Wrongful Convictions, Wrongful Acquittals, and Blackstone’s Ratio

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The British jurist William Blackstone opined “it is better than ten guilty persons escape [punishment] than that one innocent suffer.”1 While this aphorism—subsequently dubbed Blackstone’s ratio—has become a platitude of our criminal justice system, Blackstone leaves it unexplicated. Rather, he presents the ratio casually, embedded as the fourth of five principles governing evidentiary rules, and with no discussion as to whether or why it is true. Surely these are questions that should be engaged. Furthermore, even granting the general idea that we should let the guilty escape rather than punish the innocent, why should we prefer a 10:1 ratio? Or maybe the ratio is not even meant to support any critical weight, but rather just portends a more generic rhetorical device? This essay explores such questions with an eye toward vindicating something like Blackstone’s ratio, albeit with more circumspect conclusions as to exactly what the ratio should be.

1. Legal Error and Asymmetries

As intimated in the ratio, criminal law can err in either of two ways: it can wrongly convict the innocent, or it can wrongly acquit the guilty.2 Blackstone’s idea is that we should treat these two sorts of error differently, preferring—or even strongly preferring—the acquittal of the guilty to the conviction of the innocent. While he does not tell us why wrongful

convictions are worse than wrongful acquittals, there is no doubt that our criminal justice system agrees. In seeing how our system codifies this asymmetrical attitude toward errors, we also see that Blackstone’s ratio is more than abstract theorizing; quite to the contrary, it is woven into the very structure of our penal practices. Larry Laudan’s recent work provides key insights in this regard.

First, note that we exclude unfairly prejudicial evidence at trials; this is evidence whose “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury…”³ Or, as Laudan puts it, this evidence “is of such a sensational or inflammatory nature that ordinary jurors would be unable to assign it its true [probative] weight.”⁴ So, for example, imagine that the prosecution wants to extremely graphic evidence of murder. The defense can contest this evidence on the grounds that it will be unfairly prejudicial to its client. The problem, though, is this: even granting that the jury might assign an inappropriately high probative weight to the evidence, the exclusion of the evidence could preclude conviction altogether, even if the defendant is guilty.⁵ By excluding such evidence, we confer an advantage on the defendant, whether the defendant is guilty or innocent. Innocent defendants who would have been exonerated anyway are still exonerated, but now some guilty defendants who would have been convicted are also exonerated. Surely some innocent defendants benefit from this rule—i.e., those who might have been convicted given prejudicial evidence—but that same benefit is equally conferred upon the guilty.

³ Federal Rules of Evidence, Rule 403.
⁵ More technically, the credence in the defendant’s guilt might be 0.95 with the evidence, even though it should only be 0.9. However, if the evidence is excluded, the credence in his guilt might be 0.4, which is not high enough to convict.
Second—and more significantly—the standard of proof in criminal contexts favors wrongful acquittal over wrongful conviction. This standard of proof is beyond all reasonable doubt, which is a much more exacting one than what we use in civil contexts, the preponderance of the evidence. By raising the standard of proof to more onerous levels, wrongful convictions are less likely, but wrongful acquittals are more likely. And the reasoning is simply that all convictions are harder to obtain as the standard of proof rises; this helps to exonerate the innocent while, at the same time, also helps to exonerate the guilty. In other words, the standard of proof is blind to the guilt or innocence of the defendant and instead places the bar in the same place for both. The more concerned we are with wrongful convictions, the higher the bar should be, though the effect will be to trade one type of error for another. If we had symmetric attitudes toward wrongful convictions and wrongful acquittals, we would adopt preponderance of the evidence in civil trials; however, we do not, so we effect beyond all reasonable doubt as a way to codify our sympathy with Blackstone.

In his book, Laudan mentions other ways in which our preference for wrongful acquittals outweighs our preference for wrongful convictions. For example, consider forced confessions, which can be excluded at trial. Is it more likely that the forced confession comes from someone who is guilty of a crime or someone who is innocent? There is no systematic data on this question, but there are certainly reasons to believe that it is the former. The guilty

7 In terms of probabilities (i.e., to which the trier of fact is certain of the defendant’s guilt), beyond all reasonable doubt is something like 0.9 or greater, whereas preponderance of the evidence is greater than 0.5. Laudan (2006), p. 56.
8 An interesting question is why Blackstone’s ratio pertains to criminal law rather than to civil law; does it matter that, at least usually, civil liability results in financial consequences whereas criminal liability results in incarceration?
person is more likely to be apprehended in the first place, more likely to be able to plausibly confess (i.e., to know details of the crime), and so on. But there is certainly a risk that an innocent person could be coerced into confessing. By discarding all forced confessions, this innocent person is spared, but so are the (ex hypothesi, more numerous) guilty people. So, again, our asymmetric attitudes toward different types of error are manifest.

