‘We Find You Guilty’: The Standard of Proof and the Second Person Voice

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1. What is at Stake?

Why should we demand such a high standard of proof in criminal trials? A familiar answer is that what is at stake is the punishment of the innocent: important though it is to punish the guilty, for reasons of retributive justice or of utility, we must take special care to avoid punishing the innocent. Blackstone’s classic remark, that ‘it is better that ten guilty persons escape, than that one innocent suffer’,[1] does not specify just what the guilty might escape or the innocent suffer, but some writers take it to be punishment. Thus Reiman and van den Haag: ‘the principle is intended to constrain our punishment policies’.[2] And Walen: ‘what is at stake is, on the one hand the importance of doing justice by punishing the guilty, and on the other hand, the importance of not wrongfully punishing the innocent’; so we must determine ‘when criminal convictions are impermissible because the likelihood of punishing an innocent person is too high’.[3]

Others rightly point out that, important though punishment is, it is not all that is at stake. Thus Mr Justice Brennan:

> The accused...has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.[4]

As Roberts notes, a convicted innocent suffers ‘the public slander of unjustified censure’, and might fight to ‘expunge’ that slander even if this cannot avert punishment (because it has been completed), or might prolong it (as when a prisoner who persists in asserting their innocence is denied parole).[5]

We will also focus on conviction rather than punishment. This is not to deny the importance of trying to avoid punishing those who are innocent of the crime charged: it is, rather, to insist on the independent importance of conviction, and because we can ground a plausible argument for a strict criminal standard of proof on the significance of conviction. But we will attend to both the guilty and the innocent: for whilst an innocent person is clearly wronged in being convicted, an actually guilty person is also wronged if convicted under an unduly undemanding standard of proof—just as an innocent is wronged if, although acquitted, they are judged by an unduly undemanding standard.

This point is missed if we take a purely instrumental view of the trial as a process aimed at accurately identifying those who are eligible for punishment because they committed a crime. On such a view, the innocent are indeed wronged if they are convicted, and that wrong is culpable if

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[1] Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765-9), bk IV, ch 27, 352.
[2] Jeffery Reiman and Ernest van den Haag, ‘On the Common Saying that it is Better that Ten Guilty Persons Escape than that One Innocent Suffer: Pro and Con’ (1990) 7 *Social Philosophy & Policy* 226, 226.
[3] Alec Walen, ‘Proof Beyond a Reasonable Doubt: A Balanced Retributive Account’ (2015) 76 *Louisiana Law Review* 355, 357, 426.
[4] *In re Winship* 397 US 358 (1970) 363.
[5] Paul Roberts, *Roberts & Zuckerman’s Criminal Evidence* (3rd edn, Oxford University Press, 2022) 260-2; the quote is at 261.

it flows from a failure to apply a suitably stringent standard of proof. Even if they are acquitted, they are wronged if such a standard is not applied: they are exposed to an unjustified risk of mistaken conviction and punishment and wronged even if that risk is not actualised.[6] But what of defendants who are in fact guilty? Suppose they are convicted, after a trial at which an unduly undemanding standard of proof was applied. On a simple instrumentalist view, it seems that they are not wronged: since they are guilty, their punishment does not wrong them; nor does the trial that legitimises their punishment expose them to an unjustified risk of mistaken conviction and punishment, since, being guilty, they face no such risk. Those who apply such an undemanding standard might act wrongly, since they act in a way that *for all they know* exposes innocents to the unjustified risk of conviction. If the court failed to apply the stringent standard of proof that the law demands, their convictions should also be overturned on appeal as 'unsafe', because the courts should uphold the system of rules that protect the innocent against mistaken conviction. But *they* are not wronged. Rather, if they are acquitted through the application of a demanding standard of proof, they are fortunate beneficiaries of a process that is designed to protect not them, but the innocent; their legal right to an acquittal does not reflect a genuine political right—it is parasitic on the genuine rights of the innocent.[7]

Some are undisturbed by this implication of an instrumentalist account: the guilty have no right not to be convicted, since conviction would be an accurate verdict; so they have no right to procedures that protect them against conviction.[8] We will argue that we should be disturbed: all defendants, innocent or guilty, have the same right to be judged by a stringent standard of proof; a guilty defendant who is convicted under an unduly undemanding standard is wronged in just the same way as an innocent defendant who is thus convicted. We will ground this argument in an account of criminal trials as a communicative process that calls those accused of committing crimes to answer to those accusations, and to answer for those crimes if their commission is proved. (We do not suggest that this is the only possible foundation for defendants' right to a demanding standard of proof, or that more sophisticated instrumentalist accounts cannot found such a right;[9] but we have elsewhere defended a non-instrumentalist conception of criminal trials, which we sketch in s. 2,[10] and our concern here is with the distinctive implications of such a conception.)

This communicative account of the criminal trial highlights, contrastively, a further feature of many other accounts of trials and punishments: they give defendants no essentially active role. Trials and punishments are portrayed as processes that are done to, imposed on, defendants, who figure as their passive object. This is true even when it is insisted that defendants have a right to defend themselves, to be heard: for this is a right whose exercise is not integral to the success of the trial and is often understood as just one application of a general right to be heard to object to any coercive imposition by the state. Convictions and punishments are imposed on the basis of

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[6] See John Oberdiek, *Imposing Risk: A Normative Framework* (Oxford University Press 2017).

[7] Compare Akhil R Amar, 'The Future of Constitutional Criminal Procedure' (1996) 33 *American Criminal Law Review* 1123–40, 1133: 'The Constitution seeks to protect the innocent. The guilty … receive procedural protection only as an incidental and unavoidable by-product of protecting the innocent'.

[8] See e.g. Christopher H Wellman, *Rights Forfeiture and Punishment* (Oxford University Press 2017), 96-8; Robert Nozick, *Anarchy, State, and Utopia* (Blackwell 1974), 107 ('An unreliable punisher violates no right of the guilty person; but still he may not punish him').

[9] Compare Thomas Weigend's chapter in this volume.

