NOT GUILTY

Are the Acquitted Innocent?

DANIEL GIVELBER
AND
AMY FARRELL

As scores of death row inmates are exonerated by DNA evidence and innocence commissions are set up across the country, conviction of the innocent has become a well-recognized

Not Guilty

Are the Acquitted Innocent?

Daniel Givelber and Amy Farrell

NEW YORK UNIVERSITY PRESS
New York and London

NEW YORK UNIVERSITY PRESS
New York and London
www.nyupress.org

References to Internet websites (URLs) were accurate at the time of writing. Neither the author nor New York University Press is responsible for URLs that may have expired or changed since the manuscript was prepared.

Library of Congress Cataloging-in-Publication Data
Givelber, Daniel.
Not guilty : are the acquitted innocent? / Daniel Givelber and Amy Farrell.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-8147-3217-5 (cl : alk. paper) — ISBN 978-0-8147-2534-4 (ebook)
ISBN 978-0-8147-4440-6 (ebook)
1. Judicial error—United States. 2. Criminal procedure—United States.
3. Criminal justice, Administration of—United States. 4. Jury—United States. 5. Judges—United States. I. Farrell, Amy. II. Title.
KF9756.G59 2012
345.73'0122—dc23 2011052263

New York University Press books are printed on acid-free paper, and their binding materials are chosen for strength and durability. We strive to use environmentally responsible suppliers and materials to the greatest extent possible in publishing our books.

Manufactured in the United States of America

10 9 8 7 6 5 4 3 2 1

Not Guilty

Tables

Preface

This book examines the question of whether those found "not guilty" are actually innocent of the crime charged. We return to a question supposedly resolved definitively a half-century ago when Harry Kalven and Hans Zeisel reported in their classic 1966 monograph *The American Jury* that judges believed that most jury acquittals were (a) inaccurate and (b) attributable to the jury's embrace of values. Our criminal justice system was doing its job. Jurors were convicting the guilty except when there was a good reason for them to ignore the formal demands of the law and acquit despite the law. In these cases, jurors were believed to be embracing the values of the community and guarding against the blind application of the law in situations where community sentiment dictated otherwise. This process was hardly benign in all of its manifestations—jurors could ignore the evidence and acquit those who murdered civil rights workers as readily as they could exonerate peace activists who crossed a police line to protest at the Pentagon. On the whole, though, the message was a comforting one—an acquitting jury was likely to have tempered the law with mercy and thus served one of its highest and best purposes.

As a rationalization for the criminal justice system, this view covered "all the bases." If the acquitted were actually guilty, we did not need to blame the police for failing to correctly identify the suspect or amass the evidence. The acquittal of the guilty might suggest that the prosecutor did not perform admirably, but the more likely culprit in the eyes of the public was the Supreme Court's overly broad interpretation of the Constitution, which appeared to award criminal defendants unfair advantages both before and at trial. In the view of critics,

liberal judges with no accountability to the electorate were freeing the guilty through an interpretation of the Constitution that shackled the police in their effort to suppress crime. Unless the police and prosecutors were punctilious in their observance of often obscure constitutional demands, evidence could and would be excluded and the obviously guilty would go free. The public and its elected representatives might well wonder whether courts and prosecutors were "too soft" on criminals, but there was no reason to be concerned that they were "too hard" on the innocent.

Long before the DNA revolution in the 1990s revealed that some *convictions* were erroneous, courts, legislatures, and sentencing authorities shared the view that *acquittals* were likely to be *factually inaccurate* even if legally appropriate. The defendant "did it" even if the prosecutor failed to persuade twelve jurors beyond a reasonable doubt. A jury may acquit because prosecution witnesses prove unconvincing or evasive or simply fail to appear. Jurors may be confused by the evidence or misled by the silver-tongued oratory of the defense counsel. Jurors may fall into error and credit the (false) testimony of the defendant and his witnesses. Those who administer and adjudicate know of these possibilities and often attempt to remedy the wrongs of jury acquittals in subsequent legal proceedings. Thus, acquittals represent a one-time failure by the prosecution to persuade a jury of guilt beyond a reasonable doubt rather than a positive indication that the defendant did not commit the crime. Should an acquitted defendant be prosecuted in a later unrelated case, the defendant can be treated as having committed the earlier crime for a variety of purposes. These range from the setting of bail to the impeachment (discrediting) of the defendant's testimony to the severity of the sentence he receives if convicted. These practices are justified legally by reference to the prosecution's burden of proof, which is to convince the jury of the defendant's guilt beyond a reasonable doubt. If the jury believes such a doubt exists, it should acquit even if it also believes that the defendant is *probably* guilty. Given this legal framework, many observers consider it but a short step to the conclusion that the difference between the convicted and the acquitted is not whether the defendant committed the