The point of this section has been to introduce the two different types of legal error—wrongful acquittal and wrongful conviction—and to show some ways in which our institutions are asymmetrically configured with response to those errors. Burden of proof is probably the most pronounced, but there are myriad other instantiations of these asymmetrical attitudes. But this discussion only addresses one facet of Blackstone’s ratio, which is whether we have codified it, or at least something like it (i.e., with silence as to the actual magnitude of the ratio). To put it another way, the discussion has been descriptive, but nothing normative has yet been said. We still owe an important answer as to why the asymmetry is justified, as well as how much asymmetry we should have. These questions will be addressed in subsequent sections.

2. What’s Wrong with Punishing the Innocent?

If wrongful convictions are worse than wrongful acquittals, something should be said about why each is wrong, as well as how to render these wrongs commensurable. We can certainly start by saying that those guilty of crimes deserve to be punished, whereas those

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10 For more discussion, see Laudan (2006), pp. 171-193.
innocent of crimes deserve not to be punished.\textsuperscript{11} Wrongful acquittals therefore violate notions of desert, as do wrongful convictions. The problems with this approach are two-fold: first, it is just not very informative; and, second, it does nothing (yet, at least) to ground the asymmetry. Utilitarian approaches are of little help, either, since the principal concept to which they would appeal (viz., deterrence) cares little for the distinction between guilt and innocence.\textsuperscript{12} Rather, as standard criticisms of utilitarianism hold, the theory might just as well license the punishment of an innocent, so long as that punishment deters future crime. To be sure, there are various replies that the utilitarian might make, but those need not be our concern here.

More profitable than the notion of desert might be that of liability; in particular, we can draw a distinction between those who are liable to punishment and those who are not.\textsuperscript{13} Non-liability to punishment is the starting position insofar as, absent any criminal action, people are not liable to punishment. Non-liability does not have to be earned, but rather constitutes the default unless and until it is forfeited.\textsuperscript{14} In just war theory, for example, this idea figures centrally: there we say, not that combatants deserve to be attacked—surely that is going to far—but rather only that they are liable to attack.\textsuperscript{15} In the present context, we can see how liability sets apart the guilty and the innocent insofar as the guilty are liable to punishment, whereas the innocent are not.


\textsuperscript{14} Frances Kamm offers an analogy between war and boxing as pertains to the related concept of non-combatant immunity: people in the audience are not liable to being punched. See Frances Kamm, "Failures of Just War Theory: Terror, Harm, and Justice," \textit{Ethics} 114 (2004), p. 675.

The liability approach, unlike the desert approach, helps to explain the asymmetry between wrongful convictions and wrongful acquittals. Wrongful convictions are proscribed because the innocent person to whom they attach is simply not liable to punishment in the first place. By contrast, wrongful acquittals simply do not punish someone who is liable to punishment. Mere liability to punishment, however, does not make punishment compulsory; in fact, there are all sorts of reasons that we might not punish someone who is liable to punishment. For example, there could be considerations of fairness (e.g., inadequate counsel), of public policy (e.g., civic disobedience), of resources (e.g., prison space), and so on. In these cases, we do not necessarily do anything wrong by failing to punish, even though the guilty defendant is liable to punishment. Wrongful convictions are therefore worse than wrongful acquittals because the former punish someone who is not liable to punishment at all, whereas the latter do not punish someone who is liable to punishment, even if that punishment need not be disbursed.

This is a powerful line of argumentation that almost does too much: while it grounds the asymmetry, it now looks as if not punishing the guilty is not wrong at all. Or, to put it another way, the liability approach makes wrongful convictions worse than wrongful acquittals by taking a sledgehammer to the latter. Need we retreat? The response has to be that, just because the liability to punishment can be defeated, it does not follow that it has to be. Per above, let us grant that some people for whom punishment would, ceteris paribus, be appropriate should, nevertheless, not be punished. But what of those for whom no defeating conditions are available? Not only are they liable to punishment, but there is also no (good) reason not to punish them. A wrongful acquittal might not be bad if defeating considerations
exist, whereas a wrongful conviction will necessarily be bad. The modal asymmetry therefore grounds the normative one, namely that wrongful convictions are worse than wrongful acquittals.

While I am broadly sympathetic with Blackstone’s generic asymmetry, it is worth flagging an important item of concern, namely the incommensurability of different crimes. When he says “it is better than ten guilty persons escape [punishment] than that one innocent suffer,”\textsuperscript{16} he does not tell us what the guilty people are guilty of, nor what punishment the innocent person stands to suffer. This gives rise to a number of possibilities, at least some of which are worth categorizing. Let us start by supposing that there are two crimes under consideration, one of which is much worse than the other. Call the worse crime $W$ and the less-worse crime $L$. We can then postulate the following versions of Blackstone’s ratio:

1. It is better than ten guilty persons escape punishment for $W$ (or $L$) than that one innocent suffer punishment for $W$ (or $L$).

