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Andrzej Uhl [*]

To Convict an Innocent or to Let a Guilty Person Go Free: Preference for False Positive Outcomes of Criminal Trials in a Nationwide Representative Sample for Germany

Although it is broadly agreed within jurisprudence that wrongful convictions should be avoided even at the cost of effective prosecution, such a view has been losing popularity globally with the general public, who increasingly prioritise the punishment of the guilty over the non-punishment of the innocent. This study attempts to extend the limited research into public opinion on the trade-off between wrongful convictions and erroneous acquittals. A representative sample of German ISSP (German edition of International Social Survey Program) respondents is employed to test a set of hypotheses regarding preference for either error of justice. The aversion to punishment of an innocent person was particularly strong among west German respondents and respondents with high educational attainment, while no distinct preference was established for social groups marked by a high fear of crime or at risk of wrongful conviction. At odds with codified rules on evidence and procedural safeguards, legalists, who advocate unconditional adherence to the law, would often rather see the innocent condemned than the guilty acquitted. These findings are subsequently compared with studies conducted in other jurisdictions and discussed in consideration of the social and cultural norms of contemporary German society. The results can fill a research gap by explaining aspects that shape the readiness to sacrifice the freedom of a potentially criminal other to protect the remainder of society against perceived threats.

Keywords: Blackstone ratio, Germany, public opinion, punitiveness, wrongful convictions

Einen Unschuldigen verurteilen oder einen Schuldigen auf freien Fuß setzen: Präferenz für falsch positive Ergebnisse von Strafverfahren in einer bundesweit repräsentativen Stichprobe für Deutschland

Obwohl in der Rechtsprechung weitgehend Einigkeit darüber herrscht, dass ungerechtfertigte Verurteilungen auch auf Kosten einer wirksamen Strafverfolgung vermieden werden sollten, verliert diese Ansicht weltweit an Popularität in der Öffentlichkeit, die der Bestrafung der Schuldigen zunehmend Vorrang vor der Nichtbestrafung der Unschuldigen einräumt. Die Studie versucht, die spärliche Forschungsliteratur zur öffentlichen Meinung über die Abwägung zwischen ungerechtfertigter Verurteilung und fälschlichem Freispruch zu erweitern. Anhand einer repräsentativen Stichprobe von deutschen ISSP-Befragten werden eine Reihe von Hypothesen zur Präferenz für einen der beiden Justizirrtümer getestet. Die Abneigung gegen die Bestrafung von Unschuldigen war bei westdeutschen Befragten sowie Befragten mit hohem Bildungsniveau besonders stark ausgeprägt, während für die sozialen Gruppen,

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die sich durch eine hohe Kriminalitätsfurcht auszeichnen oder bei denen das Risiko einer Fehlverurteilung besteht, keine eindeutige Präferenz festgestellt werden konnte. Im Widerspruch zu kodifizierten Beweisregeln und Verfahrensgarantien würden diejenigen, die für eine bedingungslose Einhaltung des Rechts eintreten, häufig lieber Unschuldige verurteilen als Schuldige freisprechen. Die Ergebnisse werden anschließend mit Studien aus anderen Ländern verglichen und vor dem Hintergrund sozialer und kultureller Merkmale der deutschen Gesellschaft diskutiert. Die Ergebnisse können eine Forschungslücke schließen, indem sie die Aspekte erklären, die die Bereitschaft prägen, die Freiheit eines potenziell kriminellen Anderen zu opfern, um den Rest der Gesellschaft vor vermeintlichen Bedrohungen zu schützen.

Schlagwörter: Blackstone's ratio; Deutschland; Justizirrtümer; Punitivität; öffentliche Meinung

