CAN THE PURSUIT OF TRUTH RECONCILE WITH THE PRINCIPLE OF MINIMIZING FALSE CONVICTIONS?

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I. PREFACE

Only a cursory knowledge of the laws of evidence and criminal procedure is necessary to draw the conclusion that there are two central ideals that intermingle in a criminal proceeding.

The first is the pursuit of factual truth (hereinafter the "Truth Ideal");[1] and the second is protecting the innocent from false conviction (the "Protection Principle").[2]

Truth, already so dear to the legal process,[3] is of particular importance to the criminal proceeding, where we must confront matters of life and death.[4] So too is the protection of the innocent from false convictions, one of the foundational principles of our justice system, wherein we hold that "[i]t is better that ten

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1 For the philosophical conception of "factual truth" as perceived, at least implicitly, in the juridical discourse, *see* Doron Menashe, *Factual Discretion, Freedom of Proof, and Theses concerning the Professionalism of the System*, 43 HAPRAKLIT 83, 94–95 (1997); WILLIAM TWINING, RETHINKING EVIDENCE 14–34 (2d ed. 2006).

2 *See* A.A.S. ZUCKERMAN, THE PRINCIPLES OF CRIMINAL EVIDENCE 125 (1989) ("The protection of the innocent from conviction is a central theme of the law of criminal evidence. Its pivotal position is explicable by the fact that the system of criminal justice as a whole is aimed at preventing harm to the individual. If the legal system could not protect the law-abiding citizen from its own mistakes, so as to avoid the possibility that—in Romilly's words—each wretch that goes to the scaffold may be an innocent victim', the justification for its own existence would be called into question. The importance of protecting the innocent from conviction is not justified only on the basis that it will produce the best social results.").

3 *See* CA 6546/94, Union Bank Ltd. v. Azulay 49(4) PD 54 (1995) (Isr.); Aharon Barak, *On Law, Judging and Truth*, 27 MISHPATIM 11 (1996); Mordechai Kremnitzer, *Criteria for Fact-Finding and Intervention of the Appellate Instance in Findings Relating to Reliability of Witnesses* 35 HAPRAKLIT 407 (1984).

4 *See* Justice (ret.) Aharon Barak in CrimA 951/80 Kaniri v. State of Israel 35(3) PD 5, 505, 516–17 (1981) (Isr.); Miscellaneous Motion 838/84 Livni v. State of Israel 38(3) PD 729, 734 (1984) (Isr.).

criminals be acquitted, than that one innocent be convicted,"[5] and that there can be no legal conviction until all reasonable doubt is dispelled. "This trait forms the cornerstone of the criminal process and its *modus operandi*. It reflects the basic constitutional and societal philosophy of the Israeli legal system."[6]

Are we then reckoning with two separate and parallel ideals that do not interact with each other? Does one of them derive from the other, or are both derived from some higher ideal? Or is it even possible, albeit unfortunate, that these ideals conflict, and cannot be concurrently satisfied? The purpose of this short essay is to present, in a nutshell, the anatomy of the complex relationship that exists between these two ideals, both on the theoretical and conceptual plane, and how this affects the way they impact the legal discourse.

A. *Position of the Prevailing Judicial Discourse*

A review of the case law will reveal that the question of both the theoretical, conceptual, and practical interactions between these two ideals has remained effectively, and almost confoundingly, unanswered. In the few instances wherein some manner of deference to the question can be inferred, it amounts, more often than not, to the position that the Protection Principle essentially derives from the "Truth Ideal," or constitutes an important specific instance thereof. This is illustrated in the Aflalo case, wherein it was written: "The purpose of the criminal trial is to acquit the innocent and to convict the guilty. The purpose of the criminal trial is to expose the truth."[7] This position can be understood as simplistic, but it can also be hypothesized that it stems from—or is at least connected to—a conscious systemic interest in preserving a form of judicial rhetoric that maintains the centrality of the Truth Ideal, while simultaneously expressing a bold judicial commitment to the Protection Principle. This is all prior to the introduction of any

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[5] This saying is attributed to Sir Edward Seymour, *see* GLANVILLE WILLIAMS, THE PROOF OF GUILT 186–87 (3rd ed. 1963); over the years, even more pronounced ratios have been offered to describe the importance of the Protection Principle, such as 1:1000. For a historical review, *see* ZUCKERMAN, *supra* note 2, at 126.

[6] Miscellaneous Criminal Motions 8087/95 Zada v. State of Israel 50(2) PD 133, 145 (1996) (Isr.); *See also* CrimA 347/88 Demjanjuk v. State of Israel 47(4) PD 221, 644–45 (1993) (Isr.).

[7] CrimA 639/79 Aflalo v. State of Israel 34(3) PD 561, 575 (1980) (Isr.) (We find similar wording in other rulings, such as *Livni*, 38(3) PD at 734). *See also* HCJ 7357/95 Barkai Feta Humphreys (Israeli) Ltd. v. State of Israel 50(2) PD 769, 784 (1996) (Isr.).

complex anatomy, such as we will see below, of the relationship between these ideals.

This conscious interest—even if it remains in the realm of a hypothesis on our part—would seem to point to both the Ideal and the Principle as central components of the meta-procedural function of building legitimacy in the procedural rules and their results.[8] Indeed, it is hard to find a criminal process whose principles and defined objectives stray far from the aspiration to achieve accurate rulings that, at the least, expose the principle points of the truth.[9] However, the current discourse emphasizes that the pursuit of truth is not the sole principle at play and may retreat in the face of other prominent values and interests[10] that the judicial process wishes to promote—or is obliged to respect.[11] The discourse even recognizes that, occasionally, defects will arise in fact-finding as a result of human error or the unavailability of full information, which inevitably forces us to render judgment under conditions of uncertainty. However, mistakes born of such circumstances cannot be compared to the creation of criteria that, from the start, significantly compromise the principle of pursuit of truth.[12] Similarly, we have seen that the Protection Principle is perceived as a foundation of the enlightened, liberal judicial perspective of our times.[13] Dworkin explains that the conviction of the innocent, by its very

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[8] One does not need to be a jurist, realist or a student of critical legal studies to agree that this meta-procedural function exists. At the end of the day, without public confidence in the judiciary, its judges, its proceedings and its societal function, it would be difficult to picture how the justice system could continue to exist. For purely illustration's sake, *see* Justice (ret.) Barak HCJ 2148/94 Gilbert v. his Hon. the Supreme Court Chief Justice 48(3) PD 573, 603 (1994) (Isr.), ("Our status as objective judges is contingent on the public's confidence in us. . . when we preside at trial, we are, ourselves, on trial.") (Similarly, his words in HCJ 732/*84* MK Zeven v. the Minister of Religious Affairs]40(4) PD 141, 147–48 (1986) (Isr.)).

[9] *See* Justice Ben-Porat in HCJ 152/82 Alon v. State of Israel 36 (4) PD 449, 462 (1982) (Isr.). For theoretical analysis, see William Twining, *The Rationalist Tradition of Evidence Scholarship*, in RETHINKING EVIDENCE EXPOLARTORY ESSAYS, 32 (1994).

[10] As described, the main counter-principle is the principle of proteceting the innocent from false conviction. *See*, for further review: Sabra Thomas, *Addressing Wrongful Convictions: An Examination of Texas's New Junk Science Writ and Other Measures for Protecting the Innocent*, HOUS. L. REV., 52, 1037 (2014).

[11] *See, e.g.*, HCJ 11339/05 State of Israel v. District Court of Beer-Sheva (2006) (Isr.). There, the court upheld the principle of protecting the innocent, even at the cost of pursuit of truth.

[12] Compare Tribe's words elsewhere (his opposition to the mathematical quantification of the standard of proof in the criminal proceeding), Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell,* 56 VA. L. REV. 371, 385–87 (1970). For discussion and analysis, *see* Ron A. Shapira, *The Probabilistic Model of the Law of Evidence: Part One - Traditional Criticisms*, 19 TEL AVIV U. L. REV. 205, 229–31 (1994).

[13] *See* Miscellaneous Criminal Motions 8087/95 Zada v. State of Israel 50(2) PD 133, 145 (1996) (Isr.).

nature—in addition to any other measurable damages derived of its results—constitutes a severe moral infraction, derived from the fundamental injustice of negating liberty in any manner that is not an inevitable consequence of legitimate governing acts. The right of the defendant to be shielded from exposure to the tangible danger of false conviction, as a fundamental right born of concern for the public welfare, includes immunity from self-incrimination.[14]

B. *The Theoretical Argument for the Existence of a Conceptual and Normative Conflict Between These Ideals*

As we have noted, in the few instances where the case-law has addressed the issue, it has found the Protection Principle to be an important specific case of the Truth Ideal. The reasoning behind this position is simple: Exposing the truth means discovering the guilty party, and only the guilty party. In any event, the case law's line of reasoning is consistent with that defense: that it is of particular importance to protecting the innocent from false conviction. However, we must point out that this line of reasoning is flawed since what must be assessed is not what would be promised to us under the ideal set of circumstances, but rather, how we are to act given our inability—owing to the nature and character of legal proof when it comes to questions of fact—to ensure with certainty that, in any given proceeding, the ideal situation is in fact presented.[15]

Thus, the Truth Ideal and the Protection Principle need not reasonably be perceived as a formula for guaranteeing the right results in such proceedings, but rather, as the manner in which we

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14 RONALD DWORKIN, A MATTER OF PRINCIPLE 72 (1985).

15 Regarding the inherent uncertainty of the accuracy of rulings, *see*, for instance, the words of Lord Denning concerning the analysis of his interpretation of the test of the standard of proof in the criminal trial in Miller v. Minister of Pensions [1947] 2 All E.R. 372, 373. It is important to distinguish this argument, which relates to the impossibility of theoretical certainty in fact-finding proceedings, from an alternative argument that concerns only the possibility of human error in fact-finding performed by judges or jurors; for this latter argument, *see* Daniel Shaviro *Statistical-Probability Evidence and the Appearance of Justice,* 103 HARV. L. REV. 503 (1989) ("If one conclusion about the existing, or any, trial system is certain, it is that the system will err in finding facts. Innocent defendants will be convicted or found liable. Guilty or liable defendants will be acquitted or escape liability."). *See also* KH Cohen, LAW, Ch. 3, 124 ("There is a risk of error inherent in the exercise of human reasoning"). While the latter argument is intended only to point out the judiciary's awareness of its exposure to human errors, from time to time, the former argument focuses on the principle impossibility of achieving full certainty as to the accuracy of the verdict in any given instance.

ought to construct the proceedings (and, in particular, how ought we to allocate the conceptual risks in such framework) so that they will generally tend toward producing the desired outcome. Therefore, it would seem appropriate to seek to corroborate such a claim of derivation (or at least consistency) between these two ideals, in an attempt to indicate that the existence of such underlying motivation (and the design of these proceedings accordingly) to increase the probabilistic accuracy of the judicial fact-finding amounts to the commitment represented by the Protection Principle—or, at the least, does not violate such commitment.

