EPISTEMIC VIRTUE AND ACCEPTANCE IN LEGAL FACT-FINDING

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Virtude epistemológica e aceitação na investigação dos fatos no direito

ABSTRACT

The purpose of this paper is to outline the way in which an epistemic virtue approach can be used to address epistemological issues in law. My claim is that responsibilism is the right kind of approach. First, I will briefly examine the difference between this conception and the reliabilist conception of intellectual virtues. Then, I will explore two major responsibilist projects that contain several features required for an appropriate virtue approach to legal fact-finding. Next I will discuss the belief/acceptance dichotomy and attempt to show that it is acceptance – rather than belief – the right type of propositional attitude to be held by legal fact-finders, and that it may be regulated by intellectual virtues. In the end, it will be argued that the conjunction of a responsibilist epistemology and a theory of acceptance constitutes a good theoretical framework for the analysis of legal reasoning about matters of fact.

Keywords: Epistemic Virtue, Belief and Acceptance, Responsibilism, Legal Fact-Finding.

Resumo

O objetivo deste artigo é delinear o modo como uma abordagem a partir da epistemologia da virtude pode ser usada para lidar com questões epistemológicas no direito. Minha alegação é que o responsabilismo é um tipo correto de abordagem. Primeiro, vou brevemente examinar a diferença entre esta concepção e a concepção confiabilista das virtudes intelectuais. Em seguida, vou explorar dois grandes projetos responsabilistas que contêm diversas características requeridas para uma abordagem a partir da teoria das vitudes que seja apropriada para a investigação dos fatos no direito. Depois discutirei a dicotomia crença/aceitação e procurarei mostrar que é a aceitação – e não a crença – o tipo certo de atitude proposicional a ser assumida pelo investigador dos fatos no direito, e que esta atitude pode ser regulada pelas virtudes intelectuais. No final, será argumentado que a conjunção entre uma epistemologia responsabilista e uma teoria da

aceitação constitui um bom quadro teórico para a análise do raciocínio jurídico sobre questões de fato.

Palavras-chave: Virtude epistêmica, Crença e aceitação, Responsabilismo, Investigação dos fatos.

1. INTRODUCTION

In recent years, there has been an increasing interest in applying virtue epistemology (VE, hereafter) to legal epistemology[1]. This work pretends to be a modest contribution to the field. Rather than aiming at the development of a novel version of VE applicable to law, it merely attempts to show the general features that such an approach would require and to stress a very concrete point: should the display of a virtuous epistemic character by the legal fact-finder have any role in achieving a successful decision about the matters of fact disputed in a trial, it should be acknowledged that what is virtuously produced is not necessarily a belief about the account of facts object of the decision, but an acceptance of it. Given certain peculiarities of the inquiry in question, belief may not necessarily be the propositional attitude held by the inquirer in regard with the account of facts taken as proven.

Our objectives in this work are the following: first, to describe the type of VE that best works for legal fact-finding. Second, to show that any attempt to apply that type of theoretical framework to law must recognize that exercising intellectual virtue in the legal context aids judges or jurors (or whoever is tasked with the finding of facts) in appropriately forming an acceptance -rather than a belief- about the version of facts declared as legally proven.

That being said, the discussion will follow the next order: the first part will sketch two major contributions to the field of VE. One proposed by Linda T. Zagzebski[2], and another one by James A. Montmarquet[3].

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1 A few examples of the literature on the topic are AMAYA, 2008, 2009, 2011, and 2012; LAI, 2012.

2 ZAGZEBSKI, 1996.

3 MONTMARQUET 1987, 1993, and 2007.

Both positions belong to a conception of VE known as *responsibilism*[4]. Before presenting the core theses of these contributions, we will succinctly review some differences between responsibilism and a different version of VE known as *virtue reliabilism*. Again, we must bear in mind that we have no intention here to produce a novel VE, so we will only outline the features of the type of epistemological project we find attractive for law[5].

The second part will be devoted to explain the distinction between belief and acceptance. As said before, the aim of drawing this distinction is to show that it is acceptance, rather than belief, the propositional attitude to be held by triers of fact. On the final part of the work it will be suggested that if we attempt to use a responsibilist VE to give account of (some of the) epistemological problems related to legal reasoning about matters of fact, we need to include the dichotomy belief/acceptance as part of the conceptual framework. In the context of legal fact-finding, displaying a virtuous epistemic behavior would have as an ultimate goal to justify the agent's *acceptance* of a version of the facts and not necessarily to justify her *belief* in it.

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4 The label "responsibilism" is owed to CODE, 1984 and 1987. However, it must be said that responsibilism has several varieties (see BAEHR, 2011). The reason we choose these two approaches is that they share an important feature: both projects include an attempt to give conceptual priority to the notion of 'intellectual virtue' over other notions like 'justification' and 'knowledge'. In contrast with this, other responsibilist approaches (like Code's), don't seem concerned with such a task.

In our view, explaining how is it possible to reach a truthful account of the facts that triggered a legal dispute is one of the central tasks of legal epistemology. So, if we are interested in applying VE to law in order to explain (or partially explain) what a 'true verdict' is in terms of something like "exercises of intellectual virtue' or 'virtuous epistemic behavior', then we would require an approach to VE with the feature in question.