2. It is better than ten guilty persons escape punishment for $L$ than that one innocent suffer punishment for $W$.

3. It is better than ten guilty persons escape punishment for $W$ than that one innocent suffer punishment for $L$.

\textsuperscript{16} Blackstone (1893), p. 358.
Our previous analysis is most at home with (1), namely when the crime for which the ten guilty people would not be punished is the same crime for which the innocent person would be punished. So, for example, it might well be the case that we should let ten murderers go free than punish one innocent person for murder; that innocent person would be punished severely for such a crime, and that potentiality might be bad enough that we should instead forsake the punishment of the guilty.

But does the analysis change if the crimes are different? Critically, the answer is going to depend on whether we are talking about (2) or (3) and seeing why will help illuminate an important dimension. I submit that (2) follows from (1); if we are committed to (1), then we will also be committed to (2). The reason is that, under (1), we are willing to let ten criminals go free if they perpetrated an act of the same wrongness as our wrongfully-convicted innocent. A fortiori, we should then also accept those wrongful acquittals for criminals who have perpetrated less wrongful acts.

To make it more concrete, suppose that we would tolerate the wrongful acquittals of ten murderers in order to prevent one wrongful conviction for murder. Our cost is that ten murderers are not convicted, and this would be bad whether they should be punished, whether society might be subject to more crimes because they are not incarcerated, or whatever. But (2) asks us to consider whether, for example, we might tolerate the wrongful acquittals of ten thieves such that one innocent might not be convicted for murder. If we were willing to pass on the punishment of the murderers, then we should surely be willing to pass on the punishment of the thieves as well. The offset (i.e., the wrongful conviction) is the same in both cases, but the cost is lower, or at least not greater.
My intuition is that forsaking the punishment of a murderer is worse than forsaking the punishment of a thief, and an argument to this effect could be made under any range of penal theories. If this is right, then (2) follow from (1) because, as above, our willingness to let perpetrators of worse crimes go unpunished implies our willingness to let perpetrators of less worse crimes go unpunished. However, even if someone thought that all wrongdoers equally deserved punishment—i.e., that it is no worse to forsake the punishment of the murderer than the punishment of the thief—(2) would still follow from (1) insofar as they would both postulate the same costs. On either line of thinking, our commitment to (1) gets us to (2).

However, this sort of logic does not apply when we consider (3), and this suggests the first substantive emendation for Blackstone: he needs to somehow index the crimes to which guilt and innocence attach. When considering (2), I suggested that, if we are willing to let murderers go, then we should let thieves go as well. But (3) poses the converse and supposes that, if we are willing to let thieves go, then we should let murderers go as well. On this proposition, we must pause. If someone thought that all guilty people equally deserve punishment, maybe this sort of reasoning could go through. On any contrary view, it almost certainly does not. Surely murder is worse than theft. If we wrongfully acquit murderers and thieves both, there are various reasons we could give as to why the former acquittals are worse, too: because they attach to worse crimes, because it is worse to have murderers at large than thieves, and so on.

Regardless, we may well tolerate the wrongful acquittal of thieves and not the wrongful acquittal of murderers, or else only tolerate the latter to a lesser extent. This portends a problem for Blackstone’s ratio insofar as he does not distinguish which sorts of acquittal are at
stake, and the ratio might well come out false if we add this dimension. Or else it would come out differently, which is to say that maybe the numbers would be different. For example, maybe we are willing to acquit ten murderers or thieves such that one innocent not be wrongly convicted of murder (cf., (1) or (2)). However, maybe we are only willing to acquit some number of murderers such that one innocent not wrongly be convicted of theft (cf., (3)), where that number is less than ten. While more will be said about numbers in the next section, at least this structural feature is worth highlighting now.

In addition to querying whether the crimes matter, we can ask whether the punishments matter; Blackstone’s ratio is silent on this issue. Consider the following:

4. It is better that ten guilty persons escape a $1,000 fine than that one innocent suffer that fine.

5. It is better that ten guilty persons escape ten years’ imprisonment than that one innocent suffer that imprisonment.

6. It is better that ten guilty persons escape execution than that one innocent suffer execution.

Intuitively, wrongful execution is worse than wrongful imprisonment, which is worse than wrongful fine. And there are, I submit, two reasons for this. The first is severity, by which, it is worse to make the innocent suffer more. If an innocent person is going to be punished at all,
we should prefer that punishment to be minimal; any augmentation thereof makes the punishment a greater miscarriage of justice.

