

Looks Good on Paper

In the fall of 1770, John Adams went to trial representing basically all of the British soldiers involved in the Boston Massacre. After the shooting in early March, Adams (who did not live in Boston) was recruited to represent the accused after every attorney in Boston had refused. During the run-up to trial, Adams had become convinced that his clients were innocent, having acted against the mob in self-defense. Can you imagine his position? Can you imagine, in the context of the public sentiment at the time; in the midst of the anonymous handbills being circulated stoking the hatred for his clients, that Adams comes to the conclusion that his clients - *these* clients - are innocent?

After the trials that followed, six of the soldiers and their commanding officer were acquitted outright. Two of the soldiers were convicted of murder, but the charges were reduced. Two were convicted of manslaughter. An amazing result.

During his jury argument he actually argued to the jury that it is far better to let 10 guilty men go free than to send one innocent man to prison. His reasoning was that it is more important for a community to protect innocence than it is to punish the guilty.

Fast forward to the spring of 1999. I am in individual voir dire in a death penalty case and we have in front of us as a potential juror a middle aged, professional woman. Her questionnaire is horrible, but I can't get her to say anything. So just for the hell of it, I ask her if she had ever heard the saying that it is better to let ten guilty men go free than to send one innocent man to the penitentiary. She issued sort of a hissing chuckle. The conversation continued.

"So what do you think of that saying?"

"Well, it looks good on paper."

"Tell me more. What do you think about the concept?"

"OK, I'll answer it this way. I would rather have my only son wrongfully accused, imprisoned, *and executed* than to have *one* guilty man get out of prison and hurt somebody."

I asked this same question again in a mock voir dire within the year and got a very similar response. I then just kind of pitched the concept, believing that in our society, this quaint sentiment had just kind of gone out of style. After all, in our relatively new "victim-centered" culture, "protecting the innocent" is never used in connection with those who are actually *charged* with criminal offenses. I could not imagine ever using this in a closing argument like Adams had done. After all, we need to maintain our credibility with the jury, right?

But something happened last year that has caused me to re-think that position. I watched a local lawyer named Joetta Keene voir dire a jury panel in a non-death capital murder case. She quoted the phrase as "It is better to let *one hundred* guilty men go free than to send one innocent man to prison." She then asked the panel what they thought of that. There were some snorts and guffaws, but the majority of those who spoke were willing to agree with the concept.

At the end of this trial her client, like most of Adams' Boston Massacre clients, was acquitted of all charges. Not guilty. Capital murder.

This 10-to-1 ratio is generally known as "Blackstone's Formulation." See http://en.wikipedia.org/wiki/Blackstone's_formulation. In reality, it is nothing more than another way of saying "presumption of innocence."

I once heard a prosecutor during voir dire refer to the presumption of innocence as a "legal fiction." Over time, I wonder if we don't buy into the notion just a little bit. There have been times when I have. The presumption of innocence is not just a legal technicality that has no application in today's "real world." Quite to the contrary, it is vitally important to our society and way of life. That point is emphatically made every time we have another DNA exoneration. After this recent trial, I resolved to start - once again - talking about the presumption of innocence like I really believe in it.