

# Our courts treat criminal conviction with extreme caution – so shouldn't we be a little more cautious in creating criminal laws?

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*Modern judicial systems are largely grounded on the principle of the 'presumption of innocence', which is intended to protect individuals from receiving inappropriate punishments. While we are extremely careful to prevent wrongful convictions in courts, however, the laws which are enforced by courts are typically passed by simple majorities in a national legislature. Arguing that it is perhaps no less of an injustice to be convicted on the basis of a flawed law, than it is to be wrongly convicted on the basis of an appropriate one, [Patrick Tomlin](#) writes that it may be time to consider a new approach, such as using supermajorities for criminalisation decisions.*

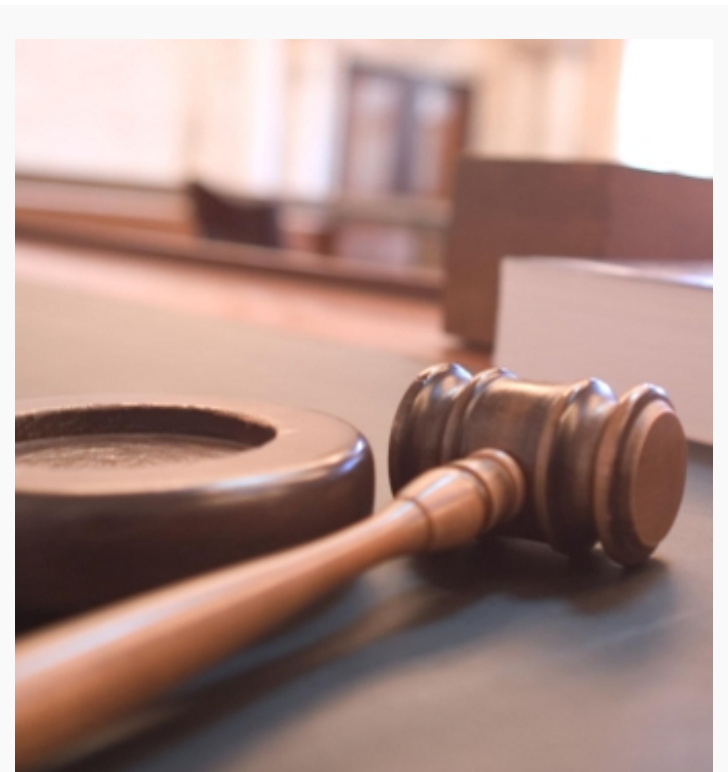


Imagine that your neighbour accuses you of a crime – for example, an assault. You know that before you can be convicted, the prosecution must prove beyond reasonable doubt that you did it. We are to be presumed innocent until proven guilty beyond reasonable doubt. Call this the Presumption of Innocence Principle (PIP). The PIP applies in the courtroom, but if we look at *why* it applies there, what *grounds* the PIP, then I think there may be important lessons for other political institutions, and in particular our legislative process.

So what grounds the PIP? A natural answer is that it protects us from inappropriate punishment – punishment we don't deserve, are not liable to, or which we have a right against. In [Blackstone's famous phrase](#), 'It is better that ten guilty persons escape, than that one innocent suffer.' In affirming the PIP we seem to affirm the idea that it is incredibly important that we only punish those who actually 'did it', and in turn affirm the idea that it's incredibly important that we only punish those whom it is appropriate to punish. We know that we cannot deliver punishment with perfect precision – we know that some innocent people will be punished no matter how careful we are – but we must be as careful as we can be. I'm going to call this the 'direct moral grounding' of the PIP, because it says that the PIP claims its place in the courtroom simply because of the very serious moral badness or wrongness of inappropriate punishment.

