Introduction

Invisible Innocence

A woman who was acquitted of beating her husband to death with a baseball bat cannot be declared innocent because enough evidence pointed to her guilt, the California Supreme Court ruled unanimously Thursday.¹

This headline is not an oxymoron. Jeanie Louise Adair, tried for the murder of her husband in 1999, was found “not guilty” by the jury. She then went to court to do what California law permitted: secure a formal judicial determination that she was factually innocent of the crime. The California Supreme Court refused her request because the prosecution had presented enough evidence that it would have been permissible for the jury to return a guilty verdict. Because a different jury, looking at the identical evidence, may have come to a different conclusion, she can never be declared innocent. Her status—found not guilty but not declared innocent—confronts virtually every person a jury acquits of criminal charges. Precisely because there is a gap between a verdict of not guilty and an affirmative determination that the defendant is innocent, those who administer the criminal justice system can, and typically do, treat acquittals as counterfactual. In essence, “they are all guilty” whether the state succeeded in proving it or not. As Edwin Meese, United States attorney general under President Ronald Reagan, once explained, “But the thing is, you don’t have many suspects who are innocent of a crime. That’s contradictory. If a person is innocent of crime, then he is not a suspect.”²
At first blush, the data regarding case outcomes seem to support this view both when Meese spoke and today. Only one out of every one hundred individuals formally charged with a crime will be found not guilty following a trial.\textsuperscript{3} And a not guilty verdict does not necessarily signal actual innocence. One can be acquitted for reasons unrelated to actual innocence (e.g., because the state’s evidence is shaky or a jury’s sentiment overwhelms its commitment to accuracy or the defendant is an accomplished liar), so even the one in one hundred who is acquitted is not necessarily innocent of the crime charged. Indeed, many observers suggest that it is more likely that an acquitted person is \textit{guilty} than that she is innocent.\textsuperscript{4}

Judges in criminal cases tell jurors that they must presume that the accused are not guilty of the crimes charged. They also tell jurors that prosecutors are obliged to introduce evidence to persuade them beyond any reasonable doubt that the defendants are guilty. If the state succeeds in doing so, then juries must convict. If the state fails to eliminate reasonable doubt about guilt, juries must acquit. A not guilty verdict says something definitive about the evidence that the state introduced: it was insufficient to eliminate all reasonable doubt about guilt from the minds of the jurors. But acquittals do not answer, nor even address, the question of whether defendants are \textit{factually innocent}. All we know is that the juries were not persuaded that the defendants committed the crimes charged.

Designed to ensure that the innocent are protected to the greatest extent humanly possible, this arrangement results in what has been aptly termed \textit{adjudicatory asymmetry}, the belief that guilt is based on a factual conclusion concerning the defendant’s behavior whereas an acquittal reflects only an absence of proof.\textsuperscript{5} We know (or believe we know) that the convicted are guilty of the crime because the evidence has eliminated every reasonable doubt. We do not know that the acquitted are innocent; the not guilty verdict may be a product of the government’s very high burden of proof in a criminal case or the jury’s failure to follow instructions or the failure of a key witness to testify as expected or a jury’s dislike of the law involved or a distrust of the state’s witnesses. Any of these reasons may result in reasonable doubt about guilt, and that doubt exonerates.
Because it is not an affirmative declaration of innocence, an acquittal does not preclude the state or others from showing that the defendant committed the crime in question when the test is whether the defendant’s guilt is more probable than not. For example, in one of the most famous criminal prosecutions of the last quarter-century, the jury in the criminal case acquitting O. J. Simpson of murder did not preclude a different jury finding that it was more probable than not that he did commit the murder in the civil suit when the victim’s families sought money damages. Nor does the acquittal necessarily preclude a judge from giving Simpson a longer sentence than would otherwise be appropriate if he is convicted of a different crime. Finally, should Simpson ever be charged with even more crimes, the state may be able to introduce evidence of the murders of Nicole Simpson and Ronald Goldman to demonstrate a pattern of criminal behavior. In his case, at least, prosecutors, courts, and most of the rest of us do not believe that his acquittal meant he was innocent.

