

THE "RIGHT" TO A FAIR TRIAL

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The right to a fair trial is commonly considered so central to our system of justice and so much a part of our legal heritage that to deny that people in general have any such right might seem tantamount to impugning our legal traditions as a whole. The right to a fair trial might seem an unimpeachable example or "paradigm case" of what we *mean* by a "right" and certainly it is so widely believed that people have such a right that to claim they generally do not strikes one initially as absurd. I hope nonetheless to present reasons for thinking that people do not in fact generally have a right to a fair trial. Here as elsewhere something similar is true instead, and I hope at least briefly to suggest a proper approach to justification for fair trials as well as to dispute the justification most commonly offered.

I doubt that I will succeed in revising legal thinking in a certain dramatic way and at a single stroke. But I do hope to open for discussion an issue long presumed closed, and I think the results of so doing may prove very startling indeed.

I

(A) It is important for what follows to outline at least roughly a number of distinctions regarding rights and types of interpretations for the phrase "a fair trial". With respect to the former, two examples will be of aid:

(1) Before the civil war, slave owners had (were given, were granted) the right to treat their slaves in any way they saw fit.

(2) Slave owners had no right to own slaves, let alone to treat them as they did.

(1) and (2) are both true despite the apparent contradiction; a sure sign that very different things are being said despite very similar phrasing. The distinction between rights such as

those referred to in (1) and rights such as those claimed in (2) has been commonly characterized in the literature as a distinction between "legal rights" and "ethical rights". (1) concerns itself with what rights slave holders had under the law, perhaps, or what rights they had on the books. Thus had the laws on the books differed, (1) might not apply. (2), on the other hand, is a claim the truth of which is independent of what laws were on the books. If (1) is true, then perhaps American law during the period of slavery did not recognize, or ignored, or flew in the face of, or denied people their rights in a certain sense. But they were not thereby without such rights in the sense of (2).

The distinction between "legal rights" and "ethical rights" which I will use in what follows is simply the distinction between rights in the sense indicated by (1) and rights in the sense indicated by (2). That rough distinction is, I think, adequate for present purposes. But it must be recognized that it is a rough distinction; we have no precise outline of either legal rights¹¹ or ethical rights. Legal rights are not, after all, simply rights on the books. Our legal traditions rely on Common Law as well as Statute Law. Moreover, there are now and have in the past been unconstitutional laws, granting certain rights, on the books. A court which decides such laws to be unconstitutional may thereby decide that people do not in fact have a legal right to something which a particular law says they do, but the court does not thereby decide that such a right wasn't on the books after all. Nor are legal rights simply rights which people would not have without a certain legal code, since there are also plenty of *ethical* rights they would not have without some legal code (the right, for example, to fair treatment under that code). Thus obvious difficulties face the attempt to get more specific

about legal rights and ethical rights than I have attempted to get here.

Just as it would be wrong to claim more than a rough outline of such a distinction, I think it would be premature to claim that such a distinction was exhaustive; that all rights were either ethical or legal. Consider, for example, claims such as (3):

(3) The right to legal recourse is currently limited to those with the economic means to instigate legal action.

(3) is compatible with the claim that the poor as well as the rich have a right to legal recourse in the sense of both (1) and (2) above. It may involve some "extended" notion of rights, and should perhaps be read as claiming in a misleading and rhetorical manner that the poor cannot exercise their rights, but it certainly involves some different use of the term than is evident in the examples above. I appeal to it here simply as a warning against presuming all rights to be either ethical or legal, and also against a temptation to outline ethical rights as any rights which are not legal rights.¹²⁾

(B) Something must also be said in preface regarding "a fair trial". We can for present purposes distinguish two basic types of interpretation which might be offered for the phrase; (i) those which would treat it as a phrase applicable only to trials which in fact reach a correct verdict, and (ii) those which would treat it as a phrase applicable independently of the correctness or incorrectness of whatever verdict is reached. Under (ii), for example, would fall interpretations treating "a fair trial" as a phrase (a) applicable on the basis of certain procedures such as a trial by a jury of one's peers, access to legal counsel, and the like, or (b) which specifies that the parties in question are treated fairly in a certain sense. As an account of "a fair trial" in the ordinary sense, I think, interpretations of type (i) are well off the mark and I have no particular candidate in mind of those which would fall under (ii); both (a) and (b) may be questionable. What is of importance here, however, is that various interpretations can be neatly distinguished as of types (i) and (ii).