However, if this is indeed the argument, closer examination will reveal it to be erroneous. This can be seen when we avail ourselves of the following intuitive consideration: What hypothetical judicial regime is capable of most closely and religiously safeguarding the Protection Principle? The answer can only be a regime whereby the defendant is acquitted in any instance of doubt—even an unreasonable doubt. Such a regime would suffice, for the purposes of reaching an acquittal, with even the possibility of a theoretical doubt that is not grounded in evidence—or, effectively, in all cases. However, such a judicial regime would be far from upholding the Truth Ideal. In fact, in perhaps the most critical sense, it would embody the polar opposite concept of adhering to the pursuit of truth. In essence, it effectively compels the fact-finder to completely and indiscriminately ignore the arguments and the evidence, to disavow the entire trial, and to decide based on an entirely irrational strategy that bears no informative connection to the proceeding at all. Indeed, absolute fidelity to the Protection Principle would render the very practice of conducting legal proceedings moot from the start, and, as such, it would be the farthest possible deviation from the Truth Ideal, which, as we will show, requires the extraction of as much yield as possible from the trial in order to reach the most accurate ruling possible, based on the evidence and arguments presented at the trial.

Thus, we can see that there is no basis for the claim of the supposed relationship of derivation between the Protection Principle and the Truth Ideal. Moreover, there is another advantage to examining the hypothetical legal regime presented above: As strange as it may seem, this hypothetical regime constitutes, in a very important sense, merely a model of the extreme conclusion of our current system in practice. It is perhaps a step between the hypothetical system herein contemplated and the legal regime we currently practice. As is well known, the determination of the

judge in the criminal trial is not intended exactly to establish the most probable narrative based on the evidence, or even a reasonably probable narrative. Effectively, the difference between our system and this hypothetical one is that the former only protects defendants from doubts of the reasonable variety[16]—i.e., those grounded in the particular evidence presented in the given instance;[17] those whose consideration would not amount to radical skepticism, as far as their reasonability and the possibility of conducting the legal proceeding is concerned;[18] those whose decision can acquit or incriminate, based on the determination of their presence or absence in a given instance, in a manner consistent with the outlook of the presumption of innocence (even as a "strong" presumption), etc.[19]—as opposed to granting full immunity from conviction.[20] Yet, notwithstanding all of these conditions, these amount to (reasonable) doubts whose consideration for the purpose of adjudication is not based on any reasonable wagering strat-

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16 Penal Law 1977 § 34V(a). (Isr.).

17 *See* CrimA 112/69 Halihal v. State of Israel 23(1) HCP 733, 740–41 (1969) (Isr.); CrimA 3126/96 Amiri v. State of Israel 50(3) HCP 638, 644 (1996) (Isr.).

18 Since, indeed, doubts that are not anchored in the evidence in the given case, or whose anchoring in the evidence of the particular case lacks theoretical basis, represent a level of skepticism that essentially undercuts the entire concept of proof. The philosopher Wittgenstein calssified these kinds of doubts in terms of what could be claimed about them without impacting the certainty of the given hypothesis. *See* LUDWIG WITTGENSTEIN, ON CERTAINTY (Denis Paul & G.E.M. Anscombe trans., G.E.M. Anscombe & G.H. von Wright eds. 1998). For instance, in Section 119: "Thus, if all attests in favor of a given hypothesis, and nothing against it – does this make its truth a certainty? It could be marked as such. However, is it necessarily consistent with reality, with the facts? This question already leads you back in a circle."

19 In the words of Edna Ulman Margalit, the presumption of innocence is a "strong" presumption. This means that the presumption of innocence will persist even after evidence is presented against the defendant purporting to attest to facts that render this position less likely that a presumption of guilt. Only the accrual of decisive evidence against the defendant can lead to a conviction. *See* Edna Ulman-Margalit, *On Presumption*, 80 J. PHILOSOPHY 143, 152–56 (1983). *See also* Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1372–70 (1971).

20 This matter also explains the great polemic that gave rise to the question of how (if at all) the presumption of innocence could be quantified in probabilistic mathematical terms. The difficulty arose in light of the recognition of the fact that an initial likelihood of guilt equaling zero would resist any attempt at change based on the probabilistic value of other evidence through probabilistic mathematical calculation relying on probabilistic multipliers; i.e., the practical significance of an *a priori* likelihood of innocence equaling zero would be immunity from conviction. On the other hand, the determination of an initial likelihood of guilt exceeding zero would be exposed to accusations of breaching the commitment to hold the defendant innocent, and abstaining from prejudging them prior to the verdict. (See *infra*, notes 38–39, and the text adjacent to them.) For a critical review of the classical arguments in this regard, *see* Shapira, *supra* note 12, at 227–29. *See also* Ronald J. Allen et al., *Probability and Proof in State v. Skipper: An Internet Exchange*, 35 JURIMETRICS J. 277, 281, 283, 293 (1995).

egy. The Protection Principle, as understood in our legal system, appears, thus, to be inconsistent with the Truth Ideal. The Principle reflects a sort of legal deviation intended to reduce a specific type of error that arises in proceedings: The conviction of innocents. The consequence of this approach is the effective promotion of the inverse error by raising the odds of acquitting guilty defendants. Therefore, it cannot be said to uphold a system that seeks to minimize mistakes in law enforcement, whatever they may be. The Protection Principle, as with any other strategy that is not devoted to identifying the most probable factual narrative, represents an inherent deviation from the Truth Ideal. The Principle is responsible for increasing the number of mistaken rulings that the criminal trial will tend to produce over time. This can even be formally demonstrated.[21]

It is important to emphasize: Our purpose here is none other than to explicate and analyze the meaning and ramifications of the operation of this Principle—not to present the normative argument against its justification. The Principle can be justified to the extent that we believe the societal cost (as opposed to the quantitative value) of the errors create thereby remains relatively optimal compared to any possible alternative adjudication strategy. Indeed, there are legs to the hypothesis that, to a great extent, this is how the justification for the Principle is perceived in the wider evidentiary discourse.[22] However, there is still reason to demonstrate the price that is paid on account of this Principle in terms of the pursuit of truth, even if such discourse was hypothetically prepared to pay such a price. This is because, as opposed to a merely hypothetical price collected in terms of building legitimacy for the legal proceeding—which is relatively meager—paying this price in practice also involves a tangible cost in these terms.[23]

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21 *See* Editor's Note to *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, 76 MICH. L. REV. 612, 622–24 (1978)

22 WILLIAMS, *supra* note 5 and adjacent text.

23 What is hinted at here is that epithets such as "Better to acquit a large number of criminals than to convict even one innocent" are rarely presented, in the present discourse, as descriptive of actual occurrences (i.e. wherein innocents were protected at the "price" of acquitting a large number of criminals), but rather, based on our analysis, are generally referenced as hypotheticals (i.e., even were the situation so, we would be willing to conduct the trial in a manner that would protect the innocent, even at the price of acquitting many criminals). The above analysis indicates that such representations are largely misleading, and what we see here bears the signs of an attempt to have the cake and eat it too—i.e., to represent the system as promoting the rights of the innocent without, compromising its capabilities (or, to a large extent, its presumption) to minimize mistakes in the proceeding and to expose the truth.

C. *Theoretical Proposals to Resolve (or "Mitigate") the Conflict*

Several theoretical arguments can be offered that are anchored, to varying extents, in the assumptions and presumptions of the prevailing discourse, whether explicit or implied, that are aimed at resolving this apparent conflict between ideals or, at the least, to soften its impact in the relevant aspects.

II. Proposal 1—Doing Justice as the Ultimate Ideal

According to this proposal, the ultimate judicial commitment is "doing justice," in respect of which the competing ideals serve merely as practical prerequisites to its accomplishment. This proposal may rely on the language and logical structure of the many evidentiary arrangements that concern constraints of judicial discretion.[24] These arrangements are focused around a falsifiable value that serves to justify judicial constraints (in their various manifestations, including the rendering of evidence as inadmissible; disqualification of testimony; the granting of immunity from testimony; the granting of privilege; the institution of estoppel; and so forth), while, at the same time, exceptions were made—whether in the Basic Law: Human Dignity and Liberty, or as part of the counter-balancing independent judicial discretion, under certain circumstances—to subordinate the admissibility provisions and remove the constraint on the pursuit of truth. Both the admissibility provisions and the exceptions thereto are thus viewed as stemming from the function of doing justice. For instance, estoppel may be denied by the court, even if all of the material conditions of the doctrine are met, in the event that its implementation would be unjust.[25] This is just one example of the establishment of a framework for the specific exercise of the judicial discretion fashioned by the case law itself, and geared toward the execution of justice. Similarly, the law empowers the competent court presiding over the petition for discovery to order the disclosure of evidence, should it find that the need for such, for the sake of doing justice, outweighs the counter-interest—whether it be matters of state security, public relations, or some other public interest—in denying

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[24] For models of rules restricting judicial fact-finding discretion, see the categorization and classification of the rules of proof appearing above by Menashe, *supra* note 1, at 87–89.

[25] *See* Nina Salzman, *Estoppel in the Civil Trial*, Ramot Publishing, Tel Aviv University Faculty of Law, 5751 at 625–34.

it.[26] The normative reasonings behind other evidentiary arrangements are similar.[27]

On the basis of the foregoing, it could evidently be argued that, just as the pursuit of truth and other, non-epistemic interests all form components of the recipe for "doing justice," this recipe also includes the Protection Principle as another interest that must be promoted in the course of our commitment to the ideal of justice.