Acquittals are essentially invisible. We know very little about why juries or judges conclude that defendants are not guilty. Because the vast majority of research concerning those accused of crime is based upon sentencing or prison data, we also know very little about those who are found not guilty; the acquitted have no race, gender, or social class. In practice, most prosecutors, defense counsel, and judges encounter the acquitted very infrequently. If we combine criminal cases resolved through guilty pleas and dismissals (the overwhelming majority) with the relatively few cases resolved by verdicts after trial, we find that an acquittal occurs approximately once in every one hundred cases. Given these statistics, it is perhaps not surprising that, with a notable exception, acquittals have remained unexamined by social scientists, legal scholars, and policymakers. Rather, they are treated as random events “signifying nothing” about the actual guilt or innocence of those prosecuted for crime.

Our collective indifference to acquittals reverberates beyond the injustice of ignoring, in a subsequent civil suit or criminal prosecution, the possibility that a jury acquittal signals innocence. If we do not know why the jury acquits, we can ignore the possibility that innocents are charged and prosecuted fully. An acquittal can be (and
typically is) treated as a failure by the police, the prosecutor, the jury, or any combination of those entities to do their respective jobs appropriately rather than as the successful exoneration of the innocent. We can ignore claims that plea bargaining may force the innocent falsely to admit guilt simply to avoid the draconian penalty attached to the conviction of certain crimes. If we ignore acquittals—if we accept that “defendants are acquitted for many reasons, the least likely being innocence”—we reduce criminal justice outcomes to extremely accurate, if sometimes harsh, convictions and very inaccurate, if sometimes emotionally understandable, acquittals. To paraphrase, convictions are from Mars, acquittals from Venus.

What We Think We Know about Acquittals

What we think we know about acquittals comes essentially from three sources: (1) a study of nearly four thousand mid-twentieth century criminal jury trials by University of Chicago law professors Harry Kalven and Han Zeisel, considered the seminal study of judge-jury decision making, and a handful of studies conducted to attempt to replicate its conclusions; (2) depictions of acquittals in popular culture; and (3) anecdotes. The picture is incomplete. Anecdotes and media presentations focus upon the counterintuitive: “guilty man acquitted” and “innocent man convicted” stories are more interesting than trials in which juries arrive at correct verdicts. They tell us little about the frequency or nature of trials in which the jury produced accurate results. Although Kalven and Zeisel provided an in-depth analysis of the trial judge’s explanation for the reasons why the jury acquitted when the judge would have convicted, they were not able to provide any direct information about what the people who decided the case, the jurors themselves, thought or believed. In this book, we have been able to extend our understanding of acquittals through utilizing new data gathered from jurors, judges, prosecutors, and defense counsel in four jurisdictions: the Bronx, the District of Columbia, Los Angeles, and Maricopa County, Arizona. Although these data were originally collected and analyzed by the National Center for State Courts (NCSC)
in 2002 to study hung juries,\textsuperscript{11} they are a unique source of information to help us develop a more complete understanding of acquittals in the modern context.

\textit{The American Jury}, published in 1966, contained an analysis of the results of a survey conducted in the mid-1950s. Kalven and Zeisel asked hundreds of judges to assess jury verdicts in terms of how the judges would have decided the cases. They found that judges agreed with the jury verdicts in 78 percent of all cases; when they disagreed, juries were far more likely to acquit when the judges would have convicted (19 percent of all cases) than they were to convict when the judges would have acquitted (3 percent of all cases). Judges and juries agreed that acquittals were appropriate in only 14 percent of all cases. Sir William Blackstone insisted, “The law holds, that it is better that ten guilty escape, than that one innocent suffer”;\textsuperscript{12} and Kalven and Zeisel’s data suggested that something like this was occurring.

Kalven and Zeisel were not content simply to report that juries were more acquittal prone than judges. They sought to explain \textit{why} juries were more lenient than judges in nearly one out of five cases. Noting that a significant majority of all cases in which the juries were more lenient than the judges involved issues of both fact and values, the authors suggested that because of the existence of “evidentiary difficulty,” the juries were “liberated” to consider nonevidentiary factors—“sentiments,” in their lexicon—in resolving the questions of fact. More simply put, close cases “liberated” the juries to consider values; and this consideration frequently resulted in juries acquitting when the judges would have convicted.\textsuperscript{13} As they eloquently put it, the jury “yields to sentiment in the apparent process of resolving doubts as to evidence. The jury, therefore, is able to conduct its revolt from the law within the etiquette of resolving issues of fact.”\textsuperscript{14} Apparently, judges were immune from the influence of sentiment.

