ASIDE

n GUILTY MEN

ALEXANDER VOLOKH†

And Abraham drew near, and said, Wilt thou also destroy the righteous with the wicked?

Peradventure there be fifty righteous within the city: wilt thou also destroy and not spare the place for the fifty righteous that are therein?

That be far from thee to do after this manner, to slay the righteous with the wicked: and that the righteous should be as the wicked, that be far from thee: Shall not the Judge of all the earth do right?

And the Lord said, If I find in Sodom fifty righteous within the city, then I will spare all the place for their sakes.

And Abraham answered and said, Behold now, I have taken upon me to speak unto the Lord, which am but dust and ashes:

Peradventure there shall lack five of the fifty righteous: wilt thou destroy all the city for lack of five? And he said, If I find there forty and five, I will not destroy it.

And he spake unto him yet again, and said, Peradventure there shall be forty found there. And he said, I will not do it for forty's sake.

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All translations of quotations are my own, unless otherwise noted.

> And he said unto him, Oh let not the Lord be angry, and I will speak: Peradventure there shall thirty be found there. And he said, I will not do it, if I find thirty there.
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> And he said, Behold now, I have taken upon me to speak unto the Lord: Peradventure there shall be twenty found there. And he said, I will not destroy it for twenty's sake.
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> And he said, Oh let not the Lord be angry, and I will speak yet but this once: Peradventure ten shall be found there. And he said, I will not destroy it for ten's sake.[1]

I. THE *n* CONTROVERSY

"[B]etter that ten guilty persons escape, than that one innocent suffer," said English jurist William Blackstone.[2] The ratio 10:1 has become known as the "Blackstone ratio."[3] Lawyers "are indoctrinated" with it "early in law school."[4] "Schoolboys are taught" it.[5] In the fantasies of legal academics, jurors think about Blackstone routinely.[6]

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[1] *Genesis* 18:23-:32 (emphasis omitted). All biblical quotations are from the King James version, unless otherwise noted.

[2] 4 WILLIAM BLACKSTONE, COMMENTARIES *352.

[3] William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 333 n.17 (1995).

[4] G. Tim Aynesworth, Letter, *An Illogical Truism*, AUSTIN AM.-STATESMAN, Apr. 18, 1996, at A14, *available in* 1996 WL 3425843. Specifically, it is "drilled into [first year law students'] head[s] over and over again." Hurley Green Sr., *Shifting Scenes: Pit-Bull Media Continues*, CHI. INDEP. BULL., Jan. 2, 1997, at 4, *available in* 1997 WL 11581791 ("I think it was attributed to a Supreme Court judge."). After they learn it, according to the Prime Minister of St. Vincent, they tell it to us. *See A Package of Caribbean Newsbriefs*, AP Worldstream, Aug. 14, 1997 (on file with the *University of Pennsylvania Law Review*) ("'The lawyers tell us that it is better that 10 guilty men or women escape rather than one innocent person be found guilty.'" (quoting St. Vincent Prime Minister Sir James Mitchell)).

[5] Dorsey D. Ellis, Jr., *A Comment on the Testimonial Privilege of the Fifth Amendment*, 55 IOWA L. REV. 829, 845 (1970).

[6] *See* Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271, 274 (1995). Park states:

> Opponents of the use of propensity evidence fear that it will have the practical effect of changing the burden of proof. The jurors may think, "Now that we know what else this guy did, we're not going to worry as much as Blackstone would about convicting an innocent man. Sure, it's better to let ten guilty men go free than to convict an innocent man in the case where the man's really completely innocent. But here, he's not completely innocent . . . ."

Id. (footnote omitted).

But why ten? Other eminent legal authorities through the ages have put their weight behind other numbers. "One" has appeared on *Geraldo.*[7] "'It's better for four guilty men to go free than one innocent man to be imprisoned,'" says basketball coach George Raveling.[8] However, "[i]t's better to turn five guilty men loose than it is to convict one innocent one," according to Mississippi's former state executioner, roadside fruit stand operator Thomas Berry Bruce, who ought to know.[9] "[I]t is better to let nine guilty men free than to convict one innocent man," counters Madison, Wisconsin, lawyer Bruce Rosen.[10] Justice Benjamin Cardozo certainly believed in five for execution,[11] and allegedly favored ten for imprisonment,[12] which is a bit counterintuitive. Benjamin Franklin thought "[t]hat it is better a hundred guilty persons should escape than one innocent person should suffer."[13] Mario Puzo's Don Clericuzio heard about letting a hundred guilty men go free and, "[s]truck almost dumb by the beauty of the concept . . . became an ardent patriot."[14] Denver radio talk show host Mike Rosen claims to have heard it argued "in the abstract, that it's better that 1000 guilty men go free than one innocent man be im-

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[7] *Geraldo* (Investigative News Group television broadcast, June 19, 1997) (transcript *available in* 1997 WL 10271651) ("[E]ven if a guilty person goes free, it's much better than an innocent person being convicted.").

[8] Mark Asher, *Coaches Seek Reforms in College Basketball: Tougher Requirements, Penalties Favored,* WASH. POST, Mar. 31, 1985, at D9 (quoting Iowa basketball coach George Raveling).

[9] Kevin Dugan, *The Mississippi Executioner,* UPI, May 17, 1987, *available in* LEXIS, News Library, Wires File.

[10] Dave Zweifel, Editorial, *Jury System Still the Best Option,* CAPITAL TIMES (Madison, Wisconsin), Oct. 6, 1995, at 14A, *available in* 1995 WL 13718683; *see also* Stacie Servetah, *Two Recent Cases Raised Issues of Law, Race,* ASBURY PARK PRESS (Neptune, N.J.), Mar. 2, 1997, at AA1, *available in* LEXIS, News Library, Asbury File ("[W]e would rather have nine guilty people go free than one innocent person go to jail.").

[11] *See* People v. Galbo, 112 N.E. 1041, 1044 (N.Y. 1916) ("[I]t is better five guilty persons should escape unpunished than one innocent person should die." (quoting 2 SIR MATTHEW HALE, HISTORIA PLACITORUM CORONÆ [THE HISTORY OF THE PLEAS OF THE CROWN] 289 (George Wilson ed., London, T. Payne 1778))).

[12] *See* Joseph A. Gambardello, *Legacy of Two Verdicts: Joy and Pain,* NEWSDAY, Mar. 23, 1990, at 6 (quoting administrative judge Burton Roberts as saying "[i]t comes back to what Cardozo said: 'Better that 10 guilty men go free than one innocent man go to jail.'").

[13] Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), *in* 11 THE WORKS OF BENJAMIN FRANKLIN 11, 13 (John Bigelow ed., fed. ed. 1904). According to Franklin, "[e]ven the sanguinary author of the *'Thoughts'* agrees to it." *Id.* (citing MARTIN MADAN, THOUGHTS ON EXECUTIVE JUSTICE 168-69 (2d ed., London, J. Dodsley 1785)).

[14] MARIO PUZO, THE LAST DON 58 (1996).

prisoned," and says of the American judicial system, "Well, we got our wish."[15]

Or, perhaps, the recommended number of guilty men should be merely "a few,"[16] "some,"[17] "several,"[18] "many" (particularly, more than eight),[19] "a considerable amount,"[20] or even "a goodly number."[21]

Not all commentators weigh the importance of acquitting the guilty against the value of the conviction of *one* innocent man. A Georgia circuit court held in 1877 that it was "better that some guilty ones should escape than that *many* innocent persons should be subjected to the expense and disgrace attendant upon being arrested upon a criminal charge."[22] Moreover, in Judge Henry J. Friendly's opinion, "most Americans would agree it is better to allow *a considerable number* of guilty persons to go free than to convict *any appreciable*

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[15] Mike Rosen, *Criminal Defense Tactics*, DENV. POST, Apr. 5, 1996, at 7B. "But why stop at a thousand? Why not make it 10,000 or a million?" *Id.*

[16] State v. Hill, 317 N.E.2d 233, 237 (Ohio Ct. App. 1963).

[17] Jones v. State, 320 S.W.2d 645, 649 (Ark. 1959); People v. Oyola, 160 N.E.2d 494, 498 (N.Y. 1959).

[18] Dunaway v. Troutt, 339 S.W.2d 613, 620 (Ark. 1960), *overruled in part on other grounds by* Life & Casualty Ins. Co. v. Padgett, 407 S.W.2d 728 (Ark. 1966), *and overruled in part on other grounds by* Missouri Pac. R.R. v. Arkansas Sheriff's Boys' Ranch, 655 S.W.2d 389 (Ark. 1983).

[19] THE TRIAL OF THE BRITISH SOLDIERS, OF THE 29TH REGIMENT OF FOOT, FOR THE MURDER OF CRISPUS ATTUCKS, SAMUEL GRAY, SAMUEL MAVERICK, JAMES CALDWELL, AND PATRICK CARR, ON MONDAY EVENING, MARCH 5, 1770, BEFORE THE HONORABLE BENJAMIN LYNDE, JOHN CUSHING, PETER OLIVER, AND EDMUND TROWBRIDGE, ESQUIRES 96–97 (Boston, William Emmons 1824) [hereinafter TRIAL OF THE BRITISH SOLDIERS] (excerpting John Adams's argument for the defense, *Rex v. Wemms*, Dec. 3-4, 1770, *reprinted in* 3 LEGAL PAPERS OF JOHN ADAMS 98, 242-43 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)). Adams argued:

> [W]e are to look upon it as more beneficial, that many guilty persons should escape unpunished, than one innocent person should suffer.
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> . . . .
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> . . . And I shall take it for granted, as a first principle, that the eight prisoners at the bar had better be all acquitted, though we should admit them all to be guilty, than that any one of them should by your verdict be found guilty, being innocent.

Id.

[20] Richard Maloney, Note, *The Criminal Evidence (N.I.) Order 1988: A Radical Departure from the Common Law Right to Silence in the U.K.?*, 16 B.C. INT'L & COMP. L. REV. 425, 456 n.211 (1993).

[21] Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 277 (1995).

[22] *In re* Rule of Court, 20 F. Cas. 1336, 1337 (C.C.N.D. Ga. 1877) (No. 12,126) (emphasis added).

number of innocent men."[23] It is unclear whether a "considerable" number is greater or less than an "appreciable" one.[24]

n guilty men, then. The travels and metamorphoses of *n* through all lands and eras are the stuff that epic miniseries are made of. *n* is the father of criminal law. This is its story.

II. *n* BY DIVINE REVELATION

Abraham's celebrated haggle in the book of *Genesis*, allegedly written by Moses[25] but also attributed to God,[26] provisionally sets a value of *n* at *(P – 10) / 10*, where *P* is the population of Sodom.[27] As it turns out, however, no innocents were killed in the destruction of Sodom: There were only four righteous people in the city, and they were all saved, although they lost their real estate.[28] Previously,[29] God had killed the entire human population of the Earth because of its wickedness[30] (except for Noah and his family[31]) in a mass capital punishment which, although carried out without the benefits of a jury or

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[23] Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 694 (1968) (emphasis added).

[24] Preliminary research indicates that "considerable" may be the greater amount. According to no less august a source than the *Oxford English Dictionary*, "appreciable" means "capable of being estimated," 1 THE OXFORD ENGLISH DICTIONARY 581 (2d ed. 1989) (first meaning), while "considerable" means "pretty large," 3 *id.* at 768 (fifth meaning). This question may be a fruitful topic for further research.

[25] *See* 24 THE NEW ENCYCLOPÆDIA BRITANNICA 371 (15th ed. 1990) (discussing Moses's literary works).

[26] The word "God," when capitalized, refers to a Hebrew god named "Yahweh." 12 *id.* at 804 (discussing Yahweh).

[27] The statement "I will not destroy it for ten's sake," *Genesis* 18:32 (emphasis omitted), implies "better *P – 10* guilty men escape than ten righteous men be killed," or, dividing both quantities by 10, "better *(P – 10) / 10* guilty men escape than one righteous man be killed."

[28] *See id.* 19:15 ("And when the morning arose, then the angels hastened Lot, saying, Arise, take thy wife, and thy two daughters, which are here; lest thou be consumed in the iniquity of the city."). Note, however, that while Lot lost his real estate, he did acquire condiments. *See id.* 19:26 ("[H]is wife looked back from behind him, and she became a pillar of salt.").

[29] *See id.* 6-7 (chronicling the wickedness of man, subsequent flooding of the earth, and story of Noah).

[30] *See id.* 6:5 ("And God saw that the wickedness of man was great in the earth, and that every imagination of the thoughts of his heart was only evil continually." (emphasis omitted)); *id.* 6:12 ("And God looked upon the earth, and, behold, it was corrupt; for all flesh had corrupted his way upon the earth.").

[31] *See id.* 6:8 ("But Noah found grace in the eyes of the Lord."); *id.* 6:18 ("But with thee will I establish my covenant; and thou shalt come into the ark, thou, and thy sons, and thy wife, and thy sons' wives with thee.").

any other due process protections, apparently also produced neither false positives nor false negatives. It is said that one day there will be another massive (post-) capital punishment, which will also produce neither false positives nor false negatives.[32] These methods, however, may only be acceptable criminal procedure for God Himself, Who may do whatever He likes.

Commandments to man can be found in the book of *Exodus*, by the same Author(s),[33] in which God rejects the tradeoff between convicting the guilty and convicting the innocent, and simply commands, "the innocent and righteous slay thou not."[34] One can take this to imply an infinite value for n, at least in capital cases. The twelfth century Judeo-Spanish legal theorist Moses Maimonides, however, interpreted the commandment of *Exodus* as implying a value of $n = 1000$ for the purposes of an execution.[35] He refers to it as the "290th Negative Commandment" and argues that executing an accused criminal on the basis of anything less than absolute certainty of his guilt would lead to a slippery slope of decreasing burdens of proof until convictions would be merely "according to the judge's caprice. Hence the Exalted One has shut this door"[36] against the use of presumptive evidence, for "it is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death once in a way."[37]

Not all gods, however, agree with the Exalted One. The Roman emperor Trajan, who was later deified, wrote to Adsidius Severus that a person ought not "to be condemned on suspicion; for it was preferable that the crime of a guilty man should go unpunished than an innocent man be condemned."[38] For the Romans, then, $n = 1$ for all cases where a man is to be "condemned," which includes capital cases.

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[32] *See Revelation* 13:10 (Revised Standard) ("If any one is to be taken captive, to captivity he goes . . . ."); *id.* 20:15 ("And whosoever was not found written in the book of life was cast into the lake of fire.").

[33] *See supra* notes 25-26 and accompanying text.

[34] *Exodus* 23:7 ("Keep thee far from a false matter; and the innocent and righteous slay thou not: for I will not justify the wicked.").

