

## THE MYTH OF FACTUAL INNOCENCE

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## INTRODUCTION

Almost all criminal defendants plead guilty, and almost all of them do so because they are guilty. The ones who take their cases to trial are also overwhelmingly guilty, at least in the sense that there is no issue about whether they committed the charged acts. The relatively few felony cases that actually go to trial in America are typically about moral guilt, not factual guilt. That is, they are about the level of the defendant's culpability and therefore the level of the crime of which he will be convicted.<sup>1</sup>

Yet the picture of the American criminal justice system painted in *12 Angry Men* is of a truth-finding system so feeble that it must depend, in the end, on the instincts of a single courageous dissenting juror—in this case Juror #8, played by Henry Fonda.<sup>2</sup> True, it wouldn't have been much of a movie if the young unnamed Puerto Rican defendant had actually been guilty of killing his father and pleaded guilty to a lesser offense, or if Henry Fonda and his colleagues spent all that time<sup>3</sup> arguing about what real juries argue about—the meaning of phrases like “with intent and after deliberation,” “knowingly,” “recklessly” or “beyond a reasonable doubt”<sup>4</sup>—in de-

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1. These categorical pronouncements about the rates of factual innocence are based not just on my own sixteen years of experience on the bench but also on the best data we have about these questions, discussed in Part I. The panic, both in the academy and in the popular press, about the sweeping tide of wrongful convictions is, alas, part of the myth of factual innocence discussed in this essay.

2. *12 ANGRY MEN* (Orion-Nova Productions 1957). One of the admirable things about the movie is that viewers—at least this viewer—are left with mixed feelings about the defendant's factual guilt or innocence. The \$64,000 question, of course, is whether those “mixed feelings” rise to the level of reasonable doubt, and the movie does a poor job of exploring that question. See *infra* note 4.

3. One of the unrealistic things about the movie is that the jury deliberations, which consume all but a few minutes of the film at the beginning and end, are presented in continuous real time, yet they take only 90 minutes. There is no effort to employ time compression or other artistic devices to convey the sense that this wrenching process—in which Henry Fonda single-handedly sways all eleven of his fellow jurors—takes more than about an hour and a half.

4. There was a brief discussion of reasonable doubt in the middle of the deliberations, and the phrase was mentioned a few times after that as more and more jurors joined Fonda's position. But, interestingly, the entirety of the brief discussion about reasonable doubt consisted of the immigrant watchmaker (Juror #11, played by George Voskovec) asking the impatient baseball fan (Juror #7,

cluding whether the defendant was guilty of first degree murder, second degree murder, or criminally negligent homicide.

Innocence projects are in some ways the modern post-conviction equivalent of *12 Angry Men*. Because there are just too few Henry Fondas in modern jury pools—or so the innocence project orthodoxy goes—vast seas of wrongfully-convicted defendants must today rely on law students and their clinical faculty advisors to do what Fonda-less juries have chronically failed, and continue to fail, to do.<sup>5</sup>

I don't mean to suggest that innocence projects are a bad thing, or that courageous individual jurors whose efforts result in the acquittal of innocent defendants (or, for that matter, courageous individual jurors whose efforts result in the conviction of guilty defendants) are some kind of naive joke we sophisticated insiders should cluck at. On the contrary, I have gained a deep respect for jurors since coming to the bench and seeing so many trials. There is something almost mystical in their collective ability to find the truth about a case, both factual and moral.<sup>6</sup> It is my respect for jurors and the jury system that puts me at odds with the Chicken Littles of Innocence who think wrongful conviction is, if not the rule, then at least a very common exception.

True, innocence projects have been instrumental in suggesting points in the system that are particularly vulnerable to truth-detection errors, especially cross-racial eyewitness identifications<sup>7</sup> and interrogation-induced false confessions.<sup>8</sup> Quite apart from the rates of these errors, it is critical for anyone who cares about maximizing the reliability of the system to identify common sources of error in an effort to reduce them. Unfortunately, the

played by Jack Warden) whether he knows what reasonable doubt means, and the impatient baseball fan getting angry that an immigrant would ask such an apparently obvious question. But several times during the deliberations Henry Fonda asks, "Yes, but it is *possible*?" with reference to his interpretation of a particular piece of evidence, suggesting that the movie's writer, director, and legal consultants did not understand the difference between reasonable inferences and speculation, or between reasonable doubt and speculative doubt.

5. For those of you who think this description of the assumptions behind some innocence projects is exaggerated, I refer you to these comments by Rob Warden, the Executive Director of the Center for Wrongful Convictions at Northwestern University School of Law: "You hear the lofty pronouncement that better 10 guilty men go free than one innocent man suffer. . . . But as a nation, we've never believed that. It's the other way around." Chip Rowe, *False Justice: Are 100,000+ Innocent Men in U.S. Prisons?*, PLAYBOY, July 2002, available at <http://www.chiprowe.com/articles/false-justice.html>. That is, Mr. Warden believes that we "as a nation" think it is better to send ten innocent people to prison than let one guilty person go free, a goal that, if achieved by the criminal justice system, would result in a wrongful conviction rate of approximately 91%.

6. See *infra* Part II for a discussion of the difference between factual and moral guilt.

7. See John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207 (2001).

8. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004) (documenting and analyzing more than 125 false confessions).

political subtext of the average innocence project is not that infrequent wrongful convictions must be detected and remedied, but rather that the system as a whole is profoundly unreliable and that the factual innocence revealed by the projects is just the tip of an iceberg of injustice.<sup>9</sup>

But the phenomenon of *12 Angry Men* and the explosion of innocence projects are not just about melodramatic license or extreme political pedagogy. Their resonance with lawyers, legal scholars, law students, and even ordinary citizens summoned for jury duty transcend their caricatures of the system. Myths, after all, are myths precisely because their oversimplifications, and even misrepresentations, try to teach us something important about the world and our place in it. In the best myths, what we lose in empirical truth we gain in a kind of transcendent insight.

Does *12 Angry Men* really deserve the label “transcendent”? Probably not. It was not the first, or last, movie about wrongful (or almost wrongful) convictions. There has been a continuous stream of them since at least 1943.<sup>10</sup> *12 Angry Men* does not seem to have had nearly the broad cultural impact lawyers assume. It was a financial disaster, despite its low budget.<sup>11</sup> It was (horror of horrors!) originally a teleplay, and although it was nominated for three academy awards (none for Henry Fonda), it didn’t win any, losing out in all three nominated categories (Best Picture, Best Director (Sidney Lumet) and Best Adapted Screenplay) to *Bridge on the River Kwai*.<sup>12</sup> I’m afraid its popularity among the lawyering classes is akin to the popularity of kung fu movies among teenage boys.<sup>13</sup>

9. See *supra* note 5. In a claim typical of innocence projects, Northwestern’s Center on Wrongful Convictions says in its mission statement that one of its purposes is to raise public awareness of the “prevalence” of wrongful convictions. Center on Wrongful Convictions, Northwestern University School of Law, <http://www.law.northwestern.edu/depts/clinic/wrongful/mission.htm> (last visited July 8, 2007).

10. To name just a few: AFTER INNOCENCE (American Film Found. 2005), LIFE (Imagine Entm’t 2000), THE HURRICANE (Azoff Entm’t 1999), A MAP OF THE WORLD (Cinerenta Medienbeteiligungs KG 1999), BROKEDOWN PALACE (Twentieth Century Fox Film Corp. 1999), SNOW FALLING ON CEDARS (The Kennedy/Marshall Co. 1999), IN THE BLINK OF AN EYE (Odyssey Video 1996), INDICTMENT: THE MCMARTIN TRIAL (Abby Mann Prods. 1995), IN THE NAME OF THE FATHER (Hell’s Kitchen Films 1993), PRESUMED INNOCENT (Mirage 1990), TRUE BELIEVER (Columbia Pictures Corp. 1989), AN INNOCENT MAN (Interscope Commc’ns 1989), A CRY IN THE DARK (Cannon Entm’t 1988), AMERICAN GIGOLO (Paramount Pictures 1980), . . . AND JUSTICE FOR ALL (Columbia Pictures Corp. 1979), THE WRONG MAN (Warner Bros. Pictures 1956), CALL NORTHSIDE 777 (Twentieth Century Fox Film Corp. 1948), THE OX-BOW INCIDENT (Twentieth Century Fox Film Corp. 1943).

11. It was filmed in only nineteen days at a total cost of just \$349,000. See BlinkBits, *12 Angry Men* Wikipedia RSS Feed, [http://www.blinkbits.com/bits/viewtopic/12\\_angry\\_men\\_wikipedia\\_rss\\_feed?t=2616855](http://www.blinkbits.com/bits/viewtopic/12_angry_men_wikipedia_rss_feed?t=2616855) (last visited July 8, 2007) (citing SIDNEY LUMET, MAKING MOVIES (1995)).

12. *Id.*

13. By some admittedly very rough objective measures, *12 Angry Men* has had little lasting impact either in the public consciousness generally or in the halls of the legal academy. A recent (March 29, 2007) Google search of *12 Angry Men* yielded 617,000 hits, compared to 639,000 for *Bridge on the River Kwai*. An identical query in the text and periodicals database of Westlaw, restricted to the title

As of March 29, 2007, *12 Angry Men* was not among the top 100 movies rented from NetFlix.<sup>14</sup> Even in the NetFlix “classic” category, it is a modest #21, right below *The Sound of Music* and seven spots below its nemesis *Kwai*.<sup>15</sup> It is true that it has enjoyed a rather consistently high reputation among the filmerati,<sup>16</sup> but the notion that the movie is an important cultural icon seems itself to be largely an echo of the myth of innocence.