Kalven and Zeisel’s liberation hypothesis has largely guided our understanding and interpretation of jury decision making and has arguably shaped the direction and scope of social science research on juries since its publication.\textsuperscript{15} Their work, and its impact on our understanding of acquittals, is the focus of the next chapter.

The representation of trials and their outcomes in popular culture
resonates with Kalven and Zeisel’s finding that juries embrace sentiment when jurors acquit those whom judges would have convicted. Courtroom scenes and trials are so common in movies, television, and literature that a majority of our experience with criminal adjudication and our expectations of it come from things we see or read as opposed to our direct experiences. Although the representation of trials and their outcomes in the American media is not static, little attention has been paid to the experiences of defendants who are acquitted of crimes. Unlike real life, where the facts are contested, in fictional accounts, the viewer or reader is generally let in on the truth through flashbacks to the events in question. Heroic lawyer characters, either defense lawyers fighting tirelessly for their (possibly) wrongfully accused clients or prosecutors upholding the values and wisdom of the state, then represent the truth that as audience members we already understand. Rarely do fictional judges or juries return verdicts that contradict this truth, comforting the public that through the aggressive presentation of the defense and prosecution cases, the legal process arrives at the morally, if not always legally, correct result.

Anecdotes from those who practice criminal law also tend to confirm the view that to be charged is to be factually guilty. Advocates for a zealous defense seem to delight in the irrelevance of a defendant’s potential or actual innocence to their work. As noted criminal defense attorney Alan Dershowitz asserted,

The Perry Mason image of the criminal lawyer saving his innocent client by uncovering the real culprit is television fiction; it rarely happens in real life. Almost all criminal defendants—including most of my clients—are factually guilty of the crimes they have been charged with. The criminal lawyer’s job, for the most part, is to represent the guilty, and—if possible—to get them off.

Defense lawyer Martin Erdmann famously opined in an article in Life magazine extolling his virtues, “I have nothing to do with justice. Justice is not part of the equation.” Not surprisingly, prosecutors tend to agree that defense victories are counterfactual. When a jury acquitted the actor Robert Blake of murder in 2005, the district attorney for
Los Angeles County informed the press that the jury was “incredibly stupid.”

Anecdotes suggest that actual trials are lessons in civics, and acquittals are the price society pays for taking so seriously the obligation that the government has to be able to demonstrate guilt convincingly in open court. No criminal case in the past quarter-century has captured the public attention as much as the O. J. Simpson murder trial, a case in which the verdict is almost universally perceived as historically inaccurate. As one commentator characterized it, criminal adjudication is an administrative process, with trials operating as the occasional adjudicatory hearing designed to assure that the government is administering fairly.

How Often Acquittals Occur

Statistics of criminal case dispositions in the largest urban counties in the United States (see table 1.1) indicate that 68 percent of the individuals charged with felony offenses were actually convicted of crimes (either felonies or misdemeanors). Of those who were convicted, the overwhelming majority (approximately 97 percent) pled guilty. Dismissals accounted for another 23 percent of the cases, acquittals but 1 percent. The remaining approximately 8 percent of cases were either disposed through alternatives to traditional criminal punishment or resolved in the following year. This pattern has been very consistent over time. In the last sixteen years that adjudication data have been reported by the U.S. Bureau of Justice Statistics, acquittals have consistently accounted for only 1 percent of all case outcomes.

