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ARGUING ON FACTS
Truth, Trials and Adversary Procedures[*]

We resist the pipes of Pan, because we care about Truth.
(Simon Blackburn)

Abstract
Today many scholars claim that finding the truth is not among the aims or functions of a trial. What should be done by judges, rather, is to assess the evidence at disposal and make a decision on what is at stake. This line of thought emphasizes the differences between inquiry and advocacy, truth and justice, dialogue in science and conflict in law. One of the reasons presented in favor of this contemporary view is the nature of the adversary systems in law: parties are conceived as "fighters", and judges as "referees" who do not participate in the collection of the evidence and must avoid any "inquisitorial" procedure in deciding cases. Because of this, it is said, trials do not and cannot aim at truth. In the same spirit, legal argumentation is conceived as a "fight" device that parties use to win the case, not as a dialogical effort for a true representation of what is at stake.
But according to the traditional view adversary procedures such as cross-examination are the best means we have to find the truth. I will try to defend this view claiming that: 1) truth is a necessary condition of justice, 2) legal argumentation on facts is truth-oriented, and 3) fallibilism requires adversary procedures.

Keywords
Truth, Factual Claims, Legal Reasoning, Legal Argumentation, Scientific Inquiry, Fallibilism.

1. *Introduction*

What is the point of arguing about facts in a trial? According to traditional wisdom a trial aims to find out the truth about the disputed facts; therefore, factual argumentation in a trial context is supposed to provide a true representation of the relevant facts. The facts have to be reconstructed on the basis of the evidence at disposal; one should give an accurate description of their features and a true explanation why they are so, providing arguments that support these claims. So, if the traditional account is correct, legal argumentation on facts is truth-oriented. Factual claims made on trial are committed to truth, even if, of course, they may fail in giving a true representation of what is at stake.
But today many scholars claim that finding the truth is not among the aims or the functions of a trial. What should be done by judges, they say, is to assess the evidence presented and make a decision on what is at stake. This critical line of thought emphasizes the differences between inquiry and advocacy, truth and justice, scientific dialogue and legal conflict. One of the reasons presented in favor of this view is the nature of the adversary system in legal proceedings: parties are conceived as "fighters", and judges as "referees" who do not participate in the collection of the evidence and must avoid any "inquisitorial" procedure in deciding cases. Because of this, it is said, trials do not and cannot aim at truth. Nor is it a function of adversary procedures.
In the same spirit, as a consequence, legal argumentation is conceived as a "fight" device that parties use to win the case, not as a dialogical effort for a true representation of what is at stake.
But according to the traditional view adversary procedures such as cross-examination are the best means we have to find out the truth. I will try to defend this traditional view claiming that: 1) truth is a necessary condition of substantive justice, 2) legal argumentation on facts is truth-oriented, and 3) fallibilism requires adversary procedures. Before going into this, let me clarify some issues about law and truth.

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2. *Law and Truth*

What is the relation between law and truth? One can conceive of it in several ways.[1] For instance, one can ask whether law is founded on some truth (you could call it "Truth in law") and whether there are any truths about law ("Truth of law"). Or, starting from the institutional features of legal systems, one could ask about the relation between, in turn, truth and jurisdiction, truth and legislation, and truth and constitution.[2] All these issues require some concept of both law and truth, of course. Among them I would like to point out the following:

(1) whether legal norms are truth-apt, that is, capable of being true or false;
(2) whether, and to what extent, law could be based or founded on some truth;
(3) whether there is truth in legal interpretation and argumentation;
(4) whether truth is an aim of a legal trial.

As to (1), non-cognitivist philosophers in legal and moral matters claim that norms are neither true nor false. The classical positivist way to put this is to say that legal norms are commands and, as such, are not truth-apt.[3] A command like "Open the door!" is neither true nor false. To put it in the contemporary philosophical jargon, it has a world-to-word direction of fit. An assertion like "The door is open" can be true or false, but norms and commands in general cannot.[4] On the contrary, non-positivist and cognitivist philosophers in these matters often claim that norms are truth-apt.[5] However, if these views imply some correspondence theory of truth, it is clear what the truth-bearers would be (the norms themselves) but it is quite mysterious, in my opinion, what the truth-makers would be (normative facts? objective values?): one should not conflate a *norm* with the *fact* that a norm has been enacted, for the enactment makes true a statement about it but not the norm itself.
Concerning (2), instead, I would say that even if law is not truth-apt one could reasonably ask whether a law could be based or founded on some truth. Think about law and economics analysis, for instance: one could claim that legal norms and institutions are founded on economic facts and their corresponding truths. Even admitting that norms are neither true nor false, one could say they are legal means to social ends given certain economic facts. If the facts were different, such norms would or should be different in order to achieve those ends. Here the analysis takes often a normative turn: the point is not to give an explanation of given norms and institutions but, rather, a normative picture of how the law should be to achieve those ends given certain economic truths. In any case, what would be admitted is that, to some extent, laws or legal norms could be based on truth.
As to (3), I will be very brief here and point out that cognitivist views of interpretation respond in the affirmative while non-cognitivist ones strongly deny that there could be any truth in legal interpretation. According to people like the Legal Realists and their skeptical progeny interpretive statements are rather judgments of value or political acts, while Dworkinians claim that our interpretive efforts aim at truth and our best interpretive statements, providing the best explanation

