

# Protecting the Guilty

Rinat Kitai<sup>†</sup>

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## OUTLINE

This essay examines the justification for setting a high standard of proving the defendant's guilt beyond a reasonable doubt in a criminal trial. It offers an original justification for the strict standard of proof that is based on the state's moral commitment under the social contract theory to avoid conviction when innocence is a possibility. This duty exists apart from the possible deleterious consequences for the convicted person. The state, in taking the concrete risk of convicting and punishing an innocent person, behaves in a morally wrong fashion, irrespective of the actual guilt or innocence of the defendant. In such a case, the state is ready to blur for the defendant the borders sorting out the permissible and the forbidden and

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<sup>†</sup> LL.B. (1992), Ph. D. (2001), Hebrew University of Jerusalem. Lecturer, Ramat Gan Law School, Israel. Visiting Scholar, New York University Law School.

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consequently to undermine the basis of the partnership between that person and the state.

#### INTRODUCTION

It is common knowledge that in a criminal trial, the state bears the burden of proving the defendant's guilt beyond all reasonable doubt, so the evidence it brings negates unequivocally any rational, plausible explanation for the defendant's innocence. Only proof of guilt beyond all reasonable doubt can overcome the presumption of innocence. Given the impossibility of reaching absolute certainty, guilt beyond all reasonable doubt is assumed to be the highest standard of proof that is realistic and within the realm of human knowledge.<sup>1</sup>

Even though the law deviates from this burden of proof in certain circumstances, particularly by means of "reverse onus" provisions, the general rule that conviction and punishment are possible only after proving guilt beyond all reasonable doubt nonetheless stands. This rule is held to be a fundamental principle of criminal procedure,<sup>2</sup> expressing a basic constitutional right of the individual.<sup>3</sup> In the words of Fitzgerald, "No rule of criminal law is of more importance than that which requires the prosecution to prove the accused's guilt beyond reasonable doubt."<sup>4</sup>

Many premises have been offered as justification for setting a strict standard of proof.<sup>5</sup> The central premise is the need of protecting the innocent from wrongful conviction.<sup>6</sup>

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1. Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 Va. L. Rev. 371, 388 (1970).

2. *Coffin v. United States*, 156 U.S. 432, 453 (1895).

3. A.A.S. Zuckerman, *The Principles of Criminal Evidence* 124 (1989).

4. P.J. Fitzgerald, *Criminal Law and Punishment* 192 (1962).

5. Such as the asymmetry between the powers of the state and the defendant (1 James Fitzjames Stephen, *A History of the Criminal Law of England* 354 (1883); Carleton Kemp Allen, *Legal Duties and Other Essays in Jurisprudence* 271-73 (1931)) and counterbalancing the prima facie presumption of guilt (George P. Fletcher, *The Presumption of Innocence in the Soviet Union*, 15 UCLA L. Rev. 1203, 1212 (1968)).

6. As James C. Morton & Scott C. Hutchison, *The Presumption of Innocence* 4 (1987), indicate.

In this essay, I propose an original approach to the justification and necessity of this standard. I challenge the position that the standard of proof beyond all reasonable doubt exists primarily for the purpose of protecting the innocent, positing, instead, that its role is no less to protect the guilty. This function derives from the state's moral duty towards all individuals under political morality to avoid conviction where innocence is a possibility. The commitment towards the guilty stands for its own sake. It opposes the idea that "the Constitution seeks to protect the innocent. The guilty, in general, receive procedural protection only as an incidental and unavoidable byproduct of protecting the innocent because of their innocence."<sup>7</sup>

The essay proceeds in the following order. Part II discusses the social cost of the heavy burden of proof in a criminal trial. In light of the actual and potential damage generated by that standard, Part III tries to understand the reasons for the protection of the innocent and to demonstrate that most of them do not lead to an inevitable preference of acquitting the guilty over convicting the innocent. Part IV demonstrates that the only valid justification for the high standard of proof relates to the commitment of the state towards the individual under the social contract theory to refrain from convicting him or her when there is a possibility that he or she has done no wrong. This obligation is no less valid towards the guilty than towards the innocent. It is extraneous to the possible deleterious consequences for the convicted defendant. Part V stands on the connection between the high standard of proof and moral theories, claiming that the high standard compels an adoption of a deontological point of view, which recognizes rights and duties that are inherently imposed on the state or individual.

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7. Akhil Reed Amar, *The Future of Constitutional Criminal Procedure* 33 *Am. Crim. L. Rev.* 1123, 1133 (1996).

## I. THE SOCIAL COST OF THE HIGH STANDARD OF PROOF

There is no disputing that the strict standard of proof exacts a high price from society, namely, the cost of the acquittal and release of a considerable number of offenders and the consequent danger to public safety.<sup>8</sup> The acquittal of an offender violates the rule of law. It causes injury to all actual and potential victims of the deeds of released offenders.<sup>9</sup> The high standard of proof weakens the element of general deterrence amongst the public, thereby exposing the public to the risk of becoming the victims of offenses.<sup>10</sup> The potential offender's knowledge that there are many obstacles to convicting him at trial gives him hope of evading punishment for his actions and thereby decreases the element of personal deterrence. Indeed, the overall objectives of punishment are undermined by the acquittal of guilty offenders.<sup>11</sup> There are those who posit that there is a miscarriage of justice whenever a verdict fails to reflect the factual truth, let alone when a multitude of offenders escape conviction and punishment.<sup>12</sup>

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8. Zuckerman, *supra* note 3, at 8, 39.

9. Glanville Llewelyn Williams, *The Proof of Guilt* 189 (3d ed. 1963); Joseph C. Cascarelli, *Presumption of Innocence and Natural Law: Machiavelli and Aquinas*, 41 *Am. J. Juris.* 229, 234 (1996); Alan Wertheimer, *Punishing the Innocent—Unintentionally*, 20 *Inquiry* 45, 49, 61 (1977). In this context Alexander Volokh, *n Guilty Men*, 146 *U. Pa. L. Rev.* 173, 211 (1997), brings as an anecdote a comment attributed to a Chinese law Professor who, after hearing that it is better to acquit ninety-nine guilty persons than execute one innocent person, queried, "Better for whom?"