It might be noted in passing that of the partial outlines presented above (ii.a) seems closest to traditional legal interpretations of "a fair trial".

Though the sixth amendment is popularly believed to guarantee the right to a fair trial, it actually speaks only of a *jury* trial, and in fact specifies only that people will "enjoy" the right to a jury trial.¹³⁾

II

Having distinguished several types of rights and types of interpretations for the phrase "a fair trial", we can separate several senses in which it might be claimed that people have a right to a fair trial:

(4) People have a legal right to a fair trial (in a sense specifiable independently of the correctness of its verdict).

(5) People have a legal right to a fair trial (in a sense not specifiable independently of the correctness of its verdict).

(6) People have an ethical right to a fair trial (in a sense specifiable independently of the correctness of its verdict).

(7) People have an ethical right to a fair trial (in a sense not specifiable independently of the correctness of its verdict).

Here (4) is obviously true and (5) is most plausibly false, and we need only to take a look at what is in fact on the books in order to decide their truth and falsity. (6) and (7), however, are more interesting claims, and (6) the more interesting of the pair. There is, I think, some reason to believe that both are false.

(A) Thus consider (6), involving an interpretation for "a fair trial" specifiable independently of the correctness of its verdict. It should first of all be noted that such a trial always involves the possibility of an incorrect verdict, thereby involves the possibility of improper punishment or improper release, and in that sense always involves the possibility of a miscarriage of justice.

Secondly, it must be remembered that people accused of crimes are almost always in fact either guilty or innocent of the crimes of which they are accused.¹⁴⁾ The dictum "innocent until proven guilty" is short for "*presumed* innocent until proven guilty", and the latter phrase wouldn't make any sense if people weren't either innocent or guilty independently of whatever legal proceedings take place and independently of whether they are found inno-

cent or guilty.¹⁵¹ That a court finds a man guilty entails neither that he is guilty nor that he wasn't until the court so "determined". One is innocent simply if one did not commit the crime in question, and guilty simply if one did.

Given all this, it seems plausible that at least many people accused of a crime, including both innocent and guilty people, cannot be said to have a right to a fair trial in the specified sense. A man guilty of murder may, precisely because he is guilty of murder, have no right to go unpunished for his crime, for the same reasons have no right to a chance to go unpunished for his crime, and thus have no right to any procedure involving a chance at going unpunished for his crime. A fair trial in the present sense is such a procedure, and thus he has no right to a fair trial. For similar reasons, he may have no right to an inadequately guarded cell. A guilty man may have plenty of rights, but the right to a fair trial need not be one of them; his crime may be such that he deserves only prompt and efficient punishment, and thus has no right to a procedure which might result in no punishment at all.

On precisely these grounds, I think, it can be argued that the guilty *generally* have no right to a fair trial. It appears that it would only be in bizarre cases (involving signed contracts guaranteeing fair trials and the like) that even the possibility of considerations overriding desert in virtue of guilt would arise.

It seems equally wrong to claim here that innocent people generally have a right to a fair trial. In the case of an innocent man, a fair trial in the sense at issue always involves the possibility of an incorrect verdict resulting in his unjust treatment. But it would be odd to claim in at least normal circumstances that an innocent man has a right to unjust treatment or a right to a procedure which involves the possibility of unjust treatment. Since it would appear that the innocent man has a right not to be subjected to such a procedure, it would seem very odd to claim that he has a right *to* it.