On the other hand, transcendent myths can be tricky things. Maybe the best measure of their vitality is in their retelling. But alas, unlike what seems to be every other movie made in the last fifty years, including *Kwai*,<sup>17</sup> *12 Angry Men* has never been remade on the big screen or been the subject of a sequel or prequel. No Tom Hanks as the brooding Juror #8, or Freddie Prinze, Jr., as the defendant. No sequel following the wrongfully accused youngster on to college then law school, or the courageous holdout into political office. No prequel showing the real perpetrator committing the murder.<sup>18</sup>

field, generated only four hits, compared to an astonishing three hits for *Kwai*. (Maybe not that astonishing, because all three articles are about a reported federal case arising out of trademark litigation over the distribution of an unauthorized sequel, *Return from the River Kwai*. See Tri-Star Pictures, Inc. v. Unger, 14 F. Supp. 2d 339 (S.D.N.Y. 1998). In this sense, *Kwai* has had some direct impact on the law that *12 Angry Men* never has.) Expanding the Westlaw searches for the presence of the movie titles anywhere in the text of the article generated 199 references to *12 Angry Men* and 62 for *Kwai*. To give some context to the way these searches might measure the cultural diaspora of a piece of fiction, the same Westlaw text search yielded 1,110 hits for *Alice in Wonderland*. Now that’s cultural resonance.

14. Netflix, Top 100, <http://www.netflix.com/Top100> (last visited March 29, 2007).

15. Netflix, Classics Top 25, <http://www.netflix.com/Top25?sgid=306> (last visited March 29, 2007).

16. For example, in June 2003 the American Film Institute named Henry Fonda’s character the twenty-eighth greatest movie hero of the twentieth century, finishing behind such dubious winners as James Bond, Dirty Harry, Indiana Jones and Bob Woodward/Carl Bernstein. See *AFI’s 100 Years . . . 100 Heroes & Villains* (CBS television broadcast June 3, 2003). The list of fifty greatest heroes and fifty greatest villains is available at AFI’s 100 Years . . . 100 Heroes & Villains, <http://www.afi.com/tvevents/100years/handv.aspx> (last visited March 29, 2007). *12 Angry Men* finished an impressive fourteenth in the Internet Movie Database’s top 250 movies as voted by its users. See IMDb Top 250, <http://www.imdb.com/chart/top> (last visited March 29, 2007).

17. See *supra* note 13.

18. I do not count the mini-versions in shows like *Veronica Mars* and *Monk*, see Nancy S. Marder, *Introduction to The 50th Anniversary of 12 Angry Men*, 82 CHI.-KENT L. REV. 557, 574 (2007), since they are neither full-blown remakes nor spoofs. It is not hard to imagine why Hollywood moguls might not be jumping on the bandwagon for a remake or spin-off: is the Britney Spears generation really ready for a movie that takes place almost entirely inside the four walls of one room, and not a bedroom at that? Other media have been more willing. It was remade for television in 1997, with Jack Lemmon as Juror #8. See BlinkBits, *supra* note 11. It was also adapted to the London stage in 1964, in a production starring Leo Genn as Juror #8, and has undergone several theatrical adaptations since, the more modern ones using actresses on the jury and retitling the work *12 Angry Jurors* or even versions called *12 Angry Women*. *Id.* Don’t ask how twelve women manage to navigate the gender bias prohibited by J.E.B. v. Alabama, 511 U.S. 127, 129 (1994).

If parody is the second sincerest form of flattery, then I should mention that there have been only three parodies of *12 Angry Men* that I've been able to discover: one in 1959 on the weekly BBC sitcom *Hancock's Half Hour*,<sup>19</sup> one in a 1994 episode of *The Simpsons*,<sup>20</sup> and one in a 1998 episode of *King of the Hill*.<sup>21</sup>

Even if *12 Angry Men* itself has not become a transforming cultural icon, its central message has: the criminal justice system nabs innocent people just about as often (and maybe more often) as it nabs guilty ones, and as a result, the primary, and very difficult, job of jurors is to determine whether the accused is guilty as a factual matter. Of course, this notion was hardly invented by Sidney Lumet. The myth of factual innocence has a long and interesting pre-1957 history, both on and off the screen.

In this essay I examine the differences between factual and moral guilt, the long history and benefits of the myth of factual innocence, and, finally, the costs of the myth in our modern, plea-bargain-dominated era. But first, some definitional and empirical clarifications.

19. *Hancock's Half Hour: Twelve Angry Men* (BBC television broadcast Oct. 16, 1959). In a complete reversal from the movie, Hancock plays the foreman of the jury in an open-and-shut case in which the defendant is unquestionably guilty. But he delays the guilty verdict because he is making more from the daily jury fee (30 bob) than he can at work. So he pontificates throughout deliberations—for example, at one point he chides, “Does Magna Carta mean nothing to you? Did she die in vain? Brave Hungarian peasant girl who forced King John to sign the pledge at Runnymede and close the boozers at half past ten?” *Id.* For highlights from this episode, see Hancock's Half Hour—“Twelve Angry Men,” [http://www.phespirit.info/hancock/hancock\\_41.htm](http://www.phespirit.info/hancock/hancock_41.htm) (last visited July 8, 2007).

20. *The Simpsons: The Boy Who Knew Too Much* (Fox television broadcast May 5, 1994). I was sure I'd seen almost every episode of *The Simpsons*, but this one did not come to mind. My thanks to Naomi Mezey & Mark C. Niles for alerting me to it in their article *Screening the Law: Ideology and Law in Popular American Culture*, 28 COLUM. J.L. & ARTS 91, 131–32 (2005). In this episode, Freddy Quimby, the nephew of the Kennedy-esque mayor of Springfield, is charged with assaulting a waiter, after a very public argument they were having over the correct pronunciation of the word “chowder.” (The waiter insists on a faux-French pronunciation—“show-dair”—while Freddy argues for the Boston blue blood version—“chowdah.”) *The Boy Who Knew Too Much, supra*. But no one witnessed the assault other than a truant and hiding Bart. What actually happened was that the waiter slipped on a Rice Krispies Square. Bart is silent because he knows if he admits he was there he'll get in trouble with Principal Skinner. The holdout juror is Homer, who is hoping, à la Hancock, not for justice but for a few more nights of free cable in the Springfield Palace Hotel, where the jury is sequestered. Homer, unlike Henry Fonda, is unable to persuade his fellow jurors of the defendant's innocence, but justice is nevertheless done when the judge allows Bart's untimely testimony, saying, “Even though reopening the trial at this point is illegal and grossly unconstitutional, I just can't say no to kids.” *Id.* I suppose this makes the judge an “ordered liberty” kind of guy, rather than a textualist.

21. *King of the Hill: Nine Pretty Darn Angry Men* (Fox television broadcast Nov. 17, 1998). Hank and eight others participate in a focus group about the Mason 5500 lawnmower. Originally, Hank is the only one who prefers the old model, the Mason 1500. Hank eventually convinces seven of the others that the 1500 is superior, with arguments such as the 5500's seat warmer will warm the beer between the rider's legs. Only Hank's father, Cotton, remains a holdout for the 5500. Hank's dispute with Cotton over the lawnmowers is a thinly disguised proxy for their feelings about Cotton “trading in” Hank's mother for a newer model. *Id.* For a summary of the episode, see FOX Broadcasting Company: King of the Hill, <http://www.fox.com/kingofthehill/episodes/0308.htm> (last visited July 8, 2007).

## I. IS FACTUAL INNOCENCE REALLY A MYTH?

It is important to frame this question with some precision. The “myth” of factual innocence is, I contend, a myth about the *frequency* with which innocent people are caught in the net of the criminal law, to be freed, if at all, only by the determination and insight of conscientious jurors, highly paid superstar lawyers, innocence project students, or, if all else fails, courageous governors. Of course, factually innocent people *are* wrongly arrested and wrongly convicted, as many innocence projects have demonstrated, and as humans have known since the dawn of time.<sup>22</sup> Systemic error is an unavoidable consequence of underlying, and irreducible, human error. But the important core of the myth of factual innocence holds that wrongful conviction is a regular occurrence, that prisons are full of innocent people, and in fact that graveyards are full of innocent capital defendants wrongfully executed.

Sadly, the empirical literature on wrongful convictions is itself woefully infected with the mythology of factual innocence. Part of the problem, of course, is definitional. How does one determine factual innocence after the system—whose whole purpose is supposed to be truth-finding—has determined, whether by plea or trial, that a defendant is in fact guilty? This is the mother of all confirmation bias problems.<sup>23</sup>

Before the advent of DNA testing, there were only a few narrow circumstances in which we could confidently assess a defendant’s factual guilt by any method other than the trial itself. In the era before the *corpus delicti* rule was vigorously enforced, “victims” of “murder” occasionally resurfaced very much alive.<sup>24</sup> Fingerprints and some other kinds of pre-DNA forensic evidence discovered after trial could sometimes do the trick.

22. Even God sometimes has trouble distinguishing the guilty from the innocent, or at least caring about the difference. He was just about to wipe out the entire population of Sodom when Abraham managed to convince him that it would be wrong to have the innocent Sodomites perish with the guilty. *Genesis* 18:23–32. For a fascinating narrative of examples of wrongful executions in England from 1640 through 1790, see Bruce P. Smith, *The History of Wrongful Execution*, 56 HASTINGS L.J. 1185 (2005).

23. There have even been a handful of studies where judges are asked after trials whether the jury reached the right result. We almost always say that they did. *See, e.g.*, C. RONALD HUFF, ARYE RATTNER & EDWARD SAGARIN, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 60 (1996) (concluding by this deeply flawed method that a surprisingly high 2% of all convicted defendants may be innocent).

24. *See, e.g.*, Smith, *supra* note 22, at 1190–92 (discussing the case of the Gloucestershire wife, son, and servant of one William Harrison, all hanged for his murder in 1660, and all exonerated post-mortem when Mr. Harrison returned in 1661 from what he claimed had been his abduction by Turkish slavers).