5 We may ask what makes a responsibilist approach to legal epistemology particularly attractive and how does it differ from other approaches. Answering this would require a paper itself. So, for the sake of brevity, we can only say that legal decision about matters of fact seems in the best of cases a fallible enterprise, thus we can always remain a little skeptical about the truth of what is taken as proven in a courtroom. In the face of such a scenario, we may ask ourselves why we should abide by the outcome of any trial at all. Well, it happens that a responsibilist VE provides us with the theoretical resources required for placing the effort and appropriate epistemic behavior of the finder of facts at the very center of the epistemological evaluation of these outcomes. So, even in the strongest skeptical scenario, we would still be able to rescue something of value with the theoretical framework of a virtue approach: a justified outcome. If the fact-finder behaved in a virtuous manner and did everything that could be done in the search for truth, then she may be justified in holding such outcome as true, even if it is not true.

In regard with the question about how this approach differs from other approaches we can say that the main difference has to do with the center of the analysis. Instead of the traditional institutional-design-centered epistemology, instead of thinking about ways of amending Evidence Law so that it makes the finding truth more likely, a virtue approach is agent-centered. For recent work on how the virtue (or aretaic) approach to the problem of justification in adjudication differs from other approaches, see AMAYA, 2012.

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2. ON VIRTUE EPISTEMOLOGY

The origin of this contemporary movement in epistemology is usually attributed to Ernest Sosa[6]. The idea behind this "virtue turn" was to avoid the apparent dead end to which the debate between foundationalism and coherentism leads. Sosa argues for a readjustment in the analysis in the same fashion as it had happened in moral philosophy. The appearance of virtue ethics brought the moral agent to the center of the analysis in an attempt to leave the traditional action-centered approaches behind. In epistemology the idea would be to make the analysis agent-centered, instead of belief-centered.

Traditionally, epistemology was concerned with the credentials of beliefs. It was concerned with the conditions that should be met by a belief in order to become knowledge. These conditions were presented in an abstract way and little was said about the believer and the role of her epistemic qualities in the enterprise of knowing. What VE proposes is to place the epistemic agent at the very center of epistemological analysis. It is the agent's epistemic performance what must be studied and evaluated since knowledge and/or justified belief are the product of her performance.

Another feature of several contributions to VE is the attempt to give conceptual priority to the notion of *intellectual virtue* over the notions of knowledge and justified belief. In other words, VE tries to explain concepts such as knowledge or epistemic justification in terms of the primitive concept of intellectual virtue.

Unsurprisingly, one of the first issues brought into discussion in VE is that about the nature of intellectual virtue. On this regard, two major approaches may be distinguished: the *reliabilist* approach and the *responsibilist* approach. Broadly speaking, the reliabilist approach – among whose most prominent defenders we can find Ernest Sosa, John Greco and Alvin Goldman[7] – conceives intellectual virtue as 'cognitive faculties' whose exercise allow the agent to form a larger proportion of true beliefs than false beliefs. Typical examples of virtues in this sense are memory, sight and intuition. In opposition to this idea, responsibilists think that intellectual

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6 SOSA, 1980.

7 SOSA 1991, 1992, 2007; GRECO 1992, 2002, 2010; and GOLDMAN, 1992 and 2001.

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virtues are better understood as 'traits of character' like intellectual humility, courage or sobriety. It is through the possession and exercise of these traits that the agent achieves epistemic success. Zagzebski and Montmarquet offer two important developments on the line of responsibilism. We will explore them in this work.

It is important to remark that the disagreement between reliabilist and responsibilists about what really counts as a virtue goes beyond the mere terminological dispute of what the correct way to use the word 'virtue' is. Simply agreeing to keep the label of 'virtue' for 'character traits' and stating that 'reliable cognitive faculties' are not exactly 'virtues' (or vice versa) cannot settle the discussion. At the center of it lies what different philosophers take as more fundamental for epistemology to fulfill its task in clarifying what knowledge is[8], how it is attainable and what kind of capacities or dispositions are truly important for succeeding in the enterprise of knowledge[9].

Roughly speaking, the reliabilist approach considers that it is the truth-conduciveness of cognitive faculties what matters most in achieving knowledge or epistemic justification. Thus, if a true belief is reached through the exercise of a cognitive faculty that tends to produce more true beliefs than false beliefs, then the belief is epistemically justified. In contrast, the responsibilist approach is more concerned with matters related to the agent's duties as a knower. In general terms, virtuous epistemic behavior consists in conscientious efforts that the agent must display in the search for knowledge. Epistemic success is reached through such efforts. So the philosophical endeavor of explaining concepts like epistemic justification or knowledge in terms of epistemic virtues makes room for a clash of diverging intuitions about how such things can or should be achieved.

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8 Or even if it is its unique or central task. See, for example, ZAGZEBSKI, 2001, on this regard.

9 The labels "virtue reliabilism" and "virtue responsibilism" were first suggested in Axtell, 1997. It is interesting to notice that there is a natural connection between virtue reliabilism and externalism, and between virtue responsibilism and internalism. In broad terms, the virtue reliabilist approach thinks of knowledge as something owed to the exercise of a reliable cognitive faculty that enables the agent to successfully engage with the world, while responsibilism thinks of it as something that is owed to the agent's attitudes, actions and choices, rather than to faculties alone. The responsibilist view advocates for a stronger link between belief and grounds for believing than the one that virtue reliabilism seems to endorse. This resembles the externalist/internalist debate in the sense that internalism (in very broad terms) suggests that grounds for believing must be accessible to the agent, while the externalist view denies that such a strong link (such access) is necessary. For more on this connection, see AXTELL, 1997, and BAEHR, 2011, p. 6-8 and 47-67.

