Wrongful Convictions, Wrongful Acquittals, and Blackstone's Ratio

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The British jurist William Blackstone opined that "it is better that ten guilty persons escape [punishment] than that one innocent suffer."[2] 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.

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[2] William Blackstone, *Commentaries on the Laws of England* (Philadelphia: J.B. Lippincott Co., 1893): 358. In other editions, see Book 4, Chapter 27.

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.[3] Blackstone's idea is that we should treat these two sorts of error differently, preferring—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 error, 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 conviction practices. Larry Laudan's work provides key insights in this regard.

First, note that we exclude unfairly prejudicial evidence at trials—evidence whose "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury…"[4] 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."[5] So, for example, imagine that the prosecution wants to present 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

[3] Larry Laudan, *Truth, Error, and Criminal Law: An Essay In Legal Epistemology* (Cambridge: Cambridge University Press, 2006): 10.

[4] Federal Rules of Evidence, Rule 403.

[5] Laudan (2006): 20.

guilty.[6] 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 may also be 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.

Second, and more importantly, the standard of proof in criminal contexts favors wrongful acquittal over wrongful conviction. This standard of proof is beyond all reasonable doubt,[7] which is a much more exacting one that what we use in civil contexts, the preponderance of the evidence.[8] By raising the standard of proof to some higher level, 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

[6] More specifically, 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.

[7] See, e.g., *In re Winship* 397 U.S. 358 (1970). See also Laudan (2006), esp. ch. 2. See also Chris Heffer, "The Language of Conviction and the Convictions of Certainty: Is 'Sure' an Impossible Standard of Proof?", *International Commentary on Evidence* 5.1 (2007). Regarding the challenges jury members face in determining whether the burden of proof has been met, see: Richard L. Lippke, "The Case for Reasoned Criminal Trial Verdicts," *Canadian Journal of Law and Jurisprudence* 22. 2 (2009): 313-30. See also Michael Pardo and Ronald Allen, "Juridical Proof and the Best Explanation," *Law and Philosophy* 27.3 (2008): 223-68.

[8] 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): 56. As an anonymous reviewer helpfully points out, this may be an idiosyncratically American conception that does not generalize.

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 criminal trials. We do not, however, so we adopt 'beyond all reasonable doubt' as a way to codify our sympathy with Blackstone.[9]

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.[10] 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 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.[11] But this discussion only addresses one facet of Blackstone's ratio,

[9] 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?

[10] Laudan (2006): 125.

[11] For more discussion, see Laudan (2006): 171-93.

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.[12] 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 innocent of crimes deserve not to be punished.[13] 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 to ground the asymmetry, at least not yet. Utilitarian approaches are also of little help, since the principal concept to which they would appeal (viz., deterrence) cares little for the distinction between guilt and innocence.[14] Rather, as standard criticisms of utilitarianism hold, the theory might just as

[12] A related issue—that largely lies outside the scope of this paper—is the extent to which we could actually adjust trial and appellate practices to match our theoretical assessments regarding these asymmetries. In other words, if we thought beyond all reasonable doubt required .85, .90, or .95 certainty by the juror, how do we realize that goal in the courtroom? All sorts of procedural mechanisms could pull these levers one way or the other (e.g., the admissibility of evidence, the presentation of testimony, rules of cross-examination, and so on); of course there are constitutional, statutory, or case law obstacles against pursuing some of these mechanisms in practice but, at least in principle, the interventions are fairly straightforward.

[13] See, for example, Igor Primoratz, *Justifying Legal Punishment* (Atlantic Highlands, NJ: Humanities Press, 1989); see also Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2009): esp. 58-77.

[14] See, for example, Jeremy Bentham, *The Principles of Morals and Legislation* (New York: Hafner Publishing, 1948). See also Frederick Rosen, "Utilitarianism and the Punishment of the Innocent: The Origins of a False Doctrine," *Utilitas* 9.1 (1997): 23-37. See also Jeffrey Brand-Ballard, "Innocents Lost: Proportional Sentencing and the Paradox of Collateral Damage," *Legal Theory* 15.2 (2009): 67-105. Finally, Bruce Jacobs provides a

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.[15]

More profitable than the notion of desert might be that of liability;[16] in particular, we can draw a distinction between those who are liable to punishment and those who are not.[17] Non-liability does not have to be earned, but rather constitutes the default unless and until it is forfeited.[18] In just war theory, for example, this idea figures centrally: there we say, not that combatants deserve to be attacked—surely that is going too far—but rather only that they are liable to attack.[19] In the present context, we can see how liability sets apart the

helpful distinction between deterrence and deterrability that helps clarify the utilitarian view of punishment. See his "Deterrence and Deterrability," *Criminology* 48.2 (2010): 417-41.