[10] Antony Duff, Lindsay Farmer, Sandra E Marshall, Victor Tadros, *The Trial on Trial (3): Towards a Normative Theory of the Criminal Trial* (Hart 2007).

judgments of a defendant's guilt, and those judgments must be securely founded: but they are typically expressed in the third person, as judgments that '*D* is guilty'. That is indeed how trials and punishments often proceed, and are often with good reason seen as proceeding by those subjected to them; and in the end both trials and punishments may be imposed in the sense that they will not be prevented by the defendant's refusal to take part. However, we will sketch an account of the criminal process as one in which the defendant is to be an active participant: one in which the court engages with the defendant, rather than merely passing judgment on them. A crucial implication of this account is that the court's verdict is then properly expressed in the second, rather than the third, person: not 'We find the defendant guilty' but 'We find you guilty'. By asking what can justify us in pronouncing such a second person judgment, we will be able to see a distinctive reason for demanding a high standard of proof in criminal trials, and for resisting the introduction of 'intermediate verdicts' that amount in effect to finding the defendant 'probably guilty'.

In what follows we will first (s. 2) sketch the communicative, participatory conception of the criminal process in which our argument is grounded. We then (s. 3) discuss the implications of this account for the standard of criminal proof: we focus on what the court (we) can say to the defendant whom we convict, and why if we are not convinced of their guilt beyond reasonable doubt we must acquit them; but we will also say something about other possible addressees of the verdict, in particular the polity at large, and the alleged victim (when there is one). In s. 4 we then discuss 'intermediate verdicts' of two possible kinds—and criticise both.

Two final preliminaries should be noted. First, we will not discuss how this strict standard of proof is to be expressed, or explained to jurors. We talk of a 'beyond reasonable doubt' (BRD) standard, although English courts now give jury directions in terms of being 'sure' ('made sure' by the prosecution) of the defendant's guilt:[11] for the language of 'beyond reasonable doubt' makes explicit the importance of reasons in reaching and justifying verdicts, whereas in common usage I can be 'sure' of *P* without having what I see as conclusive evidence for it, or even in the face of what I recognise as strong counter-evidence; but we will not discuss how any such standard should be explained to lay jurors.[12]

Second, our argument is couched in terms of an adversarial system of contested criminal trials in which verdicts are given by lay juries. We cannot discuss here the actual infrequency of contested trials, or the rationale for giving a central role to lay citizens (as jurors or magistrates) in criminal trials. Nor can we discuss the applicability of such an account to more inquisitorial systems, though we would hope to be able to argue that such systems give different institutional form to what are at some deeper level the same aims and values.

2. *The Criminal Trial as a Calling to Account*[13]

We should see a criminal trial, we suggest, not simply as an inquiry about an accused person that aims to establish whether they committed an offence, but as a process in which they are to be active participants: it calls them to answer to a charge of criminal wrongdoing, and to answer

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[11] See Roberts (n 5) ch 6.4 and Paul Roberts' chapter in this volume.

[12] See also Walen (n 3) 373–376.

[13] See Duff et al (n 10); Antony Duff, *The Realm of Criminal Law* (Oxford University Press 2018) ch 5. Note that this is a normative, idealising account; it is not offered as an accurate description of our current practices.

for that wrongdoing if it is proved or admitted. In an adversarial trial, the accused is first called to make a formal answer to the charge by pleading 'Guilty' or 'Not guilty'; although they are not forced to enter a plea, or punished for refusing to do so, it is expected of them. It is then for the prosecution to prove that they committed the offence, not for them to prove that they did not—though if the prosecution adduces strong evidence that they committed it, they may have to rebut that evidence if they are to avoid conviction; but if it is proved (or admitted) that they committed the offence, they are called to answer (held responsible) for it. They can still avoid conviction, by offering a defence—an answer that exculpates them by showing that their conduct was justified or excusable: but it is now up to them to answer, by admitting their guilt or offering a defence; if they fail to offer an exculpatory answer that suffices at least to create a reasonable doubt about their guilt, they will be convicted—held formally liable for the offence.[14]

This conception of the criminal trial is grounded in a conception of the role of the criminal law in a democratic republic of free and equal citizens. The law of such a polity is a 'common' law: it belongs to the citizens, who make it and subject themselves to it. The substantive criminal law defines a set of 'public' wrongs: wrongs, that is, that violate the polity's self-defining values, and that therefore concern the whole polity and require a formal, public response. The criminal trial, and the punishments to which it leads, constitute that response. That response should take the form of a calling to account because citizens must treat each other, and the law must treat them, as responsible agents—members of the polity who can, and should, answer for their own conduct. The response is required, because a polity that takes its self-defining values seriously will take violations of those values seriously: it will care about wrongs that flout those values as public wrongs, which require a public response. The response must do justice to victims of such wrongs, recognizing that they have been not merely harmed, but wronged; and to perpetrators of such wrongs, recognizing their status as responsible members of the polity. We do such justice by calling the perpetrators to public account: they must answer for what they did, not just to their victims, but to their fellow citizens collectively, for violating the values that structure their life as a political community. If offenders were enemies,[15] we would not owe it to them to respond to their crimes by calling them to account: we would need to find ways of dealing with their crimes and preventing their repetition, but would not need to address them as responsible members of the polity (though we must still recognise them as fellow human beings). But, on an inclusively communitarian view of political community, we should not see them as enemies: we should recognize and treat them as responsible fellow citizens;[16] an implication of this is that we should hold them responsible, call them to answer, for their crimes. The point is not just that *if* we are to respond to their crimes, or subject them to coercive treatment because of those crimes, we should do so by a process that calls them to answer: it is that we *should* respond to their crimes in this way; we owe this to them as well as to their victims and to the polity as a whole. In calling them

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[14] We assume here that the distinction between offences and defences is substantively significant: see George Fletcher, *Rethinking Criminal Law* (Little, Brown 1978) 552-79, 683-758; John Gardner, 'Fletcher on Offences and Defences' (2004) 39 *Tulsa Law Review* 817. But the crucial claim for our present purposes, that the trial is a communicative process that calls alleged offenders to account, can be accepted even by those who deny that the distinction has any substantial significance.

