

Tragic Consequences of *Deadly Dilemmas*: A Response to Allen and Laudan

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In 2007, I published an article in the *Journal of Criminal Law and Criminology* that established for the first time an empirically warranted factual wrongful conviction rate for an actual set of real world cases: capital rape-murders from the 1980s.¹ That rate was 3.3–5 percent.² In that article I also offered a number of caveats concerning the too-easy invocation of this number. The first was that the incidence of factual innocence was very unlikely to be uniform across the universe of criminal convictions generally.³ Rather, different subcategories of criminal conviction, especially those far removed from rape-murders in their typical factual characteristics, such as burglary or fraud, might have very different rates of factual innocence.⁴ In technical terms, when it comes to factual innocence we would expect the universe of convictions to display substantial “substructuring,” a circumstance that not only calls for caution in generalizing rates established for one category to another category, but also renders virtually useless any notion of a system-wide “wrongful conviction rate.”⁵ On the other hand, I cautioned against a facile dismissal of the rate for capital rape-murders based on the fact that capital case convictions are virtually always the result of trials, while convictions in most other

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¹ D. Michael Risinger, *Innocents Convicted: An Empirically Justified Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007).

² *Id.* at 762, 780.

³ *Id.* at 782–85.

⁴ *Id.* at 783.

⁵ *Id.* at 783–85. Such substructuring raises a version of the more general “reference class” problem, an issue (or set of issues) about which Professor Allen has written instructively (along with Professor Pardo). Ronald J. Allen & Michael S. Pardo, *The Problematic Value of Mathematical Models of Evidence*, 36 J. LEGAL STUD. 107 (2007).

categories of crime are substantially the result of plea bargains.⁶ Because there are well-established cases of factually innocent defendants pleading guilty to escape the death penalty or other harsh sentencing, I suggested that the burden should be on those who claim that the universe of convictions by plea was unlikely to contain factually innocent persons at a rate even approaching the rate of otherwise similar convictions resulting from trial to develop and marshal evidence for this claim, rather than simply assuming and asserting it.⁷ In *Deadly Dilemmas*, a recent article in the *Texas Tech Law Review*,⁸ Ronald Allen and Larry Laudan have taken up that challenge.⁹

Allen and Laudan's purpose in their analysis of the factual innocence rate in plea cases is not limited merely to throwing light on various aspects of the phenomenon of innocents convicted. Rather, it is part of a larger agenda involving claims not only about the incidence of wrongful conviction of the innocent, but also about the incidence of the wrongful acquittal of the guilty, the interconnectedness of the two, and the comparative costs associated with each kind of system error. Initially, I will examine their claims in regard to plea bargains and the factually innocent. I will then comment on their methodology and their calculus in regard to the larger issues.

Allen and Laudan develop a multistep analysis to the problem of guilty pleas by the factually innocent by looking at the data I developed for *Innocents Convicted* and the data developed by Brandon Gar-

⁶ Risinger, *supra* note 1, at 787.

⁷ *Id.*

⁸ Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65 (2008).

⁹ At various points in their article, Allen and Laudan suggest that I took or implied positions (usually rather extreme and unsophisticated positions) that I did not. For instance, in their text at least, they assert that, "Risinger makes the striking claim that rates of error in plea-bargained cases could be as high as error rates at trial. Such an unsubstantiated and highly improbable proposition stands in stark contrast to the commendably empirical cast to his article." *Id.* at 69. In their footnote, however, they indicate that "[a]gnosticism, though, may be his ultimate position, as he goes on to say: 'It would seem incumbent on those who claim otherwise to proffer substantial particular reasons for the claimed differences, rather than simply invoking general problems of extension and external validity.'" *Id.* at 69 n.21.

First, it should be noted that my discussion was explicitly directed to the very limited issue of innocence rates in regard to pleas in murder cases only, many of which are negotiated in the shadow of the death penalty. See Risinger, *supra* note 1, at 787. And while I did in fact take the formal position that innocence rates in plea cases in *that* group "could," in the absence of specific evidence to the contrary, be as high as in cases that were resolved by trial, this was done in the context of cautioning against too-easy dismissal of the issue of pleas by the factually innocent, in an attempt to induce the production of evidence and specific analysis. The existence of Allen and Laudan's article is evidence that I have at least in part succeeded.

rett in his examination of the first two hundred DNA exonerations.¹⁰ However, they do not very clearly define the reference set of cases represented by these data.¹¹ At other points in the article, they are laudably sensitive to the problems of generalizing from data derived from one universe of convictions to others, but in this initial analytic undertaking, they seem to be implying that their results concerning pleas derived from these data will necessarily generalize to the entire universe of pleas in criminal cases. However, because of the nature of the cases to which post-conviction DNA evidence applies most powerfully, the Garrett DNA exoneration set is dominated by sex crimes, largely stranger rapes. Yet Allen and Laudan make the unqualified assertion that by combining my data on capital rape-murder with Garrett's data on the first two hundred DNA exoneration cases, we can derive an "overall probability of a wrongful conviction."¹² However, just as one must be cautious in generalizing from the factually false convictions in the category of capitally sentenced rape-murder to other categories of crime, one must be equally careful in generalizing to other categories of crime any false plea conviction rate or overall innocence rate derived from the capital rape-murder data combined with the DNA exoneration data. The most that these data could convincingly show would be an overall risk of convicting the innocent in violent stranger-on-stranger sex crimes prior to the common availability of DNA typing for use during investigation and at trial.

¹⁰ See generally Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008).

¹¹ To my mind, at any rate, a certain looseness in regard to the reference set of crimes under consideration at any given time pervades the Allen/Laudan paper. Besides the general dichotomy between convictions by trial and convictions by plea, at various times they appear to be referring to the rape-murder subset of capitally sentenced crimes, to capitally sentenced crimes in general, to the mixed bag of crimes dominated by cases involving stranger-on-stranger sexual attacks represented by the DNA exonerations, to some not very well-defined set of violent crimes, and to all crimes. More troubling, these categories sometimes appear to morph from one to another without explicit signal. For instance, the reference set explicitly studied in *Innocents Convicted* is initially (and accurately) specified by Allen and Laudan as "capital rape/murders" (which ought more properly to have been designated "capitally sentenced rape/murders"). See Allen & Laudan, *supra* note 8, at 69. Later, however, it has become "rape/murder" without qualification. See *id.* at 71. But there are rape/murders that were not capitally sentenced, for a variety of reasons including plea bargains, and the data developed in *Innocents Convicted* was limited to the set of capitally sentenced rape/murder convictions in the 1980s, few if any of which (and none in the sample set from which the data were derived) involved pleas. See Risinger, *supra* note 1, at 782-88.

¹² Allen & Laudan, *supra* note 8, at 71.

With that initial very significant qualification on what the Allen/Laudan analysis can actually show us directly, we can go on to examine what conclusions they reached and how they reached them. But first, it is advisable to deal preliminarily with one other issue: the presumed unrepresentativeness of cases resolved by trial when it comes to the proportion of convicted innocents. The argument, which has a certain surface plausibility, goes this way: Clear cases of innocence are terminated without trial by discharge. Clear cases of guilt plead. Therefore, the residual set of cases that go to trial are relatively rich in close cases, which means that it will be relatively rich in factually inaccurate convictions (and factually inaccurate acquittals, for that matter). We do not have to address the strengths or weaknesses of this argument generally, at least not yet. However, there is one important set of cases for which the argument breaks down significantly: cases involving the imposition of the death penalty.

Let us proceed slowly. Cases can only result in the imposition of the death penalty in jurisdictions that have the death penalty. In such a jurisdiction, the decision to seek the death penalty is a prosecutorial decision. This decision is based on many factors, perhaps, but there seems to be no good reason to believe that it is generally more restricted to epistemically strong cases of factual guilt than other charging decisions. Once the decision is made to charge, one of two things will occur: either the prosecutor will offer a plea to something less than death or he will not. This decision is also made for a variety of reasons. In the set of cases where a plea is offered, there will be a certain proportion of people against whom the case is epistemically weak who will nevertheless plead to escape the threat of the death penalty. In the set where no plea is offered, the defendant against whom the evidence of factual guilt is overwhelming will not have the option of taking a plea. So one would expect the resultant set of trials (all of which might end up with defendants being capitalily sentenced) first, to be atypical of the average or modal distribution in other kinds of cases, and second, to be less rich in close cases than the norm. This is because some close cases have pled out of the set that would not have pled in a normal setting, and because some clear cases have not been allowed to plead that would have pled out in a normal setting. In this way, capitalily sentenced cases are the product of a universe atypically poor in its percentage of close cases, so that a rate derived from that special universe is not so easily generalized to non-capital contexts. Certainly, Allen and Laudan should have addressed this difficulty before using the capital rape-murder wrongful conviction rate as a factor in their derivation of an innocence rate for

pleas (in whatever set of cases they claim that their plea rate, and their overall innocence rate, are properly applicable to).