Adding to our understanding of this debate, let us briefly consider an objection to the responsibilist conception suggested by Greco[10]. A central flaw in responsibilism as an epistemological project may lay in the fact that such an approach states requirements for knowledge so strong that the resulting definition of knowledge seems implausible. For example, Zagzebski defines knowledge, as we will see, as true belief that arises out of 'acts of intellectual virtue'[11]. Consider a case like this: A pedestrian realizes that a bicycle (or something moving really fast) is dangerously heading towards her, so she immediately gets out of the way. Such realization would only amount to knowledge if it is reached through an act of intellectual virtue.

The intuitions of many would be that it shouldn't be questioned that the pedestrian actually *knew* that she was about to be ran over, even if it's true that the belief was not the result of an 'act of intellectual virtue'. An acceptable epistemology should be able to take this as a paradigmatic instance of knowledge. A responsibilist epistemology appears to leave many everyday cases intuitively regarded as knowledge out of the definition.

It may be considered that the responsibilist approach at best tells us something about the way in which human cognition works in a certain type of situations, but is not the right approach to elucidate the concept of knowledge. Yet, the responsibilist still has in her favor the fact that there seems to be an important ethical dimension in the enterprise of knowledge that is central to epistemology as a normative discipline. The responsibilist may rightfully argue that there is more to an accomplished and successful epistemic life than the mere capacity to reliably arrive at true beliefs.

Now, setting aside the objections to responsibilism as a general approach to epistemology, something must be said about why it should be favored when addressing issues in law. And the reason for doing so is quite straightforward. As we mentioned (see note 2), it is interesting to explore how a true decision about matters of fact in a trial (or at least justified one) is reached through the exercise of intellectual virtue. However, the problem for reliabilism is that explaining knowledge about the facts that triggered a legal dispute

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10 GRECO, 2002 and 2000.
11 ZAGZEBSKI, 1996, p. 270.

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just in terms of the possession of certain cognitive faculties such as acute vision or good memory seems to fall short.

The search for truth in a trial is an endeavor that requires effort and commitment. In order to fulfill her task, a legal fact-finder must be moved by a *due regard for truth*. Being devoted to the finding of truth is the most fundamental element of a virtuous epistemic character and is a motivation that is displayed in several manners, like being intellectually sober or meticulous. Not being virtuous -being gullible and careless, for example- would most likely lead the fact-finder to failure. There are many epistemic perils in legal fact-finding, like the possibility of the information being manipulated by the parties. So, even if the idea of knowing through 'acts of intellectual virtue' seems like asking too much in cases like the pedestrian and the cyclist, the case of legal fact-finding seems to rightfully ask for that much.

Having this in mind, we will now proceed to survey the VE projects of Zagzebski and Montmarquet, both of which share several desirable features for an appropriate epistemological approach to law.

2.1 Zagzebski's VE

Zagzebski believes that open-mindedness, thoroughness, intellectual courage, carefulness, etc. are the sort of excellences we can properly call "virtues". There are many types of excellences. Faculties like good memory or accurate vision are excellences, indeed. However, not all excellences are virtues.

Virtues are praiseworthy excellences. It's true that having a remarkably accurate vision would give cause for praise, but this wouldn't be the sense of praiseworthiness that matters for virtue. The sense in which virtues are praiseworthy can only be understood bearing in mind the blameworthiness of vice.

It is in the face of the possibility of being vicious that the being virtuous becomes commendable. Even if a highly reliable cognitive faculty is an excellence, the lack of it wouldn't be blameworthy. Consider the case of accurate eyesight. It makes as much sense to blame people for not having a remarkably accurate vision just as it makes sense to blame them for not having big hands. In contrast, it makes perfect sense to blame people for being utterly naive or close-minded. Being a mathematical genius may be worthy of praise, but there is no blame in not being so.

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Praiseworthiness is the most distinctive element of the traits we can rightfully label as virtues. The triumph of virtue over vice is an admirable endeavor. Being virtuous in the face of the possibility of not being so is the way in which epistemic virtues are praiseworthy and reliable cognitive faculties can't be.

Praiseworthiness also supposes an element of choice and voluntary control not clearly present in the exercise of cognitive faculties. We can't choose to have a good memory, but we can choose to be epistemically careful or reckless. If intellectual virtue is something over which we have voluntary control (at least to a relevant or substantive extent), there is room for responsibility discourse about its presence or absence. We can be held responsible for not carrying out a careful inquiry, but we can't be blamed for not having a reliable memory, since usually we have no control over this.

That being said, the structure of virtue has two components[12]. The first is a *motivational component*. Each virtue can be defined in terms of a particular motivation. Open-mindedness is the motivation to be receptive to ideas of others. Intellectual courage is the motivation to withstand the opposition of others and persevere with one's ideas if we deem them as valuable. Intellectual sobriety may be understood as the motivation to carefully examine what we are told in the light of the evidence supporting it. The point is that having a virtue means having a motivation to epistemically behave in a way that (intuitively) allows us to achieve a true belief. It means having the motivation to act in a way that puts us in the right direction to make cognitive contact with reality.

The motivational component has two aspects. One is the particular and distinctive motivation each virtue has (staying open to the ideas of others, defending our views in the face of opposition, etc.). The other one is the motivation to achieve cognitive contact with reality. All intellectual virtues share this end. They only differ in the particular "road" each one suggest for achieving that end.