According to the Bureau of Justice Statistics data, only 3 percent of all criminal cases were actually resolved through trials in which judges or juries rendered verdicts of guilt or innocence. Of the small proportion of cases that did go to trial, approximately one-third resulted in acquittals. Thus, although acquittals represented only a tiny fraction of criminal dispositions, they represented a much larger proportion of those rare cases that did go to trial.
### Table 1.1

**Adjudication Outcomes for Felony Defendants in Large Urban Counties (2004)**

<table>
<thead>
<tr>
<th>Most serious arrest charge</th>
<th>No. of defendants</th>
<th>% convicted</th>
<th>% convicted of felonies</th>
<th>% convicted of misdemeanors</th>
<th>% not convicted</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Total</td>
<td>plea</td>
<td>trial</td>
<td>dismissed</td>
</tr>
<tr>
<td>All offenses</td>
<td>51,256</td>
<td>68</td>
<td>59</td>
<td>57</td>
<td>2</td>
</tr>
<tr>
<td>Violent offenses</td>
<td>11,091</td>
<td>61</td>
<td>52</td>
<td>49</td>
<td>3</td>
</tr>
<tr>
<td>Property offenses</td>
<td>15,934</td>
<td>72</td>
<td>62</td>
<td>60</td>
<td>2</td>
</tr>
<tr>
<td>Drug offenses</td>
<td>19,022</td>
<td>67</td>
<td>60</td>
<td>58</td>
<td>1</td>
</tr>
<tr>
<td>Public-order offenses</td>
<td>5,209</td>
<td>72</td>
<td>61</td>
<td>59</td>
<td>2</td>
</tr>
<tr>
<td>Weapons</td>
<td>1,587</td>
<td>71</td>
<td>61</td>
<td>59</td>
<td>2</td>
</tr>
<tr>
<td>Driving-related</td>
<td>1,642</td>
<td>81</td>
<td>73</td>
<td>70</td>
<td>3</td>
</tr>
</tbody>
</table>

**Source:** Tracy Kyckelhahn and Thomas Cohen, “Felony Defendants in Large Urban Counties, 2004.” Statistical Tables, Table 19, “Adjudication Outcome for Felony Defendants, by Most Serious Arrest Charge, 2004.” Bureau of Justice Statistics, Washington, DC.

**Note:** Eleven percent of all cases were still pending adjudication at the end of the one-year study period and are excluded from the data in this table. Data on adjudication outcomes were available for 99 percent of those cases that had been adjudicated during the study period. Detail may not add to total because of rounding.

* Includes diversion and deferred adjudication. Murder defendants were followed for an additional year.

** Denotes less than .05 percent.
When Acquittals Are Legally Appropriate

As a technical matter, an acquittal reflects the fact finder’s judgment that the state has failed to offer evidence sufficient to establish the defendant’s guilt beyond a reasonable doubt. This leaves open the possibility that the state was correct that the defendant committed the crime but simply failed to persuade twelve laypersons or a judge that this was the case. Double jeopardy precludes the state from appealing acquittals, so there are no appellate court rulings clarifying when an acquittal is appropriate and when it is not. When the jury or judge returns a not guilty verdict, legal inquiry ceases. Those acquittals that do result in further popular or scholarly inquiry (e.g., O. J. Simpson) support the view that acquittals tell us little other than that juries are capable of behaving irrationally.

Actual innocence is difficult to verify. Courts virtually never address or rule upon the question of whether defendants are truly innocent. In a jury trial, the judge’s role is to determine whether there is sufficient evidence to permit the jury to return a verdict of guilty. If there is no jury, then the judge must determine whether she is persuaded of the defendant’s guilt beyond a reasonable doubt. Neither situation requires the judge to determine whether the defendant is actually innocent of the crime charged. Once either the judge or the jury decides that the state’s case for guilt is unpersuasive, their work is done; their verdicts of not guilty leave open the question of whether they believe that the defendants are actually innocent. It is a question that they are neither asked nor expected to answer. Thus, although any serious evaluation of the quality of criminal justice rendered requires an inquiry into whether the innocent are prosecuted and acquitted, an explicit answer cannot be found in the results of the adjudicatory process itself. Because a claim of actual innocence requires a judgment that goes beyond that which official governmental bodies make, such claims are readily and frequently disputed.

A focus upon acquittals requires a rethinking of the definition of innocence commonly employed by scholars examining the problem of wrongful convictions. Taking a Caesar’s wife approach to the definition
of innocence, these investigators have adopted a conservative “wrong man” definition of factual innocence. If the defendant was involved in the behavior described as criminal, the case was excluded from consideration even if that individual was innocent of any crime. This significantly underinclusive approach makes sense when the goal is to establish that mistaken convictions occur. It complements our most powerful tool for establishing wrongful convictions, DNA evidence establishing that the biological evidence is not from the prisoner.

