TWO KINDS OF ACQUITTALS – DIFFERENT KINDS OF DOUBTS

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ABSTRACT. In most countries that follow the Anglo-American legal system, the criminal process is based on the existence of only two possible alternative legal outcomes – "guilty" and "not guilty" – at the end of a criminal proceeding. That is, a person is acquitted unless the court finds him to be guilty. In contrast, a small number of legal systems, such as those of Scotland, Italy, and Israel, maintain an additional form of acquittal, situated between the two stated polar options. In this paper we review the criminal systems that have adopted more than one type of acquittal while delving specifically into the case of Israel. From a descriptive perspective, we summarize the history of their acquittal options as well as describe the additional option's characteristics when compared to full acquittal as well as the epistemic circumstances in which such an outcome is reached. From a normative perspective, we reject incorporation of this additional type of acquittal due to differences in its expressive implications from full acquittal. We articulate our doubts regarding its necessity and constitutionality, which we do while also addressing the difficulties that this type of verdict engenders. Our main contention is that recognition of this type of acquittal, alongside full acquittal, erodes the fundamental premises of criminal law, contradicts its position regarding the defendant's innocence at the heart of the criminal proceeding, and therefore undermines this proceeding's normative and moral commitment to the defendant's basic rights.

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I INTRODUCTION

In most countries that follow the Anglo-American legal system, the criminal process is based on the existence of only two possible alternative legal outcomes – "guilty" and "not guilty" – at the end of a criminal proceeding. That is, a person is acquitted unless the court finds him to be guilty. In contrast, a small number of legal systems, such as those of Scotland, Italy, and Israel, maintain an additional form of acquittal, situated between the two stated polar options.

In this paper we review the criminal systems that have adopted more than one type of acquittal while delving specifically into the case of Israel. From a descriptive perspective, we summarize the history of their acquittal options as well as describe the additional option's characteristics when compared to full acquittal as well as the epistemic circumstances in which such an outcome is reached. From a normative perspective, we reject incorporation of this additional type of acquittal due to differences in its expressive implications from full acquittal. We articulate our doubts regarding its necessity and constitutionality, which we do while also addressing the difficulties that this type of verdict engenders.

Our main contention is that recognition of this type of acquittal, alongside full acquittal, erodes the fundamental premises of criminal law, contradicts its position regarding the defendant's innocence at the heart of the criminal proceeding, and therefore undermines this proceeding's normative and moral commitment to the defendant's basic rights.

The article is structured as follows: Chapter II reviews the criminal law systems employing more than one category of acquittal. In Chapter III we compare critiques of the two kinds of acquittal on the one hand and justifications for such acquittals on the other hand. In Chapter IV we outline our position regarding sustaining only one kind of acquittal, that which attests to the fact that the defendant's guilt remained unproven beyond all reasonable doubt. We also argue against distinguishing between types of acquittal on the basis of the doubt resting at their foundations. Given these arguments, we suggest abandoning any type of acquittal that is not full acquittal, a verdict that covers the defendant with a cloud of suspicion.

II LEGAL SYSTEMS THAT EMPLOY MORE THAN ONE TYPE OF ACQUITTAL

The vast majority of criminal law systems allow for only two types of verdicts. One is conviction (a "guilty" verdict) of the defendant; the other is acquittal, or the rejection of claims regarding any type of guilt (a "not guilty" verdict) on the defendant's part. In these criminal systems, a verdict of acquittal covers a spectrum of possibilities, from high probability of guilt (but below the level of "beyond a reasonable doubt") through no doubt remaining of the defendant's innocence.[2] Exceptions to this structure are found in the Scottish, Italian and Israeli criminal systems, in which additional categories of acquittal appear, all of which have different implications.[3]

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[2] Vincent T. Bugliosi, 'Not Guilty and Innocent – The Problem Children of Reasonable Doubt' 4 *Crim. Just J.* 349 (1981) 355.

[3] In American justice systems (both federal and state), juries have only two options for reaching a final verdict – "guilty" and "not guilty". Jurors are consequently instructed to convict a defendant (i.e., find the defendant "guilty") if the evidence supporting his guilt meets the relevant burden of proof (in a typical criminal proceeding, proof of guilt beyond a reasonable doubt). If the evidence does not reach the level required for conviction, the verdict to be rendered is not guilty. The not guilty verdict can be chosen in situations where the jurors are persuaded of the defendant's innocence as well as in situations in which they are persuaded that there is insufficient evidence to support guilt. Nevertheless, over the years, the "not proven" category has come to be used on a *de facto* basis in several cases. Two of these cases are particularly well-known. The first one is the trial for treason of the former vice president, Aaron Burr, held in 1807. At the end of a four-week trial, the jury members were not content with delivering either of the two traditional verdicts. Instead, they declared: 'We of the jury say that Aaron Burr is not proved to be guilty under the indictment […]'. Despite the defense attorney's objection to the verdict's wording, Chief Justice Marshall let it stand and classified it as a "not guilty" verdict (see: Thomas Fleming, *Duel: Alexander Hamilton, Aaron Burr and the Future of America* (1999) at 392–393). The second example took place nearly 200 years later. In December 1998, President Bill Clinton faced impeachment in the United States Senate. Rather than voting guilty or not guilty, Republican Senator Arlen Specter announced that the charges against the President were "not proven". Specter was upset that the Senate refused to allow live testimony and explained his vote by stating: 'I do not believe the president is 'not guilty'. […] I believe that there has been […] a sham trial, and it's a trial on which you can't really come to a verdict'; see: Hannah Phalen, '*Overcoming the Opposition to a Third Verdict: A Call for Future Research on Alternative Acquittals*' 50 *Ariz St. L. J.* 401 (2018). Aside from these well-known cases, additional cases can be found in which a "not proven" verdict was delivered (Joseph M. Barbato, 'Scotland's Bastard Verdict: Intermediacy and the Unique Three-Verdict System' 15 *Ind. Int'l & Comp. L. Rev.* 543 (2005) 573-575; Phalen, *ibid*, pp. 405-406). Thus, for example, in a case heard in the state of Washington, the trial court judge ruled that '[m]y judgment here is not a verdict of innocence. It will be a verdict of 'not proven' (*State v. Bastinelli*, 506 p. 2d 854, 857 (Wash. 1973)). In California, two attempts (in 1993 and 2003) were made to enact legislation providing for the "not proven" option in criminal proceedings, but they were unsuccessful. It should be noted that the American Civil Liberties Union (ACLU) as well as a prosecutors' organization opposed both versions of the proposed legislation (Barbato, *ibid.*, p. 575; Phalen, *ibid.*, p. 405). It is therefore clear that the "not proven" verdict has not officially taken root in the American criminal justice system. Officially, the practice of using only two types of verdicts – conviction or acquittal (guilty or not guilty) – remains in place and is used in the Federal system and in all fifty States.