However, merely having the motivation to epistemically behave in a way that permits us to achieve cognitive contact with reality does not guarantee we reliably attain it. So, virtue needs a second component: a success component. Such component is brought by

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12 ZAGZEBSKI, 1996, p. 165-184.

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entrenchment. Virtues are acquired habits. To successfully operate, they must lead the agent to a stable and consistent resistance of vice. Having a virtue means that a certain motivation is rooted deeply in our character.

The motivation to, say, fairly consider the ideas suggested by others must actually make the agent receptive to those ideas in order to effectively achieve its end. Cognitive contact with reality can only be virtuously achieved if the motivation to be open-minded is entrenched in the agent's character in a fashion that keeps him open to every reasonable new idea and keeps him away from any bias derived from vicious inclinations. So, an agent is not truly open-minded if he stays receptive only to ideas coming from people he likes. Virtuous character demands that the right motivation endures the temptation to behave viciously. A motivation is authentically virtuous only if it disposes the agent to act in a way that, avoiding vice, allows him to form a true belief.

Summarizing, the notion of virtue we have so far is that of an acquired trait of character. Each virtue can be distinguished by a particular motivation to epistemically behave in a way that tends to place the agent in cognitive contact with reality. Such motivation must be entrenched in the agent's character as a habit in order to successfully achieve its end. Virtues are stable dispositions to act under the right motivation and consistently avoid acting under the opposing vicious motivation. That makes virtues praiseworthy in a way that other excellences -like cognitive faculties- are not.

Having now a better grasp of the notion of virtue in question, we are able to see the way in which virtue leads to knowledge. According to Zagzebski, knowledge is explained in terms of *acts of intellectual virtue*:

> An act of intellectual virtue *A* is an act that arises from the motivational component of *A*, is something a person with virtue *A* would (probably) do in the circumstances, is successful in achieving the end of the *A* motivation, and is such that the agent acquires a true belief (cognitive contact with reality) through these features of the act[13].

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[13] ZAGZEBSKI, 1996, p. 270.

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Knowledge is understood here as "a state of cognitive contact with reality[14] arising out of acts of intellectual virtue"[15]. However, this definition is susceptible to multiple attacks. The first and more obvious problem has already been mentioned at the beginning: it rules out basic perceptual beliefs as instances of knowledge. The case of the pedestrian and the cyclist is a relevant counterexample since a great deal of our quotidian beliefs is produced in such a fashion. A definition that rules those beliefs out is too restrictive.

Besides that, another problem arises in the case of legal fact-finding. If acting virtuously is knowledge-conducive, what happens when facts are established as virtuously as possible by the jury (or judge), and yet the result of their inquiry can't be considered knowledge? It must be acknowledged that there is an important epistemic constraint in this context. The resolution about matters of fact is done and must only be done on the basis of the evidence admitted and presented at trial[16]. There is a set of available evidence and inquiry about the facts that triggered the litigation ought to restrain itself to that set.

Let us think about a criminal trial. If some relevant piece of information that proves the guilt of the defendant has been appropriately left out for some legitimate reason (i.e., because a rule of exclusion requires so), nothing can be done about it at the point of verdict. Since evidence is frequently permissive, conflicting and contradictory, the case theories proposed on its basis are sometimes unable to defeat the presumption of innocence by satisfying the standard of proof. Even if the jury's deliberation is done thoroughly, with sobriety and intellectual courage, it is still possible for the outcome to be a false account of the facts. It is quite a conceivable scenario to have a

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14 Zagzebski states that the notion of "cognitive contact with reality" has a broader sense than "knowledge". Knowledge is but one form of cognitive contact with reality. Contact may also take the form of understanding or certainty, for example. So, virtue can be seen as a trait of character that enables the agent to attain cognitive contact with reality in several ways. This is an interesting point since the inclusion of such notions expands the scopes of epistemology and gives rise to questions about the centrality for the field of the task of giving an account of knowledge. In any case, if "knowledge" where to be equated with "cognitive contact with reality", Zagzebski's definition would be circular. Since the latter has a broader sense, there is no such circularity.

15 ZAGZEBSKI, 1996, p. 270-271.

16 Surely, there are many other constraints like the prohibition of drawing any inference out of a defendant's decision not to testify during a trial. The jury has the duty to regard as irrelevant the defendant's silence. However, given the purposes of this work, we will only focus on the "admission" constraint that stablishes what counts as evidence and what doesn't.

resolution about matters of fact that is not knowledge in spite of being the product of epistemically virtuous action.

One reaction to this would be to simply reject that legal fact-finding can be done virtuously at all. An inquiry that establishes that many obstacles to the discovery of truth is vicious by nature. However, this would be too hasty. What can be said is that maybe legal fact-finding is not always knowledge-conducive. But there's no need to embrace any species of radical skepticism. We can still assume that truth is, at least in principle, attainable in this context. The point is that, given what is at stake in a trial, other important things (like the protection of constitutional rights, for example) come into consideration when establishing the facts. Now, even if finding the truth is somewhat harder in this sort of inquiry than in others, virtuous epistemic character may still be demanded from the multiple agents that participate in fact-finding since there seems to remain an important ethical dimension in this type of inquiry.