Confessions by the “real” criminal could also prove convictions wrongful, though, of course, there is that problem of false confessions.<sup>25</sup>

But a shocking segment of the literature in this area is based on wholly unreliable evidence, and even anecdote and conjecture, to label convicted defendants “innocent.” For example, one of the earliest, and most oft-cited, works on wrongful convictions was a 1987 study done by Hugo Bedau and Michael Radelet claiming that 23 of the 350 capital defendants whose cases they examined (including Sacco and Vanzetti) were executed despite their factual innocence.<sup>26</sup> Yet the method by which Bedau (a philosopher) and Radelet (a sociologist) determined whether the executed defendants were actually innocent was essentially to reconstruct from the trial record, and contemporaneous newspaper reports,<sup>27</sup> a quite one-sided narrative from which some doubt about factual guilt might plausibly be argued.

Other scholars immediately criticized this methodology and challenged Bedau and Radelet to come up with a single case of a demonstrably innocent person executed in America in the modern era.<sup>28</sup> Bedau and Radelet have not only been unable to do so, one of them has recently admitted that their label “innocent” was really just a way of saying there were errors in the trial, that factual guilt seemed to them to be a “close call,” and

25. An argument could be made that the second confession is more reliable than the first, because it's typically made without any police pressure and under the cover of an already convicted defendant. See Stephanos Bibas, *The Right to Remain Silent Helps Only the Guilty*, 88 IOWA L. REV. 421, 426–27 (2003) (arguing that *Miranda v. Arizona*, 384 U.S. 436 (1966), has hurt the innocent by reducing confessions by the guilty). But, of course, the circumstances of each individual case matter very much on this issue, and it is not at all difficult to imagine reasons for a false second confession—for example, to protect a family member rightly arrested or even convicted.

26. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 73 tbl.10 (1987).

27. *Id.* at 29.

28. See, e.g., Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988); see also FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 163–64 (2003). Judge Cassell has called the idea that innocent people have been executed in America under the modern death penalty system an “urban legend.” Paul G. Cassell, *We're Not Executing the Innocent*, WALL ST. J., June 16, 2000, at A14. Of course, there is the now infamous case of Roger K. Coleman, executed for raping and killing his nineteen-year-old sister-in-law. Anti-death-penalty activists across the country put considerable political pressure on Virginia Governor Mark Warner to order post-execution DNA tests—the first governor ever to do so—in an effort to identify the modern era's first wrongfully executed person. See Maria Glod & Michael D. Shear, *DNA Tests Confirm Guilt of Executed Man*, WASH. POST, Jan. 13, 2006, at A1. The tests confirmed Coleman's guilt. See *id.* Of course, it would be just as wrong to conclude from this one story that innocence project clients are almost all guilty and the students in those projects all gullible do-gooders, as it would be to conclude that almost all innocence project clients are innocent and their student representatives all modern day Henry Fondas. These high publicity stories may catalyze issues and inject them into the public consciousness, but they cannot tell us anything more than we already know: the systems—both trial and post-trial exoneration—are not perfect.

that some of those close calls must surely, as a statistical matter, have involved some factually innocent people.<sup>29</sup>

It is also not unheard of for academics—or more often reporters or activists misquoting academics—to conflate trial error rates with wrongful conviction rates. Studies showing astonishingly high error rates in capital trials<sup>30</sup> have very little to do with the question of the rate at which factually innocent people are being convicted. It is a giant leap from an erroneous trial ruling to reversible error, and another giant leap from reversible error to factual innocence.

A similar categorical mistake was arguably made by former Illinois Governor George Ryan in 1993, when he commuted all 167 pending death sentences in Illinois, in part because the Northwestern Innocence Project had identified thirteen innocent Illinois death row inmates.<sup>31</sup> Among the prisoners whose death sentences were commuted were many whose factual guilt was not at all in doubt.<sup>32</sup> Why did those deserving to die get the benefit of this kind of twentieth-century version of the Blackstone Ratio?<sup>33</sup> Indeed, much of the empirical confusion about wrongful conviction rates has been driven by histrionics over the death penalty. To a large and unfortu-

29. See Hugo Adam Bedau et al., *Convicting the Innocent in Capital Cases: Criteria, Evidence, and Inference*, 52 *DRAKE L. REV.* 587, 590 (2004) (“Close calls, by themselves, do not provide evidence sufficient to enable us to point to the innocence of a particular individual defendant who was executed.”). I sympathize with the so-far unsuccessful hunt for even a single wrongfully executed person in the modern era, and even with the argument that such persons almost certainly exist, given the most recent data from innocence projects. But even with a numerator other than zero, we still need a denominator to estimate the *rates* of wrongful executions, and it is the *rates* that matter in assessing imperfect systems. See *infra* text accompanying notes 34–38.

30. See, e.g., James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 *TEX. L. REV.* 1839, 1850 (2000) (claiming overall capital trial error rate of 68%).

31. Gov. Ryan commuted 164 death sentences to life, and 3 to 40 years (consistent with the sentences received by their co-defendants). See Abdon M. Pallasch et al., *Gov. Ryan Empties Death Row of All 167*, *CHI. SUN-TIMES*, Jan. 12, 2003, at 2A. The day before, he pardoned four death row inmates whom he determined had been tortured into confessing. *Id.*

32. This included Jacqueline Williams, who wanted a baby so much that she and her confederates broke into a pregnant woman’s apartment, shot and stabbed her, cut her open and removed her fetus, then killed her ten-year-old and eight-year-old children to eliminate them as witnesses. See James Taranto, *Best of the Web Today*, <http://www.opinionjournal.com/best/?id=110002904> (last visited March 29, 2007). Governor Ryan admitted not all of the 167 were innocent: “Hell, I know some of those people are guilty. But you can’t pick and choose. That’s what drove us to mass commutations. How many more cases of wrongful convictions have to occur before we can all agree that this system in Illinois is broken?” Pallasch et al., *supra* note 31 (quoting Gov. Ryan). In his January 13, 2003, online column for the *Wall Street Journal*, James Taranto called the mass commutations “an act of stunning moral vanity.” Taranto, *supra*.

33. One might also ask why Gov. Ryan merely commuted the death sentences of all Illinois death row inmates instead of pardoning them, since he’d admitted only “some” of them were factually guilty. That is, the “wrongful conviction” rationale is both too strong and too weak to justify Gov. Ryan’s mass commutations.

nate extent, the debate about wrongful convictions in a capital context has become a proxy for arguments in favor of and against the death penalty.<sup>34</sup>

And then there is the biggest empirical problem of all—what I call the problem of the missing denominator. Because the myth of innocence is a myth if we have exaggerated the *frequency* of wrongful convictions, it does us no good to wring our hands over the number of wrongful convictions if we cannot associate that number with the number of rightful convictions. We need a denominator. It is true that innocence projects across the country have identified, through DNA, some 500 rape and homicide defendants over the last two decades who were wrongfully convicted at trial.<sup>35</sup> But over that period, more than forty million felony cases were filed.<sup>36</sup>

The data emanating from innocence projects never, and perhaps for ethical reasons could never, tell us how many clients had their guilt confirmed by DNA analysis.<sup>37</sup> Despite this lack of a denominator, most reporters and some scholars have jumped to the unsupportable conclusion that the system is in chaos and that innocent defendants are being convicted at an alarmingly high, even if never mentioned, rate.<sup>38</sup>

Even when they mention a rate, these leaps of faith ignore the difference between pleading guilty and being found guilty after trial, and thus

34. Compare Paul G. Cassell, *In Defense of the Death Penalty*, in DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? 183 (Hugo Adam Bedau & Paul G. Cassell eds., 2004), with HELEN PREJEAN, *THE DEATH OF INNOCENTS: AN EYEWITNESS ACCOUNT OF WRONGFUL EXECUTIONS* (2005).

35. Even this number is just an educated guess, because innocence projects have sprouted at a rate that has not kept up with their reporting. It does appear that in the seventeen-year period 1989–2003 a total of 340 rape and homicide convicts were exonerated by innocence projects. Samuel R. Gross et al., *Exonerations in the United States, 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523–24 (2005). I am therefore using a conservative (that is, high) extrapolated figure of 500 exonerations for the twenty-year period 1986–2005.

36. In the mid-point year of that period, 1997, there were roughly two million felony filings in state courts. NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2003, at 38 (2003), available at [http://www.ncsconline.org/d\\_research/csp/2003\\_Files/2003\\_Criminal.pdf](http://www.ncsconline.org/d_research/csp/2003_Files/2003_Criminal.pdf). Federal criminal filings were comparatively negligible, amounting to only 60,000 in fiscal year 1997. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1997, at 16 tbl.1.2, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs9902.pdf>. Thus, I use the figure of two million felony cases per year, or forty million over the twenty-year period from 1986–2005.

37. See Ellen Yankiver Suni, *Ethical Issues for Innocence Projects: An Initial Primer*, 70 UMCK L. REV. 921, 949 (2002) (discussing the problem of disclosing facts learned from a guilty innocent project client).

38. See, e.g., Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739. Despite its ambitious title, this article makes no effort to approximate wrongful conviction *rates* and, like virtually every other scholarly contribution to the myth of innocence, uses single cases to prove what no serious person disputes: that the system is not perfect. In fact, the title of this article itself reflects the confused thinking about this problem. Wrongful convictions can be, and I suggest probably are, both systemic and exceedingly rare. See also Adam Liptak, *Study Suspects Thousands of False Convictions*, N.Y. TIMES, Apr. 19, 2004, at A15.

assume with absolutely no basis that the error rates are the same for both.<sup>39</sup> But even if we assume a high and unacceptable trial error rate—say 20%—no serious scholar believes that two out of every ten defendants who plead guilty are innocent.<sup>40</sup>

It is nevertheless possible, with some careful examination of charge rates, trial rates, and data from innocence projects, coupled with some modest assumptions and extrapolations, to estimate a lower and upper bound of the wrongful conviction rate. On the upper bound side, we know wrongful *trial* convictions are exceedingly rare, as a percentage of all criminal cases, for no other reason than that criminal trials themselves are exceedingly rare. The average federal plea bargaining rate is 96.3%.<sup>41</sup> The average state rate is 95%.<sup>42</sup> That means that even if juries were only 80% right (an assumption at which even the most radical of trial critics would surely cringe), the overall wrongful conviction rate would still be only around 1%, assuming all defendants who plead guilty are guilty.