[35] Students of statutory and constitutional interpretation will recognize the Maimonidean leap. The number 1000, no doubt, emanates from a penumbra of *Exodus* 23:7.

[36] 2 MOSES MAIMONIDES, THE COMMANDMENTS 270 (Charles B. Chavel trans., 1967) (discussing the "Negative Commandments").

[37] *Id.* This statement is, of course, consistent with an infinite value of n.

[38] DIG. 48.19.5 (Ulpian, De Officio Proconsulis 7) ["[S]ed nec de suspicionibus debere aliquem damnari diuus Traianus Adsidio Seuero rescripsit: satius enim esse inpunitum relinqui facinus nocentis quam innocentem damnari."].

The most celebrated divine commandment related to punishing the innocent is, of course, Blackstone's. Evidence of Blackstone's divinity is provided by an Arkansas district court, which ruled in 1991 that "Blackstone is, in the law at least, immortal,"[39] and evidence of His miraculous works is supplied by Lord Avonmore, who wrote: "He it was that first gave the law the air of science. He found it a skeleton, and clothed it with life, color and complexion; he embraced the cold statute, and by his touch it grew into youth, health, and beauty."[40] Blackstone's $n = 10$ applies in all cases of suffering, which is a broader category than both Yahweh's and Trajan's.

In Islam, moreover, $n = 1$ for punishment, according to Ayatollah Hossein Ali Montazeri, who was first in line to become the leader of Iran during the mid-1980s.[41] One British writer, commenting on the death of innocent bystanders at the hands of the police during anti-Irish Republican Army crackdowns, wrote, "[f]or a Catholic, oddly enough, it may be better to be shot suddenly like that if you are innocent, than if you are guilty."[42] This view, however, is either out of the ordinary or not widely advertised.

To date, no major religious wars have been fought over the value of n.[43]

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[39] United States v. Pardue, 765 F. Supp. 513, 523 n.3 (W.D. Ark. 1991), *rev'd on other grounds*, 983 F.2d 835 (8th Cir. 1993).

[40] *Id.* (citation omitted). An early doubter of Blackstone's divinity was Thomas Jefferson, who protested the "'canoniz[ation]'" of the *Commentaries*. *See* Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 10 (1996) (quoting 6 THE WRITINGS OF THOMAS JEFFERSON 65 (Paul Leicester Ford ed., 1905)). But he's dead now.

[41] *See Moderate Ayatollah Steps Down as Khomeini's Successor*, Reuter Libr. Rep., Mar. 28, 1989, BC Cycle [hereinafter *Moderate Ayatollah*], *available in* LEXIS, News Library, Wires File ("'In Islam, it is better if a guilty person escapes justice than that an innocent man receives punishment.'" (quoting Ayatollah Hossein Ali Montazeri)); Hugh Pope, Reuters, Nov. 23, 1985, AM Cycle, at International News, *available in* LEXIS, News Library, Wires File (same); *see also* Leonid Syukiyainen, *Aiming at Criminals, Hitting Islam*, MOSCOW NEWS, Sept. 11, 1997, *available in* LEXIS, News Library, Mosnws File (discussing Chechen government's possible violations of Islamic law).

[42] Auberon Waugh, *Suspicion Is Not Grounds for Execution*, SUNDAY TELEGRAPH (London), Sept. 29, 1996, at 31, *available in* 1996 WL 3981912 (distinguishing between guilty men who need to repent and receive absolution before execution and innocent men who have no fear of eternal retribution).

[43] There have been, however, other historical instances of numerical religious violence. In fourth- and fifth-century Antioch, Alexandria, and Constantinople, mobs rioted over numbers related to the nature of God and Christ. *See* ARTHUR GOLDSCHMIDT, JR., A CONCISE HISTORY OF THE MIDDLE EAST 19 (1979). First, the number of persons of God (g) was a subject of contention. After the Council of Nicaea in 325, the Trinitarian Christian Roman Empire ($g = 3$) persecuted the Arians ($g = 1$). *See* 1 THE NEW ENCYCLOPÆDIA BRITANNICA, *supra* note 25, at 549. In addition to

III. DATING *n*

A British editorial recently surmised that the "bias against punishment" has its roots in "the most famous of all miscarriages of justice: Christ's crucifixion."[44] In fact, however, people have been mulling over the innocent-guilty tradeoff at least since the ancient Greeks. Aristotle allegedly wrote that it is a "serious matter to decide [that a slave] is free; but it is much more serious to condemn a free man as a slave," and gave the same judgment, also with $n = 1$, about convicting innocents of murder.[45] Others date the maxim to the codes of Ath-

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the *g*-controversy, the number of persons of Christ (p) was in dispute. After the Council of Ephesus in 431, the Orthodox Byzantine Empire ($p = 1$, both divine and human) persecuted the Nestorians of Antioch ($p = 2$, one divine and one human). *See* THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH 1138-39 (E.A. Livingstone ed., 3d ed. 1997) [hereinafter CHRISTIAN CHURCH]. Then, once p was agreed to be 1, people came to blows over the number of natures of Christ (ch). After the Council of Chalcedon in 451, the Orthodox church ($ch = 2$, one Person "in two Natures") persecuted the Monophysites of Egypt (Copts), Syria (Jacobites), and Armenia ($ch = 1$ and wholly divine). *See* GOLDSCHMIDT, *supra*, at 19; CHRISTIAN CHURCH, *supra*, at 1104-05. Parallel to the ch-persecution was the question of the number of wills (w) of Christ, which was finally resolved when Emperor Philippikos, who held with the Monothelites that $w = 1$ (in conflict with the official position, adopted at the Council of Constantinople in 681, that $w = 2$, both divine and human), was overthrown in 713. *See* 2 THE OXFORD DICTIONARY OF BYZANTIUM 1400-01 (Alexander P. Kazhdan et al. eds., 1991); 3 *id.* at 1654; CHRISTIAN CHURCH, *supra*, at 1106. Broader questions, such as the number of deities (d), were also fought over. Greek Orthodox Byzantines and Western Catholics ($d = 1$) fought dualists ($d = 2$) such as Paulicians from the seventh to the ninth centuries, Bogomils in the 12th and 13th centuries, and Cathari in the 13th century. *See id.* at 219-20, 301, 1243. Zoroastrians ($d = 2$) persecuted Jews ($d = 1$, big time), Christians ($d = 1$), Hindus ($d = a\ whole\ lot$), and others, including, unaccountably, Manichaeans, even though these also believed that $d = 2$ (evidently, the wrong two). *See* 7 THE NEW ENCYCLOPÆDIA BRITANNICA, *supra* note 25, at 776; 29 *id.* at 1084. Zoroastrians were then persecuted by Muslims ($d = 1$). *See id.* What goes around comes around. Also noteworthy are 17th-century Russian religious debates as to how many fingers one should cross oneself with (f) and how many times one should say "Hallelujah" in the liturgy (h) (new style $f = 3$, $h = 3$ v. Old Believer $f = 2$, $h = 2$). *See* NICHOLAS V. RIASANOVSKY, A HISTORY OF RUSSIA 199 (5th ed. 1993). Archpriest Avvakum (Habakkuk), a prominent Old Believer, was burned at the stake in 1682, *see id.* at 199, and persecution of Old Believers continued into modern times. *See id.* at 233, 245, 394 (detailing persecution under Peter the Great, Anne, and Alexander III).

[44] *Who Are the Guilty Men?*, SUNDAY TELEGRAPH (London), Feb. 23, 1997, at 30, *available in* 1997 WL 2289684.

[45] 2 ARISTOTLE, PROBLEMS bk. 29.13, at 144-45 (W.S. Hett trans., Harvard Univ. Press 1937). The full quote reads:

> ἔτι δὲ ἕκαστος ἡμῶν μᾶλλον ἂν προέλοιτο τοῦ ἀδικοῦντος ἀποψηφίσασθαι ὡς οὐκ ἀδικεῖ ἢ τοῦ μὴ ἀδικοῦτος καταψηφίσασθαι ὡς ἀδικεῖ, οἷον εἴ τις φεύγει δουλείας ἢ ἀνδροφονίας. τούτων γὰρ ἑκάστου ὄντων ἃ κατηγορεῖ αὐτῶν, μᾶλλον ἂν ἀποψηφίσασθαι ἑλοίμεθα ἢ μὴ ὄντων καταψηφίσασθαι. ἔστι γάρ, ὅταν τις ἀμφιδοξῇ, τὰ ἐλάττω τῶν ἁμαρτημάτων αἱρετέον. δεινὸν γὰρ καὶ τὸ τοῦ δούλου ὡς ἐλεύθερός ἐστι καταγνῶναι πολὺ δὲ δεινότερον, ὅταν τις τοῦ ἐλευθέρου ὡς δούλου καταψηφίσηται.

ens.[46] Deposed Panamanian leader and amateur classical scholar, Manuel Noriega, has apparently traced the saying—with $n = 1$, but in the more generalized context of conviction—back to Socrates.[47]

According to some researchers, though, the maxim is considerably older. At least three commentators—one Hebrew prophet, one Founding Father, and one appellate judge—have dated it back to the beginning of time. Moses's precept, from the book of *Exodus*,[48] was supposedly handed down from Someone who was around "in the beginning."[49] Benjamin Franklin claims that the maxim, with $n = 100$ and for suffering, "has been long and generally approved; never, that I know of, controverted."[50] According to Ninth Circuit Judge Alex Kozinski, the "popular notion"[51] that $n = 10$ (for conviction) is just something "'[w]e have always said.'"[52] A then-future U.S. president, John Adams, was more modest and merely dated the saying (with $n =$ *a variety of numbers between five and twenty, and for suffering*) back to the beginning of laws, saying that "there never was a system of laws in the world, in which this rule did not prevail."[53]

> [Again, every one of us would rather acquit a guilty man as innocent than condemn an innocent man as guilty, in a case where a man was accused of enslaving or murder. For in each of these cases if the charges were true we should prefer to vote for their acquittal on the charges against them, rather than to vote for their condemnation, if the charges were untrue. For when there is any doubt one should choose the lesser of two evils. For it is a serious matter to decide in the case of a slave that he is free; but it is much more serious to condemn a free man as a slave.]

Id. Aristotle's authorship of *Problems* is disputed. *See* 14 THE NEW ENCYCLOPÆDIA BRITANNICA, *supra* note 25, at 59, 73 (discussing *Problems*'s possible misattribution).

[46] The code of Solon is discussed in *Dean v. Duckworth*, 559 F. Supp. 1331, 1337 (N.D. Ind. 1983), *rev'd on other grounds*, 748 F.2d 367 (7th Cir. 1984). *See also* 1 GIUSEPPE MASCARDI, DE PROBATIONIBUS, conc. 36, nn.7-10, at 87 (Frankfurt-am-Main, Sigismund Feyrabend 1593) (discussing other ancient sources).

[47] *See* John Fernandez, *Facing Prison, Noriega Blames Bush*, ATLANTA J. & CONST., July 11, 1992, at A6 (noting that Noriega opted to quote Socrates's statement that "[i]t is better for a guilty man to go free, than an innocent man be condemned," rather than to state that he was innocent of drug-related charges). Noriega did not give a citation. *See id.*

[48] *See Exodus* 20:1-:17.

[49] *Genesis* 1:1. "Someone" may have had precepts back then too. *See John* 1:1 ("In the beginning was the Word, and the Word was with God, and the Word was God.").

[50] Letter from Benjamin Franklin to Benjamin Vaughan, *supra* note 13, at 13.

[51] Bunnell v. Sullivan, 947 F.2d 341, 352 (9th Cir. 1991) (en banc) (Kozinski, J., concurring).

[52] Darlene Ricker, *Holding Out: Juries vs. Public Pressure*, A.B.A. J., Aug. 1992, at 48, 52 (quoting Judge Alex Kozinski).

[53] TRIAL OF THE BRITISH SOLDIERS, *supra* note 19, at 96-97.

IV. *n* IN ENGLISH HISTORY

In the ninth century, King Alfred is said to have hanged a judge for having executed a defendant "when the jurors were in doubt about their verdict, for in case of doubt one should rather save than condemn."[54] A century later, the laws of King Æthelred the Unready—considered precursors to modern jury procedure by some scholars[55]—provided that twelve thanes (knights) and a reeve (a representative of the king) would "swear on [a] relic . . . that they [would] accuse no innocent man, nor conceal any guilty one."[56]

In 1471, English Chief Justice John Fortescue suggested $n = 20$ for execution: "In deede I woulde rather wyshe twentye euill dooers to escape deathe thoroughe pitie, thenne one manne to bee uniustlye condempned."[57] It was apparently widely believed in English courts during the Middle Ages and the Renaissance that it was better to let many guilty men escape than to convict one innocent person,[58] and a form of Fortescue's maxim was cited in a 1607 case from the Star Chamber court.[59] In the seventeenth century, Matthew Hale used $n = 5$ for execution, "for it is better five guilty persons should escape unpunished, than one innocent person should die."[60] Hale admitted

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[54] "[Alfred] pendi Freberne pur ceo qil jugea Harpin a la mort ou les jurours furent en dote de lur verdit. Car en doutes deit len einz ces sauver qe dampner." THE MIRROR OF JUSTICES, bk. 5.1, ab. 108, at 166-67 (William Joseph Whittaker ed., Selden Society vol. 7, London, Bernard Quaritch 1893). Note that the *Mirror*, written around 1290 in Anglo-Norman and attributed to Andrew Horn, fishmonger of Bridge Street and Chamberlain of the City of London, is considered an unreliable source of medieval English legal history. *See* Frederic William Maitland, *Introduction* to *id.* at x-xiv.

[55] *See* Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 6 (1993) (acknowledging that historical gaps make it difficult to trace the origins of the jury system).

[56] SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY 72 (William Stubbs ed., 8th ed., Oxford, Clarendon Press 1895).

[57] "[M]allem reuera vigīti facino rosos mortem pietate euadere, quā iustū vnū iniuste condempari." JOHN FORTESCUE, A LEARNED COMMENDATION OF THE POLITIQUE LAWES OF ENGLAND 63 (Robert Mulcaster trans., photo. reprint 1969) (1567).

[58] *See* 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 196 (2d ed. 1937) (asserting that both the Star Chamber and common-law courts adhered to this belief in the 16th century); 9 *id.* at 224 (1926) (stating that 16th-century judges believed the maxim).

[59] *See* Robinson v. Nethersall (Eng. Camera Stellata 1607), *reprinted in* LES REPORTES DEL CASES IN CAMERA STELLATA 1593 TO 1620, at 319, 320 (William Paley Baildon ed., London, Spottiswoode & Co. 1894) ("[I]t were better to acquite 20 that are guyltie then Condempne one Innocente.").