[15] Compare Jakobs' notorious conception of *Feindstrafrecht*: see Daniel Ohana, 'Günther Jakobs's Feindstrafrecht: A Dispassionate Account', in Markus Dubber (ed.), *Foundational Texts in Modern Criminal Law* (Oxford University Press 2014) 353.

[16] Or, if they are not citizens, as guests: see Duff (n 13) ch 3.3.

to account we treat them not merely as subjects to whom the law is applied, but as agents—agents of the law itself.[17]

There are two connected points here. One concerns responsible agency: a responsible agent is one who can answer for herself and her conduct; to deny me the opportunity to do so denies my standing as a responsible agent.[18] A trial seeks to determine a defendant's responsibility for an alleged crime: the indictment accuses *D* of being culpably responsible for it; the prosecution offers evidence that *D* is responsible; a conviction holds *D* culpably responsible. Now to hold someone responsible is to call them to answer; but if we are to call someone to answer, we must allow and enable them to answer, and be ready to listen to their answer. The other point concerns citizenship in a democratic polity: citizens will be active members of the polity, agents of its institutions, including its criminal law; one exercise of that agency is to answer for one's alleged wrongdoing in a criminal court. These points come together because in a liberal polity, respect for its members' responsible agency is central to its self-defining values.

In calling an accused to answer, we assign them a specific role in the criminal law's enterprise of holding alleged wrongdoers to public account: they are to contribute to that enterprise by answering for their alleged crimes. We must therefore enable them to play that role: the court must treat them with the respect due to a responsible agent and give them a fair chance, and the resources, to answer. Hence the importance of the right to 'effective participation', which the ECtHR emphasises in applying ECHR Article 6.[19] We can distinguish three dimensions to that right.

First, the accused must have the *capacity* to participate in the trial: they must be fit to plead. If, for instance, they have succumbed since the time of the alleged crime to a mental disorder so severe that they cannot understand or participate in the trial, they cannot be tried—even if their guilt could be proved without their participation.[20] To try a defendant who lacks the capacities required for answering the criminal charge would be a travesty.

Second, they must be given a fair *opportunity* to answer to the charge: they must be informed of the charge, in a language they can understand, allowed time to prepare a defence, allowed to put that defence to the court and to examine witnesses; it would be a travesty to call them to answer, but then proceed to judgment without giving them a chance to answer. The court must also listen to their answer, and attend carefully to any defence that the accused offers.

Third, they must be given the *resources* necessary to make use of that opportunity: hence the rights specified in ECHR Art. 6(3). The old joke that both the millionaire and the pauper have the right to stay in an expensive hotel applies here: a right to effective participation must, if it is to be enjoyed by all citizens as equals under the law, be not just a negative right not to be

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[17] Since responsibility is reciprocal - Antony Duff, 'The Reciprocity of Criminal Responsibility' in Thomas Crofts, Louise Kennefick and Arlie Loughnan (eds), *Routledge International Handbook on Criminal Responsibility* (Routledge 2025) 37 - in a trial that calls defendants to answer the state that calls them is also held to account: compare Summers' and Hodgson's chapters in this volume, and Lindsay Farmer, 'Criminal Responsibility and Proof of Guilt', in Markus D Dubber and Lindsay Farmer (eds), *Modern Histories of Crime and Punishment* (Stanford University Press 2007) 45; see also Michael Law-Smith, 'Criminal Trials and Truth' *Canadian Journal of Law and Jurisprudence,* First View, DOI: https://doi.org/10.1017/cjlj.2026.10064.

[18] John Gardner, 'The Mark of Responsibility', in *Offences and Defences* (Oxford University Press 2007) 177.

[19] European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb)* (Council of Europe, 2025) paras 165-71.

[20] Ronnie Mackay and Warren Brookbanks (eds), *Fitness to Plead: International and Comparative Perspectives* (Oxford University Press 2018).

actively prevented from participating, but a positive right to be enabled to participate, which involves providing resources for those who otherwise lack them.

On this conception of the trial, the right to effective participation matters not merely because an accused must have the chance to defend themselves and thus avoid conviction, but because they must be enabled to answer the charge as a responsible citizen who is called to account by their fellows; this matters even if their answer is 'Guilty as charged'. For some defendants will want to plead guilty—and not merely as part of a plea bargain that makes their actual guilt or innocence irrelevant; they will want to admit their wrongdoing. But such admissions of guilt, as public confessions of wrongdoing, have value for the defendant and for the polity only if based on an understanding of the charge and its implications; they must be voluntary and informed.

If a defendant lacks the capacity, or is denied the opportunity or resources, to answer the charge, their trial and conviction are unjust—even if they are provably guilty. For to convict them would be to say that they have failed to offer an exculpatory answer to the charge; but if they were denied a fair opportunity to answer, or the resources to make use of that opportunity, or lack the capacity to do so, they have not *failed* to answer. If the polity is to call an accused to answer, it must allow and enable them to answer: the denial of their fair trial rights delegitimizes the conviction, even if a conviction would be empirically reliable without their participation. We cannot say, as we could say on a purely instrumentalist view, that at least the court reached 'the right verdict' in convicting an actually guilty defendant through a process that breached their fair trial rights: for what makes a verdict right is that it expresses a justified judgment on whether the accused provided an exculpatory answer to the charge (a charge backed by persuasive evidence) that they faced; whatever the truth of the charge, a verdict of 'Guilty', which is a judgment that they failed to offer such an answer, is unjustified if they were not allowed and enabled to answer.

A defendant might refuse to answer: refuse to enter a plea or take part in the trial, perhaps to express a denial of the court's legitimate authority. That cannot bar their trial, if the prosecution offers unrebutted evidence that proves their guilt: they have been called to answer, and given the opportunity and offered the resources to answer; they have now failed to offer an exculpatory answer, and can be justly held culpably responsible.