Do innocent people plead guilty? Of course. Innocent people sometimes even preempt their false guilty pleas by falsely confessing, both with and without overbearing interrogation. But, again, at what *rates* do factually innocent people confess or plead guilty?<sup>43</sup> Even if 1 out of 100 pleading defendants is factually innocent, the upper bound for the overall wrongful conviction rate would still be just 1.95%.<sup>44</sup>

39. See, e.g., Andrew E. Taslitz, *Convicting the Guilty, Acquitting the Innocent: The ABA Takes a Stand*, CRIM. JUST., Winter 2005, at 18, 19 (concluding that even if the error rate is small, “tens of thousands” of innocent people are in prison or otherwise under supervision). But this very much depends on how small the wrongful conviction rate is. If it is only 0.0016%, see *infra* text accompanying notes 43–48, and even if every wrongfully convicted defendant is in prison, then of the roughly two million people in U.S. prisons today only thirty-two are innocent.

40. The only study of false guilty pleas that I am aware of was done in England in the early 1980s, and it concluded that 2.2% of a sample 500 guilty pleas in the city of Birmingham appeared unjustified based on independent reviews of the committal papers. See MICHAEL MCCONVILLE & JOHN BALDWIN, COURTS, PROSECUTION, AND CONVICTION 66–67 (1981).

41. In 2003 (the latest year for which these statistics are available), 74,850 federal criminal cases were filed (and not dismissed) and 72,110 of them were disposed of by guilty plea. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 423 tbl.5.22 [hereinafter BJS SOURCEBOOK], available at <http://www.albany.edu/sourcebook/>.

42. BJS SOURCEBOOK, *supra* note 41, at 450 tbl.5.46.

43. The increasingly pervasive myth of false confessions is a kind of corollary to the myth of innocence. But like the data on wrongful convictions, the data of false confessions has been exaggerated beyond all statistical recognition. See Paul G. Cassell, *The Guilty and the “Innocent”: An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL’Y 523 (1999) (concluding that in a recent study of false confessions a substantial fraction of defendants labeled “innocent” were in fact guilty, that the problem of false confessions does not appear to be pervasive, and that it is concentrated among the mentally retarded).

44. That is, the 1% of tried defendants wrongfully convicted, plus the wrongfully-pleading defendants, whose percentages are calculated as  $95\% \times 1/100 = 0.95\%$ . I can’t imagine the “innocent-but-pleading” rate is anywhere near 1 out of 100, although I say this with great trepidation and humility. There is no doubt that the plea bargain machinery puts tremendous pressure on criminal defendants—

As for the lower bound, innocence project data allow us to do some estimates. In the twenty years in which innocence projects have identified roughly 500 people wrongfully convicted after trial,<sup>45</sup> there were roughly two million trials.<sup>46</sup> Even assuming 25% of those two million trials resulted in acquittals (and ignoring, as legal academics are wont to do, the problem of wrongful acquittals), that would yield a wrongful trial conviction rate of only 0.033%.<sup>47</sup> Since, as mentioned above, only 5% of cases are tried, that yields a lower bound for the overall error rate of the system at around 0.0016%.<sup>48</sup>

Now, where between these two estimated bounds—1.95% and 0.0016%—does the real wrongful conviction rate lie? No one knows, but we do know wrongful convictions are not anywhere near the 50/50 kind of proposition that infects the popular culture.

When I say that the myth of innocence infects the popular culture, I may well be doing a disservice to the general public by attributing the myth so completely and broadly to them. In fact, I suspect the average person has a great deal of confidence in the reliability of the system in ordinary kinds of cases for ordinary sorts of purposes. For example, I doubt a prospective employer's first reaction to an applicant's disclosure of a prior felony conviction is to assume the conviction was wrongful and that the applicant was factually innocent. And where have the mavens of wrongful conviction been in the slew of corporate scandals that have spilled into the criminal

guilty and innocent alike—to plead guilty to avoid the risk of a much more drastic result. And, in fact, the myth of innocence—which, to a charged defendant, makes the system look incapable of distinguishing the guilty from the innocent—only increases the pressure for the innocent to plead guilty, as discussed in Part IV(D). The confluence of these forces could mean that innocent defendants plead guilty at a higher rate, but there are other forces that reduce this likelihood. Political pressures on prosecutors will limit how sweet their offers will be to very serious charges. Trial judges can reduce the risk by refusing to accept waivers of the factual basis even when state versions of the Federal Rule of Criminal Procedure 11 allow waivers, and by refusing to take so-called *Alford* pleas. See *North Carolina v. Alford*, 400 U.S. 25, 37–38 (1970) (guilty plea by defendant who insists on his factual innocence, and says he is pleading guilty to avoid the risk of wrongful conviction and execution, is not an “involuntary” plea).

45. See *supra* note 35.

46. I reach this conclusion by applying a 5% trial rate to the roughly forty million criminal cases filed in that twenty-year period. See *supra* note 36.

47. An acquittal rate of 25% applied to a total of two million trials yields 1.5 million trial convictions. If only 500 of those trial convictions were wrongful, that represents a wrongful conviction rate of 0.00033 ( $500 \div 1,500,000$ ).

48. It is a lower bound because we can safely assume that not all wrongfully convicted defendants in this period have been identified (that is, the real numerator is likely higher). This number also assumes all people who plead guilty are in fact guilty, and we know that's not true. See *supra* note 40 and accompanying text.

law? My guess is that not many ordinary people think Kenneth Lay was railroaded by a deeply unreliable trial system.<sup>49</sup>

In the end, the myth of innocence seems to be driven more by legal academics, wrongful conviction advocates, and journalists than by the available data. But as with all editorials dressed in the sheep's clothing of fact, the myth of innocence at least threatens to become accepted liturgy, and that acceptance could, paradoxically, do substantial damage to the reliability of the criminal justice system.

Before addressing the costs and benefits of the myth, let me pause to emphasize the difference between factual guilt and moral guilt. I do this because in my judgment the most significant cost of the myth of innocence is an overemphasis on factual guilt and a corresponding neglect of moral guilt.<sup>50</sup>

## II. FACTUAL GUILT AND MORAL GUILT

When I use the phrase "factual guilt" I mean to describe the situation in which a criminal defendant did in fact commit the act charged, whether or not he had the required mental state. When I use the phrase "moral guilt" I mean the conclusion the fact finder makes about the mental state of a factually guilty defendant, as well as the broader, though related, question of what punishment is just.

Mens rea, which is Latin for "guilty mind," has been part of our criminal law from its English inception.<sup>51</sup> In fact, virtually every civilization that has left a record on the subject—including the Babylonians, Jews, Egyptians, Greeks, and Romans—recognized the idea that both the act and intention must be judged by the law.<sup>52</sup> Indeed, the notion that punishable

49. I recognize the myth of innocence does not adhere as tightly to the rich and well-represented, which of course is just part of the central racist and classist assumptions upon which the myth has always been built. See *infra* text accompanying notes 84–86.

50. See *infra* Part IV(E).

51. It comes from the English legal precept "*actus non facit reum nisi mens sit rea*" (the act is not guilty unless the mind is guilty), which dates from at least the time of Henry I in the early 1100s, and which was likely based on the writings of St. Augustine. See Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932); Paul Robinson, *Mens Rea* 3 (Univ. Penn. Law Sch., Working Paper No. 35, 1999), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1038&context=upenn/wps>.

52. See *Morissette v. United States*, 342 U.S. 246, 243 & n.4 (1952) (citing 8 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 126 (1932)). It is true that this general rule had some strict liability exceptions, such as the quite common ancient rule that a man was strictly liable for the acts of his slaves, and even a strict liability view of homicide. See 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I 470–73 (Lawyers' Literary Club 2d ed. 1959) (1895). But these exceptions did not displace the rule that even in ancient times—when access to the workings of the mind was so limited, at least by modern standards—civilized people cared both about the wrongdoer's acts and his intentions.

crimes must be non-accidental appears to be a human universal.<sup>53</sup> Holmes famously noted that even a dog knows the difference between being stumbled over and kicked.<sup>54</sup>

And yet mens rea also seems to be one of a handful of legal precepts that simply does not resonate with the general public.<sup>55</sup> True, the public's reaction to the notion that a criminal's state of mind should have something to do with his guilt has no doubt waxed and waned over time.<sup>56</sup> Many people's current skepticism about mental state defenses (including the general defense that the defendant did not have the required mental state) seems grounded on a perfectly appropriate and healthy skepticism of psychiatry and psychology.<sup>57</sup> But there also seems to be a deeper, and perhaps more longstanding, belief that serious criminal acts should be punished regardless of the actor's state of mind, simply because we can never be sure of what was in the actor's mind. Everyone understands that a Mafia hit and a hunting accident should generate different responses from the criminal law, but refinements beyond that seem troubling.<sup>58</sup>

53. See Stephen Morse & Morris B. Hoffman, *The Uneasy Entente Between Insanity and Mens Rea: Beyond Clark v. Arizona*, J. CRIM. L. & CRIMINOLOGY (forthcoming fall 2007) (manuscript at 7, available at <http://lsr.nelco.org/cgi/viewcontent.cgi?article=1147&context=upenn/wps>). But see Deborah W. Denno, *Criminal Law in a Post-Freudian World*, 2005 U. ILL. L. REV. 601, 610 & n.58 ("Commentators generally agree that primitive English law, developed during the fifth century, was basically grounded in strict liability.") (citing 2 POLLOCK & MAITLAND, *supra* note 52, at 470-73); Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1, 15 (2002) (suggesting that "the supposedly ancient concept of mens rea as evil motive is really a modern polemical construct"). This confusion about the historical pedigree of mens rea may have something to do with the fact that the criminal law itself—in the modern sense of the state punishing free-riders—is relatively recent. See Morse & Hoffman, *supra*, at 55-56. This confusion may also explain why the United States Supreme Court has described principles of mens rea as being "essential" to the criminal law, *Morissette*, 342 U.S. at 273-74, but has never held that they are so fundamental as to be required by substantive due process. Compare Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107 (suggesting constitutional limits to the legislative abolition of mens rea) with Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1278-79 (1998) (calling the notion that "individualized moral blameworthiness" is central to the criminal law a myth). The ambivalence of the Court and commentators on this constitutional question is no doubt framed by the emergence of the regulatory state and its increasing reliance on newly-created strict liability crimes.

54. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (Dover Publ'ns 1991) (1881).

55. The others that come to mind are the doctrines of complicity (and its cousin felony murder) and, in the civil arena, employment-at-will. The general public's uneasiness with these doctrines often emerges in jury selection. In my experience, it is not at all uncommon for prospective jurors to express disbelief that someone who did not pull the trigger could be guilty of murder, or that an employer can fire employees for almost any (or no) reason (at least in states, like Colorado, that remain employment-at-will states).

56. This vacillation seems to have corresponded roughly to a similar vacillation in the public's acceptance of the insanity defense. John Hinckley's acquittal did much to drive recent skepticism about insanity. See Morse & Hoffman, *supra* note 53, at 59-60.

57. See, e.g., *id.* at 63 (criticizing the "over-sciencing" of mens rea and insanity).

58. This skepticism about super-refinements of intentionality has been expressed by several commentators who have argued that the four flavors of intentionality recognized by the Model Penal Code—intentional, knowing, reckless, and negligent—in fact collapse into one another. See, e.g., Larry

Indeed, human brains have likely been built by evolution to give their owners a strong presumption that other humans' misbehaviors are intentional and not accidental. It is not difficult to imagine that a strong neural presumption of intentionality would have been highly adaptive. It is unlikely that our ancestors would have survived to be our ancestors had they not been equipped with powerful assumptions that the stranger coming over the hill was equipped with the same capacity for intentionality (e.g., murder) as they were.<sup>59</sup>

This leaves us with an impossible neural paradox. We have a deeply embedded sense that we should not punish accidents the same as non-accidents, yet an equally powerful sense that most human actions are intentional and a corresponding skepticism about protestations by the wrongdoer that the wrong was an accident. In fact, these questions have a normative content incapable of scientific assessment. Despite all of neuroscience's recent advancements, it still cannot discriminate, or indeed even define, the differences between, for example, acting intentionally and acting knowingly. Some of us have argued not only that these categories are logically indistinct,<sup>60</sup> but that they mask a normative continuum that really just boils down to one question: how bad was this behavior?<sup>61</sup> Jurors, not brain scanners, must answer that question.

In any event, this generalized resistance to the mens rea inquiry—at least to any form of the inquiry more refined than accident versus non-accident—may explain, in part, why so many people, including Sidney Lumet, wrongly assume that the focus of criminal trials is on factual

Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931 (2000); Morris B. Hoffman, Booker, *Pragmatism, and the Moral Jury*, 13 GEO. MASON L. REV. 455, 473–74 (2005); see also Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29 (discussing the "problem" of willful ignorance and the unsatisfactory treatment of that mental state by courts); Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY. 597, 597–60 (2001) (arguing that this culpable mental state does not fit into the current framework of the Model Penal Code). The same skepticism about our ability to assess mental states has driven five state legislatures to abolish the insanity defense altogether, and others to channel all mental state evidence into the insanity issue and to forbid it as a negation of mens rea. It has also driven the Supreme Court's deference to those legislative decisions. See *infra* note 62.

59. See, e.g., Morris B. Hoffman & Timothy H. Goldsmith, Commentary, *The Biological Roots of Punishment*, 1 OHIO ST. J. CRIM. L. 627 (2004). Of course, I do not mean to commit the naturalistic fallacy by suggesting that the fact we may have an evolutionary predilection to assume intentionality means that the law should reflect that predilection. But such a built-in prejudice would explain the difficulties legislators, judges, and jurors have with mens rea. See generally Owen D. Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141 (2001).

60. See *supra* note 58.

61. See Hoffman, *supra* note 58, at 474.

guilt.<sup>62</sup> At least in my experience, factual guilt is seldom a genuine trial issue,<sup>63</sup> and what most jurors end up struggling over is not “whodunit” but rather “what was that guy thinking?”

### III. A BRIEF HISTORY OF THE MYTH

Truth has always been an important human idea. The Egyptians, Sumerians, and Hindus (as just a small cross-section) all worshipped deities devoted to truth.<sup>64</sup> Cicero’s first division of moral goodness was “the knowledge of truth.”<sup>65</sup> The significance of the association between the good and the true is that it simultaneously recognizes the human capacity to lie and the categorical, or at least social, value of resisting the temptation to do so in most circumstances.<sup>66</sup>

In ancient systems, the unity of God and ruler meant that “truth-finding” wasn’t any more complicated than a matter of accessing revealed truth. The myth of innocence was not necessary, or even conceivable, in

62. Even the United States Supreme Court has at times exhibited some hostility toward mens rea, driving it to the same sort of confusion between mens rea and excuse exhibited by jurors and legislators. For example, despite acknowledging the common law and pre-common law pedigree of mens rea, the Court has never found that mens rea is so fundamental as to be required by substantive due process. *See supra* note 53. To be fair, this result probably has more to do with the Court’s deference to states on these issues of defining crimes than with its own hostility toward mens rea. *See, e.g.,* *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (upholding Montana statute prohibiting introduction of evidence of voluntary intoxication to negate mens rea); *Patterson v. New York*, 432 U.S. 197, 206–07 (1977) (upholding New York statute shifting to defendant the burden of proving defense of “extreme emotional disturbance”); *Powell v. Texas*, 392 U.S. 514, 535–37 (1968) (upholding Texas public drunkenness law, even as applied to chronic alcoholics who allegedly cannot “control” their behavior). Moreover, in *Clark v. Arizona*, 126 S. Ct. 2709 (2006), the Court not only upheld Arizona’s truncated insanity definition, *see id.* at 2718–25, but also upheld the Arizona case-based rule channeling most mental health evidence into insanity and away from mens rea, *see id.* at 2725–29, making it extremely difficult, if not impossible, to show already skeptical jurors that a sane but mentally disturbed defendant may nevertheless have lacked the required mens rea because of his mental condition.

63. There are, of course, cases in which factual guilt is very much at issue, and even some categories of cases that seem more likely to raise questions about factual guilt, such as sex assaults on children, where there is often no forensic evidence. But they are the exception and not the rule.

64. The Egyptian goddess of truth and justice was Maat, who represented “the order which rules the world through balance.” PATRICIA TURNER & CHARLES RUSSELL COULTER, *DICTIONARY OF ANCIENT DEITIES* 298 (Oxford Univ. Press 2001) (2000). The Sumerian god of truth was Kittu, but, interestingly, his job title did not include justice; that job was his brother’s, Misharu. *See* James W. Bell, *Sumerian Gods, Demons & Immortals Whose Names Start with “K”*, <http://www.jameswbell.com/geog0050knames.html> (last visited March 29, 2007). Addanari is the Hindu goddess of truth, nature, and religion. TURNER & COULTER, *supra*, at 14. Shiva, among her many other jobs, is also associated with truth. *Id.* at 427.

65. M. TULLIUS CICERO, *DE OFFICIIS* 18–19 (Walter Miller trans., Harvard Univ. Press 1961) (1913).

66. There may be biological roots to our deepest notions of right and wrong, including our imperfect worship of the true, grounded in the fact that we evolved as highly social animals in relatively small groups. *See, e.g.,* Morris B. Hoffman, *The Neuroeconomic Path of the Law*, in *LAW AND THE BRAIN* (Semir Zeki & Oliver Goodenough eds., 2006); Edward O. Wilson, *The Biological Basis of Morality*, *THE ATLANTIC MONTHLY*, Apr. 1998, at 53.

these systems because God told us—directly or through his anointed ruler—what was true and what was false, what was right and what was wrong, and who was guilty and who was innocent.<sup>67</sup> But as civilizations became more complex and as the reach of absolute divine rule was diluted by bureaucracy (and, in the West, by the Church), systems had to be developed as proxies for the unerring truth-detecting abilities of individual god-kings. A certain lack of trust in the divine proxies was understandable, and more forgivable than a lack of trust in the divine itself. Justice and truth-finding became forever infected with the imperfections of man.

Thus, for example, even the Babylonians, for whom the concepts of law and justice played such an early and central role, and who identified justice with two different gods, Marduk and Shamash, developed a court system in which cases were heard by up to four judges, whose verdicts were reviewable by the king.<sup>68</sup> The Babylonians recognized that justice systems administered by non-divine but divinely-appointed judges might be infected with human error correctible only by the divine king himself.<sup>69</sup>

Another complication is that as the gods began to take on more and more characteristics of man—the gods of the Greeks fighting and lying and philandering and otherwise acting thoroughly human—gods needed their own dispute resolution system, and mythical justice began to be administered in two discrete systems, one for gods and one for men. Thus, the Greek goddess Dike was the goddess of human justice, but her mother Themis was the goddess of divine justice.<sup>70</sup>

But “justice” has always been much broader than mere “truth-finding.” Indeed, the image of justice with the balanced scales—probably first represented by Greek depictions of Dike and Themis, and later copied by the Roman goddess *Justicia*—may well have been meant to reflect the

67. Although as already mentioned, in one of the Old Testament’s quintessentially anthropomorphic visions of God, even He occasionally gets confused between guilt and innocence. *See supra* note 22.