While this feature alone accounts for the ordering of (4)-(6), a second feature is worth noting, namely that of reversibility; reversible punishments are, ceteris paribus, preferable to irreversible punishments. A fine, for example, is reversible insofar as the state can reimburse the person who was wrongly forced to pay it. Wrongful imprisonment is even less reversible than wrongful fine since, whereas the fine can be returned, the years of imprisonment cannot be. In either of these cases, financial compensation could be required to make the wrongfully convicted whole, but this is hardly guaranteed, particularly if the prosecution was not blameworthy for the erroneous conviction (e.g., through negligence, recklessness, etc.). Wrongful execution, though, is the least reversible at all: financial compensation could be due to the deceased’s estate, but that hardly helps him.\textsuperscript{17}

The wrinkle, though, is that even compensation—which, again, might be unavailable—will not make the innocent person whole, particularly if he suffered collateral consequences of criminal conviction. These are wide ranging, and potentially include loss of government benefits, residency restrictions, social stigma, disadvantages in private employment and housing markets, and so on.\textsuperscript{18} At least some of these can be rectified with an admission of

\textsuperscript{17} For more on wrongful executions in particular, see Hugo Adam Bedeau, “Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions”, in Hugo Adam Bedau (ed.), The Death Penalty in America: Current Controversies (New York: Oxford University Press, 1997), pp. 344-360. Bedeau catalogues almost fifty cases of people sentenced to death who were subsequently acquitted. One of them, Joseph Green Brown, was within hours of death before the 11th Circuit intervened.

error, though some might not be; regardless, the suffering between the wrongful conviction and the rectification still looms as a moral hazard. For this reason, reversibility is best conceived as a spectrum, ranging from errors that are more reversible to those that are less reversible. Even if wrongful fines might not be fully reversible, they are still more reversible than wrongful imprisonment, which, in turn, is more reversible than wrongful execution.

As already mentioned, Blackstone’s ratio is presented without any reference to the nature of the punishment that attaches to wrongful conviction. But, considering severity and reversibility, there are reasons to think that an emendation is due. Maybe it should look something like the following, where $x > y$:

4*. It is better that $n$ guilty persons escape a $1,000 fine than that one innocent suffer that fine.

5*. It is better that $n + x$ guilty persons escape ten years’ imprisonment than that one innocent suffer that imprisonment.

6*. It is better that $n + y$ guilty persons escape execution than that one innocent suffer execution.

If the tolerance for wrongful convictions varied based on the punishment, it would more accurately track our—or at least my—moral intuitions. This sort of schema acknowledges that wrongful execution is worse than wrongful imprisonment, and that both are worse than
wrongful fine. As the wrongfulness of the erroneous conviction increases, we should tolerate more wrongful acquittals as recompense.

While I think this is roughly right, an added wrinkle has to do with the commensurability of fines and imprisonments. The above analysis presupposes that wrongful imprisonments are always worse than wrongful fines, which could be false. For example, someone might be wrongfully imprisoned for two days as against someone else being wrongfully fined an amount that bankrupts him; this person might well (rationally) prefer the light prison sentence to the hefty economic one. This hypothetical shows that high reversibility need not always come out ahead, but low severity need not always come out ahead, either; the discussion of collateral consequences makes this point. Ultimately, there are probably three things that we need to take into account—severity, reversibility, and collateral consequences—and these feature into some tripartite analysis as to how bad a punishment is. So, most generically, we have the following propositions:

7. It is better that $n$ guilty persons escape a lesser punishment than that one innocent suffer that punishment.

8. It is better that $n + x$ guilty persons escape a greater punishment than that one innocent suffer that punishment.

Crimes and punishments are therefore two axes along which Blackstone’s ratio might not be invariant. To be sure, these two axes are complementary insofar as worse crimes
generally entail worse punishments. Still, there is no necessary connection between them since the vagaries of criminal codes will disassociate them at times. The point is simply that important conceptual issues get masked through his formulation. For now, though, let us set this issue to the side and assume equivalence between the crimes and punishments of the guilty and of the innocent. A critical question is still how we weigh—and how we should weigh—wrongful convictions against wrongful acquittals; it is that question to which we now turn.

3. How Many Wrongful Acquittals per Wrongful Conviction?

Blackstone proposes that we should tolerate ten wrongful acquittals per wrongful conviction. But why ten? Following convention, let $n$ represent the number of wrongful acquittals tolerated per wrongful conviction; $n$ varies widely across commentators and jurisdiction. Blackstone, writing in the 18th century, was hardly the first to embark upon this inquiry. In the Bible, God admits to Abraham that He will spare Sodom if only ten righteous are found among the wicked. Voltaire is the most punitive: “‘tis much more Prudence to acquit