[15] For a classic treatment, see J.J.C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973). See also J.J.C. Smart, "Utilitarianism and Punishment," *Israel Law Review* 25.3-4 (1991): 360-75. For a historical perspective, see Steven Sverdlik, "The Origins of the Objection," *History of Philosophy Quarterly* 29.1 (2012): 79-101. Sverdlik argues that the objection originated with W.D. Ross in the 1920s, even though it is often attributed to Smart.

[16] To be sure, though, 'desert' and 'liability' often travel together. Certainly, liability is a necessary condition for desert: someone cannot deserve to be punished if they are not liable to punishment. (Here I understand 'liability' in the moral sense, not the legal sense. So a foreign diplomat who has immunity from punishment may still be liable to punishment, and may deserve to be punished—even if he cannot be.) However, desert is probably not a necessary condition for liability. For example, suppose that someone violated the law, but had good reason to do so (e.g., a lost hiker breaking into a cabin for protection and sustenance—or that it is an unjust law in the first place. There we might think this person is nonetheless *liable* to punishment (i.e., because breaking a law is at least *prima facie* wrong), but does not *deserve* to be punished. So maybe liability indicates something provisional, whereas desert is more all-things-considered. For the present purposes, though, these details are not critical; I will use liability instead of desert primarily to connect to the literature in just war theory. For more discussion, see: Thomas Hurka, "Liability and Just Cause," *Ethics and International Affairs* 21.2 (2007): 199-218; David Luban, "War as Punishment," *Philosophy & Public Affairs* 39.4 (2011): 299-330; and Saba Bazargan, "Complicitous Liability in War," *Philosophical Studies* 165.1 (2013): 177-95.

[17] Warren Quinn, "The Right to Threaten and the Right to Punish," *Philosophy & Public Affairs* 14.4 (1985): 327-73.

[18] 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," *Ethics* 114 (2004): 675.

[19] Fritz Allhoff, *Terrorism, Ticking Time-Bombs, and Torture* (Chicago: University of Chicago Press, 2012): 20. For more discussion, see Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114.4 (2004): 693-733; Lionel McPherson, "Innocence and Responsibility in War," *Canadian Journal of Philosophy* 34.4 (2004): 485-506; David Rodin, "The Liability of Ordinary Soldiers for Crimes of Aggression," *Washington University Global Studies Law Review* 6.3 (2007): 591-607; Uwe Steinhoff, "Rights, Liability, and the Moral Equality of

guilty and the innocent insofar as the guilty are liable to punishment, whereas the innocent are not.

This liability 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;[20] 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., civil 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 meted out.

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

Combatants," *Journal of Ethics* 16.4 (2012): 1-28; and Seth Lazar *Sparing Civilians* (Oxford: Oxford University Press, 2016).

[20] Perhaps this is another way in which the liability approach could separate from the desert approach: maybe those deserving to be punished always should be, whereas this would not be true for those merely liable to punishment. For more discussion, see Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988), esp. ch. 5; David Boonin, *The Problem of Punishment* (Cambridge, Cambridge University Press, 2008), esp. chs. 2-3; and Saba Bazargan "Killing Minimally Responsible Threats," *Ethics* 125.1 (2014): 114-36.

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,"[21] 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 that ten guilty persons escape punishment for *W* (or *L*) than that one innocent suffer punishment for *W* (or *L*).

[21] Blackstone (1893): 358.

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

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

The 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 is potentially 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. The cost is that ten murderers are not convicted, and this would be bad whether they should have been punished (cf., deontology) or whether society will be subject to more crimes because the

guilty are not incarcerated (cf., consequentialism).[22] 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) follows 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

[22] This point is meant to be open-ended with regards either to re-offense *of those murderers* or else opportunistic commission of crimes by *other criminals* (e.g., the non-punishment of the murderers emboldens another group). Note that 're-offense' is more accurate than 'recidivate' in this context since recidivism presupposes conviction.

proposition, we should 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 asking 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.[23]

[23] 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): 344-60. Bedeau catalogues almost fifty cases of people

Even worse, though, is that 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.[24] At least some of these can be rectified with an admission of 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.

sentenced to death who were subsequently acquitted. One of them, Joseph Green Brown, was within hours of death before the Eleventh Circuit intervened. See *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986). See also: Kren Miller, *Wrongful Capital Convictions and the Legitimacy of the Death Penalty* (New York: LFB Scholarly Publishing, 2006); and Robert M. Bohm, *The Death Penalty Today* (Boca Raton: CRC Press, 2008).