[60] 2 HALE, *supra* note 11, at 289. Hale also cites a Latin maxim: "Tutius semper est errare in acquietando quàm in puniendo, ex parte misericordiae, quàm ex parte justitiæ." ["It is always safer to err in acquitting than in punishing, on the side of mercy

that this doctrine had certain inconveniences; in particular, that it was hard to get satisfactory evidence of witchcraft, so that many undoubtedly guilty persons escaped.[61] As Increase Mather put it in 1692, during the Salem witch trials, "It were better that ten suspected Witches should escape, than that one innocent Person should be Condemned."[62]

Sir Edward Seymour, in 1696, favored $n = 10$ for suffering. Seymour reportedly declared, "I am of the same opinion with the Roman, who, in the case of Catiline, declared, he had rather ten guilty persons should escape, than one innocent should suffer";[63] though Lieutenant General Mordant is said to have replied, "The worthy member who spoke last seems to have forgot, that the Roman who made that declaration was suspected of being a conspirator himself."[64]

Then, in the 1760s, came Blackstone. Blackstone, it seems, wrote his *Commentaries* with a bottle of wine by his side, and his doubling of Hale's $n = 5$ may have been a case of "seeing double."[65] The maxim had become part of the common law by 1802.[66] By 1823, Blackstone's doctrine had become a "maxim of English law" and was cited in judi-

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than on the side of justice."] 2 *id.* at 290. Greenleaf says this maxim was "familiarly known in the ancient common law of England." 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 29, at 35-36 n.4 (16th ed. 1899). Carleton Allen, however, suspects that Hale made it up. *See* CARLETON KEMP ALLEN, LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE 257 (1931) ("I suspect that [the Latin maxim] was [Hale's] own invention."). Hale cites two cases of murders where the alleged victim showed up after the alleged murderer had been executed. *See* 2 HALE, *supra* note 11, at 290 n.*g* (describing case where uncle was convicted of murdering his niece when in fact she had run away); *see also* 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 232 (London, W. Clarke & Sons 1817) (setting forth the case of the uncle and niece described by Hale). For other cases of murder that never were, see Rollin M. Perkins, *The Corpus Delicti of Murder*, 48 VA. L. REV. 173, 173-86 (1962).

[61] *See* 2 HALE, *supra* note 11, at 290.

[62] INCREASE MATHER, CASES OF CONSCIENCE CONCERNING EVIL SPIRITS PERSONATING MEN, WITCHCRAFTS, INFALLIBLE PROOFS OF GUILT IN SUCH AS ARE ACCUSED WITH THAT CRIME (1692), *reprinted in* WHAT HAPPENED IN SALEM? 117, 125 (David Levin ed., 2d ed. 1960). "[T]hat is an old saying, and true, *Prestat reum nocentem absolvi, quam ex prohibitis Indiciis & illegitima probatione condemnari.* It is better that a Guilty Person should be Absolved, than that he should without sufficient ground of Conviction be condemned." *Id.* at 125-26.

[63] Proceedings in Parliament Against Sir John Fenwick, bart. upon a Bill of Attainder for High Treason: 8 William III (1696), *reprinted in* 13 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 537, 565 n.* (T.B. Howell ed., London, T.C. Hansard 1812).

[64] *Id.* The identity of the Roman is unclear.

[65] *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642, 654 (1876) [hereinafter *Some Rules of Evidence*].

[66] *See* People v. Troche, 273 P. 767, 778 (Cal. 1928) (Preston, J., dissenting).

cial opinions,[67] though Thomas Starkie used n = "ninety-nine (*i.e.* an indefinite number)" as "the maxim of the law" in his book on evidence only the following year.[68] (For an indefinite number, Starkie's ninety-nine seems quite definite.) John Stuart Mill also endorsed the maxim in an address to Parliament in 1868.[69]

Of late, British courts have taken the position both that $n = 1$[70] and that $n = 10$,[71] and allegorically refer to the dilemma as "trying to steer between the Scylla of releasing to the world unpunished an obviously guilty man and the Charybdis of upholding the conviction of a possibly innocent one."[72] Some British laymen have been more generous, though. London Metropolitan Police Commissioner Sir Peter Imbert has expressed a belief that $n = 100$,[73] while ex-police superintendent Ian McKenzie, once a police officer and later a doctor of psychology with the Fort Worth, Texas, police department, told BBC television that $n = 5000$, leaving one Briton to ask how the ratio could

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[67] *See, e.g.*, Hobson's Case, 168 Eng. Rep. 1034, 1034 (Appleby Sp. Assizes 1831) ($n = 10$).

[68] THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE 756 (9th Am. ed. 1869). One commentator quotes Starkie and continues:

> The absurdity of this proposition is too obvious to need remark. It is better that an indefinite, i.e. an unlimited, i.e. an infinite, number of murderers should escape punishment, than that one innocent person be condemned; but as there is possibility of mistake, and as it is even probable, nay, morally certain, that sooner or later the mistake will be made, and an innocent person made to suffer, and as that mistake may happen at the very next trial, therefore no more trials should be had, and courts of justice must be condemned and abrogated!

Some Rules of Evidence, *supra* note 65, at 654-55.

[69] *See* 191 PARL. DEB. (3d ser.) 1053 (1868) (statement of J. Stuart Mill) ("[J]uries and Judges carry out the maxim, 'It is better that ten guilty should escape than that one innocent person should suffer,' not only to the letter, but beyond the letter.").

[70] *See* The King v. Kingston, 32 Crim. App. 183, 189-91 (Eng. 1948) ($n = 1$).

[71] *See* Warner v. Metropolitan Police Comm'r, 52 Crim. App. 373, 387 (Eng. 1968) ($n = 10$).

[72] The King v. Patel, 35 Crim. App. 62, 66 (Eng. 1951).

[73] *See* Richard D. Ostler, Letter, TIMES (London), June 22, 1992, at 15 (expressing concern at the number of innocent men being convicted with unreliable evidence despite Imbert's "encouraging belief . . . that it is better that 100 guilty men should go free than that one innocent man should be convicted").

have risen 500 times or more since earlier, more innocent times.[74] "There has been some inflation" since Hale.[75]

The maxim has apparently made its way throughout the former British empire, to Canada,[76] Australia,[77] and Hong Kong. Hong Kong, which has now been returned to China, actually got off to a halting start: In 1857, during the "incident of the poisoned bread," Attorney General Thomas Chisholm Anstey said in open court, "'Better hang the wrong men . . . than confess that British sagacity and activity have failed to discover the real criminals.'"[78] More recently, politician Martin Lee, of the United Democratic party, held that $n = 99$, though politician Elsie Tu disagreed: "What I want is justice for that one innocent man, but not a free ride for the [ninety-nine] guilty ones."[79]

V. THE INNOCENT MAN AND HIS (HER? ITS?) FATE

Although the innocent man referred to in the maxim is typically the innocent about to be unjustly punished by the court, this is not always the case. One writer, commenting on the fear that a guilty verdict in the O.J. Simpson criminal trial would have provoked riots, remarked, "Better . . . to let one killer go free than to have more in-

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[74] *See* John Stalker, *It's Time We Accepted That Policing Is Too Important to Be Left to the Police*, SUNDAY TIMES (London), Dec. 1, 1991, at 16 ("The ratio has risen 500 times since my day: what sort of a deal is that for society?").

[75] Jeffrey Reiman & Ernest van den Haag, *On the Common Saying That It Is Better That Ten Guilty Persons Escape Than That One Innocent Suffer: Pro and Con*, *in* CRIME, CULPABILITY, AND REMEDY 226, 226 n.2 (Ellen Frankel Paul et al. eds., 1990).

[76] *See, e.g.*, The Queen v. Lepage [1995] S.C.R. 654, 677 (Can.) (Major, J., dissenting) ($n = 10$); Chaulk v. The Queen [1990] S.C.R. 1303, 1368 (Can.) (Wilson, J., concurring in the judgment) ($n = 1$); The Queen v. Jenkins, 1996 Ont. C.A. LEXIS 361, at *34 (Ont. Ct. App. May 15, 1996) ("[I]t is better to let the guilty go free than to convict the innocent."); The Queen v. Peruta [1992] 78 C.C.C.3d 350, 357 (Que. Ct. App.) ($n = 1$); The Queen v. Poirier [1992] 71 C.C.C.3d 426, 438 (Que. Ct. App.) ($n = 1$).

[77] *See* Repatriation Comm'n v. Law (1981) 147 C.L.R. 635, 639 (Austl.) ($n =$ *"many"*).

[78] Arthur Hacker, *When Eccentrics Ruled the Roost*, ASIAWEEK, June 20, 1997, at 50, 52 (quoting Thomas Chisholm Anstey).

[79] Kevin Sinclair, *Thugs We Let Roam Free*, S. CHINA MORNING POST, Feb. 20, 1995, *available in* LEXIS, World Library, Allnws File (quote appears only in the LEXIS version). Sinclair discusses Lee and Tu's disagreement over whether Hong Kong's "warm and cuddly judicial system" should "follow[] the revolving-door principles of liberal Western nations." *Id.*

nocents die."[80] Similar sentiments have been expressed on the subject of possible innocent victims of high-speed police chases.[81]

Whoever the innocent man is, he can also, naturally, be an innocent woman. The literature, in a less self-conscious time, usually said "man," but today usually says "person" or "defendant." In the early modern period, many commentators wrote of guilty and innocent "perfons," warning that "prefumptive evidences fhould be warily preffed."[82] What exactly a perfon is may be a fruitful fubject for further refearch. Increase Mather wrote that he would "rather judge a Witch to be an honest woman, than judge an honest woman as a Witch";[83] this is because most witches at the time seem to have been female.[84]

One author, discussing the implications of punishing people with multiple personalities (only one of which may be guilty), points out that "[u]nless one could devise punishments that punished only the guilty self in some body, multiple selves within the same body would face the legal system with the choice between a radically extended system of vicarious responsibility, or not punishing anyone."[85] The author suggests the maxim, "Better to let ten guilty selves go free than to punish one innocent self."[86]

To avoid charges of speciesism, we must also consider the possibility that innocent men should not be the only creatures to escape punishment. Research has revealed that bees also do it. In 1732, Thomas Fuller established that $n = 2$ for perishing: "Better two Drones be Preserv'd, than one good Bee perish."[87] Fuller, who seems to have been into numbers, also coined the following gems: "Better have one

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[80] Heather Bird, *Trial Shows the System Works—Sort of*, TORONTO SUN, Feb. 5, 1997, at 4.

[81] *See* Editorial, *Time to Weigh Human Toll of Pursuits*, ASHEVILLE CITIZEN-TIMES (North Carolina), Oct. 11, 1996, at A10 ("[S]ometimes it's better to let a guilty party get away than to put the lives of innocent people in jeopardy.").

[82] 2 HALE, *supra* note 11, at 289.

[83] LEVIN, *supra* note 62, at 126.

[84] *See* NIKOLAI V. GOGOL, *Povest' o tom, kak Ivan Ivanovich possorilsia s Ivanom Nikiforovichem [The Tale of How Ivan Ivanovich Quarreled with Ivan Nikiforovich]*, *in* 2 POLNOE SOBRANIE SOCHINENII [COMPLETE COLLECTION OF WORKS] 219, 226 (Izdatel'stvo Akademii Nauk SSSR 1937) ("[У] одних только ведьм, и то у весьма немногих, есть назади хвост, которые впрочем принадлежат более к женскому полу, нежели к мужескому." ["Only witches, and rather few, have tails in the back, and they, after all, belong more to the feminine gender than to the masculine."]).

[85] MICHAEL S. MOORE, LAW AND PSYCHIATRY 151 (1984).

[86] *Id.*

[87] THOMAS FULLER, GNOMOLOGIA: ADAGIES AND PROVERBS; WISE SENTENCES AND WITTY SAYINGS 35 (London, printed for B. Barker 1732).

Plough going than two Cradles";[88] "Better two Losses, than one Sorrow";[89] "Better have no Children, than sottish and mad ones";[90] and "A wooden Leg is better than no Leg."[91] Back to bees. In 1875, Alan Cheales wrote that $n = 5$ for starvation: "Better feed five drones than starve one bee."[92]

Inorganic objects, such as computers[93] and states,[94] and certain categories of people, such as saints,[95] are typically not entitled to the presumption of innocence.

The gender and species of the innocent man is potentially of great significance and may be a fruitful topic for further research.

The possible fate contemplated for the guilty man is usually acquittal, although an Alabama court has considered a jury instruction that one thousand guilty men may go "unwhipped of justice,"[96] and a West Virginia court has weighed leaving the guilty "to the infallible justice of God"[97] in certain circumstances. Innocent men also face a variety of fates. There are, of course, the usual suspects:

- execution:
  - $n = 1$,[98]
  - $n = 5$,[99]

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[88] *Id.* at 33.

[89] *Id.* at 35.

[90] *Id.* at 33.

[91] *Id.* at 19.

[92] ALAN B. CHEALES, PROVERBIAL FOLK-LORE 126 (Folcroft Library 2d ed. 1976) (1875). But see "Feed a cold, starve a fever."

[93] "It is better to assume your computers are guilty until proven innocent." Paul Bennett, *Webbed Feet*, SANTA FE NEW MEXICAN, May 16, 1997, at 53 (referring to the "Year 2000 problem"), *available in* LEXIS, News Library, Papers File.

[94] "You see, people who are charged with crimes are treated in some ways better than states, because if you're charged with a crime, you're assumed innocent until proven guilty. In case after case after case I can give you, the state of California has been assumed guilty." *Judicial Overhaul: Hearing of the Courts and Intellectual Property Subcomm. of the House Judiciary Comm.*, 105th Cong. (1997) (statement of California Attorney General Dan Lungren), *available in* LEXIS, News Library, Fednew File.

[95] "Saints should always be judged guilty until they are proved innocent." GEORGE ORWELL, *Reflections on Gandhi*, *in* SHOOTING AN ELEPHANT 102, 102 (1950). "[I]t is probable," Orwell explained, "that some who achieve or aspire to sainthood have never felt much temptation to be human beings." *Id.* at 108.

[96] Burkett v. State, 45 So. 682, 685 (Ala. 1908); *see* Jackson v. State, 104 So. 220, 220 (Ala. 1925) ("unwhipped"); *see also* State v. Smith, 73 S.E.2d 901, 903 (N.C. 1953) ("This ruling may permit a violator of the law to go unwhipped of justice.").

[97] State v. Michael, 16 S.E. 803, 804 (W. Va. 1893).

[98] *See* Beth S. Brinkmann, Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 371 n.122 (1984).

[99] *See* 2 HALE, *supra* note 11, at 289.