If we examine appropriate acquittals (rather than wrongful convictions), the acquitted should include all people who did not commit the crimes charged even if their manifest behavior might have aroused legitimate suspicion. Some, perhaps most, of the acquitted are people who have nothing to do with the crime; whether acting in good or bad faith, the state's witnesses incorrectly identify them as the criminals. Some of the acquitted may have engaged in behaviors that the state seeks to characterize as criminal but are innocent because they lack the required mental state or their conduct is legally justified. Examining the extent to which the innocent are acquitted requires a definition of historical accuracy that reflects the substantive law.

The criminal law defines serious felonies in terms of both state of mind and act, and it acknowledges that even when defendants do the acts with the prohibited state of mind, they may nonetheless be justified or excused. The forgetful man who places a necktie in his bag and leaves the store without remembering that he has done so is not guilty of larceny. Larceny requires a purpose to deprive another of his property permanently. By definition, the forgetful person in this example does not have such a purpose. The jury that acquits this person has rendered a historically accurate verdict. A woman who shoots and kills her abusive husband insists that she acted only because she was convinced that he was about to kill her. If she actually and reasonably thought she was about to die and she reasonably believed that she could save herself only by using deadly force, she has committed no crime. A jury that acquits her has absolved an innocent person. To suggest that these are acquittals of people who are not really innocent ignores the fundamental structure of our criminal law. Acquittals are
historically accurate whenever juries correctly determine that either
the defendants did not engage in the prohibited conduct or, if they did
so engage, either they lacked the state of mind required to make the
conduct criminal or their actions were the products of appropriate be-
liefs that justify their actions.\textsuperscript{30}

This adjudicatory asymmetry that guilt rests upon a factual conclu-
sion concerning the defendant’s behavior whereas an acquittal reflects
only an absence of proof complicates any effort to understand the fate
of those who are actually innocent. The first consequence of this asym-
metry—ignorance—we have already noted. We know far more about
why the innocent are occasionally \textit{convicted} than we do about those
instances in which they are appropriately acquitted. Recent advances
in forensic science such as DNA evidence collection has focused in-
creased attention on the problem of mistaken convictions. According
to the Innocence Project, as of this writing, there have been 235 post-
DNA exonerations in the United States since the early 1990s.\textsuperscript{31} Exon-
erations are newsworthy and frequently result from formal legal inqui-
ries. “Man bites dog” is a more interesting story than “dog bites man.”

We also hear (if not necessarily learn) a great deal about the op-
posite problem, the guilty person who is erroneously acquitted. One
“knows” immediately when the guilty have been acquitted because
the prosecutors or police can point to evidence in their possession—
confessions, criminal records, statements by codefendants—that, had
they been permitted to present it to the jury, would have demonstrated
guilt. Or, through interviewing jurors, one can learn of their mistakes
in attempting to apply the law. Also, the official language of the law, ap-
pellate decisions, repeatedly provides examples of the guilty going free.
According to the United States Supreme Court, to ensure adherence to
the mandates of the Fourth (search and seizure), Fifth (right to remain
silent and to call witnesses), and Sixth (right to counsel) Amendments
to the United States Constitution, evidence seized in violation of these
constitutional provisions typically cannot be considered by judges or
juries in determining the defendants’ guilt. This doctrine, the exclu-
sionary rule, has generated (and continues to generate) considerable
distress. For example, in \textit{Brewer v. Williams},\textsuperscript{32} involving the abduction
and murder of a ten-year-old girl who had simply left her parents for a moment to go to the washroom, the majority found the defendant's confession inadmissible in evidence because he had been questioned without his lawyer being present. Chief Justice Burger dissented in no uncertain terms: "The result in this case ought to be intolerable in any society that purports to call itself an organized society."  

When the innocent are acquitted, however, the matter ends there. Prosecutors can blame acquittals upon the denseness of the juries, the chicanery of defense counsel, or questionable rulings by the trial judges. The police can point to the relative ineptitude of the prosecutors. The judges can identify the juries' credulity. Whatever the explanation and by whomever offered, typically the matter ends there. Appellate courts have no power to reverse the judgment.  