2.1 *Scotland: Two types of acquittal*

Since the seventeenth century, the Scottish legal system[4] has allowed for three possible outcomes to criminal proceedings: guilty, innocent, and "not proven".[5] The last outcome has been described as a product of "historical accident". According to one scholar, its origin can be partially "traced to the recognition of the inability of an unskilled jury to interpret the significance of particular facts".[6] Historically, juridical practice up to the Sixteenth Century involved framing indictments in general terms while leaving determinations of guilt or innocence to the jury.[7] In the Seventeenth Century (during the reign of Charles II), the verdicts of guilty and not guilty, standard until then, were revised to "proven" and "not proven".[8] According to Smith, "[t]he practice which thus arose of the jury finding certain facts proved was encouraged when juries between 1660 and 1688 refused to convict on prosecutions brought under unpopular and repressive Statutes."[9] This practice continued until the beginning of the Eighteenth Century, when jurors were again authorized to hand down a verdict of "guilty" or "not guilty". The verdict of "not proven" did not, however, disappear; it remained in place along with the verdict of "not guilty". Simultaneously, "not proven" acquired a new meaning, that of a verdict that stands between guilty and not guilty.

An early Twentieth Century scholarly article described the not proven verdict as one that a jury hands down in circumstances where "their suspicions have been aroused, although they cannot hold the charge fully proved."[10] It is also delivered in situations where the jurors 'have some lingering doubts as to the guilt of an accused and who are certainly on the evidence not prepared to say that he is innocent'.[11]

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[4] The Act of Union 1707 between Scotland and England permitted Scotland to retain its separate legal system, which it continued to administer. The Scottish criminal justice system maintains its own court system, its own police forces, its own prosecution service and its own prisons.
[5] Samuel Bray, 'Not Proven: Introducing a Third Verdict' 72 *U. Chi. L. Rev.* 1299 (2005) 1301; Peter Duff, 'The Scottish Criminal Jury: A Very Peculiar Institution' 62 *Law & Contemp. Probs.*, 173 (1999) 193.
[6] J. Irvine Smith, 'Criminal Procedure' in *Introduction to Scottish Legal History* 426 (1958) at 442.
[7] *Ibid*.
[8] *Ibid*.
[9] *Ibid*; Barbato, *supra note* 3, at pp. 547-548; Ian Douglas Willock, *The Origins and Development of the Jury in Scotland* (1966) at 219.
[10] A.S. Pringle, 'The Verdict of "Not Proven" in Scotland' 16 *Jurid. Rev*. 432 (1904) 432–433.
[11] *McNicol v. HM Advocate* [1964] Scots Law Times 151, 152.

In a comprehensive study conducted in 2019[12], videos of staged trials were shown to 64 mock juries as well as to 969 individual participants, both of whom were asked to reach a verdict. They were then given questionnaires on which the participants were asked to express their opinions on the verdict of "not proven". The research findings indicated that a verdict of "not proven" was preferred when the jurors were convinced that the evidence presented was insufficient to prove the defendant's guilt beyond all reasonable doubt, or when they found it difficult to chose between the two competing versions of the crime. Alternatively, the "not guilty" option was chosen when the jurors were convinced of the defendant's innocence or when they received the impression that the complainant or one of the witnesses was not being truthful.

These circumstances, as we will see, characterize one of the paradigmatic cases in which doubt-based acquittals are granted in Israeli law.[13]

According to Scottish case law, the implication of a not proven verdict is that there is insufficient evidence to prove guilt, with "not guilty" signifying that the court has been persuaded of the defendant's innocence. That is, jurors declare a defendant to be not guilty if they are persuaded that the defendant has not carried out the offense attributed to her.[14]

According to Duff, as of 1996, one-third of the acquittals rendered by jurors, and one-fifth of the acquittals rendered by judges, have been "not proven" verdicts.[15] This verdict is a matter of dispute in Scotland itself[16] and over the years it has become the subject of much criticism.[17]

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[12] The cited research was the largest of its kind ever undertaken in the UK. See: Rachel Ormston, James Chalmers, Fiona Leverick, Vanessa Munro and Lorraine Murray, `Scottish jury research: Findings from a mock jury study (2019)`. https://www.gov.scot/publications/scottish-jury-research-findings-large-mock-jury-study-2/pages/8/). For other studies conducted in recent years see: M Smithson, S Deady and L Gracik, 'Guilty, not guilty, or …? Multiple options in jury verdict choices' (2007) 20 *Journal of Behavioral Decision Making* 481; L Hope et al., 'A third verdict option: Exploring the impact of the not proven verdict on mock juror decision making' (2008) 32 *Law and Human Behavior* 241; L J Curley et al., 'The bastard verdict and its influence on jurors', (2019) 59 *Medicine, Science and the Law* 26.

[13] For a discussion and critique of the "not proven" verdict in Scotland, see Lockerbie *Trial Briefing Handbook* 13 (John P. Grant ed., 1999); William Roughead, *Twelve Scots Trials* (1913) at 221, and the sources cited there.

[14] Bugliosi, *supra* note 2, p. 353.

[15] Peter Duff, 'The Not Proven Verdict: Jury Mythology and "Moral Panics"' 1996 *Jurid. Rev.* 1, 7. For possible explanations of that data, see Bray, *supra* n. 5, p. 1315 n. 82.

[16] Bray, *supra* note 5, p. 1302.

[17] Among other reasons, this is due to the claim that such a verdict increases the rate of acquittals. It is also due to the fact that it negatively labels defendants who have been acquitted. See John Gray Wilson, *Not Proven* (1960) at 7-8; Bray, *supra* note 5, p. 1302 n. 16. In the 2019 study, *supra* note 12, it was argued that where the "not proven" verdict was available, acquitting juries tended to choose not proven rather than not guilty as the means to acquit the accused. Individual jurors were also less-likely to favor a guilty verdict when the not proven verdict was available. In addition, the study's findings indicated that dismissing a "not proven" verdict may lead to more jurors favoring a

Calls have been made to change it,[18] with several attempts made to eliminate it.[19] In Scotland, the dispute between those who support the not proven verdict and those who oppose it has given rise to a "war of terms". The opponents have referred to it as the "ungracious verdict", the "bastard verdict", the "second-class acquittal", or the "ambiguous and indefensible verdict"; supporters have termed it "the most honest verdict a jury can truly give."[20] And yet, despite the dispute, the not proven category remains in place and, as noted above, quite commonly used.

2.2 *Italy: Five types of acquittal*

In 1989, Italy instituted a comprehensive reform of its criminal law system by adopting a new Code of Criminal Procedure (hereinafter: "the Code").[21] The new Code shifted Italy's criminal justice system from an inquisitorial system (the format used by most countries in continental Europe) to an adversarial system, which is the norm among common law countries.[22]

Paragraph 530 of the Code states the following:

> 1. If the elements of the offence does not exist [541 2, 542], if the defendant did not commit the act, [541 2, 542], if the act does not constitute a criminal offence nor is deemed an offence under the law, or if the offence was committed by a person lacking criminal responsibility [s.85 of the Italian Penal Code) or who is not punishable for another reason, the judge shall acquit, elaborating the reason for the acquittal in the operative part of the judgement.
>
> 2. The judge shall acquit when no proof exists, or there is insufficient or inconsistent proof of the act, that the act constitutes a criminal offence or that the offence was committed by a person considered responsible for the act.

guilty verdict, what might lead to an increase guilty verdicts over a larger number of trials. The study's authors also stressed that it is impossible to estimate the likely scale of such an impact because its effect will vary depending on factors including the balance of evidence and the initial balance of opinion in the jury at each trial.

[18] Duff, *supra* note 15, pp. 7-12.

[19] Bray, *supra* note 5, p. 1302.