However, this proposal belies its purpose. Even were we to accept the assumption underlying the proposal's argument—that both the Truth Ideal and the Protection Principle are perceived as mere tools or components in the service to the ideal of justice—this nonetheless would not necessitate that these be consistent and resolved with each other. After all, disputes over the very essence and derivatives of the ideal of legal justice form the bread and butter of jurisprudence. *Au contraire*—if the law does, indeed, perceive both the Truth Ideal and the Protection Principle as aspects of the ideal of justice, this would add a further layer of tragedy to the practical necessity of choosing to promote one over the other. It is also important to emphasize that there is no place to speak of reaching any sort of balance between the two ideals through mutual compromise and appeasement, since, by their very nature and definition, each of them must assert its primacy over its counterpart. Essentially, any formulation of compromise would mean the same thing: To establish a standard of proof in the criminal trial that satisfies neither the Truth Ideal, nor the Protection Principle.[28]

1III. Proposal 2—Legal Truth as an Alternative Ideal to the Discovery of Factual Truth

This proposal seeks to resolve the apparent conflict between the ideals by entirely denying the existence of an independent value in the discovery of factual truth. According to this proposal, the systemic principle is, in fact, the discovery of legal truth,[29] which can certainly be reconciled with recognition of the Protec-

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26 Evidence Ordinance [New Version], 5731-1971, § 44–45 (Isr.).

27 For instance, *see id.* § 49–50A.

28 At least, as long as the theoretical processes of deconstruction and reconstruction are not applied to the ideals. *See infra* Section VI.

29 For the distinction between factual truth and "legal truth," *see* HCJ 152/82 Alon v. State of Israel 36(4) HCP 449, 465–71 (1952) (Isr.); CrimA 115/82 Moadi v. State of Israel 38(1) HCP 197, 261 (1984) (Isr.); Additional Hearing 9/83 Military Court of Appeals v. Vaknin 42(3) HCP

tion Principle as a part of its commitment to the principles of law, which are included in the legality of the truth it envisages.[30] Can our issue be resolved through such an approach?

The solution to this difficulty requires a closer examination of the institution of "legal truth." Justice Alon (who would appear to be, at this point in time, the pioneering investigator of the distinction between "legal truth" and "factual truth") writes that the meaning of legal truth is "the discovery of truth within the realm of the legal system,"[31] and "the discovery of truth to the extent that it may be investigated in accordance with the substantive norms and procedural rules of the given legal system wherein such investigation is conducted."[32] While the concept of legal truth does recognize that "the court has, on more than occasion, knowingly prevented itself from discovering the factual truth as a matter of judicial policy, the legal system preferring the protection of certain

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378, 853–55 (1988) (Isr.); CA 1354/92 Attorney General v. Jane Doe 48(1) HCP 711, 744–50 (1994) (Isr.); CrimA 2910/94 Yefet v. State of Israel 1(2) HCP 221, 375 (1996) (Isr.).

30 It is worth noting that the wellspring of case-law concerning legal truth distinguishes between two essential understandings attributed thereto. One such understanding identifies legal truth with the contents of the facts established in the text of the judgment. The veracity of this determination stems from the "recognition of their validity by the court system, and its mandated binding power." *See* Alon, 36(4) HCP at 471. We are not examining this understanding of legal truth, as it serves no purpose in advancing this discussion, since this "ideal" is not beholden to any particular normative principle relating to content or procedure, other than the basic premise of the determination being "mandated." The second understanding of legal truth, on the other hand, argues for the optimal (or at least proper) operation of the necessary legal and normative principles applicable "in such legal system, wherein the legal investigation is conducted." Alon, 36(4) HCP at 465. Only this understanding of the ideal of legal truth could purport to function under the umbrella of the Protection Principle as a part of its binding standards; therefore, this understanding has been assumed for the purposes of our discussion in this essay. We should further note, as an aside, that they soft attractiveness the that the idea of legal truth holds for the legal community stems from the back-and-forth between these two conceptualizations thereof. From the understanding of legal truth as the optimal incarnation of the normative principles and cognitive criteria, we draw the theory, while from the identification of this truth with the contents of mandated fact-finding, we can draw practical conclusions. Were only the theory to be present in the discourse, it would be perceived as a hypothetical automatically, since its power (though not insignificant) would be exhausted through the mere presentation of the theory instructing the investigation, which stems from the principles of the system and is not beholden to the factual truth. However, its legitimate power in respect of all judicial decisions would be largely lost. On the other hand, were only the practical understanding to remain, the theory would lose its ideological strength and, consequentially, its legitimacy in respect of judgment, since this would be presented solely as a formal exercise of such power. The back-and-forth between these two understandings of legal truth thus allows it to serve as a fairly durable crutch for the legal proceeding. However, since it is clear that these two understandings of legal truth are unable to coexist, it is doubtful if this crutch, itself, has a sturdy basis to rely on.

31 Alon, 36(4) HCP at 465.

32 *Id*.

values and interested to the discovery of factual truth."[33] Nonetheless—Alon continues—under this perception,

> this conflict between the legal truth and the factual truth must necessarily arise as the exception, in those specific instances where the legislator saw the protection of such values and interests to supersede the discovery of factual truth . . . . I would go on to add that, in general, the pursuit of justice demands the valuation of truth above any lie, and that only in exceptional cases may considerations of competing values trump the value placed in the truth and its discovery.[34]

Thus, we see that the idea of legal truth, as understood in the prevailing discourse, does not advise any injury to the ideal of the pursuit of factual truth. Therefore, it does not possess the ability to relieve the tension between said "Truth Ideal" and the Protection Principle.[35] We find that even one wishing to allow for the issue

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[33] *Id.* at 467.

[34] *See* Moadi, 38(1) HCP at 26. *See also* Jane Doe, 48(1) HCP at 746–47.

[35] It should be noted, nonetheless, that there is also some basis for a more "radical" employment of the concept of legal truth. Under this usage, the discovery of the factual truth is perceived not merely as a principle that may retreat when confronted with certain other principles, but rather, as being entirely emptied of value. Not only that, but in this framework, abstaining from discovering the factual truth, or even ignoring it, could themselves become a value, so-to-speak (and even one protected by the constitutional right of human dignity. *See* CA 5942/92 John A v. John B 48(3) HCP 837, 843 (1994) (Isr.). This usage of the institution of "legal truth" puts to test the thesis presented in this essay. However, we believe that a more thorough analysis will reveal the precise meaning of the use for which legal truth is intended. Jane Doe, 48(1) HCP at 744–50, concerned a claim for alimony, wherein the court was required to determine the defendant's paternity. Justice Alon found (in light of the side note delivered in CA 548/87 Sharon v. Levy 35(1) HCP 736, 748–49 (1987) (Isr.)) that, even though a DNA test could determine in the matter of paternity at the standard of proof necessary for a civil proceeding, the court will not make use of such a test when its results could tarnish the perceived legitimacy of a minor; for instance, when the test results might reveal that the woman who was married to X conceived a child with Y during the time she was married. In this case, the determination of Y's paternity could mark the minor as a Halachic bastard. Alon based his argument in the justice system being behold to legal truth, which at times may deviate from the factual truth. *Prima facie*, the normative standard required of the legal truth in this instance would have been to ignore (or even falsify) reality. In practice, and to our dismay, this is not the case. Firstly, we should note that, in this case, there was no disregard for a "determined" fact that the minor was the son of Y; rather, a known means of establishing proof was sacrificed, with the reason for such sacrifice stemming from the value in not revealing the truth under those circumstances. Secondly, and more importantly, the judge's commitment, in the framework of the truth ideal, is ultimately contingent on the "matters of fact" that must be pursued, these being a function of the substantive law. The judge of the criminal trial (in order to examine the defendant's culpability) pursues the question of whether the defendant shot the victim before, and not after, the personal and familial status of the defendant, because these are the matters of fact that the law directs the judge to examine. If we return to the Jane Doe Case, it could be argued that the substantive law does not direct the judge to (or not to) identify bastards, even if for the purpose of disclosing illicit sexual conduct or adultery. In other words, the substantive law is interested, on the one

contemplated in this analysis to be viewed through the lens of legal truth must nonetheless remain essentially tethered to both of these ideals, which cannot coexist. They are bound by both the Protection Principle, as a part of the necessary guiding policy of the legal proceeding, while simultaneously needing to adhere to the ideal of minimizing the number of erroneous rulings for which this proceeding is responsible, as a function of legal truth.

IV. Proposal 3—Separating the Geometrical-Procedural Positions of the Actions of the Two Ideals

This proposal, to be certain, represents a common view in the contemporary discourse on evidence. Under this approach, the operations of the two ideals we contend with can be positioned on the staged, linear path of the criminal proceeding. Forming the basis of the legal trial up until the point of the verdict is the Truth Ideal; upon reaching the point of the verdict, it becomes incumbent on the judge to then comply with the Protection Principle. Thus, under this approach, the Ideal and the Principle do not come into conflict, but can instead coexist peacefully. Variations of the reasoning underlying this approach may see the Protection Principle being applied at the point of the verdict "only as necessary"[36] or as the "default." This refers to cases in which the judge has not reached a full or sufficient understanding of the relevant facts of the case to render judgment. In these cases, the Protection Principle is applied by the power of the standard of proof rules in the criminal trial. This means that, throughout the stages of the proceeding, the judge strives to uncover the truth. Sometimes, their efforts will bear fruit, and, come to the stage of reaching a verdict, they will reach a clear belief and complete determination in respect

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hand, to incentivize women to refrain from cheating by defining their fateful consequences; on the other hand, it wishes, based on practical considerations of justice, to refrain from casting serious aspersions on innocent minors. And yet, these two hands are hands of the same body of law, which is entirely calibrated to ensure the child's welfare and to protect family values. This is the body of law that determines what matters of fact are needed, and what reality it wishes to expose. In this manner, even the extreme interpretation of legal truth is explained so as not to contradict the "Truth Ideal" in fact-finding, as presented in this essay. It should be mentioned that Dan Cohen developed a similar concept between decision rules and conduct rules: Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625 (1984).

[36] To paraphrase the "hard cases" conceptualized by Dworkin; *see* Ronald. M. Dworkin, Taking Rights Seriously 14–45 (1977).

of the disputed facts of the case. In this case, such belief will, in any event, be adopted as the determination in respect of those disputed facts. Sometimes, the judge will not reach any such degree of certainty, and will instead be left with doubts. In these cases, the judge implements the Protection Principle, which allows conviction only if the remaining doubts in respect of the defendant's guilt are unreasonable doubts.