With these prefatory points, let us examine the Allen/Laudan methodology for deriving “an overall probability of a wrongful conviction” (full stop, no qualification as to category). Their first step is to “[a]ssume the rate of error in rape trials is 5 out of 100, as Risinger suggests.”¹³ Actually, what I suggested was that one might generalize the 1980s capital rape-murder innocence rate to capitally sentenced crimes then and now,¹⁴ to a specified subset of non-capital murder convictions then and now,¹⁵ and to stranger rapes then but *not* now, because trial use of DNA evidence has in those cases changed that epistemic game substantially.¹⁶ But let us pass over this. We will assume (without a very strong warrant) that the innocence rate in whatever trials are represented by the rest of the data Allen and Laudan later invoke is 5 in 100. They then turn to Garrett’s determination that in the first 200 DNA exonerations, there were only nine pleas, with the other 191 resulting from trials.¹⁷ They then say: “Accepting this as the best approximation we presently have of the ratio of the errors from pleas to errors from trial, we need to adjust the numerator of Risinger’s error rate by multiplying it by that figure.”¹⁸ Here is where the biggest rabbit goes into the hat. I am not exactly clear on what they intended by “the best approximation we presently have,” but it seems crystal clear that the ratio they have just derived (9/191) understates the ratio of factually wrong pleas to factually wrong trials by an unknown but significant and potentially very large amount. Given the practicalities of the DNA exoneration process, it is much easier for a person who never pled guilty to attract the attention, support, and investment of time and money that will lead to an exoneration than it is for a person who pled guilty. Therefore, the 9/191 is a floor figure, and the real figure is almost certainly higher, and it might be two or three or four or more times higher.

I want to be clear about what I am *not* claiming here. I am not saying that I believe that the set of pleas in the universe of cases represented by the DNA exonerations (however one might define that universe) contains the same percentage of innocents convicted as the set of convictions after trial. And on a commonsense level, I

¹³ *Id.*

¹⁴ See Risinger, *supra* note 1, at 785.

¹⁵ *Id.* at 786–87.

¹⁶ See *id.* at 785–86.

¹⁷ Allen & Laudan, *supra* note 8, at 71 (citing Garrett, *supra* note 10, at 74).

¹⁸ *Id.*

would be surprised if pleas were not somewhat more reliable in regard to factual guilt than trials. Yet how much more reliable remains murky, and the actual number of false pleas to be properly assigned to the universe of DNA exonerations could be ten times the number taken by Allen and Laudan from the Garrett data. It might properly be 90/191 instead of 9/191, the added 81 cases representing false pleas not uncovered by the practicalities of the screening process undertaken by innocence advocates, and thus proportionally underrepresented to this extent. This new figure would yield a percent of the total reference universe comprising exonerees after plea, which would be more than seven times greater than the Allen and Laudan percentage, that is, 32 percent (90 out of 281)¹⁹ versus 4.5 percent (9 out of 200), but still significantly less than that represented by trials (which would then be 191/281, or 68 percent). And we currently have no way of knowing that the actual figure properly attributable to false confessions is not ten times (or fifteen times or three times or one and a half times) the Allen/Laudan figure. All we know is that the real proportion of pleas to trial convictions for the reference set from a perspective of omniscience is virtually certain to be significantly more than 9/191, and probably less, and perhaps significantly less, than 1:1. More than this these data will not support.²⁰

So what this tells us is that after Allen and Laudan complete the rest of their calculations (combining the plea innocence rate proportionally with the trial innocence rate under the above assumptions), their number represents an absolute floor which the real number is almost certain to be substantially above. And look at the result of their calculation. With all of the assumptions (except their election of

¹⁹ Here is how the analysis goes. Assume the number that represents the true number of false convictions by plea under equally effective screening processes is ninety exonerees by plea. This would be eighty-one more than the current Garrett data show. See Allen & Laudan, *supra* note 8, at 71. Those eighty-one new cases would then be added to the 200 cases in the current data, for a total universe of 281, of which ninety would be exonerees after plea and 191 would be exonerees after trial.

²⁰ Some indication of the potential volatility of the innocence rate applicable to pleas can be gleaned from updated data in regard to DNA exonerations. Since Allan and Laudan wrote, there have been another sixty-three DNA exonerations, and ten of those have involved pleas, bringing the current totals as of May 2010 to 19 out of 254. Innocence Project, Facts on Post-Conviction DNA Exonerations, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited June 2, 2010). This represents a 67 percent increase in the percentage of DNA exonerees who plead guilty over the figure used by Allan and Laudan (7.5% versus 4.5%). Since their formula gives this percentage only a small effect, it pushes the resultant only slightly higher, but it nevertheless illustrates the problem of using the DNA exoneree percentage at any given time as anything but a floor figure for the percentage of convicted innocent who pled guilty.

the trial innocence rate number) favoring an understated resultant, their result is still a nearly one percent innocence rate.²¹

The derivation of a one percent number for convicted innocents in *Deadly Dilemmas*, whatever reference set it is intended to apply to, shows clearly how the debates are shifting, and in general, from my perspective, shifting for the better. In order to see what I mean by this, it is necessary to examine the assumptions that drove (or rather more often, stifled) debate prior to the coming of the DNA exonerations. At the beginning of *Innocents Convicted*, I described what I took to be the main camps in the debates over the implications of the phenomenon of the convicted innocent. I labeled the main groups on opposite sides of various issues flowing from the existence of a non-trivial number of innocents who have been wrongly convicted “Paleyites” and “Romillists.”²² Here is what I said about them:

People who think about the problem of wrongful conviction often fall into two camps, which we might label Paleyites and Romillists. Paleyites, whom I have named after the early exponent of this position, the 18th-century proto-utilitarian the Rev. William Paley, believe that, even though it is wrong to convict an innocent person, such convictions not only are inevitable in a human system, but represent the necessary social price of maintaining sufficient criminal law enforcement to provide an appropriate level of security for the public in general. Hence, one should not be moved by the prospect of wrongful conviction to take actions that would reduce such convictions, no matter how common, at the cost of reducing convictions of the guilty to a dysfunctional level.²³ Paleyites tend to be conservative, in the sense that any changes to current ways of conducting the criminal justice process, proposed for their supposed effect on protecting the innocent, will be presumed so counterproductive in their effect on convicting the guilty that they will be opposed.

Romillists, whom I have named after the early 19th-century reformist Sir Samuel Romilly, have such a horror of convicting the innocent that they are willing to propose many changes to whatever system exists, on the ground that such changes in our way of

²¹ To be exact, 0.84 percent. Allen & Laudan, *supra* note 8, at 71

²² Risinger, *supra* note 1, at 763.

²³ Paley’s famous quotation on the subject is “[H]e who falls by a mistaken sentence, may be considered as falling for his country; whilst he suffers under the operation of those rules, by the general effect and tendency of which the welfare of the community is maintained and upholden.” WILLIAM PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 443 (7th ed., Joshua Belcher 1811) (1785).

criminal law enforcement will better protect the innocent.²⁴ In so doing, it may be that some of the proposals might make the conviction of the truly guilty more difficult, perhaps significantly so. Whatever the actual effect, the Paleyites can be counted on to find the potential effect abhorrent, and to label the proponents “soft-headed sentimentalists” or some similar characterization, while the Romillists in turn will label the Paleyites hard-hearted troglodytes, indifferent to the plight of the convicted innocent, with knee jerk opposition to reform.

What neither side has a good handle on, however, is the magnitude of the problem of factually wrongful conviction and wrongful acquittal. . . .

....

Traditionally, a certain stripe of Paleyite has also denied that wrongful convictions happen at all, or, that if they happen, they happen so rarely that worrying about them is like worrying about being struck by a meteorite. The reasons assigned for this assumed near-perfection in regard to false-positive error have generally been the numerous layers of filtration involved in the pre-trial system, and the general fairness of the adversary trial itself, with its formal requirement that the prosecution prove guilt beyond a reasonable doubt.²⁵

It is this latter form of argument, invoking the assumed extreme rarity of the conviction of the factually innocent, which is blessedly beginning to disappear from the debates and being replaced with other arguments concerning the implications of that phenomenon. So it is with *Deadly Dilemmas*.

To elaborate a bit, I consider myself mildly Romillist, and I think it is clear that Allen and Laudan are of a generally Paleyite orientation,²⁶ though of course much more intellectually sophisti-

²⁴ Two of Romilly’s famous quotations in response to Paley are “When, therefore, the guilty escape, the Law has merely failed But when the innocent become the victims of the Law . . . it creates the very evil it was to cure, and destroys the security it was made to preserve,” and “Nothing is more easy than thus to philosophize and act the patriot for others, and to arm ourselves with topics of consolation, and reasons for enduring with fortitude the evils to which, not ourselves, but others are exposed.” Sir Samuel Romilly, *Observations on the Criminal Law as It Relates to Capital Punishments, and on the Mode in Which It Is Administered*, in 1 THE SPEECHES OF SIR SAMUEL ROMILLY IN THE HOUSE OF COMMONS 106, 165–66 n.† (1820).

²⁵ Risinger, *supra* note 1, at 763–767 (some footnotes and footnote text omitted).