1. Introduction

A criminal trial, particularly continental criminal trial governed by the rule of 'substantive truth' can be described as a truth-finding process (Müller, 1977; Weigend, 2003) in which an impartial court inquires into the question of empirical reality. Just like any other empirical process of this kind, a criminal trial is inextricably related to the risk of error which can by no means be fully eliminated (Peters, 1972; Rosenbaum, 1990). Insofar as there is an identifiable hypothesis, two types of errors can be distinguished. In some cases, a hypothesis might be confirmed in spite of its incongruency with the empirical reality, in others, the inquirer may reject a factually true hypothesis. The former error is commonly referred to as a false positive or Type 1 error, whereas the latter is known as false negative or a Type 2 error. Depending on the area of social life, either of the said errors may be deemed more consequential. For instance, many broadly distributed medical tests have been designed primarily to detect any case of disease and are therefore characterised by sensitivity (i. e. resiliency against type 2 errors) far higher than specificity (resiliency against type 1 errors). Social scientists, in turn, are taught to prioritise the falsification of inaccurate hypotheses. This primacy is reflected in high standards of statistical significance, which apply, for instance, to the analyses presented hereafter and preclude discussion of findings likely to have occurred by accident (Caulfield & Hill, 2018).

The subject of this paper is the respective choice over the preference for either type of error in the specific process of hypothesis-testing – the criminal trial, in which wrongful convictions represent false positives and erroneous acquittals constitute a false negative result of the applied procedure (Feinberg, 1971; Friedman, 1972). Regarded separately, both the protection of the innocent and the punishment of the guilty are seen as desirable, but when they are pitted against each other in antimony, the result might be unclear (Sommer et al., 1991). Some tradeoff between wrongful conviction and erroneous exoneration is inevitable, as "decision making about guilt is decision making which invariably involves a degree of uncertainty" and "the likelihoods of false positive and false negative verdicts are inversely related" (De Keijser et al., 2014, p. 34).

Historically, although attempts have been made to minimise the risk of both errors, the legal scholarship and judicature insisted on the avoidance of false positives, that is to say regarded erroneous acquittal as a lesser evil compared to wrongful convictions (Reiman & van den Haag, 1990; Volokh, 1997). This belief has been enshrined in a number of case laws, theoretical writings, and legal maxims, the most famous of which remains the so-called Blackstone ratio according to which "it is better that ten guilty persons escape than that one innocent

suffer" (Blackstone, 1893, p. 352). Only recently has research shown that such a clear solution to the wrongful conviction/erroneous acquittal dilemma hardly mirrors the sentiments of the general public, which should not be ignored whilst discussing the judicial practice and the relevant provisions of substantive law (Scurich, 2015).

Though usually regarded as black letter law by jurisprudence, the Blackstone formulation has been losing popularity globally with the general public who increasingly prioritise the punishment of the guilty over the non-punishment of the innocent (Xiong et al., 2017). While some conclude that the standard of proof should therefore be lowered, other observers might consider it a threat to the human rights of those wrongly convicted. The decision on the Blackstone ratio is a matter of criminal justice policy and constitutes a choice between individual liberty and collective security at the level of an individual case handled by a criminal court and, as such, has broader ethical and political implications. In Germany, where the current study is based, lawyers associated with the Nazi regime warned against the "distinctly liberal fear of wrongful convictions" (Müller, 1977, p. 527). While in 2016 most Germans (around 77 %) still stated a preference for false negatives, that number had been on a steady decline throughout the last three decades, both in the country's east and west (Xiong et al., 2017). The gradual abolition of procedural guarantees in the criminal process can be seen, alongside the growing severity of sanctions, as a consequence of penal policies regarded by some as populist (Pratt, 2006). However, unlike the views on the adequacy of penalties meted out for particular offences, the public opinion on the determination of guilt and preferred balance between two aforementioned types of errors in criminal justice has not attracted much scholarly attention so far (De Keijser et al., 2014).

The present paper attempts to address this gap by identifying the demographic, social, and cultural antecedents of the preference for false positive outcomes in criminal trials among a representative sample of Germany-based respondents. Following the brief introduction, it summarizes the academic debate over the wrongful conviction/erroneous acquittal dilemma as well as various 'restrictive rules' established to lower the risk of false positives even at the cost of false negatives. Subsequently, the scarce empirical literature on public attitudes towards the said rules is presented and discussed in detail. The methodology chapter elucidates the source and composition of the sample provided and explains the choice of statistical procedure applied to analyse the responses given by the participants of the original survey, what is followed by presentation of analyses and findings. The final chapter features a discussion of findings, pinpoints the limitations of the study at hand and mentions the possible directions for further research into the subject.