How should we consider this proposal? First, it would seem to be a tad self-defeating: In its attempt to present the presence of both the Truth Ideal and the Protection Principle, it formulates a judicial program that entirely negates the possibility of any given stage or case of the criminal proceeding featuring both together. It also implies, essentially, that a significant portion of the judicial work is not initially beholden to the Protection Principle, and that the other part is not guided by the Truth Ideal. This being the case, this approach does not resolve the apparent contradiction of both of these ideals acting simultaneously, but instead, raises its hands and surrenders to this premise from the start. However, beyond this, we can also see that this approach suffers from broad conceptual fallacies in its understanding of the Protection Principle in the criminal discourse. Moreover, underlying this approach is simplistic and, to a large degree, a mistaken understanding of the nature of the fact-finding process in the judicial proceeding.

This approach identifies the Protection Principle with the standard of proof rules of the criminal trial. This is a false conflation. Under a more reasonable interpretation of the prevailing discourse, the Principle is understood as a normative, functional principle, and it is appropriate that this be interpreted in full view of the complex of legal procedures and evidentiary and interpretive thought processes and justifications whose determinations, directly and indirectly, impact the determination of the level and dispersion of conceptual risks in the process.[37] Take, for instance, a criminal trial system that adopts an identical standard of proof to that in our system but denies defendants the opportunity to cross-examine the prosecution's witnesses. Such a system clearly does not sufficiently protect the defendant from false conviction, notwithstanding its standard of proof rules.

Furthermore, this approach is also inconsistent with the presumption of innocence that is guaranteed to the defendant in the criminal trial. Under the prevailing understandings of our system

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[37] *See* Alex Stein, *Section 10 of the Evidence Ordinance and Its Interpretation: A Positive Development, or a Risk of Injustice?* 21 LAW 325, 330–33 (1992).

of law, the presumption signifies a normative commitment to assuming the innocence of the defendant, for as long as the proceeding is underway. This "presumption" is not lip service; rather, it is intended to guide and dictate the manner in which the criminal trial is conducted from its inception.[38] The words of Tribe[39] are relevant here:

> It may be that most jurors would suspect, if forced to think about it, that a substantial percentage of those tried for crime are guilty as charged. And that suspicion might find its way unconsciously into the behavior of at least some jurors sitting in judgment in criminal cases. But I very much doubt that this fact alone reduces the 'presumption of innocence' to a useless fiction. The 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, after all they have to offer in their defense has been carefully weighed. The suspicion that many are in fact guilty need not undermine either this normative conclusion or its symbolic expression through trial procedure . . . .

Thus, we see that the presumption of innocence guides the proceeding under the Protection Principle throughout its length and breadth. By seeking to restrict the operation of the Protection Principle to a predefined point in time and space, we would effectively clip the wings of the presumption of innocence itself.

Moreover, as stated, the aforesaid proposal draws on simplistic and erroneous assumptions as to the nature and quality of proof and judicial fact-finding. Contrary to the underlying presumptions of this approach, "difficult cases" are hardly outliers of the judicial workload. *On the contrary,* the very nature of legal proof and the circumstances and constraints[40] of the legal process preclude any possibility of arriving at "theoretical certainty" as to the veracity of

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38 *See* Tribe, *supra* note 19.

39 *Id.* at 1370–71.

40 The discussion concerning the nature of legal proof is, of course, beyond the scope and reach of this paper. But we will say this: The archetype of legal proof in questions of fact is very different from the models of analytical inference, deductive reasoning or mathematical-demonstrative proof used as models for certainty. There is some similarity between legal proof in questions of fact and scientific reasoning, since, in both cases, processes of inductive (or hypothetical-deductive) thought and argument are employed; however, unlike in standard scientific reasoning, legal reasoning is far more encumbered by the constraints of time, resources (both material and cognitive) and procedure. Similarly, it has been argued that the learning process in the legal proceeding is slow and largely circular. For an introduction to this discussion, *see* Lee Loevinger & D.H. Kay, *Standards of Proof in Law and Science*, 32 JURIMETRICS J. 313 (1992);

legal propositions.[41] Indeed, the duty of the judge, who knows that every case decided is a difficult case, is to account for such possibility in advance. Further, the judge should conduct the trial in a manner that ensures, to the extent possible, that as few such errors and biases as possible will accrue to the detriment of the defendant; i.e., to ensure that a conviction of the defendant is effectively based on "practical certainty" (as opposed to the unattainable theoretical certainty).[42] The position that an impartial investigation aimed at uncovering the truth will succeed in doing so in all cases (or at least, in the decisive majority of cases) where the judge believes that she has done so is simply false, and risks exposing defendants to a very real danger of false conviction. Awareness in respect of these possibilities entails commitment to an unqualified effort to conduct the trial in a manner which allows defendants to exhaust all opportunities to defend themselves, and that adopts an asymmetrical allocation of risks in the process.

> Indeed, the judge in the criminal justice system is committed to bias, not neutrality. In the Hakhami case, Justice Straussberg-Cohen[43] stated that, in formulating the rule in the precedent case [the Kinzy case–DM], the court accounted for the interest of the defendant to oppose the testimony of his partner against him. The concern of incriminating the defendant through his partner, in a manner that distorts the truth, is what led to preventing his testimony. The court's perspective in this regard was one of seeking to protect the defendant from being incriminated by his partner, and ensuring the rules of fair trial for the defendant. There, the defendant opposed the examination of his partner as a witness of the prosecution in his trial out of concern that his rights, as a defendant, would be harmed. Here, the defendant seeks to examine his partner as a defense witness, in the hopes to build his defense on such testimony, while the witness is the one concerned that his own defense, in his trial, will be harmed by the testimony he delivers in the trial of his partner. This difference between the two cases is itself enough to raise question marks as to whether it is appropriate to employ the rationale of the Kinzy case in the case before us.

Gad Freudenthal, *The Philosophy of Natural Sciences (Scientific Translation and Drafting)*, Open University, Tel Aviv (5739) 6–11; Menashe, *supra*, note 1, at 108–09.

41 *See Miller*, 2 ALL E.R. at 373. *See also* Daniel Shaviro, *Statistical-Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530; Lee Loevinger, *Standards of Proof in Law and Science*, 18 INTERDISCIPLINARY SCIENCE REVIEWS 144 (1993).

42 *Cf.* Wittgenstein, *supra* note 18.

43 HCJ 6319/95 Hakhami v. Tel Aviv-Jaffa Magistrates Court Judge 51(3) HCP 750, 759 (1997) (Isr.).

V. Proposal 4—The Truth Ideal as Solely Aimed at Examining the Question of Proof of Guilt

Another more nuanced proposal seeks to resolve the normative tension between these ideals by concerning the criminal trial, from its inception, solely with settling the question of whether or not the guilt of the defendant can be established. Under this proposal, the Truth Ideal is only intended to ensure that the significance of a conviction, and the determination of the defendant's guilt, is true that it has been proven that the defendant committed the act attributed to them in the verdict. In contrast, according to this theoretical approach, the semantic and pragmatic contents of the not-guilty verdict is not at all interchangeable with the proposition that the defendant did not commit the act. A reasonable variation of this approach even sees "exoneration" as a residual category of determination in relation to conviction. This means that the defendant's "exoneration" is little more than a determination of the absence of a conviction, owing to a lack of proof of their commission of the crime (as opposed to proof that they did not commit the crime). This approach has a basis in the case-law. In the Yakovovich case, the court ruled that "[t]he role of the court is to adjudicate guilt, which it may discover on the basis of the material presented it, and not to precisely draw a picture, in its entirety, explaining all aspects of the case before it."[44]

As such, according to this perspective, the Truth Ideal and the Protection Principle would appear not to conflict at all. *Au contraire*—they work hand in hand. The Truth Ideal guides the proceeding and ensures the accuracy of propositions regarding the guilt of the defendant—i.e., whether they have performed the act attributed to them, and the details of the act, etc. And the Protection Principle allows for a trial to be conducted, and such determinations to be reached, even after all "reasonable" doubts have been removed; i.e., those that have some practical hold on the

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44 CrimA 125/50 Yakovovich v. Attorney General 6(1) HCP 514, 520 (1952) (Isr.). The apparent weakness of the legal interest in discovering the defendant's innocence, and its focus on the question of guilt, can also be derived from the accepted approach whereby a suspect is not entitled to have their case put to trial. While they do have the ability to demand that a proceeding be opened against them, since Section 58 of the Criminal Justice Code [Combined Version] 5742-1982 allows any person to file a police complaint, it nonetheless seems that this possibility is considered to be, at best, a purely academic one. Further reinforcement for this theoretical approach can be found, ostensibly, in the criminal prosecutor's duty not to indict a person that will likely be acquitted at trial. *See* HCJ 2534/97 MK Yahav v. State Prosecutor 51(3) HCP 1 (1997) (Isr.).

human capacity for discretion as to belief in their veracity.[45] Thus, the Truth Ideal assists in protecting the innocent, and the Protection Principle reciprocates by helping to ensure that the truth is ascertained.

We believe that the attractiveness of this approach stems largely from its grounding in a faithful, if somewhat crude, depiction of the criminal justice system. Indeed, the principle of the one-sidedness of evidentiary proof is predominant in the criminal trial. This is in the sense that the prosecution is the side required to establish guilt, and the various elements thereof.[46] The judge may base a conviction solely on positive findings. In contrast, the judge is not required to ground their conclusions in any corresponding exculpatory findings, and is certainly able to base an acquittal, on the mere absence of the establishment of guilt.[47]

Nonetheless, we believe that this approach suffers a fatal flaw. The identification of the flaw must topple any reasonable effort to maintain it for the purposes of resolving the apparent ideological conflict we seek to address. The issue is a simple one: While, to a great extent, the principle of the one-sidedness of proof does govern in the criminal proceeding, this, nonetheless, is not ultimately a further expression of the Protection Principle itself. While the argument that the proceeding itself is intended to determine if guilt has been established is nominally correct, we cannot derive from this that ensuring the reliability of rulings in respect of guilt is a concern of the proceeding. And this final claim is, in fact, inherently flawed. If it were true, after all, there would be no specific reason to suffice with the boundaries of the reasonable doubt; rather, it would seem appropriate to acquit the defendant even on the basis of a purely theoretical doubt. Practically speaking, this would mean acquittal in all cases (or perhaps the obviation of the criminal trial as a whole, as its conclusion would be foregone). In other words, the fact that the criminal proceeding exists in the first place testifies, firstly, to the apparent aspiration that acquittal rulings,and not only convictions, should be based on some informative link to the facts of the case. Otherwise, what would be the purpose or justification in holding a proceeding at all where, practically speaking, an innocent person could be exposed to the very real risk

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45 *See* Wittgenstein, *supra*, note 18.