[20] *Ibid*, p. 1302 and the sources cited there.

[21] Codice di procedura penale (CPP)

[22] See William T. Pizzi & Luca Marafioti, 'The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation' 17 *Yale J Int'l L.* 1 (1992) 5, 15.

> 3. If evidence exists that there is a legal excuse or personal grounds for exemption from criminal responsibility for the act committed, or doubt exists as to their existence, the judge shall acquit, pursuant to Paragraph 1.

Clause 530 of the Code comprehensively lays out five different types of acquittal:

i. "No crime was committed".
ii. "There was a crime, but the defendant did not commit it".
iii. "The defendant is innocent of the crime because the evidence was insufficient to convict him".
iv. "No crime was committed because the defendant had a justification for his action".
v. "It is impossible to decide the case due to procedural flaws".

The Italian system is not content with a declaration of acquittal so long as the evidence for the defendant's conviction is insufficient; instead, it differentiates between five different types of acquittal.[23] The first two types are the most forceful, that is, "full acquittal", according to which the accused is determined to be completely innocent. In contrast, additional type of acquittal, "innocent due to lack of evidence", is weaker, being handed down in cases where the evidence is insufficient to convict; it therefore does not been fully exonerate the accused. We can call this verdict "acquittal for lack of evidence". The last two categories, which are not discussed here, refer to acquittals handed down because the accused's actions are protected by some legally recognized justification, or technical flaws have been discovered in the investigation.

Italy's judicial decisions have set out a third possible verdict, "acquittal for lack of evidence", derived from clause 530(2) of the Code, which states that a judge can declare a verdict of innocence when, among other things, evidence against the accused is lacking or insufficient.[24]

The Italian legal system is fully cognizant of the different implications attached to "full acquittal" as opposed to "acquittal for lack of evidence". First of all, the type of acquittal can affect the defendant's public image. Second, the Italian system allows a defendant to appeal an acquittal so

[23] According to para. 129 of the Code, the various types of acquittal are to be delineated in set formulae (formula assolutoria), to be declared at the end of the ruling.
[24] See the decision handed down in Cassazione penale, Sez. Unite, sentenza n. 40049 of 28 October 2008.

as to allow him to obtain a "stronger" form of acquittal.[25] It follows that the first and second types of acquittal cannot be appealed because they inherently imply full acquittal,[26] whereas the third type, acquittal "for lack of evidence" can be appealed. The Italian Supreme Court of Cassation in Rome has decided that the accused is to be allowed to appeal an acquittal based on "the lack of sufficient evidence" due to the moral outcomes of such an acquittal as well as their connotations in civil courts and disciplinary hearing.[27] Third, the type of acquittal also influences the accused's right to compensation, or to restitution for legal expenses incurred. In the case of full acquittal, which covers the first two types, the accused is entitled to receive compensation and indemnification, both of which are denied in situations of acquittal "for the lack of sufficient evidence".[28] Fourth, the type of acquittal also has bearing on the determination of the legal responsibility in civil law, administrative law and disciplinary hearing. Contrary to acquittal due to "the lack of sufficient evidence", which has no evidentiary status, on the occasion of full acquittal (types 1 and 2), the accused enjoys a decisive position during the conduct of such procedures.[29]

2.3 *The case of Israel: Full acquittal and doubt-based acquittal*

2.3.1 *Overview*

The Israeli legal system employs verdicts of "convicted" (parallel to "guilty") and "acquitted" (parallel to "not guilty") but also an additional, separate category, generally known in Hebrew as "acquitted on the basis of doubt" (hereafter: "doubt-based acquittal").[30] This category, as formulated by the Israeli courts, has special substantive and technical characteristics. Due to the presence of this unique, third alternative, we now consider the case of the Israeli system as a test case. We review the development of doubt-based acquittal within Israeli law and characterize the

[25] Pizzi & Marafioti, *supra* note 22.
[26] Italy's Supreme Court handed down such a ruling in two cases: Cass. civ. sez. 4,49580/2014 and Cass. civ. sez. 4,29507/2018.
[27] Cass. civ. sez. 5,19393/2018.
[28] Tar Lazio sentenza n. 10727/2019.
[29] On the distinction made by the court between "full acquittal" and "acquittal due to lack of evidence" with respect to paras. 652-654 of the Code see: Cass. civ. sez. 6, sent. 13 novembre 2013, n. 25538; Cass. civ., sez. lav., 11.2.2011, n. 3376; Cass. 9-3-2010 n. 5676; Cass. 30-10-2007 n. 22883.
[30] The international literature regarding the advisability of introducing an additional type of acquittal pertains mainly to Scottish law; it does not relate to Israeli law, what may be due to linguistic obstacles.

different situations in which this category is used. Similarly, we stress the implications of doubt-based acquittal for the defendant. Although the discussion at this point focuses on Israel's legal system, we take this opportunity to discuss how the Israeli case demonstrates the diverse implications accompanying the types of acquittal that differ from full acquittal.

2.3.2 *Development of doubt-based acquittal in Israel*

Israel (then Palestine) was part of the Ottoman Empire until World War I. Toward the end of the war, the British army came to occupy the territory. Thanks to a mandate elicited from the League of Nations in June 1922, the British obtained international legal legitimacy for their continued control of Palestine, what became known as the British Mandate or Mandatory period (1922-1948). Ottoman law, which had applied to Palestine until then,[31] was slowly replaced by legislation based on English common law. As happened in other regions under British control but not belonging to the British Commonwealth, the body of criminal law adopted in Palestine by its British rulers was English in the main; however, criminal adjudication, both verdicts and sentencing, was conducted under the authority of professional judges rather than jurors.[32] In 1924, the High Commissioner for Palestine introduced the Criminal Procedure (Trial Upon Information) Ordinance. Section 45 of the Ordinance (as amended in 1939), provided that:

> After the reply, if any, of the Attorney General or his representative, the court shall consider the whole case and, unless a majority of the court considers that the accused is *guilty*, it shall *acquit* him". (Emphasis added)

Following establishment of the State of Israel in 1948, the legislation passed during the Mandate, including the above-mentioned Criminal Procedure Ordinance, was absorbed into the young State's legal system, where it constituted the basis for the developing legislation for many years. Section 45 of the Criminal Procedure (Trial Upon Information) Ordinance was also incorporated into Israeli legislation; its principles are currently set out, with minor changes, in section 182 of the Criminal Procedure Law [Integrated Version], 1982.[33]

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[31] From the middle of the Nineteenth Century through the end of Ottoman control in Palestine, Ottoman legislation had been primarily influenced by the inquisitorial French legal system.

[32] Regarding the British Mandate legal system in general, see Assaf Likhovski, *Law and Identity in Mandate Palestine* (2006).

[33] The text of which is the following: "Upon the determination of guilt, the court will, by reasoned decision in writing […] decide to acquit the defendant or, if it finds him guilty, to convict him."

Despite the fact that Israel's criminal legislation has always shaped verdicts according to the polarities "acquitted" or "convicted", the case law has moved in a different direction. Shortly after the State's establishment, two decisions were handed down by criminal tribunals in which a third type of verdict began to appear – "doubt-based acquittal". As far as we could discover, the first criminal case concluded with this kind of verdict was a murder case heard by the Tel Aviv District Court in 1949. The District Court simply held that the accused 'should be acquitted of the charge of murder on the basis of doubt.[34] No additional explanations were provided.