2. The Restrictive Rule

The assertion that it is worse to punish the innocent than to let the guilty go unpunished has been present in various jurisdictions and manifested in countless maxims, many of which indicated the precise number of guilty defendants on one side of the scales of justice set against an innocent individual (Volokh, 1997). Across cultures, centuries, and authors, the aforementioned number ranged from 1 to 5 000. While Blackstone famously proposed a ratio of 1:10, earlier English jurists Fortescue and Hale claimed twenty false negatives are equal in cost to one or five false positives respectively (Scurich, 2015). A few further examples include John Stuart Mill's 10, Benjamin Franklin's 100, and Charles Dickens' "several thousand" (Volokh,

1997). It is noteworthy that the ratio was sometimes subject to reversal and represented the number of innocent to be condemned in order to ensure the punishment of one guilty individual. The founder of the Soviet secret police Felix Dzerzhinsky held that it is "better to execute ten innocent men than to leave one guilty alive". Similar views were explicitly expressed by functionaries of other repressive regimes all around the world (Ekins, 2016).

Furthermore, any such a ratio is linked to the presumption of innocence (or, should the ratio be reversed, the presumption of guilt), which has been deemed – somewhat inaccurately – its logical consequence (Halvorsen, 2004). Since the actual ratio of wrongful convictions and erroneous acquittals does not lend itself to empirical study, the desired proportion can be legally implemented through strict norms concerning the standard of proof. Ideally, a criminal court passing a conviction with at least 90 % certainty of the defendant's guilt would produce results in line with the 10:1 rule. While some studies placed the exact ratio at the center of their attention (Sommer et al., 1991; De Keijser et al., 2014), the numbers can be also considered rhetorically and convey the moral precept rather than a quantifiable instruction for the court or jury (Reiman & van den Haag, 1990; Halvorsen, 2004).

The arguments raised in favour of the 'restrictive rules' (the Blackstone ratio as a rule to restrict the conditions of a criminal conviction) have included citizens' trust in the criminal justice system, erosion of deterrence, violation of the social contract between the state and the individual, monetary costs of punishment and the limited nature of the state's right to punish (Scurich, 2015). In utilitarian terms, the dissatisfaction of the wrongfully punished exceeds by far that of those who might be disappointed with the impunity of a perpetrator (Reiman & van den Haag, 1990), and the costs of undeserved punishment to society are greater than the costs of reduced deterrence following an erroneous acquittal (Posner, 2007). The evidence-based discussion within the field of law and economics remains inconclusive (Xiong et al., 2017); while wrongful convictions are commonly considered more detrimental to general deterrence, some authors hold both types of error equally deleterious (Png, 1986; Rizzolli & Saraceno, 2013).

Decisive arguments in support of the restrictive rule reach beyond the straightforward cost-benefit calculations performed by utilitarians. While the state has a direct duty towards the innocent defendant (i. e. a duty to acquit them in the absence of guilt), the obligation to punish the guilty lacks this kind of firmness (Reiman & van den Haag, 1990). Namely, it is harder to determine to whom the punishment of the guilty is owed unless one buys into the alleged right of the criminal to be punished. Some lawyers believe acquittals of the factually guilty criminals are a 'necessary price to be paid, however grudgingly, for a fair trial' (Zalman, 2006, p. 485). According to Halvorsen (2004), punishing a person for a crime they did not commit is as contemptible as committing that crime against them whereas the failure to punish the guilty is not comparable with a crime perpetrated against an innocent. Admittedly, an erroneous acquittal might eventually result in considerable harm as releasing factually guilty criminals renders them free to re-offend and further victimize the citizenry (Allen & Laudan, 2008). The state that fails to imprison a violent offender is, however, merely indirectly responsible (by negligence) for the harm caused by them while in the act of wrongful conviction it is the state itself that inflicts unjust suffering upon the innocent individual (Halvorsen, 2004). From the deontological standpoint, he argues, there is a clear distinction between doing wrong and merely allowing it to happen. Despite the identical result of both a harmful action and failure to prevent harm, the law appears to honour such a distinction – a passer-by who refrains from rescuing a drowning person would not be punished as harshly as an assailant who threw that