[1] Cf. e.g. Patterson (1996), Pintore (1996), Haack (2003a).
[2] It is clear that different legal theories have different views on these matters. A legal theory based on moral realism will say, for instance, that there are truths about constitutional values, while non-cognitivist views will reject this claim.
[3] However there are reasons not to reduce norms to imperatives or commands: (i) norms do not necessarily depend on a subject stating them, while genuine imperatives do; (ii) norms can be premises or conclusions in logical inferences, but imperatives *qua* imperatives cannot; (iii) norms can be iterated, while imperatives cannot (it does make sense to say "It should be that *p* should be", while it does not to say "I order that I order that *p*").
[4] A positivist can perfectly admit, however, that a norm-proposition (a proposition to the effect that a certain norm exists) is true or false. See in particular von Wright (1991) and Jørgensen (1938).
[5] See e.g. Kalinowski (1967).

and justification of our legal materials and practices, are certainly true.[6] Similar views can be held about legal argumentation, to which I will come back below.
Now it is (4) the main issue I want to discuss in the present paper. It is not on legal norms and their relation to truth. It is about facts; to be sure, about legally relevant facts in a trial context. A fact is legally relevant when, according to the logical structure of a conditional, a norm prescribes that a certain legal consequence follow from the type of fact considered in the antecedent of the conditional. Then in a trial a judge should see whether (it is proven that) the fact in hand is a token of that type. If this account is correct, one is committed to say that truth is an aim of a trial. For the judge should see whether it is true or false that the fact in hand instantiates the type of fact from which a certain legal consequence should follow according to the law. But in our times the claim that truth is an aim of a trial has been put into question and rejected by several legal scholars. I will deal with this in the following.

3. *Inquiry or Advocacy?*

In some recent papers, focusing on the U.S. legal culture, Susan Haack has claimed that science is concerned with inquiry and an open-ended search for truth, whereas law is concerned with advocacy and a need of finality in settling disputes.[7] "Inquiry starts with a question and seeks out evidence, aiming to arrive at an answer; advocacy, aiming to persuade, starts with a proposition to be defended and marshals the best evidence it can in its favor".[8] Inquiry and advocacy are very different attitudes and activities.
One of the reasons she presents in favor of this view is the nature of the adversary system in the U.S. legal trials, or, as she calls it, "the adversarialism of the U.S. legal culture".[9] In the adversary system parties are not interested in the search and discovery of truth, but rather in the outcome of the case. Some authors (not Haack herself) qualify parties as "fighters": what these want is to win their case, not to find or point out what really happened.[10] To this end they have to provide good evidence and good arguments, so as to persuade judges or juries. Accordingly, some authors think of judges as "referees" who do not participate in the collection of the evidence and must avoid any "inquisitorial" procedure in deciding cases. A trial for Haack isn't exactly a "search for truth": rather, it is better described "as a late stage of a whole process of determining a defendant's guilt or liability".[11] Why "a late stage"? Because the process starts with the search and collection of the favorable evidence by the parties, who then try to persuade the finder of fact.
So, for Haack inquiry is the core business of science and advocacy is the one of law (or of attorneys at least). Science is truth-oriented, while law is outcome-oriented or, at best, justice-oriented.
Haack recognizes with Bentham that "factual truth is an essential element of substantive justice; it really matters that the person who is punished be the person who actually committed the crime or caused the injury".[12] She acknowledges that substantive justice requires truth, for an application of law is correct when, *inter alia*, the relevant factual reconstruction is true.[13] If you want, to put it in abstract philosophical terms, factual truth is a necessary (even not sufficient) condition of justice. But Haack also claims that adversary procedures like cross-examination (as they are actually run in

[6] See e.g. Llewellyn (1950) and Guastini (2005) on the one hand, and Dworkin (1986) and (1996) on the other. Cf. also Endicott (2005).
[7] Cf. Haack (2003b), (2004a), (2004b), (2007), (2008) and (2009).
[8] Haack (2009, 13).
[9] Haack (2004a, 17). She says that "there are deep tensions between the goals and values of the scientific enterprise and the culture of the law, especially the culture of the U.S. legal system" (Haack 2009, 2).
[10] See e.g. Frank (1949).
[11] Haack (2008, 563).
[12] Haack (2007, 14).
[13] "Justice requires just laws, of course, and just administration of those laws; but it also requires factual truth" (Haack (2004a, 15).