68. MSN Encarta Encyclopedia, *Babylonia*, [http://encarta.msn.com/encyclopedia\\_761571780\\_2\\_\\_8/Babylonia.html#s8](http://encarta.msn.com/encyclopedia_761571780_2__8/Babylonia.html#s8) (last visited March 29, 2007); Gateways to Babylon, *Marduk*, <http://www.gatewaystobabylon.com/gods/lords/marduk1.html> (last visited March 29, 2007).

69. This notion of justice by divine intervention seems to be a human universal, often expressed in the form of trial by battle or ordeal, discussed in the text accompanying notes 71–77. Where, you might ask, were the interventionist powers of Marduk (or Apollo) to prevent the errors in the first place? The answer, in part, is probably grounded in the nature of polytheistic systems, in which individual gods had limited, and competing, powers. Marduk and Apollo may have been divine, but their ability to prevent injustice in the human world was compromised by the meddling influences of dozens of other powerful gods, who cared about things other than justice.

70. In some ways this distinction may have mimicked the distinction ancients made between public and private wrongs.

balanced and proportionate approach to *punishment*, not the weighing of evidence of factual guilt, as in the modern symbolism.

Still, the ancients were well aware of the fallibility of man, and indeed even of the increasing fallibility of their anthropomorphic gods. As forms of democracy and republican government erupted onto the human stage and replaced infallible kings, even if temporarily, ancient systems begin to worry about factual guilt along with the divine challenge of just punishment. Thus, classical and post-classical trial systems were very much interested in the problem of wrongful conviction. By the time of the always practical Romans, trial systems were being designed as much for truth-finding as punishment, which was still left largely to the Senate or emperor, or their magisterial representatives.<sup>71</sup>

But all this began to change with the ascendancy of the Church. All-knowing god-kings, with their potentially fallible human agents, and classical trial systems designed to check fallible but powerful rulers, began to be replaced with a single all-knowing God, just interventionist enough to take worries about factual innocence back off the table. Thus, medieval truth-finding systems, both on the continent and in England, were once again based on revealed truth, in the form of reconstituted theological versions of the ancient rights of trial by battle and trial by ordeal.<sup>72</sup> The guilty man lost the trial by battle because God intervened to cause him to lose. The guilty were burned in the ordeal of hot iron because God intervened to cause that just result.

The jury, though long in existence in Europe, and likely imported to England during the Conquest, was nevertheless exceedingly rare from the time of Charlemagne through the mid-1200s.<sup>73</sup> For most serious crimes,

71. Indeed, most ancient, classical, and even medieval juries were presentment juries, that is, they typically acted as modern-day grand juries, screening cases for probable cause before the ultimate guilt or innocence, and punishment, was determined later by other methods. WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 106 (2d ed. 1971). It took the English presentment jury several centuries to evolve first from mere presentment, then to a mixed system of presentment and trial before a subset of the presentment jurors, then to a completely separate system of non-overlapping presentment and trial juries. *Id.* at 125–38.

72. Trial by battle and trial by ordeal both have rich pre-medieval histories, reaching back as far as recorded civilizations. There is evidence that the Israelites, pre-Roman era Germanic tribes, and Swedish Goths all practiced a form of trial by battle, which then spread to Europe through the Vikings. EDWARD J. WHITE, *LEGAL ANTIQUITIES: A COLLECTION OF ESSAYS UPON ANCIENT LAWS AND CUSTOMS* 109–12 & n.10 (1913). Various forms of the ordeal are just as old, appearing to have been practiced by the Egyptians (from the time of Ahmase II), ancient Greeks, Israelites, and even Hindus. *Id.* at 141–43 & n.4.

73. See THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800*, at 11 (1985); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I* 37–40 (2d ed. 1898). Some legal historians have even argued that the jury trial began as a procedural antecedent of the ordeal, with the role of proto-jurors limited to deciding which ordeal a given defendant should face. See,

trial by ordeal and, to a lesser extent, trial by battle, remained the Crown's and Church's trial method of choice.

The worm of revealed truth began to turn yet again in the early part of the thirteenth century, as a result of increasing theological skepticism about God's interest in the everyday activities of man,<sup>74</sup> as well as a few prominent scandals in which priests performing these truth-finding rituals had been bribed by the winning side.<sup>75</sup> The ordeal was banned by the Church in 1215.<sup>76</sup> And although trial by battle remained on the books in England until 1819, it fell out of favor in the thirteenth century and all but disappeared by the end of Edward III's reign.<sup>77</sup> Largely by default, trial by jury became the English truth-finding mechanism for serious crimes.

In England, the idea that the state might wrongfully accuse an individual of committing a crime ascended at roughly the same time as the divine perfection of kings descended, and nobles became not the enforcers of the King's law but its principal political targets.<sup>78</sup> The problem was simple: people lacked confidence in the divine truth-finding abilities of kings, yet kings retained the same powers of accusation as they did in the days their powers were thought divine. The criminal law became an important tool in the King's struggle for retaining that power, and prominent anti-royalist

*e.g.*, THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 120 (Little, Brown & Co. 5th ed. 1956) (1929).

74. As one English legal historian has put it, "The clergy had never given an unqualified assent to the ordeal; they had been the means of its gradual disuse, as they deemed it an impious reference to Heaven." JOHN PROFFATT, *A TREATISE ON TRIAL BY JURY, INCLUDING QUESTIONS OF LAW AND FACT* § 28, at 41–42 (Fred B. Rothman & Co. 1986) (1877).

75. One prominent priest admitted that he had felt a moral duty to assist in achieving the "right" result. PLUCKNETT, *supra* note 73, at 114–15.

76. This ban was part of Pope Innocent III's Fourth Lateran Council. *Id.* at 118–19.

77. LLOYD E. MOORE, *THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY* 123 (2d ed. 1988); WHITE, *supra* note 72, at 118; Daniel Klerman, *Settlement and the Decline of Private Prosecution in Thirteenth-Century England*, 19 *LAW & HIST. REV.* 1 (2001).

78. Many of the most significant English criminal law reforms can be traced to Parliament's own fear of prosecution. These reforms included Parliament's abolition of the Crown's unlimited peremptory challenges in 1305, An Ordinance for Inquests, 1305, 33 Edw., Stat. 4 (Eng.); limitations on the King's right to pardon homicides imposed in 1389, Other Statutes Made at Westminster, 1389, 13 Rich. 2, c. 1 (Eng.); the first right to counsel (in treason cases only) in 1695, An Act for Regulateing of Tryals in Cases of Treason and Misprision of Treason, 1695, 7 & 8 Will. 3, c. 3 (Eng.); and its repeal of the ban of "full defense" (i.e. allowing defense counsel to address the jury) in felony cases in 1836, An Act for Enabling Persons Indicted of Felony to Make Their Defence by Counsel or Attorney, 6 & 7 Will. 4, c. 114 (1836). Some scholars have argued more generally that in both England and America legislators have been willing to implement the most significant protections in criminal law and procedure at times when they believed themselves most at risk of criminal prosecution. See Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 *U. ILL. L. REV.* 599.

members of Parliament were occasionally accused on trumped-up charges and executed.<sup>79</sup>

It was this fear—of political repression through unjust criminal prosecution—that caused a kind of neo-classical rediscovery in England of the problem of factual innocence. The idea that the criminal law could be, and was, used as an unjust tool of political repression was a significant and resonating narrative of the Enlightenment—a narrative that had important repercussions in the American colonies. American skepticism, even hatred, of the English criminal justice system was a central part of the pre-revolutionary experience. The new nation's preoccupation with factual guilt coincided exactly with its collective suspicion of our English ancestors' woeful, or at least suspicious, ability to detect the truth in politically charged cases.

Yet even as the jury trial emerged in England and America as the pre-eminent, and humanly flawed, form of truth-detection, it would be a mistake to believe that over the broad swathe of its history it was concerned primarily with factual guilt. It was not. It was much more concerned with the punitive aspects of moral guilt, that is, with the punishment that a just and merciful king or society should impose on the factually guilty. After all, apart from political prosecutions, English life went on, and ordinary criminals needed to be detected and prosecuted. And the overall confidence in the reliability of these tasks remained high.

In fact, throughout the police-less seventeenth and eighteenth centuries, ordinary criminal cases in England were frequently initiated and, in the modern parlance, “put together,” by victims or witnesses themselves, with any additional rudimentary investigation done by the magistrates at what we would call the preliminary hearing.<sup>80</sup> Even after the creation of professional police in London in the late 1800s, magistrates retained the power to summarily convict or acquit in misdemeanor cases, and it seems the vast bulk of prosecutions not only terminated at the magistrate level, but frequently enjoyed a legislative exemption from the ordinary presumption of innocence.<sup>81</sup> Parliament might have had serious worries about the

79. Perhaps the most famous examples were the political trials of the 1680s conducted by Judges Jeffreys and Scroggs, and the treason trials of the later Stuarts. See JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 67–79 (2003).

80. See CYNTHIA B. HERRUP, *THE COMMON PEACE: PARTICIPATION AND THE CRIMINAL LAW IN SEVENTEENTH-CENTURY ENGLAND* 68 (1987); PETER KING, *CRIME, JUSTICE AND DISCRETION IN ENGLAND: 1740–1820*, at 17 (2000); see also John Styles, *Sir John Fielding and the Problem of Criminal Investigation in Eighteenth-Century England*, 33 *TRANSACTIONS OF THE ROYAL HIST. SOC'Y* 127 (5th series 1983).

81. See Bruce P. Smith, *The Presumption of Guilt and the English Law of Theft, 1750–1850*, 23 *LAW & HIST. REV.* 133 (2005).

truth-finding abilities of political prosecutions against its own members, but the establishment of guilt in ordinary criminal cases was largely a matter of routine, either at the magistrate or judge level, often bolstered by the statutory presumption of guilt.