46 *See* Penal Code, 5737-1977 § 34(22)(A), 34(22)(B) (Isr.) ("Should a reasonable doubt arise as to a reservation from criminal culpability, and should such doubt not be allayed, the reservation shall apply."). *See also* ZUCKERMAN, *supra*, note 2, at 123–24.

47 *Cf.* Saltzman, *Estoppel in the Criminal Trial*, 18 (5754) 19, 43–44.

of infringement of their freedom, dignity, property, and reputation, and where other rights and interests of all participants in the proceeding are infringed? No, we are forced to conclude that the real purpose behind the proceeding is to convict the guilty, and the associated deterrence and rehabilitation this allows for. If so, we must acknowledge the unvarnished epistemic interest that forms the base of the mandate for the entire system to identify the guilty, and not merely to shield the innocent. Whoever argues that the interest in exposing the guilty is significantly less valued than the interest in identifying the innocent is effectively rewriting the Protection Principle. Thus, there is no innovation—nor any particular use to us—in attempting to compare this principle to the other prevailing principle in this system—the Truth Ideal. According to this latter ideal, it is as important to maintain a real informative link between the acquittal ruling and the act, essentially, as it is to maintain this link in respect of convictions.

Secondly, this proposal would, to some extent, appear to undermine the normative and cognitive understandings that are generally associated with an acquittal. As noted, this proposal would see both the semantic and epistemological meaning of acquittal interpreted merely as a lack of proof of guilt. This could harm the cognitive standing of the defendant acquitted at criminal trial (or at least, those not acquitted out of doubt) as not only being a person in respect of whom the system failed to establish guilt, but a person that should rightly be seen as innocent (and not solely out of non-epistemic considerations), and who should be afforded immunity in respect of double jeopardy[48] and other associated rights.[49]

VI. Proposal 5—The Truth Ideal as Representing the Sspiration to Rule Based on the Value of "Beliefs," Rather Than "Acceptances"

There is an old quandary in western philosophy regarding the question of whether the human consciousness is active or passive in the process of acquiring information concerning the scientific

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48 Criminal Justice Code [Combined Version] 5742-1982, § 5 LB 43 (Isr.).

49 For instance, reimbursement of defense costs from the State treasury, Penal Code, 5737-1977, § 80 LB 226 (Isr.). *See* CrimA 826/96 Rayash v. State of Israel 51(1) HCP 481, 500 (1997) (Isr.).

world.[50] One position is that knowledge is acquired through an active and voluntary process of conscious judgment, through "acceptances." The other position is that knowledge is acquired passively through the accumulation of conscious sensations, through "beliefs."[51] The mark of the belief in "p" is the disposition of the believer to feel, in respect of the matter at hand, that p is either true or untrue, whether or not the believer is prepared to act, speak or argue accordingly. In contrast, to "accept" p is to act on the basis of p as fact—i.e., to adopt the conscious policy as an inference, assumption, hypothesis, or presumption that p is true. Accordingly, an acceptance is generally explained as the result of an argument fitting defined rules. In contrast, beliefs are explained as stemming from the action of incidental relevant factors, such as sensory stimulants.

In this way, we can ask: What is the standard of consciousness adopted in the process of legal fact-finding? Or, in other words, do judges decide, and are they intended to decide, on the basis of their beliefs, or on the basis of their acceptances (i.e. what they adopt as a matter of conscious policy)? Cohen, who discusses this question, reaches the conclusion that only the latter possibility is conceivable. He argues as follows:[52]

> The legal process does best to aim at verdicts that embody appropriately reasoned acceptance. In this, the legal process resembles scientific inquiry, which, I have argued elsewhere, does best to aim at the acceptance of explanatory and predictive theories. In both cases, the knowledge pursued requires the adoption of an active, rather than passive, attitude towards resolution of the issues. And just as, in scientific inquiry, surrender to belief may harm the progress of science by blocking reconsideration of issues that need to be reconsidered, so, too, in trials of fact, surrender to belief may obstruct the pursuit of justice by making it easier for illegitimate considerations to influence verdicts. If justice is to be done, the canonical purpose of advocacy ought to be to provide proof or disproof's that a rational trier of fact could accept.

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[50] Two of the main proponents were Descartes and Hume. Descartes held that conscious knowledge is acquired through acts of free will. Hume, on the other hand, believed that man's beliefs are the product of their involuntary exposure to impression and concepts. *See* RENÈ DESCARTES, PRINCIPLES OF PHILOSOPHY 31, 42 (Sarah Yuretsky trans., 1979); DAVID HUME, A TREATISE OF HUMAN NATURE 13-20 (Yosef Or trans., 2010).

[51] L. Jonathan Cohen, *Should A Jury Say What it Believes or What it Accepts*, 13 CARDOZO L. REV. 465 (1991).

[52] *Id.* at 475.

And now, in our case, one could seemingly reason that these words apply equally to the analysis of the essence of the Truth Ideal in the legal process. As such, a proponent of Cohen's position would want to word their argument in a manner that is ostensibly consistent with both the Truth Ideal and the Protection Principle. By this argument, the Ideal guides the judge to adopt a conscious policy born of conscious and methodical rules and principles—including the Protection Principle and the presumption of innocence—and, only through the utilization of these, to examine the evidence presented before them and determine as to whether these represent the "truth" to which the trial and the point of judicial determination. Thus, one would argue, the judge in the criminal trial is meant to achieve the Truth Ideal and the Protection Principle simultaneously.

This argument, however, is unconvincing. The reason for this is that, while the Protection Principle and the presumption of innocence are indeed understood as conscious normative standards meant to guide the investigation in the criminal trial, they are not necessarily intended to do so in the service of the Ideal of the discovery of the factual truth. *Au contraire*— these principles should be perceived as formulating a separate framework of conscious interests, an alternative system of acceptances that are suggested to the fact-finder.

Indeed, this system will sometimes coincide with the system of acceptances stemming from the unadulterated perception of the Truth Ideal. For instance, the rule forbidding the admission of prejudicial evidence against the defendant in the criminal trial is consistent with both the system of acceptances guided by the Protection Principle and that guided by the Truth Ideal. This is because, while the Protection Principle will encourage the court to adopt a policy maximizing the margin of error against the risk of false conviction,[53] the proponent of the Truth Ideal (built on the perception of acceptances) would recommend that same policy as a rational strategy to ultimately improve the mathematical accuracy of fact-finding,[54] specifically through the conscious and deliberate rejection of the fact-finder's estimated beliefs in respect of the probative value of the evidence in question.[55] And yet, there will also

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53 Menashe, *supra* note 1.

54 *See, e.g.*, Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1035 (1975). *See also* ZUCKERMAN, *supra* note 2, at 222.

55 These "beliefs" are the product of stereotypical thinking that accompanies evidence, which can stir up prejudices. Theoretical reinforcement of systematic failures that these beliefs

be occasional conflicts between the two systems of acceptance. For instance, if the aforesaid rule disqualifies prejudicial evidence, whether in the service of the prosecution or the defense,[56] it would remain consistent with the conscious policy behind the Truth Ideal, but appear to diverge from the Protection Principle.[57] The presumption of innocence represents the inverse example: While the Truth Ideal claims "neutrality" of acceptances, the presumption represents a deliberate deviation of judgment stemming from the systems of acceptances serving the Protection Principle. Therefore, it would appear that this proposal is also incapable of resolving the normative tension between the Truth Ideal and the Protection Principle.

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are known to reflect can be seen in the studies of Kahneman and Tversky into the psychology of probabilistic jurisprudence. From such a review, we believe, the conclusion can be drawn that typical thinking—or intuitive-probabilistic jurisprudence—is likely to lead to the exaggeration of the weight of incriminating evidence. This is further owing to the fact that this kind of thought process is typically conducted using what Kahneman and Tversky termed "mental shortcuts," i.e., heuristics. The heuristic relevant to our case, for example, is "Representativeness." Through this "shortcut," people will predict future scenarios that are consistent with what they perceived to be the most noticeable characteristic from the data. As a result, they ignore an important factor in probabilistic determination—the "Base Rate," or the prior probability of the result. In one study illustrating the "Representativeness" fallacy, it was demonstrated how subjects would "predict" that students with certain characteristics or behavioral tendencies would learn specifically in the computer sciences clinic, and not in the school for social work, while clearly ignoring the Base Rate—that, *a priori*, the chances of any given student learning computer science, rather than social work, was already lower, since the number of students in the first clinic, as presented in the data, was fewer. And yet, the subjects ignored this statistic, and the determining factor in their predictions was the fact that the attributes of the described student more closely matched stereotypes associated with computer science students than those associated with social work students. *See* Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237, 237–39 (1973). *See also* L. Jonathan Cohen, *On the Psychology of Prediction: Whose is the Fallacy?* 7 COGNITION 385 (1979).

56 As appears to be relevant from the language of Rule 403 of the Federal Rules of Evidence: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

57 The same words apply in respect of accepting a rule that disqualifies hearsay without regard to the type of proceeding and identity of litigants whose evidence the rule acts to disqualify. *See* Menashe, *supra* note 1, 112–11. *See also* Eric Green, Charles Nesson & Peter Murray, *The Theoretical Foundation of the Hearsay Rules,* 93 HARV. L REV. 1786 (1980).

VII. Proposal 6—Searching for a "Strong Perception" of Commitment to the Protection Principle

The final proposal is an essentially philosophical approach to resolving the conflict between these ideals. It involves finding philosophical principles that, due to their nature and importance, are of a higher normative standing than other principles (the "Strong Perception"), thus enabling them to override the described dilemma. In his comprehensive work on the subject,[58] Shochet proposes that certain procedural rights must be viewed as immune to the necessary relativity of values mentioned above. In such cases, the Truth Ideal would be superseded by the Protection Principle. This proposal is based on three central foundations: Firstly, on Rawls' theory of the social contract,[59] and the argument that, based on Rawls' theory that decisions must be reached from behind the Veil of Ignorance, the public must ultimately choose to establish a society that entirely precludes the possibility of false convictions. This choice must, therefore, be reflected in the protection of procedural rights aimed at implementing such a principle.