Two years later, in 1951, in the *Podamski* case, Israel's Supreme Court explained the nature of a "doubt-based acquittal" verdict for the first time by distinguishing between a "regular" acquittal and one that is "doubt-based":

> [The defendant] does not need to prove his innocence regarding the crime; all that he is required to do is to give an explanation for the presumption that arises from the evidence offered by the prosecution. Once a satisfactory explanation is given, and the judge accepts it, *the judge must acquit the defendant***.** If a reasonable explanation is given, but the judge cannot decide whether or not to accept or reject the explanation – meaning, he is not prepared to decide whether or not these matters are correct – *the judge must acquit him on the basis of doubt*.[35] (Emphasis added.)

The *Podamski* case is important in two respects. First, regarding terminology, it defined the new acquittal category as a separate linguistic term by adding the phrase "on the basis of doubt" alongside the word "acquitted". The Court accordingly instructed that in those cases in which the judge is unable to decide the correctness of a defendant's explanation, "the judge must acquit him on the basis of doubt". Second, it provided two scenarios that could lead to an acquittal, each having its own independent configuration and clearly distinguished from the other. From that point onward, instead of only one type of acquittal, two categories of acquittal were available, each applicable under different circumstances and bearing a different name.

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[34] CrimC (Tel Aviv District Court) *Attorney General v. Levy* (1949, not published], mentioned in CrimA 16/49 *Levy v. Attorney General* [1949] IsrSC 2, 561, p. 565.
[35] CrimA 20/41 *Podamski v. Attorney General* [1951] IsrSC 5, 1187, at p. 1196 (emphases added).

Ever since these two early judgements introduced the phrase "acquitted on the basis of doubt", the term has been mentioned and used in hundreds of judgements[36] and discussed at length in the Israeli academic literature.[37] Since the concept was first formulated, Israeli case law, in a long series of decisions, has characterized "doubt-based acquittal" as a "technical acquittal" or a "doubtful acquittal", in which doubt exists regarding the person's innocence, as distinct from a "full acquittal", for which it must be proven, as an affirmative matter, that the defendant has not committed the crime attributed to him.[38]

It should be noted that Israel's adoption of a third verdict was done without reference to Scottish law that, as noted above, had adopted a third type of verdict, known as "not proven", centuries before. Indeed, there is no indication that the judges were even aware of this option or of the debate in the English legal literature regarding this issue. The court also did not note the difficulties and negative effects that may arise as a result of this kind of verdict.

2.3.3 *Outcomes of doubt-based acquittal*

Generally speaking, a doubt-based acquittal stigmatizes the defendant and thus has a serious adverse impact on his reputation. It can also potentially harm his ability to make a living. That is because a doubt-based acquittal does not clear the defendant of all guilt.[39] This type of acquittal is in effect perceived as merely technical, or derived from a mistake or a failure on the part of the prosecution (such as failing to prevent a witness from disappearing or slipping out of the country). Thus, for example, in the *Binyaminov* case, Israel's Supreme Court clarified that even though guilt had not been proven to the degree required in criminal law, "the appellant is under heavy suspicion" and is therefore being acquitted only "due to doubt."[40] Similarly, in *Grandivski,* the Court held that its decision to acquit the defendant because of doubt "does not remove the

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[36] As will be cited below.

[37] Yaniv Vaki, Maya Rozenshein, 'Doubts and Acquittals: A Doubtful Relationship' *David Wiener Book on Criminal Law and Ethics* 489 (Dror Arad-Ayalon, Yoram Rabin & Yaniv Vaki, Editors, 2009) (in Hebrew); Doron Menashe, Eyal Gruner, 'The Categorization of Acquittal: Absolute Acquittal vs Doubtful Acquittal – Reconsideration' 27(1) *Bar-Ilan Law Studies* 7 (2011) (in Hebrew); Micha Lindenstrauss, *Beyond A Reasonable Doubt – Selected Issues* (second edition, 2009) (in Hebrew).

[38] CrimA 1382/00 *Ben Aruyo v. State of Israel* [2002] IsrSC 56(4) 714, at p. 719: "An 'absolute' acquittal […] is based primarily on a positive determination that the defendant has not committed a crime. In contrast, a doubtful acquittal or a `technical` acquittal [is characterized by] the absence of an affirmative determination that the defendant has not committed a crime […]"; see also CrimA 960/99 *Macmillan v. State of Israel* [1999] IsrSC 53(4) 294, p. 303-305.

[39] CrimA 4466/98 *Davash v. State of Israel* [2002] IsrSC 56(3) 73, p. 98.

[40] See for example CrimA 6052/97 *Binyaminov v. State of Israel* (6 April 1998).

suspicion" that he was involved in the murder of the deceased.[41] That kind of acquittal thus transmits the message that the acquitted defendant is in fact a criminal who has evaded justice.[42] Such a person continues to be suspected by the public of having committed a crime even though he avoided conviction, possibly due to some technical reason. As the Court held in another case: 'A doubt-based acquittal often indicates that the court suspects that what has been alleged did indeed occur as described in the indictment, but the strength of the evidence is weak or the court feels that there is another source of doubt'.[43]

Furthermore, the distinction between a "full" acquittal and a "doubt-based" acquittal has substantive outcomes in Israeli law in terms of the defendant's rights. While doubt-based acquittal does not involve criminal sanctions such as fines or incarceration, it does have operative outcomes.

One of the most-important examples of such outcomes relates to the question of whether doubt-based acquittal justifies denial of compensation for false imprisonment. Section 80(a) of the Israel Penal Code provides that "[w]here it appears to the court that there was no basis for the charge or that there were other circumstances justifying its doing so, it may order the Treasury pay to the accused the costs of his defense and compensation for his detention or imprisonment in connection with the charge of which he has been acquitted." The rulings that interpret this section distinguish between the two types of acquittals with respect to the reimbursement of expenses for the defendant's defense and the payment of such costs out of public funds.[44] Hence, it was held that the fact that the acquittal was a doubt-based acquittal, as opposed to a full acquittal, was a proper and weighty factor to consider in denying the defendant's right to indemnification for the time he had spent in prison.[45] In other words, a doubt-based acquittal

[41] CrimA 892/07 *Grandivski v. State of Israel* (26 May 2009), per Justice Elon, para. 34.
[42] See CrimA 347/88 *Demjanuk v. State of Israel* [1993] IsrSC 47(4) 221, p. 644.
[43] CrimA 7653/11 *Yad'an v. State of Israel*, per Justice Rubinstein, para. 15 (26 July 2012).
[44] See for example CrimA 302/02 *Hamadan v. State of Israel* [2003] IsrSC 57(2) 550, p. 558. In that case, Justice Rivlin held that for the purpose of Sec. 80 of Israel's Penal Code, "[t]here is no doubt that the manner in which the process is concluded, and the reasons for the defendant's acquittal, could have significance for the purpose of determining the 'justification' of the compensation and indemnification."
[45] In *Davash*, *supra* note 39, p. 131, Justice Dorner noted that "[t]he proper standard for payment of legal expenses and compensation to defendants who were acquitted at trial is the type of acquittal . . . whether it was doubt-based, or absolute." See also CrimA 7115/04 *Ben Baruch v. State of Israel* (2 May 2007); CrimA 12003/05 *Hamoda v. State of Israel* (18 September 2008); CrimA 5923/07 *Shatiyawi v. State of Israel* (6 April 2009), para. 25. In that case, Justice Arbel expressly held that when the acquittal is due to doubt, it "can reduce the appellant's potential for receiving compensation."

limits the right to compensation for false imprisonment while reducing the acquitted individual's right to equal treatment as well as enjoyment of his property rights.