²⁶ I want to point out that there are many worse things to be called than a Paleyite. The Reverend Paley himself was not only a foundational thinker in the movement that was to become utilitarianism, but a man of significant moral courage, an opponent of slavery, and a man who ruined his chances at a bishopric rather than stifle his criticisms of the way the rich had not lived up to their moral obligations to the poor. See the delightful sketch of Paley in *Reading Raids*, TAIT’S EDINBURGH

cated than some of the more famous pamphleteer Paleyites of recent years.²⁷ However, it should be obvious from the quotation from *Innocents Convicted* immediately above that, contrary to the suggestions of Allen and Laudan at various places in their article, I recognized, both there and in other places in the article, the legitimacy of inquiring about the phenomenon of inaccurate acquittals, and of looking at the effect of any reforms undertaken to reduce the conviction of the innocent on the ability to convict the guilty.²⁸ So, we agree on this. We also seem to agree that various sources of information, my own work among them, have established with reasonable certainty that there are at least some categories of crime for which there is a non-trivial percentage of factually innocent persons among the convicted, because even Allen and Laudan's one-in-a-hundred number (including pleas) is hardly so small as to be tenably characterized as trivial.²⁹

Beyond this, there are areas of both agreement and disagreement. We are agreed that some Romillist commentators have been less than careful in the extremity of their claims that convictions of the factually innocent must be totally eliminated, though the heavens fall. But I fail to see that this circumstance renders knowledge of the magnitude of the problem of innocents convicted meaningless without more, as Allen and Laudan appear to assert. In addition, their demolition of the Blackstone ratio as an appropriate measure of system performance is masterful and interesting.³⁰ But I believe it is pretty much beside the point of the rest of the article, since few people have urged with any serious reflection the use of the Blackstone ratio in the way they describe, as we will see below. In fact, Allen and Laudan's attacks on the excesses of the "total elimination" position, and on the Blackstone ratio, seem to me to be the thrashing of strawmen, and in the case of the "total elimination" position, to the extent anyone ever actually took it seriously, a strawman already thoroughly pummeled.

MAG., August 1855, at 476, 480, available at <http://books.google.com/books?id=QkQFAAAAQAAJ>.

²⁷ The most prominent of this ilk is Joshua Marquis, District Attorney of Clatsop County, Oregon. See generally Joshua K. Marquis, *Truth and Consequences: The Penalty of Death*, in DEBATING THE DEATH PENALTY 117 (Hugo Adam Bedau & Paul G. Cassell eds., 2004).

²⁸ See Risinger, *supra* note 1, at 791, 794–99.

²⁹ Although the implications of even that one percent number for the number of factually innocent persons in prison are pretty disturbing, at least to me, Allen and Laudan assert that "[i]t is hard to imagine conducting a criminal justice system that makes substantially fewer errors." Allen & Laudan, *supra* note 8, at 71. I think they suffer from an unfortunate failure of imagination.

³⁰ See *id.* at 75–77.

Let me expand upon the first of these points. Virtually no one is likely to claim that total elimination of the conviction of the innocent is not a beau ideal. Like most ideals, it is not capable of attainment in the real world, at least if one also desires to have a system where there are any convictions of the guilty. Any system applying human intelligence to decide cases in a world of imperfect knowledge will commit errors of false conviction and false acquittal, so the real question is how to design a functional system that keeps both types of error to a minimum, and when facing the inevitability of a residue of error, whether and how to disvalue one type of error over the other. So people who fall into the rhetorical excess of calling for the absolute elimination of all false convictions in the real world as the paramount value to be pursued to the exclusion of all others have driven their position to an untenable extreme. This criticism is hardly novel. It goes back at least as far as Laplace, whom Allen and Laudan invoke;³¹ it was driven home with ruffles and flourishes by my colleague Erik Lillquist in his article *Absolute Certainty and the Death Penalty*,³² and I embraced it myself in *Innocents Convicted*.³³

Yet the rejection of such an extreme position is only the beginning, not the end, of an inquiry into the moral import of false convictions. Arguments regarding the moral import of false convictions have weaker and more tenable forms. Once it becomes clear that for some important sets of real world convictions there is a nontrivial rate of factual false conviction, whether that be one percent, five percent, or something in between, I would assert that a moral obligation arises to carefully address the implications of such information. In the past, many have told themselves that they had no need to pay much attention to these issues because, given the procedural protections our system affords criminal defendants, conviction of the factually innocent was (they thought) vanishingly rare. Establishment of the likely order of magnitude of such convictions, and the fact that they are not vanishingly rare, eliminates the ability of various actors in the system to dismiss the phenomenon of false convictions as trivial, not worth addressing, and certainly not a problem they are obliged to take seriously. There are a variety of ways to approach the underlying moral issue, all of which involve some attempt to establish a position on whether acquitting the guilty is, like convicting the innocent, always an evil in itself, whether the evil of convicting an innocent person is

³¹ *Id.* at 79.

³² Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45 (2005).

³³ Risinger, *supra* note 1, at 791.

always worse than acquitting a guilty person, and if so, by how much. These debates are central to the Allen and Laudan paper, and we shall return to them at some length below. But beyond this is the question of how to deal with the call for feasible reforms aimed at lowering the rate of false convictions. Such reforms may usefully be divided into three categories with different moral implications. First, there are reforms that improve the diagnosticity of the system and thereby reduce the incidence of both wrongful convictions and wrongful acquittals. Such reforms, at least in the context of the violent crimes that appear to be the primary focus of Allen and Laudan's concerns,³⁴ should be relatively noncontroversial.³⁵ Second, there are reforms that are effective in protecting the innocent with no reduction in convictions of the guilty, or at least epistemically defensible convictions of the guilty (a kind of moral Pareto optimality claim).³⁶ These too should be non-controversial once the existence of these conditions is agreed upon. Finally, and most controversially, there are reforms that save or release some number of convicted innocents at the cost of foregoing some otherwise defensible convictions of the

³⁴ I have already indicated that the exact focus of the reference set of crimes being referred to at any given point in the *Deadly Dilemmas* is often difficult to pin down. See *supra* note 11. However, the most clearly stated general focus is to be found on page 80: "violent crime," but again, which categories of crime are being referred to are not specified. Allen & Laudan, *supra* note 8, at 80. What is most likely intended, however, is the set specifically referenced in Larry Laudan's unpublished draft. Larry Laudan, *The Social Contract and the Rules of Trial: Re-Thinking Procedural Rules* (Working Paper, 2008), available at <http://ssrn.com/abstract=1075403>. The intended crimes are listed as "homicide [presumably including negligent homicide], rape, armed robbery, aggravated assault or burglary." *Id.* at 13. All of these, except burglary, are explicitly mentioned at various places in *Deadly Dilemmas*. Note, however, that burglary is not included in the one source of violent crime rate statistics cited in *Deadly Dilemmas*, the four-page 1994 Bureau of Justice Statistics, *Selected Findings, Violent Crime* document. See Allen & Laudan, *supra* note 8, at 84 n.99 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENT CRIMES 1 (1994), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=598>).

³⁵ In footnote 68 of *Deadly Dilemmas*, Allen and Laudan make the rather startling pronouncement that "the only plausible way to reduce the number of false convictions is to make it more difficult to convict the innocent, which unfortunately means making it equally more difficult to convict the guilty." Allen & Laudan, *supra* note 8, at 76 n.68. This is, of course, not true, as Allen and Laudan themselves later indicate in footnote 76. See *id.* at 79 n.76. The development of DNA typing has shown that such changes are indeed possible, and later in the article they themselves propose a number of changes to the criminal justice system, such as more robust discovery on both sides, which they claim to be generally truth conducive (that is, the changes would both protect the innocent and make it easier to convict the guilty). See *id.* at 89–90.

³⁶ Primary among these is the adoption of various masking protocols to eliminate bias in forensic science practice and in eyewitness identification. See Risinger, *supra* note 1, at 796–99.

guilty. This is the set of reforms that will be most controversial, since they involve consequentialist claims about the relative moral disvalue of factually false convictions and false acquittals. These issues also lie at the heart of the Allen and Laudan paper, and we will revisit them in due course. Finally, there is perhaps another kind of “reform” lurking in the shadows of the Allen and Laudan paper, which would entail changes that would convict more guilty at the price of convicting more innocent. We will also have occasion to revisit this kind of “reform” below.

As for the “Blackstone ratio,” that is, the label now generally given to Blackstone’s version of the moral assertion that “it is better that ___ guilty go free than that one innocent be convicted,” I believe that all we can say about the intendment of this expression was that it was meant as a general declaration that, for any given crime, an error that convicts an innocent person is much worse morally than an error that acquits a guilty person. The number Blackstone chose to make this point was ten.³⁷ Alexander Volokh, however, has rather amusingly shown that the notion is ancient, and that various thinkers over the centuries have put the number in the blank at various values between one and one thousand.³⁸ The trope first appeared in English in Sir John Fortescue’s *De Laudibus Legum Anglie*, composed in the late 1460s, where the number employed was twenty.³⁹ Sir Matthew Hale used the formula in the 1670s, but his number was only five.⁴⁰ What is clear is that when Blackstone used the ratio image, like Hale and Fortescue before him, he was not speaking as a mathematician, probability theorist, or formal logician but as what he was—a practical lawyer/judge commenting on the subjective certainty that should be required of juries making findings of guilt in individual criminal trials. It was a way to justify the principle of calling on jurors to apply great caution in convicting individual defendants in particular cases when the specific evidence of their guilt was relatively weak. It seems unlikely that the idea of actually determining the number of true acquittals, false acquittals, true convictions, and false convictions produced by the criminal justice system as a whole (and actually compar-

³⁷ See 4 WILLIAM BLACKSTONE, COMMENTARIES *352.