Second, the asymmetry between the official determination of guilt and no determination of actual innocence feeds the belief that those charged with crimes are guilty. Despite maxims to the contrary, the presumption of guilt, not the presumption of innocence, permeates the criminal adjudicatory system. There are no formal events or pronouncements to contradict this view. All results, including acquittals and dismissals, can be rationalized on the grounds that guilty defendants “beat” the charge rather than that innocent persons were vindicated. Moreover, in contrast to the absence of any procedure to determine whether acquitted persons are innocent, we do have formal processes for determining that people juries have acquitted are really guilty after all. As noted, although the O. J. Simpson civil suit is the most obvious public manifestation of this phenomenon, it is found in criminal cases as well. For example, if the defendant is prosecuted for a crime (e.g., an armed robbery at knife point on July 1) and the state wishes to prove a pattern of criminal behavior, the prosecutor can introduce evidence of a similar crime (an armed robbery using a screwdriver on February 1) even though the defendant has been tried and acquitted of that supposedly similar crime. This practice does not offend due process, the Supreme Court has held, because the earlier acquittal did not mean that the defendant was innocent but only that the state had failed to prove guilt beyond a reasonable doubt.  

Thus,
the “acquitted but guilty” can be made to suffer for their crimes. That judges routinely and appropriately make findings of fact that acquitted defendants are in fact guilty but never make findings of fact that acquitted persons are innocent confirms the view that it is only the guilty who are charged and, necessarily, only the guilty who are convicted.

Herbert Packer suggested that there were two competing ideologies of criminal justice administration: the crime control model and the due process model. These reflect the tension between the need for a criminal process that deals efficiently with a large mass of cases and concern for the privacy of individuals and for limiting state power. Former attorney general Edwin Meese’s assertion, noted at the outset of this chapter, that “if a person is innocent of crime, then he is not a suspect,” reflects the core assumption of the crime control model: it is the executive (e.g., police and prosecutors), as opposed to the judiciary, who makes the significant decisions about guilt. From this premise, which its proponents assert as an empirical matter, follows the presumption of guilt. This, in turn, justifies an essentially administrative approach to the guilt-determination process. The result is a core belief shared by virtually all personnel who work within the criminal justice system that defendants formally accused of crimes are guilty.

The pervasive problem of crime fuels the belief that we do not prosecute the innocent. Because resources to combat crime effectively are scarce, triage is essential. Personnel and funds must be allocated where they will be most productive. Police, prosecutors, judges, and correctional officials make rational decisions about how to proceed in light of the enormity of the problem and the lack of adequate resources. Police officers are not going to waste time arresting and presenting to the prosecutor suspects who have not engaged in serious wrongdoing. The overwhelming numbers of arrests they do make are of people caught in the act or known to the victims or witnesses at the scene. If, however, the police err, the prosecutors are not likely to squander resources proceeding against suspects they believe did not commit crimes or, more commonly, against whom only weak cases exist. Indeed, there are informal sanctions (e.g., pretrial detention and the denial of bail despite inadequate evidence) that can be and are imposed.
in such cases.\textsuperscript{41} Defense counsel aids in this process by ensuring that those who are genuinely innocent come to the attention of prosecutors and are extruded from the system. Certainly, by the time of trial, it is the guilty alone who stand before the judges or juries.\textsuperscript{42}

Those who stand trial are protected by numerous adjudicatory devices designed to help ensure that any innocent person who stands trial will be acquitted. The acquittals and dismissals that occur reflect an overly compassionate criminal justice system in which the guilty are released to guarantee that no innocent person is ever convicted.\textsuperscript{43} The guilty are acquitted along with the innocent both because no adjudicatory system, however constituted, can achieve perfect accuracy and because we embrace values other than achieving the highest possible level of factual accuracy. These values are found in three clusters. The first cluster, which commands the greatest attention from courts and commentators, includes our regard for individual privacy, mistrust of the state, desire to control police-citizen interactions, and preference for broad discretion not to prosecute. The second cluster of values, exemplified by concepts such as the presumption of innocence and the demand that guilt be established beyond a reasonable doubt, reflects a preference that errors made be ones that result in false negatives (acquitting the guilty) rather than false positives (convicting the innocent). Commitment to the adversary system represents the third cluster of values. This includes the preference for a system of justice in which advocates can free guilty persons by outperforming adversaries in front of passive fact finders rather than a system in which the decision makers (state employees) control the gathering, presentation, and analysis of evidence.