- $n = 12$,[100]
- $n = 20$,[101]
- $n =$ *"hundreds,"*[102]
- $n = 1000$;[103]

- conviction or condemnation:
  - $n = 1$,[104]
  - $n = 5$,[105]
  - $n = 9$,[106]
  - $n = 10$,[107]
  - $n = 12$,[108]
  - $n = 20$,[109]
  - $n = 99$,[110]
  - $n = 100$,[111]
  - $n = 599$,[112]
  - $n = 1000$,[113]
  - $n = 5000$,[114]
  - $n =$ *"several,"*[115]

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[100] *See* Howard Rosenberg, *New Doubts Raised About "Crime of the Century"*, L.A. TIMES, Sept. 14, 1996, at F1.

[101] *See* FORTESCUE, *supra* note 57, at 62.

[102] Letter from Charles Dickens to the editors of *The Daily News* (Feb. 23, 1846), *in* SELECTED LETTERS OF CHARLES DICKENS 213, 215 (David Paroissien ed., 1985).

[103] *See* 2 MAIMONIDES, *supra* note 36, at 270.

[104] *See* DIG. 48.19.5 (Ulpian, De Officio Proconsulis 7).

[105] *See* Charles B. Rosenberg, *The Law After O.J.*, A.B.A. J., June 1995, at 72, 74.

[106] *See* Zweifel, *supra* note 10, at 14A.

[107] *See* Bunnell v. Sullivan, 947 F.2d 341, 352 (9th Cir. 1991) (en banc) (Kozinski, J., concurring).

[108] *See* Richard E. Meyer, *A Wrongful Conviction: How Justice System Can Go Wrong*, L.A. TIMES, Mar. 17, 1985, at 1.

[109] *See* Robinson v. Nethersall (Eng. Camera Stellata 1607), *reprinted in* LES REPORTES DEL CASES IN CAMERA STELLATA 1593 TO 1620, *supra* note 59, at 319, 320.

[110] *See Some Rules of Evidence*, *supra* note 65, at 654.

[111] *See* Marcel Berlins, *Something Rotten in the State of Britain*, MANCHESTER GUARDIAN WKLY., Feb. 18, 1996, at 28.

[112] *See* James Bemis, Commentary, *Dismissing Flawed DUI Cases May Be Lesser Evil*, DAILY NEWS (L.A.), Sept. 21, 1997, at SV2, *available in* LEXIS, News Library, Lad File.

[113] *See* Laufer, *supra* note 3, at 333 n.17 (citing JEREMY BENTHAM, PRINCIPLES OF JUDICIAL PROCEDURE 169 (1829)) (discussing also $n = 1$, $n = 10$, and $n =$ *"several"*).

[114] *See* Stalker, *supra* note 74, at 16.

[115] Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151, 196 (1994).

- n = *"many,"*[116]
- n = *considerable/appreciable;*[117]

- imprisonment:
  - n = *1,*[118]
  - n = *4,*[119]
  - n = *10,*[120]
  - n = *99,*[121]
  - n = *100,*[122]
  - n = *1000;*[123]
- punishment:
  - n = *1,*[124]
  - n = *9,*[125]
  - n = *90,*[126]
  - n = *99,*[127]
  - n = *900,*[128]
  - n = *1000,*[129]
  - n = *"several,"*[130]
  - n = *"many";*[131] and

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[116] United States v. Johnson, 123 F.2d 111, 141 (7th Cir. 1941) (Evans, J., dissenting), *rev'd on other grounds,* 319 U.S. 503 (1943).

[117] *See* Friendly, *supra* note 23, at 694 ("[B]etter to allow a considerable number of guilty persons to go free than to convict any appreciable number of innocent men.").

[118] *See* Claude Baroux, Editorial, *Liberté . . .*, LA VIE FRANÇAISE, Nov. 4, 1995, *available in* LEXIS, World Library, Noneng File; *infra* note 179 (quoting the $n = 1$ language).

[119] *See* Asher, *supra* note 8, at D9.

[120] *See* Gambardello, *supra* note 12, at 6.

[121] *See* Sinclair, *supra* note 79, at 23.

[122] *See* Jean-Marie Burguburu, *Détention provisoire et ordre public,* LE MONDE, July 13, 1996, at 11.

[123] *See* Rosen, *supra* note 15, at 7B.

[124] *See* Evelyn Gordon, *Justices: The Case Is Closed, but Incomplete,* JERUSALEM POST, July 30, 1993, at 4; *Moderate Ayatollah, supra* note 41.

[125] *See* Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self Defense,* 28 B.C. L. REV. 459, 512 n.285 (1987).

[126] *See id.*

[127] *See* 2 EDWARD M. THORNTON, A TREATISE ON ATTORNEYS AT LAW § 712, at 1120 (1914) (citing Shelton v. State, 1 Stew. & P. 208 (Ala. 1831)).

[128] *See* Singer, *supra* note 125, at 512 n.285.

[129] *See The Demjanjuk Verdict,* JERUSALEM POST, July 30, 1993, *available in* LEXIS, News Library, Arcnws File.

[130] John Leubsdorf, *Constitutional Civil Procedure,* 63 TEX. L. REV. 579, 610 (1984).

[131] Fyffe v. Commonwealth, 190 S.W.2d 674, 680 (Ky. 1945).

- suffering:
  - $n = 10$,[132]
  - $n = 99$,[133]
  - $n = 100$,[134]
  - $n =$ *"many."*[135]

A British court held, in an 1883 case often cited in the United States, that $n = \infty$ for attorneys sued for slander.[136] If the rule were otherwise, the court explained, "the most innocent of counsel might be unrighteously harassed with suits."[137] Perish the thought that innocent lawyers be unrighteously harassed.[138] We may say the same of *Gregoire v. Biddle*, a 1949 case in which Judge Learned Hand explained that the courts could not subject conscientious bureaucrats "to the constant dread of retaliation."[139]

Charles Dickens generously endorsed a value of $n =$ *"hundreds"* for capital cases, suggesting not just "that hundreds of guilty persons should escape," but that they should escape "scot-free."[140] Dickens was, in fact, so generous that he thought that hundreds of guilty persons should escape scot-free to avoid even the mental image of suffering innocents: $n = 100$ was better "than that the possibility of any innocent man or woman having been sacrificed, should present itself, with the least appearance or colour of reason, to the minds of any class of men!"[141]

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[132] *See In re* Fegler, 36 F. Supp. 88, 89 (E.D. Mich. 1940).

[133] *See* Lamprecht v. State, 95 N.E. 656, 660 (Ohio 1911).

[134] *See* Letter from Benjamin Franklin to Benjamin Vaughan, *supra* note 13, at 13.

[135] TRIAL OF THE BRITISH SOLDIERS, *supra* note 19, at 96.

[136] *See* Munster v. Lamb, 11 Q.B.D. 588, 604 (Eng. C.A. 1883); *see also* Yaselli v. Goff, 12 F.2d 396, 402 (2d Cir. 1926) (Davis, J., dissenting) (citing *Munster*), *aff'd*, 275 U.S. 503 (1927); Friedman v. Knecht, 56 Cal. Rptr. 540, 545 (Ct. App. 1967) (same).

[137] *Munster*, 11 Q.B.D. at 604.

[138] Perhaps the British court was onto something, though; better to keep such suits out of the civil justice system and leave them to the poetic justice system.

[139] 177 F.2d 579, 581 (2d Cir. 1949).

[140] Letter from Charles Dickens to the editors of *The Daily News*, *supra* note 102, at 215; *see also* Captain David D. Jividen, USAF, *Will the Dike Burst? Plugging the Unconstitutional Hole in Article 66(c), UCMJ*, 38 A.F. L. REV. 63, 70 n.38 (1994) ("[T]here has been many a case in the civil courts where the appellate court has erred, and a guilty person has been permitted to go scot free." (quoting *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on H.R. 2498 Before the Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1205 (1949) (statement of Congressman Elston))).

[141] Letter from Charles Dickens to the editors of *The Daily News*, *supra* note 102, at 215.

The maxim has also been invoked in the context of:

- burning an innocent woman for witchcraft ($n = 1$, $n = 10$);[142]
- confining a sane man in a mental institution ($n = 3$, $n = 5$),[143] especially for life ($n = \infty$);[144]
- "denying an 'innocent' ABC its day in court" ($n = 1$);[145]
- denying meritorious religious claims ($n =$ *"a goodly number"*[146] under the Religious Freedom Restoration Act (partially struck down);[147] $n =$ *"a few"*[148] under the Free Exercise Clause of the First Amendment (still around)[149]);
- facing the executioner ($n = 1$);[150] and
- introducing a precedent "which may press hardly hereafter on the innocent" ($n = 1$).[151]

Of course, such blithe invocation could easily lead too far down the road to "inconsiderate folly" and "pestiferous nonsense."[152] As one author noted, "there is nothing so dangerous as a maxim":[153]

> Better that any number of savings-banks be robbed than that one innocent person be condemned as a burglar! Better that any number of innocent men, women, and children should be waylaid, robbed, ravished, and murdered by wicked, wilful, and depraved malefactors, than that one innocent person should be convicted and punished for the perpetration of one of this infinite multitude of crimes, by an intelligent and well-meaning though mistaken court and jury! Better any amount of crime than one mistake in well-meant endeavors to suppress or prevent it![154]

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[142] *See* LEVIN, *supra* note 62, at 125-26.

[143] *See* Goetz v. Crosson, 967 F.2d 29, 39 (2d Cir. 1992) (Newman, J., concurring).

[144] *See* 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1400, at 201 (Chadbourn rev. 1974).

[145] Shepherd v. ABC, 62 F.3d 1469, 1476 (D.C. Cir. 1995).

[146] Paulsen, *supra* note 21, at 277.

[147] *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997) (holding that "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance").

[148] Brent E. Marshall, Note, *The Unseen Regulator: The Role of Characterization in First Amendment Free Exercise Cases*, 59 NOTRE DAME L. REV. 978, 1000 n.106 (1984).

[149] *See* U.S. CONST. amend. I.

[150] *See* Cynthia Tucker, Editorial, *Better to Err on Safe Side of Execution*, ATLANTA J. & CONST., Feb. 9, 1997, at C7.

[151] Matthews v. State, 55 Ala. 187, 195 (1876).

[152] *Some Rules of Evidence*, *supra* note 65, at 655.

[153] *Id.* at 653, citing "[s]omebody." See also the career of another dangerous maxim, Maxim(ilien) Robespierre.

[154] *Some Rules of Evidence*, *supra* note 65, at 655.

VI. CHARACTERIZING *n*

Commentators most often call the "*n* guilty men" maxim a "maxim."[155] It is also known as a "general maxim" (*n = 10*);[156] an "old maxim" (*n = 10*);[157] a "benign maxim" (*n = 99*);[158] a "maxim that has been long and generally approved" (*n = 100*);[159] and a maxim that has been listed in a case reporter in a special section entitled "Maxims" (*n = 10*).[160]

When they are not calling it a "maxim," however, legal commentators differ on the nature of the "*n* guilty men" notion. Some consider it an element of folklore, such as an "adage" (*n = 1, n = 12*),[161] an "old adage" (*n = 1, n = 10, n = 100*),[162] or an "ancient and honored adage" (*n = 10*).[163] Others describe it as a historical phenomenon, such as an "age-old tradition" (*n = 1*).[164] It has run the gamut from "perhaps not an unreasonable assumption" (*n = 10*)[165] to a "sense of comparative evil" (*n = 100*).[166] Some writers even think of it as an item of food, specifically a "chestnut" (*n = 10*).[167]

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[155] Compare "Let us call a stone a stone."

[156] Maureen J. Mann, Comment, *Overlooking the Constitution: The Problem with Connecticut's Bail Reforms*, 24 CONN. L. REV. 915, 941 (1992).

[157] Eric Kades, *Avoiding Takings "Accidents": A Tort Perspective on Takings Law*, 28 U. RICH. L. REV. 1235, 1248 (1994). But see the "ancient maxim: 'Never eat anything larger than your own head.'" Andrew Ferguson, *Sweet Land of Gluttony*, WKLY. STANDARD, Feb. 2, 1998, at 4.

[158] 2 THORNTON, *supra* note 127, at 1120.

[159] Letter from Benjamin Franklin to Benjamin Vaughan, *supra* note 13, at 293.

[160] Hobson's Case, 168 Eng. Rep. 1034, 1034 (Appleby Sp. Assizes 1831).

[161] David Everett Marko, *The Case Against Gender-Based Peremptory Challenges*, 4 HASTINGS WOMEN'S L.J. 109, 129 (1993) (*n = 1*); Rosenberg, *supra* note 100, at F1 (*n = 12*).

[162] Berlins, *supra* note 111, at 28 (*n = 100*); Patricia Lynch Kimbro, *Area's Cops Say Justice Served Despite Many Mistakes in Case*, NASHVILLE BANNER, Oct. 4, 1995, at A7, *available in* LEXIS, News Library, Banner File (*n = 1*); Ben Rosenbaum, *Time to Revise Old Ways*, ORLANDO SENTINEL, Sept. 25, 1994, at 3, *available in* LEXIS, News Library, Arcnws File (*n = 10*); Peregrine Worsthorne, *We Are All Guilty*, SUNDAY TELEGRAPH (London), Mar. 24, 1991, at 22, *available in* LEXIS, News Library, Arcnws File (*n = 100*).

[163] State v. Sullivan, 307 P.2d 212, 215 (Utah 1957) (*n = 10*).

[164] McKenzie v. Risley, 842 F.2d 1525, 1545 (9th Cir. 1988) (en banc) (dissenting opinion).

[165] Ballew v. Georgia, 435 U.S. 223, 234 (1978) (Blackmun, J.).

[166] David Wasserman, *Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation*, 49 MD. L. REV. 392, 397 n.40 (1990) (book review).

[167] Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 824 & n.138 (1985).

In terms that are less complimentary, the maxim has also been called "a propagandistic 'noble lie' and myth" (*n = 10*),[168] a "vainglorious[] boast" (*n = 100*),[169] and "bunk" and a "pious platitude of some old maid sop" (*n = 99*).[170]

VII. COMPARATIVE *n*

The idea that letting some number of guilty men go free is better than punishing an innocent man is not confined to the Anglo-American legal tradition. It seems to be widely recognized among economists: "[T]he disutility of convicting an innocent person far exceeds the disutility of finding a guilty person to be not guilty," as (only) an economist might say.[171]

Even continental Europeans believe in the *n* principle. In 1824, Thomas Fielding cited it as an Italian proverb.[172] The French apparently agree. As Jean de La Bruyère put it, "[a] guilty man punished is an example for the rabble; an innocent man condemned is a matter for all honest people."[173] The French have rather consistently gone with *n = 1*.[174] Voltaire has been cited as favoring *n = 1*[175] (sometimes

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[168] Barton L. Ingraham, *The Right of Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O'Reilly*, 86 J. CRIM. L. & CRIMINOLOGY 559, 579 (1996).