Similar considerations are relevant to the claim that people have a right to a fair trial in the other interpretation of "a fair trial" offered above. If a guilty man had a right to a fair trial in the sense of a trial specifiable only in terms of

the correctness of its verdict, it would appear that a guilty man had a right to a procedure which *must* result in his conviction and proper punishment. But it seems odd to say that anyone has a right to be punished, odd to say that anyone has a right to be convicted, and thus odd to say that anyone has a right to a procedure which must result in these.

It may be more plausible that an innocent man has a right to a fair trial in this second sense, but it would still appear that he has a right moreover to no trial at all, a right not to be bothered with such things, and thus a right not to be subjected to any such procedure. Even if it were the case that the innocent had a right to a fair trial in this sense, it would not follow that people in general do; the guilty still would not.

(B) Two possible lines of objection against the argument presented spring immediately to mind, but neither seems adequate against it.

(1) It might be said, first of all, that the form of the argument is a bad one. It appears to argue from the claims that *S* has no right to *x*, and that *y* involves *x* or the possibility of *x*, that *S* has no right to *y*. But we can certainly think of contrary cases. Brushing one's teeth always involves the possibility of accidentally choking to death on a wayward bristle. It would seem odd to say that I have a right to accidentally choke to death on a wayward bristle. Yet I surely have a right to brush my teeth.

I think it can be maintained in defense of the original argument, however, that the toothbrush analogy is a misleading one. In particular, the case of brushing one's teeth is one in which the possible consequence *x* is not something that is wrong, right, or a travesty of justice; it is simply unfortunate. In cases in which it would be dreadfully wrong that *x* or a travesty of justice that *x* it seems much more plausible that one has no right to a procedure involving *x* or involving the possibility that *x* for the same reasons that one has no right to *x*. Were brushing one's teeth to involve the possibility of someone else's accidental electrocution or the violation of an important promise or a travesty of justice, I think, we would have good reason to withdraw the claim that one had a right to brush one's teeth. To the extent that the original argument fits this pattern rather than its offered analogue,

it seems safe from such an objection.

It should also be noted here that whether S has a right to y , where y involves the possibility of x , may depend on both the seriousness of x and whether x is a real possibility or a far-fetched one. One would not have thought, however, that the right to a fair trial was intended as a right contingent on the seriousness of an incorrect verdict and the extent to which it was a real possibility.

(2) It might secondly be urged against the argument above that it takes a conveniently suspect claim as its target. Thus it might be insisted that there are other ways in which the right to a fair trial might plausibly be construed and which escape its clutches.

Consider first the claim that there is something else which people have a right against, namely punishment solely on the grounds that they have been accused of a crime. Wrongly or rightly, this has often been taken as being involved in the right to a fair trial, and has sometimes even been thought to amount to the same thing.

Here considerations of desert throw significant light. It is in one sense true, and in another sense questionable, that no one deserves to be imprisoned simply because they have been accused of a crime; that phrase is simply ambiguous. It may be read as claiming that there is one thing no one deserves, namely being imprisoned simply because they have been accused of a crime. But under that interpretation the claim seems questionable, since there might be a case in which someone is guilty of so heinous a crime that they not only deserve imprisonment but deserve to be imprisoned for the wrong reasons. It might well be the case with regard to a man guilty of murder and innocent of public drunkenness that thirty days merely on suspicion of public drunkenness is the least he deserves. The phrase may equally be read, however, as claiming that it is never solely in virtue of being accused that anyone deserves imprisonment. That, I think, is true, and applies to people irrespective of their guilt.