What of the right of silence: the right, increasingly limited in recent years,[21] to remain silent at one's trial without penalty? Our account implies that, in a just system of law in a decent polity, defendants have a civic duty to play an active role in their trial, and not to remain silent; but there is good reason not to make that civic duty an enforceable legal duty. A legal right to remain silent is important: it allows principled dissenters to express their dissent by refusing to take part in their trial, and protects them against the oppressive pressure to speak that a legal duty to speak would enable officials to exert. But the role of this right is on this account different from the role of rights to 'effective participation'. Those rights flow from the trial's aim as a process through which a polity calls alleged wrongdoers to account. The right of silence constrains our pursuit of that aim: we call on the defendant to answer, but should not use the law to enforce that call.

We have talked so far of the defendant's role in a criminal trial as an active participant who is to respond to a call to answer to a charge of criminal wrongdoing, and answer for that conduct if it is proved (or admitted). The court must therefore address the defendant in the second person: 'How do you plead?'; 'What is your answer to the prosecution case?'. *D* may choose to speak

[21] At least in English law: see e.g. Hannah Quirk, 'The Case for Restoring the Right of Silence', in John J Child and Antony Duff (eds), *Criminal Law Reform Now* (Hart Publishing 2019) 253.

through counsel; but counsel must speak in their voice. Having addressed the defendant in the second person, the court must be ready to listen to whatever answer they give, and to consider it with the seriousness that it deserves;[22] only then can the court claim the right to pass judgment.

What then should we say about that judgment? It is a judgment that the defendant has, or has not, provided an exculpatory answer to the prosecution's case; but to whom is that judgment addressed, and in what person is it properly expressed?

3. 'We Find You (Not) Guilty'

The trial is a process in which the defendant is addressed by the polity through the court that speaks in the polity's name: 'We the people call you to answer to this charge'. The verdict must therefore be addressed primarily to the defendant:[23] 'We find that your guilt has (not) been proved'. This is true, but there are others by whom the verdict is to be heard, and to whom it might be addressed as at least secondary hearers.

Consider acquittals in a system in which conviction and acquittal are the only options. If the trial is governed by the presumption of innocence the defendant is entitled to an acquittal so long as the prosecution failed to prove their guilt to the appropriate standard.[24] An acquittal therefore says to *D* not 'We find you innocent of the charge', since that is not the question that the court was to determine. It rather says, 'We began this trial with the presumption that you are innocent of the charge brought against you; that presumption has not been defeated; so you are still presumed to be innocent of the charge'.[25]

One reason for expressing the message of an acquittal in this way is to make clear that it is not a matter of what the court, or individual jurors, believe about *D*'s guilt or innocence: they might all believe that *D* is guilty, but must acquit if that guilt has not been proved to the requisite standard. The presumption of innocence is about conduct, not belief: it concerns how those bound by it treat those whom they are to presume to be innocent.[26] That is also why it is in one sense right, but in another sense wrong, to say that an acquittal can 'leave room for considerable

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[22] More precisely, the court need attend only to any legally relevant answer that the defendant offers. We cannot discuss here the problems involved in deciding what kinds of argument courts should be expected to hear.

[23] Verdicts of English juries are apparently addressed to the court, and speak of the defendant in the third person. For reasons that will emerge later, we think that the jury should address the defendant directly.

[24] We do not claim that the presumption of innocence rules out intermediate verdicts: it does not (see Federico Picinali, *Justice In-Between: A Study of Intermediate Criminal Verdicts* (Oxford University Press 2022), ch 2.2); our concern here is with two-verdict systems.

[25] 'Not proven' might therefore be a more accurate rendering of an acquittal than 'Not guilty': but 'Not proven' is tainted, in Scots law, by the fact that it is a 'third way' between 'Guilty' and 'Not guilty', which implies that the presumption of innocence has been put in doubt (see James Chalmers, Fiona Leverick and Vanessa E Munro, 'Beyond Doubt: The Case Against "Not Proven"' (2022) 85 *Modern Law Review* 847; the 'not proven' verdict in Scotland was abolished by the Victims, Witnesses, and Justice Reform (Scotland) Act 2025, ss 65-6). 'Not guilty' also has the merit of making explicit the implication of the prosecution's failure to prove guilt.

[26] See e.g. Thomas Weigend, 'There is only one Presumption of Innocence' (2013) 42 *Netherlands Journal of Legal Philosophy* 193, 196: 'a person charged with a crime is to be treated as if he had not committed that crime until the court has found him guilty'. Also Picinali (n 24) 67: the presumed innocence 'is not an assertion to the effect that the defendant has not committed the crime charged; it is, instead, the defendant's enjoyment of the rights to which all members of the polity are prima facie entitled' (and my civic rights do not include rights concerning what others believe about me).

doubt about the innocence of the defendant' or even 'express[] such doubt'.[27] Those who acquit the defendant, and observers of the trial, might still wonder whether they are guilty—that is a matter of what beliefs we form, with what kind of conviction. But an acquittal formally affirms the non-defeat of the presumption of innocence as a presumption about how people are to be treated; it thus precludes *practical* doubt about *D*'s innocence. Finally, to put the matter in these terms shows why it is wrong to describe acquittals of the actually guilty as 'mistaken', or 'false': an acquittal is mistaken if the evidence offered at the trial sufficed to prove *D*'s guilt to the requisite standard, but if it was not thus sufficient, an acquittal is neither false nor mistaken.

(To put the matter in these terms provokes a question to which we return in s. 4. In a binary system governed by the presumption of innocence, that presumption is either defeated by proof of guilt to the requisite standard, or left intact in the absence of such proof. But why retain so crudely binary a system? Why not allow courts to give formal expression to what might be the case: that the evidence led at the trial creates serious doubt about *D*'s innocence, or even shows it to be probable that *D* committed the crime, and so casts doubt on—although it does not suffice to defeat—the presumption of innocence?)