³⁸ Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 180–85 (1997).

³⁹ SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIE 65 (S.B. Chrimes ed. & trans., Cambridge Univ. Press 1942) (1545). *De Laudibus Legum Anglie* was written sometime between 1468 and 1471. Harold Dexter Hazeltine, *General Preface* to FORTESCUE, *supra*, at ix.

⁴⁰ 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 289 (Sollum Emlyn ed., 1736) (written before Hale’s death in 1676).

ing their ratios in any combination as a measure of system performance) would have struck him as possible or useful had he ever formulated the question of system performance in that way, which so far as I know he never did. So the “Blackstone ratio” as analyzed by Allen and Laudan is in a central sense not really the Blackstone ratio. Nevertheless, for those who have been tempted to convert the Blackstone ratio to a canonical measure of system performance, Allen and Laudan establish how unconstraining the Blackstone ratio really is when used as a measure of system performance, since, taken as a mathematical expression, its conditions could formally be met by holding the number of convicted innocents steady and raising the number of acquittals of the guilty.

So much for the starters in the Allen and Laudan paper. We now move from the hors d’oeuvre to the main course, which is their claim about the proper utilitarian calculus warranted by social contract theory for dealing with the phenomenon of factually wrongful convictions in context.

Their first claim is that in determining whether the criminal justice system is working satisfactorily, one must look at both wrongful convictions and wrongful acquittals and take both phenomena into account, both in judging current system performance and in judging any proposed changes in the system.⁴¹ Their second claim is altogether more novel and more bold. They assert that in judging the desirability of any proposed changes to our current way of doing things, “the social contract” demands that as long as the risk of being a crime victim is higher than the risk of being the victim of a wrongful conviction, reforms lowering the false acquittal rate have priority.⁴²

Reforms increasing the diagnosticity of the criminal justice system will have this effect and will reduce the number of false convictions as a desirable side effect. So it would seem no one could object to such reforms, and Allen and Laudan do not. But (according to their view) any reform lowering the false conviction rate that does so at the cost of raising the false acquittal rate should be rejected. And indeed, the logic of their position would demand that at least some reforms raising the true conviction rate should be undertaken, even if they raise the rate of the conviction of the innocent.

I believe I have accurately captured the nut of their position in the preceding paragraph, and as such, I have some substantial prob-

⁴¹ Allen & Laudan, *supra* note 8, at 85.

⁴² *Id.* at 80.

lems with it, which I will raise below. But first, let us devote some attention to seeing how they arrive at these conclusions.

Allen and Laudan's claim that many err by overvaluing false convictions and undervaluing false acquittals is the gravamen of Paley's own criticism of reformists of his own era,⁴³ and of Bentham's similar criticism⁴⁴ (which is used as an epigraph for the Allen and Laudan article). However, the social contract account that generates this conclusion, at least in the strong form in which it is put, seems to be all Allen and Laudan's own. They attribute it to the "Laplace/Nozick thesis," saying that this is "the natural way to think about the trade-offs at stake here."⁴⁵ They set out the thesis thusly: "[T]he social contract obliges the state to minimize the aggregate cost innocent citizens face, which consists of exposure to false conviction as well as criminal victimization."⁴⁶ But they give no discussion of the actual positions of Laplace or Nozick on these trade-offs, referring us instead in a footnote to an article by Professor Laudan that is posted in draft on the Social Science Research Network (SSRN).⁴⁷ An examination of that article reveals that neither Laplace nor Nozick wrote more than a few sentences each upon the subject, and in both cases these short passages do not make completely clear the actual position taken by either Laplace or Nozick.⁴⁸

The relevant passage from Laplace⁴⁹ best translates⁵⁰ thus:

⁴³ See PALEY, *supra* note 23, at 440–43.

⁴⁴ Allen & Laudan, *supra* note 8, at 65.

⁴⁵ *Id.* at 79.

⁴⁶ *Id.*

⁴⁷ *Id.* at 78 n.77.

⁴⁸ See generally Laudan, *supra* note 34, at 31–43.

⁴⁹ That is, the one cited by Professor Laudan. *Id.* at 32–33. The publication history of this passage is a bit tortured. The first two volumes of Laplace's *Théorie Analytique des Probabilités* were originally published in 1812. See *Avertissement de la Seconde Édition* [Foreword to the Second Edition] to LAPLACE, THÉORIE ANALYTIQUE DES PROBABILITÉS (3d ed., Paris, Courcier 1820) (1812), reprinted in OEUUVRES COMPLÈTES DE LAPLACE [COMPLETE WORKS OF LAPLACE] i (1886) [hereinafter OEUUVRES COMPLÈTES], available at <http://ia361301.us.archive.org/6/items/theorieanaldepro00laprich/theorieanaldepro00laprich.pdf> (indicating that the first volume was published at the beginning of the year and the second part followed a few months after the first). Two years later, a second edition was published with a lengthy prefatory essay called *Essai Philosophique sur les Probabilités*, which appeared separately as well. See CHARLES COULSTON GILLESPIE & PIERRE-SIMON LAPLACE, 1749–1827: A LIFE IN EXACT SCIENCE xviii (1997); see also *Avertissement de la Seconde Édition* to LAPLACE, *supra*, at i (noting that the Introduction to the second edition had already appeared separately under the title *Essai Philosophique sur les Probabilités*). The *Essai* continued to be modified thereafter by "supplements," the first coming out in 1816 (which would make the 1816 edition the second edition of the *Essai*, but the first of

It is doubtless necessary for judges, in order to condemn an accused, to have the strongest proofs of his offense. But such a proof⁵¹ is never more than a probability; and experience has only too clearly shown the errors to which such criminal judgments, even those that appear most certain, are still susceptible. The [im]possibility of amending these errors [after execution] is the most solid argument of the philosophers who have wished to forbid the penalty of death. We would be obliged, then, to abstain from judging if it were necessary for us to await mathematical demonstration. But judgment is required by the danger that would result from the impunity of crime. This judgment reduces itself, if I am not mistaken, to the solution of the following question: Has the proof of the crime of the accused attained the high degree of probability necessary so that the citizens have less to dread regarding the errors of the tribunal, if he is innocent and condemned, than from his new attempts, and those of the wretches who would be emboldened by the example of his impunity, if he is culpable and absolved? The solution to this question depends upon many elements that are very difficult to determine.⁵²

This is hardly a very precisely worked out passage, and, I must say, Laplace himself does not seem to be completely comfortable with it. It is entirely unclear whether the citizens' dread to which Laplace refers in regard to wrongful conviction is solely a fear for themselves as potential victims of the next wrongful conviction, or a moral dread of and condemnation of wrongful conviction in general. Nor is the basis of this passage, whatever its meaning, very clearly lodged in social contract theory rather than, say, an enlightened despot's notion of proper approaches to the policy of criminal justice.

the first supplemental material, which was integrated into the text). *Id.* It was in this 1816 edition that the problem of criminal procedure was first addressed. *See id.* I have not been able to obtain a copy of that original language, which was apparently modified in some regards thereafter until the version accompanying the "canonical" fourth edition of the *Théorie*. I have used the French text of the *Essai Philosophique* from the *Librarie Belges* series. *See Essai Philosophique sur les Probabilités*, OUVRES PHILOSOPHIQUES DE LA PLACE (Brussels, Librarie Belges 1829), available at <http://books.google.com/books?id=IYQPAAAAQAAJ> [hereinafter *Essai Philosophique*].

⁵⁰ That is, I have done my best.

⁵¹ "Such a proof:" The text says "*preuve morale*"—that is, a "moral" proof in the sense of one not based on demonstration (as in mathematics) but on inference from evidence. *Essai Philosophique*, *supra* note 49, at 117.

⁵² *Id.* at 117 (Risinger translation); *see also* PIERRE SIMON, MARQUIS DE LAPLACE, A PHILOSOPHICAL ESSAY OF PROBABILITIES (Frederick Wilson Truscott & Frederick Lincoln Emory trans., 1902) (English translation).