In addition to Rawls' theory, Shochet bases this approach on Dworkin's work, with emphasis on his perception of "faithfulness to the justifying principle."[60] According to Shochet, the defendant's right to a fair trial must be recognized as a constitutional right. This being the case, and owing to its higher position in the hierarchy, this right must supersede any competing ideal (including, *inter alia*, the Truth Ideal) that does not meet the same constitutional standard.[61] Thus, if we were to prefer the Truth Ideal in a particular circumstance, we would need to meet the requirements of the Limitation Clause; i.e., that the preference for such competing ideal is anchored in a law that is intended for an appropriate purpose, and that the infringement of rights not be excessive.[62] Only meeting the requirements of the Limitation Clause would allow the Protection Principle to be limited, according to the circum-

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[58] Hachshon Shohat, *The Moral and Legal Obligation to Protect Innocents from False Conviction: A Critical-Analytical Review of the Derivative Normative and Procedural Commitments of the Legal System* (2015) (unpublished Ph.D thesis, University of Haifa), https://www.dbisrael.co.il/pdf/533595344art1.pdf.

[59] *Id*. at 124–34.

[60] *Id*. at 147–52. *See also* Dworkin, *supra* note 14.

[61] This distinction is based, *inter alia*, on the article of Gazel-Ayal & Reichman, *see* Oren Gazal-Ayal & Amnon Reichman, *Public Interests as Constitutional Rights?* 41 Law 97 (2011).

[62] *See* Basic Law: Human Dignity and Liberty, 5752-1992, § 8 (Isr.). *See also* Constitution Act, 1982, § 1 (Can.).

stances of the case. Meanwhile, on the other side of the same coin, preferring the Truth Ideal over the Protection Principle would be allowed "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[63]

This three-pronged argument would appear, *prima facie*, to hold merit. In particular, the argument with respect to the "justifying principle" seems to successfully manage the normative tension between the Truth Ideal and the Protection Principle[64] by explaining that these are factors that exist on separate normative levels of priority. One of them, the Protection Principle, serves as a legal principle; while the second, under this argument, is an important and material societal interest—that associated with eradicating crime—which nonetheless cannot be reduced to a general principle.

This being said, the "faithfulness to the justifying principle" argument fails to appreciate the value in uncovering the truth, as expressed by the Truth Ideal. This finds expression in two different aspects:

The first aspect: As we know, one of the basic values providing justification for the enforcement of criminal law is that of "retribution." It would be difficult to conceive of any full justification for the criminal justice system that did not involve the retribution principle. Obviously, retribution must be based on accurate facts. Otherwise, it would involve repaying a wrong with a right, rather than a wrong with a wrong. Failure to punish crime would result in the opposite of the concept of retribution. Thus, there is moral value in confirming the accuracy of legal fact-finding, and, when total certainty is unattainable, determining based on the situation most probabilistically likely to be true. This is a core value at the foundation of the Truth Ideal. Thus, this represents not only an interest in enforcement but an independent moral value underpinning the entire criminal justice system.

It is worth noting that the attempt to claim that retribution, as the purpose of punishment, is superseded by the principle of "better to acquit ten criminals than to convict one innocent"[65] rests on

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63 Constitution Act, 1982, § 1 (Can.).

64 As a side point, it should be noted that even more extreme doctrines (such as the American "Fruit of the poisoned tree") cannot reconcile the two ideals, since their entire purpose is to serve a system of checks and balances in that same given incident being tried before the court. For an analysis of the doctrine from the perspective of constitutional law, *see* Todd R. Olin, *Fruit of the Poison Tree: A First Amendment Analysis of the History and Character of Intelligent Design Education*, 90 MINN. L. REV. 1107, 1146 (2006).

65 *See* ZUCKERMAN, *supra* note 2.

a false premise. It presumes that the Protection Principle holds greater weight than the Truth Ideal. However, this does not accurately portray the normative situation. In practice, the retribution principle constitutes its own independent moment in the criminal justice system, radiating its influence in the form of support for the Truth Ideal. The Protection Principle exists alongside this principle. No determination has been made as to the greater of these principles, as evidenced by the scholarly debate regarding to what extent the entire proceeding must be either adapted to the Protection Principle, or to reduce its impact solely to the decision stage.[66] This dispute can be viewed in the following terms: A dispute between support for the Protection Principle (under its Strong Perception) and support for all other ideals—i.e. retribution and the Truth Ideal—alongside the Protection Principle.

The second aspect whereby Shochet's "faithfulness to the justifying principle" argument fails to appreciate the Truth Ideal is as follows: The Truth Ideal is not of merely instrumental value. It is not only important to the principle of law enforcement; rather, the pursuit of truth is an end unto itself.[67] This value is brought down in the rhetoric of case law and literature, which would see the pursuit of truth as an essential component of juridical justice[68] not only because fact-finding is essential to accurate enforcement, but because the discovery of truth conveys its own moral importance to the parties of the proceeding—and, at times, to all of society.[69]

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66 This normative discussion should not be confused with the conceptual discussion in Proposal 3, used to illustrate the recent disagreement. See two central works of literature on the subject of evidence law theory the first, Larry Laudan, and the second, Alex Stein: LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY (2006). The author argues that the protection of innocents is reflected, and need be reflected, only in the standard of evidence that is skewed in favor of the defendant. Any further distortion to the allocation of risks, expressed in the placement of obstacles or counterweights aimed at confounding the effort to arrive at a factually accurate ruling and uphold the Truth Ideal, would constitute a "double standard" violating the public interest. Laudan sees such a system as erring in both the rational and moral senses. As for the counterpoint: ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 173–75 (2005). Stein argues for the existence of a moral-public purpose of the legal system to minimize the allocation of risks against defendants. He sees this as a basic and foundational principle that must guide the criminal trial through all of its stages.

67 *See* DORON MENASHE, THE LOGIC OF ADMISSIBILITY OF EVIDENCE 20 (2008) ("Menashe, The Logic of Admissibility"); *supra* note 3.

68 Accordingly, many arguments have been made to the effect of "[p]reventing the transfer of evidence to the police harms the effort to do justice and the inherent public interest of pursuing the truth and demanding justice from the defendants." In this regard: Additional Criminal Hearing 5852/10 State of Israel v. Shemesh, para. 3 of the judgment of Justice Danziger (published on Nevo), Jan. 9, 2012 (Isr.).

69 For a broader discussion, *see* MENASHE, *supra* note 67, at 26–34.

Thus, it would seem that this last proposal, as well, fails to allay the normative tension between the Truth Ideal and the Protection Principle.

A. *Summary of the Discussion and Critical Review of the Proposals*

At this point, we have presented and extrapolated on a number of theoretical proposals that attempt to resolve the normative tension between the Truth Ideal and the Protection Principle. We believe that all of these proposals fail to achieve their goals.

Proposals 1 and 2 both sought to present seemingly overriding normative principles (such as the "doing of justice" and the "legal truth"), in respect of which the Truth Ideal and the Protection Principle are merely partial expressions or means of their achievement. These proposals were unsuccessful because a careful study of their details revealed that the presumption of a higher order, itself, did not really contribute to resolving the tension and apparent contradiction between the Protection Principle and the Truth Ideal, but, at most added a sense of irony to this dichotomy, by demonstrating how such a contradiction existed even between the components of such higher normative arrangement.

The third proposal sought to reduce the tension between these ideals in a different manner. Under this proposal, both ideals exist in the discourse, but they operate on different stages—the trial, and the verdict—and serve different functions of evidentiary reasoning. This approach failed as well because in its effort to save the two ideals, it succeeded only in negating both of them. The consequence of this proposal would have seen no functional stage of the proceeding governed by both ideals jointly; rather, according to the positions in the prevailing discourse, both principles vie for simultaneous application in every stage of the proceeding. Moreover, only mistaking the premises underlying the concept of the Protection Principle and the cognitive standing of the presumption of innocence—along with a simplistic understanding of the nature of legal proof—could lead to the formulation of such a position.

The fourth proposal sought to neutralize the tension by granting exempting the proceeding and its operators from the cognitive obligations of an acquittal verdict, to the extent that these related to questions of guilt or innocence. Effectively, this proposal failed because it would largely undermine the justifications for maintain-

ing and enforcing a criminal justice system at all. As long as we subscribe to the notion that this system is intended first and foremost, to protect the relevant community in practice (and not merely in appearance) from crime (in addition to protecting the members of such community from the system's own machinations), we must accept the premise of an acquittal verdict bearing a reasonable informative connection to innocence in respect of the given act.

The fifth proposal seeks to adopt the criterion of 'acceptances' for the purpose of analyzing the factual Truth Ideal. According to the criterion, the fact-finder is not obligated to pursue or establish the reliability, tendency or unmitigated and unadulterated (by rules and policy) impression gained from such facts in respect of the contents of the factual incident under investigation, but rather, their acceptances—the judgments in respect of such event derived from the full gamut of cognitive standards, themselves derived from the legal rules and principles. As the Protection Principle is a central tenet of the criminal justice system, its consideration in weighing the juridical contents of the event under investigation is, in any event, consistent with the fulfillment of the Truth Ideal. Yet this proposal, similarly, must be rejected since, as we have indicated throughout this essay, the Protection Principle is not understood, and should not be understood, as a kind of standard designed for the purpose of attaining the optimal conditions for fact-finding. Indeed, it knowingly deviates from the factual Truth Ideal. The normative gap between the Truth Ideal and the Protection Principle does not stem from the adoption of various cognitive criteria for fact-finding, but rather, mainly from the Protection Principle (i.e. the presumption of innocence) proposed by material alternative ideologies to the Truth Ideal. In other words, the Protection Principle is not a judgment understood to guide the judges' perceptions of truth, but rather, a judgment intended to lead to fact-finding and verdicts that are expressly *not* based on their perceptions of the truth.

The sixth proposal seeks to resolve the issue between the two ideals by recognizing a "strong perception" of the Protection Principle and, consequentially, recognizing certain procedural rights as superseding and, thus, impervious to competing rights. This proposal relies on broader philosophical theories attributed to Rawls and Dworkin, and the distinction between rights and interests (with rights of the accused being considered under the latter category). However, as we have shown, this proposal ignores the basic moral

principle found in the imperative that establishes retribution as the central object of punishment. Similarly, this proposal fails to recognize that the value in the Truth Ideal is not merely utilitarian, but is largely an object in and of itself. Thus, even recognition of a "strong perception" of the Principle does not lead us to a state of harmony between the competing values, nor to the resolution of the normative tensions described above between the Truth Ideal and the Protection Principle.