A related issue is noted in the Israeli Supreme Court's remarks in a 1997 decision regarding section 81 of the Penal Code, stated as follows:

> Where the court acquits an accused person after finding that the complaint which gave rise to the proceedings was made frivolously, vexatiously or groundlessly, it may . . . require [the complainant] to pay the costs of the defense of the accused and the costs of the public prosecution, as the court may prescribe.

In that specific case, the Supreme Court held that a doubt-based acquittal, as opposed to an absolute acquittal, negates the accused's entitlement to reimbursement of his expenses from the complainant.[46]

An additional example of the curtailment of rights by a doubt-based acquittal pertains to non-Israeli citizens who, after acquittal, submit a request to obtain permanent residency status in Israel. The Supreme Court held that in these circumstances, only a full acquittal (as opposed to a doubt-based acquittal) will wholly clear the accused and remove the cloud of suspicion that could hamper his application for permanent residence.[47]

The distinction between the two types of acquittals is also significant with respect to the acquitted person's risk of facing disciplinary sanctions regarding the particular act. The Israeli courts have held that a doubt-based acquittal cannot prevent the acquitted defendant from being subjected to disciplinary proceedings for the same event.[48] Additionally, a doubt-based acquittal can block a defendant's appointment to a position in the civil service. Finally, a doubt-based acquittal can provide the grounds for dismissing a person from his job.[49]

2.3.4 *Situations in which doubt-based acquittal is applicable*

A review of Israeli case law reveals the two major situations in which doubt-based acquittal is applied by the courts.

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[46] LCrimA 1703/96 *Doe v. State of Israel* [1997] 51(4) IsrSC 708, p. 711.
[47] LCrimA 1703/96 *Hamadan v. Government of Israel* [2005] IsrSC 59(4) 134.
[48] HCJ 13/57 *Tzimukin v. Civil Servant Disciplinary Tribunal* [1057] IsrSC 13 856, pp. 861-862.
[49] Labor Case (Haifa District) 1759/02 *Raba v. Bank Merchantile Discount Ltd.* (1 August 2007).

The first situation is one in which suspicions and evidence indicate the defendant's guilt, but doubt exists as to whether they are sufficient to convict at the level required for criminal cases. Such situations can occur when the judge has doubts regarding the decision to acquit or convict.[50] Doubt-based acquittal thus stands at the threshold for criminal proof.[51] The court has noted in many cases that it has acquitted the defendant on the grounds of doubt because the case was 'borderline'or because the court was far ,[52]'from being persuaded of the defendant's claim of innocence'.[53]

In the second type of situation the court, after being presented with two versions of the factual situation, each of equal weight – one supporting the defendant's innocence and one supporting his guilt – is unable to choose between them. In this situation, the question of the defendant's guilt or innocence remains unresolved on a factual level, presenting the judge with a factual **"tie"** that cannot be decided. Here, there is no lack of certainty – rather, the situation reflects a lack of knowledge; hence, Israel's Supreme Court has often explicitly held that 'when the set of facts is at a tie […], the appellant should be acquitted because of doubt'.[54]

2.3.5 *Winds of change*

Once doubt-based acquittal was incorporated into Israeli law, it has become one of its hallmarks**.** Over the years, defendants receiving doubt-based acquittals have appealed to the High Court of Justice with requests for retrials or requests to appeal -- while arguing that a verdict of "doubt-

[50] It appears that Supreme Court President Aharon Barak was referring to this type of doubt in FHCrim 4342/97 *State of Israel v. El Abid* [1998] 51(1) 736, p. 859: "There are times when the fact that there is equivocation regarding the presence of a reasonable doubt itself creates a reasonable doubt and leads to the defendant's doubt-based acquittal".
[51] See CrimA 10049/03 *Anonymous v. State of Israel* [2004] IsrSC 59(1) 385, 405, per Justice Joubran: "I acknowledge and will not deny that it was difficult to make a decision in the case here […] If this were a civil case, it would be appropriate to reject the appeal without hesitation, but the appellant has succeeded in eroding to some degree the evidence that the State had presented against him. And in these circumstances, there is no choice, in my view, other than to acquit him because of doubt".
[52] CrimA 1787/98 *Farida v. State of Israel* (20 August 1998).
[53] CrimA 7480/01 *Hason v. State of Israel* (28 November 2002).
[54] See for example CrimA 3059/03 *Glovovich v. State of Israel* [2003] IsrSC 58(1) 654, 672, per Justice Heshin: "When the set of facts presents a tie […], the appellant should be acquitted because of doubt"; see also CrimA 528/76 *Chelnik v. State of Israel* [1977] IsrSC 31(3) 701, 707, per Justice Asher: "If the court is not willing to come to an unequivocal conclusion in either direction, for reasons that have been proven before it, it must acquit the defendant because of doubt".

based acquittal" contains the potential to injure the defendant's rights. Nonetheless, all these requests, without any exception, were denied.[55]

Some years ago, Israel's Supreme Court provided a salient discussion of the issue, pointing in the right direction. In 2012, for the first time since the concept of doubt-base acquittal was formulated in case law more than seventy years ago, the Court criticized its use. In the *Yad'an* case, Justice Hendel, writing for the Majority, held:

> At the substantiation stage, the court may note that incriminating evidence exists, what gives rise to suspicions at some particular level. Nevertheless [...], the court should not – in the closing sentence of its decision – acquit the defendant on the basis of doubt while noting his guilt at one or another level of strength.[56]

Despite the significance of this statement, which could have pointed to a change in Israeli case law, the remark was noted *in dictum*; it has yet to lead to the abolition of the doubt-based acquittal category, nor to any change in its status within the Israeli legal system.

III CONSIDERATIONS FOR AND AGAINST MAINTAINING TWO TYPES OF ACQUITTALS

3.1 *General*

Over the years, various scholars have proposed adding other types of acquittal to the criminal justice system, suggestions that became the subject of debate. Bray proposed that legislatures introduce a variation of the Scottish "not proven" acquittal as a possible third verdict.[57] Robinson and Cahill suggested that the traditional not guilty verdict be replaced by four different categories of acquittal: (1) "a blameless violation"; (2) "a justified violation"; (3) "no violation"; and (4) an

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[55] See: RCrimA 1568/99 *Gilad v. State of Israel* (25 May 1999); RCrimA 89/89 *Asher v. State of Israel* (8 August 1989); In HCJ 6541/07 *Schwartz v. Magistrates Court, Tiberias* (2 Oct. 2007), the HCJ rejected a woman's petition to nullify her doubt-based acquittal regarding a crime of assault and to order that a verdict of full acquittal be handed down. In addition, in MH 7420/03 *Dagan v. State of Israel* (9 Sept. 2003), it was ruled that the Court will not grant a retrial if the defendant acquitted on the basis of doubt.

[56] *Yad'an, supra* note 43, per Justice Hendel, para. 3 (emphases in the original).