person into the water in the first place. The difference does not reside in the objective effect of an action, but in the strength of an obligation – "our failure to the obligation [to protect innocent citizens from crime] is not as bad as our failure to exercise the obligation not to harm innocent persons in more direct ways" (ibidem, p. 11). In accord with that position, regardless of whatever harm might result from the errors of impunity, the state should rather accept it than inflict pain itself by punishing a potentially innocent defendant. While we expect that the criminal justice system should not be a source of unjust harm, hardly anyone holds such expectations of violent offenders (Reiman & van den Haag, 1990). Betraying the trust that an innocent should be able to place in the judiciary seems to entail particular injustice, which is unquantifiable in the terms of plain disutility.

3. State of the Art

The extant criminological literature concerning public attitudes towards the Blackstone ratio consists of eight studies in total. Two of these have grappled with the exact value of the ratio's denominator (Sommer et al., 1991; De Keijser et al., 2014), thus asking an 'open question' about the number of potential offenders acquitted for the sake of saving the innocent individual from a wrongful conviction. A further four posed a 'closed question' as to whether the non-punishment of the innocent should be given precedence over the punishment of the guilty (Ekins, 2016; Xiong et al., 2017; Zhuo, 2021; Williamson et al. 2021), or, in other words, whether the denominator of the ratio should be larger than its numerator whatsoever. The remaining two studies combined both approaches (Ricciardelli et al., 2009; Scurich, 2015). While the present paper is one of the 'closed question' type, the accurate representation of the research landscape upon which it draws necessitates a brief summary of both types of studies.

The comparative survey of Estonian and American students by Sommer et al. (1991) was the first attempt to investigate attitudes towards the restrictive rule. The study aimed at determining the 'empirical' Blackstone ratios, that is a maximum number of guilty offenders whom the study participants were ready to acquit so that an innocent individual remains unpunished. Crucially, the proposed ratios were associated with different crimes and varied positively with the seriousness of the offence, while the ranking of seriousness was also different in both countries. Both Americans and Estonians were ready to acquit fewer guilty defendants to save one innocent person in murder cases relative to less serious crimes such as embezzlement or traffic violations.

In the Netherlands, a pen and paper experiment was launched to study the 'empirical' Blackstone ratio in a nationally representative sample (De Keijser et al., 2014). The scenarios distributed among the Dutch respondents varied in the type of the offence (low to high seriousness) and the provision of information as to the consequences of errors (both, either wrongful conviction or erroneous acquittal, or no information). In spite of the uniform standard of proof applied to all cases by the judiciary (De Keijser et al., 2007), the study also showed that the ratio proposed by the lay respondents was considerably lower if a fictitious defendant was accused of more serious offences (De Keijser et al., 2014).

Xiong and colleagues (2017) have heavily criticised both studies on the empirical Blackstone ratio for the unwarranted assumption that respondents generally find wrongful convictions worse and their opinions only vary in quantitative terms (i. e. the exact number of acquitted offenders). This criticism is only partially valid as the results presented by Xiong and colleagues

themselves prove the preference for erroneous acquittals to be the prevailing attitude in most countries. It is, however, important to consider the responses to the 'closed question' prior to any analysis of how the 'open question' is answered.

In 2016, as many as 40 % of Americans surveyed by the Cato Institute stated they would rather have 20 000 innocent in prison than the same number of guilty offenders at large (Ekins, 2016). The proportion proved higher among Republican voters, 45 % of whom subscribed to that controversial view. Those who supported Donald Trump in the 2016 Republican primaries predominantly (52 %) stated a preference for 20,000 wrongfully imprisoned. All in all, these results confirm the politically non-neutral character of the restrictive rule and allow for hypotheses on a potential link between a rejection of the Blackstone ratio and political conservatism or authoritarianism. Further authors (Zalman et al., 2012, p. 62) have presented results that suggest that "in the policy arena, the concern with wrongful convictions has a liberal ideological valence". Differences were furthermore established between demographic groups defined by ethnicity and race, education, and income.