B. *Our Proposal—Relative Necessity of Compliance*

At this stage, it would appear that we have returned to our point of origin. There is a normative tension that appears insurmountable between the Truth Ideal and the Protection Principle. The prevailing discourse seeks to advance two ideals whose importance cannot be understated on the one hand, but that seems impossible to promote simultaneously on the other. In the following proposal, I do not intend to alter this principle conclusion. However, I do hope to present an analytical, interpretive framework for the existing discourse that could largely redeem its integrity[70] and clear the way for the possibility of these two ideals coexisting—if not in their more radical conceptions, such as those supposed by the discourse. In this sense, our analysis will also square the existing discourse with the constructive interpretation model[71] and with the "Charity Principle" in the explication and explanation of social constructs.[72]

These principles implore us to seek out the best and most rational explanation for the principles and rules in question, as well as the rhetoric surrounding them. I believe that this task would be assisted by conceptualizing the aforementioned ideals and obligations or duties of the discourse, which create a certain relative necessity but are nonetheless duties for all intents. They do not exist solely on the plain of the desirable and fitting. They create a necessity for compliance, but this necessity is not absolute. These obligations demand compliance in the sense that they exclude certain kinds of considerations from the bounds of lawful and justified arguments for failing to perform such obligations.[73] Thus, the Truth

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[70] For an extended discussion regarding the argument, *see* Shohat, supra note 58.

[71] *Id*.

[72] DONALD DAVIDSON, ESSAYS ON ACTIONS AND EVENTS 221, 290 (2d ed., 2002).

[73] *See* Haim Gantz, Draft Lectures in Jurisprudence, Dionon, Tel Aviv University (20–23).

Ideal and the Protection Principle are merely terms of speech for the preferred and recommended course of action—not obligations that compel compliance under all circumstances. They are duties that formulate a relative necessity of compliance. This means that each of these principles generates certain categories of considerations deemed insufficient to justify the failure to comply therewith. Furthermore, this generates categories of considerations that convert certain circumstances into situations wherein compliance is of particular importance. If we can identify these considerations, and witness how both the Truth Ideal and the Protection Principle are satisfied—both of which are unique to the criminal trial—then we will have succeeded in our objective of indicating the possibility of real (as opposed to artificial)[74] circumstances in which these ideals may coexist. And indeed, we can indicate that underlying the Ideal of exposing the factual truth—specifically with respect to the criminal trial—are imperatives directed at the panel that are not irreconcilable with the Protection Principle and even those that are consistent therewith. The Truth Ideal seeks to expose the factual truth so that the ultimate verdict, whether for conviction or acquittal, will be based on arguments stemming from relevant considerations,[75] and not on the basis of procedural agreements; considerations of formalistic efficiency or convenience;[76] or any

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74 As was proposed in the case law (*see* Section VII(C) of this essay), and in Proposals 3-5 above.

75 This matter is often expressed in terms of preference for substance over procedure in the criminal trial. *See* CrimA 1/48 Sylvester v. Attorney General HCP 1, 5, 18 (1948) (Isr.); CrimA 951/80 Kaniri v. State of Israel 35(3) PD 5, 510 (1981) (Isr.); CrimA 639/79 Aflalo v. State of Israel 34(3) PD 561, 575 (1980) (Isr.). "The criminal trial is not a competition, not a spectator sport, and nothing else. Justice is not a game. The purpose of the criminal trial is to expose the truth," (as brought down in FH 23/85 State of Israel v. Tubul 42(4) PD 309, 354 (1988) (Isr.). *See also* Miscellaneous CrimA 3447/96 State of Israel v. Azulay 50(3) HCP 309, 312L (1996) (Isr.), "Right and proper proceedings in the criminal trial are the Magna Carta of defendants; and yet, we are absolutely forbidden from allowing the criminal trial to become essentially a guessing game." We are not certain as to whether substance does, in practice, rule over procedure in the criminal trial (compare to: R. Shapira, Sylvester v. State of Israel Attorney General, Early Trials (Consolidated Kibbutz Publishing, edited by Dafna Barak-Erez) (1999), at 31–33). Nonetheless, for our purposes it is sufficient to presume that the "configuration" of the criminal trial includes, ultimately, fewer components of procedural justice and more elements of "truth" and "substance," at least when comparing said configuration to that of the civil trial.

76 This matter can be seen in the distinction made in the normative-legal treatment of settlements, compromises and alternative dispute resolutions ("ADR") and the various procedural agreements that exist in civil proceedings (in respect of the facts, the points of contention, and means of proof), compared to those that exist in the criminal trial. *See*, solely for the sake of illustration, Section 79C of the Courts Law [Combined Version], 5744-1984; Regulation 431(1)(3) of the Civil Procedure Regulations, 5744-1984: Authorities of the Court in Pretrial Hearing; CA 61/84 Biazi v. Levy 42(1) PD 446, 475 (1988) (Isr.): "Between agreement and truth

other procedural justifications that bear no sufficient informative link to the cognitive questions contemplated by such proceeding.[77] The Protection Principle, for its part, seeks to base the exercise of juridical discretion on the need to convict only on the basis of diligent conduct of the fair trial[78] and on a sufficient quantity of evi-

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– agreement is preferred," "The contract splits the mountain;" and in its wake, CA 166/84 Bar Ilan v. Ken Kanaan 86(4) HCP 114 (1986) (Isr.); CA 1742/90 Shar Zion Candle-making Factory v. Ararat Insurance Co. Ltd. 94(3) HCP 1918 (1994) (Isr.); CA 4027/97 Sulfured Ltd. v. Amishai 98(2) HCP 278 (1999) (Isr.); Leave of CA 6383/98 Phoenix Israel Insurance Co. Ltd. v. Sarhan 99(1) HCP 1444 (1998) (Isr.); Estoppel by power of procedural agreement; Leave of Appeal 674/86 State of Israel v. Naot Sinai Communal Village founded by the Beitar Freedom Seed Movement Ltd. 42(2) HCP 527 (1986) (Isr.), adoption of points of contention or facts agreed to by the court; CrimA 532/71 Bahmozky v. State of Israel 26(1) HCP 543 (1972) (Isr.), on the court's duty to confirm that confessions garnered in the framework of plea bargains are true, and its authority to reject such arrangements. For later caselaw on the topic of plea bargains in criminal law, *see* CrimA 180/84 Haldi v. State of Israel 38(1) HCP 836 (1985) (Isr.); CrimA 188/84 Maya v. State of Israel 38(3) HCP 162 (1986) (Isr.); Leave of Appeal 486/86 Keshet v. State of Israel 40(3) HCP 472 (1987) (Isr.); CrimA 945/85 John Smith v. State of Israel 41(2) HCP 572 (1984) (Isr.). For analysis, see the article of A. Gezel, *Considerations for Denial of Plea Bargains*, Defense Attorney (April 2000), 3-9. *See also* HCJ 218/85 Arbiv v. Tel Aviv District Prosecutor 40(2) PD 393, 398–99 (1986) (Isr.), which determined that: "All agree that the plea bargain is not binding on the court. . . similarly, it is customary that the defendant himself may retract his promise and insist that his guilt or innocence be determined on the basis of a full criminal trial, wherein all of the evidence is presented before the court, and the court determines the facts on the basis thereof, exercises the law with respect thereto, and determines the question of guilt or innocence." And: "The State and the prosecutors on its behalf must achieve, in respect of the criminal conception, its objectives; they must bring about the conviction of the guilty, and the exoneration of the innocent." *Id.* at 403. *See also* CrimA 3754/91 State of Israel v. Samhat 55(5) HCP 798 (1991) (Isr.) (regarding the importance of the consideration of the pursuit of truth as a component of the court's discretion in respect of a recanted confession). Further illustration in this regard can also be found in the judgment of the District Court: Tax Assessment Appeal (Haifa) 93/93 Neima v. Value Added Tax Administrator 98(2) District Protocols 818, 827 (1998) (Isr.), which discusses the standing of confessions given by agreement, and so was ruled (Judge D. Bein): "It was agreed between the parties that the confessions provided before the VAT investigators should be considered as primary testimony. However, I can't see how it is appropriate to grant weight to confessions whose issuers were never cross-examined. While according to Regulation 10A of the VAT and Purchase Tax Regulations (Appeal Procedures), 5736-1976, the court is entitled to rely on evidence that would not be admissible in ordinary civil proceedings, nonetheless, in this case, when I am called upon to evaluate the weight of these admissions, I believe that we must act with the utmost of caution. It is thus inappropriate to rely on admissions in reaching determination that attribute the suspicion of criminal conduct to the appellant."

77 *See* CA 6654/93 Binkin v. State of Israel 48(1) PD 290, 295 (1993) (Isr.). *See also* A. Gross, *The Pursuit of Truth and Judicial Review: Intervention of the Appellate Instance in Fact–Finding*, Legal Review 20 (5756-5757), 551, 589; Aharon Barak, 4 Legal Interpretation: Constitutional Interpretation 528 (1994) ("The rhetoric of human rights must be grounded in a reality that places these rights at the top of the national priority list. Protecting human rights costs money, and the society that respects human rights must be prepared to bear the monetary cost"). *Cf.* Dworkin, *supra* note 36, at 278.

78 Indeed, the civil proceeding is characterized by greater flexibility than the criminal proceeding, and allows for many deviations that the law permit, whether *a priori* or *de facto*, from

dence in accordance with the seriousness of the matter, beyond questions relating to the strength of the evidence and their ability to establish fact.[79] Once more, these requirements do not conflict, and could even be said to be consistent, with the Truth Ideal. Furthermore, both the Truth Ideal and the Protection Principle demand rational thought and the devotion of optimal cognitive juridical resources specifically with respect to the criminal trial. Similarly, we believe that both of these principles instill value in the reliability of the verdict without regard to its results in terms of law enforcement or its other ramifications.[80]

Nonetheless, as explained in this essay, there is an area wherein these ideals remain under normative tension and in danger of conflict, even when conceiving of these ideals as relative obliga-

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the archetype of prevailing adjudication. For example, the legal requirement of the presence of a litigant may be waived. In the civil trial, the litigant is not required to report in person, nor indeed to personally perform any action required of them (as a litigant) for the sake of the trial, but may instead appoint an attorney for these purposes, unless the court orders the personal presence of the litigant under Regulation 474 of the Civil Procedure Regulations, 5744-1984. In contrast, the starting assumption of the criminal trial is the presence of the litigant at trial (Section 126 of the Criminal Procedure Law [Combined Version], 5742-182). This is deemed to be a fundamental right—and obligation—of the accused, and is required, *inter alia*, for the sake of the "conduct of a fair trial" that can bring about the "proper investigation of the facts" and "expose the truth"). *See* CrimA 1632/95 Meshulem v. State of Israel, 47(5) HCP 534, 547 (1996) (Isr.); HCJ 7357/95 Barkai Feta Humphreys (Israeli) Ltd. v. State of Israel 50(2) PD 769, 784 (1996) (Isr.).