10. Robert Nozick, *Anarchy, State, and Utopia* 97 (1974).

11. Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 *Ark. L. Rev.* 231, 235 (2000) (discussing the erroneous conviction of an innocent defendant).

12. John Rawls, *A Theory of Justice* 86 (1971); Wertheimer, *supra* note 9, at 61; Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 *Hastings L.J.* 457, 460 (1989); Williams, *supra* note 9, at 189; Nozick, *supra* note 10, at 97 (arguing that some people attribute intrinsic importance to the conviction of offenders); Herbert L. Packer, *The Limits of the Criminal Sanction* 164-165 (1968) (stating that the crime-control model is amenable to avoiding mistakes in the criminal process, as long as this does not hamper the objective of reducing crime by releasing too many offenders or overly reducing general deterrence).

In addition to the above-mentioned contentions, which are based on a logical analysis of the connection between acquittal of the guilty and conviction of the innocent because of the standard of proof, arguments have been made with regard to the possible empirical effects of the high standard of proof. If the public perceives that too many people successfully evade punishment for their crimes, the result may be public distrust of the state's ability to uphold public order and disregard for the law. The acquittal of guilty persons may demoralize the police in performing their duty of law enforcement or, alternatively, encourage them to use improper methods to elicit confessions. Another possible result could be the imposition of disproportionately severe penalties on those actually convicted.<sup>13</sup>

## II. THE PRINCIPLE OF DEFENDING THE INNOCENT AND ITS GROUNDS OF JUSTIFICATION

Against the social cost of the heavy burden of proof stands the most prominent claim raised to justify the high standard of proof, namely, the need of protecting the innocent from wrongful conviction. Society considers conviction of the innocent to be much worse than acquittal of the guilty.<sup>14</sup> The standard of proof reflects the importance that society attaches to the danger of convicting the innocent. The acquittal of a possibly guilty person is preferable to conviction of a possibly innocent person.<sup>15</sup> Scholars have long contended that it is better to acquit five, ten,<sup>16</sup> twenty, a hundred, and even a thousand guilty

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13. Sundby, *supra* note 12, at 460 n.16; Williams, *supra* note 9, at 189.

14. R.M. Dworkin, *Taking Rights Seriously* 199-200 (1978).

15. Jeremy Bentham, *A Treatise on Judicial Evidence* 197 (1825); Linda E. Carter, *A Beyond a Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness*, 52 *Ohio St. L.J.* 195, 204-05 (1991); Douglas N. Husak, *Philosophy of Criminal Law* 210 (1987); *In re Winship*, 397 U.S. 358, 372 (1970).

16. This is the common ratio: Allen, *supra* note 5, at 257-58; Williams, *supra* note 9, at 187; Sundby, *supra* note 12, at 499.

persons than to convict one innocent person.<sup>17</sup> The Biblical story of Sodom and Gomorrah, Abraham's question to God—"Wilt thou also destroy the righteous with the wicked?"—and God's negative reply seek to teach of the divine importance of preventing harm to the innocent.<sup>18</sup> In a civil trial, society generally has no predilection for one side or the other, and a mistake in favor of the claimant is not perceived as more serious than a mistake in favor of the defendant.<sup>19</sup> By contrast, the criminal standard of proof is the means by which society's value judgment regarding the proper allocation of the risk of an erroneous verdict between society and the individual is brought into effect. Its role is to ensure that risk of an erroneous verdict tips the scales towards releasing the guilty offender rather than convicting the innocent.<sup>20</sup> Obviously, due to the fallibility of human judgement, the danger of error in the verdict exists in every trial.<sup>21</sup> A high standard of proof does not prevent mistakes; in fact, in lowering the risk of convicting the innocent, it may even increase the total number of mistaken verdicts in point of fact.<sup>22</sup> Moreover, the burden

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17. For the different ratio mentioned in the equation of the acquittal of the guilty versus the conviction of the innocent, see Volokh, *supra* note 9, at 173-216. See also to this point Bentham, *supra* note 15, at 198; Allen, *supra* note 5, at 257-258; George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 *Yale L.J.* 880, 881-82 (1968); William L. Twining, *Theories of Evidence: Bentham and Wigmore* 95-96 (1985).

18. Cascarelli, *supra* note 9, at 234. Volokh, *supra* note 9, at 173-77 (who mentions that in fact no innocent person was hurt in the destruction of Sodom and Gomorrah).

19. Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law* 128 (1998); Morton & Hutchison, *supra* note 6, at 4; R.M. Dworkin, *A Matter of Principle* 89 (1985); Alex Stein, *An Essay on Uncertainty and Fact-Finding in Civil Litigation, with Special Reference to Contract Cases*, 48 *U. Toronto. L.J.* 299, 316 (1998); *In re Winship*, 397 U.S. at 371.

20. Charles Tilford McCormick, *McCormick On Evidence* 580 (John W. Strong ed., 4th ed. 1992); Sundby, *supra* note 12, at 458; Stephen A. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 *Stan. L. Rev.* 271, 288 (1975); *In re Winship*, 397 U.S. at 371-72.

21. Rawls, *supra* note 12, at 86; Zuckerman, *supra* note 3, at 122-123; Morton & Hutchison, *supra* note 6, at 4; Wertheimer, *supra* note 9, at 45; Stein, *supra* note 19, at 299.