[169] *The Police Are NOT Above the Law!*, WKLY. J., June 17, 1997, at 6.

[170] People v. Edwards, 236 N.Y.S.2d 84, 85 (App. Div. 1962) (Kleinfeld & Rabin, JJ., dissenting).

[171] Lawrence B. Solum, *You Prove It! Why Should I?*, 17 HARV. J.L. & PUB. POL'Y 691, 701 (1994).

[172] *See* THOMAS FIELDING, PROVERBS OF ALL NATIONS 59 (London, Longman et al., 1824) ("Meglio è liberar dieci rei, che condannar un innocente." ["It is better to free ten guilty men than to condemn one innocent."]).

[173] JEAN DE LA BRUYÈRE, LES CARACTÈRES 261 (La Renaissance du Livre 1912) ["Un coupable puni est un exemple pour la canaille; un innocent condamné est l'affaire de tous les honnêtes gens."]. La Bruyère continues, "Je dirai presque de moi: 'Je ne serai pas voleur ou meurtrier.' 'Je ne serai pas un jour puni comme tel,' c'est parler bien hardiment. Une condition lamentable est celle d'un homme innocent à qui la précipitation et la procédure ont trouvé un crime; celle même de son juge peut-elle l'être davantage?" ["I will almost say of myself, 'I will not be a thief or a murderer.' 'I will not one day be punished as such,' is to speak quite boldly. A lamentable condition is that of an innocent man, to whom haste and procedure have found a crime; can that of his judge be more so?"] *Id.*

[174] *See, e.g.*, Maurice Peyrot, *La psychose de l'erreur judiciare*, LE MONDE, Dec. 16, 1992 (société), at 10 ("[I]l [est] aussi inacceptable de condamner un innocent que de libérer un coupable." ["It [is] as unacceptable to condemn an innocent man as to free a guilty man."]); Edwy Plenel, *L'affaire du sang relance le débat sur la magistrature*, LE MONDE, July 30, 1994, at 1 ("[I]l vaut mieux laisser courir un coupable que tuer un innocent." ["It is better to let a guilty man go than to kill an innocent man."]). But

translated into English as $n = 2$)[176] and $n = 100$.[177] Apparently, the French have sided with his most conservative estimate.

Although Europeans seldom agree on anything, the French and the Italians even agree with the Germans on this point.[178] Johann Wolfgang von Goethe once said he would "rather commit an injustice than suffer a disorder," which, in his context, came out to the same thing.[179] In the western hemisphere, similar sentiments have been

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see Burguburu, *supra* note 122, who comments ironically on the social stigma of being held as a suspect: "[L]e vieil adage, 'mieux vaut cent coupables en liberté qu'un innocent en prison,' ferait plutôt sourire puisque, justement, on n'est jamais innocent quand on est en prison, même à titre provisoire." ["The old adage, 'better one hundred guilty men at liberty than one innocent man in prison,' would rather make people smile, precisely because one is never innocent when one is in prison, even provisionally."]).

[175] *See* 1 VOLTAIRE, ZADIG 28 (Marcel Didier 1962) ("C'est de [Zadig] que les Nations tiennent ce grand principe, qu'il vaut mieux hazarder de sauver un coupable que de condamner un innocent." ["It is from [Zadig] that the Nations hold this great principle, that it is better to risk saving a guilty man than to condemn an innocent."]).

[176] *See* VOLTAIRE, ZADIG 53 (photo. reprint 1974) (1749) ("'[T]is much more Prudence to acquit two Persons, tho' actually guilty, than to pass Sentence of Condemnation on one that is virtuous and innocent."). Those nutty translators.

[177] *See, e.g.*, John Jenswold, *New Law on Federal Courts Fritters Away Constitutional Rights*, CAP. TIMES (Madison, Wis.), June 12, 1996, at 13A ("[B]etter a hundred guilty men go free than an innocent man hang." (citing Voltaire)); Jim Yardley, *Jury Out on Hunt Ethics Charge*, ATLANTA J. & CONST., Apr. 22, 1993, at 3, *available in* LEXIS, News Library, Arcnws File ("It's better that 100 guilty men go free than one innocent man suffer.").

[178] *See* Conny Neumann, *Freispruch mangels Beweisen Totschlag bleibt ungesüehnt*, SÜDDEUTSCHE ZEITUNG, Apr. 8, 1995, *available in* LEXIS, World Library, Allwld File ("Lieber einen Schuldigen laufen zu lassen, als einen Unschuldigen zu verurteilen." ["Better to let a guilty man go than to convict an innocent man."]).

[179] Baroux, *supra* note 118. Baroux states:

> Goethe disait: "J'aime mieux commettre une injustice que souffrir un désordre." C'est-à-dire qu'il préférait un coupable en liberté qu'un innocent en prison, contrairement au sens que donnent aujourd'hui à son propos ceux qui ignorent le contexte dans lequel il fut prononcé (lors du siège de Mayence en juillet 1793, le dramaturge allemand avait empêché le lynchage d'un "casseur" présumé lors de l'évacuation des troupes françaises). Certains magistrats devraient parfois relire les bons auteurs.
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> [Goethe said, "I would rather commit an injustice than suffer a disorder." That is, he preferred that a guilty man go free than that an innocent man be imprisoned, contrary to the meaning given to his remark today by those who are unaware of the context in which it was pronounced (during the siege of Mayence in July 1793, the German dramatist had prevented the lynching of an accused "hooligan" during the evacuation of French troops). Certain magistrates should sometimes reread good authors.]

Id.

expressed in Mexico,[180] although some Mexican commentators call them "anachronic [sic]."[181]

VIII. *n* SKEPTICS

Jeremy Bentham, founder of utilitarianism,[182] warned against the warm fuzzy feeling that comes from large values of *n*:

> "[W]e must be on our guard against those sentimental exaggerations which tend to give crime impunity, under the pretext of insuring the safety of innocence. Public applause has been, so to speak, set up to auction. At first it was said to be better to save several guilty men, than to condemn a single innocent man; others, to make the maxim more striking, fix the number ten; a third made this ten a hundred, and a fourth made it a thousand. All these candidates for the prize of humanity have been outstripped by I know not how many writers, who hold, that, in no case, ought an accused person to be condemned, unless evidence amount to mathematical or absolute certainty. According to this maxim, nobody ought to be punished, lest an innocent man be punished."[183]

Some less theoretical minds went somewhat further in their skepticism about the *n* maxim. German chancellor Otto von Bismarck is said to have remarked that "it is better that ten innocent men suffer than one guilty man escape."[184] Feliks Dzerzhinsky, founder of the Soviet secret police, saw Bismarck's motto and raised him an execution: "Better to execute ten innocent men than to leave one guilty

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[180] *See* Renward Garcia Medrano, *Justicia, no venganza*, EL NACIONAL, Aug. 9, 1996, *available in* LEXIS, World Library, Mexpub File ("[S]ería tan pernicioso dejar sin castigo [a] los culpables, como castigar a personas inocentes." ["It would be as pernicious to leave the guilty unpunished as to punish innocent people."]); *Mujeres Apoyo Tristan*, SERVICIO UNIVERSAL DE NOTICIAS, June 18, 1997, *available in* LEXIS, World Library, Mexpub File ("Es preferible que un culpable sea declarado inocente a que se mate a un inocente . . . ." ["It is preferable that a guilty man be declared innocent than that an innocent be killed."]); *Triunfa la cordura sobre el Salvaje de la calle 96'*, EL DIARIO/LA PRENSA, Mar. 3, 1993, at 16 ("Es preferible que salgan libres cien culpables a que se condene a un inocente. A través de mas de doscientos años de práctica, se ha demonstrado que el sistema funciona." ["It is better that a hundred guilty people go free than that one innocent be condemned. Over two hundred years of practice have shown that the system works."]).

[181] Juan Ruiz Healy, *A Fondo; Yet Another Blow to Mexican Image in the United States*, NEWS (Mex.), Jan. 12, 1998, *available in* LEXIS, News Library, Mexpub File.

[182] *See* 2 THE NEW ENCYCLOPÆDIA BRITANNICA, *supra* note 25, at 109.

[183] Laufer, *supra* note 3, at 333 n.17 (quoting BENTHAM, *supra* note 113, at 169).

[184] John W. Wade, *Uniform Comparative Fault Act*, 14 FORUM 379, 385 (1979).

man alive."[185] Dzerzhinsky apparently did not elaborate on the rationale for this sort of treatment. Nor did Nikolai Yezhov, one of his like-minded successors,[186] except to quote the Russian proverb, "When you cut down the forest, woodchips fly."[187] "Kto vinovat?" ("Who is guilty?") is, after all, a "classic Russian question."[188] The "Lenin omelette," for instance, is prepared according to the principle that "it's better to break a hundred eggs than to let a guilty egg go free."[189] "[F]or big eaters only."[190] This perspective is perhaps best explained by Major Nungo, a Colombian military prosecutor, who said, "[f]or us military men, everybody is guilty until proved otherwise .... '[B]etter to condemn an innocent man than to acquit a guilty one, because among the innocent condemned there may be a guilty man.'"[191]

A military motif appears quite often in works of *n*-skepticism. Back in England, James Fitzjames Stephen suggested that:

> [Blackstone's maxim] resembles a suggestion that soldiers should be armed with bad guns because it is better that they should miss ten enemies than that they should hit one friend.... Everything depends on what the guilty men have been doing, and something depends on the way in which the innocent man came to be suspected.[192]

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[185] "Lieber zehn Unschuldige exekutieren, als einen Schuldigen laufen lassen." *Und jetzt Lenin*, SÜDDEUTSCHE ZEITUNG, Aug. 24, 1991, *available in* LEXIS, World Library, Allwld File.

[186] Yezhov said in 1936, shortly after becoming head of the NKVD (the precursor to the KGB), "Better that ten innocent people should suffer than one spy get away." CHAIM POTOK, THE GATES OF NOVEMBER 71 (1996); *see also id.* at 103 (*n = 100*).

[187] *Id.* at 71 ("Лес рубят—щепки летят."); *see also* Robert Leiter, *Family Saga, Russian Style*, JEWISH EXPONENT, Dec. 5, 1996, at 10 (*n = 999*).

[188] Tony Barber, *Jeltsin witheet over blunders van generaals*, HET PAROOL, Jan. 10, 1996, at 5, *available in* LEXIS, World Library, Noneng File ("Kto vinovat? is een klassieke Russische vraag.").

[189] James Lileks, *Lights, Tree, Action*, STAR TRIB. (Minneapolis), Dec. 14, 1997, at 3B, *available in* LEXIS, News Library, Majpap File; *see also* Hugh Comstock, Letter, *Leave Gates Alone; He Feeds the Economy*, CHARLESTON DAILY MAIL (Charleston, W. Va.), Oct. 28, 1997, at 6A, *available in* LEXIS, News Library, Papers File (describing "Stalin Syndrome" as "[b]etter 100 innocent should die than one guilty go free").

[190] Lileks, *supra* note 189.

[191] *Colombia: Dirty Work at the Crossroads*, LATIN AM., Jan. 30, 1976, at 39.

[192] 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 438 (London, MacMillan 1883). Carleton Allen added that:

> It also depends on the general social conditions in which they have been doing it.... I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no sensible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken

The wrongly convicted defendant may be comforted by William Paley's suggestion that "he who falls by a mistaken sentence may be considered as falling for his country."[193]

The British Isles appear to be entering a golden age of *n*-skepticism, thanks, perhaps, to the efforts of the Irish Republican Army. One British writer asks what use $n = 10$ is "if those [ten] guilty men use their freedom to plant a bomb that kills [a hundred] schoolchildren."[194] Another observer blends judicial theory, gastronomy, and $n = 1000$: "[T]hat, no doubt, is an admirable precept; but it does not tell us who precisely benefits from the liberty of the lucky thousand, with their Semtex and their icing sugar-ammonium nitrate confectionery of murder."[195]

Although Jeremy Bentham was indeed an *n*-skeptic, he never questioned the value of protecting the innocent. In one of his tirades on judges who heard cases of tax law, he said:

> Of the class to which he belongs, and by the sympathy with which he is engrossed, it is the interest that the mass of wealth extracted from the labour of the labouring classes be as great as possible: the greater it is, the more there is of it to enrich them, and encourage others. Rather than see one guilty individual escape, what number of innocent ones he would see suffer, it is not so easy to say.[196]

In other news, "it's better for a good movie to be trashed than for a bad movie to be praised."[197]

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down and society is in a state of chaos. In short, it is only when there is a reasonable and uniform probability of guilty persons being detected and convicted that we can allow humane doubt to prevail over security. But we must never forget that ideally the acquittal of ten guilty persons is exactly ten times as great a failure of *justice* as the conviction of one innocent person.

ALLEN, *supra* note 60, at 286-87.

[193] WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 433 (Boston, Richardson & Lord 1821). "Nothing is more easy than thus to philosophize and act the patriot for others," answered Samuel Romilly, who was not impressed by Paley's logic. SAMUEL ROMILLY, OBSERVATIONS ON THE CRIMINAL LAW OF ENGLAND 75 (London, T. Cadell & W. Davies 1810).

[194] Worsthorne, *supra* note 162, at 22.

[195] Kevin Myers, *Why the IRA Can't Curb Its Bloodlust*, DAILY MAIL (London), Feb. 20, 1996, at 8.

[196] 2 JEREMY BENTHAM, *Principles of Judicial Procedure, in* THE WORKS OF JEREMY BENTHAM 1, 119 (John Bowring ed., London, Simpkin, Marshall, & Co. 1843).

[197] Rhys Southan, Letter, *Cynics in Our Midst*, DALLAS OBSERVER, July 17, 1997, *available in* LEXIS, News Library, Dalobs File.

IX. FEDERAL *n* LAW

United States jurisprudence on the subject of *n* is contradictory and tormented. The Supreme Court first commented on the issue in 1895, when the majority opinion in *Coffin v. United States* cited Athenian law, Trajan, Fortescue, Hale, and Blackstone all at once, to underscore the long history of the presumption of innocence, but refused to commit to a number.[198] The Court revisited the issue in an equally indefinite way in 1959, when it established, in *Henry v. United States*, that "[i]t is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest."[199]

Virtually all of the Supreme Court *n*-guilty-men jurisprudence was created in the 1970s, starting with *In re Winship* in 1970.[200] The majority opinion in *Winship* stated, somewhat noncommittally, that "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[201] Justice Harlan's concurring opinion, however, was much stronger and has been more widely cited. "I view the requirement of proof beyond a reasonable doubt in a criminal case," Justice Harlan wrote, "as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[202]

Both opinions in *Winship* can be read to establish that $n = 1$; even though Harlan's concurrence said convicting an innocent man was "far worse" than letting a guilty man go free, the Court recognized in *Patterson v. New York* that the risk society bears in protecting the innocent "is not without limits; and Mr. Justice Harlan's aphorism provides little guidance for determining what those limits are."[203] The value $n = 10$ was suggested in Justice Marshall's concurring opinion in *Furman v. Georgia*,[204] but did not appear in a majority opinion until Justice Blackmun, in *Ballew v. Georgia*, called it "perhaps not an unreasonable

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[198] 156 U.S. 432, 454-56 (1895).