2.2 Montmarquet's VE

Sometimes our actions are blameworthy. If those blameworthy actions are based on wrong beliefs, then surely there must be a way to ground blameworthiness for action in blameworthiness for belief. Think about the case of a racist, for example. This man believes there is something about people of a certain ethnic group that makes them untrustworthy. On the basis of such a belief, he engages in all kind of actions that show his despise for this people. James A. Montmarquet project is concerned with the possibility of basing responsibility for action in doxastic responsibility. On his view, epistemic virtues are seen as traits of character that enable us to believe responsibly, to believe what we ought.

A belief achieved and held in an epistemically responsible manner is a justified belief in an important sense. It is a belief to which we are entitled. Following Kornblith, we may understand epistemic responsibility in the following terms: «Justified belief is belief which is the product of epistemically responsible action; epistemically responsible action is action guided by a desire to have true beliefs»[17].

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[17] KORNBLITH, 1983, p. 47.

At the core of epistemic responsibility what we find is the desire for truth. But desire for truth is not enough. It may be a necessary condition for epistemic responsibility, but not a sufficient one. To notice this, Montmarquet proposes the example of an epistemic fanatic who believes that her methods for interpreting certain sacred texts continuously generate new and powerful truths. This epistemic fanatic genuinely desires truth but only pays attention to her methods and stays closed to any sort of criticism or suggestion. Evidently, the mere desire for truth does not render her epistemic behavior responsible. So, trying to give account of how a truly epistemically responsible character would be, Montmarquet comes up with the notion of epistemic virtues[18]. Responsibility, understood as the desire for truth, can be regarded as the central virtue but it must be complemented with other virtues. These complementary virtues can be classified into three groups: virtues of impartiality, virtues of intellectual sobriety, and virtues of intellectual courage[19].

The virtues of impartiality are qualities that a responsible epistemic agent must have as a member of an epistemic community. They guide her interactions with other epistemic agents. In this group we may find virtues like the open-mindedness and intellectual humility. The virtues of intellectual sobriety are qualities that tend to make the agent careful and help her avoid hasty inferences or being too gullible. Here we may find virtues like intellectual carefulness and thoroughness or meticulousness. Finally, among the virtues of epistemic courage, we may find virtues like intellectual perseverance, which is the tenacity to resist opposition to our ideas or research lines, particularly when the opposition arises out of the sometimes tyrannical or oppressive rule of the beliefs accepted by the majorities.

All of these virtues supplement the desire for truth. They are *ways of being responsible*. In our search for truth, we must stay open to new ideas or be willing to withstand opposition, and so on. These qualities regulate the desire for having true beliefs. They are excellences that a truth desiring person would want to have.

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18 MONTMARQUET, 1987 and 1993.
19 MONTMARQUET, 1993, p. 23.

That being said, we may now proceed to highlight a very importantaspect about the VE project in question: truth-conduciveness is not considered a defining feature of virtue. The reason for this is a very well-known skeptical scenario. Let us suppose that, because of the intervention of a demon, we are sent to a world where all the traits that we regard as virtues lead to falsehoods instead of truths. Furthermore, it's a world were vicious traits like epistemic recklessness are truth-conducive. Would this make us change our mind and start considering vices as the real virtues and virtues as vices? For some, it wouldn't.

We may feel intuitively compelled to assume that even if virtue is not truth-conducive in the demon's world, it may still provide justification. If an inquiry of any kind leads to a false result and yet the inquiry has been done under virtuous standards, we may still feel that the resulting belief is in an important sense justified. We may still think that we are somehow entitled to hold that belief.

So, for virtue to remain desirable, truth-conduciveness may not need to be a defining feature. It would still connect us with epistemic justification in a particular sense[20]. To understand it, a distinction between two types of justification[21] must be drawn: *pure epistemic justification* and *practical epistemic justification*[22]. To explore the distinction let us consider an example: A jury is dealing with a criminal case. In that case, much of the decisive evidence comes from the testimony of scientific experts. After meticulously considering all of the evidence and arguments, the jury reaches at the conclusion that the defendant did not commit the crime. Let us now suppose that, years after the trial, a substantial part of the scientific assumptions used by the experts for the explanation of the evidence is proved to be utterly wrong. Would this mean that the jury's conclusion was not justified?

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20 By giving up truth-conduciveness and keeping justification, Montmarquet believes an important intuition is saved. As all of us know, throughout history there have been many brilliant people like Aristotle, Galileo, or Newton whose theories strongly differed in matters of truth-conduciveness. Yet, we may still regard those men as somehow equal in matters of justification. Just because Newton proved to be right about some things and that Aristotle was wrong, we would not say that Aristotle was not justified in believing what he believed. Also, we would probably not say that because Newton was right he was virtuous while Aristotle was vicious. So, if truth-conduciveness were to be understood as a defining element of an epistemic virtuous character, then we would have problems dealing with intuitions like this.

21 Some insights relevant for this distinction can be traced in Kornblith's distinction between ideal reasoning and epistemically responsible reasoning (KORNBLITH, 1983).

22 MONTMARQUET, 2007.

It can be said that certainly the type of epistemic justification the jury has is not the kind of justification that matters for knowledge. They lack *pure* epistemic justification. However, assuming they reached their conclusion on grounds obtained *to the best of their effort*, we may still hold them practically justified. Error was not produced by a lack of effort or the lack of a due regard for truth. It was not produced by vicious epistemic behavior.

Practical epistemic justification is a sort of justification that is not as relevant for knowledge as it is relevant for the evaluation of action. Let us remember that Montmarquet is originally concerned with the possibility of grounding responsibility for action in responsibility for belief. The notion of practical epistemic justification allows us to give account of such grounding.