the U.S.) are not a good means to that end. Therefore, if I understand correctly, there is a tension within law itself: justice requires truth, but trials hardly deliver it.
These claims recall the critique of the adversary system made several decades ago by Jerome Frank in particular.[14] As is well-known, Frank was a Legal Realist who was skeptical not only about rules but also about facts. Rule-skeptics contested that legal rules univocally determine the outcome of a case. Fact-skeptics like Frank contested that actual legal procedures permit us to find out the truth on trial and to predict future decisions. This is due, in his opinion, to a variety of factors: in part to the epistemic problems involved in such activities as reconstructing the past, relying on testimony, etc. (what he called "the elusiveness of the facts on which decisions turn"); in part to judicial discretion; and in part to the legal features of the adversary system where parties are fighters and the winner is not the one who has a right to that but the one who is most persuasive and rich enough to get the best advocates and the best evidence in his favor.[15]
In the same spirit, legal argumentation could be conceived as a "fight" device that parties use to win the case, not as a dialogical effort for a true representation of what is at stake.
How to avoid the drawbacks of adversarialism? Frank's way out was to make appeal to the judge's discretion and sense of justice. Haack's proposal is to slightly move the U.S. legal system in the direction of a more "continental" approach, giving the judges some "inquisitorial" powers or encouraging them to use such powers when needed (for instance to appoint independent experts in matters of scientific evidence assessment).[16] I do not want to discuss these proposals however. I would rather like to discuss some of their assumptions and the skeptical claims about truth on trial.

4. *Truth on Trial?*

Because of the features outlined above it is held that trials do not and cannot aim at truth, at least in the systems where trials are shaped along the lines of the adversary model. I have some objections against this view. On the one hand I lack the competence to go into a technical discussion of the U.S. legal procedure or of the procedure of other positive systems; on the other hand I have some methodological and conceptual worries about the view in question.
First of all, a *methodological* point. As I understand them, such claims as those made by Haack seem to contrast the pathology of the adversary system with the physiology of science. Science is taken in its ideal dynamics, made of disinterested inquirers who search for truth and critically assess their own or others' empirical hypotheses without any sort of prejudice. This is of course ideal science, not necessarily real science. (But Haack is well aware that science, like every human enterprise, is susceptible to corruption). Law instead is taken in its real dynamics, made of interested litigators who pursue their own success and do not care about justice in its own sake. Now, is this a fair comparison and assessment? Would things be different if we were to consider the physiology of the adversary system and the pathology of science? The same problem appears if we compare the adversary and the inquisitorial system. Haack's proposal makes appeal to unbiased and scrupulous judges who reasonably use their inquisitorial powers. This is the physiology of the inquisitorial system. What about biased or even malicious judges who abuse their powers to favor the outcome they like? History provides a lot of examples of such a pathological drift. A fair comparison would require taking either the physiology of both or their pathology.
In the second place, I think that the skeptical accounts are partial if they do not take into account the role of judges: litigators pursue their own interests, it is clear, but judges should pursue justice. I would call this the *partiality* objection. The skeptical accounts stress the role of the parties in a trial

[14] See Frank (1930) and (1949).
[15] Frank (1949). Note that there is a tension in claiming at the same time that uncertainty comes from judicial discretion and judicial "laissez-faire".
[16] See in particular Haack (2004a, 24-5).

and underestimate, in my opinion, the judicial point of view. From the point of view of the judge, very simply, justice should be made and this requires that the factual reconstruction be true. This means, to be sure, that the accused in a criminal case can be legally convicted only if (it has been proven that) he did what he is accused of; otherwise, given the principles of our legal systems, he should be acquitted (think of a killing case). And it means that the plaintiff in a civil case is entitled to win only if (it has been proven that) what he claims is true (think of an injury case). Notwithstanding the different standards of proof in criminal and civil cases, it is impossible to think of a correct application of the law on the basis of false premises, because there is a conceptual relation between justice and truth, according to which the latter is a necessary condition of the former. So, according to my argument, even if truth is not *the* goal of a trial, it is *one of its* goals. The first of these is making justice, but if a true representation of the case or a true reconstruction of what happened are necessary conditions of a just decision, then determining such truths is one of the goals of a trial.[17] This is the point of view judges should have.