Let's now turn our attention to the legislature. When legislators make criminal laws, we don't expect them to be anywhere near as careful as juries are. So far as I know, there are no institutional or informal political

norms which say how confident an individual legislator need be in the proposed criminalisation of some conduct before they vote to pass it. And, as a collective, they pass criminal laws on a bare majority. Imagine that legislators are voting on a proposed criminal law. 51 per cent of them have a 51 per cent credence in the proposition 'Conduct X ought to be criminalised', whilst 49 per cent have 0 per cent credence in the proposition. Confidence in this bill is low – the average credence of these legislators is just 26 per cent – and yet, if the individual legislators each vote on



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a balance-of-probabilities basis, this law would pass on a majority vote. And that's when legislators are voting on one measure, and voting purely on whether they think the conduct ought to be criminalised. When we add in the fact that legislators vote on multiple measures at once, and that party loyalty and instructions, and their career prospects, influence their decision-making, the average credence could be lower still. The point is, compared with the very high bar set for conviction, it is pretty easy to pass a criminal law.

I think this comparison between our criminalisation and conviction processes is troubling, because the PIP, and its direct moral grounding, seem to tell us to be very careful not to distribute inappropriate punishment. Yet being convicted for something you didn't do is not the only way to receive some inappropriate punishment – you can also be convicted of something you *did* do, but that isn't properly punishable, something that the legislature should never have criminalised. Consider people who are convicted of adultery. Adultery is not the sort of thing that the state should criminalise and punish. These people are inappropriately punished, just as those who are wrongfully convicted are. Both these ways of being inappropriately punished seem morally equivalent – either way, you're getting punishment you shouldn't receive. So, shouldn't we be a bit more careful about criminalising conduct than we presently are?

The above concern relies on an analogy between wrongful criminalisation and wrongful conviction, as both lead to inappropriate punishment. But those who are convicted of inappropriately criminalised conduct they actually carried out are in a different situation from those who are convicted for crimes they did not commit. The most important difference is that with criminalisation, the legislature has announced in advance that conduct X would be punished. But does this mean the analogy breaks down? The analogy would fail if the legislature has (morally-speaking) a completely free hand over what it criminalises, if there are no (procedure-independent) truths about what should or should not be criminalised, such that there is nothing for the legislature to get 'wrong'. But that would make eating bread, having sex, talking, and riding one's bike all appropriate for criminalisation without any justification. Shouldn't we object to these things being made criminal, even if the legislature wants to make them criminal?

A more nuanced worry about the analogy is one that concedes that there are incorrect criminalisation decisions, but argues that even when the legislature gets it wrong, their having criminalised something *makes* it justly punishable. Eating bread shouldn't be criminalised, but once it has been made criminal by the correct procedure, the bread-eater is not wronged (as the wrongly convicted are) when she is punished. But this begs the question. The exact issue is what the correct procedure for criminalisation is – are we happy with a procedure that takes such a cavalier attitude towards mistakes in criminalisation?

A slightly different worry about the analogy is that the person who is wrongly convicted has no way to avoid being convicted, but the person who is convicted of an unjust crime was given fair warning, and so had the chance to avoid the punishment. It is difficult to know how important this difference is. Essentially the argument is that because the person was threatened, we should be less bothered about their being punished. But errors in criminalisation threaten people with things they should not be threatened with. When a highwayman issues his unjust threat – your money or your life! – those who refuse to give up their money may be fools, but they are nevertheless treated unjustly. Is the highwayman's murder less morally troubling than an ordinary murder because he issued fair warning?

Perhaps the analogy between incorrect criminalisation and conviction is not perfect. But at the very least, the cognitive dissonance between our great care to protect the innocent at trial on the one hand, and our extremely lax attitude to criminalisation on the other strikes me as troubling.

Philosophical democratic theory, in my experience, tends to look at all political decisions as if they are of one kind – philosophers argue about how we should make our 'political decisions' and why. But in enforcing our laws we recognise that not all laws are created equal – in particular we recognise that punishment is a particularly worrisome part of the state's toolkit, which we must handle with great care. My question is, why shouldn't this instruction to handle with care not also apply in creating the laws which mandate these punishments? Perhaps, for example, we should use supermajorities for criminalisation decisions, reflecting the awesome impact they have on people's lives.

For a longer discussion of this issue, see the author's recent article in the [Journal of Political Philosophy](#). For a related argument about sentencing, see his 'Can the Presumption of Innocence Protect the Guilty?' in [Criminal Law and Philosophy](#).

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*Note: This article gives the views of the author, and not the position of EUROPP – European Politics and Policy, nor of the London School of Economics.*

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