22. Morton & Hutchison, *supra* note 6, at 5.

to prove the defendant's guilt beyond all reasonable doubt does not serve to completely prevent the mistaken conviction of innocent defendants.<sup>23</sup> However, it does prevent the trier of fact from taking a calculated risk of this kind.<sup>24</sup> Thus, the deliberate tipping of the scales in favor of the defendant with regard to the allocation of the risk of error reflects society's value judgment that the interest of the innocent to be acquitted overwhelmingly supercedes society's interest in convicting offenders and enforcing the law. The maxim according to which it is better to acquit many offenders than convict one innocent person links the standard of proof in a criminal trial with the desire to protect the innocent. Some scholars hold, therefore, that this standard of proof is aimed at avoiding a mistake resulting in conviction and punishment of the innocent and, correspondingly, at protecting innocent defendants.<sup>25</sup>

What, then, are the reasons for society's great concern for preventing the conviction of an innocent person? The standard of proof reflects primarily the nature of the accusation directed at the individual, its severity, and its possible consequences for her.<sup>26</sup> There is no dispute that a criminal conviction is likely to have deleterious consequences for the convicted defendant,<sup>27</sup> perhaps leading to social, psychological, or economic damage.<sup>28</sup> A criminal conviction bears a social stigma.<sup>29</sup> It can affect

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23. Sundby, *supra* note 12, at 461-62; Michael Ross, *How Many Innocent Men Will Be Killed*, *Hum. Rts.*, Summer 1996, at 20.

24. Tribe, *supra* note 1, at 388.

25. Morton & Hutchison, *supra* note 6, at 6; Zuckerman, *supra* note 3, at 125-26.

26. See generally: Dale A. Nance, *Civility and the Burden of Proof*, 17 *Harv. J.L. & Pub. Pol'y* 647, 648 (1994); *Addington v. Texas*, 441 U.S. 418, 423 (1979).

27. *In re Winship*, 397 U.S. at 363-64; Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 *Yale L.J.* 1149, 1162 (1960); Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 *Yale L.J.* 1299, 1339 (1977); Irit Weiser, *The Presumption of Innocence in Section 11(d) of the Charter and Persuasive and Evidential Burdens*, 31 *Crim. L.Q.* 318, 322-23 (1989).

28. *R. v. Oakes*, [1986] 1 S.C.R. 103, 119-20.

29. Zuckerman, *supra* note 3, at 5; Weiser, *supra* note 27, at 323; Gregory W. O'Reilly, *Comment on Ingraham's "Moral Duty" to Talk and the Right to Silence*, 87 *J. Crim. L. & Criminology* 521, 526-27 (1997); Carter, *supra* note 15, at 205; In

employability<sup>30</sup> and even disqualify the convicted person from a particular trade or profession. Its immediate consequences are manifested in the denial of property, dignity, physical liberty, and, in some places, even the denial of life. The denial of physical liberty, let alone the denial of life, are the severest constraints that the state can impose on the individual.<sup>31</sup> Punishment involving the denial of physical liberty serves to augment the social stigma involved. It might even be claimed that the great value attached by every democratic state to the individual's physical liberty justifies the high standard of proof in a criminal trial and, accordingly, that the primary function of the high standard of proof is to protect the individual's liberty.<sup>32</sup> It would be a mistake, however, to regard the high standard of proof merely as a specific aspect of other basic rights, such as the individual's right to physical liberty and right of property. The right to physical liberty is often not at stake, for the majority of offenses do not involve the risk of loss of liberty and some offenses do not even include imprisonment as punishment.<sup>33</sup> Indeed, the high standard of proof has a great degree of direct bearing on individual liberty, as well as on the right to property, which can be restricted by conviction. However, the protection provided by the high standard of proof to the individual is broader than the mere safeguarding of her liberty or property.

According to Ronald Dworkin, every punishment, whether justified or not, brings about "a bare harm" to the convicted individual, encompassing suffering, frustration, pain, and an inability to fulfill one's aspirations due to the

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re *Winship*, 397 U.S. at 363-64; *R. v. Oakes*, [1986] 1 S.C.R. 103, 119-20. For the assumption that the stigma of conviction is not severe in many cases, see 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, 575 (1996).

30. O'Reilly, *supra* note 29.

31. Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 *Mich. L. Rev.* 510, 530 (1986); Packer, *supra* note 12, at 165 (on the final outcome of the criminal trial intertwining stigma and loss of freedom).

32. Fitzgerald, *supra* note 4, at 192.

33. Morton & Hutchison, *supra* note 6, at 62.

loss of freedom.<sup>34</sup> However, when an innocent party is convicted, the injustice brings an additional, special suffering. This was termed by Dworkin “the injustice factor” or “the moral harm.”<sup>35</sup> Dworkin did not include in this harm the convicted person’s possible sense of anger, frustration, or other negative emotions that may be experienced. Indeed, similar circumstances may produce different emotions and reactions in different people. These emotions may be stronger for the convicted innocent person than for his guilty counterpart, thereby increasing the former’s “bare harm.” In some cases, in contrast, because of the innocent person’s sense of pride and recognition of his innocence (as opposed to the guilty person, who may feel a sense of guilt), the innocent person may not feel the “bare harm” as strongly.<sup>36</sup> Therefore, the injustice factor does not relate to the individual’s feelings or emotions. Rather, it is an objective notion of the inherent evil of a mistaken conviction.<sup>37</sup> This element exists independently of the degree of bare harm caused to the innocent and of the question whether anyone, including the convicted individual himself, is conscious of the injustice or feels it.<sup>38</sup> Thus, we can think of the case of an innocent person who believes he was rightly convicted because he is ignorant of the mens rea requirement of the offense with which he was charged.<sup>39</sup> Nevertheless, his conviction creates a moral harm. Dworkin demonstrates that the deleterious consequences for the innocent person, namely, the “bare harm,” fail to explain the absolute predilection for exonerating the guilty over the conviction of the innocent disregarding the social cost of the former.<sup>40</sup> However, in my

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34. Dworkin, *supra* note 19, at 80.

35. *Id.*

36. *Id.* at 80, 86.

37. *Id.* at 80.

38. *Id.* at 80-81.

39. For the possibility of a defendant’s erroneous belief of guilt, see David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. Cin. L. Rev. 1, 34-35 (1973).