This brings us to a further critical claim. From a *conceptual* point of view the skeptical accounts neglect the relation between truth and proof. It is undisputable that in our (adversary) systems both plaintiffs and public prosecutors have to prove what they claim. They have the so-called burden of proof.[18] What is disputed (somehow inexplicably in my view) are the consequences of this: some scholars claim that given the burden of proof one is committed to recognize that trials do not aim at truth but, rather, at dispute resolution according to some positive rules. These include not only the burden of proof rules, but also those on the admissibility of evidence, the assessment of evidence and the standards of proof. So it would be right to say that a legal decision in favor of the plaintiff or prosecutor is legally correct when the burden of proof has been satisfied by the plaintiff or prosecutor, regardless of truth; or, to put it differently, when the claim has been proven according to the relevant standard, regardless of truth. Now, it is certainly true that our legal systems include such rules but I cannot see why truth would become immaterial given those rules. My argument focuses on the conceptual relation between truth and proof. Is it possible to prove that *p* and, at the same time, claim that it is false that *p*? Such a conjunctive claim would sound rather paradoxical, or even contradictory. Why? Because of the conceptual relation of truth and proof: to prove that *p*, is to prove that it is true that *p*.

However some prominent scholars contend that the conceptual relation between truth and proof does not hold in legal matters. In particular Jordi Ferrer has claimed that the sentence "It is proven that *p*" is not synonymous with "It is true that *p*", but synonymous with "There is sufficient evidence in favor of *p*".[19] If this is right, it can perfectly happen that it is proven that *p* while it is false that *p*; this happens when the standards of proof are met but in fact it is false that *p*. One could reply that the relevant difference in such cases is between being proven and being *considered as* proven; in such cases, when the standard is met but in fact it is false that *p*, it is not proven that *p* but it is erroneously considered as proven (unless there is a justified divergence of substantive truth and judicial findings, as I will say in the next section). Moreover, suppose you are a party in a trial: the act of presenting some evidence and the speech act of describing such evidence as relevant[20] to the factual issue in hand commits you to say that what you claim about such evidence is true. Otherwise it would be fine to say things like "I have the proof that *p* but it is false that *p*". According to our conceptual framework, if I am right, it is legitimate to draw an inference not only

[17] To be just, a normative conclusion needs to follow not only from an acceptable normative premise, but also from a true factual premise. Were the minor premise false, the norm would be applied to the wrong situation. In the Italian literature, see Taruffo (1992) defending this thesis for the civil cases and Ferrajoli (1989) for the criminal ones. Furthermore Ferrajoli claims that truth is required both on legal and factual claims (which is different from saying that legal norms themselves could be true); for a critique of Ferrajoli on this issue see Villa (1999, 152-8, 181-91).

[18] I make abstraction from some technicalities like the distinction between burden of proof and burden of production. They do not touch on the present conceptual point. Cf. Prakken and Sartor (2006).

[19] Ferrer (2004, 38-41). See also Ferrer (2006) and Pardo (2010).

[20] Because it directly proves what is at stake or permits to draw an inference about it.

from "I claim that *p*" to "I claim that it is true that *p*", but also from "I have the proof that *p*" to "I have the proof that it is true that *p*".[21] This is not to equate truth with proof, but to recognize that an evidentiary claim implies the concept of truth and a truth-claim. To show this, it is useful to reformulate the so-called Moore's paradox. Such a paradox is known from a passage of Wittgenstein's *Philosophical Investigations* (second part, X). It concerns the relation between reality and belief, the paradox being, in my reading, that a conceptual difference such as the difference between reality and belief implies nevertheless a certain connection between the two, so as to make some statements paradoxical as the following:

(A) It rains but I believe it does not.

We can reformulate Moore's paradox considering the relation between truth and proof:

(B) I have the proof that *p* but it is not true that *p*.

Such a statement as (B) is paradoxical by virtue of the conceptual relation between truth and proof. *If I claim I have the proof that* p *I am conceptually committed to claim that it is true that* p *and I am not entitled to claim that it is false*. This goes beyond the criminal-civil divide and the different standards of proof. No one, both in civil and criminal cases, would ever claim something like (B), or to have a false proof of the fact he is trying to prove.[22]
This could be rephrased in terms of argumentation. Imagine someone who claims, first, that he has the proof that *p* and, second, that one can infer from it that it is false that *p*. It would be not only strange but also self-defeating. The idea of providing an argument for *p* and for not-*p* at the same time is a very bad one. One has to give arguments for (the truth of) *p* and avoid arguments that lead to the opposite conclusion.
In sum, I would say that truth is (*i*) a conceptual presupposition of assertive discourse in general and of factual claims in particular (in a trial context as well), and (*ii*) a goal of our epistemic practices in general and of evidentiary ones in particular (in a trial context as well, with the specification that truth on trial is not pursued for itself but for the sake of justice).[23]

5. *Substantive Truth vs. Formal Truth*

Now the reader may ask what concept of truth is at stake here. In the preceding pages I almost implicitly used a *correspondence theory of truth*. A statement or a belief is true when it corresponds to the fact it is about. The correspondence idea has some problems from a philosophical point of view but we don't need to address them here.[24] It suffices to say, in my opinion, that a