Before turning to convictions, we should say something about other possible addressees of the verdict, and what an acquittal can say to them. For while an acquittal should, on our account, be addressed directly to the defendant ('We find you not guilty'), it is also intended to be heard by, and is thus also addressed to, a wider audience. It is a public pronouncement by the court, which is intended to be heard and accepted by the citizenry in whose name the court acts: 'We, the people' accused you; 'the people' are therefore to hear the verdict and make it their own. This is not to say that they must believe *D* to be innocent: they might believe, with good reason, that *D* is guilty, and that belief might affect their private dealings with them; the fact that I have been acquitted of theft does not require you to resume our acquaintanceship, or to invite me into your home.[28] To say that they must accept the verdict is to say, rather, that they must continue to treat the acquitted defendant as innocent *in their civic dealings*, those they have simply as fellow citizens.[29] (Or should we say only that they must not treat *D* as guilty—which leaves open the possibility of treating them as suspicious, not to be fully trusted? This would be, in effect, to allow others to reach their own intermediate verdict, and draw their own practical conclusions from it: we discuss this in s. 4.)

The other obvious potential addressee of the verdict in the case of alleged victimising crimes is the complainant, the alleged victim. Complainants might not be, in English courts for instance, formally parties to the trial. But they have a particular interest in the trial, beyond their role simply as members of the polity (in a normative sense that applies even if they *take* no interest in the trial): the criminal law must do justice to victims, whose wrongs the polity shares,[30] as well as to defendants and to the polity's self-defining values. That interest becomes more significant if their evidence is crucial to the prosecution case, as is problematically true in some rape cases. It is then harder to say to them, as acquittals say to the polity, that they must accept the verdict,

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[27] Picinali (n 24) 61–62.

[28] Matters are more complicated in more intimate relationships, for instance of friendship or of marriage: we must ask what kind of trust such relationships may involve, how it can be undermined, and what can restore it.

[29] How are we to distinguish our civic from our private relationships: those we have simply as fellow members of the polity from those we have as friends, lovers, or neighbours? We cannot pursue this question here.

[30] See Antony Duff and Sandra E Marshall, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7.

and treat the defendant as innocent of the charge—even if we add that this applies only to their 'public' dealings with the defendant; and especially hard if they know, as might be the case, that the defendant is guilty.[31] We could say that whilst *finding* that *D* is innocent of the charge might amount to finding that the complainant was lying or mistaken, an acquittal implies no such finding; it finds only that guilt was not proved to the relevant standard. But this might still leave the complainant dissatisfied. For the complainant might say 'I know that *D* is guilty; I have given sworn evidence as to his guilt, and submitted myself to cross-examination: why can't you now take my word for it?'. The answer to this indignant question is that, first, we must also attend to the defence's case, perhaps including *D*'s own (cross-examined) testimony; second, we owe it to the defendant to convict them only if their guilt is proved beyond reasonable doubt (for reasons explained later in this section); third, to say that we are left with a reasonable doubt about his guilt is not to specifically doubt *your* word, or *your* honesty—it is to say only that we cannot take it for granted that any testimony that survives cross-examination is true, if it is contradicted by other testimony from the defence. We need not see reason to mistrust you in particular; but you should not expect us to operate a system in which the complainant's (cross-examined but contradicted) word is always accepted—even though you might be unlucky in such a system, if there is insufficient evidence to warrant a conviction).

We turn now from acquittals to convictions: what does conviction say to the defendant (and to others); what implications does this have for the standard of proof? 'We find you guilty of the crime charged', says the court. This is not simply the assertion of a proposition, that it has been proved that *D*'s actions satisfied the law's definition of the crime charged, and that they did not offer a legally recognised defence that created reasonable doubt about their guilt. It is a censorial judgment of culpable wrongdoing: in finding you guilty we condemn your conduct and censure you as its agent.

A first step towards justifying a stringent standard of proof is to suggest that if we are going to censure a person, whether formally by a criminal conviction or informally in blaming them for their alleged wrongdoing, we must be willing to look them in eye as we do so. This is a version of Pettit's 'eyeball test'. A criterion of republican freedom, Pettit argues, is that citizens are able to 'look others in the eye without reason for the fear or deference that a power of interference might inspire';[32] we would add that citizens must also be willing to look each other in the eye, in recognition of their equal status as fellow members of the polity. This implies that the defendant must be able and willing to look the court—the judge, the jurors—in the eye, and we might wonder whether they really can look 'without reason for the fear or deference that a power of interference might inspire': for the court surely has just such power, and defendants are subject to the law's vastly superior authority and power. However, first, what undermines republican freedom is the possibility not of any interference, but of uncontrolled or arbitrary interference;[33] but in a just system of law a court's power over a defendant is neither uncontrolled nor arbitrary. Second, under a democratic system of law, we are truly equal, even when the law gives some of

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[31] Other witnesses might of course also know that the defendant is guilty.
[32] Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012), 84; compare Sherman J Clark, 'The Courage of Our Convictions' (1999) 97 *Michigan Law Review* 2381. Contrast the common suggestion that if jurors returning to court to render their verdict look at the defendant, they are going to acquit; if they do not, they are going to convict. On our account, failing to look at the person we are about the convict is a failure of civic respect.
[33] See Pettit (n 32) ch 1.

us a limited, accountable authority over others: we are all equally subject to the law, and must be able and willing to look each other in the eye, and address each other with respect, as equals.

How does this bear on the standard of proof? First, what makes 'We find you guilty' just or correct is not the mere fact that the defendant committed the crime charged: if a jury convicts an actually guilty defendant without adequately persuasive evidence, we cannot say consolingly, 'Well, at least they got it right, if only by chance'; for they got it wrong, and wronged the defendant in thus getting it wrong.[34] Compare our informal extra-legal practices of blame. To blame you for some (alleged) wrongdoing is to hold you guilty of it: you might ask what justifies that blame, and if my response is to admit that I have simply guessed or assumed that you were to blame, you can dismiss the blame even if you are actually 'guilty as charged'. If we are to justify either a criminal verdict or an act of blaming, we who convict or blame must be able to explain the grounds on which we reached our verdict: we must justify it to the person whom we convict or blame by appeal to the (as we must claim) adequate grounds that we had for believing them guilty.[35]

Second, what are 'adequate grounds'?[36] Why should it not suffice that the prosecution shows it to be more likely than not that the defendant is guilty? The answer is clearest in a case in which it is proved or admitted that *D* committed the offence charged, but they offer a defence—an exculpatory answer for their criminal conduct. Suppose that that defence suffices (even given prosecution attempts to disprove it) to give the jury reason to doubt *D*'s guilt:[37] but we, the jury, then look *D* in the eye, and say 'You have shown that there is reason to doubt your guilt; but we still convict you'. The 'but … still' seems necessary—we cannot just say '… and we convict you', since the doubt-creating evidence conflicts with whatever evidence we had of *D*'s guilt. But it does more than conflict—it undermines the conviction, just as if I say 'You've shown me that there is reasonable doubt about whether you committed the wrong of which I accused you, but I'm still blaming you for it'.[38] The same point applies if the reasonable doubt is not about a defence, but about the commission of the offence, and arises not from evidence led by the defence but from the weakness of the prosecution case: 'Despite the prosecution's evidence and arguments we have reasonable doubt about [i.e. we have reason to doubt] your guilt; but we still convict you'.