Nozick's contribution is more clearly lodged in a kind of social contract account, but it suffers from being put in a hypothetical form in service of another point, which makes it impossible to determine if Nozick was actually adopting it, especially since he goes on to give what he considers to be some problems of such a position in practice. The key passage⁵³ occurs in *Anarchy, State, and Utopia*⁵⁴ at a point where Nozick is addressing arguments that might be made by an "independent," that is, someone who has not yet voluntarily agreed to join a "protective association" in his version of the state of nature and who is objecting to being restricted by such associations from pursuing individual private justice (that is, revenge) against their members.⁵⁵ Nozick begins by assuming that one proper objection might be that the procedures adopted by "independents" would be too unreliable given their individual investments in each case they pursue.⁵⁶ He appears to assume that it is something in the nature of a natural right not to be punished by a procedure that is "too unreliable" in regard to factually inaccurate results. After disposing of the claim that to avoid objection such a procedure must be the "least dangerous" possible procedure (on grounds similar to those already discussed above), Nozick continues:

If a person objects that the independent's procedure yields too high a probability of an innocent person's being punished, how can it be determined what probabilities are too high? We can imagine that each individual goes through the following reasoning: The greater the procedural safeguards, the less my chances of getting unjustly convicted, and also the greater the chances that a guilty person goes free; hence the less effectively the system deters crime and so the greater my chances of being a victim of crime. That system is most effective which minimizes the expected value of unearned harm to me, either through my being unjustly punished or through my being the victim of crime. If we simplify *greatly* by assuming that the penalties and victimization costs balance out, one would want the safeguards at that most stringent point where any lowering of them would increase one's probability of being unjustly punished more than it would lower (through added deterrence) one's vulnerability to being victimized by crime; and where any increasing of the safeguards would increase one's probability of being victimized by a crime (through lessened deterrence) more than it would lessen one's probability of being

⁵³ That is, the passage quoted in Laudan, *supra* note 34, at 33.

⁵⁴ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 96–97 (1974).

⁵⁵ *Id.* at 96–101 (discussing procedural rights).

⁵⁶ *See id.* at 96–97.

punished though innocent. Since utilities differ among persons, there is no reason to suspect individuals who make such an expected value calculation to converge upon the identical set of procedures. Furthermore, some persons may think it important in itself that guilty people be punished and may be willing to run some increased risks of being punished themselves in order to accomplish this. These people will consider it more of a drawback, the greater the probability a procedure gives guilty people of going unpunished, and they will incorporate this in their calculations, apart from its effects on deterrence. It is, to say the least, very doubtful that any provision of the law of nature will (and will be known to) settle the question of how much weight is to be given to such considerations, or will reconcile people's different assessments of the seriousness of being punished when innocent as compared to being victimized by crime (even if both involve the same physical thing happening to them). With the best will in the world, individuals will favor differing procedures yielding differing probabilities of an innocent person's being punished.⁵⁷

Thus, far from embracing the "Laplace/Nozick hypothesis," Nozick actually regards it as unworkably indeterminate because Nozick is here a contractualist (to use the more recent term) or at least does not see any principled way to reject the contractualist invocation of varying evaluations and asserted grounds for evaluating the evils of false acquittal and false conviction.

So the "Laplace/Nozick thesis" is not the Nozick thesis nor very clearly the Laplace thesis either. But so what? If it is not the Laplace/Nozick thesis, then it is the Allen/Laudan thesis influenced by a couple of ideas tossed off in passing by Laplace and Nozick. All that is lost by realizing that the thesis is mostly Allen and Laudan's own is the weight of authority that might be attributed to its pedigree, a dubious ground for decision in matters of political and legal theory and philosophy anyhow. The real questions are what are the implications of the thesis, is it an appealing prescription, and what does it gain by being asserted as part of "the social contract"?

To evaluate Allen and Laudan's claims concerning these questions, it will be necessary to place them in the context of the broader tides of social contract theory as it has ebbed and flowed over the last

⁵⁷ *Id.* The only part of the passage quoted in Laudan, *supra* note 34, at 33, is a small section of the hypothetical reverie of each individual: "That system [of criminal justice] is most effective which minimizes the expected value of unearned harm to me, either through my being unjustly punished or through my being a victim of a crime." But a glance at the whole passage shows that this is not actually Nozick's position but a kind of strawman starting point for an analysis that ends at a very different place.

three and a half centuries. Of necessity, a rather potted treatment will follow. But some such account is a necessary preliminary as an aid to analysis, especially for the majority of any likely readers of this response, who will almost certainly be legal academics, lawyers, and judges for whom the contours of the debates surrounding contract-based assertions about government authority and responsibility, and morality in general, are likely to be foreign territory vaguely remembered from their undergraduate years.

To begin at somewhere near the beginning of human dealings with agreement, humans are social animals, and as such, they seem to be hard-wired to enter into reciprocal arrangements, involving something in the nature of agreement or at least acceptance, where acting reciprocally is rewarded, and breach is punished if possible.⁵⁸ The evolution of language made it possible to delineate the terms of such arrangements, and the earliest legal systems recognized the special significance of mutual promises between equals; however, such arrangements often are not very clearly separated from a different aspect of the moral obligation of promises, the honor-based obligation to keep unilateral promises, especially formal vows.⁵⁹ Nevertheless, notions of contract had little to do with theories of political authority and obligation or with theories of general morality until quite recently, as various notions about divine anointment, arguments about the good, and scholastic notions of natural law did most of the work over most of recorded history. While proto contract-based accounts of certain kinds of broader social arrangements are sometimes given in pre-modern sources,⁶⁰ it seems reasonably clear that Thomas Hobbes was the first to attempt a full-scale, contract-based approach to account for political arrangements.⁶¹

Virtually every educated person is generally aware of Hobbes's invocation of the "state of nature" where "perfect liberty" is the natural state but exists only in the context of the "war of all against all," a

⁵⁸ See generally HERBERT J. SCHLESINGER, PROMISES, OATHS, AND VOWS: ON THE PSYCHOLOGY OF PROMISING (2008).

⁵⁹ See 1 WILLIAM HERBERT PAGE, THE LAW OF CONTRACTS § 3 (2d ed. 1920).

⁶⁰ The Wikipedia entry on Social Contract identifies (short) proto-social contract accounts from Ancient India. Wikipedia, Social Contract, http://en.wikipedia.org/wiki/Social_contract (last visited Mar. 18, 2010). It further notes that many view Plato's *Crito* to be a foundational source for a contract-based approach to obligation and also that the British historian of early modern thought, Quentin Skinner, had identified what he takes to be proto-contractarian accounts in the writings about the social covenant of various early Renaissance authors such as Francisco Suarez. *Id.*

⁶¹ *Id.*; Ann Cudd, *Contractarianism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2007), <http://plato.stanford.edu/entries/contractarianism/>.

circumstance that renders life for everyone “solitary, poor, nasty, brutish and short.”⁶² From this, Hobbes posited an agreement to surrender liberty for security, resulting ultimately in an ineluctable and inevitable agreement to accept absolute monarchy. This result illustrates an important point about contract-based accounts: the actual content of the obligatory social arrangements asserted by any particular account is not much constrained by the general contract-based nature of the approach. John Locke, by contrast, managed to retain in his social contract theory notions of natural rights derived from natural law unsundered from the state of nature, including a right of rebellion, that would have been anathema to Hobbes.⁶³

Another important point emerges from a contemplation of Hobbes. It is impossible to tell whether his arguments proceeded from what he believed to be actual anthropological facts or whether they were merely “as if” arguments using hypothesized contract notions as a tool for examining his version of a proper social order. As Hume pointed out,⁶⁴ if contract theorists really believe that they are talking about real agreements at some past time, they have a severe problem, unless one assumes that the promise of a person can bind his descendants in perpetuity—not a very attractive notion, at least not to British sensibilities at the time Hume wrote.

In modern discourse, “social contract theory” is not a monolithic doctrine but a family of approaches to political arrangements, social obligation, and general morality linked only by virtue of the fact that their proponents utilize some notion of agreement as part of the justification for the conclusions reached. Modern social contract theories generally do not embrace any claims about actual historical agreements by real humans, but freely admit that their claims are about notional contracts that humans should be regarded as agreeing to.⁶⁵ Contract accounts must have a large element of consequentialism because their mode of analysis asks questions about what humans should agree to given the consequences of agreeing and not agree-

⁶² See THOMAS HOBBS, *LEVIATHAN* 83–84 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651).

⁶³ See JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* §§ 211–43 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (chapter 19). This chapter, “Of the Dissolution of Government,” is the last chapter of Book II, which is entitled “Essay Concerning the True Original, Extent and End of Civil Government.” *Id.*

⁶⁴ See 1 DAVID HUME, *Of the Original Contract*, in *ESSAYS AND TREATISES ON SEVERAL SUBJECTS* 511 (London, T. Cadell 1768) (1742).

⁶⁵ See Fred D’Agostino & Gerald Gaus, *Contemporary Approaches to the Social Contract*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2008), <http://plato.stanford.edu/entries/contractarianism-contemporary>.

ing. But these accounts can be exclusively consequentialist (in all the variety of forms that consequentialism itself takes) or they can incorporate deontological elements like the natural rights retentions of Locke.