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19 For example, Husak (2009) argues that our society overcriminalizes. If this is true, then lesser crimes might carry unduly severe punishments, thus separating our two axes.
21 Laudan thinks that we should care more about the ratio between proper acquittals to wrongful convictions ($m$) than between wrongful acquittals to wrongful convictions ($n$), though he allows that increases in $m$ produce increases in $n$. Laudan (2006), pp. 74-76. For my purposes, I shall follow standard convention.
22 And Abraham drew near, and said, Wily thou also destroy the righteous with the wicked? Peradventure there by fifty righteous within the city: wilt thou also destroy and not spare the place for the fifty righteous that are therein? That be far from thee to do after this manner, to slay the righteous with the wicked: and that the righteous should be as the wicked, that be far from thee: Shall not the Judge of all the earth do right? And the Lord said, If I find in Sodom fifty righteous within the city, then I will space all the place for their sakes. And Abraham answered and said, Behold now, I have taken upon me to speak unto the Lord, which am bust dust and ashes. Peradventure there shall lack five of the fifty righteous: wilt thou destroy all the city for lack of five? And he said, if I find there forty and five, I will not destroy it. And he spake unto him yet again, and said, Peradventure
two Persons, tho’ actually guilty, than to pass Sentence of Condemnation on one that is virtuous and innocent." Benjamin Franklin was willing to free a hundred guilty lest one innocent suffer. Moses Maimonides was perhaps the most extreme, holding it better “to acquit a thousand guilty persons than to put a single innocent man to death.”

Some state courts in the U.S. have been less specific, instead using qualitative language. For example, a Georgia court held that it was “better that some guilty ones should escape than that many innocent persons should [suffer].” Ohio has held that \( n \) is “a few”, while Arkansas and New York “several.” Twenty-one states have been more precise, settling on some particular value for \( n \). Of these many have been quite conservative, setting \( n = 1 \).

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23 Without knowing the total population of Sodom, this passage does not tell us the \( n \) value, though it can be represented as \( (P-10)/P \), where \( P \) is the population. Volokh (1997), p. 177.


31 These include Florida, Indiana, Louisiana, Missouri, Montana, Oregon, Pennsylvania (in a dissent), Washington (for double jeopardy only), and West Virginia. Volokh (1997), pp. 212-16.
Michigan, North Carolina, and Utah, have agreed with Blackstone, setting \( n = 10 \).\(^{32}\) The best states for criminals are New Mexico \(( n = 99)\)\(^{33}\) and Oklahoma \(( n = 100)\).\(^{34}\)

If anything, federal courts have been even more vague. Ninth Circuit Judge Alex Kozinski allows that we follow Blackstone’s \( n = 10 \), but not for any particularly good reason.\(^{35}\) In Coffin v. United States, the Supreme Court favorably mentioned Blackstone and other commentators, but did not commit to a value for \( n \).\(^{36}\) Concurring in In re Winship, Justice Harlan said “it is far worse to convict an innocent man than to let a guilty man go free.”\(^{37}\) However, he does not tell us how much worse or what the preferred ratios should be. Concurring in Furman v. Georgia, Blackstone’s \( n = 10 \) was endorsed by Justice Marshall.\(^{38}\) Writing for the majority in Ballew v. Georgia, Justice Blackman approvingly cited Marshall’s language from Furman.\(^{39}\) Other cases have been non-committal.\(^{40}\)

On the one hand, a lack of consensus should hardly be surprising: what basis could we possibly have for setting \( n \) to be some specific number? If Voltaire picks \( n = 2 \), Franklin picks \( n = 100 \), and Maimonides picks \( n = 1000 \), how could we adjudicate the debate? Certainly none is making an empirical claim about the world; these claims are better understood as a priori moral platitudes. And whatever evidence we could mount that wrongful convictions are worse than wrongful acquittals, we just are not going to be able to setting on some integral value for the

\(^{32}\) Id.
\(^{36}\) Coffin v. United States, 156 U.S. 432, 454-56 (1895).
amount therein. Rather—and in a rare case where U.S. courts have done better than philosophers—the answer has to qualitative. Punishing the innocent is, *ceteris paribus*, worse than letting the guilty go free. As to whether it is slightly worse, moderately worse, or much worse, it is just not clear what can be said.

On the other hand, something has to be said, doesn’t it? Granting that wrongful convictions are worse than wrongful acquittals, we presumably want to institutionalize that fact. And, as we saw in § 1, various institutional remedies are on offer. Focusing just on the standard of proof, the worse wrongful convictions are, the higher we can set the standard. For example, maybe Voltaire would advocate preponderance of the evidence, whereas Maimonides would advocate beyond all reasonable doubt. As *n* gets higher, the standard of proof should get more exacting.\(^{41}\) For this reason, *n* cannot be ineffable, lest its pragmatic significance lay unrealized.