An action A based (or partly based) on a belief B has practical epistemic justification if B is obtained through the display of appropriate efforts motivated by a due regard for truth. Such "due regard for truth" can be understood as having a desire for truth properly supplemented by the possession of intellectual virtues of the three types mentioned above. So, virtue may not bear pure epistemic justification since it is not necessarily truth-conducive, but it provides practical justification. Epistemically responsible action in Montmarquet's sense (desire for truth plus intellectual virtue) leads to belief with practical epistemic justification.

So we have seen that the project in question is mainly concerned with giving account of responsibility for belief. This can be particularly useful for cases in which belief is part of what explains action. Legal fact-finding appears to be one of those cases. We have also seen that it allows for a distinction between epistemological discussions about the concepts of pure epistemic justification (that which is required for knowledge) and practical epistemic justification (that which is required for epistemically well-grounded action). This distinction may have its equivalent in legal epistemology. Such field raises concerns for both the truth of legal decision about matters of fact and the doxastic responsibility of epistemic agents involved in its production. This project allows us to address the second group of concerns by providing a notion of epistemically responsible (virtuous) action, which is thought to bear epistemic justification of a particular type: practical epistemic justification.

> **Practical epistemic justification is a sort of justification that is not as relevant for knowledge as it is relevant for the evaluation of action.**

With this picture in mind, we will now show that this responsibilist view of virtue as a trait of character that allows us to believe responsibly requires a slight amendment in order to be successfully applied to the field of proof and evidence in law.

3. BELIEF VS ACCEPTANCE IN LEGAL FACT-FINDING

So far we have sketched two major contributions to the responsibilist version of VE. Both contributions share worries about epistemic responsibility. They suggest that virtuous epistemic behavior is the one governed by the possession of traits like open-mindedness, intellectual courage, and intellectual thoroughness, among others. On both accounts, displaying a virtuous epistemic behavior is required for the correct formation of beliefs. Additionally, both contributions share the underlying assumption that beliefs are, at least to some extent, voluntary[23].

Our purpose now will be to challenge the idea that belief is the propositional attitude that triers of fact (whether they be judges or juries) must hold in relation to the facts considered proven in court. To do so, we will introduce the distinction between belief and acceptance by focusing on two crucial features of the latter: its voluntariness and its context dependence. The conclusion we want to reach is that it is acceptance, rather than belief, the propositional attitude that we may expect to be formed in an epistemically virtuous way when deciding matters of fact in law. This means that a responsibilist virtue approach to legal epistemology must be amended by taking into account this distinction.

The first issue at hand is doxastic voluntariness[24]. The main contemporary source of objection to the thesis that beliefs are voluntary is Bernard Williams[25]. We will start by following this road.

If we think about the notion of belief, some of us may suddenly realize that there is something odd about considering it voluntary.

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23 ZAGZEBSKI, 1996, p. 58-69; MONTMARQUET, 1993, p. 79-96 and 2008.

24 The literature on the thesis of doxastic voluntarism is vast. Unfortunately we cannot devote enough space here to address it appropriately. Should the reader be interest in the subject, please refer to WILLIAMS, 1973; HEIL, 1984; GINET, 2001; FELDMAN, 2001; AUDI, 2001; MONTMARQUET, 2008; HIERONYMI, 2009; and, of course, the classics CLIFFORD, 1877, and JAMES, 1896.

25 WILLIAMS, 1973, p. 136-151.

This is because beliefs appear to aim at truth. Believing that *p* means believing "It is the case that *p"*. Beliefs are states generated mainly by evidence. We don't decide or choose what to believe, it just happens to us once we are acquainted with relevant evidence. For example, I don't choose to believe that there is a cup of coffee in front of me. I just happen to believe it by simply opening my eyes and looking at the cup. The evidence "strikes my mind" and I believe accordingly.

If we were able to believe at will, we would be able to believe something even in the face of evidence to the contrary. But we are not able (if we are being minimally rational) to believe something in the face of evidence to the contrary. Thus, we are not able to believe at will.

What happens in cases when, say, a woman claims that she *can't believe* that her car has been stolen? Does this mean that she is willingly resisting a belief? Well, it may be that she is just expressing her wish for reality to be different from what it is. Her expression would then be just figurate speech for saying that she finds it psychologically difficult to come to grips with reality. Given what is at stake, her evidence standards unconsciously increase and the evidence she is acquainted with does not fulfill it.

However, there is another interpretation of this kind of cases. Let us assume now that there is no unconscious increase in the evidence standards. If someone shows us strong evidence suggesting that our car has been stolen, we can't avoid believing so out of mere will. Thus, what we may mean when we say "I can't believe someone stole my car" is that we *refuse to accept* that our car has been stolen.

Acceptance can be characterized as having or adopting "…a policy of deeming, positing, or postulating that *p* - i.e. of including that proposition or rule among one's premises for deciding what to do or think in a particular context"[26]. It has two important features. First, it is a voluntary act since it consists in adopting the policy of deeming a proposition as true and including it in our reasoning in order to reach a decision. One can either choose to adopt such policy or refuse to do so. Second, the reasons that ground it are not always epistemic reasons. While belief is grounded in evidence, acceptance can be grounded in reasons aside from evidence, e.g. a rule.

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[26] COHEN, 1992, p. 4. See also COHEN, 1989, p. 389. As the reader may note, the notion of acceptance presented in this paper is in great debt with Cohen's idea about the notion.