Consider with this in mind the claim that people have a right not to be imprisoned simply because they have been accused. If this is read as claiming that there is one thing which everyone

has a right against, namely being imprisoned simply because they have been accused of a crime, the claim seems implausible for reasons similar to those given in other cases. I suggested above the possibility of a case in which someone deserved (because of having committed some heinous crime) to be imprisoned for the most arbitrary of reasons. Here as elsewhere it would seem odd to say that anyone has a right not to be x -ed when they in fact deserve to be x -ed, and thus in at least some imaginable cases there is or would be no ethical right against arbitrary punishment and no ethical right to anything else. There *is* a true claim regarding rights and accusation, closely related to the true claim concerning desert above, but it would seem a very odd "interpretation" of the claim concerning rights above. It *is* true that it is never solely in virtue of being accused that anyone has no right to anything but imprisonment.

Arguments of the same form can, I think, be framed against any right to a fair trial which it is claimed that people always have or always have in certain circumstances irrespective of guilt or innocence. There is one further way, however, in which the claim to a right to a fair trial might be interpreted. There are cases in which rights seem to conflict in a certain way; I may claim a right to x and you a right to y , x and y conflict, and the fact that I have a right to x results in the inapplicability in this case of any right you have in general to y . Thus I may in general have a right to free speech and you may in general have a right to silence noisy people. When an apparent conflict arises, it is because I have a right to free speech in a particular case that you have no right to silence noisy people in that case. Now it may be that the right to a fair trial is like y in such cases; it may be claimed simply that there is *a* right (in general?) to a fair trial, which accrues because an accusation has been made, perhaps, but *not* that the fact of accusation is sufficient for their being such a right in all cases, *not* that such a right fits the pattern of x above in all cases, and *not* that it is a right immune to inapplicability on the pattern of y and the right to silence noisy people above.

I see no reason to think there is such a right, and the alternative justification for fair trials suggested below is not one which would justify

the claim that there is. But such a notion of the right to a fair trial *would* escape the clutches of the general argument presented. It would also, however, represent an incredibly weak and unhelpful as well as uncommon notion of any right to a fair trial.

It is not merely rights which may fit the pattern above. A whole constellation of things, including obligations and deserts, may do much the same work. I may in general have a right to brush my teeth as often as I like. But in a case in which brushing my teeth would involve violating important obligations or result in a tragic catastrophe that I could have foreseen, I can not be said to have any such right; in such situations I have no right to brush my teeth. It's also the case that one often has no right to *x* if one deserves something quite different; questions of desert may override claims to rights in certain standard ways. It would seem odd to say that I have a right to fail a particular exam if I deserve a passing grade, and it seems odd to say that I have a right to a passing grade if I deserve to fail.

The importance of all this is that it could be similarly argued that any right to a fair trial would be a right constantly rendered inapplicable by other things (including desert) which hinge on guilt or innocence. Thus even if there *were* a right to a fair trial in the sense outlined it would be a right constantly rendered inapplicable by the simple fact that the person accused is either guilty and thus deserves only punishment, or innocent and thus deserves immediate release. Since the situation in which someone is accused is almost always one in which they are either guilty or innocent, and since questions of desert hinging on guilt or innocence would generally if not always render inapplicable any such (general) right, there has rarely been and could rarely be a situation in which anyone in fact has a right which they supposedly have in general. Situations of accusation are generally ones in which it would be at least seriously misleading simply to claim that someone had that ethical right.

III

I promised in the introduction to give not only reasons to think that people generally do not

have any right to a fair trial, but to offer as well some partial indication of what is true instead.

(A) It seems obvious that we should conduct investigations, as thorough as possible, into the guilt or innocence of people who have been accused of a crime. We should do so because that is the best way to find out whether people are guilty or innocent, and how we should treat them from then on depends on which they are. We owe it to ourselves, perhaps, to conduct trials of a certain form (that form which seems most likely to clearly exhibit innocence and to ferret out guilt) in that we owe it to ourselves to protect ourselves from the guilty among us and have an obligation to the innocent among us to protect them.

This, I think, is a proper if partial approach to ethically justifying fair trials. That people have a right to such is not the justification, because they generally have no such right. Moreover, such a justification for a fair trial is one which hinges on our ignorance; it is because we don't know who is innocent and who is guilty without proper investigation, or at least have no right to assume that we know without proper investigation, that we should conduct trials of a certain form.