This tension—between how precise we can be versus how precise we need to be—penetrates the core of Blackstone’s ratio. It is easy enough to say something specific (e.g., *n* = 10), but at a cost of being completely arbitrary. Conversely, we can say something less specific (e.g., *n* = many), but at a cost of practical impotence. Navigating the Scylla and Charybdis of this dilemma is therefore critical. My position is that our theoretical apparatus decidedly underdetermines any quantitative for *n*; there is simply no way to reason toward a particular value. In the next section, we will see the sorts of considerations that would push in either direction, but those considerations will only delimit a ballpark rather than some particular number. My own intuition is that Blackstone was close, and that *n* should be something on the

\(^{41}\) For the underlying mathematics, see Laudan (2006), pp. 72-74.
order of ten. Or else $n$ should be something like “several”, which I take to be consistent with on
the order of ten. However, this still leaves open a wide range of possibilities. A hundred is
probably too high, and a thousand almost certainly is. I am more agnostic, though, about
whether two is too low. At this stage, such an intuition can hardly be more than
impressionistic; let us now turn to the considerations that would help to substantiate it.

4. Should $n$ be High or Low?

Imagine that Voltaire ($n = 2$) and Maimonides ($n = 1,000$) were in a debate, or else that
the Supreme Court was trying to adjudicate the penal policies of Montana ($n = 1$)\textsuperscript{42} and
Oklahoma ($n = 100$)\textsuperscript{43}. What are the factors that militate in favor of $n$ being high or low? Or,
better yet, what are the factors that militate in favor of $n$ being comparatively high or low? We
can maintain skepticism about whether $n$ can be precisely formulated without giving up all
hope as to whether anything can substantively be said about it. Rather, reasons can be
marshaled in favor of why $n$ should move in one direction or the other, and, even if this is done
qualitatively, we can gain a deeper understanding of the underlying moral commitments. In
this section, I propose to articulate what these reasons are and how they help configure $n$.

Dialectically, the starting point should be that $n$ is high, or even very high. At stake is
how many innocent people we convict, and we could quite reasonably think that no innocent
people should be convicted. Or else that such convictions should be exceedingly rare. As we
saw in § 2, innocent people are not liable to punishment, so their conviction betrays this basic
principle. Aside from the intrinsic wrongs of punishing the innocent, there are also extrinsic

\textsuperscript{43} Pruitt, 270 P. 2d at 362.
ones: economic costs of superfluous punishment, erosion of sense of security across society, collateral consequences on the convicted, and so on.\textsuperscript{44} Wrongful conviction is often thought to be the worst travesty of justice, with wrongful execution occupying the outright pinnacle. Absent any countervailing considerations, it therefore seems appropriate that \( n \) be (very) high and so Maimonides takes an early lead on Voltaire.

But now let us explore whether countervailing considerations exist; what features would drive \( n \) down? Consider Judge May, writing in 1896:

\begin{quote}
As there is the possibility of a mistake, and as it is even probably, nay, morally certain that sooner or later the mistake will be made, and an innocent person made to suffer, and as that mistake may happen at the very next trial, therefore no more trials should be had and courts of justice must be condemned.\textsuperscript{45}
\end{quote}

In other words, even with the standard of proof being beyond all reasonable doubt, courts will make \textit{at least some} mistakes. Even if the standard were pushed higher (e.g., 0.98, 0.99), there would be some—albeit fewer—mistakes. The only way to ensure that there would be no mistakes at all would be if the standard of proof were held at 1.0, but then there would very rarely ever be \textit{convictions}; the standard would be so high that a conviction would be all but impossible without a confession, video evidence, and so on.

So, while a high \( n \) precludes us from punishing the innocent, it also precludes us from punishing the guilty. For example, there are surely some innocent people in prison right now, though we know not who. Under Judge May’s argument, we should just free \textit{everyone}. But if the prospect—or, indeed, “moral certain[ty]”\textsuperscript{46}—of condemning one innocent person means

\textsuperscript{44} For more discussion, see Richard L. Lippke, “Punishing the Guilty, Not Punishing the Innocent”, \textit{Journal of Moral Philosophy} 7 (2010), p. 465-467.
\textsuperscript{46} Id.
that we cannot prosecute anyone, then something has to have gone wrong. Consider Bentham, who mocks this position:

> We must be on our guard against those sentimental exaggerations which tend to give crime impunity, under the pretext of insuring the safety of innocence. Public applause has been, so to speak, set up to action. At first it was said to be better to save several guilty men, than to condemn a single innocent man; other, to make the maxim more striking, fix the number ten; a third made this ten a hundred, and a fourth made it a thousand. All these candidates for the prize of humanity have been outstripped by I know not how many writers, who hold, that, in no case, ought an accused person to be condemned, unless evidence amount to a mathematical or absolute certainty. According to this maxim, nobody ought to be punished, lest an innocent man be punished.47

In other words, Judge May’s line of thinking proves too much, or else portends a *reductio*. Surely we have to be able to do something about crime; indeed, we have to be able to have the very sort of trials that Judge May decries. Protections for innocents are certainly due, but wrongful convictions are an inevitable part of any criminal justice system. The question is not whether such wrongful convictions are tolerable, but rather how tolerable they are.