It would seem that all social contract theories must make claims about at least three general notions: a specification of the set of parties to be viewed as “agreeing”; a specification of the conditions of the “original position,” from which decisions about agreement will be viewed and taken; and a specification of what can count as a reason to agree or not to agree to a proposed term of the agreement.⁶⁶ Each of these contains knotty problems. For instance, one of the modern criticisms of classical contract-based theories is that the set of contracting parties always excluded by assumption women, children, aliens, slaves, “defectives” of various sorts (mental and physical), and perhaps those uneducated citizens who rarely thought about political theories, thus making the interests of the (notionally) agreeing parties different from the interests of what should properly be viewed as society in general.⁶⁷ As for the conditions of the original position, two main issues arise. Do the parties judge from a notional assumed precivilization perspective or from a perspective taking into account current or other intermediate social arrangements? Perhaps more importantly, do the parties know anything about their own current status, or must they be assumed to be negotiating from behind what John Rawls famously posited, a “veil of ignorance,”⁶⁸ where, once the bargain is complete, they may find themselves inserted into the resulting social arrangements in any role with any set of advantages and disadvantages whatsoever? Finally, as to what counts as a reason to agree or disagree to the terms of the social contract, can the categorical imperatives of various deontological schools count, or must categorical imperatives be reduced to consequentialist considerations? And more particularly as to consequentialism, can every personal utility that might affect a personal decision (even in a formal decision-theoretic account), such as altruistic fellow-feeling, esthetics, etc., be brought forward and invoked as a possible ground for agreement or

⁶⁶ This list is neither canonical nor intended as exhaustive, but it is sufficient for present purposes. D’Agostino and Gaus list five variables: the nature of the contractual act, the parties to the act, what the parties are agreeing to, the reasoning that leads to agreement, and what the agreement is supposed to show. *Id.*

⁶⁷ See generally EVA FEDER KITTAY, *LOVE’S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* (1999); see also CAROLE PATEMAN, *THE SEXUAL CONTRACT* 1–18 (1988); Cudd, *supra* note 61 (describing subversive contractarianism).

⁶⁸ JOHN RAWLS, *A THEORY OF JUSTICE* 118–23 (rev. ed., The Belknap Press of Harvard Univ. Press 1999) (1971).

disagreement, or must the grounds for agreement be restricted in order that determinate results can be obtained from the exercise?

Most modern social contract theories require some way to take into account the interests of every human being subject to the social arrangements under consideration, and many of them adopt Rawls's "veil of ignorance" mechanism to purge the exercise of special pleading by and for the rich, the powerful, and the talented. But there is much more debate about what should count as an appropriate ground for agreement or disagreement. Here there is a major division of social contract theories into two broad approaches, which currently go under the name of contractarian approaches and contractualist approaches.⁶⁹ Contractualists generally reject as unrealistic and potentially distorting any a priori restriction on the invoked reasons that may be deployed to argue for the propriety of accepting or rejecting the terms of the social contract.⁷⁰ Instead, contractualists claim that the social contract should be viewed as based upon what humans as reflective moral agents should agree to, or at least should not reject. Contractarians reject the contractualists' ecumenism as

⁶⁹ This distinction is current in the philosophical literature, as reflected in the various entries in the *Stanford Encyclopedia of Philosophy* cited in this Essay, see, e.g., Cudd, *supra* note 61; D'Agostino & Gaus, *supra* note 65, but it is a distinction rarely made in the legal literature, where the two terms are generally used interchangeably. To see for yourself, put the term "contractualism" into the journals database (Jlr) on Westlaw and check the first few dozen hits.

⁷⁰ While there may be something of a consensus that contractualism as an explicit school is recent, and to be traced largely to the writings of John Harsanyi, JOHN HARSANYI, *ESSAYS ON ETHICS, SOCIAL BEHAVIOR, AND SCIENTIFIC EXPLANATION* (1976), and especially Thomas Scanlon, THOMAS SCANLON, *WHAT WE OWE TO EACH OTHER* (1998), there is not a consensus as to exactly what distinguishes contractualism from contractarianism. Once the distinction is undertaken, contractualism is generally traced back to Kant (as opposed to the Hobbesian roots ascribed to contractarianism), and John Rawls is adopted as a contractualist. For purposes of this Essay, the main distinctions seem to be these: Contractualists reject utilitarian consequentialism, especially its strong forms of "aggregation" (the small harms to many can outweigh a large harm to one), although they do not necessarily reject all aggregation considerations; contractualists concentrate on justification (what is a person obliged to agree to, or for Scanlon, what is a person obliged not to reject) rather than voluntary consent or agreement; and finally, and most importantly for this Essay, contractualists allow the parties to the social contract to be "moralized," that is, to be motivated by moral precepts not based on self-interest but on other kinds of moral argument, although not all contractualists reject a role for self interest of various sorts (hence the "ecumenism" of contractualists to which I have referred in the text). Contractarians are generally the mirror image of contractualists on these issues, concentrating on self interest, utilitarian aggregation, and ideas of voluntarily motivated agreement rather than duties to agree or not to reject (although many contractarians retain some natural rights trumps à la Locke). For a good summary, see D'Agostino & Gaus, *supra* note 65.

wholly unworkable and specify that decisions be made only in light of rational maximization of the security, liberty, and property interests of the parties. In this, they come close to adopting the homo economicus of classical economic theory as the only model for rational decision making and the driver of what counts as persuasive in regard to moral and social policy.

Going further with this is unnecessary, since what has been said allows us to locate the Allen/Laudan position well enough. It is implicit about universality but almost certainly embraces universality in theory, although some of its explicit arguments might be interpreted as implying something less than universal.⁷¹ The Allen/Laudan position is at least tolerant of the “veil of ignorance” mechanism, though it does not play out its implications in sufficient detail. It is aggressively and thoroughly consequentialist and dominantly contractarian in the sense of limiting the invoked utilities behind the acceptance or rejection of their proposed social contract terms to considerations of rational maximization of the material interests of a notional individual making the decision to agree to the contract terms.⁷² But it is probably worth noting at this point that the various problems of social contract theory, both as to the artificiality of its framework and the determination of its content, have led many social philosophers to abandon it as a primary tool, or even as a useful heuristic, and to arrive at their versions of desirable social arrangements by other methods.⁷³ This is not to say that all social contract arguments are without persuasive weight. It is merely to say that a general invocation of what “the social contract requires,” of the kind found at various points in Allen and Laudan’s paper,⁷⁴ cuts less ice than they imply.

That said, let us examine Allen and Laudan’s position from an internal social contract perspective. Let us begin with the issue of un-

⁷¹ See *infra* text accompanying notes 75–78.

⁷² See, e.g., Allen & Laudan, *supra* note 8, at 84 (“Would rational people choose to be raped, shot, or brutalized once a week, every week without fail, for six years rather than spend some or all of that time in jail falsely convicted?”). I believe this is a fair example of the methodology on this point.

⁷³ This is hardly a new position and is hardly limited to deontologists. John Stuart Mill operated well enough as an extremely sophisticated consequentialist without indulging in much contractarian rhetoric.

⁷⁴ See, e.g., Allen & Laudan, *supra* note 8, at 79 (“According to [the Laplace/Nozick] thesis, the social contract obliges the state. . . .”); *id.* at 81 (“[Dworkin and Kant’s position] ignores the social contract’s imposition of an obligation on the state to protect its citizens not only from false convictions but also from becoming victims of crime.”).

iversalism. As we have previously noted, one of the classic criticisms of social contract accounts is that their proponents tend to generate the content of the contract from the perspective of the social group to which they belong, and it was to eliminate this tendency toward unacceptably biased content of social contract theorizing that John Rawls developed his famous “veil of ignorance” approach to determining the content of the social contract. Allen and Laudan invoke and utilize Rawls’s “veil of ignorance” approach, but they do it half-heartedly and less than thoroughly.⁷⁵ For instance, they use rape as one of their prime examples of the kind of “violent crime” or “serious crime” that drives their analysis in the second half of the article,⁷⁶ without apparently noticing that, from a purely selfish perspective, what you would want in the contract in regard to standards of proof would depend heavily on whether you were male or female. While it is true that rape of males by other males exists, the risk of this is heavily substructured, that is, it is not evenly distributed across the male population but is confined to fairly isolatable subgroups of gays and prison inmates. In addition, actual rape of males by females is virtually unknown. So the vast bulk of males will not see themselves as potential rape victims in their normal setting, and virtually no woman will imagine herself falsely accused of rape. By Allen and Laudan’s contractarian logic (which apparently excludes any invocation of fellow-feeling), males would want incredibly high standards of proof (at least for rape), and females would want conviction on mere suspicion (or allegation).⁷⁷ A “veil of ignorance” analysis might have resolved

⁷⁵ They invoke and utilize Rawls’s “veil of ignorance” once. See Allen & Laudan, *supra* note 8, at 83 & n.98.

⁷⁶ See, e.g., *id.* at 83–84; see also *id.* at 82 n.81.

⁷⁷ One might argue that traditional theories took the interests of women into account by virtue of male adoption of those interests under a quasi-property notion, as Dworkin initially attempted to do. See the criticism of such positions in KITTAY, *supra* note 67, at 84–87. And I am not sure that this would escape the implicit prohibition on “fellow feeling” considerations. Even if it does, it could hardly be said to eliminate the group conflict-of-interest problem. I would like to point out here that Allen and Laudan are not themselves very clear about what can count as risks in the social contract calculus. They do seem to allow that it would be understandable and acceptable for a person to prefer a few episodes of mugging victimization of themselves to one false conviction of themselves for mugging. See Allen & Laudan, *supra* note 8, at 83 (“To be sure, there are other crimes for which the balance might tilt the scale in the other direction. . . .”). But they nowhere accept any explicit fellow-feeling consideration as appropriate. Perhaps they realize that once fellow feeling is in bounds as a consideration, whether on deontological or mere emotional grounds, the determinacy of their results collapses, as Nozick pointed out. *Id.* at 81–84.

this conflict had Allen and Laudan noticed the conflict,⁷⁸ although I am not sure how this stark collision of interests would be resolved if the selfish “personal risk” model were all that was available even behind the “veil of ignorance.”

