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## Better That Ten Guilty Men...

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***Better That Ten Guilty Men...***  
**Alexander Volokh**  
**in BEYOND A REASONABLE DOUBT (Larry King ed., 2006)**

“Better that ten guilty persons escape, than that one innocent suffer,” said English jurist William Blackstone. The ratio 10:1, now known as the “Blackstone ratio,” expresses the classic Anglo-American ideas of the presumption of innocence and (insofar as the statement speaks of “guilt,” “conviction,” “imprisonment,” and the like) the burden of proof “beyond a reasonable doubt” that prevails in criminal law.

But why ten? Other eminent legal authorities through the ages have put their weight behind other numbers. “One” has appeared on Geraldo. “It’s better for four guilty men to go free than one innocent man to be imprisoned,” says basketball coach George Raveling. However, “it’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. “It is better to let nine guilty men free than to convict one innocent man,” counters Madison, Wisconsin, lawyer Bruce Rosen. Justice Benjamin Cardozo certainly believed in five for execution, and allegedly favored ten for imprisonment, which is a bit counterintuitive. Benjamin Franklin thought “that it is better a hundred guilty persons should escape than one innocent person should suffer.” Mario Puzo’s Don Clericuzio heard about letting a hundred guilty men go free and, “struck almost dumb by the beauty of the concept . . . became an ardent patriot.” 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 imprisoned,” and says of the American judicial system, “Well, we got our wish.”

And it’s not just the number of guilty men that varies from formulation to formulation. Even the number of innocent men depends on the speaker. 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.” 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* number of innocent men.” It is unclear whether a “considerable” number is greater or less than an “appreciable” one.

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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.”

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 about convicting innocents of murder. Others date the maxim to the codes of Athens. Deposed Panamanian leader (and perhaps amateur classical scholar) Manuel Noriega has claimed the saying went back to Socrates (though he did not provide a citation).

According to some researchers, though, the maxim is considerably older. According to Ninth Circuit Judge Alex Kozinski, this “popular notion” is just something “we have always said.” Benjamin Franklin claims that the maxim “has been long and generally approved; never, that I know of, controverted.” A then-future U.S. president, John Adams, dated the saying (using a variety of numbers between five and twenty) back to the beginning of law itself, saying that “there never was a system of laws in the world, in which this rule did not prevail.”

And, on some accounts, the precept was handed down from Someone who was around “in the beginning.” Consider the following haggale between Abraham and God in Genesis 18:23–:32:

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.

And he said unto him, Oh let not the Lord be angry, and I will speak: Peradventure there shall thirty be found there.

And he said, I will not do it, if I find thirty there.

And he said, Behold now, I have taken upon me to speak unto the Lord: Peradventure there shall be twenty found there.

And he said, I will not destroy it for twenty’s sake.

And he said, Oh let 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.

What a lawyer! As it turns out, even the requisite ten were lacking. Nor were any innocents killed: There were only four righteous people in the city, and they were all saved, though they lost their real estate. Previously, God had killed the entire human population of the Earth because of its wickedness (except for Noah and his family) in a mass capital punishment which, although carried out without the benefits of a jury or 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. 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 Exodus 23:7, by the same Author, in which God rejects the tradeoff between convicting the guilty and convicting the innocent, and simply commands, “the innocent and righteous slay thou not.” Despite the seeming absoluteness of this command, the twelfth century Judeo-Spanish legal theorist Moses Maimonides interpreted it to imply that “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.” He called this the “290th Negative Commandment” and argued that executing an accused criminal on the basis of anything less 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” against the use of presumptive evidence.

Not all gods, however, are as strict as the Exalted One. The Roman emperor Trajan, who was later deified, wrote—in much looser terms—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.”

The most celebrated divine commandment related to punishing the innocent comes, of course, from Blackstone himself. 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,” 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.”

The maxim is also valid in Islam, according to Ayatollah Hossein Ali Montazeri, who was first in line to become the leader of Iran during the mid-1980s. One British writer, commenting on the death of innocent bystanders at the

hands of the police during anti-Irish Republican Army crackdowns, wrote, “for a Catholic, oddly enough, it may be better to be shot suddenly like that if you are innocent, than if you are guilty.” This view, however, is either out of the ordinary or not widely advertised.

To date, no major religious wars have been fought over the precise acceptable number of guilty men.

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While the maxim of the guilty men has had wide currency throughout English and American law, it has not been without its detractors. For instance, Jeremy Bentham, founder of utilitarianism, warned against the warm fuzzy feeling that comes from excessive regard for protecting hypothetical innocent defendants:

We must be on our guard against those sentimental exaggerations which tend to give crime impunity, under the pretext of insuring the safety of innocence. Public applause has been, so to speak, set up to 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.

Some less theoretical minds went somewhat further in their skepticism. German chancellor Otto von Bismarck is said to have remarked that “it is better that ten innocent men suffer than one guilty man escape.” Ditto Feliks Dzerzhinsky, founder of the Soviet secret police: “Better to execute ten innocent men than to leave one guilty man alive.” Major Nungo, a Colombian military prosecutor, explains the rationale: “For us military men, everybody is guilty until proved otherwise . . . . Better to condemn an innocent man than to acquit a guilty one, because among the innocent condemned there may be a guilty man.”

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It is probably fair to say, however, that (to put it mildly) these last authorities do not exactly come from the mainstream of the Anglo-American tradition. To those who accept the maxim’s fundamental logic, Blackstone’s “ten” still seems to be the most popular choice. All innocent readers who have never been convicted may now take a moment to thank Blackstone’s maxim for having

inspired American criminal law and the burden of proof “beyond a reasonable doubt.” All guilty readers who have been acquitted may do so too.

Consider, however, the story of the 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. The Chinese professor thought for a second and asked, “Better for whom?”