[21] This could be easily put in inferentialist terms. Cf. Canale and Tuzet (2007).
[22] As a counter-argument, Christian Dahlman suggested me to consider the following: That there is legal proof that *p* means that there is a legal obligation to act as if it were true that *p*; but, given that it is logically possible to have an obligation to lie, this does not show that there is a necessary conceptual connection between truth and legal proof. To my impression, in the possible world of a lie-obligation the concept of proof would be different indeed; I deal with the concept of proof that is used in our epistemic and legal practices, where to claim that it is proven that *p* is to claim that it is true that *p* and there is sufficient evidence for it.
[23] "The truth needs to be found not for its own sake but for the application of rules and principles" (Pastore 2003, 333-4). But Pastore supports an epistemic concept of truth. "Truth is an ideal that consists in the warranted assertibility of statements" (Pastore 2003, 335).
[24] Cf. Horwich (1998), Engel (2002), Künne (2003). Notice that a minimalist or disquotationalist conception of truth rules out the difference between cognitivism and non-cognitivism in normative matters. "Expressivism in ethics says that ordinary moral judgements such as "torture is wrong" are *not* truth-apt: they are neither true nor false, but are expressions of feeling or emotions. But, on the minimalist picture, if truth-aptness amounts just to "syntactic

correspondentist concept of truth is the one we use in our ordinary discursive and inferential practices. Does the same hold for truth-claims in a legal trial?

Well, things are more complicated on trial. Correspondingly, legal argumentation on truth is more complicated than everyday argumentation on truth. There is a well-known distinction between *formal* and *substantive* truth. The former consists in judicial findings; the latter in correspondence with facts. Some scholars take the distinction to mean that a trial is only concerned with formal truth.[25] I subscribe to the view of those who contend that both are legally important. Robert Summers, in particular, has claimed that a primary function of trial court procedures and of rules of evidence in cases before courts in which facts are in dispute "is to find the truth" in a substantive sense.[26] This is the case not only for reasons of justice (just application of the law) but also for reasons of utility.[27]

Therefore, in a well designed system "judicial findings of formal legal truth generally coincide with substantive truth in particular cases".[28] But formal legal truth may, in a particular case, fail to coincide with substantive truth. This may happen for "pathological" motives (e.g. lack of competence of the triers of fact) but also for good reasons (e.g. protection of fundamental rights). Summers calls the latter situation "rational divergence".[29] Some rules of exclusion in common law countries determine a right-oriented divergence (think of evidence being excluded because illegally collected). But some of the divergences are also truth-oriented. Such is the case of hearsay evidence exclusion.

> It is, of course, true that to exclude hearsay evidence in some particular case may be to defeat the truth. Yet one rationale for the general exclusion of hearsay evidence is simply that the fact-finder is likely to accord such evidence too much weight, given that the party who would merely be quoted in court is not actually present before the court and so is not available for cross examination. And another rationale, also truth serving in nature is that exclusion of hearsay may induce the hearsay's proponent to introduce instead the live testimony of the witness who would then be subject to cross examination.[30]

So, some divergences are rational because they are designed to protect some fundamental rights and some are rational for epistemic reasons: according to Summers it is rational to exclude a kind of evidence which is not reliable in general (like hearsay evidence) even if in a particular case it might be the only way to find the truth. So *coincidence of substantive and formal truth is the rule and divergence is the exception*. Such divergences are the price we pay for the fact that the law has many purposes that sometimes conflict with one another and substantive truth is one among them.[31]

This has important consequences for legal argumentation on facts: arguing on facts may consist in arguing either on substantive or on formal truth, depending on the case; in particular, in the latter situation, one has to argue that there are good reasons to exclude some evidence and to stick to formal truth.

In the light of this our previous claim should be made weaker. Substantive truth is a necessary condition of justice except in those cases in which the discovery of substantive truth would

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discipline", the expressivist view is automatically ruled out. This can be seen easily if truth-aptness is just a matter of satisfaction of the disquotational schema" (Engel 2002, 82).

[25] See e.g. Carnelutti (1915, 31-6) and Kelsen (1945, 135-6).

[26] Summers (1999, 497).

[27] "If a rule of law is judicially applied to the true facts it envisions, the rule can also be tested for the adequacy of its formulation and for the soundness of any means-goal hypothesis it embodies" (Summers 1999, 498).

[28] Summers (1999, 498). But one may suspect this is unrealistic.

[29] Summers (1999, 501 ff.).

[30] Summers (1999, 502-3).

[31] "If the system is well designed, and if, in a particular case of divergence, relevant rationales for such divergence are in play, the divergence is merely the price we pay for having a complex multi-purpose system in which actual truth, and what legally follows from it, comprise but one value among a variety of important values competing for legal realization" (Summers 1999, 511).

undermine a fundamental value protected by the law and deemed as more important than discovering the truth in a particular case.