[57] Bray, *supra* note 5, p. 1304.

"unpunishable violation".[58] However, we should note that their taxonomy is grounded in substantive considerations; it does not include a category related to insufficient evidence. Myers suggests that every criminal conviction should be accompanied by a "vote of censure", meaning an explicit finding by the jury that the crime committed is worthy of moral condemnation. Myers proposed four possible determinations: '(1) required facts to prove all elements found, and for censure; (2) required facts to prove all elements found, and against censure; (3) required facts to prove all elements not found, but sufficient for censure; and (4) required facts to prove all elements not found, and against censure'. All but the first verdict would result in an acquittal. This proposal incorporates both jury nullification (the elements proven and against censure) and the Scottish "not proven" verdict (the elements not proven but sufficient for censure option).[59] Leipold suggests that the traditional use of two verdicts could be maintained, but proposed that they be accompanied by a secondary, voluntary process that could result in an additional verdict declaring innocence. Under the system proposed by Leipold, the defendant would have the option of choosing between the current process and an alternative process that could result in a declaration of his innocence.[60]

3.2 *Justifications for recognizing the two types of acquittal*

There are several answers to the question of why an additional type of acquittal was created and justified, as opposed to only two possible verdicts of guilty and (completely) not guilty. One explanation is the need for judges to express their thinking and impressions in more-precise terms rather than being forced to blur them so as to mix them all under one general category of "not guilty". Thus, for example, the Israeli Supreme Court has noted the need for doubt-based acquittal due to its ability to reflect the 'conscience of a judge, who is not satisfied with a conviction, but who is also not satisfied with the inability to express his doubts'.[61]

The second explanation involves the need and obligation to provide reasons for the court's ruling. In a legal system in which cases are adjudicated by judges, the latter are required to explain their decisions. Even if the category is eliminated, doubt can still be expressed in the reasons given for the decision, even if not mentioned in its bottom line. If the expression of doubt has a

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[58] Paul H. Robinson & Michael T. Cahill, *Law Without Justice: Why Criminal Law Doesn't Give People What They Deserve* (2006) at 210.
[59] Richard E. Myers II, 'Requiring a Jury Vote of Censure to Convict' 88 *N. C. L. Rev.* (2009) at 137.
[60] Andrew D. Leipold, 'The Problem of the Innocent, Acquitted Defendant' 94 *Nw. U. L. Rev.* 1297 (2000).
[61] CrimA 3751/11 *Abu Tarash v. State of Israel* (2 September 2012), per Justice Rubinstein, at para. E.

negative impact on the defendant's rights, the same problem will arise from any statement of doubt appearing in the court's judgment, beyond its bottom-line conclusion.

The third explanation is that an acquittal verdict can extend over all the different levels of innocence or guilt. The decision to acquit can be based on a spectrum of points of probability stretching from the level of very high probability of guilt (but not sufficient high to reach the level of being beyond reasonable doubt) to the other end of the spectrum, the level at which there is "no doubt remaining that the defendant is innocent". Israeli case law intentionally sought to distinguish between groups of defendants for whom there is no doubt of their innocence and should therefore be granted a "purifying" acquittal, and those for whom doubt remains of their innocence, with heavy suspicions still hanging over their heads, leaving them marked with the shadow of possible guilt. The point behind creating a separate category for the group of "suspect" defendants was the designation of a group of defendants who, while fully acquitted, could **not** be labeled "innocent". By contrast, elimination of doubt-based acquittal would mean that the "innocent" verdict would refer to the entire range of non-guilt situations, which would lead to a situation where an entirely innocent person could be viewed as having been acquitted only because of some remaining doubt regarding his guilt. It can further be argued that doubt-based acquittal is justified due to the quality of the information it embraces, the use of which can save public resources. For example, in cases where a decision is needed regarding compensation and indemnification for a defendant acquitted upon discovery that there were no grounds for charging him (see above), a verdict of doubt-based acquittal would be sufficient to deny compensation and indemnification and thus avoid initiation of new proceedings to clarify the matter.

The fourth explanation for creation of the "doubt-based acquittal" category is the perception that the criminal verdict reflects the true narrative. One of the main objectives of a criminal proceeding is to strive to uncover the truth. For this reason, the outcomes of such a process – conviction or acquittal – are meant to reflect truth-based narratives. The failure to achieve this objective in all those cases where the criminal verdict is not based on an absolute positive factual determination – lying in the range between conviction and "absolute acquittal" – creates a sense of discomfort. It expresses dissatisfaction with the declaration of the defendant's innocence in light of a certain probability of his guilt. A response to this tension is a qualified declaration of innocence in the form of a doubt-based acquittal.

The final explanation involves the need to protect complainants and crime victims. Through doubt-based acquittal, the court is able to transmit to the complainant and the general public a message that although the defendant was acquitted, this does not mean that the complainant's version of events is not truthful. Often, even if the court believes the complainant's version, it is obligated to acquit the defendant if there is reasonable doubt of his guilt. By issuing a doubt-based acquittal, the court refrains from delivering the wrong message, one that could adversely impact on the good name and reputation of the complainant and create negative incentives for other potential complainants, deterring the filing of their complaints.

3.3 *Availability of different types of acquittals: Criticism*

The reasons for eliminating doubt-based acquittal are weighty. First, doubt-based acquittal infringes upon the defendant's right to preserve his good name and reputation because this type of acquittal leaves a cloud of suspicion hanging over his actions.

Second, doubt-based acquittal affects exercise of the defendant's right to property. As described previously, doubt-based acquittal may potentially restrict the acquitted party's right to compensation and indemnification. As described above, the Israeli system as well as the Italian system maintain distinguishes between defendants obtaining a doubt-based acquittal and those receiving a "full acquittal" with respect to reimbursement of their defense costs as well as the payment of those costs by the national treasury. Furthermore, according to these systems indemnification and reimbursement for false imprisonment will not be rendered when the original verdict was doubt-based acquittal despite the injury to the acquitted right to equality as well as his property rights.

Moreover, in the Italian like the Israeli system, the criteria determining compensation for legal costs, grounded in the type of acquittal handed down, also apply to administrative proceeding regarding the reimbursement of legal costs incurred by public officials tried for offenses committed in the fulfillment of their duties. In Israel, the sum of the government's share of trial costs is determined, in part, by the type of acquittal handed down. In the case of doubt-based acquittal, that share is considerably lower than the share to be covered in cases of full acquittal, based on the fact that the public official was shown to not having committed the acts of

which she was accused.[62] In Italy, despite the administration's obligation to reimburse the trial costs incurred by employees after their acquittal, the return of legal costs may be denied in cases where the public official was found innocent due to the lack of evidence, explained by the fact that the official's criminal responsibility had not been fully ruled out.[63]

In addition, doubt-based acquittal can also prevent such a person's appointment to public office and may lead to dismissal from an existing position.[64]

Third, doubt-based acquittal impairs the defendant's right to remain silent. In order to obtain a full acquittal and avoid making do with a doubt-based acquittal, the defendant is compelled to surrender this right in order to transmit a detailed version of the events.[65] That is, in order to allow the judge to construct a coherent, factual version of the events in his verdict supporting the defendant.