Why does the admission of reasonable doubt undermine a conviction? If the defendant offers a defence that we admit creates reasonable doubt, to convict insults the defendant by not taking that defence seriously. We called them to answer; they offer an exculpatory answer that creates

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[34] This was part of the argument of s. 2. The jury's decision is a 'constitutive' one (Martin Smith, 'What's Wrong with Partial Punishment?', unpublished): the verdict has value only if it flows from an appropriate procedure for establishing guilt.

[35] So juries should in principle give reasons for their verdicts: Stephen C Thaman, 'Should Criminal Juries Give Reasons for their Verdicts?' (2011) 86 *Chicago-Kent Law Review* 613; Mark Coen and Jonathan Doak, 'Embedding Explained Jury Verdicts in the English Criminal Trial' (2017) 37 *Legal Studies* 786.

[36] Smith (n 34): 'blaming the guilty … has value only in so far as one has taken appropriate steps to avoid blaming the innocent': but what steps are 'appropriate'; why should it not be enough that we have established that the person is probably guilty?

[37] Compare Terrorism Act 2000, s 118(2): 'it is a defence for a person charged with an offence to prove a particular matter … If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not'.

[38] We put the matter in terms of reasonable doubt for the reasons indicated above: see Roberts (n 11) and Walen (n 12); but we could also talk of making sure or of being sure with good reason.

reasonable doubt about their guilt; but we dismiss that answer, though it has not been disproved: this makes a mockery of the idea that the defendant is called to answer, since we do not listen to their answer with the requisite seriousness. If the reasonable doubt is rather left by the weakness of the prosecution's case, a similar point applies: to convict is to show that we are too willing to jump to the conclusion that the defendant is guilty—we do not take the presumption of their innocence, with which the trial should have begun, seriously enough. Like extra-legal blame, a conviction (which condemns the defendant's conduct and censures them as its agent) must express a categorical judgment of guilt: not 'You are probably guilty', but 'You are guilty'.[39]

A related point is that blame (whether formally expressed in a conviction or informally in our extra-legal discourse) does not admit of degrees determined by the strength of the evidence of guilt; nor does punishment. We might qualify our blame in the light of evidence that the wrong done was not as serious, or its agent not as culpable, as we initially thought—as we do with punishment: the less serious the wrong turns out to have been, the less culpable its agent, the less stringent is our blame, the milder the punishment that we may impose. But if we are reasonably doubtful of guilt, we do not for that reason moderate our blame, qualify the conviction, or mitigate the punishment: 'Guilty, although not that guilty', is appropriate; 'Guilty, although perhaps not guilty' is not.[40] We either blame or we do not, and thus (since conviction is a formal species of blame) we either convict or do not; we cannot sensibly qualify our blame in the light of uncertainty about the other's guilt. In blaming or convicting, we express a categorical judgment that the person we blame or convict is guilty; but we can properly express such a judgment, and assert it in face of that person's would-be exculpatory responses, only if we have assured ourselves of their guilt 'beyond reasonable doubt'; only if we are, with good reason, sure of their guilt.[41]

That completes our account of why criminal convictions should require proof of guilt beyond reasonable doubt, an account based on what is needed to justify saying to the defendant 'We find you guilty'. Of course convictions, like acquittals, have a wider audience: they are to be heard by the public, and the complainant (if there is one). For complainants, we can talk of vindication or assurance: by holding the wrongdoer to account, we recognise the wrong suffered by the victim, and assure the victim that we have taken it seriously. For the public, the conviction announces what the court has decided in our collective name: the wrongdoer has been called to account. It thus authorises us to treat the convicted defendant as guilty, though care is needed in determining how this authorises us to behave towards them: just as any punishment imposed on them must be appropriate to the crime of which they were convicted, and finite in that once it is completed they are restored to good civic standing, so our informal responses must be proportionate and finite.[42]

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[39] We cannot tackle here the next question: what kind of doubt should count as 'reasonable', or make us unsure?

[40] See Federico Picinali, 'Do Theories of Punishment Necessarily Deliver a Binary System of Verdicts? An Exploratory Essay' (2018) 12 *Criminal Law and Philosophy* 555, 558–559: 'as a conceptual matter, we cannot punish the defendant, e.g., "for having probably committed a crime," … . A categorical verdict of guilt seems, therefore, necessary for punishment' (and see 571 on censure); see also Smith (n 34).

[41] For a similar line of argument see Federico Picinali, Can the Reasonable Doubt Standard be Justified? A Reconstructed Dialogue' (2018) 31 *Canadian Journal of Law & Jurisprudence* 365, 388-96.

[42] What about jurisdictions in which convictions, although public, are anonymous; See, James B Jacobs and Elena Larrauri, 'Are criminal convictions a public matter? The USA and Spain' (2012) 14 *Punishment & Society* 3. We would say that this right to anonymity protects offenders from potentially excessive informal responses: like the right of silence (see Child and Duff (n 21), it constrains, rather than reflecting, the proper aims of the criminal trial.

(This leads to a further question that we cannot discuss here. In some systems complainants can bring tort cases against those who, they allege, wronged them, but who were acquitted by the criminal court; given the difference between the standards of proof in criminal and in civil cases, they might win their civil case. Does our argument for a stringent standard of proof in criminal cases imply that an equally stringent standard should be applied in such civil cases; or can we argue that the character and aims of tort cases are sufficiently different from those of criminal trials to justify such a difference in the appropriate standards of proof?)