A similar point could be made in philosophy about truth and justification.[32] Richard Rorty has claimed among others that there is no practical difference between truth and justification: even if it is possible in principle to distinguish truth from justification, what we aim at in our discursive practice are justified beliefs and assertions.[33] But imagine that "*p*" stands for "*A* killed *B*". If "*p*" is true, it is correct to convict *A*. If "*p*" is false, it is not correct. Now imagine that it is justified to believe that *p*, but "*p*" is false. It might be justified to believe that *p* since there might be some (in fact deceptive) evidence to that conclusion. Would it be correct to convict *A* in such a case? Our intuitions may differ, but even those who claim that it would be legally correct should give a specific argument for that, for instance the distinction between formal and substantive truth and the possibility of some justified exceptions to their coincidence. This supports the claim that truth and justification are not the same and their difference *makes* indeed a practical difference. The same holds for substantive and formal truth, and it is false that only the latter is relevant to law.

Eugenio Bulygin has made the point very clearly.[34] He says that the fact that a proposition has been proven in court does not entail its truth (one could say, better: the fact that it has been considered as proven does not entail its truth), where truth is intended in the correspondentist sense via the semantic rules that link our words and sentences to reality.[35] He gives the example of Dmitri Karamazov, who was accused and convicted for a crime he did not commit.

> He did not kill his father and so, according to the penal law, he ought not to be punished. But there was a certain amount of evidence against him and the jury decided that he had killed his father. Once this decision had been taken, the judge was under an obligation to sentence him to prison. So he did and his decision was perfectly lawful, i.e. it was justified by the law of procedure, though not by the penal law.[36]

This is an interesting way to put the matter: the decision was justified by procedural law, not by criminal law. There was a divergence in that case between substantive and formal truth, to put it in Summers' terms. Does it follow from this and similar cases that substantive truth is immaterial in court? Not at all. Two considerations are in order for Bulygin: first, what has to be proven in criminal cases is determined by criminal and not by procedural law; secondly, the fact that the jury decision, though lawful, was not justified by criminal law "enables us to say that it was wrong, that a judicial mistake had been made in the case of Dmitri Karamazov".[37] I completely agree with this and would repeat Summers' diagnosis: this is a price we pay for the fact that law is a multi-purpose system, where the purposes of criminal law sometimes conflict with those of procedural law, where the purpose of final decisions conflicts with the purpose of correctness, etc.

Something similar has been pointed out by Mirjan Damaška. Given that it is possible to discover the truth (notwithstanding the difficulties stressed by Frank and other fact-skeptics), he wonders if it is

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[32] On the conceptual distinction between truth and justification, cf. Engel's remarks in Engel and Rorty (2005, 38-40). Cf. Wright (1992).

[33] See his remarks in Engel and Rorty (2005, 72-3). *Contra*, see Haack (2004b, 43).

[34] Bulygin (1985, 162): "it may be true that *A* ought to pay his tax and that he did not pay it and yet the judge ought not to sentence him (if e.g. it has not been proved in court), and vice versa, it may be true that the judge ought to sentence *A* for not having paid his tax, though it is not true that he did not pay it."

[35] "The semantic rules determine to what individuals the names "Tom" and "Peter" refer and what relation is designated by the predicate "killed". The sentence "Tom killed Peter" is true if and only if the individual referred to by "Tom" stands in the relation designated by the predicate "killed" to the individual referred to by "Peter". What a judge says about Tom's killing Peter is absolutely irrelevant for the truth of this sentence. So in order to find out whether the sentence "Tom killed Peter" is true the judge must know the semantic rules of the language (must understand the language) and he must discover certain facts" (Bulygin 1995, 20).

[36] Bulygin (1985, 162). Cf. Bulygin (1995, 20-4).

[37] Bulygin (1985, 163). Such a decision produces its legal effects (what was stressed by Kelsen) but this does not mean it is correct.

really important to do that.[38] He thinks it is (for reasons of justice and utility, as I understand him) with some exceptions however:

1) the litigation with a heavy law-making component, in which the reconstruction of what happened is rather unimportant (in the U.S. 1965 case *Griswold* vs. *Connecticut*, for example, whether an individual instructed a couple to use contraceptives "is not nearly as important as the chance to determine the constitutionality of a criminal statute banning this activity"[39]);

2) the civil lawsuits in which conflict-resolution is more important than truth-discovery (given also that in such cases "litigants are sovereign in determining what is in issue between them through admissions, stipulations and settlements"[40]);

3) the criminal cases where an individual has to be protected from the abuse of power by public officials (given that "the criminal process also serves a variety of needs and values that are independent from and potentially in conflict with the drive toward fact-finding accuracy"[41]).