Fourth, doubt-based acquittal adversely impacts on the presumption of innocence applying to every criminal defendant prior to conviction.[66] In order to receive full acquittal and avoid lower-level doubt-based acquittal, a defendant is subjected to a heavy burden of proof regarding his innocence, what undermines the presumption of innocence. If every defendant is innocent until proven guilty, pursuant to the presumption of innocence, doubt-based acquittal can induce a situation where no defendant is ever considered innocent unless she can prove her complete innocence. Recognition of doubt-based acquittal thus leads to an outcome implying that a defendant will remain wrapped under veil of doubt unless a defendant can prove his innocence in a positive sense.

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[62] See for example HCJ 320/96 German v. the Herzliya Municipal Council, PD 52(2) 222 (1998).

[63] See the decision handed down by the Regional Administrative Court of Lazio (Province of Rome), Tar Lazio sentenza n.10727/2019.

[64] IB (District Court of Haifa) 1759/02 Rabaah v. Mercantile Discount Bank Ltd. (8 Jan. 2007). See also Doron Menashe and Eyal Gruner, "The Categorization of Acquittal: Absolute Acquittal vs Doubtful Acquittal - Reconsideration", 27(1) *Bar-Ilan Law Studies* 7, 14 (2011). In this article, the authors focus on the fact that doubt-based acquittal may be used as evidence against the accused in administrative proceeding, as well as evidence against her in reaching a decision regarding her dismissal. See also paras. 652-654, the Italian Procedural Code, *supra* n. 21.

[65] This conclusion confirms Allen's model of a narrative: see Ronald J. Allen, 'The Narrative Fallacy, the Relative Plausibility Theory, and a Theory of the Trial' 3 *Int'l Commentary on Evidence*, no. 5 (2005).

[66] See Laurence H. Tribe, 'Trial by Mathematics: Precision and Ritual in the Legal Process' 84 *Harv. L. Rev.* 1329 (1971) at 1370-1371: "That presumption, as I have suggested elsewhere, 'represents far more than a rule of evidence' […] That presumption retains force not as a *factual* judgment, but as a *normative* one – as a judgment that society *ought* to *speak* of accused men as innocent, and *treat* them as innocent until they have been properly convicted […] The suspicion that many are *in fact* guilty need not undermine this normative conclusion or its symbolic expression".

Under such circumstances, as stated, the condition of a suspect whose guilt has not been established because he did not stand trial will be superior to that of a defendant who, after standing trial, received a doubt-based acquittal. Whereas the former will enjoy the benefits of a presumption of innocence, the latter, due to no fault of her own, will be plagued by unending suspicions. This point raises an additional issue touching on the character, function and formulation of the presumption of innocence. The serious commitment to the concept of "innocence" requires viewing innocence as a category of truth rather than a legal status, as a positive fact, and not a conditional presumption. It appears to us that there is room for adopting such a perspective, according to which a person brought to trial and not convicted is innocent rather than presumed innocent.

We suggest that such type of acquittal would empty the concept of innocence of its meaning and of its normative content. It would boldly operate against the accepted conceptual framework according to which the default position of doubt, taken in the absence of positive proof of guilt, is the profound belief in the accused's innocence.

Fifth, doubt-based acquittal restricts the defendant's constitutional right to due process.[67] A well-rooted perception states that the criminal process is directed at adjudicating guilt, not establishing innocence. One key rule derived from this perception is that the defendant carries this burden imposed merely by pointing some level of doubt regarding the alleged guilt scenario alleged by the prosecution; yet, no requirement to affirmatively prove her innocence exists. It is therefore the case that the defendant needs only to create doubt regarding the guilty scenario on the one hand, whereas the court has the freedom to determine, *inter alia*, the probability of the defendant's innocence on the other. When the court decides to acquit the defendant on the basis of doubt, it extends the factual frontier beyond the one that placed before his adjudiction. At the same time, the defendant lacks any opportunity to defend himself against such conclusions, or to rebut them.

The built-in inequality in the distribution of power between investigative and prosecuting mechanisms, including disparities in the state's resources available to both in contrast to those of the accused, is revealed in full force the moment defendants face the identical, stringent demands

[67] Regarding the nature of the right to due process in general, see Stefan Trechsel, 'Why Must Trials Be Fair?' 31 *Israel Law Review* 94 (1997).

placed before the prosecution in its attempt to achieve a positive conviction. To illustrate, we can state that in numerous situations, the positive and total elimination of all reasonable doubt regarding the accused requires interpretation of the criminal event while directing attention to the actual guilty party involved or, at least, pointing out the prosecution's failures and the investigation's flaws. Completion of these tasks is usually very difficult if not impossible, especially for an innocent defendant. In any event, it is reasonable to expect that doing so requires considerable resources, amounts that an individual defendant is highly unlikely to have at her disposal.

IV A PROPOSAL TO ABOLISH DOUBT-BASED ACQUITTAL

The difficult outcomes of doubt-based acquittal justify re-examination of the practice from a constitutional perspective, a step necessary in order to properly balance the opposing interests, the reasons supporting this type of acquittal, as well as those indicating the need for its elimination. Despite the justifications and explanations for its existence, the difficulties inherent in this third category of verdict – and certainly the problems created by its wide-spread use by the courts – lead us to the conclusion that doubt-based acquittal should be eliminated. As explained above, doubt-based acquittal adversely affects several of the defendant's basic constitutional rights. We have therefore concluded that there is no justification for differentiating between the two types of acquittal. Furthermore, due to the difficulties and failures of doubt-based acquittal, as just described, it must be expunged from the legal and the public discourse. In short, there is no reason to adopt this divergent concept if it upsets the fundamental ideals of criminal law.

The objective of the criminal process is to determine the defendant's guilt in light of the prosecution's evidence, not to pass judgement on the question of his innocence.[68] The threshold for proof in a criminal proceeding limits the possibility of conviction only to clearly proven

[68] For a discussion on the presumption of innocence and its relationship to the level of proof of "beyond a reasonable doubt", see: David Hamer, *Presumptions, standards and burdens: managing the cost of error*, 13(3-4) LAW PROBABILITY AND RISK 221 (2014); Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1195 (2003); Yaniv Vaki, *Beyond A Reasonable Doubt – The Flexible Principle of Proof in Israeli Law* (2013) (in Hebrew); Barton L. Ingraham, *The Right of Silence, The Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O'Reilly*, 86 J. CRIM. L. & CRIMINOLOGY 559 (1996); William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV 329, 340–341 (1995).

instances of guilt;[69] for the sake of obtaining that level of security, it knowingly makes compromises in matters regarding the reliability and accuracy of the acquittal outcome.[70] When the court takes upon itself the power to decide the question of the defendant's innocence – but is not satisfied with the proof for negating his guilt or putting that guilt into doubt – the court is forced to deal with an issue that neither the law nor the parties have placed before it and which it is doubtful that the court has the ability to decide. To prove innocence, it is of course not enough to raise doubts as to the prosecution's evidence – such evidence will have to be proven to be false and completely (or at least nearly) undone. We should recall the serious built-in imbalance between the strengths of the two sides in a criminal proceeding: the investigation and prosecution systems, with state resources available to them on the one hand, versus the relatively poor resources of the individual defendant on the other hand.

This imbalance becomes overwhelmingly apparent when the defendant seeking a full acquittal is confronted with the same strict requirements faced by the prosecution when seeking a conviction.