At any rate, this example illustrates a pervasive problem with the Allen/Laudan approach: a failure to account for the substructuring of risks generally. They invoke general statistics about the rate of occurrence of the crimes that are their explicit primary focus, which they variously describe as “serious crimes” and “violent crimes” and which include murder, rape, armed robbery, burglary, and aggravated assault. But the risk of being the victim of such crimes and the risk of being falsely accused of them are both heavily substructured. The risks of victimhood are much higher in urban poor settings, the risks of being falsely accused are much higher if you are a young, urban black male, and so on. Perhaps a “veil of ignorance” analysis would resolve all these competing interests, although I am doubtful. But not to have noticed the necessity of such an account and taken some steps to work it out gives Allen and Laudan’s enterprise, to my mind at least, the flavor of a social contract generated from a point of view significantly narrower than universal.

Let us now turn to the crime statistics that Allen and Laudan invoke in service of such propositions, such as that “the probability of a woman being a victim of rape during her lifetime is approximately 8% . . . and the probability of being the victim of a crime of violence is 83%,”⁷⁹ and that “the risk of being the victim of a serious crime in the United States is significantly more than 300 times greater than the lifetime risk of being falsely convicted of a serious crime.”⁸⁰ The statistical bases for such statements are notoriously soft. Numbers for the rates of individual crimes (given in crimes per hundred thousand people per year) are generally derived from “victim surveys.” The main victim survey in the United States is the National Crime Victimization Survey done by the Bureau of the Census and then analyzed by the Bureau of Justice Statistics.⁸¹ (The term “victim survey” is some-

⁷⁸ And they certainly did not notice it. They repeatedly speak of the risk of being wrongly convicted of rape and the risk of being raped as if these applied equally to all people. *See, e.g.*, Allen & Laudan, *supra* note 8, at 81, 83.

⁷⁹ *Id.* at 80 n.81.

⁸⁰ *Id.* at 79–80.

⁸¹ *See* Wikipedia, Crime Statistics, http://en.wikipedia.org/wiki/Crime_statistics (last visited Mar. 31, 2010) (providing a good overview of processes and problems). For those who want the other end of the telescope, the National Academies’ National Research Council (NRC) Panel to Review the Programs of the Bureau of Justice Statistics just published an extensive report. NAT’L RESEARCH COUNCIL OF THE NAT’L

thing of a misnomer. These surveys are interviews of structured samples of the population to determine if they have been crime victims.) Such survey data is preferred for many purposes to data derived from police reports for a number of reasons—the main one being that it has a chance to capture offenses that go unreported. Of course, this makes the surveys the product of unchecked self-reporting by the interview subjects. Also, the survey results are subject to assumptions about the boundaries of criminal conduct under the law, both on the part of the interviewer and the interviewee. When is an assault an aggravated assault instead of a simple assault, for instance, or what constitutes a rape attempt?⁸²

An example might prove instructive. It is in itself merely an anecdote, of course, but perhaps has its lessons to teach nonetheless. While in the midst of writing this piece, my eye fell upon the following story in the “From the Desk of Chief John Dowie” column from my local newspaper, *The Observer* of Kearny, New Jersey:

On Feb. 8 at 2 a.m., Officers Norat and Bannon responded to a dispute in a bar on Kearny Avenue and found a blood covered [sic] patron outside the premises who advised the police that he

ACADS., ENSURING THE QUALITY, CREDIBILITY AND RELEVANCE OF U.S. JUSTICE STATISTICS (Robert M. Groves & Daniel L. Cork eds., 2009), *available at* http://www.nap.edu/openbook.php?record_id=12671&page=R1. As the main text notes, the main source for such information in the United States is that derived from the National Crime Victimization Survey, an effort supervised and administered by the Bureau of Justice Statistics, but the actual survey interviews are done under the supervision of the Census Bureau. *Id.* at 80–83.

⁸² Data (in the sense of narrative descriptions of events) on both completed crimes and attempts is collected during the survey. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NSVC INTERVIEWING MANUAL FOR FIELD REPRESENTATIVES B3-5 (2003), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/manual.pdf> (providing the instruction regarding attempts). It is entered in narrative form into spaces on the survey instruments that do not attempt to distinguish between attempts and completed crimes. For a survey instrument, which would be the readily available form most closely resembling the form in use when the interviews underlying the Allen/Laudan data were done, see BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY, NCVS-1 BASIC SCREEN QUESTIONNAIRE (2001), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/quest_archive/ncvs1.pdf. Who actually decides how to code the survey descriptions into specific crime categories is currently unclear, at least to me, but it would seem that this function would be performed by personnel in the Bureau of Justice Statistics after the questionnaires are submitted by the Census Bureau. This specific issue is not dealt with in the NRC report, *supra* note 81. As a result of this problem and others, the statistics are better for identifying trends over time than for establishing the actual incidence of crime. However, for the reasons given in the text following *infra* note 85, it is not necessary to attempt to solve all the riddles of the NCVS survey data.

had been assaulted with a piece of a coffee pot while inside the premises.

After summoning medical assistance for the man, the officers conducted a follow-up inquiry inside the bar and found that the victim was indeed struck with a coffee strainer when he became unruly and refused to leave.

As a result, a 52-year-old Martinsville man was arrested at the scene for aggravated assault.⁸³

There are a number of points to be made here. First, the assault involved, while likely to represent a fairly common type, was not exactly the kind of crime most of Allen and Laudan's rhetoric brings to mind. Second, the victim was not without some responsibility for the amount of risk for the crime that he took on himself, both in patronizing such a bar and in becoming unruly and refusing to leave.⁸⁴ Again, the substructuring of risk makes drawing conclusions from various general forms of data on rates a slippery operation. Finally, note that this incident will be reported as an aggravated assault in the police statistics and perhaps in any "victim survey" interview, but it will almost certainly be disposed of by a plea downgrading it to simple assault. Would Allen and Laudan count this as a "wrongful acquittal" for aggravated assault, "a serious charge for a brutal act"?⁸⁵ This is unclear, but it illustrates the difficulty involved in making these distinctions that often accompanies real cases on the ground.

I could go on at length about how the numbers given by Allen and Laudan are almost certainly artificially high and seem to have been selected to make their readership (who are unlikely themselves to be subject to threats anything like the ones that Allen and Laudan report) feel more threatened so that those readers will be more open to their message. But it really does not make much difference whether the ratio of the risk of being a crime victim to the risk of wrongful conviction for such a crime (however defined and for whatever reference group you choose) is 300:1, 100:1, or 500:1. This is because *some* such substantially higher risk must always attach to the risk of being a victim over the risk of being a convicted innocent simply as an inevitability of any likely set of social arrangements in the

⁸³ *From the Desk of Chief John Dowie*, THE OBSERVER (Kearny, N.J.), Feb. 18, 2009, at 3.

⁸⁴ It is highly unfashionable to "blame the victim," but it strikes me as right to recognize that some victims bear some responsibility for their own victimhood, and this is to me a minor case in point.

⁸⁵ This is what Allen and Laudan claim is at stake in regard to the kinds of crime, including aggravated assault, which they invoke and focus on.

real world. Any other result is virtually unimaginable. Far from being a strength of the Allen/Laudan approach, it is its major and fundamental weakness.

Let us expand upon this. Assuming that human society will always have some level of violent crime, for any crime that you choose and for any subcategory of the population that you choose, the risk of being a crime victim must always be higher than the risk of being falsely accused whenever victimhood is more randomly distributed within the group under consideration than is conviction for such a crime. And that is true everywhere. Consider society as a whole in regard to armed robbery. Assume that armed robberies are randomly committed (as to victim), that every armed robbery is reported and investigated, and that an arrest is made and a charge lodged in regard to each one.⁸⁶ Unless the police arrest, the prosecution charges, and the system convicts people with virtually no evidence that raises the probability of their guilt above random selection from the population (an almost unimaginable system), then to the extent that arrests and prosecutions are undertaken based on evidence, even very weak evidence, the risk of victimhood will *always* be higher than the risk of being falsely convicted.⁸⁷ And for any other subset you choose as a reference set, no matter how high the crime rate and the false conviction rate (think an urban high crime neighborhood), as long as there are more crimes than convictions and as long as victimhood is more randomly distributed than arrest, the Allen and Laudan conditions must obtain to some extent, and usually to a very large degree.

⁸⁶ Neither condition is true in the real world, and certainly the latter condition is far from true. But these realities would widen the gap between risk of being a victim and risk of being a convicted innocent.

⁸⁷ The only circumstance in which this would not be true would be if there were a subgroup within the reference group for whom the risk of being selected for conviction were higher than the risk of being a victim. Suppose there is a startup society of 1000 persons in which there are ten armed robberies in its first year. These robbers are all accurately identified and convicted. The sentence for each robbery is one year, so after the first year there are ten convicted robbers who spend year two in jail. But in the third year, there are ten robberies whose perpetrators left no clues, so they are resolved by charging the ten released robbers from the first year and convicting them, on the (let us assume) accurate assumption that the recidivism rate in the first year out of prison is 50 percent. Here for the subgroup of released robbers in year three, the likelihood of being a victim is one in one hundred, but the likelihood of being an innocent convicted is one in two. Such "round up the usual suspects" subgroups are the only ones for which the Allen and Laudan conditions might not hold in the real world (registered sex offenders might be such a real group). Most people give no thought to the wrongful-conviction risks of such groups of the previously convicted.