40. See also Alex Stein, *The Refoundation of Evidence Law*, 9 Can. J.L. & Jurisprudence 279, 325 (1996) (stating that “[t]hus, most victims of rape would have readily swapped their traumatic experience for a year in a civilized jail, but

view, even the notion of moral harm does not, in itself, explain why the injustice caused by the conviction of an innocent person is greater than the injustice caused when an offender escapes punishment and, perhaps, even commits additional offenses after his acquittal.

Alex Stein characterizes the moral harm in the erroneous conviction of the innocent as the state's political unfairness towards the defendant when there is reasonable doubt as to her guilt.<sup>41</sup> According to Stein, this individual will feel that she has been sacrificed for the general interest and that the state has consciously treated her unfairly. Only naturally she will wonder why she has been chosen to bear such a heavy burden in the name of the public benefit. Stein is referring to the conviction of an innocent defendant. However, society is equally unfair to the individual when it convicts her despite reasonable doubt as to her guilt, whether she is innocent or guilty. Stein's characterization of the moral harm in erroneous conviction of the innocent conforms with the next argument, below, which, in my opinion, seems to be the primary justification for the strict standard of proof.

### III. THE VIOLATION OF THE STATE'S MORAL COMMITMENT TOWARD BOTH THE INNOCENT AND GUILTY

Conviction of a defendant despite reasonable doubt as to his guilt implies a violation of the state's commitment toward the individual, whether he is innocent or guilty. The origin of this commitment is explained by the social contract theory. The commitment is based on the concept that the state, which replaced "the state of nature," derives its power from the consent of the people, while at the

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to find partners for such a bargain would be a rather difficult, if not altogether impossible task").

41. Alex Stein, Hearsay Statements as Evidence in Criminal Trials: "Is" and "Ought," 21 *Mishpatim* 325, 332-33 (1992) (Hebrew); Alex Stein, The Admissibility of Hearsay Statements and Evidence in Criminal Trial: On the New Bill, *New Ideas and the same Old Tenets*, 10 *Bar-Ilan Law Studies* 157, 164-66 (1993) (Hebrew).

foundation of this relationship are the mutual obligations of the state and the individual. Whether or not one accepts the characterization of the state of nature as a state of war against all,<sup>42</sup> there is general consensus that a person in a stateless society is in danger of suffering injury to life, limb, and property at the hands of others. It is this danger that impels people to unite within the framework of statehood in order to achieve greater liberty and safety than each enjoys in the state of nature. A person's consent to subjecting himself to the power of the state implies that he is willing to forego some of his liberties in exchange for protection of his life, limb, and property by the state.<sup>43</sup> Therefore, "[t]he terms of the contract must not be worse for the individual than the conditions of the state of nature."<sup>44</sup>

The theory of the social contract is not undisputed as the basis of statehood. Some of the arguments against conceiving the state as the product of a contract, especially regarding the matter of consent, are, indeed, well grounded and quite sound.<sup>45</sup> However, even if we reject the notion of the social contract as the explanation for the formation of society, it is hard to dispute its underlying rationale, namely, that for the framework of statehood to be justified, the cooperation between individuals must uphold and

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42. For the Hobbesian state of nature of a war of all against all see Thomas Hobbes, *Leviathan* 82 (Michael Oakeshott ed., 1946).

43. *Id.* at 109-10; John Locke, *The Second Treatise of Civil Government* ch. 9, & 123-24, 62, 64, 131 (1946); Jean-Jacques Rousseau, *The Social Contract* 30 (1954):

Instead of making any alienation they have only made an advantageous transition from a mode of living unsettled and precarious to one better and more secure, from a state of natural independence to one of liberty, from possessing the power of injuring others to security for themselves, and from their strength, which others might, by the employment of theirs, overcome, to a right which social union renders invincible.

44. David Heyd, *Capital Punishment: A Comment*, 25 *Isr. L. Rev.* 481, 485 (1991).

45. For more details, see: J.W. Gough, *Social Contract* (2d ed. 1957). For an objection to the notion of the social contract, see John Austin, *The Province of Jurisprudence Determined* 313-61 (1954); William Godwin, *Enquiry Concerning Political Justice* 98-102 (K. Codell Carter ed., 3d ed. 1971).

maintain the liberty and security of each one.<sup>46</sup> The state has the duty to secure justice for the individual.

In order to outline the framework for social cooperation, the state must set rules that determine the realms of the permissible and the forbidden by providing penal prescriptions.<sup>47</sup> The individual needs to know what she is allowed to do and what she must avoid.<sup>48</sup> A person should have complete freedom within the limits of the law. Knowing the borders, sorting out the permissible from the forbidden, is a necessary condition for the stability of the social order and the maintenance of society. The rules determining the realms of the permissible and the forbidden demarcate the borders of the individual's liberty within the state.<sup>49</sup>

Since the individual recognizes the state's authority to punish him for transgressing the law, he must equally feel secure from being punished as long as he adheres to the law. A person acting within the confines of the law should not fear any infringement of his liberty.<sup>50</sup> Conviction of an innocent person therefore blurs for that person the distinction between the permissible and the forbidden in his relationship with the state and, consequently, the limits of his liberty to act within the framework of the permissible. Uncertainty as to the basis of the individual's claims and expectations of the state, which are based on the individual's reliance on the existing rules, undermines the basis of the individual's liberty.<sup>51</sup> The framework of statehood does not only entail the power of the Leviathan and the state's enormous ability to harm the individual, for an army of outlaws and terrorists can also wield such

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46. For this opinion see: David Hume, *Hume's Moral and Political Philosophy* 111 (Henry David Aiken ed. 1966).

47. Hobbes, *supra* note 42, at 173: "Civil law, is to every subject, those rules, which the commonwealth hath commanded him, . . . for the distinction of right, and wrong; that is to say, of what is contrary, and what is not contrary to the rule.;" Rawls, *supra* note 12, at 235.

48. Locke, *supra* note 43, at 62.

49. Rawls, *supra* note 12, at 253.

50. *Id.* at 241.