Thus, for example, we can imagine that in many situations, the affirmative and absolute acquittal of a defendant, devoid of any possible reasonable doubt, will require the defendant to resolve the fundamental question raised in the criminal incident, a process perhaps leading to identification of the true guilty party. At the very least, the defendant will need to uncover all the flaws and failures of the prosecution's investigation. Normally, the substantial resources that such a process requires are not available to individual defendants. Therefore, if the legal system is one in which a judge is required to give reasons for a verdict, as in the Israeli system, we recommend that for the sake of limiting the negative consequences of doubt-based acquittal and distinguishing between the stage of providing reasons and the stage of rendering a decision, the courts should express their doubts when asked to provide reasons rather than when they are required to describe their bottom-line verdict. Put simply, we recommend that they cease indicating their doubts by means of a doubt-based acquittal; instead, they should do so only when

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[69] Federico Picinali, *Innocence and Burdens of Proof in English Criminal Law*, *Law Probability and Risk*, 13 (3-4), 243 (2014).

[70] Lord Devlin: "Trial by jury is not an instrument of getting *at* the truth; it is a process designed to make it as sure as possible that no innocent man is convicted" cited in Sir Richard Eggleston, 'Sixth Wilfred Fullagar Memorial Lecture 'Beyond Reasonable Doubt'', 4 *Monash U. L. Rev.* 1 (1977) p. 22.

stating the reasoning behind their verdict. If they take this direction, courts will be able to express their doubts without branding the trial's outcome a second-class acquittal.

We should stress that our argument promotes eliminate of any additional type of acquittal whether speaking of judges who hand down closely reasoned verdicts, or as to juries who announce their decisions without any mention of the reasoning applied. As previously stated, the reasons for eliminating this additional type of acquittal are, for the most part, rooted in the fact that this category may potentially inflict disproportionate or unjustified harm to the defendant's basic rights as part of a criminal procedure. In any case, retraction of the third type will lead to clearing the defendant without leaving any traces of doubt about his innocence. Hence, elimination of the additional type of acquittal while allowing reasoning explaining the doubt does not fully erase the remnants of uncertainty that may tarnish the defendant. However, we also believe that there is difference between reasoning explaining doubt and decisions regarding the presence of doubt. First, the public is more exposed to verdicts and to "bottom lines" than it is to the reasoning behind these decisions. Second, judicial and other decisions (in civil, administrative and disciplinary proceedings) are handed down on the basis of the "bottom line" of the (criminal) verdicts and not on the basis of the reasoning behind those verdicts. Therefore, even if reasoning of doubt may have some effect on the accused, its impact, if any, will be small, certainly when compared to that of a doubt-based acquittal.

Hence, when there is insufficient evidence to convict, the court should acquit a defendant whether or not it has accepted the defendant's version of the events, even if the court is unprepared to decide that version's veracity. In both cases, the verdict must be the same – innocent. The difference between the two cases need not to be detailed in the final verdict, only in the court's reasons for the verdict, i.e., its reasons for accepting the defendant's version of his innocence, or for finding that there is reason to doubt the prosecution's version. In the same way that a guilty verdict concludes with a determination according to which the court decides that the defendant must be convicted, an acquittal must have a similar straightforward determination. A guilty verdict is not accompanied by a description regarding the strength of the decision to convict. Even if there is just mild doubt, below the level of reasonable doubt, this doubt is not expressed in the verdict's determination but, instead, in the reasons given for the verdict, stated prior to the verdict. The same needs to be done with acquittals. At the stage at which the court sets out its reasoning,

it can, and should, elaborate in full the judge's thinking on the issue of guilt. The reasoning must be clear and include the reason or reasons for concluding that there was doubt as to guilt, for determining the reasonableness of that doubt. The court will thus be able to set out the nature and level of that doubt in a manner that reflects, precisely and fully, the judge's thoughts on the matter and what led the judge to acquit the defendant.

In addition, as noted, doubt-based acquittal applies to the entire broad range of circumstances in which a court does not reach a positive conclusion regarding the defendant's guilt or innocence. A doubt-based acquittal is any acquittal that is not a full acquittal whereas a full acquittal is given when there is no (reasonable) doubt as to the defendant's innocence. However, one of the standard justifications for employing doubt-based acquittal is the quality of the information that it reflects. The creation of an additional category, to exist alongside that of full acquittal, was meant to encourage more accurate classification at a factual level of legal outcomes. In this way, that category could introduce greater transparency to the courts' decisions and allow the parties exposed to better understand that decision, what should conclude in more-efficient utilization of public resources.

And yet, expansion of the use of doubt-based acquittal to a broader range within the spectrum of possible guilt situations – starting from a point close to proof of guilt beyond reasonable doubt and continuing to a point close to proof of innocence (or lack of guilt) – serves to considerably blur the nature of the verdict, up to the point where the verdict cannot inform the reader of the evidentiary situation or its strength within the actual case. In consequence, describing an acquittal as doubt-based does not indicate the strength of the evidence in the case nor reflect the full evidentiary situation regarding the case. Such a description does not indicate whether the case is one where there is considerable evidence pointing to the defendant's guilt, to a level reaching the threshold for conviction, or whether the case is one where almost no evidence supporting the defendant's guilt. Given the opaqueness of this third type of verdict, the two situations are classified in an identical manner and labelled identically by those facing a doubt-based acquittal. It follows that this type of verdict does not achieve its objective, and should therefore be eliminated.

The set of cases that present a (full) acquittal will subsequently also include cases that, in the past, would have led to a doubt-based acquittal. Furthermore, it can be argued that elimination

of doubt-based acquittal will do harm to those defendants whose cases have already ended with a full acquittal because this group would henceforth be labelled differently. Moreover, those defendants who have been fully acquitted will no longer include only those about whom there is no doubt as to their innocence; it will also include those for whom some level of incriminating evidence was found to be present. The response to this argument would be that such defendants were innocent of any guilt prior to the criminal proceedings of which they were the subject, and they remained innocent after they were acquitted. Regarding this matter, there is no difference – and in our view, there should be no difference – between parties acquitted after it has been clarified that their innocence is undoubted and defendants acquitted despite the incriminating evidence that, however, does not reach a level allowing for any conclusion to be drawn concerning the matter of their guilt.

V SUMMARY AND CONCLUSIONS

Introduction of an additional type of acquittal, similar to the Scottish "not proven" or the Israeli "doubt-based acquittal", appears an attractive option: it rests on a narrative that conveys judicial consciousness of the limits of certainty. Appearances, however, are often deceiving. We submit that the integrity of the criminal justice system generally and the protection of the human rights of the defendant specifically, are better served with a binary form of decision: guilty, or not guilty. It does not, however, follow that judicial consciousness lacks importance. Judgments are based on facts and law, incorporated into a reasoned narrative that seeks to convince the parties, colleagues, the legal profession and the public at large that justice has been done. It is in this narrative, but not in the verdict, where a judge can and indeed should articulate shades of doubt and the reasoning behind the acquittal, a reasoning rooted in the criminal legal system's integrity.

The difficulties involved in a verdict based on this additional type of acquittal arise primarily from the very broad reach of the concept in a manner that harms the defendant's basic and constitutional rights have led us to conclude that only one type of acquittal – full acquittal – should endure, with other types of acquittal, such as Scotland's "not proven" and Israel's "doubt-based acquittal", scrapped.