> To put all of this another way, n just cannot be that high, lest criminal justice becomes impossible. So rather than innocence being lexically prior to all other values, it must factor into a broader calculus. Under this calculus, wrongful convictions can be tolerated, though they do not (directly) comprise any positive moral value. Worth emphasizing, though, is that innocence matters and that wrongful conviction is bad. The point is simply that innocence cannot be a trump against everything else, or criminal justice would be crippled.

> A second point worth emphasizing is that this analysis goes to innocence at the institutional level, not the individual level. To make this distinction, consider two propositions: on the first, we know that someone, somewhere in our criminal justice system, is guilty, but we

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know not who; and, on the second, we know that some particular person is innocent. Of course we should free the individual that we know to be innocent. The issue at stake here, though, is different, and pertains to innocence at the institutional level; this innocence is harder to remediate since its locus is unknown. When I say that innocence factors into a broader calculus, that attaches institutional innocence, not individual innocence. And, of course, institutional innocence is the problem that systematically confounds our criminal justice system, not (or at least not very often) individual innocence.

A third point worth emphasizing is that we should clearly try to mitigate institutional innocence. The word ‘mitigate’ is chosen carefully here, insofar as ‘minimize’ clearly cannot be right; institutional innocence can easily enough be minimized—i.e., assured to be zero—by not having any criminal justice system at all. Or institutional innocence could even be lessened by raising the burden of proof (e.g., from 0.9 or 0.95 to 0.98 or higher, just less than 1.0), though at the cost of n being too high. Rather, the idea is that, within some fairly robust criminal justice system, we want to effect institutional norms that institutional innocence is mitigated. For example, improved forensics would reduce wrongful convictions within our criminal justice system without compromising its overall integrity.48 Having registered these disclaimers, two arguments will be developed as to the tolerance of institutional innocence, innocence as transaction cost, and innocence as collateral damage.

There is nothing intrinsically good about institutional innocence; quite to the contrary, it constitutes a moral harm. One way to justify—or at least rationalize—it is to look at it as a

48 What I have in mind here are any forensics that could be exculpatory, whether at trial or after. With regards to the latter, see, for example, Edward Connors et al., Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial (Alexandria, VA: US Department of Justice, 2006).
transaction cost in the pursuit of our broader commitments vis-à-vis punishing the guilty. Our criminal justice system has all sorts of costs that we wish were lower, yet we tolerate them regardless. For example, the annual cost of imprisonment is over $25,000. And even getting someone into prison has all sorts of other economic costs: those of law enforcement, prosecutors, defenders, judges, and so on. In addition to economic costs of conviction, there are the social costs that are borne by the crime that eventuates in conviction, most notably those suffered by the victim of the crime. Beyond victims, crimes harm communities, whether by making their members feel unsafe, or even adversely subjugating their behavior to the potentiality of crime (e.g., not going out at night).

So convictions have costs, as do crimes. And, as a society, we are willing to tolerate the costs of convictions to as to offset the costs of crimes. Not only does conviction lower the chance that the wrongdoer will perpetuate more crimes—at least while he is incarcerated—but conviction of the guilty also restores victims and communities, to say nothing of deterring other would-be criminals. In fact, conviction of the innocent might well do the same, at least insofar as the wrongfully convicted’s innocence is unknown. The point here is not that we should punish the innocent, but rather that their punishment is inescapable under a penal system that zealously punishes the guilty. And just as we are willing to pay the economic costs for the conviction of the guilty (and, sometimes, the innocent), we are willing to pay the moral cost of wrongful conviction.

That said, this is a descriptive claim—i.e., we are willing to pay these costs insofar as, in fact, we do—but does it have a normative corollary? Pace the Judge May quote, it has to: if it did not, we should release all those in jail and not prosecute those future accused. This just cannot be right, at least in its absolutism. Rather, whatever the moral values that militate in favor of convicting the guilty, those values have to be able to withstand at least some commensurability with wrongful convictions. However, it does not follow that wrongful convictions are no worse than wrongful acquittals \((n = 1)\); wrongful convictions can be worse than wrongful acquittals \((e.g., n = 10)\) without reaching Judge May’s conclusion \((n = \infty)\).

Most fundamentally, we are justified in spending various resources against crime. And the outlay of these resources can be justified either prospectively or retrospectively; prospectively in terms of reducing future crime or retrospectively in terms of the criminal’s desert, the victim’s and community’s entitlement, and so on. What we spend is not just economic, though, but also social and moral. Some of these costs are low—\(e.g.,\) loud sirens and jury duty—but some are quite high; the conviction of innocents comprises a high moral cost. The point is simply that it is one cost among many and that its integration into our broader moral calculus does not foreclose a substantive commitment to criminal justice. Rather, the upshot is simply that it has implications for how that criminal justice system is configured \((i.e., n \text{ cannot be too low})\).