One can easily see that the multi-purpose diagnosis applies also here, and my weaker claim should take these exceptions into account as well: factual truth is a necessary condition of justice except in those cases in which it is less important than other legal purposes that are in conflict with it. In such cases arguments on facts would be different than elsewhere because they would focus on the normative features of the facts, so to say, rather than on the facts themselves trying to provide a true explanation of them.

But notice that some truth-claims are also made in such cases: to protect an individual from the abuse of power by public officials, one has to claim that (it is true that) such an individual is in need of protection and is entitled to this by the law; to give conflict-resolution more importance than truth-discovery in certain civil lawsuits, one has to claim that (it is true that) the case in hand is of the relevant sort, the parties want to determine a certain settlement and the law gives them the power to do it; and even in deciding a constitutional case one has to claim that (it is true that) some principles apply to the case, should be balanced in a certain way, etc. Of course the truth-makers of such normative claims, when these are true, are different from, and somehow more problematic than, the ones of factual claims on what happened. However what strikes me as conceptually wrong is to say that those claims are not truth-apt and legal decisions in such cases dispense with truth altogether.

6. *Legal Argumentation and Fallibilism*

I have given some arguments in favor of the view that truth is a necessary condition of justice. Now I would like to show that legal argumentation is truth-oriented and that fallibilism requires adversary procedures.

If the above account is correct, indeed, *legal fact-finding aims at truth and so does legal argumentation concerning the relevant facts* (unless it has been shown there are good reasons to dispense with substantive truth and stick instead to formal truth). Factual argumentation in law starts from the evidence at disposal and tries to provide the best explanation of it.[42] What happened? Who killed Dmitri Karamazov's father? What was the drug that caused the injury? And so on. Empirical hypotheses are made and should be assessed on trial. The fighting parties usually provide conflicting hypotheses that judges or jurors consider and assess. As I contended elsewhere,[43] the first inferential step of the fact-finding process is abductive: abductions are drawn from the evidence to a hypothesis capable of explaining it. Now abduction is an uncertain inference, a non-

[38] Damaška (1998, 301 ff.).
[39] Damaška (1998, 303).
[40] Damaška (1998, 304).
[41] Damaška (1998, 305).
[42] See Pardo and Allen (2008). Cf. Bex et al. (2010).
[43] See Tuzet (2005). On evidentiary reasoning as abductive cf. Pastore (2003, 340).

deductive device whose tentative conclusions should be carefully checked by further inferential steps and empirical tests.[44] Judges and jurors undertake a *reductio ad unum* process in which the (epistemically and legally) best explanation of the evidence is to be selected.

What are the argumentative features of such an inferential process? Given that abductions aim at true explanatory hypotheses, an easy answer to this question would be that abductive in particular and factual argumentation in general is truth-oriented as well. (Or at least one could say that argumentative claims are truth-claims even if insincerely made: if I argue that *p* I argue that it is true that *p*, no matter what I really think about it). But this answer does not take into account the specific features of a trial and, more in detail, the features of a trial according to the adversary model.

A trial context is a conflict context. In this sense it is true that it does not consist of a dialogical or collaborative effort for a true representation of what is at stake. Parties are "fighters" (who have to follow some rules anyway) and trial argumentation has dialectical and rhetorical aspects that are absent from scientific argumentation. Nor is trial argumentation the *ex post* elaboration of an individual mind, as it goes for judicial argumentation justifying the decision that was made;[45] it is constitutively dialectical and conflicting. This is remarkably true of the adversary trial, if judges are mere "referees" who do not participate in the fight. Now recall the first objection I made to Haack's account: it contrasts the pathology of the adversary system with the physiology of science and with the physiology of the inquisitorial system. To this objection one could reply that what we are discussing is in fact adversarial physiology, not pathology! It is perfectly normal that parties fight for their case. The system is designed for this, not for the collaborative discovery of truth. Legal argumentation on trial is not supposed to be a disinterested effort for truth and justice. It is supposed to be an effort for success. It is advocacy, not inquiry. Or so the reply goes.

But somewhere Haack is less critical against the adversary system, when she claims for instance that the way of adversarialism and exclusionary rules "is not an inherently bad way to determine the truth in legal disputes; but as it presently works it isn't nearly as good a way as we would ideally like it to be".[46] One of the reasons for this is that neither system is perfect, of course; what matters, focusing in particular on the system of exclusionary rules, is what parties do in fact: considering Bentham's strategy for which no species of evidence whatsoever ought to be excluded, "just as the inclusive strategy that Bentham urges would work poorly unless the advocates for the parties do a decent job of seeking out relevant evidence and of revealing the flaws in the dubious stuff admitted along with everything else, so too the exclusionary strategy built into our rules of evidence will also work poorly unless the parties do a decent job of challenging dubious stuff to get it excluded".[47] No rule produces a decent result without people who do a decent job. This is fine, but there is something more.

