights as necessary if defendants are to be able to answer the charges that they are called to answer, and so to discharge their civic duty to answer. My focus has been on these rights as rights enjoyed by guilty as well as innocent

[26] This right has in recent years been seriously eroded in English law (Quirk 2019): defendants cannot be legally compelled to give evidence; but courts are increasingly allowed to draw adverse inferences from a defendant's silence.

defendants, by defendants who know that they are guilty as much as by those who do not know this. My argument has been that the rights have the same grounding and significance for *all* defendants – whereas other accounts portray such rights as properly rights of the innocent, so that guilty defendants' enjoyment of them is somehow parasitic on the rights of the innocent. But I am not suggesting that these are peculiarly rights of the guilty:[27] they are rights that properly belong to all defendants, in virtue simply of their role as defendants. Any defendant who is denied those rights is wronged; any defendant, whether innocent or guilty, who is convicted through a trial that denies those rights is wronged by that conviction.

[27] Indeed, a defendant who intends to plead guilty has no need of some of the art 6(3) rights, as Mark Dsouza pointed out to me.