[24] See, for example, Kathleen M. Olivares, Velmer S. Burton, and Francis T. Cullen, "The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later," *Federal Probation* 60.3 (1996): 10-17; see also Gabriel J. Chin, "Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction", *Journal of Gender, Race & Justice* 6 (2002): 255-78; see also Richard Tewksbury, "Collateral Consequences of Sex Offender Registration," *Journal of Contemporary Criminal Justice* 21.1 (2005): 67-81.

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 factor into some multivariate analysis of 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.[25] 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

[25] 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.

jurisdiction.[26,27] Blackstone, writing in the 18th century, was hardly the first to embark upon this inquiry. In the *Bible,* God says to Abraham that He will spare Sodom if only ten righteous are found among the wicked.[28,29] Voltaire is the most punitive: "'tis much more Prudence to acquit *two* Persons, tho' actually guilty, than to pass Sentence of Condemnation on one that is virtuous and innocent."[30] Benjamin Franklin was willing to free a hundred guilty lest one innocent suffer.[31] 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."[32]

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[26] See Alexander Volokh "*n* Guilty Men," *University of Pennsylvania Law Review* 146 (1997): 173-216. See also Laudan (2006): 72.

[27] 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): 74-76. For my purposes, though, I shall follow the standard convention.

[28] "And Abraham drew near, and said, Wilt thou also destroy the righteous with the wicked?/ Peradventure there by fifty righteous within the city: wilt though 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 spare 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 but 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 there shall be forty found there. And he said, I will not do it for forty's sake./ And he said unto him, Oh let not the Lord be angry, and I will speak: Peradventure there shall thirty be found there. And he said, I will not do it, if I find thirty there. And he said, Behold now, I have taken upon me to speak unto the Lord: Peradventure there shall be twenty found there. And he said, I will not destroy it for twenty's sake./ And he said, Oh let now the Lord be angry, and I will speak yet but this once: Peradventure ten shall be found there. And he said, I will not destroy it for ten's sake." *Genesis* 18:23-32 (King James Version).

[29] 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): 177.

[30] François-Marie Voltaire, *Zadig* (London: John Brindley, 1749) (emphasis added). Quoted in Laudan (2006): 63. In his work on torture, Voltaire strongly champions the innocent; perhaps it is therefore better to read him here as saying "at least two" instead of "no more than two." See also François-Marie Voltaire, "Commentaire sur le Livre des Délits et des Peines," (1766) in *Œvres Complètes de Voltaire*, ed. Louis Moland (Paris: Garnier, 1877-1885), vol. 25: 539-77. See also "Prix de la Justice et de l'Humanité" (1777) in Voltaire (1877-1885), vol. 30: 533-86.

[31] Benjamin Franklin, "Letter from Benjamin Franklin to Benjamin Vaughan," (March 14, 1785), in John Bigelow (ed.), *The Works of Benjamin Franklin*, vol. 2 (New York: G.P. Putnam's Sons, 1904): 13. Quoted in Laudan (2006): 63.

[32] Moses Maimonides, *The Commandments*, trans. Charles B. Chavel (Brooklyn, NY: Soncino Press, 1967): 270 (emphasis added). Quoted in Laudan (2006): 63. Note that Maimonides is specifically talking about *execution*; his high *n* might therefore go toward vindicating (6*) or (8) from above.

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]."[33] Ohio has held that *n* is "a few",[34] while Arkansas and New York "several."[35] Courts in twenty-one states have been more precise, opining some particular value for *n*.[36] Of these many have been quite conservative, setting $n = 1$.[37] Georgia, Michigan, North Carolina, and Utah, have agreed with Blackstone, setting $n = 10$.[38] The best states for criminals are New Mexico ($n = 99$)[39] and Oklahoma ($n = 100$).[40]

If anything, federal courts have been even more vague. Ninth Circuit Judge Alex Kozinksi allows that we follow Blackstone's $n = 10$, but not for any well-articulated reason.[41] In *Coffin v. United States,* the Supreme Court favorably mentioned Blackstone and other commentators, but did not commit to a value for *n*.[42] 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."[43] However, he does not tell us how much worse or what the preferred ratios should be.

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[33] *In re* Rule of the Court, 20 F. Cas. 1336, 1337 (C.C.N.D. Ga. 1877) (emphasis added). Quoted in Volokh (1997): 176.

[34] *State v. Hill*, 317 N.E.2d 233, 237 (Ohio Ct. App. 1963). Referenced in Volokh (1997): 176.