When Haack criticizes the epistemological confusions in some U.S. Supreme Court's decisions as *Daubert* and the bad methodologies supported by them, she seems to agree on the fundamental thesis that legal proceedings *should aim at truth*.[48] But she seems to deny that the adversary procedure is a good means to the end of truth. Now this view goes against the traditional opinion on the epistemic virtues of the adversary system and of its components like cross-examination, according to which they are the best means we have to discover the truth.[49] So, in the traditional view, the rationale for the adversary system is not only legal and moral (to give everyone the opportunity to discuss his case before an impartial judge or jury) but also epistemic, since cross-examination and adversary procedures permit us to find out the truth much better than inquisitorial

[44] "*No* standard of proof can fully eliminate the uncertainty or render the kind of abductive inferences used in legal reasoning truth-preserving" (Laudan 2005, 356).
[45] Cf. Feteris (1999) in particular.
[46] Haack (2004b, 61).
[47] Haack (2004b, 61).
[48] See in particular Haack (2004b) and (2009). In the Italian literature cf. Taruffo (2009).
[49] "Adversarial procedure is the best aid to truth-finding" (Pastore 2003, 341). Cf. e.g. Twining (2006, 85-6).

or other procedures do. Wigmore's dictum that "Cross-examination is the greatest legal engine ever invented for the discovery of truth" is often quoted to this effect. Now, apart from the technicalities of cross-examination and other legal devices, I would like to indicate an argument which is in my opinion crucial for supporting adversary procedures. The argument is *fallibilism* and is very simple: given that humans are fallible, adversary procedures are epistemically more reliable than inquisitorial ones.

"Fallibilism" as a slogan was introduced in contemporary philosophy by Charles Peirce. His pragmatist philosophy emphasized the epistemic limitations of human cognition and, at the same time, resisted a skeptical position on knowledge. Haack is well aware of it and of the distinction between fallibilism as a theoretical claim about human cognition (human liability to hold false beliefs) and as a methodological caveat (we cannot ever be sure of what we believe, since we are fallible, so we should be open to belief revision in the light of new evidence).[50] But she seems to forget about it when she deals with adversary and inquisitorial models. True, she does not support inquisitorial models as such but rather suggests to introduce inquisitorial correctives in adversary systems, or, as she calls them, "adaptations of adversarialism" (in particular, court-appointed experts in matters of scientific evidence).[51] Moreover another pragmatist philosopher, William James, stressed the human need of making decisions in due time and, in particular, the legal need to settle questions one way or another:

> in human affairs in general the need of acting is seldom so urgent that a false belief to act on is better than no belief at all. Law courts, indeed, have to decide on the best evidence attainable for the moment, because a judge's duty is to make law as well as to ascertain it, and (as a learned judge once said to me) few cases are worth spending much time over: the great thing is to have them decided on *any* acceptable principle, and got out of the way.[52]

This recalls Haack's contrast between the open-ended fallibilism of science and the law's concern for finality: Peirce's fallibilist pragmatism fits science and our epistemic life; James' humanist pragmatism fits our practical life. Therefore Peirce's fallibilism seems to support Haack's position and the idea that trial procedures (or at least adversary procedures) are not a good means to the end of truth. But I think we should remind of fallibilism when we compare adversarial with inquisitorial procedures. It is in practice impossible to measure their error rates, but I believe it is a fair guess to say that the former is a better guarantee than the latter against fact-finder's errors.[53]

To resume. When I argue for "*p*" I argue for the truth of "*p*" and, since I am fallible as any other human, the best way to decide about "*p*" is to confront the different opinions about it. The adversary system is designed for this.

So, if the traditional view is correct, legal argumentation on factual claims is truth-oriented and fallibilism requires adversary procedures. Then judicial reasoning and argumentation can be conceived as *ex post* efforts to give an adequate justification to the decision made, both in hard and easy cases, on the basis of what the parties discussed on trial.[54]

Acknowledgments

[50] See e.g. Haack (2009, 2). On Peirce's fallibilism see also Tiercelin (2005).

[51] See again Haack (2004a). Cf. Haack (2003b).

[52] This is a passage from § VIII of *The Will to Believe* (1897), now in James (1968, 728).

[53] Cf. Laudan (2006). But once Peirce defined "atrocious" the adversary legal procedure according to which bias and counter-bias would be favorable to the extraction of truth (see Haack 2004b, 49). In correspondence Haack has remarked that given the limitations of time and resources an adversarial process can be, not a perfect way of arriving at the truth but, a good-enough way; but this in her view depends on some assumptions which are rarely true in practice, e.g. that both sides have roughly equal resources.

[54] See Moreso (1996, 93): "in neither hard nor easy cases can logic alone tell us which are the applicable normative premises, nor whether the statements describing the facts of the case are true (the scope of external justification); but in both cases logic serves to test whether steps taken from the premises to the conclusion are correct (the role of internal justification)."

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