51. *Id.* at 235.

power to hurt the individual. Rather, it also entails the individual's renouncement of a great part of his powers in the state of nature, including the power to defend himself against his attackers, in return for the state's obligation to provide him protection. Therefore, when the state uses its powers of punishment against an innocent person, not only does that person find himself in danger similar to what he had been subject to in the stateless position, but his position is actually worsened.<sup>52</sup> If the state can punish a person unjustly for a crime he did not commit, he is better off without the state.<sup>53</sup> Hence, the state must make a commitment to every person subject to its authority not to punish him as long as he fulfills his corresponding commitment to act in accordance with the law. When an innocent person is convicted, the state is in breach of its commitment towards the individual: by condemning and punishing him, the state places the individual in conflict with it, though he has performed his obligation towards the state to act within the confines of the law. The state becomes the individual's attacker, rather than his protector from attackers. In such a case, the state is treating the individual in an ungrateful manner.<sup>54</sup>

However, the state also bears a duty towards the guilty person, to refrain from convicting her as long as her guilt has not been proven with the greatest certainty possible. When the state convicts someone despite the doubt in the evidence with regard to her guilt, it does not know at the highest possible certainty that this person is guilty. It places her at the same tangible risk of an erroneous conviction as it does the innocent.

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52. Locke, *supra* note 43, at 63-64 (discussing the individual's renouncement on the power of punishing).

53. Cesare Beccaria, *On Crimes and Punishments* 42-43 (Henry Paolucci trans., 1963).

54. For this explicit argument on the ingratitude of the state, see Hobbes, *supra* note 42, at 207: "for seeing all sovereign power, is originally given by the consent of every one of the subjects, to the end they should as long as they are obedient, be protected thereby; the punishment of the innocent, is a rendering of evil for good." In his view, when the state inflicts evil on an innocent person who is not its subject, it does not breach the law of nature. *Id.* at 207-08.

When the state risks the conviction and punishment of a person who might be innocent, it demonstrates a lack of care towards him and readiness to sacrifice him for the sake of a social goal, such as preventing the possible endangerment of the public, increasing general deterrence, or maintaining the public's confidence in the criminal justice system. It is ready to blur for him the borders of the permissible and consequently to undermine the basis of the partnership between that person and the state. Punishing even the guilty person in such a case is still wrong, despite the antecedent wrong by the defendant, since the state is prepared to disregard the possibility of his innocence and to treat him ungratefully.

Indeed, it is quite clear that the state is morally wrong when it convicts and penalizes an individual, while depriving her a due process of law, even if that person is actually guilty of the crime. The state inflicts evil even on a guilty person when it refuses to hear evidence regarding her innocence.<sup>55</sup> To Robert Nozick, the mere taking of a risk of conviction based on unreliable or unfair procedure is the decisive factor in determining whether a person is entitled to a defense against the users of such a procedure, regardless of her guilt or innocence.<sup>56</sup> When reasonable doubt regarding the guilt of the defendant exists, the state, as the enforcer of the criminal procedure, is not in the position to know whether or not that defendant deserves punishment and, accordingly, is not entitled to punish her.<sup>57</sup> Therefore, the state, in taking the concrete risk of

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55. See, Hobbes, *supra* note 42, at 182: "For all judges, sovereign and subordinate, if they refuse to hear proof, refuse to do justice: for though the sentence be just, yet the judges that condemn without hearing the proofs offered, are unjust judges . . . ."

56. Nozick, *supra* note 10, at 101-08 (discussing whether a guilty person can defend himself from being placed on trial based on imprecise procedures that increase his chances to get the punishment he deserves and whether he can legitimately expect protective association whose services he has hired to furnish him with a defense when his guilt has been determined based on unreliable procedure. According to Nozick, a protective association is committed to supplying the individual with a defense and to punishing the users of unreliable or unfair procedure, regardless of the defendant's guilt.).

57. See *id.* at 106 (relating to a conviction of a defendant based on unreliable

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convicting and punishing an innocent person, behaves in a morally wrong fashion, irrespective of the actual guilt or innocence of the defendant.<sup>58</sup>

Indeed this becomes clearer if we look to the context of the relationship between individuals: there is no doubt that A is acting out of a vicious motive if he does harm to B (for example: imprisoning B), if he knows of no fault on B's part. This is true even if A is thereby preventing B from causing an unknown, even greater harm (such as the commission of an atrocious offense).<sup>59</sup> According to Kurt Baier, if O. kills his wife and Casanova out of jealousy, without having sufficient evidence that his wife is cheating on him with Casanova,

We do not think him a whit more justified in killing Casanova and his wife even if it were true that they had committed adultery. Our condemnation of Count O. in this case is modified only by our knowledge that neither Casanova nor the lady had any right to complain or to feel aggrieved. They got their deserts, but Count O. is to be condemned for unjustifiably administering them.<sup>60</sup>

The question can be raised whether a guilty person does have a right to grievance against the state for her conviction when there is reasonable doubt as to her guilt. Kurt Baier would probably answer in the negative. Nozick holds that, "[a]n unreliable punisher violates no right of the guilty person; but still he may not punish him."<sup>61</sup> I think, however, that the answer to this question is in the affirmative and irrelevant.

The answer is yes, because a person suffers persecution and therefore an affront to his dignity if he is convicted on the basis of evidence that leaves reasonable doubt as to his guilt. Any conviction when reasonable

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procedure).