[35] *Jones v. State*, 320 S.W.2d 645, 649 (Ark. 1959); *People v. Oyola*, 160 N.E.2d 494, 498 (N.Y. 1959). Referenced in Volokh (1997): 176.

[36] Volokh (1997): 201. It bears emphasis that these numbers represent the musings of judges and are not legislatively codified. This fact alone hardly makes them penologically inert—since they may guide future deliberations of courts—but it is fair to say that the pragmatic upshot of these opinings may be limited.

[37] These include Florida, Indiana, Louisiana, Missouri, Montana, Oregon, Pennsylvania (in a dissent), Washington (for double jeopardy only), and West Virginia. Volokh (1997): 212-16.

[38] *Id*.

[39] *State v. Chambers*, 524 P.2d 999, 1002-03 (N.M. Ct. App. 1974). Referenced in Volokh (1997): 214.

[40] *Pruitt v. State*, 270 P.2d 351, 362 (Okla. Crim. App. 1954). Referenced in Volokh (1997): 215.

[41] Darlene Ricker, "Holding Out: Juries vs. Public Pressure," *A.B.A. Journal* (August, 1992): 52.

[42] *Coffin v. United States*, 156 U.S. 432, 454-56 (1895).

[43] *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (emphasis added).

Concurring in *Furman v. Georgia*, Blackstone's n = 10 was endorsed by Justice Marshall.[44] Writing for the majority in *Ballew v. Georgia*, Justice Blackmun approvingly cited Marshall's language from *Furman*.[45] Other cases have been non-committal.[46]

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 settle on some integral value for the 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

[44] *Furman v. Georgia*, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring). Referenced in Volokh (1997): 198.
[45] *Ballew v. Georgia*, 435 U.S. 223, 234 (1978). Referenced in Volokh (1997): 198.
[46] See, for example, *Patterson v. New York*, 432 US. 197, 208 (1977). Referenced in Volokh (1997): 198.

proof should get more exacting.[47] For this reason, *n* cannot be ineffable, lest its pragmatic significance be substantially diminished.

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 underdetermines any quantitative value 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 order of ten. Or else *n* should be something like "several", which I take to be 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)[48] and

[47] For the underlying mathematics, see Laudan (2006): 72-74. As discussed in § 1, this is not to say that, pragmatically, we can have full control over these issues. Rather, the point is a theoretical one.

[48] *State v. Riggs*, 201 P. 272, 282 (Mont. 1921). Referenced in Volokh (1997): 214.

Oklahoma (n = 100).[49] 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. 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 to 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 wrongs: economic costs of superfluous punishment, erosion of sense of security across society, collateral consequences on the convicted, and so on.[50] 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. Specifically, what features would drive n down? Consider Judge May, writing in 1896:

> 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

[49] *Pruitt*, 270 P. 2d at 362.

[50] For more discussion, see Richard L. Lippke, "Punishing the Guilty, Not Punishing the Innocent," *Journal of Moral Philosophy* 7 (2010): 465-67.

> mistake may happen at the very next trial, therefore no more trials should be had and courts of justice must be condemned.[51]

In other words, even with the standard of proof being beyond all reasonable doubt, courts will make *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 *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 *everyone*. But if the prospect—or, indeed, "moral certain[ty]"[52]—of condemning one innocent person means 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.[53]

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[51] John Wilder May, "Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases," *American Law Review* 10 (1876): 654-55. Quoted in Laudan (2006): vii.

[52] *Id*.

[53] Jeremy Bentham, "Principles of Judicial Procedure" in *The Works of Jeremy Bentham*, vol. 2., ed. John Bowring (Edinburgh: William Tait, 1838-1843): 169. Quoted in William S. Laufer, "The Rhetoric of Innocence," *Washington Law Review* 70 (1995): 333 n.17.

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. It is worth emphasizing, though, 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 speaks to innocence at the institutional level, not the individual level. To make this distinction more clearly, consider two propositions: on the first, we know that someone, somewhere in our criminal justice system, is guilty, but we know not who; and, on the second, we know that some particular person is innocent. Of course, we should free the individual 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 to institutional innocence, not to individual innocence. And, of course, institutional innocence is the problem that problematizes 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 such that institutional innocence is mitigated. For example, improved forensics would reduce wrongful convictions within our criminal justice system without compromising its overall integrity.[54] 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 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 per prisoner.[55] And even getting someone into prison has all sorts of other economic costs:

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[54] 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: U.S. Department of Justice, 2006). See also Brandon L. Garrett Peter J. Neufeld, "Invalid Forensic Science Testimony and Wrongful Convictions," *Virginia Law Review* 95.1 (2009): 1-97. See also Joel D. Lieberman, Courtney A. Carrell, Terance D. Miethe, Daniel A. Krauss, and Ronald Roesch, "Gold Versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?", *Psychology, Public Policy, and Law* 14.1 (2008): 27-62.