Indeed, even in ordinary cases that managed to reach the Crown Courts, the most important function of English jurors, as early as the 1300s, was not to assess factual guilt, which was still pretty much a given, but rather to act as a buffer between the guilty and what came to be viewed by ordinary citizens as grossly excessive levels of punishment. Thomas Green describes mid-fourteenth century English jury verdicts as “judgments about who ought to live and who ought to die, not merely determinations regarding who did what to whom and with what intent.”<sup>82</sup> Blackstone’s famous phrase “pious perjury” describes the not uncommon nullification by seventeenth century juries in cases where they believed death was unwarranted even for a factually guilty defendant.<sup>83</sup> Even as late as the eighteenth century, English jury trials were in fact “sentencing proceedings,” whose whole function was to persuade the jury to convict the factually guilty defendant of a lesser non-capital offense.<sup>84</sup>

How could it be that factual guilt was so taken for granted even after trials were no longer a matter of revealed truth? The answer may have something to do with the oath. God-fearing people took the oath seriously. A truth-finding system that gives witnesses, including the accused, the choice between telling the truth and suffering eternal damnation can have a high level of confidence in its accuracy, and needs no myth of factual innocence.<sup>85</sup> As our Anglo-American faith began to wane, so too did our confidence in the oath, and therefore our confidence in the truth-finding abilities

82. GREEN, *supra* note 73, at 98.

83. WILLIAM BLACKSTONE, 4 COMMENTARIES \*238–39.

84. John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 41 (1983); *see also* J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND: 1660–1800*, at 419–30 (1986).

85. In fact, a high confidence in the oath was reflected in a third kind of medieval trial system—trial by compurgation, sometimes also called “the wager of law.” In criminal trials by compurgation, the accused, after taking his oath of innocence, was required to call a designated number of compurgators, or “oath-helpers.” The required number and rank of the compurgators varied according to the seriousness of the charge. If the required quantity and quality of compurgators appeared and vouched by their own oaths for the defendant’s oath of innocence, the defendant was declared innocent without any further messy inquiry into the actual facts. *See generally* ROBERT VON MOSCHZISKER, *TRIAL BY JURY* §§ 43–48, at 34–38 (1922). *See also* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996) (analyzing the impact of our modern failure to recognize the importance of the oath on the meaning of the Fifth Amendment’s prohibition of “compell[ing]” a witness to testify).

of any of our systems.<sup>86</sup> It is that loss of confidence in the oath that may have become the kernel at the core of the modern myth of factual innocence.

There is almost no data about colonial and early post-colonial American juries, and almost no innocence liturgy from this period. There is no doubt that slavery—the great festering constitutional issue—left in its wake a profound skepticism about southern governments' ability, and indeed even their intent, to treat the newly freed slaves justly in any manner of things, including the criminal justice system. Thus, most of the earliest American innocence literature is associated with abolitionist and post-abolitionist views of racial injustice, slavery itself being a kind of archetypical wrongful conviction.<sup>87</sup> From Reconstruction and Jim Crow forward, there has been a strong and no doubt entirely earned (though largely retrospective) presumption of wrongful conviction whenever all white policemen arrested, and all white juries convicted, black defendants.<sup>88</sup> This only reinforced our already libertarian skepticism from the Revolutionary period.

The result is an American race-based strain of the myth of innocence that is so robust it has been virtually impervious to the winds of changing politics. From Huckleberry Finn to the Ox-Bow Incident, through and beyond World War II, there has been a powerful American narrative about the shabby way the criminal justice system mistreats the disenfranchised and powerless.

This political strain of the myth has somehow metastasized into an overall lack of confidence in the system's truth-detection abilities, quite apart from the race or ethnicity of its targets. Indeed, in the allegedly bucolic and innocent post-WWII period—when confidence in government was arguably at an all time high—Erle Stanley Gardner's Perry Mason was a staple of pop literature, then radio and television.<sup>89</sup> And in the Perry Ma-

86. For example, concerns in the mid-1700s about wrongful convictions at the Old Bailey led to several evidentiary reforms, including rules relating to confessions and corroboration, and allowing a defendant to be represented by a lawyer. Smith, *supra* note 22, at 1198.

87. Not all of the earliest innocence narratives were race-based. For example, there was a notorious case of the wrongful conviction and near-execution (the supposed murder victim showed up at the hanging) of two free, white Vermont men in 1819. See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 121–22 (2002).

88. Still, I know of no reliable data on the *rates* at which innocent black defendants were railroaded by the criminal law, both North and South, in the last half of the nineteenth century. The appalling image of perfectly innocent black men being lynched without trials is so repugnant that it has drowned out a very different question: what effect did the racism of that period have, and might still be having, on wrongful conviction rates?

89. Gardner published the first of what would be eighty-two Perry Mason novels in 1933. Warner Brothers actually produced six feature Perry Mason films in the mid- to late-1930s, but the stories did not reach mass appeal until a CBS afternoon radio show that ran from 1944 to 1955. Perry Mason had

son stories the police and prosecutors suffered a 100% error rate—the charged person (always white and often well-to-do) was *never* guilty, and was saved not by Henry Fonda or innocence project students but by Raymond Burr.<sup>90</sup>

And then there is O.J. Simpson. In a delicious inversion of the innocence narrative, this time the black defendant is, from all indications, actually guilty,<sup>91</sup> and the system still can't get it right.

What I call in this essay the “myth of factual innocence” is in some sense a distorted version of the presumption of innocence.<sup>92</sup> It is one thing to presume the innocence of an untried defendant, and quite another to presume it of an already convicted one. Of course, the myth of innocence reinforces the presumption of innocence. It is in the trial process itself—where individual jurors are called upon to assess both the factual and moral guilt of an individual defendant—that the myth has its most palliative value. We *want* jurors to believe the arrest and prosecution systems are so completely unreliable that virtually everyone is factually innocent, in order to reinforce the presumption that the particular defendant before them is innocent. We *want* all jurors to be Henry Fondas, and we *want* all jurors to believe there will be a terrible miscarriage of justice if they are not Henry Fondas. But at what cost?

#### IV. COSTS OF THE MYTH

##### A. *Loss of Confidence*

The most obvious cost of the myth of factual innocence is the general public's loss of confidence in the criminal justice system, both in policing and in adjudication. More than fifty years of being told by the fourth estate that innocent people are regularly arrested, and only slightly less regularly

three runs on television, all starring Raymond Burr as the world's winningest criminal defense lawyer: once as a weekly series from 1957 to 1966; then in one season as a series in 1973; and finally as intermittent made-for-television movies that ran from 1985 through Burr's death in 1993.

90. Television took back the mantle of innocence in 1963 in *The Fugitive* series, which ran through the 1967 season.

91. Although acquitted in the criminal case, Simpson was found in the civil case to have caused the deaths of Nicole Brown and Ronald Goldman. *Rufo v. Simpson*, 103 Cal. Rptr. 2d 492, 497 (Ct. App. 2001).

92. The presumption of innocence—at least the obligation of the state to prove a defendant's guilt, if not necessarily beyond a reasonable doubt—seems to be as deeply embedded in the history of civilization as the ideas of truth and falsity, and human fallibility. It traces its roots through Deuteronomy, Sparta, Athens, Trajan's Rome, and the earliest English common law. For a discussion of the history of the presumption of innocence, see *Coffin v. United States*, 156 U.S. 432, 454–56 (1895). *But see supra* note 81 and accompanying text (discussing the English statutory presumption of misdemeanor guilt frequently operating at the magistrate level).

convicted, has had its effects. The presumption of innocence, at least in the general public's mind, has become almost irrebuttable. With so many innocent folks caught up in the web of such an unreliable system, guilty verdicts themselves are at risk of losing their reliability, and convictions their opprobrium.

This skepticism about the system is palpable in jury selection. In my experience, it is not uncommon for prospective jurors—especially those who have never actually served on a jury—to express the belief that the trial is some kind of battle of lawyers largely unrelated to truth, that the best lawyers usually win, and therefore that poor people who can't afford the best lawyers tend to be wrongfully convicted.<sup>93</sup> This loss of confidence is also quite regularly expressed by prospective jurors in a form some commentators have dubbed “the CSI bias,” in which prospective jurors indicate their confidence in the system is so low that they could not convict anyone without irrefutable forensic evidence.<sup>94</sup>

Having said that, I must also say that I do not believe these views are having significant impacts on verdicts, at least in my jurisdiction, both because jurors with the most extreme forms of these views are being excused for cause or peremptorily, and because jurors in large part can put their prejudices aside, actually pay attention to the evidence and follow the instructions, and do the right thing in the case at hand despite grand views about the system as a whole.<sup>95</sup> Nevertheless, the loss in confidence is hurting the system in the following less direct ways.

### B. *Undervaluing Public Defenders/Overvaluing Lawyering*

The myth of factual innocence condemns defense lawyers to the same rubbish bin of incompetence as jurors. All these innocent people are in prison because their defense lawyers were not Perry Mason. If you are rich enough to hire Perry Mason, you get off, sometimes even if you are guilty.

93. Just this year I was astonished by a prospective juror in a criminal case who told us in chambers that he could not be fair because he had heard that the lowest ranking law students are the ones that go on to become district attorneys, and that such under-qualified lawyers must surely be prosecuting lots of innocent people, especially ones who can't afford “real lawyers.”

94. These views are probably just fallout from the popular television shows that oversell the state of forensic science. Even so, an exaggerated reliance on forensics plays into an exaggerated view of factual innocence. For a thought-provoking criticism of claims that the “CSI effect” is real, see Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 *YALE L.J.* 1050 (2006).