58. See *id.* at 107 (relating to moral considerations concerning the users of the unreliable procedure).

59. As in the example of Godwin, *supra* note 45, at 183.

60. Kurt Baier, *The Moral Point of View* 145 (1958).

61. Nozick, *supra* note 10, at 107.

doubt as to the defendant's guilt exists, of which the defendant is conscious, causes special harm to the defendant, because of the rejection and mistrust the state reveals towards him in persecuting him, despite his possible innocence. The role of the state, represented by its law-applying agents, in a criminal trial as accuser and not merely settler of disputes between individuals or between an individual and the state,<sup>62</sup> creates a situation of pursuit and conflict. Even when a private individual, and not the state, is responsible for bringing charges and placing the accused on trial, it is still the state that permits the accusation of an individual for violating the law. The special insult involved in conviction despite reasonable doubt arises from the very readiness of the state to convict and punish a person without knowing whether he has done any wrong, regardless of whether he is in fact guilty. In such a case, perceptions of betrayal, rejection, injustice, and alienation are generally unavoidable. The individual has to feel certain that the state will treat him as innocent as long as it has not been persuaded of his guilt to the highest degree of certainty.<sup>63</sup>

The answer regarding the question of the individual's right to feel aggrieved is irrelevant because the state's behavior towards that individual should be evaluated independently of whether she is conscious of the injustice caused to her. The state is not allowed to act towards the individual unfairly from the state's vantage point. The state's indecency towards the individual is of equal measure when the individual is factually guilty, but convicted and punished without proof of her guilt to a degree that leaves no room for a real possibility of innocence. Moral harm is created, therefore, both when in the conviction of an innocent person who has done nothing on her part to violate the law, as well in the conviction of a guilty person where there is a lack of evidence, as a vicious act of the state. The state is obligated toward the

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62. Zuckerman, *supra* note 3, at 4, 6; Beccaria, *supra* note 53, at 14.

63. *In re Winship*, 397 U.S. at 364.

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individual to refrain from creating such a special insult or a moral harm, regardless of whether anyone is conscious of the state's injustice. The state ought not to punish a person as long as reasonable doubt regarding her guilt exists. It ought not to undermine the individual's liberty to act within the permissible.

#### IV. THE CONNECTION BETWEEN THE HIGH STANDARD OF PROOF AND MORAL THEORIES

Accepting the justification for the high standard of proof in a criminal trial as resting on the state's commitment towards the individual is strongly contingent on the adoption of a deontological point of view. Indeed, under prevailing opinion, the standard of proof in a criminal trial reflects a rejection of the utilitarian approach because of total unwillingness to equate the risk of conviction of the innocent with other kinds of risks to society.<sup>64</sup>

##### *A. A Teleological Concept of the Standard of Proof in a Criminal Trial*

Utilitarianism, which seeks to maximize the general good, would likely be prepared under certain circumstances not only to convict a person despite reasonable doubt as to his guilt, but even to sacrifice him by convicting him for what he is known not to have done for the sake of the general good.<sup>65</sup> Under the principle of the greatest

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64. Stein, *supra* note 40, at 325-26; Tribe, *supra* note 1, at 386; Dworkin, *supra* note 19, at 82-84. For a different opinion, according to which the standard of proof reflects considerations of utility, see Lawrence B. Solum, *You Prove It! Why Should I?*, 17 *Harv. J.L. & Pub. Pol'y* 691, 701 (1994); Note, *Winship on Rough Waters: The Erosion of the Reasonable Doubt Standard*, 106 *Harv. L. Rev.* 1093, 1094-95 (1993) (claiming that society's assessment regarding the balance of interests between the individual and society may vary in light of crime-fighting exigencies).

65. James Rachels, *The Elements of Moral Philosophy* 93-94 (1986); Geoffrey Scarre, *Utilitarianism* 166-68 (1996); *Value and Obligation* 457 (Richard B. Brandt ed., 1961); Wertheimer, *supra* note 9, at 45.

happiness of the greatest number, it is not unimaginable that utilitarianism would allow, for instance, the random choice of an African-American scapegoat to be convicted for a white woman's rape he has not committed in order to prevent a lynch.<sup>66</sup> The opponents of utilitarianism as a legitimate moral theory often rely on this very example.<sup>67</sup> The immorality of such an approach is clear; moreover, it involves a deliberate lie.<sup>68</sup> However, an act utilitarian moralist, who evaluates every concrete case on its merit, might maintain that it is morally right to prevent the death of many innocent persons by killing one innocent person and thereby decrease the total of evil and infringement of human rights,<sup>69</sup> let alone convict someone who is more probably guilty than innocent, even in the absence of full certainty. Conviction may help to enforce the law and prevent potential harm to the general public. Such an approach does not necessarily suffer from the same moral flaw as a calculated sacrifice of the innocent.

Rule utilitarianism, which examines how the general rule maximizes the common good, does not advocate a general principle allowing deliberate conviction of the innocent.<sup>70</sup> Its approach would likely be that punishment of only real offenders is generally beneficial to society.<sup>71</sup> Accepting a rule for the deliberate conviction of the innocent may be of benefit to society in the short run, but in the long run it may undermine the public's confidence in

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66. Rachels, *supra* note 65; Nozick, *supra* note 10, at 28 (discussing sacrificing an innocent person to save an entire neighborhood from acts of revenge).

67. Nozick, *supra* note 10, at 28.

68. Dworkin, *supra* note 19, at 79-80.

69. Nozick, *supra* note 10, at 28-29; Rachels, *supra* note 65, at 100-01. David Cummiskey, *Kantian Consequentialism* 145-47, 150-51 (1996). In Cummiskey's opinion, conceiving the individual as an end in and of himself does not prevent the sacrifice of the innocent to save more lives. This opinion requires the assumption that the negative duties of the state towards a person do not supercede its positive duties. But see *infra* text accompanying notes 90-93.

70. For an opinion that on the issue of sacrificing the innocent, the approaches of act utilitarianism and rule utilitarianism differ, see John Rawls, *Two Concepts of Rules*, 64 *Phil. Rev.* 3, 10-13 (1955); Rachels, *supra* note 65, at 99-100.