However, to say that criminal conviction should require proof beyond reasonable doubt is not to say that conviction and acquittal should be the only two possible verdicts. We must now ask whether there should be room for an 'intermediate verdict' reflecting a judgment that there is substantial evidence of guilt, but that it is not strong enough to justify a conviction.

4. Intermediate Verdicts?

Why should we maintain a binary system that allows only two verdicts, rather than one that allows for an intermediate verdict: for instance, one that reflects the fact that the evidence creates serious doubt about the defendant's innocence, or even shows it to be likely that they committed the offence, and thus casts doubt on (though it does not defeat) the presumption of innocence.

We should distinguish two kinds of 'intermediate verdict', which differ in their meaning and their legal consequences. One amounts to a qualified conviction: it expresses a qualified censure of the defendant for their (probable) commission of the crime, and leads to a punishment whose severity is mitigated in virtue of the doubt that remains about their guilt. Thus Fisher proposes a 'probabilistic model', under which a plurality of conviction options exists along the evidentiary spectrum and punishment gravity is correlated with certainty of guilt. …. [C]onviction on guilt by a preponderance of the evidence would entail only the lowest of the possible sanction alternatives.[43]

Similarly, Laudan proposes a four-verdict model, allowing a verdict of 'probably guilty': this could not lead to imprisonment, 'but a milder form of punishment might well be' appropriate.[44] But s. 3 showed what is wrong with suggesting that convictions need not be categorical: the mistake this involves is shown in Fisher's remark that this 'fragmentation of the criminal conviction' transforms 'the question of criminal responsibility from a qualitative question of "yes or no" to the quantitative "how much"'.[45] 'How much', as a question about responsibility, is a question not about how strong the evidence of responsibility is, but about the degree of responsibility for which it is evidence: lesser evidence of responsibility is not evidence of lesser responsibility. The same confusion is shown in the 'continuous gradation' principle described by

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[43] Talia Fisher, 'Conviction without Conviction' (2012) 96 *Minnesota Law Review* 833, 836.
[44] Larry Laudan, 'Need Verdicts Come in Pairs?' (2010) 14 *International Journal of Evidence & Proof* 1, 17. Compare the '*poena extraordinaria*' described in Picinali (n 24) 19–25.
[45] Fisher (n 43) 868.

Foucault, that ‘slight evidence of a serious crime marked someone as slightly criminal’:[46] slight evidence of criminality is not evidence of slight criminality.[47]

Further, ‘We find you guilty’ expresses a judgment that the defendant is supposed to make their own, as a first-person confession or admission that ‘I am guilty’. However, ‘We find you probably guilty’ is not such a judgment. ‘I am probably guilty’ can make sense, as expressing some doubt about the relevant norms or their bearing on my conduct: but it is not a confession or admission, and cannot express the kind of doubt about the conclusiveness of the evidence of one’s guilt that ‘We find you probably guilty’ would.

However, Laudan’s further remarks on such ‘milder form of punishment’ suggest a different possibility, which the argument of s 3 does not rule out:

> [I]t could be specified that a defendant receiving a ‘probably guilty’ verdict would, if subsequently convicted of a serious crime within n years, be given a harsher sentence than that crime would ordinarily warrant. … It would also be conceivable that double jeopardy protection … should be waived for defendants receiving this verdict.[48]

The former provision resembles a suspended sentence: conviction of the later offence triggers the imposition of the sentence for the earlier (probable) offence; it is therefore open to the objections already discussed. But the latter provision is different, and is less puzzling if we do not call it a ‘punishment’:[49] for it does not censure the defendant, nor does it seem to be intended to burden them. Instead, it expresses our continuing suspicion that the defendant was guilty, and gives legal force to that continuing suspicion by waiving protection against double jeopardy.

In one way, this looks like a sensible kind of provision. Outside the law, we might think that someone is probably guilty of wrongdoing, without being sure enough to assert their guilt and to blame them, and that suspicion is likely to affect our future conduct: we might be less ready to trust them, more inclined to take precautions or to ‘keep an eye’ on them, and ready to revisit the question of whether they committed the wrong if new evidence emerges. There is, however, an obvious objection to allowing this kind of verdict in a criminal trial. It declares to the defendant that we still suspect them, and to the polity that they are still suspected; this invites others to treat them as suspicious, and has implications for the defendant and for our social relationships with them. An acquittal declares to the defendant and the polity that *D*’s guilt has not been proved, that therefore the presumption of innocence has not been defeated, and that *D* must therefore still enjoy all those ‘rights to which all members of the polity are prima facie entitled’;[50] by contrast, ‘probably guilty’ seems to declare that *D* is not entitled to enjoy *all* those rights. It authoritatively justifies, indeed mandates, a socially corrosive continuing mistrust of the defendant; whilst it is formally consistent with the presumption of innocence, it is inconsistent with the idea(l) of mutual social trust that underpins that presumption. We cannot discuss this conception of civic trust here, save to say that it requires citizens to presume of each other that they are responsible,

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[46] Michel Foucault, *Discipline and Punish* (2nd edn, trans Sheridan; Vintage Books 1995) 42, quoted by Fisher, (n 43) 834.
[47] See Martin Smith, ‘Blame, Punishment and Intermediate Options’ (2024) 28 *Edinburgh Law Review* 235, 239–241.
[48] Laudan (n 44) 17.
[49] Compare ‘conditional acquittal’, in Picinali (n 24), which permits a retrial if new, persuasive evidence of the conditionally acquitted defendant’s guilt is later found. See also his remarks on ‘afflictive measures’, Picinali (n 40) 559. We cannot discuss Picinali’s suggestion here: see Symposium on Federico Picinali, *Justice in Between: A Study of Intermediate Criminal Verdicts* (2024) 28 *Edinburgh Law Review* 220–258
[50] Picinali (n 24) 67.

reason-responsive fellow members of the polity, unless and until they show that they are not.[51] Such trust is crucial to the flourishing (indeed the survival) of civic community, but would be formally undermined by a system that provided for verdicts of 'probably guilty'.