[55] John J. Dilulio, Jr. and Anne Morrison Piehl, "Does Prison Pay?: The Stormy National Debate over the Cost-Effectiveness of Imprisonment," *The Brookings Review* 9.4 (1991): 28-35; see also Jeff Yates and William Gillespie, "The Elderly and Prison Policy," *Journal of Aging & Social Policy* 11.2-3 (2000): 167-75; and Travis, Jeremy, Bruce Western, and Steve Redburn. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington D.C.: National Academies Press, 2014. Another study puts the average cost at $31,977.65 per year for federal inmates. See Kathleen M. Kenny, "Annual Determination of Average Cost of Incarceration," *Federal Regster* (J0uly 19, 2016). It also bears notice that the U.S. spends $6 on incarceration for every $10 spent on higher education. Erin Orrick A. Vieraitis, "The Cost of Incarceration in Texas:

those of law enforcement, prosecutors, defenders, judges, and so on. In addition to economic costs of conviction, there are the social costs of the crime itself, 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 so as to offset the costs of crimes. Not only does conviction lower the chance that the wrongdoer will commit more crimes—at least while the wrongdoer 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 absorb the economic costs for the conviction of the guilty (and, sometimes, the innocent), we are willing to absorb 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* Judge May, 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 an absolute sense. 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

Estimating the Benefits of Reducing the Prison Population," *American Journal of Criminal Justice* 40.2 (2015): 399-415.

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 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.[56] Killing non-combatants is bad, but an absolute prohibition against this eventuality would be too restrictive vis-à-vis legitimate military objectives. The key moral principle in thinking about collateral damage is the doctrine of double effect, which dates to St. Thomas Aquinas and has been oft-discussed in contemporary literature.[57] Consider Frances Kamm's formulation:

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[56] See, for example, Allhoff (2012): 7-9. See also Judith Jarvis Thomson, "Self-Defense," *Philosophy & Public Affairs* 20.4 (1991): 283-310; Colm McKeogh, *Innocent Civilians: The Morality of Killing in War* (New York: Palgrave Macmillan, 2002); Noam Zohar, "Double Effect and Double Intention: A Collectivist Perspective," *Israel Law Review* 40.3 (2007): 730-42; and Marcus Schulzke, "The Unintended Consequences of War: Self-Defense and Violence against Civilians in Ground Combat Operations," *International Studies Perspectives* 18.4 (2017): 391-408.

[57] Thomas Aquinas, *Summa Theologica* II.II.64.7. Available at http://www.intratext.com/IXT/ENG0023/ (accessed April 14, 2018). The contemporary literature is quite substantial but see, for example, Philippa Foot, "The Problem of Abortion and the Doctrine of Double Effect," *Oxford Review* 5 (1967): 5-15; see also Warren

> 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.[58]

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.[59]

This principle readily translates to institutional innocence as well. Certainly, jurors should not wrongfully convict someone that they know to be innocent, but that is not the dilemma that institutional—as opposed to individual—innocence portends. Rather, at issue is whether they 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

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Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," *Philosophy and Public Affairs* 18.4 (1989): 334-51; see also Shelly Kagan, *The Limits of Morality* (Oxford: Oxford University Press, 1991): 128-82; see also Thomson (1991): 293. For direct application to just war theory, see Michael Walzer, *Just and Unjust Wars*, 4th ed. (New York: Basic Books, 2006): 151-59. For an extended critique—especially as pertains to just war theory—see Kamm (2004).

[58] Frances M. Kamm, "The Doctrine of Triple Effect and Why a Rational Agent Need Not Intend the Means to His End," *The Aristotelian Society Supplementary Volume* 74.1 (2000): 23.

[59] 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. See Allhoff (2012): 22-28. For the alternative, see C.A.J. Coady, "Terrorism, Morality, and Supreme Emergency," *Ethics* 114 (2004): 772-89. More generally, see Kamm (2000), Hurka (2007), and Lazar (2016). See also Jeff McMahan, "The Just Distribution of Harm Between Combatants and Noncombatants," *Philosophy & Public Affairs* 38.4 (2010): 342-79.

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 there are substantial ways in which these desiderata pull in opposite directions. 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

transaction 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 jurisdictions that answer the question qualitatively; Arkansas and New York come the closest with "several".[60]

[60] Jones, 320 S.W.2d at 649; *Oyola* 160 N.E.2d at 498.

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