71. Rachels, *supra* note 65, at 98. In Hobbes' view, *supra* note 42, at 207: "there can arrive no good to the commonwealth, by punishing the innocent."

the justice system by engendering alarm and a general sense of lack of security.<sup>72</sup> Indeed, the injustice caused by the conviction of an innocent person may trouble the public.<sup>73</sup> Leaving doubt as to the actual guilt of the convicted person impairs the element of moral condemnation in a criminal conviction.<sup>74</sup> It undermines the objectives of criminal punishment in general.<sup>75</sup> Finally, conviction of the innocent enables the real offender to evade punishment and, occasionally, to continue to put the public at risk.<sup>76</sup>

All the above-noted reasons serve to justify the high standard of proof in a criminal trial under the utilitarian approach as maximizing society's overall good.<sup>77</sup> Moreover, utilitarians might claim that lowering the standard of proof would enable the wrongful conviction of political opponents and unpopular people. Utilitarian moralists might maintain, therefore, that the social price of the conviction of an innocent person will, in general, be higher than the cost entailed in acquitting a guilty offender. They might further claim that in ensuring to as great an extent as realistically possible that only true offenders are convicted, the high standard of proof even contributes to the crime-fighting effort.

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72. Rachels, *supra* note 65; George C. Kerner, *Three Philosophical Moralists* 61 (1990); *In re Winship*, 397 U.S. at 364 (the high standard of proof is essential for maintaining the public's respect and confidence in the criminal justice system). Bentham, *supra* note 15, at 197 (stating that the security of the community is undermined when innocence does not suffice to escape conviction. Even though the tangible damage due to the acquittal of a guilty person who continues to commit crimes may be higher, the sense of alarm among the public is higher when an innocent person is convicted). It is doubtful whether the "alarm" contention is based empirically. See Stein, *supra* note 40, at 325 n.182 (stating that, "[n]owadays most people seem to be more concerned with being protected by rather than *from* the criminal law machinery").

73. Rawls, *supra* note 12, at 12; Dworkin, *supra* note 19, at 80-81.

74. *In re Winship*, 397 U.S. at 364.

75. Zuckerman, *supra* note 3, at 128-29.

76. Rachels, *supra* note 65, at 98.

77. Thus, a bold utilitarian like Bentham advocates a high standard of proof in a criminal trial. Bentham, *supra* note 15, at 197-98. See *supra* note 72 for this point.

Yet, on the other hand, utilitarians might prefer in principle the consequences of the conviction of the innocent over the acquittal of a multitude of offenders, given the fear that too many such acquittals will cause a great measure of harm to the public. If the damage from the release of offenders appears more severe than the damage from convicting the innocent, utilitarians will prefer to lower the risk of acquitting offenders by lowering the standard of proof. In addition, it is possible to dispute the empirical validity of the utilitarian contention propounded by Bentham, that punishment based on a lower standard of proof will produce a sense of insecurity amongst the public:<sup>78</sup> perhaps the law-abiding population's fear of being the victim of a criminal act is, in fact, greater in either general or certain circumstances than its fear of being the victim of a mistaken conviction.<sup>79</sup> At any rate, as long as utilitarianism rejects the notion of the individual as a unique personality, there is no reason, from a purely rule utilitarian point of view, to rule out a priori departure from the standard of proof beyond all reasonable doubt.<sup>80</sup> There is no reason for the rule utilitarian to insist on this standard in circumstances where the damage caused by the acquittal of a guilty person is greater than the damage caused by the conviction of an innocent person. The rule utilitarian will find it difficult to insist on this burden unreservedly as a universal rule detached from concrete circumstances, such as the level of crime compared with the number of innocent persons convicted. Indeed, Dworkin has held that there is no reason to assume that a rule-utilitarian moralist would exclude in all cases the conviction of an innocent person, even in the most exceptional circumstances, if taken into account considerations of pure utility. In his view, the arguments regarding the approach rule utilitarianism would take vis-

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78. See *supra* text accompanying note 72.

79. Wertheimer, *supra* note 9, at 60-61; Stein, *supra* note 40, at 325 n. 182.

80. For this point, see Kerner, *supra* note 72, at 59-61; Stein, *supra* note 40, at 325-326; Wertheimer's explicit opinion, *supra* note 9, at 46, 61. According to Wertheimer, "The numbers do count. . . ." *Id.* at 61.

à-vis conviction of the innocent are all based on non-utilitarian moral intuitions. They are not based on utility considerations, that a total prohibition on such a conviction will serve society's utilitarian interests in the long run, regardless of the social price of the high standard of proof.<sup>81</sup> There is no logical constraint, from the utilitarian point of view, in preferring to punish a person whose guilt is apparently more plausible than her innocence, thereby preventing her from committing further offenses, over wrongfully convicting an innocent person, thereby causing her to feel injured, persecuted, and alienated.

If utilitarianism is prepared to allow the innocent to be convicted due to a decreased standard of proof in the appropriate circumstances, it will most certainly be willing to do so in the event of a guilty offender. In the latter case, a great many of the arguments in favor of a high standard of proof are irrelevant, since conviction of the guilty enforces the rule of law, increases general deterrence, and protects the public from the commission of further offenses.

*B. A Deontological Concept of the Standard of Proof in a Criminal Trial*

A deontological approach to the standard of proof in criminal law would assume that an innocent person has the genuine right not to be convicted for offenses he did not commit.<sup>82</sup> A genuine right by definition bars its own infringement based on purely utilitarian considerations of a certain social goal.<sup>83</sup> As already indicated, it is my view that the right to be protected from mistaken conviction should be extended also to include a guilty person whose guilt is not proven beyond all reasonable doubt based on the commitment of the state under social contract theory.

Dworkin argues that the moral harm caused by conviction of the innocent cannot be calculated under a utilitarian formula, even its most sophisticated form, for

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81. Dworkin, *supra* note 19, at 82.

82. *Id.* at 72, 82; Zuckerman, *supra* note 3, at 125.