Both the attack on the right to a fair trial above and the alternative justification suggested here, I think, fit neatly with our intuitions concerning proper procedure on a day of judgment before an omniscient god. It is precisely because the fair trial is to be justified as an *investigative* procedure that an omniscient god would be under no obligation to provide one and that no one would have any right to demand one.

(B) Things may be a bit more baroque when it comes to the relation between ethical rights and legal rights. It might seem, for example, that the existence of an ethical right to *x* entails that there should be a legal right to *x*, and that the lack of an ethical right to *x* is sufficient indication that it is not the case that there should be a legal right to *x*. But this need not be the case. If we should give people trials of a certain sort and the institution of a legal right to a fair trial is necessary to ensure that we do so, it may be that we should give people a legal right to a fair trial despite the fact that they have no

ethical right to one. I will leave the consideration of such auxiliary issues to others or to another paper, since it is after dust has settled over the central issue of whether people have an ethical right to a fair trial that these other issues become most important.

(C) I would finally like to offer a simple example of why any of this is of importance, especially since one justification of fair trials has only been impugned in favor of another. It is common for lawyers to justify the fact that they are doing their level best to free a man they fully believe to be obviously guilty by appealing to the right to a fair trial and by construing it as a right which applies universally to the guilty as well as the innocent. To the extent that the outline above is correct, and to the extent that lawyers have attempted to offer an ethical justification for their efforts on behalf of the guilty, they've failed.⁽⁶⁾

NOTES

1. A term which may, after all, be quite ordinary.
2. I would also append a final warning with respect to ethical and legal rights. There are various rights in the sense of (1), (2), and perhaps (3), and some further sentence may involve a claim concerning rights in one of these senses. It would be wrong, however, to think that the term "right" has two senses: "ethical right" and "legal right", and it would be wrong to think that every appearance of the term "right" is one in which we can substitute either "legal right" or "ethical right" as meaning the same thing. Legal and ethical rights are like red and yellow roses in this way rather than like banks (the kind you keep your money in) and banks (of rivers).

Were we to take "rights" as having several senses in the way the term "bank" does, we would for example be at a loss as to whether to substitute "legal rights" or "ethical rights" for the second appearance of the term "rights" in (4): A legal right is a right which is on the books. We cannot supposedly substitute "ethical right" for "right" in its second appearance, and to substitute "legal right" would make the phrase a 'a right which is on the books' peculiarly redundant. But this is a warning as to how we might go wrong in treating "senses" of "rights", rather than a legitimate problem. (4) parallels nicely in certain respects with (5): A red rose is a rose which is red.

3. I will not here consider at length whether what the sixth amendment says (or what it would say were it to read "people hereby have the right to a fair trial") is neither true nor false, in virtue perhaps of being a "performative utterance". If interpreted in terms of legal rights, I think, it would be true. If interpreted in terms of ethical rights I think it would be false for reasons given in the body of the paper, and at any rate the "hereby" would stand out like a sore thumb.
4. The exception, of course, being cases in which a law neither unambiguously applies nor fails to.
5. Nor does "presumed innocent until proven guilty" in fact apply to people accused of crimes. If we did indeed presume them innocent we would presume it a waste of time and money to try them, and would presume that they shouldn't be put on trial at all. If we either thought of them as innocent or treated them as if they were innocent we would immediately release them with no questions asked. The best defenses I've run across of the dictum "innocent until proven guilty" are (1) David Boyer's claim that it amounts to nothing more than a stricture concerning burden of proof, and (2) Jack Sanders' proposal that the jury (though not others) should indeed start with the presumption that the government is simply trying to harass the defendant.
6. I am much obliged to David Boyer for fruitful discussion on important points too numerous to indicate individually and for a frustratingly scrupulous reading of an earlier draft.