If we were able to believe at will, we would be able to believe something even in the face of evidence to the contrary.

To show this last point, let us consider another example. Suppose that a friend is in troubles with the police. The evidence at hand shows that our friend is responsible for the bad deed he's been arrested for. Inevitably, the evidence causes the belief that he carried out the bad deed. Yet, out of solidarity, we decide to help him acting under the premise that he is innocent. However, *solidarity is not evidence*. Hence, it can't be a reason for belief, though it can be a reason for acceptance.

Nevertheless, acceptance *can* be done for epistemic reasons, just like belief. We can accept a given proposition because of the evidence. This means that belief can be a *prima facie* reason for acceptance. It is not unusual for belief and acceptance to go hand in hand. We frequently accept what we believe. Belief can guide action as much as acceptance can. The distinction becomes important when evidence is not the right type of reason for action. A salesman may act under the premise that "the customer is always right" even in the face of abundant evidence to the contrary. So, acceptance has the possibility of admitting both epistemic and non-epistemic reasons. The latter are not the sort of inputs relevant for the production of beliefs, but are relevant for actions and decisions. Such inputs or reasons can be rules, objectives, policies, prudential reasons, etc.

As it is becoming clear now, acceptance is not necessarily truth-directed as belief. We do not necessarily accept *p* because we believe that *p* is true. Acceptance consists in a voluntary act of including a proposition in our reasoning as if it were true, and acting in accordance with its consequences. As we said, such inclusion can be done either for epistemic reasons (evidence) or for other reasons, like trying to achieve a certain goal or objective. This makes of acceptance susceptible to teleological explanation while belief, on the other hand, is susceptible to causal explanation at most.

With the possibility of not necessarily being truth-directed, but instead goal-directed, the notion of acceptance allows us to give account of the epistemic behavior of agents in situations where acting on the basis of belief comes at odds with the achievement of certain goals or objectives that the agent has. A typical example of a situation like this is that of a lawyer defending a client in a criminal case. His beliefs about the innocence or guilt of the client may

conflict with his duties as a lawyer and, consequently, have to be regarded as irrelevant. His beliefs must not guide his actions since that may not be in the client's best interest. He is expected to act as if she were innocent. Hence, he must accept that proposition in order to fulfill his duties as lawyer.

That being said, we can conclude that acceptance is clearly voluntary while belief appears not to be so. However, acceptance has another feature that makes it the right candidate to describe the attitude of agents in the determination of facts in a trial. Such feature is its context dependence.

Belief is a state that remains through different contexts.

Belief is a state that remains through different contexts. A person cannot be expected to believe a proposition *p* in a context *C* and, at the same time, not to believe it in a context *C'*. It seems implausible to say that someone, for example, believes something as a mother and does not believe it as a businesswoman. This is only possible if there is an inconsistency or conflict in her system of beliefs or if she is somehow able to change her mind (modify her beliefs) whenever her roles or duties change.

 Let us consider another hypothetical case. A trier of facts learns about some evidence that is never submitted into the proceedings by the parties. Once such evidence has struck on the trier's mind, a belief *B* is formed. At the moment of making a decision, the trier has to disregard *B*. Does this mean that the trier believes *B* in her private doxastic context and, at the same time, does not believes *B* in her role as a trier of facts? The answers is no. What happens is that she believes *B*, but she accepts something different from *B* given her responsibilities as a trier of facts. This does not suppose a problem. Acceptance has the "flexibility" necessary to deal with changes of context. Stalnaker suggests the same point in the following terms:

> A person may accept something in one context, while rejecting it or suspending judgment in another. There need be no conflict that must be resolved when the difference is noticed, and he need not change his mind when he moves from one context to another[27].

Acceptance has a practical nature. As we have already stated, it is not necessarily truth-directed and its formation admits reasons aside

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27 STALNAKER, 1984, p. 80-81. In this regard, see also BRATMAN, 1992, p. 4-5.

from evidence. Usually, these other reasons come from the context. The case of agents finding facts in a trial is a clear case of this. When determining facts, juries or judges must restrain their reasoning to the evidence admitted in the proceedings. It is not surprising for a constraint like this to cause a difference between what the trier of fact believes and what she accepts. In fact, the difference may occur for at least six different reasons identified by Jordi Ferrer[28]:

1) The trier's belief is irrational. It is not consistent with the available evidence;

2) As in the example above, the trier has learned of some piece of evidence that was not integrated to the proceedings. This evidence causes a certain belief, but she cannot use it to ground her decision;

3) The trier had access to evidence that was illegally obtained (in the violation of constitutional rights, for example) or that had to be rejected for some other legal reason. Again, the trier cannot get rid of the influence such evidence has on the formation of her beliefs, but she cannot make use of it to reach a decision;

4) The evidence available is not enough to defeat a legal presumption. Consequently, the presumption is still operational and the decision must be based on it;

5) Certain facts are not disputed. All the parties accept them as true;

6) The application of a legal rule concerning evidence predetermines the result of the decision about facts.

These situations render the state of belief unavailable as a correct grounding for the decision about facts in law. The triers of facts' beliefs, whether they are true or false, must be regarded as irrelevant criteria for the correctness of the decision. What matters is what they can objectively justify through the evidence *legally* available. They have the duty to take into consideration the evidence incorporated into the proceedings, and only that evidence. Notice that this means that, in the case of legal fact-finding, reasons for acceptance are epistemic in nature (acceptance is reached in the light of evidence). Yet, such acceptance does not necessarily coincide with what is

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28 FERRER, 2006, p. 297. For a Spanish version of this, see FERRER, 2005, p. 83-84.

believed because the evidence available for acceptance may not be the same evidence available for belief.