79 At least one of the variations for understanding this concept: The criminal trial requires, in addition to a level of proof that is beyond a reasonable doubt (and, it can be argued, by power thereof, albeit not exclusively), a second order of certainty, or "epistemic confidence." In other words, a high level of confidence—or a serious effort at the least—is required as to the certainty or reliability of various factual determinations. This definition may seem general and imprecise, but it is precisely for that reason that it is suited to the clarification of the ambiguous approaches posed by the discourse, such as can serve to ground them in the various rules in practices. Meaning that, as opposed to the precise value of the pursuit of truth in the civil proceeding, which definitely minimizes errors in providing the lawful remedies, the pursuit of truth in the criminal proceeding has been arguably known at times as a value stemming from the mere fact of a societally mandated decision rendered in respect of the given sequence of events. For example,consider cases in which there is a victim complainant, and a defendant that denies any connection to the incident. This matter stems, inter alia, from the seriousness of the issue; from the intensity of the participation of the involved parties in the proceeding; from a plurality of involved parties, which in some cases constitutes a significant part of the entire public; and, mainly, from the connection that such incidents (and, in some cases, the mere fact of the mandated determination thereof) have with the formation of the consciousness and identity of the involved parties.

80 And to simplify the author's argument: it is believed that the reliability of the verdict has more significant importance than its results, in terms of law enforcement or its other ramifications. That argument has been an object for an extansive academic research. *See, e.g.*, Mordechai Kremnitzer, Doron Menashe & Khalid Ghanayim, *The Use of Lethal Force by Police*, 53 CRIM. L.Q. 67 (2007).

tions, since the question remains if the relative necessity of compliance in respect of the Protection Principle also extends to considerations relating to the promotion of the Truth Ideal, and vice versa. Thus, the main contribution of this essay is merely to demonstrate that this field, though still existent, does not encompass all areas of operation of these ideals, but is rather one part of a discourse that, in its other aspects, does allow for each ideal to operate uninterrupted, and even, at times, in collaboration and coordination with its counterpart.

As for the field of dispute itself, this matter requires separate analysis and explication of the existing discourse and, as such, is beyond the scope of this essay. Nonetheless, we should indicate that one possible manner of analyzing this issue is to attempt to deconstruct and reconstruct the principles in question-based on the principles and rules of our criminal justice system, evidence theory, and jurisprudence. Such a process would be far from simple and laden with its own principle issues.[81] However, several lines of reasoning can still be suggested. For instance, one path that could be examined would be the severity of the crime and the anticipated punishment type. It could be reasoned that, to the extent that these are less extreme, the Protection Principle would lose more of its resilience relative to the Truth Ideal (even if the latter would also lose some of its strength but to a lesser extent). Thus, perhaps specifically in respect of lighter criminal transgressions in the "grey area," and not in the paradigmatic core of the criminal proceeding,

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[81] Indeed, the two ideals arguably contain a measure of internal resistance to their deconstruction. We have already noted above that the Protection Principle rests on the exceptional gravity associated with the false conviction of innocents. As stated, it can be reasoned that this severity is anchored in the liberal-normative perception that attributes a very specific and unique moral hazard to the conviction of innocents. A hazard that is principally differentiated from the types of damages, pain and suffering that could be derived from the more general program of utilitarianism, but that is fixed and unchanging irrespective of the circumstances of the matter, on account of the nature of this specific injustice (see *supra*, note 14 and the adjacent text). Thus, matters such as the gravity of the crime, the anticipated punishment, the presence or absence of a complainant or victim etc. are not relevant variables to the function of the gravity of failure to uphold the Protection Principle. Similarly, it can be argued that the Truth Ideal is also possessed of an intrinsic rigidity that resists deconstruction and hierarchical reconstruction, since, based on the prevailing assumption, the concept of factual truth is given to bivalence—i.e., that any factual proposition that the discourse might encounter can be regarded as either absolutely true or false. Thus, it would appear that the Truth Ideal can only attempt to align itself such that all of its factual determinations on the matters that establish, directly or indirectly, the effective outcome, whether for or against, should not be false. Without putting too fine a point on it, it is charged with ensuring that its findings are the truth, and nothing but the truth. In respect of the bivalence concept, *see* MICHAEL DUMMETT, TRUTH AND OTHER ENIGMES 1–24 (1978).

the relative weight of the Truth Ideal is bolstered.[82] Moreover, with regard to crimes that involve an actual complainant or victim (or potential victim), such as in the case of sex crimes, the Protection Principle could also be seen as holding less relative weight.[83] On the other hand, in cases where it could be reasoned that the process faces exposure to human error in criminal adjudication—as opposed to the risk of false testimony—we could then see the relative weight of the Truth Ideal weakened.[84] These are all little more than preliminary shots in the dark—or, more precisely, manifestations of the ambiguity the disclourse itself has cast over this entire subject.

C. *A Word Regarding the Impact of the Basic Law: Human Dignity and Liberty on Our Discussion*

The saying that "the accused's rights are of constitutional standing" is not new and has been known for some time. In recent times, constitutional arguments have been made more often than not to justify the exclusion of evidence, resulting in a defendant's acquittal.[85] In respect of this epithet, normative, informed, and comprehensive attention must be paid to the constitutional anchoring and standing of the Protection Principle, on the one hand, and the cognitive standing of the Truth Ideal, on the other. This is the

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[82] Even if it does not yet reach its optimal state, wherein any deviation aimed at preferring one sort of error over another would be negated. Such an optimal state is what we find in classical civil justice. Indeed, the probabilistic equation is the determining strategy shown to best minimize errors in judgment; i.e., in this sense, which most completely focuses on and optimizes the Truth Ideal and the exposure of truth itself. *See* Editor's Note to *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, *supra* note 21, at 615–21. *See also* STEIN, *supra* note 66, at 604–05; David Kaye, *Naked Statistical* Evidence, 89 YALE L. J. 335 (1980) (book review).

[83] *See also* the comments of Shamir on this subject in *On Justice and Social Change*, 18 TEL AVIV U. LEGAL REV. 631, 636 (1993) (and that of R. Shapira in *Penal Law: From Focus on the Individual to Ruling on Intergroup Conflicts*, THE ISRAEL LEGAL YEARBOOK 629, 641 (1996-1997), (note 60)). *Cf.* Ayelet Shachar, *Sexuality of the Law: The Legal Discourse on the Topic of Rape*, 18 TEL AVIV U. LEGAL REV. 159, 192 (1993).

[84] A position of this sort as to the Logical Structure of Evidence Law can be found in Edward J. Imwintelried, *The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law*, 46 U. MIAMI L. REV 1069 (1992).

[85] The most well-known precedent in this regard is, of course, *Miranda v. Arizona*, 384 US 436 (1966), wherein the Fifth Amendment to the United States Constitution was invoked, leading to the acquittal of the defendant. Many other cases followed in this vein, attributing great significance to the Constitutional amendments in the criminal trial; *see Colorado v. Connelly,* 479 US 385 (1978); *Mincey v. Arizona*, 437 US 157 (1986).

place to note that, notwithstanding the recognition of the presumption of innocence and the right to refrain from self-incrimination as unqualified constitutional rights, there have been several instances wherein the courts have softened the tone of this determination, and expressed a preference for the Truth Ideal over the Protection Principle.[86]

Thus, the normative relationship between the Protection Principle and the Truth Ideal remains essentially shrouded in ambiguity to this day. These recent rulings only illustrate the need to adopt our proposal. As long as these rights are considered to exist in conflict with one another, defendants will forever remain subject to the circumstances of each case and the discretion of the particular presiding panel.

For instance, in the Miranda Case, we say that the emphasis was placed on the importance and the scope of the right to refrain from self-incrimination. From this, we can infer that as the circumstances of each individual case vary, so do the legal rulings, and the balance is tipped one way or the other.

This is also the place to note that the current difficulty, with respect to the interface between Evidence Law and Constitutional Law, is not new, and has merited extensive academic analysis.[87] This discourse, which also concerns the Protection Principle and the Truth Ideal, is cognizant of the difficulties that exist between them and presents many and various proposals to resolve the issue.[88] The relevant solution closest to our own proposal can be found in the important proposal of Professor Stein,[89] who holds that the rules of evidence must be adapted to comply with the constitutional doctrines in terms of risk allocation.[90] This theory

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[86] *See Berghuis v. Thompkins*, 560 US 370 (2010), wherein the defendant's right to remain silent was negated because they had not expressly stated, in accordance with the Miranda ruling, that they were exercising their right to refrain from self-incrimination by remaining silent. This ruling came under intense scrutiny, and illustrates the inherent difficulty presented by the tension between the two ideals. For some of the criticism of this ruling, *see* Richard L. Budden, *All in All, Miranda Loses Another Brick from Its Wall: The U.S. Supreme Court Swings Its Hammer in Berghuis v. Thompkins, Dealing a Crushing Blow to the Right to Remain Silent [Berghuis v. Thompkins, 130 S. Ct. 2250 (2010)]*, 50 WASHBURN L. J. 483, 510 (2011).

[87] H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1112 (1991).

[88] Welsh S. White, *Evidentiary Privileges and the Defendant's Constitutional Right to Introduce Evidence*, 80 J. CRIM. L. & CRIMINOLOGY 377 (1989).

[89] Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65 (2008).

[90] *Id*.

termed the "Least Harm Principle,"[91] is as important as it is significant. However, this proposal, as well, in seeking to divvy the allocation of risks, is unable to contend (and effectively incapable of contending) with the risk allocation undertaken by the defendant themselves.[92]

At the end of this circular journey, we remain with our proposal: To recognize the obligation born of relative necessity. In this manner, and only in this manner, can we find the long-awaited resolution between the Principle of protecting the innocent from harm and the Ideal of the pursuit of truth.

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91 For a further discussion of this issue, *see* Alex Stein & Gideon Parchomovsky, *The Distortionary Effect of Evidence on Primary Behavior*, 124 HARV. L. REV. 518 (2010).

92 Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013).