[199] 361 U.S. 98, 104 (1959).

[200] 397 U.S. 358 (1970).

[201] *Id.* at 364.

[202] *Id.* at 372 (Harlan, J., concurring). Harlan's concurrence has been cited in many cases, including *Lego v. Twomey*, 404 U.S. 477, 494 (1972) (Brennan, J., dissenting).

[203] 432 U.S. 197, 208 (1977).

[204] 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring) (quoting William O. Douglas, *Foreword* to JEROME FRANK & BARBARA FRANK, NOT GUILTY 11-12 (1957)).

assumption."[205] *Ballew*'s mild language did not overrule *Winship*, which continued to be cited during the 1980s.[206]

The Supreme Court has also declined to extend the presumption against wrongful conviction to the context of civil commitment,[207] stating that the interests of people wrongfully committed to a mental institution would be protected by the "concern of family and friends."[208]

The Fifth,[209] Eighth,[210] and Eleventh[211] Circuits' rulings have been consistent with those of the Supreme Court. The Federal, Third, Fourth, Sixth, and Tenth Circuits apparently have never ruled on the issue (although district courts in the Third,[212] Fourth,[213] and Sixth[214] Circuits have dealt with the question). The Seventh and Ninth Circuits have had dissents and concurrences dealing with the question,[215] but have never addressed it in a majority opinion.[216]

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[205] 435 U.S. 223, 234 (1978).

[206] *See* Rose v. Clark, 478 U.S. 570, 580 (1986); Francis v. Franklin, 471 U.S. 307, 313 (1985).

[207] *See* Addington v. Texas, 441 U.S. 418, 428-29 (1979) ("It cannot be said . . . that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed.").

[208] *Id.* at 428-29.

[209] *See* Handford v. United States, 249 F.2d 295, 296 (5th Cir. 1957) ($n = 1$), *rev'd on other grounds*, 359 U.S. 120 (1959). *Handford* was repeatedly and consistently approved in: Hall v. United States, 419 F.2d 582, 588 (5th Cir. 1969); Turner v. United States, 415 F.2d 1234, 1236 (5th Cir. 1969), *withdrawn on other grounds*, 441 F.2d 736 (5th Cir. 1971); Washington v. United States, 327 F.2d 793, 795 (5th Cir. 1964); Dunn v. United States, 307 F.2d 883, 885 (5th Cir. 1962); Ginsberg v. United States, 257 F.2d 950, 954-55 (5th Cir. 1958). On the district court level, see also *Barnes v. Mississippi Dep't of Corrections*, 907 F. Supp. 972, 979 (S.D. Miss. 1995) ($n = 1$). $n = 1$ was extended to habeas corpus in *Pate v. Holman*, 341 F.2d 764, 776 (5th Cir. 1965).

[210] *See* Gulotta v. United States, 113 F.2d 683, 686 (8th Cir. 1940) ($n = 1$); *see also* Donnell v. Swenson, 258 F. Supp. 317, 330 (W.D. Mo. 1966) ($n = 1$). Another district court in the Eighth Circuit, however, has ruled that $n = 100$. *See* Smith v. Armontrout, 632 F. Supp. 503, 515-16 n.34 (W.D. Mo. 1986) ("[I]t is better to acquit a hundred guilty men than to convict one innocent man."), *aff'd*, 812 F.2d 1050 (8th Cir. 1987).

[211] *See* United States v. Eason, 920 F.2d 731, 736 (11th Cir. 1990) ($n = 1$). However, the rule of *In re Rule of Court*, 20 F. Cas. 1336, 1337 (C.C.N.D. Ga. 1877) (No. 12,126), that $n =$ *"some"* for merely being arrested on a criminal charge, may still apply.

[212] *See* United States v. Michalski, 265 F. 839, 840 (W.D. Pa. 1919) ($n =$ *"some"*).

[213] *See* Salling v. Bowen, 641 F. Supp. 1046, 1051 (W.D. Va. 1986) ($n =$ *"several"* for criminal punishment, and $n =$ *"a few"* for being denied Social Security benefits); United States v. Smith, 592 F. Supp. 424, 437 (E.D. Va.) ($n = 1$), *aff'd*, 750 F.2d 1215 (4th Cir. 1984).

[214] *See In re* Fegler, 36 F. Supp. 88, 89 (E.D. Mich. 1940) ($n = 10$).

[215] *See* Bunnell v. Sullivan, 947 F.2d 341, 352-53 (9th Cir. 1991) (en banc) (Kozinski, J., concurring only in the judgment) ($n = 10$); McKenzie v. Risley, 842 F.2d 1525, 1545 (9th Cir. 1988) (Fletcher, Pregerson, Canby & Norris, JJ., dissenting) ($n = 1$); United States v. Banks, 687 F.2d 967, 984 (7th Cir. 1982) (Swygert, J., concurring

Other circuits have gone their own way (presumably unconstitutionally). The First Circuit ruled once on the issue, establishing $n = 10$ in 1989.[217]

In 1829, before the Supreme Court had entered the lists—and even before the creation of the D.C. Circuit—a District of Columbia court cited Matthew Hale's $n = 5$ and pointed out that if Hale's opinion had been required:

> [T]here can be no doubt that his patriotism would have prompted him to say, that it is better that ten guilty persons should escape punishment, than that any one of those rules of the common law which were adopted for the protection of the personal liberty and safety of the subject or citizen, should be abrogated.[218]

$n = 5$ or even $n = 10$, then, for abrogating common law rules. In the general criminal context, the D.C. Circuit restated this as $n = some$ in 1975,[219] and narrowed it down to $n = 10$ in 1976.[220] The D.C. Circuit also established $n = 1$ for the purpose of allowing the American Broadcasting Companies to go to court.[221]

The Second Circuit began its n-jurisprudence with $n = \infty$ in 1949,[222] as a way of preempting liability for public officials. In 1926, one Second Circuit judge advocated adoption of the British rule,

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and dissenting) ($n = 1$); United States v. Johnson, 123 F.2d 111, 141 (7th Cir. 1941) (Evans, J., dissenting) ($n =$ *"many"*), *rev'd on other grounds*, 319 U.S. 503 (1943).

[216] But see two Seventh Circuit district court rulings that deal with n. A district court in Illinois denied the maxim entirely in *United States ex rel. Reck v. Ragen*, 172 F. Supp. 734, 745 (N.D. Ill. 1959), *rev'd on other grounds*, 367 U.S. 433 (1961), stating: "This 'maxim' . . . is fallacious, since it places the price of ten guilty men on one innocent man, thus admitting that there is a limit over which an innocent man may be unjustly convicted without violating any principles of our philosophy. Thus, the 'maxim' contradicts the 'maxim.'" But a district court in Indiana ruled that $n = 1$ in *Dean v. Duckworth*, 559 F. Supp. 1331, 1337 (N.D. Ind. 1983), *rev'd on other grounds*, 748 F.2d 367 (7th Cir. 1984).

[217] *See* United States v. Clotida, 892 F.2d 1098, 1105 (1st Cir. 1989) ("'[T]he law holds, that it is better that ten guilty persons escape, than that one innocent suffer.'" (quoting BLACKSTONE, *supra* note 2, at *352)). *But see* Smith v. Butler, 696 F. Supp. 748, 764-65 (D. Mass. 1988) ($n = 1000$).

[218] United States v. Watkins, 28 F. Cas. 419, 440 (C.C.D.C. 1829) (No. 16,649).

[219] *See* United States v. Diggs, 522 F.2d 1310, 1330 (D.C. Cir. 1975).

[220] *See* United States v. Greer, 538 F.2d 437, 441 (D.C. Cir. 1976) ($n = 10$); *see also* United States v. Herron, 567 F.2d 510, 522 (D.C. Cir. 1977) ($n = 10$).

[221] *See* Shepherd v. ABC, 62 F.3d 1469, 1476 (D.C. Cir. 1995) ("[I]t is better to risk permitting a 'guilty' ABC to defend this case than to risk denying an 'innocent' ABC its day in court.").

[222] *See* Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) ("[I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.").

from *Munster v. Lamb*,[223] that $n = \infty$ for attorneys sued for slander, but fortunately he was in dissent.[224] A 1969 concurrence stated that $n = 99$,[225] but the first actual ruling in a squarely criminal case did not come until 1989, in an opinion that cited Blackstone and held that $n = 10$.[226] The Second Circuit is also at odds with the Supreme Court on the value of confining the mentally ill; it granted in 1992 that while $n = 10$ may be too high in the context of civil commitment, n is still greater than one, and is perhaps three or five.[227]

Military courts, which have their own rules, ruled in 1951 that $n = 5$,[228] but scaled n down to one in 1957[229] and have kept it there ever since.[230]

X. STATE *n* LAW

The Appendix gives a state-by-state breakdown of values of n for forty-five states. Twenty-one states have not ruled on the matter; three have ruled, but not in a majority opinion; of the remaining twenty-six, twenty-one have pretty much settled on some value of n. This leaves the weirdoes: Alabama, California, New York, Ohio, and Virginia.

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[223] 11 Q.B.D. 588, 604 (Eng. C.A. 1883).

[224] *See* Yaselli v. Goff, 12 F.2d 396, 402 (2d Cir. 1926) (Davis, J., dissenting), *aff'd*, 275 U.S. 503 (1927).

[225] *See* United States v. Miller, 411 F.2d 825, 833 (2d Cir. 1969) (Moore, J., concurring).

[226] *See* United States v. Schwimmer, 882 F.2d 22, 27-28 (2d Cir. 1989).

[227] *See* Goetz v. Crosson, 967 F.2d 29, 39 (2d Cir. 1992). District courts in the Second Circuit have been inconsistent on the point since 1806. *Compare* United States v. Allen, 24 F. Cas. 772, 774 (C.C.E.D.N.Y. 1868) (No. 14,432) ($n = 1$), United States v. Smith, 27 F. Cas. 1192, 1199 (C.C.D.N.Y. 1806) (No. 16,342) ($n = 1$), *and* United States v. Bonanno, 180 F. Supp. 71, 82 (S.D.N.Y. 1960) ($n = 1$), *with* United States v. Sadiq, 783 F. Supp. 98, 101 (E.D.N.Y. 1992) ($n = 10$), *and* United States v. Fatico, 458 F. Supp. 388, 410–11 (E.D.N.Y. 1978) (discussing $n = 10$ and $n = 1000$), *aff'd*, 603 F.2d 1053 (2d Cir. 1979).

[228] *See* United States v. O'Neal, 2 C.M.R. 787, 791 (A.F.B.R. 1951) ($n = 5$), *rev'd on other grounds*, 2 C.M.R. 44 (C.M.A. 1952); *see also* United States v. Jones, 9 C.M.R. 691, 706 (A.F.B.R. 1953) ($n = 5$).

[229] *See* United States v. Reese, 24 C.M.R. 467, 497 (N.B.R. 1957) ("It will be much better that the guilty now and then escape in this way, than to introduce or sanction such practice which may place the innocent entirely in the power of a court....").

[230] *See* United States v. Payne, 41 C.M.R. 188, 191 (C.M.A. 1970) ("[I]t is far better that human justice should fail, and the guilty be left to the infallible justice of God, than that an innocent person should have his life destroyed ...."); *see also* United States v. Williams, 39 M.J. 555, 558 (A.C.M.R. 1994) ("[w]e are better served by protecting the innocent than by convicting the guilty.").

Alabama has gone from n = *"many,"*[231] with a brief detour through $n = 1$,[232] to $n = 5$ in recent years[233] (although some Alabama courts have disparaged the use of n altogether[234]).

California attempted to rise above the n controversy in 1904, critiquing the maxim as "argumentative" when presented to a jury.[235] But succeeding California courts soon entered the fray, with an $n = 10$ dissent in 1928[236] and an $n = 1$ majority opinion in 1934.[237] California law continued to be $n = 1$ through the 1960s,[238] until this was overturned in 1970 to $n = 10$ by *In re Dean*.[239] This new value of n has remained ever since.[240] In addition, California courts have ruled that $n = \infty$ in attorney slander cases,[241] that $n > 1/54$ for civil commitment,[242] and that $n < 10$ where parents' infant daughters are accusing

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[231] Farrish v. State, 63 Ala. 164, 165 (1879); *see also* Wilson v. State, 8 So.2d 422, 437 (Ala. 1942) (n = *"many"*); Woodson v. State, 54 So. 191, 194 (Ala. 1910) (Mayfield, J., dissenting); Bolling v. State, 12 So. 782, 783 (Ala. 1893) ($n = 1$ but qualified with a "better, far better"), *rev'd on other grounds*, 22 So. 275 (Ala. 1897); Harnage v. State, 274 So. 2d 333, 346 (Ala. Crim. App.) (n = *"many"*), *rev'd on other grounds*, 274 So. 2d 352 (Ala. 1972).

[232] *See* Lindsey v. State, 88 So. 189, 190 (Ala. Ct. App. 1921) ("[I]t is better that the guilty go free than that the innocent should suffer.").

[233] *See Ex parte* Mauricio, 523 So. 2d 87, 92 (Ala. 1987) ($n = 5$).

[234] *See, e.g.*, Lowe v. State, 7 So. 97, 98 (Ala. 1890) ("It cannot be said that the trite expression, 'it is better that ninety-nine guilty men should escape than that one innocent man should be punished,' is an established maxim of the law. The law recognizes no such comparison of numbers.").

[235] *See* People v. Nunley, 75 P. 676, 678 (Cal. 1904).

[236] *See* People v. Troche, 273 P. 767, 778 (Cal. 1928) (Preston, J., dissenting); *see also* People v. Scott, 151 P.2d 517, 527 (Cal. 1944) (Carter, J., dissenting) ($n = 10$).

[237] *See* People v. Lamson, 36 P.2d 361, 367 (Cal. 1934) ($n = 1$).

[238] *See* People v. Alverson, 388 P.2d 711, 719 (Cal. 1964) (McComb, J., dissenting) ($n = 1$).

[239] 90 Cal. Rptr. 473, 474 (Ct. App. 1970).