crime (he did) but whether or not either the prosecution or the jury did its job poorly. There are no innocents.

Much has happened in the years since Kalven and Zeisel wrote *The American Jury* that suggests that we need to reexamine the view that, the jury's verdict notwithstanding, only the guilty stand trial. The work of the Innocence Project, in particular, has led to a sea change in our collective attitude toward this perception. That work—and the scholarly inquiry it has spawned—has properly commanded the attention of all interested in how our criminal justice system operates.[1] It has led to the creation of Innocence Projects in forty-four states.[2] It has demonstrated that, on occasion, we err when we convict even those whose guilt seems most apparent. What, then, of those whom the jury *acquits*? Have courts and legislatures been correct that they are simply beneficiaries of prosecutorial lapses or defense pyrotechnics? Or are the wrongfully convicted but the tip of the iceberg of those who are charged with crimes that they did not commit?

We suggest that there is much to commend the latter view—juries acquit because of the evidence, not in spite of it. Acquittals are evidence—not sentiment—based. Defendants go free because the state has failed to provide sufficient persuasive evidence of their guilt. What accounts for the state's failure to offer persuasive evidence? While there are many possible explanations, the most likely is that the defendant is not guilty of the crime and the state's effort to convict him or her reflects an attempt to establish a proposition that is simply false.

We do not (because we cannot) claim to have special knowledge as to whether a jury verdict of not guilty is correct or not. By definition, the acquittals we examine are not cases that involve dispositive forensic evidence—particularly DNA evidence. The cases we examine were tried at a time when DNA techniques were widely available, so it seems fair to conclude that these are not cases in which there was an obvious scientific test that might conceivably have persuaded all observers that the defendant either did or did not commit the crime in question. What we can do is empirically compare acquittals with other dispositions to determine whether they differ in ways that are consistent with innocence. If the answer to this question is in the affirmative

—and we will demonstrate that it is—we leave it to others to demonstrate why the simplest explanation for acquittals—innocence—may not be the correct one.

The conclusions drawn here are the product of collaboration between a law professor and a social scientist. Given our different disciplinary backgrounds, we came to the challenge of understanding acquittals from different perspectives. The law professor's perspective is that of someone long skeptical of the claim that criminal trials resulting in convictions reflect the objective truth about the defendant's behavior while those resulting in acquittals do not. In part, this skepticism flows from the experience, now many years in the past, of having been a prosecutor in more than twenty-five criminal jury trials. In part, it is triggered by the courts' "head I win, tails you lose" approach to the outcome of criminal trials. Convictions represent the truth, acquittals the failure of proof.

The judicial embrace of these practices finds support in Kalven and Zeisel's research presented in *The American Jury* and its comforting but empirically questionable finding that when judge and jury disagree about guilt, they do so because the judge evaluates the evidence objectively while the jury is moved by sentiment. It is unusual, if not downright weird, to determine how a group arrived at a decision by valorizing the explanation provided by an observer—even an experienced observer—who disagreed with the decision. If we are going to embrace the policy of treating acquitted individuals as though they were guilty, at the least we ought to try to understand the views of those who rendered the verdict—the jurors themselves. From a social science perspective, questions about the accuracy of acquittals in criminal trials should be addressed through empirical research. Since modern assumptions about the process by which juries arrive at acquittals are informed largely by research conducted over fifty years ago, it is timely to revisit questions of the meaning of acquittals through empirical research with more recent data and more sophisticated empirical techniques. Additionally, new sources of data allow us to address deficiencies in previous research, most notably the need to include the experiences and perceptions of jurors, who are the actual