The second way to justify wrongful convictions owes to a notion well-explored in just war theory, that of collateral damage.\(^{50}\) Killing non-combatants is bad, but an absolute prohibition against this eventuality would be too restrictive vis-à-vis legitimate military

\(^{50}\) See, for example, Allhoff (2012), pp. 7-9.

One may never intentionally bring about an evil, either as an end in itself, or as a means to some greater good. Nonetheless, one may use neutral or good means to achieve a greater good which one foresees will have evil consequences provided that (i) the evil consequences are not disproportionate to the intended good, (ii) the action is necessary in the sense that there is no less costly way of achieving the good.\footnote{Frances M. Kamm, “The Doctrine of Triple Effect and Why a Rational Agent Need Not Intend the Means to His End,” \textit{The Aristotelian Society Supplementary Volume} 74.1 (2000), p. 23.}

Fundamentally, it matters whether the evil (e.g., the killing of non-combatants) is intended, or unintended but foreseen; given proportionality and necessity, the latter can be permissible, while the former cannot.\footnote{A common example to illustrate this is the bombing of a munitions factory that lies adjacent to the playground. Destroying the factory will shorten the war and save myriad innocent lives; furthermore, given military exigency, it is the only way to do so. Unfortunately, though, some children on the playground will unfortunately be killed. If the stakes are high enough, most commentators think that this sort of bombing could be justified. However, we are supposed to feel differently about a complementary case, one in which we bomb the playground directly, in the hopes of eviscerating the morale of the evil adversary and bringing it to quick surrender. The standard analysis is that the strategic bombing can be justified, but not the terror bombing. I actually think that the terror bombing could, at least in principle, be justified, though this is a decidedly minority view. See Allhoff (2012), pp. 22-28. For the alternative, see C.A.J. Coady, “Terrorism, Morality, and Supreme Emergency”, \textit{Ethics} 114 (2004): 772-789.}

This principle readily translates to institutional innocence as well. Certainly we may not wrongfully convict someone that we know to be innocent, but that is not the dilemma that institutional—as opposed to individual—innocence portends. Rather, at issue is whether we
might convict some, not knowing whether they are guilty or not. Applying Kamm, our criminal procedure may still be employed, despite its propensity to wrongfully convict, so long as requirements of proportionality and necessity are met. Proportionality is satisfied when \( n \) is comparatively high, or in other words, when each conviction of the innocent of offset by many convictions of the guilty. And necessity is satisfied by recognizing that, aside from these wrongful convictions, there is no way to convict (a reasonable number of) the guilty; any standard of proof less than 1.0 will adversely bear against some innocents. Analogizing to the killing of non-combatants, wrongful convictions are certainly bad, but they can be tolerated given broader institutional and social goals.

5. Conclusion

So where does this leave us? One key insight on Blackstone’s ratio is that criminal justice trades on irreconcilable goals. First, the guilty should be convicted. Second, the innocent should be let go. The problem is that our institutional configuration is largely blind as to the difference between guilt and innocence. On the one hand, protections afforded to the innocent are similarly bestowed upon the guilty. And, on the other, any capacity we have to successfully prosecute the guilty presages wrongful convictions.

The second key insight of Blackstone’s ratio is in recognizing that the two sources of error in our criminal justice system need not be treated equally. Rather, that system can be configured such as to prioritize wrongful convictions over wrongful acquittals, and, in fact, it has. As we have seen, wrongful convictions are morally worse than wrongful acquittals. However, wrongful convictions need not be wholly foreclosed; the arguments from transaction
costs and collateral damage delimited a calculus under which institutional innocence can be justified.

All told, Blackstone had it right insofar as we should prefer wrongful acquittals to wrongful convictions, and pronouncedly so. But I am skeptical as to whether any precision can be conferred upon the comparative magnitudes of these wrongs. As \( n \) gets too low, the force of the asymmetry gets obfuscated. As \( n \) gets too high, the arguments in favor of transactions costs and collateral damage lose their force. At root in this paper is a fundamental question about criminal law: how many wrongful acquittals should we bear per wrongful conviction? While its terms (cf., “how many”) beg for a particular number, we can do no better than order of magnitude. And, in this regard, Blackstone’s \( n = 10 \) sounds about right, though my personal sympathies are with the jurisdiction that answer the question qualitatively; Arkansas’s and New York come the closest with “several”.\(^{54}\)

\(^{54}\) Jones, 320 S.W.2d at 649; Oyola 160 N.E.2d at 498..
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