However, we are already familiar with a range of preventive or precautionary legal measures that are supposedly justified by a court's finding of probable guilt. One example is 'binding over to keep the peace':[52] a court can bind someone over whether or not they have been convicted, so long as it is 'satisfied so that it is sure that a breach of the peace involving violence, or an imminent threat of violence, has occurred or that there is a real risk of violence in the future'.[53] Another example is that a Secretary of State who 'reasonably believes that [an] individual is or has been involved in terrorism-related activity' can ask a court to authorise the imposition of 'terrorism prevention and investigation measures', which involve 'requirements, restrictions and other provision' imposed on the individual.[54] A third example is the 'civil injunction' that a court can impose if it 'is satisfied, on the balance of probabilities, that [a person] has engaged or threatens to engage in anti-social behaviour', and 'considers it just and convenient to grant the injunction for the purpose of preventing the [person] from engaging in anti-social behaviour'.[55] There are many such examples of 'civil preventive orders',[56] involving the imposition of various kinds of restriction on people who are believed to have (probably) engaged in criminal conduct, in order to prevent further such conduct. Such measures are controversial, but we will not engage in that controversy here: the point here is that they suggest a conception of an 'intermediate verdict' that connects it to some familiar existing crime-related procedures.

A proposal that we should allow 'intermediate verdicts' to the effect that *D* is probably guilty could thus be read as a proposal, not to allow mitigated forms of the censure and punishment that conviction involves, but to allow courts to impose such preventive orders as the outcome of a criminal trial. If a defendant's guilt is not proved to the requisite standard for a conviction, but the court thinks it likely (perhaps on the balance of probabilities) that they committed the offence charged, it could make such a finding, and consider making a preventive order—imposing the kinds of requirement or restriction that existing civil preventive orders allow, as being necessary to prevent future similar offending by this defendant. Such a finding would not be a conviction censuring *D* as a wrongdoer; the measures imposed would not be punishments—they would not be intended to burden or to communicate censure (although it is sadly likely that they would in practice be perceived as punishments imposed on probably guilty defendants).[57]

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[51] See Dale Nance, 'Civility and the Burden of Proof' (1994) 17 *Harvard Journal of Law & Public Policy* 647; also Antony Duff, 'Who Must Presume Whom to be Innocent of What?' (2013) 42 *Netherlands Journal of Legal Philosophy* 170.

[52] Justices of the Peace Act 1968, s 1(7); Magistrates Courts Act 1980, s 115.

[53] Criminal Practice Directions 2015 (Division VII: Sentencing), J.2 'Binding Over to Keep the Peace' (as amended October 2018, April 2019 and October 2019) 16. See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/924048/crim-practice-directions-VII-sentencing-2015.pdf> accessed 13 April 2026.

[54] Terrorism Prevention and Investigation Measures Act 2011, ss 2–6.

[55] Anti-Social Behaviour, Crime and Policing Act 2014, s 1.

[56] See Andrew J Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2014) ch 4.

[57] One merit of this proposal is that it would give those on whom such orders are imposed the protection provided by the due process requirements of a criminal trial: compare Andrew J Ashworth and Lucia Zedner, 'Preventive Orders: A Problem of Under-criminalization?', in Antony Duff et al (eds), *The Boundaries of the Criminal Law* (Oxford University Press 2010) 59.

However, even if such preventive orders can be justified, they should not be incorporated into the criminal process via 'intermediate verdicts': for that would conflate, and thus confuse, two kinds of process whose normative structures are very different. A criminal trial is focused on the past: it calls a defendant to answer a charge of criminal wrongdoing; even if the sentencing of those who are convicted also looks to the future, to determine what kind of punishment might be most beneficial, the trial is focused on the past. It also addresses the defendant in the second person: *D* must answer to the charge, and answer for the offence if it is proved; the verdict addresses them as having provided or failed to provide a suitably exculpatory answer. The focus of preventive orders, by contrast, is on the risk that *D* will commit future crimes: but this makes a crucial difference to the terms in which the court can address them. It is one thing to be called to answer for my alleged past conduct: I can speak in the first person of what I know as an agent—I can admit or deny, justify or excuse, what I have done, in a first-person agential voice. The same would be true if the question about future risk concerned *D*'s intentions: I can be called to answer for my intentions as to my future conduct in the first person. But the kinds of preventive order that concern us here are not based solely on evidence of the person's intentions for the future: they are based on predictions in relation to which the person can speak only, as others speak, in the third person.

I can be called to answer for my alleged wrongful conduct as its agent, and can speak in a distinctive agential voice about what I have or have not done. I can similarly be called to answer for my intentions as to my future conduct. But the question at stake in relation to this kind of preventive order is whether I am dangerous, and that is something on which I can only speak in the third person: I can try to judge whether I am dangerous, in the way that others can try to judge that question; but I cannot admit or deny my dangerousness as an agent, or be called to answer for being dangerous.

Thus even if these kinds of preventive order, based in part on a judgment that the person is probably guilty of criminal conduct, can be justified, the process for imposing them must differ from that of the criminal trial: this is not a role that 'intermediate verdicts' should play within criminal trials.

Concluding Remark

As other chapters in this volume show, there are many different ways to try to justify a strict standard of proof for criminal trials, grounded in quite different conceptions of the proper aims of the criminal trial (and of the system of criminal law as a whole). We have offered a distinctive argument for something like a 'beyond reasonable doubt' standard, grounded in a conception of the criminal trial as a communicative enterprise that seeks to call alleged wrongdoers to account, which is itself grounded in a distinctive conception of the role of criminal law in a democratic polity. Central to that conception of the trial is that the defendant is to be an active participant, who must be addressed in the second person, as a responsible member of the polity who is called to answer to their fellow citizens: second-person conviction, 'We find you guilty', must be based on proof of the defendant's guilt that leaves no room for reasonable doubt. Such an account also rules out 'intermediate verdicts', of either of the two kinds that we distinguish, which amount to a formal finding that the defendant is probably guilty.