95. See John L. Kane, *Reasonable Doubt and Other Shibboleths*, *LITIG.*, Fall 2002, at 22. Moreover, as I've mentioned above, in their everyday lives and for ordinary (that is, non-trial) purposes, people seem to continue to have a high confidence in the reliability of the system. See *supra* text accompanying notes 48–49.

But if you are so poor you must rely on public defenders instead of “real lawyers,” your chances of being rightly acquitted are next to zero.

Despite the innocence project anecdotes about sleeping, drunk, and otherwise incompetent defense lawyers, this picture of rampant defense incompetence couldn't be further from the truth, at least in my experience. I have told friends, and even written,<sup>96</sup> that if they get into serious criminal trouble in Denver, the first thing they should do is give away their assets in order to qualify for a public defender. Yes, public defenders are overburdened and underpaid, but on the whole they are also the finest single collection of criminal defense lawyers around, and for good reason—experience. I would stack the best of our public defenders against any private defense lawyer I know.<sup>97</sup>

Somewhat paradoxically, the low esteem into which the myth of innocence casts public defenders simultaneously overvalues lawyering itself, not unlike how it overvalues forensics. Contrary to public perception, the best facts win, not the best lawyers. Trials are contests of facts, not contests of lawyers. Some of the best lawyering I have ever seen has resulted in spectacular losses, some of the worst in spectacular wins. It's the evidence that's important to outcome, not the oratorical or sartorial abilities of the messengers.<sup>98</sup>

The view that the best lawyers win and the worst lawyers lose, that public defenders are bad and highly paid private defense lawyers are good, not only does terrible damage to the public's already waning confidence in the system, it has the pernicious effect of reinforcing all the worst stereotypes of the system as being hopelessly racist and classist. Not only do innocent people get wrongly convicted, so this stereotype goes, it is the poor and disenfranchised—those who cannot afford Perry Mason—who are getting disproportionately wrongfully convicted. Conversely, rich white

96. Morris B. Hoffman, Op-Ed, *Free-Market Justice*, N.Y. TIMES, Jan. 8, 2007, at A19.

97. Here's where I must admit my own popular and scholarly contributions to the myth of public defender incompetence. Along with two economist co-authors, in 2005 I published an econometric study of public defender effectiveness rates as compared to those of private counsel. Morris B. Hoffman et al., *An Empirical Study of Public Defender Effectiveness: Self-Selection by the "Marginally Indigent,"* 3 OHIO ST. J. CRIM. L. 223 (2005). Our data showed that public defenders were less effective than private lawyers, but a closer reading of that data suggested a reason having nothing to do with abilities: public defender clients tend to be self-selected for guilt. I reprised this analysis in an opinion piece published in the New York Times. See Hoffman, *supra* note 96.

98. Granted a certain minimum level of competence is necessary. But here again the myth has mixed up incidents with incidence. Sure, there are terrible miscarriages of justice because defense counsel are too incompetent to defend defensible cases (and, of course, miscarriages of justice in the other direction when incompetent prosecutors are too incompetent to prove provable cases). But at what rates?

men who are guilty are regularly getting off because of their highly paid lawyers.

People who believe this may watch lots of movies and TV, but they are not spending much time in our courtrooms. As these mistaken beliefs percolate through the culture and through the population of prospective jurors, they make it only more difficult to find jurors who will be able to decide the case on the merits. The myths of innocence, trial gamesmanship, and unequal treatment become self-fulfilling.

### *C. Undervaluing Jurors*

While the myth of innocence overvalues lawyering, it undervalues juroring, and for precisely the same reasons. It is because jurors are such dunderheads, in whose midst we can hardly expect a Henry Fonda once a year let alone every day, that they get bamboozled by slick and corrupt prosecutors (when they wrongfully convict) or by slick and greedy big name defense lawyers (when they wrongfully acquit), or so this stereotype goes. This kind of caricature of jurors is as far from the truth as the caricature of lawyers.

In my experience, jurors almost always take their jobs, and oaths, very seriously. It is not at all uncommon for them to express, in our post-verdict debriefings, that their emotions told them one thing but that the facts and law required them to do the other, in either direction. In many cases in which they have returned not guilty verdicts, jurors tell me afterwards that they thought the defendant was probably guilty, but that the prosecution simply did not prove the case beyond a reasonable doubt. Conversely, I have had many jurors, especially in homicide cases, dissolve into tears because they knew the consequences of their guilty verdict but were compelled by the evidence and the instructions to render it anyway.

The myth of innocence contributes to a terribly impoverished view of jurors as either complete idiots or secret racists, incapable in either event of evaluating evidence fairly and honoring their oaths to decide the case based on that evidence and based on laws with which they might not even agree. Again, as with the other aspects of the myth, as this impoverished view becomes accepted truth in the community of prospective jurors, it threatens to self-fulfill.

### *D. Increasing the Rate of Wrongful Pleas*

One of the worst effects of the myth of innocence is that its widespread acceptance among the public will itself increase the chances that

innocent defendants might plead guilty. After all, if an innocent person is wrongfully accused of a serious crime, and believes the criminal trial system is so unreliable that he has a good chance of being wrongfully convicted of the charged offense despite his innocence, he will be under tremendous pressure to plead guilty to a less serious charge even though he is innocent. And of course because the system is 95% about guilty pleas and only 5% about trials, even a slight increase in the rate of wrongful pleas, unlike a slight increase in the rate of wrongful trial convictions, will have a tremendous impact on the overall numbers of wrongful convictions.

### *E. Neglecting Moral Guilt*

I've saved for last what I believe to be the most profound and damaging cost of the myth of factual innocence: by overemphasizing factual guilt the system neglects moral guilt. This is the central failing of narratives like *12 Angry Men*.

Prospective jurors are unprepared for the arduous task of assessing a defendant's intentionality in part because they so regularly come into our courtrooms assuming trials are only about factual guilt. It is not uncommon in my experience to have jurors let out audible gasps when I move from the instructions dealing with the charges to the ones dealing with the lesser-included offenses based on less culpable mental states. I can imagine what they are thinking: "What? I spent the last week thinking my job was to decide whether the prosecution proved the defendant pulled the trigger. And now, after all the evidence has been presented, and it is clear to everyone (despite the fact that so many innocent people get convicted) that this defendant is not innocent and that he did in fact pull the trigger, it turns out you, judge, have changed everything around and are now asking us to decide what was inside defendant's head at the time he pulled the trigger?"

Granted, in most cases the lawyers will have alerted the jurors to the question of intentionality in their openings, examinations, and closings. This problem can also be blunted by giving some of the elemental and culpability instructions early on. Still, these citizens have spent their adult lives being told that that the system is in shambles, that innocent people are regularly falsely accused and falsely convicted, and therefore that their trial energies will be consumed, as were Henry Fonda's and his colleagues', in the difficult task of ferreting out the innocence lurking behind the insurmountable evidence of guilt.

This perception not only predisposes our jurors to speculate, as did Henry Fonda and his colleagues, about unreasonable alternative factual explanations, and to substitute an any-doubt test for a reasonable doubt

test,<sup>99</sup> it also has the potential to prejudice defendants who have defensible cases based on lack of the required mens rea. When the myth is so exclusively focused on factual guilt, and when the myth is overcome by overwhelming evidence, jurors will have little patience with a factually guilty defendant's contention that he is morally and legally innocent because of what was inside his head at the time of the crime. That is, the myth of innocence reinforces what is already, as discussed above, a widespread skepticism about mental defenses.<sup>100</sup>

### CONCLUSION

*12 Angry Men* was a good movie, and everyone interested in the jury system should see it. But it buttresses a long and unfortunate tradition of grossly overestimating the frequency at which factually innocent people are caught up in the criminal justice system.

Yes, we want jurors to force prosecutors to prove both the act and the intention beyond a reasonable doubt. We also should care very much about factually innocent defendants who are wrongfully convicted despite these presumptions and all the other protective mechanisms in place. But by conflating the pre-trial presumption of innocence with a wholly unsupported post-trial presumption that the criminal justice system is highly unreliable, we threaten to turn the myth into reality, especially in our plea-bargain dominated era. And by sending the message to prospective jurors that trials are typically about factually innocent people wrongly accused, we also risk them overlooking the factually guilty but morally innocent, that is, the defendant who committed the act but without the required intention.

So what's a culture to do? To begin with, legal scholars could start a more comprehensive and serious hunt for a meaningful wrongful conviction denominator, instead of continuing to swoon about the numerator.<sup>101</sup> It also wouldn't hurt if they paid some attention to the problem of wrongful acquittals.

Journalists could help by trying to inject some perspective, let alone any critical analysis, into their stories on innocence projects and other con-

99. See *supra* note 4.

100. See *supra* text accompanying notes 55–61.

101. The only serious effort to do so that I am aware of has been by D. Michael Risinger, *Convicting the Innocent: An Empirically Justified Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY (forthcoming 2007), available at <http://ssrn.com/abstract=931454>. Professor Risinger estimates a lower bound of 3.3% for wrongful trial convictions. *Id.* at 15. Given the 95% plea bargaining rate, we must multiply that 3.3% estimate by 5% in order to estimate the overall wrongful conviction rate. That yields 0.165%, a number within the range I propose in this essay (1.95% to 0.0016%), and still a far cry from the histrionics of innocence advocates.

tributions to the mythology of innocence. Having regular crime/court beat writers do these stories, rather than feature or editorial writers, might be one good way to inject perspective.

Trial lawyers and judges can help by making clear early on that a crime consists of both an act and an intention, and by being vigilant in excusing prospective jurors whose focus on the act threatens to blind them to the intention, or whose deeply flawed views about the rate of wrongful convictions threatens to turn them into Henry Fondas hunting for unreasonable doubt.

But I'm not too sanguine. Culture, especially legal-academic culture, is an awfully big battleship to turn. Besides, "Innocent Man Convicted" just sells more movie tickets and newspapers, and gets more attention from student-editors of law reviews, than "Guilty Man Convicted" or even "Guilty Man Acquitted."