Legal fact-finding is a context defined, among other things, by the existence of rules that establish what counts as evidence, how it becomes available, how to reason about it, etc. So, even if our case against the voluntariness of belief were weak, even if we could somehow voluntarily come to the state of belief, belief would still be unsuitable for deciding matters of fact in a trial. The epistemic constraint posed by legal rules does not have the capacity to produce a change of belief. We can't forget a piece of evidence just because a rule says so. Instead, the constraint can make us modify what we accept. So, it is acceptance, rather than belief, the propositional attitude under which triers of fact ought to reach their decision.

4. VIRTUOUS ACCEPTANCE IN THE CONTEXT OF LEGAL FACT-FINDING

We have explored two major responsibilist projects, both of which contain important features required for an appropriate virtue approach to the problem of legal proof. On the one hand, from Zagzebski's project we obtain a good picture of *what* virtue is. On the other hand, Montmarquet's view allows us to see *why* we want it.

Virtues are acquired -and praiseworthy- traits of character that express an agent's regard for truth. We want agents -we want judges and/or jurors- to have these traits and act under a due regard for truth because it provides them practical epistemic justification.

As we have mentioned, legal fact-finding is a type of inquiry where some obstacles appear in the search for truth. The outcome of legal fact-finding may perfectly consist in regarding as proven a false proposition or not regarding as proven a true one. This is owed, to a substantial extent, to the fact that there is an epistemic constraint in the inquiry. A fact-finder behaving in an epistemically virtuous manner would not be free from that constraint. She is expected to consider only the evidence incorporated to the proceedings and to follow the legal rules and standards governing such evidence. So, the exercise of epistemic virtue does not guarantee by itself that truth is achieved in this context.

It must also be acknowledged that the exercise of virtues is not necessarily truth-conducive in the context of inquiry in question because of the constraint on what counts as valid evidence.

Now, even if those conditions prevent epistemically virtuous action from providing grounds necessary for getting the truth, virtuous action still provides the grounds necessary for practical epistemic justification. Given the epistemic constraint, a legal fact-finder may unknowingly lack the grounds necessary to reach a true account of the facts disputed at trial. However, she may still be epistemically justified given her appropriate epistemic efforts.

We have also discussed the notion of acceptance. We have identified two main features that make it a good candidate for being the propositional attitude held by legal fact-finders in relation to the outcome of their inquiry. Such features are voluntariness and context dependence. We have reviewed as well a list of situations that give place to a discrepancy between what the fact-finder may believe and what she must accept under the epistemic constraint. If belief were the attitude to be held, the situations mentioned would require the fact-finder to be able to change her beliefs at will in order to avoid any discrepancy. This appears to be implausible.

Beliefs are not produced, nor removed or changed, at will. Or at least not the kind of beliefs that legal fact-finders have to deal with. These beliefs are produced by evidence and are expected to change only when something in the evidence changes. Acceptance, on the other hand, is clearly a voluntary act. It consists in treating a proposition as if it were true, including it in our reasoning, and acting in accordance to its consequences. Acceptance can also be done in one context and not done in another, without bearing a conflict or inconsistency. This shows that it has the right features to be the propositional attitude susceptible of epistemically virtuous formation when reasoning about matters of fact in law.

If we are interested in including a responsibilist VE analysis in legal epistemology, it must be acknowledged that the correct formation of belief cannot be the aim of virtuous epistemic action. Virtue responsibilism is originally concerned with this. However, when applied to the understanding of how facts are established in a trial, it must be concerned with the correctness of acceptance.

It must also be acknowledged that the exercise of virtues is not necessarily truth-conducive in the context of inquiry in question because of the constraint on what counts as valid evidence. However, virtue can still provide practical epistemic justification.

Once these points are admitted, we can identify the place of a responsibilist approach in legal epistemology. As we said before, there are at least two major lines of philosophical concerns in legal epistemology. The first line has to do with questions about truth and "pure" justification in the finding of facts. The second line has to do with questions about epistemic responsibility. An approach following the line sketched by the two projects presented in this work would be well suited to give account of the second line of concerns.

Under such a view, epistemic virtues are trait of characters that entitle the agent (that is, give her practical epistemic justification) to act under the acceptance of certain premise. So, even if virtue doesn't warrant by itself the truth of the outcome of the agent's inquiry, it does provide warrant of the integrity of the investigation.

Since what is at stake in the context of legal fact-finding is the freedom or the wealth of members of our community, fact-finders have the duty to display their best effort. Successful cognitive contact with reality in that context takes more than acute eyesight or good memory or any ability of that kind. It takes commitment, perseverance, humility and thoroughness, among other things. Should traits of that sort govern the epistemic behavior of the fact-finder, then it may be said that her verdict is a case of virtuous acceptance.

A theory of acceptance explains in a natural fashion how deliberation and decision about matters of fact is done by fact-finders since it successfully shows how the usual divorce between what the fact-finder believes and what she ultimately accepts is perfectly possible. Such a theory in conjunction with a responsibilist conception of intellectual virtue gives us a good conceptual framework to identify what the desirable epistemic agency for legal fact-finding is. It gives us important tools to state how a good finder of facts should drive herself in the epistemic domain while in a court of law.

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