The belief that the vast majority of the acquitted really are guilty rests on the assumption that neither the police nor the prosecutors will pursue criminal charges against innocent people. This belief solves a problem that may otherwise exist: how to justify the vast disparity in resources available to the state compared to those available to the criminally accused. As judge and legal scholar Richard Posner put it,
hardheaded we must recognize that this may not be entirely a bad thing. The lawyers who represent indigent criminal defendants seem to be good enough to reduce the probability of convicting an innocent person to a very low level. If they were much better, either many guilty people would be acquitted or society would have to devote much greater resources to the prosecution of criminal cases. A bare-bones system for the defense of indigent criminal defendants may be optimal.  

Defense counsel commonly do not challenge the dominant assumption that the acquitted, like the convicted, are guilty. Anecdotal evidence suggests that defense counsel generally presume that defendants are guilty. Even if the reality is not as extreme as one may conclude from data showing that acquittals represent less than 1 percent of all adjudicatory outcomes, there is no reason to doubt the observation that criminal defense lawyers who restrict their practices only to the innocent will have little to do. In addition to being rare in the population of those who plead or go to trial, the presence of actual innocents in any attorney’s practice will be obscured by the insistence of many of the guilty that they are in fact innocent. Defense lawyers need to begin with the premise that what really matters is what the prosecution can prove, not what the defendants insist happened. Ethical rules push in this direction: defense lawyers who encourage their clients to acknowledge guilt in private conversations are defense lawyers who have placed themselves and their clients in an awkward situation if the clients insist upon testifying. Does she place her duty to the client ahead of her duty as an officer of the court and permit the defendant to testify even if she believes that the testimony will be false? To solve this problem, many defense counsel embraced “don’t ask, don’t tell” long before it emerged as a policy of the military.

Ideology matters as well. At a minimum, defense counsel view their role as forcing the government to secure convictions in an open and lawful manner. Securing acquittals for the guilty serves the important end of forcing the government to follow its own rules even in its treatment of the most despised members of the community. While essential, securing acquittals of the innocent does not necessarily send a
more powerful message about the government’s commitment to following its own rules than the acquittal of guilty persons against whom the government simply failed to amass persuasive evidence.

Defense counsel likely subscribe to the dominant assumption that the majority of clients they defend are actually guilty because any other view may render their work emotionally and practically unsupported. Consider this description by a defense lawyer of the effect of a belief in innocence upon the behavior of a defender:

Given the defense lawyer’s typical relationship to truth, there is a stunning change in perspective when a lawyer represents someone who is innocent. Suddenly, there is nothing more important than the truth, nothing more sacrosanct. Now, the lawyer who is ordinarily indifferent to the truth is outraged that the system is indifferent to it. Sometimes the defense lawyer representing a client he or she believes to be innocent is downright desperate. Gone is the cocky irreverence that characterizes many defenders. Gone is the nonchalance. Defenders who seek to vindicate a factually innocent person wear their hearts on their sleeves: “Please, please, please,” they beg, “my client is really innocent.” They are willing to lay themselves bare before the most recalcitrant prosecutor. They are willing to be thought of as naïve. 47

The typical outcome of a criminal case is a conviction based upon the defendant’s entry of a guilty plea. Few want to do work that regularly results in injustice to their clients. Those whose work it is to negotiate plea agreements for their clients need to believe that what they are doing serves their clients well rather than poorly. Because all agree that the vast majority of all those clients are in fact guilty, defense counsel may be unlikely to perceive, much less believe, that there is a risk that their advice to their client to accept a plea bargain may result in the conviction of the innocent.

Believing that those charged are guilty also eases the conscience of those who administer criminal justice in our society. No one wants to participate in a practice that they believe routinely imprisons the innocent or compels the innocent to plead guilty to crimes they have
not committed in order to avoid very severe sentences. A prosecutor securing an indictment will not know typically whether the case will be one of the 97 percent that do not go to trial (ending in a guilty plea, dismissal, or deferral) or one of the 3 percent that go to trial. Trials are unpredictable; but to the extent that prosecutors have initial questions about whether defendants will be convicted, they take comfort from the knowledge that acquittals are extremely rare outcomes.