[240] *See* People v. Level, 162 Cal. Rptr. 682, 698-700 n.8 (Ct. App. 1980) (Hanson, J., dissenting) (highlighting the steadfastness of the value of n (citing MACKLIN FLEMING, THE PRICE OF PERFECT JUSTICE 3-9 (1974))).

[241] *See* Friedman v. Knecht, 56 Cal. Rptr. 540, 545 (Ct. App. 1967) (stating that in all but an "infinitesimal" number of cases, sanctions are adequate to protect an attorney possibly subject to slander).

[242] *See* Thompson v. County of Alameda, 614 P.2d 728, 735 (Cal. 1980). The court in *Thompson* explained:

> Assume that one person out of a thousand will kill. Assume also that an exceptionally accurate test is created which differentiates with 95% effectiveness those who will kill from those who will not. If 100,000 people were tested, out of the 100 who would kill 95 would be isolated. Unfortunately, out of the 99,900 who would not kill, 4,995 people would also be isolated as potential killers. In these circumstances, it is clear that we could not justify incarcerat-

them of pedophilia.[243]

New York started out with $n = 1$ in *People v. Barrett*,[244] and stayed with this number for more than half a century. The confusion began in 1858, when *Ruloff v. People* changed the value to $n =$ *"many"* and $n = 5$ (at the same time).[245] Since then, n has vacillated between $n = 1$,[246] $n = 5$,[247] $n = 10$,[248] $n = 99$,[249] $n =$ *"some,"*[250] and $n =$ *"many."*[251] The status of n in New York is therefore uncertain.

Ohio was once a consistently $n = 99$ ("ninety-nine") state, beginning with *Silver v. State* in 1848.[252] The steady stream of cases reaffirming $n = 99$ ("ninety and nine,"[253] "ninetynine"[254]) was only broken by one $n =$ *"many"* case, *Robbins v. State*,[255] which was consistent with $n = 99$. In 1963, however, *State v. Hill* scaled the number down to

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ing all 5,090 people. If, in the criminal law, it is better that ten guilty men go free than that one innocent man suffer, how can we say in the civil commitment area that it is better that fifty-four harmless people be incarcerated lest one dangerous man be free?

Id. (citing Dennis W. Daley, Comment, Tarasoff *and the Psychotherapist's Duty to Warn*, 12 SAN DIEGO L. REV. 932, 942-43 n.75 (1975)).

[243] *See In re* Kailee B., 22 Cal. Rptr. 2d 485, 490 (Ct. App. 1993). The court stated:

While one may accept this homily in a criminal setting, though its exact statistical basis has not been precisely defined nor universally accepted, we trust that few, if any, would agree it is better that [ten] pedophiles be permitted to continue molesting children than that [one] innocent parent be required to attend therapy sessions in order to discover why his infant daughter was falsely making such appalling accusations against him.

Id.; *see also In re* Carmen O., 33 Cal. Rptr. 2d 848, 854-55 (Ct. App. 1994) (supporting the proposition of *In re Kailee B.*).

[244] 2 Cai. R. 304, 309 (N.Y. Sup. Ct. 1805) (Livingston, J.) ($n = 1$).

[245] 18 N.Y. 179, 184-85 (1858), *overruled on other grounds by* People v. Lipsky, 443 N.E.2d 925 (N.Y. 1982).

[246] *See* People v. Sher, 167 N.Y.S.2d 748, 751 (Sup. Ct. 1957) ($n = 1$); People v. Smith, 167 N.Y.S.2d 329, 331 (Sup. Ct. 1957) (same); *In re* Ulster County Dep't of Social Servs., No. N-286-93W, 1995 WL 519189, at *5 (N.Y. Fam. Ct. Mar. 24, 1995) (same); *see also* People v. Molineux, 61 N.E. 286, 311 (N.Y. 1901) (O'Brien, J., concurring) (same).

[247] *See* People v. Galbo, 112 N.E. 1041, 1044 (N.Y. 1916). See also an $n = 5$ dissent in *People v. Larkman*, 20 N.Y.S.2d 35, 38 (App. Div. 1940) (Harris, J., dissenting).

[248] *See* People v. Cohen, 191 N.Y.S. 831, 842 (Sup. Ct. 1921).

[249] *See In re* X, Y and Z, 43 N.Y.S.2d 361, 365 (Dom. Rel. Ct. 1943) (noting that $n = 99$ reflects "the spirit of the Anglo-Saxon attitude in law").

[250] People v. Oyola, 160 N.E.2d 494, 498 (N.Y. 1959); People v. Yonko, 339 N.Y.S.2d 837, 846 (App. Div. 1973) (Capozzoli, J., dissenting).

[251] People v. Lipsky, 443 N.E.2d 925, 930 (N.Y. 1982).

[252] 17 Ohio 365, 369 (1848).

[253] Lamprecht v. State, 95 N.E. 656, 660 (Ohio 1911); Jones, Stranathan & Co. v. Greaves, 26 Ohio St. 2, 4 (1874).

[254] State v. Wing, 64 N.E. 514, 518 (Ohio 1902).

[255] 8 Ohio St. 131, 151 (1857).

n = *"a few."*[256] It is unclear how much "a few" is, but it is probably less than ninety-nine. Moreover, "a few" applies only to capital cases,[257] which is highly counterintuitive.

Virginia has reluctantly recognized $n = 99$ for criminal cases in general since *McCue v. Commonwealth* in 1905[258] but considers the proper value of n to be somewhat lower than ninety-nine for cases of housebreaking.[259]

XI. ADVICE FOR CRIMINALS

Criminals, therefore, are advised to go to New Mexico ($n = 99$)[260] or Oklahoma ($n = 100$).[261] Criminals who had planned on going to Ohio or Virginia, hoping to find $n = 99$ there, may want to reconsider.[262] Criminals who like to live on the edge may want to take their chances with n = *"many"* in Kentucky,[263] New Jersey,[264] Rhode Island,[265] or South Carolina.[266] They may also want to try out New York, but this could be risky.[267]

Criminals who are planning to violate federal law should go to the D.C. Circuit ($n = 10$)[268] or the Second Circuit (which contains Connecticut, New York, and Vermont) ($n = 10$).[269] The abnormally high crime rate in Washington, D.C. (41% and 58% higher than those of its nearest competitors, Florida and Arizona), suggests that many

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[256] 317 N.E.2d 233, 237 (Ohio Ct. App. 1963).

[257] *See id.* ("[I]t is better that a few of the guilty escape their just deserts than to put to death one who is innocent.").

[258] 49 S.E. 623, 630 (Va. 1905) ("We have no fault to find with the expression as a rhetorical phrase.").

[259] *See* McDaniel v. Commonwealth, 181 S.E. 534, 538 (Va. 1935) ($n < 99$ for housebreakers).

[260] *See* State v. Chambers, 524 P.2d 999, 1002-03 (N.M. Ct. App. 1974).

[261] *See* Pruitt v. State, 270 P.2d 351, 362 (Okla. Crim. App. 1954).

[262] *See supra* notes 252-57 and accompanying text (Ohio); *supra* notes 258-59 and accompanying text (Virginia).

[263] Fyffe v. Commonwealth, 190 S.W.2d 674, 680 (Ky. 1945).

[264] State v. Haines, 120 A.2d 118, 124 (N.J. 1956).

[265] State v. Paster, 524 A.2d 587, 591 (R.I. 1987).

[266] State v. Manis, 51 S.E.2d 370, 375 (S.C. 1949).

[267] *See supra* notes 244-51and accompanying text (discussing the uncertain status of n in New York).

[268] *See supra* notes 218-21 and accompanying text.

[269] *See supra* note 226 and accompanying text.

criminals already have gone there.[270] To be on the safe side, criminals who go to D.C. to violate federal law should run for public office.

Whether there really is a relationship between high values of n and high crime rates is controversial. "Tough-on-crime" types believe that there is a positive relationship between n and c, or that high values of n—a high presumption of innocence—lead to high values of c—an increased incidence of crime. Others believe, however, that n and c are negatively related—that punishment may be counterproductive, and that low values of n can lead to high values of c. We would like to find a mathematical function that relates n and c, for example, $c = an + b$, to know precisely how different values of n will affect c. Unfortunately, we do not know at the outset what form this function will take. It may, for instance, look like $1 / c = an^2 + b$, or $\ln c = a / n + b$. Standard statistical programs[271] can tell us the values of a and b that best fit the data, but first we must guess at the precise form of the function. I tried different mathematical functions until I found a functional form that best fit the data. Using values of n as revealed by state court opinions, and FBI data on c in different states,[272] this trial-and-error method yields the following possible model:

$$c^2 = -1{,}251{,}677 \ln n + 30{,}217{,}466.$$

c is measured in cases per 100,000 population. The numbers (in this case, –1,251,677 and 30,217,466) were chosen to make the equation fit the real-world numbers as closely as possible. In this model, n and c are negatively related: as n (the presumption of innocence) goes up, c (the crime rate) goes down.[273] Knowing n allows us to pre-

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[270] The crime rate in Washington, D.C., is 11,761.1 per 100,000. Florida is the state with the highest crime rate, at 8,351.0 per 100,000, followed by Arizona (7,431.7). THE WORLD ALMANAC AND BOOK OF FACTS 1996, at 958 (Robert Famighetti ed., 1996) [hereinafter WORLD ALMANAC] (citing FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES (1993)).

[271] I have used Microsoft® Excel.

[272] *See* WORLD ALMANAC, *supra* note 270, at 958 (listing United States crime rates by region).

[273] In this model, $R^2 = 0.032505$ and $F = 0.839919$. For simple linear regression models, where there is only one independent variable, the F-statistic is the square of the t-statistic; t-statistics can therefore be derived by taking the square roots of the F-statistics in each case. Here, the t-statistic is 0.8159. Also, for simple linear regression, R^2 is the square of ρ, the correlation coefficient. Here, $\rho = 0.16104$.

I report these values so the model looks scientific. In fact, $R^2 = 0.5$ or higher is expected with cross-sectional data. Moreover, a t-statistic higher than 2.052, or an F-statistic higher than 4.21, is expected when there are (as here) 27 data points, if we are to accept the model at a 95% significance level. *See, e.g.*, MICHAEL D. INTRILIGATOR, ECONOMETRIC MODELS, TECHNIQUES, AND APPLICATIONS §§ 5.2-.4, at 124-34 (1978)

dict c, and, conversely, knowing current crime rates, c, allows us to know n—that is, to determine the strength of the presumption of innocence.

The current national crime rate is 5482.9 crimes per 100,000 people.[274] Setting $c = 5482.9$, we find that $n = 1.132$—a slight presumption of innocence. If Blackstone were in charge of the criminal justice system, of course, n would be 10, and so c would be 5228.3 crimes per 100,000, about 4.6% lower than the current rate.

The data, however, are inconclusive. Another model, which fits the data about as well,[275] instead shows n and c positively related, with crime rates going up as the presumption of innocence increases:

$$1 / c^2 = -(5.6 \times 10^{-10} \ln n) + (4.75 \times 10^{-8})$$

In this model, the Blackstonian crime rate (the value of c corresponding to $n = 10$) is 4651.9. Setting $c = 5482.9$, the national average, we find that the corresponding value of n is 1.0967×10^{11}, or approximately 109,670,000,000 (that is, better that 109.67 billion guilty men be acquitted than one innocent man be convicted). That's a lot of presumption of innocence.

A definitive choice between these models must await further empirical evidence.[276]

XII. THE FUTURE OF n

We have seen where n has come from. Where is n going?[277] Similar statistical methods allow us to determine the evolution of the presumption of innocence over time. Using all U.S. judicial majority decisions as our data set,[278] we can use the following model to predict future values of n based on the year y:

$$\ln n = -0.00123\, y + 3.17.$$

(noting that certain t-statistic and F-statistic levels are often expected if a high significance level is desired).

[274] *See* WORLD ALMANAC, *supra* note 270, at 958.

[275] $R^2 = 0.001303$ and $F = 0.032616$.

[276] Requirements for the models considered in this study were: (1) that there exist a value of c corresponding to $n = 10$; (2) that there exist a value of n corresponding to $c = 5482.9$, the national average; and (3) that this value of n be greater than 1, that is, that the model imply that innocence is currently presumed.

[277] *Cf.* ROBERT FROST, *Stopping by Woods on a Snowy Evening*, *in* THE POETRY OF ROBERT FROST 224, 225 (Edward Connery Lathem ed., 1969) ("[n] miles to go before I sleep, [n] miles to go before I sleep.").

[278] For the sake of clarity, I have translated n = *"a few"* into $n = 3$, n = *"some"* into $n = 5$, n = *"several"* into $n = 10$, n = *"many"* into $n = 100$, and $n = \infty$ into $n = 1000$.

Setting $n = 1$,[279] we can determine the year in which we can expect the presumption of innocence to disappear in the United States.[280] The model predicts that this will happen in the year 2586.[281] Note, however, that other models are equally consistent with the data. The following model suggests that n and y have a linear relationship to each other:

$$n = 0.234\,y - 408$$

This model fits the data equally well,[282] but indicates gradually *increasing* values of n, and suggests that at the inception of the United States, n was 11.04. This value is consistent with Blackstone's, which seems reasonable: Blackstone was writing at about that same time, and the English legal system prevailed in the American colonies.[283] (This despite the claim that "America was founded on" $n = 1000$.)[284] The model also shows that the current value of n should be about 59.72.[285]

Definitively choosing between these models must await further empirical evidence.

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[279] *ln* represents the natural logarithm function. $ln\ 1 = 0$.

[280] $R^2 = 0.003892$, $F = 0.42593$. $R^2 = 0.9$ or higher is expected with time-series data. A t-statistic higher than 1.98, or an F-statistic higher than 3.94, is expected when there are (as here) more than 100 data points, if we are to accept the model at a 95% significance level. *See* INTRILIGATOR, *supra* note 273, at 124-34.

[281] Two other models, yielding similar results are: $ln\ n = -0.106\sqrt{y} + 5.46$; and $ln\ n = (4255/y) - 1.403$. Each of these models has similar values of R^2 (0.003787 and 0.003469, respectively) and similar F-statistics (0.41434 and 0.37946, respectively). The first of these models predicts that the presumption of innocence will last until the year 2654, while the second model predicts that it will last until the year 3032. (I only report the numbers to three significant figures, so any calculations made with the versions of the equations given here will be approximate.) Averaging the years obtained from these two models and the one in the text, we may reasonably expect the presumption of innocence to last until the year 2757.

[282] $R^2 = 0.003643$, $F = 0.398521$.

[283] *See* Alschuler, *supra* note 40, at 5-6 (describing the availability of the *Commentaries* in revolutionary America).