83. According to Dworkin's definition, *supra* note 19, at 82.

every such formula takes into account psychological factors such as perceptions or preferences. Moral harm, however, is an objective element that exists independently of whether or not people know that an innocent person has been convicted, suspect that this has happened, or actually care about it.<sup>84</sup> The conviction of an innocent person makes the world objectively worse. In Dworkin's view, recognizing the individual's absolute right not to be convicted when innocent would mean acceptance of the moral harm as an important and independent component of the overall damage.<sup>85</sup>

Dworkin tries to demonstrate that utilitarian considerations are inapplicable in determining the criminal standard of proof because of the intangible moral harm caused to the world by the conviction of the innocent. The concept of objective moral harm is an attractive tool for showing why some things and actions are of inherent value. It manifests the criticism commonly launched against utilitarianism, that it does not attribute the adequate value to human rights and to the moral duties of the individual, but instead considers them derivative of and subject to utilitarian considerations.<sup>86</sup> Sidgwick's example of a theft that is kept secret because the owner does not notice that the article has been stolen<sup>87</sup> is a good illustration of the idea of moral harm. Dworkin would likely argue that a world in which a theft has been committed without justification has become a worse place and, thus, objective moral harm has been caused. Utilitarian moralists, however, would reject an intangible idea of a moral harm, with no possibility of quantifying the degree of benefit to society. They reject the notion of duties inherently imposed on the state or individual. Moreover, the utilitarian moralist also would likely claim that

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84. *Id.* at 81.

85. *Id.* at 82.

86. David Lyons, *Forms and Limits of Utilitarianism* 189 (1965); Mentioned by Nozick, *supra* note 10, at 28. For this explicit approach, see: Austin, *supra* note 45, at 269-71; Godwin, *supra* note 45, at 89.

87. Henry Sidgwick, *The Methods of Ethics* 291-92 (7th ed. 1930).

someone, such as the prosecutor or false witness, must necessarily be aware of the injustice caused; it is therefore incorrect to make the empiric assumption that a bad deed can remain forever unrevealed and not influence the public in a way that can be assessed in utilitarian terms. Hence, Dworkin's concept of moral harm cannot be regarded as proof of utilitarianism's inapplicability in fixing the standard of proof, but, rather, as indicating the preferability of a deontological approach over it.

A deontological approach places the individual in the center of the conceptual universe. The Kantian imperative to see the individual as an end in and of herself and not merely as a means to an end underscores the dignity, autonomy, and integrity of the individual. Indeed, if we consider an act inherently good and right, it follows that a person ought to be punished only for committing an offense and never for promoting another good.<sup>88</sup> As Kant argued,

judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime, for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the law of things.<sup>89</sup>

Conceiving the individual as an end in and of himself in the context of the duty to prove his guilt to a high degree of certainty was expressed already in ancient Jewish Law. Judaism regards every person as created in the image of God and as constituting an entire world unto himself. The Mishna describes the judge's cautioning of witnesses not to

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88. Tribe, *supra* note 1, at 386; Daniel Kiselbach, *Pre-Trial Criminal Procedure: Preventive Detention and the Presumption of Innocence*, 31 *Crim. L. Q.* 168, 177 (1989); Fletcher, *supra* note 17, at 890 (saying that it is forbidden to sacrifice a person arbitrarily for the sake of a social goal if he has not violated the law).

89. Immanuel Kant, *The Metaphysical Elements of Justice* 100 (John Ladd trans., 1965).

give unreliable testimony.<sup>90</sup> The judge emphasizes the responsibility they bear, by instructing them to remember that every person is an entire world unto himself and is obligated to say that the world has been created for him. In this story, the Mishna clearly connects the standard of proof with the concept of the individual as an end in and of himself.

Under the concept of a person as an end in and of herself, when the judge comes to decide a defendant's fate, only the specific defendant and the specific question of her guilt or innocence should be under consideration. The judge has a duty to adjudicate in accordance with the evidence that has been adduced as to the defendant's guilt or innocence. The judge's moral commitment must be directed towards the defendant whose guilt or innocence is being considered. Exposing the individual to a concrete, calculated risk by lowering the standard of proof, thereby enabling conviction despite reasonable doubt as to his guilt, is the conscious sacrifice of that individual for the sake of the common interest.

Accordingly, Wertheimer's view,<sup>91</sup> that the state bears equal responsibility for acquitting offenders as it does for convicting the innocent, must be rejected. It is erroneous to assume that the state has made a mistake when it acquits a guilty person when reasonable doubt exists regarding her guilt. On the contrary; as noted above, the state demonstrates in such a case a lack of care towards the individual. Wertheimer's analogy<sup>92</sup> between conviction of an innocent person due to a lowered standard of proof and a person being killed in a traffic accident because he was wearing a seatbelt, when the obligation to wear a seatbelt is intended to save lives, cannot be accepted as well. In the seatbelt example, as opposed to the case of conviction, the state has no control over the accident and its outcome.<sup>93</sup> The same is true of a decision not to allocate sufficient

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90. Mishna, Sanhedrin 4:5.

91. Wertheimer, *supra* note 9, at 61-62.

92. *Id.* at 52-54.

93. See also Stein, *supra* note 41.

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resources to education or the health services. The state can avoid causing harm to the individual by allocating necessary additional resources, but only when those resources exist. As opposed to issues in which the availability of resources determines the state's ability to prevent harm to an individual, the state can avoid the sacrifice of the individual and the undermining of the borders of the partnership between him and the state when a reasonable doubt regarding his guilt exists by simply deciding to acquit the individual at trial.

## CONCLUSION

Allowing the conviction of a person despite the existence of reasonable doubt as to her guilt, thereby taking a conscious risk that she may be innocent, lies in opposition with the conception of the individual as an end in and of herself, both as a single individual and as a member of the state. Instead, it implies that the state is treating the individual in an ungrateful manner and is prepared to blur and undermine the borders of her liberty to act within the permissible. The duty imposed on the state not to condemn a person for violating the law without proper evidence and to regard her as an autonomous end in and of herself is founded on the social contract theory, namely, on the partnership between the state and that individual. This duty gives rise to the individual's absolute and inalienable right, *innocent or not*, towards the state not to be convicted unless her guilt has been proven beyond all reasonable doubt.