decision makers in criminal trials. Too long has our understanding of their actions, particularly our understanding of why they reach conclusions about guilt that differ from judges' conclusions, been limited to the assumptions of the judiciary. A ground-breaking study into hung juries[3] by researchers from the National Center for State Courts (NCSC) in 2000–2001 provides a rich source of data from which we attempt to develop a more complete understanding of acquittals in the modern context. Using data information provided by judges and juries for more than three hundred criminal trials conducted in 1999–2000 in four jurisdictions—the Bronx, Maricopa and Los Angeles Counties, as well as the District of Columbia—we seek to understand the meaning of acquittals. While we did not collect this data, we recognized its potential to answer long-neglected questions about the meaning of acquittals and the role of juries in the process of arriving at acquittals in the modern context. We are greatly indebted to the work of the NCSC researchers for developing a rich source of data that allowed us to undertake the research for this book.

Acknowledgments

This book would not have been possible without the support of our colleagues and friends. Many people—more than we can name—contributed to the ideas presented in this book. Colleagues at the School of Criminology and Criminal Justice, School of Law, and Institute on Race and Justice supported our work on this project and encouraged our continued scholarship on issues of justice. We are grateful to the members of the Northeastern University School of Criminology and Criminal Justice writing seminar for their thoughtful feedback on early versions of chapters. Particularly, we thank Nicole Rafter, who leads the workshop. From the initial book proposal to the development of substantive chapters, she provided invaluable guidance on strategies for framing an empirically rich book, as well as read our work as we went along. We are both greatly indebted to Jack McDevitt for his insight into the serious problems of justice that we sought to address through our research and writing. He helped foster this interdisciplinary partnership and continually supported our collaborative law and social science approach. Thank you to the graduate and undergraduate research assistants at the Institute on Race and Justice who helped us find newspaper articles, dug through archival records, and assisted with the formatting of numerous data tables. In addition, at the very real risk of underinclusion, we would like to thank Stan Fisher, Jim McCloskey, Michael Meltsner, Jonathan Oberman, Michael Radelet, and Steve Subrin for their feedback and intellectual contributions to our thinking about the issues addressed in this book.

We are extremely grateful to Paula Hannaford-Agor, Valarie Hans, Nicole Mott, Thomas Munsterman, and the research team at the Center for State Courts, who originally collected much of the data that

we use in this book to examine questions about jury decision making and acquittals. While their data was originally collected for a different purpose—to provide an empirical picture of hung juries—we found it to be well suited to addressing other types of questions about jury decision making, particularly in illuminating the circumstances in criminal cases where judges and juries disagreed about the correct legal outcome. We recognize the immense effort that it took to collect the original data from court records and detailed surveys of judges, attorneys, and jury members participating in criminal trials. By facilitating public access to their data through the Inter-University Consortium for Political and Social Research, the National Center for State Court research team has facilitated new avenues for research beyond the original designs of their project. Our research would not have been possible without access to such a rich and unique source of data about judge and jury perceptions of the facts presented in criminal trials.

We extend a heartfelt thanks to the editorial staff at New York University Press. In particular, we would like to thank our editor, Ilene Kalish, and her assistant, Aiden Amos, for their continued support and encouragement of this project. They provided helpful feedback and suggestions throughout all stages of this project. Additionally, we are grateful to the reviewers, whose thoughtful suggestions and comments greatly improved the book.

Finally, we would like to thank our respective spouses, Fran and Shea, without whose continued support and encouragement this project would remain only a disconnected set of ideas and ambitions. Thank you for allowing us the many late nights and weekend hours we spent conducting analysis and writing. Your willingness to provide both a sounding board for new ideas and the patience to allow us space to think and write made this book possible.

Contents

1

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.[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 *guilty* than that she is innocent.[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 *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 *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.[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.[6] 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.[7] 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.[8] 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