So the Allen/Laudan thesis describes a condition that is universally true and will always be true in the world we inhabit. Think of what this means for the prescriptions they derive from this relationship. They say that “the standard of proof and other trial rules should be set at that point where the total costs of being victimized or falsely convicted is minimized. Roughly speaking, assuming no dependencies between the two, if the two errors are equally costly, the risks should be equated.”⁸⁸ But no such changes to the trial rules can ever eliminate the imbalance, so virtually any change whatsoever that increases the number of true convictions is justified by Allen and Laudan’s logic, no matter the collateral damage in false convictions, until the unattainable goal of equalizing the risks is achieved, which will be never. The relationship that they have adopted has the effect of creating, à la Orwell’s *1984*, a state of perpetual and unwinnable war on false acquittals, which will logically justify any proposed “reform” that raises the likelihood of convicting more of the guilty.

And make no mistake, the reference to the standard of proof in the passage quoted above was no slip of the pen. The changes in the current system that Allen and Laudan discuss explicitly in *Deadly Dilemmas* as being consistent with their approach are not particularly threatening to the factually innocent (although they may be looked upon as radical by those with other notions of the proper uses of procedure in the criminal justice system). But an attack on the beyond-a-reasonable-doubt standard of proof definitely poses a threat to the innocent who have been charged with crimes they did not commit. And while such an attack is not fleshed out in *Deadly Dilemmas*, it is a centerpiece of another essay by Professor Laudan.⁸⁹ And by the logic of their position, there would seem to be no limit to the drop in the standard of proof that could be justified, all the way to preponderance and even beyond, at least for the “violent crimes” they claim to limit themselves to.

This brings us to another problem. If only these violent crimes are subject to the logic of the Allen/Laudan thesis, that would seem to imply that other kinds of crimes would be tried under different trial rules. How this would work is not addressed. But this result would be a good thing in one way since the crimes Allen and Laudan limit themselves to (or their archetypal versions of them) are the only crimes upon which one could achieve anything like consensus about the proposition that the optimum enforcement would be perfect en-

⁸⁸ Allen & Laudan, *supra* note 8, at 79.

⁸⁹ See generally Laudan, *supra* note 34, at 50–62.

forcement. Very few would opt for less than perfect enforcement as to murder. But much of our criminal justice system is devoted to crimes, from drug crimes through tax crimes on down to traffic crimes, where perfect enforcement is much less clearly a shared ideal to be striven for. Many of the fundamental investments of our system have derived from suspicion of the abuses that the state can undertake through the definition of crime and its perfect enforcement, especially in regard to political crimes like sedition and such. One irony here is that the traditional account justifies high standards of proof to protect the innocent from being convicted of serious crimes, with lesser crimes being treated by the standards of the serious crimes more or less as a matter of convenience, even though less is at stake for the convicted innocent in such cases.⁹⁰ The Allen/Laudan thesis reverses this, justifying low standards for serious crimes based on the assertedly higher need to convict the guilty when a serious crime is at issue. Presumably, under their system, trials for nonviolent crimes could be conducted using the beyond-a-reasonable-doubt standard as before. But I suspect that many would feel uncomfortable providing less protection for the innocent in regard to serious crimes (irrational as Laudan and Allen might find the view), which would likely result in the unintended and perverse consequence of pulling all standards of proof down to the low level applicable to serious crimes, however one might define that, were the Allen and Laudan view ever operationalized.⁹¹

And speaking of views that Allen and Laudan find irrational, or at least unacceptable, they spend a lot of time attempting to crush the

⁹⁰ This was the basis of the objection to the extension of proof beyond a reasonable doubt to any but capital cases given by the nineteenth century criminal law theorist (and Massachusetts judge) John Wilder May. See *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642, 660–62 (1875).

⁹¹ We have already seen a stark example of this with the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (AEDPA). The various provisions of the act that cut off post-conviction grounds for relief that might otherwise have been available through federal habeas corpus were motivated by the desire to prevent persons under sentence of death (who concededly have every incentive to do so) from making claims serially to delay their executions for years. However, since wrongfully convicted persons who are not under sentence of death have no incentive at all to delay presenting meritorious claims, oversights in their cases failing to raise meritorious claims should be easily forgiven, since it is dominantly only themselves who suffer significantly by extended incarceration for the derelictions of their attorneys. However, it apparently would have appeared to be too obviously vicious (and bloodthirsty) to make the terms of AEDPA apply only to death penalty cases, so virtually all of its provisions apply across the board, in spite of the lack of any good reason to do so beyond public relations.

idea that the state should be seen as having special responsibilities to insure that the innocents that it sweeps up in carrying out its crime-control functions are not convicted. Here, I think they are wrong to reject this proposition, but whether or not they persuade you is dependent in large part on whether you embrace a social contract approach to state obligation in general and whether you are persuaded that the content they derive for that contract is exactly right. For instance, if you think that the state is more responsible for a wrongful conviction than for a crime that might result from a criminal's free-will-based choice, influenced by a wrongful acquittal, to commit a crime (Laplace's emboldened wretches), then you will reject their analysis or at least its most extreme implications. That does not mean that you would not be cognizant that wrongful acquittals are indeed undesirable and involve costs that must be taken into account in some calculus that tries to resolve the dilemma that Allen and Laudan have identified. But it does mean that there would be space for special treatment of the problem of convicting the innocent.

Is such a position tenable? Viewing the state as having more responsibility for harm done directly to the immediate subjects of its acts than for harm done indirectly by its failures to act, or by its choices to act one way rather than another, has a long tradition, especially in situations where the latter harm is done by the subsequent choice of an independent human agent.⁹² From this view, the dominant frame of reference for evaluating the justice of the performance of the criminal justice system (as opposed to its efficiency) is limited to how it deals with those drawn into it. Generally, this means those who are arrested and charged. In evaluating the relative evil of false convictions and false acquittals from this perspective, it makes moral sense, to me at least, to say that the former represent larger injustices than the latter, and I personally (for what that is worth) would only consent to support and live under a system that generally took on and lived up to that view. Luckily for me, this view is the official ideology of our criminal justice system, although in practice perhaps honored

⁹² In fact, Allen and Laudan spend quite a bit of time attempting to discredit such views, as represented by Immanuel Kant and Ronald Dworkin. See Allen & Laudan, *supra* note 8, at 81–83. Their main premise seems to be that Kant can be forgiven because the threat of crime victimhood was perhaps smaller in his day, and because the state had not yet taken the role of general policing on itself, but these things have changed to such a degree that the similar position of Dworkin is untenable in the modern world. I do not personally find this line of attack persuasive, especially the part asserting that the decision to establish efficient policing vests the state with special new obligations to the victims of crime that justify, and in fact demand, less relative concern for the direct victims of state action through factually inaccurate conviction.

in the breach more than I would like. This was what Blackstone was getting at, even if his ratio doesn't mathematize the principle very well when generalized in certain ways identified by Allen and Laudan.

There is at least some possibility that I have been too hard on Allen and Laudan or at least have exaggerated the lengths to which they would push their thesis. It is not that I think that either my analysis of the logic of their position or of their rhetoric is unfair, but that at the end of *Deadly Dilemmas* they do manifest a certain reticence about their conclusions, saying finally that their dominant objective is only "to try to nudge the discourse in the correct direction."⁹³ Perhaps, like Winston Churchill, they feel that they have seen the boat off course and feel that they have had to lean out far to the other side to bring the boat closer to the proper direction of sail.⁹⁴

Unfortunately, such a method of course correction can sometimes upset the boat entirely. It does seem unlikely that their attack on the beyond-a-reasonable-doubt standard of proof in criminal cases will be adopted anytime soon. The same may be true for their other proposals, although I am either in favor of some of them and more or less undecided or indifferent as to others. But the bad effect to be practically feared from *Deadly Dilemmas* is that Allen and Laudan's general position—"quit worrying about the convicted innocent, direct your efforts to reducing the number of acquitted guilty"—will be invoked and cited to defeat proposed reforms that help significant numbers of convicted innocents without seriously impacting the rate of true convictions. If this is the consequence of *Deadly Dilemmas*, it will be a tragic one.

⁹³ Professor Laudan, in another and more recent article, proposes a four-category verdict system with "Scots verdicts" being allowed for both convictions and acquittals, each of which would have different effects on such things as the possibility of new trials, etc. See Larry Laudan, *Need Verdicts Come in Pairs?*, 14 INT'L J. EVIDENCE & PROOF 1, 18–24 (2010). This very interesting proposal retains proof beyond a reasonable doubt as a requirement for full conviction. The consideration of this proposal is well beyond the scope of this Essay.

⁹⁴ I have searched and searched for this quotation from Churchill, referring to criticisms for apparent changes of policy, but I have not found it. Any reader who can supply it would earn my great gratitude.