Yet the typical justifications for treating acquittals as historically erroneous are hardly persuasive. The screening process for accepting a case for prosecution is concerned with the existence of a prima facie case, not the validity of a defense. Police and prosecutors are arguably no more adept at determining whether witnesses are telling the truth than twelve jurors devoted to answering that question. The small percentage of defendants who resist plea bargains and insist on trial may all be counting on deficiencies in the prosecutions’ cases rather than their own innocence, but there is no a priori reason to believe this is true. Even though some defendants undoubtedly do engage in witness intimidation, there is neither data nor reason to assume that even a substantial fraction of those who go to trial do so. Those who chose trial do so in the face of sentencing regimes that explicitly authorize judges to increase a convicted defendant’s sentence precisely because he insisted upon going to trial and authorize an ever greater increase if the defendant also testified, albeit unpersuasively, in his own behalf.

For the few cases that do go to trial, judges and juries do not necessarily arrive at similar judgments about guilt. Kalven and Zeisel found that judges and juries agreed that the defendants should be acquitted in fourteen out of one hundred cases but disagreed about the appropriateness of acquittals in twenty-two out of one hundred cases. Thus, of the 36 percent of cases in which either the judges or juries or both thought acquittals were appropriate, judges and juries agreed that the defendant should be acquitted less than 40 percent of the time.

Things have not improved in the past fifty years. In a study of nearly four hundred felony jury trials conducted by the NCSC, which we will discuss at length in succeeding chapters, juries returned acquittals in 27 percent of the cases whereas judges indicated that they would
have acquitted, had these been bench trials, in 19 percent of those cases. The impression of a reasonably high level of agreement between judge and jury about innocence dissipates when we examine the degree of actual overlap between judge and jury assessments. Judges were prepared to acquit in 7 percent of the cases even though the jury had found the defendant guilty, and juries acquitted in 16 percent of the cases even though the judge would have convicted those defendants. Overall, the judges and juries agreed that acquittal was the appropriate disposition in only 11 percent of the case while disagreeing about innocence in twice as many cases (23 per cent).

Out of one hundred jury trials, then, judges and juries agreed to acquit in eleven, and agreed to convict in about sixty-six. They disagreed about acquittal in 23 percent of cases. Thus, contemporary judges and juries agree on the appropriateness of acquittals in only one-third (11 percent) of all the total cases (34 percent) in which either the judge or the jury is prepared to find the defendant not guilty. Given evidence of disagreement between judges and juries about when it is appropriate to acquit a defendant, it may be more comforting to believe that all defendants are guilty and that acquittals are mere artifacts of the burden of proof. Otherwise, we might have to confront seriously the question of whether the difference is attributable to the willingness of judges to convict the innocent or to the willingness of jurors to acquit the guilty.

So what is to be said about the 1 percent of defendants who are actually acquitted? If pretrial screening really eliminates every innocent person, then the tiny acquittal rate represents a spectacularly low error rate for a process as fraught with uncertainty as the determination of contested historical fact whether by plea or after trial. However, notice that pretrial screening would have to achieve an even more astounding error rate, a false positive error rate of zero, if among the millions who go to judgment, there are no innocents. No criminal justice system can possibly operate with such tiny error rates, and no serious commentator suggests that ours does. Given the inevitability that some innocents will not be dismissed through pretrial screening, to what extent do the acquitted overlap with the innocent? In the remainder of this book, we explore that question.
We have investigated the meaning of acquittals primarily through a detailed analysis of data from nearly four hundred criminal trials originally collected by the NCSC. These data, obtained from the lawyers who presented the evidence, the jurors who decided the cases, and the judges who presided over the trials, offer more detailed and nuanced information about acquittals than has been available to those who previously investigated acquittals. We describe these data and our approach in detail in chapter 3 and use the data to examine particular patterns of acquittals in chapters 4 through 6. In the next chapter, we explore what we know about the presence and fate of the innocent through previous investigations of pretrial dismissals and trial outcomes, including, most prominently, Kalven and Zeisel’s monumental work, *The American Jury.*