[284] Paul Wimmer, Letter, *Witch Trial*, ORLANDO SENTINEL, Nov. 16, 1997, at G2, *available in* LEXIS, News Library, Orsent File.

[285] Two other models yielding the same result are: $n = -(855562/y) + 488$; $n = 20.5\sqrt{y} - 855$. These two models fit the data similarly well ($R^2 = 0.003601$ and $R^2 = 0.003633$, $F = 0.393883$ and $F = 0.397408$), give 1789-values of n of 9.46 and 10.65, and give current values of n of 59.27 and 59.60.

CONCLUSION

Juvenal[286] and Goethe[287] believed that the guilty are never *really* acquitted. To such people, the question is somewhat moot. Franz Kafka doubted the existence of guilt;[288] Archibald MacLeish doubted the existence of innocence.[289] Albert Camus doubted both,[290] and Pontius Pilate doubted truth.[291] To these, too, our question cannot help but be a little beside the point. Still others sidestep the issue, such as former British prime minister John Major, who told a Tory

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[286] *See* JUVENAL, FOURTEEN SATIRES 79 (J.D. Duff ed., Cambridge University Press 1970). Translation from JUVENAL, THE SATIRES OF JUVENAL 151 (Rolfe Humphries trans., 1958) ("Exemplo quodcumque malo committitur, ipsi displicet auctori. prima est haec ultio quod se iudice nemo nocens absolvitur, improba quamvis gratia fallaci praetoris vicerit urna." ["Any performance that sets an evil example displeases even its author himself: to begin with, punishment lies in the fact that no man, if guilty, is ever acquitted with himself as judge, though he may have won in the courtroom bribing the praetor in charge, or stuffing the urn with false ballots."]).

[287] *See* 1 GOETHE, WILHELM MEISTERS LEHRJAHRE 129 (Philipp Reclam 1927) ("Denn alle Schuld rächt sich auf Erden." ["All guilt is punished on earth."]).

[288] *See* FRANZ KAFKA, DER PROZESS [THE TRIAL] 253 (Von Schocken Books 1960) ("'Ich bin aber nicht schuldig,' sagte K., 'es ist ein Irrtum. Wie kann denn ein Mensch überhaupt schuldig sein. Wir sind hier doch alle Menschen, einer wie der andere.' 'Das ist richtig,' sagte der Geistliche, 'aber so pflegen die Schuldigen zu reden.'" ["'But I'm not guilty,' said K.; 'it's a mistake. And, besides, how can a person be guilty? After all, we're all people here, one as the other.' 'That's true,' said the priest, 'but that's how guilty people talk.'"]).

[289] *See* ARCHIBALD MACLEISH, J.B. 111 (Sentry ed. 1958) ("God is unthinkable if we are innocent."). MacLeish continues:

> Without guilt
> What is a man? An animal, isn't he?
> A wolf forgiven at his meat,
> A beetle innocent in his copulation.

Id. at 124.

[290] *See* ALBERT CAMUS, LE MYTHE DE SISYPHE [THE MYTH OF SISYPHUS] 97 (1942) ("[S'il] peut y avoir des responsables, il n'y a pas de coupables." ["While there may be responsible people, there are no guilty ones."]). *But see* ALBERT CAMUS, LA CHUTE [THE FALL] 95 (1956) ("'C'est que, voyez-vous, monsieur, disait le petit Français, mon cas est exceptionnel. Je suis innocent!' Nous sommes tous des cas exceptionnels. Nous voulons tous faire appel de quelque chose! Chacun exige d'être innocent, à tout prix, même si, pour cela, il faut accuser le genre humain et le ciel." ["'It's just that, you see, sir,' the little Frenchman was saying, 'my case is exceptional. I'm innocent!' We are all exceptional cases. We all want to appeal something! Everyone demands to be innocent, at any cost, even if it means accusing the human race and heaven."]).

[291] *See John* 18:38 ("Pilate said to him, 'What is truth?'").

party conference, "'Better the guilty behind bars than the innocent penned in at home.'"[292]

Others take a still different tack. Just convict all the guilty and acquit all the innocent,[293] say letter writers,[294] state supreme courts,[295] Ulysses S. Grant,[296] and the Chinese.[297] Blackstone's maxim "supposes a dilemma which does not exist[: t]he security of the innocent may be complete, without favouring the impunity of crime,"[298] said Jeremy Bentham. "The law recognizes no such comparison of numbers,"[299] the Alabama Supreme Court has reasoned (debatably), adding (perhaps more soundly) that "[t]he tendency of such a charge, unexplained, is to mislead" jurors.[300] That court has often upheld trial courts' decisions not to offer the maxim, holding that the maxim is merely argumentative and misleading.[301] Other state supreme courts,

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[292] Sheila Gunn et al., *Major Gives Seal of Approval to Tories' Right-Wing Agenda*, TIMES (London), Oct. 9, 1993, at 8 (quoting John Major).

[293] *Cf.* "Better to be rich and healthy than to be poor and sick."

[294] *See* Aynesworth, *supra* note 4 (attacking *n = 10*).

[295] *See* People v. Brown, 214 N.W. 935, 936 (Mich. 1927) ("[A]ll guilty persons should be found guilty and all innocent persons . . . should be found not guilty.").

[296] *See* THE GREAT QUOTATIONS 288 (George Seldes ed., 1960) ("Let no guilty man escape, if it can be avoided." (citing Ulysses S. Grant, Indorsement on a letter regarding the Whiskey Ring, July 19, 1875)).

[297] *See* Louis Henkin, *Rights: Here and There*, 81 COLUM. L. REV. 1582, 1604 (1981) ("[The Chinese] believed that no single guilty person should go free and no single innocent convicted.").

[298] 1 JEREMY BENTHAM, *Principles of Penal Law*, *in* THE WORKS OF JEREMY BENTHAM 367, 558 (John Bowring ed., Russell & Russell Inc. 1962) (n.d.).

[299] Lowe v. State, 7 So. 97, 98 (Ala. 1890).

[300] *Id.*

[301] *See* Carden v. State, 4 So. 823, 825 (Ala. 1888) ("[T]his mere argumentative charge . . . [has been] repudiated as misleading . . . ."); *see also* McGhee v. State, 59 So. 573, 577 (Ala. 1912) (calling the charge argumentative); Smith v. State, 51 So. 610, 613 (Ala. 1910) (same); Burkett v. State, 45 So. 682, 686 (Ala. 1908) (same); Parham v. State, 42 So. 1, 6 (Ala. 1906) (same); Bell v. State, 37 So. 281, 284 (Ala. 1904) (stating that numerical comparison was "mere conclusion"); Walker v. State, 35 So. 1011, 1014 (Ala. 1904) (noting that the maxim has been "repeatedly condemned"); Barnes v. State, 20 So. 565, 565 (Ala. 1896) (describing the maxim as "mere argument"); *Lowe*, 7 So. at 98 (calling the maxim "misleading"); Perry v. State, 6 So. 425, 427 (Ala. 1889) (same); Garlick v. State, 79 Ala. 265, 267 (1885) (declaring that the maxim's "tendency is to mislead"); Ward v. State, 78 Ala. 441, 443 (1885) ("[T]he law does not institute such comparisons."); Farrish v. State, 63 Ala. 164, 165-66 (1874) (expressing that the charge is "calculated to mislead").

including those of California[302] and Illinois,[303] have agreed. Starkie called the notion that "moral probabilities . . . could ever be represented by numbers . . . and thus be subjected to arithmetical analysis . . . chimerical,"[304] but that did not stop him from developing such an analysis anyway.[305]

To those who accept the fundamental logic of the proposition, however, $n = 10$ still seems to be the most popular choice, even though, as Susan Estrich reminds us, these ten guilty men may not be acquitted because they are "right or macho or manly."[306] That Justice William O. Douglas's version of the maxim[307] is often cited in connection with the O.J. Simpson verdict,[308] and appears most prominently in a case where the petitioner is named Furman,[309] is potentially of great significance and may be a fruitful topic for further research.

The maxim has been "so long in use as to be deemed a mere sound, signifying nothing."[310] Thus, in the 1940s, two Alabama defendants tried (unsuccessfully) to have their juries given simultaneous instructions that $n = \infty$ and $n =$ *"many,"* that is, "that no innocent person should be convicted and that it is better that many guilty go unpunished than one innocent person be convicted."[311] Nonetheless, all innocent readers who have never been convicted may now take a moment to thank Blackstone's maxim for having inspired Western

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[302] *See* People v. Stegenberg, 59 P. 942, 943 (Cal. 1900) (finding an $n = 100$ jury instruction "uncalled for"); People v. Ebanks, 49 P. 1049, 1054 (Cal. 1897) (same). *But see supra* notes 236-40 and accompanying text.

[303] *See* Seacord v. People, 13 N.E. 194, 198 (Ill. 1887) (condemning jury instruction of $n =$ *"ninety and nine or any number"*); Adams v. People, 109 Ill. 444, 451 (1884) (same).

[304] STARKIE, *supra* note 68, at 753-54.

[305] *See supra* note 68 and accompanying text. Jeremy Bentham also tried to quantify precisely burdens of proof, but his suggestions were referred to as "fantastic," and not in a positive sense of the word. *See* United States v. Fatico, 458 F. Supp. 388, 411–12 (E.D.N.Y. 1978) (citing 1 W.M. BEST, LAW OF EVIDENCE 97 (1st Am. ed. 1878) (citing criticism by Dumont, French translator of Bentham)), *aff'd*, 603 F.2d 1053 (2d Cir. 1979).

[306] Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1184 (1986).

[307] *See* Douglas, *supra* note 204, at 11 ("We believe that it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.").

[308] *See, e.g.*, Christo Lassiter, *The O.J. Simpson Verdict: A Lesson in Black and White*, 1 MICH. J. RACE & L. 69, 72-73 n.9 (1996) (citing Douglas, *supra* note 204, in connection with reactions to criminal verdicts).

[309] *See* Furman v. Georgia, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring) (citing Douglas, *supra* note 204).

[310] Silver v. State, 17 Ohio 365, 369 (1848).

[311] Daniels v. State, 11 So. 2d 756, 758 (Ala. 1943); Robinson v. State, 11 So. 2d 732, 733 (Ala. 1943).

criminal law. All guilty readers who have been acquitted may do so too.

The story is told of a Chinese law professor, who listened as a British lawyer explained that Britons were so enlightened that they believed it was better that ninety-nine guilty men go free than that one innocent man be executed.[312] The Chinese professor thought for a second and asked, "Better for whom?"[313]

[312] *See* Dominic Lawson, *Notebook: The Voters Want Cash, Mr. Clarke*, DAILY TELEGRAPH (London), Apr. 8, 1995, at 17, *available in* 1995 WL 7996172.

[313] *Id.*

APPENDIX

n IN STATE LAW

STATE	RULING	CASE
Alabama	*See supra* text accompanying notes 231-34.	
Alaska	No ruling.	
Arizona	*n = "many"* (concurrence only)	State v. Good, 460 P.2d 662, 666 (Ariz. Ct. App. 1969) (McGuire, J., concurring).
Arkansas	*n = "some"* for double jeopardy	Jones v. State, 320 S.W.2d 645, 649 (Ark. 1959).
California	*See supra* text accompanying notes 235-43.	
Colorado	No ruling.	
Connecticut	No ruling.	
Delaware	No ruling.	
Florida	*n = 1*	Adjmi v. State, 154 So. 2d 812, 819 n.3 (Fla. 1963).
Georgia	*n = 10*	Pedigo v. Celanese Corp. of Am., 54 S.E.2d 252, 258 (Ga. 1949).

Hawaii	No ruling.	
Idaho	*n = "many"* (dissent only)	State v. Hester, 760 P.2d 27, 41 (Idaho 1988) (Johnson, J., dissenting).
Illinois	No ruling.	
Indiana	*n = 1*	Tucker v. Marion County Dep't of Pub. Welfare, 408 N.E.2d 814, 820 (Ind. Ct. App. 1980).
Iowa	No ruling.	
Kansas	No ruling.	
Kentucky	*n = "many"*	Fyffe v. Commonwealth, 190 S.W.2d 674, 680 (Ky. 1945).
Louisiana	*n = 1*	State v. Mouton, 653 So. 2d 1360, 1362 (La. Ct. App. 1995).
Maine	No ruling.	
Maryland	No ruling.	
Massachusetts	No ruling.	
Michigan	*n = 10*	People v. Watkins, 475 N.W.2d 727, 737 n.12 (Mich. 1991).

Minnesota	*n = "some"*	State v. Butenhoff, 155 N.W.2d 894, 900 (Minn. 1968).
Mississippi	No ruling.	
Missouri	*n = 1*	State v. Mayfield, 879 S.W.2d 561, 565 (Mo. Ct. App. 1994).
Montana	*n = 1*	State v. Riggs, 201 P. 272, 282 (Mont. 1921).
Nebraska	No ruling.	
Nevada	No ruling.	
New Hampshire	No ruling.	
New Jersey	*n = "many"*	State v. Haines, 120 A.2d 118, 124 (N.J. 1956).
New Mexico	*n = 99*	State v. Chambers, 524 P.2d 999, 1002-03 (N.M. Ct. App. 1974).
New York	*See supra* text accompanying notes 244-51.	
North Carolina	*n = 10*	State v. Hendrick, 61 S.E.2d 349, 356 (N.C. 1950).
North Dakota	No ruling.	
Ohio	*See supra* text accompanying notes 252-57.	

Oklahoma	*n = 100*	Pruitt v. State, 270 P.2d 351, 362 (Okla. Crim. App. 1954).
Oregon	*n = 1*	State v. Carr, 42 P. 215, 216 (Or. 1895).
Pennsylvania	*n = 1*	Commonwealth v. Nicely, 18 A. 737, 738 (Pa. 1889).
Rhode Island	*n = "many"*	State v. Paster, 524 A.2d 587, 591 (R.I. 1987).
South Carolina	*n = "many"*	State v. Manis, 51 S.E.2d 370, 375 (S.C. 1949).
South Dakota	No ruling.	
Tennessee	*n = 1* (dissent only)	Robinson v. State, 513 S.W.2d 156, 160 (Tenn. Crim. App. 1974) (Galbreath, J., dissenting).
Texas	No ruling.	
Utah	*n = 10*	State v. Sullivan, 307 P.2d 212, 215 (Utah 1957).
Vermont	No ruling.	
Virginia	*See supra* text accompanying notes 258-59.	

Washington	*n = 1* for double jeopardy	State v. Schoel, 341 P.2d 481, 485-86 (Wash. 1959).
West Virginia	*n = 1*	State v. Michael, 16 S.E. 803, 804 (W. Va. 1893).
Wisconsin	No ruling.	
Wyoming	No ruling.	