The most comprehensive study within the literature to date utilises global data gathered for the International Social Survey in order to trace the trends in the acceptance of the restrictive rule. While in a vast majority of jurisdictions there is still a strong preference for false-negative outcomes of criminal process (i. e. for erroneous acquittal over wrongful conviction), the aforementioned international study by Xiong and colleagues (2017) has revealed that the opposite view has been gradually gaining traction worldwide. In spite of the emergence of the global innocence movement (Zalman, 2006), the proportion of those believing that it is worse to convict an innocent than to acquit a guilty person fell by 8.7 percentage points on average in the surveyed countries between 1985 and 2006. The sharpest drop was recorded in the United Kingdom (-14.5) and the Western part of Germany (-14.1).

In an original attempt to separate abstract judgment from case-based preferences, the survey on the Blackstone ratio conducted by Scurich (2015) was complemented by framing the question in personal terms; the participants were asked whether they would rather suffer the consequences of wrongful conviction or be victimized by an erroneously acquitted offender. A considerable subgroup (26 %) of study subjects changed their preference once the scenario featured their own hypothetical experiences. The initially very strong aversion to false positives fell from 85 % to 75 %. The surveyed women in particular were more likely to prefer false positives to false negatives within the personal framing. However, the choice between a day in prison and physical assault, which was presented to the respondents, appears arbitrarily set, not least because many criminals who got away with their crimes might never re-offend. Notwithstanding such threats to the validity of the study itself, the author identifies a significant issue that ought not to be ignored when discussing citizens' proposals of the trade-off between wrongful convictions and erroneous acquittals and person's social situation might render them particularly sensitive for either error. Such sensitivity might influence their policy preference more than abstract moral views presented by proponents of the restrictive rules.

Further studies established a relationship between the citizen's preference for the false positives and the fundamentalist religiousness or white biblicist Christianity on the individual level (Young, 2000; Perry & Whitehead, 2021). It was also observed that countries characterized by lower concern about wrongful conviction were more likely to broadly apply the practice of plea bargaining known to produce miscarriages of justice (Givati, 2011). Ricciardelli and colleagues (2009) found Canadian criminal justice students (particularly in interaction with the year of study) more supportive of the Blackstone ratio than their peers studying other majors. In a rare

attempt to explain the preference for false positives in the Chinese context, Zhuo (2021) found subjects from the neighborhoods marked with high social cohesion, men, and conservative respondents more likely to disapprove of the restrictive rule. Following Zhuo (2021), Williamson and colleagues (2021) discovered correlation between the concern over due process and aversion towards wrongful convictions in Australia.

To date, few explanations for the decreasing support for the restrictive rule can be found in the prior scholarship. Unlike the research on public perception of sentencing, the literature concerning the citizens' views on the determination of guilt is limited and lacks inquiry into the roots of the discrepancies between the established legal rules and the demands of the general public (but see Zhuo, 2021 and Williamson et al., 2021). Such inquiry is warranted for at least two competing reasons. On the one hand, the restrictive rule is anchored in rational penal law and safeguards the human rights of those falsely indicted (Zalman, 2006). Thus, it is necessary to understand why the sentiments of the general public might shift against it and consequently jeopardise the current legislation on the standard of proof. On the other hand, the courts' responsiveness to public sentiment and the extent to which its sentencing practices reflect public attitudes can be prioritised as factors commonly associated with the legitimacy of criminal justice (De Keijser et al., 2014; Roberts, 2011; Robinson, 2007; Robinson & Darley, 1997). Therefore, the reasons behind the rejection of the restrictive rule can be indirectly related to the prestige of law and trust in the judiciary institutions.

4. Current Study and its Hypotheses

To address the identified gap, this study set out to explore this phenomenon on a national level, which allows for a detailed approach and statistical analysis. Taking Germany as the unit of study, it examined the demographic, cultural, and social antecedents of the preference for 'false positives' stated in a representative national sample of the International Social Survey Program. In the 'Role of Government' edition of the program, the respondents were asked to decide which miscarriage of justice is worse: 'To convict an innocent or to let a guilty person go free'. As the 2016 German questionnaire was incorporated into a larger population survey ALLBUS, the available data allowed a secondary analysis using a variety of variables. Going beyond mere statistical analysis, the hypothesis construction was informed by sociological and cultural considerations on contemporary German society. To fully realize the potential of the preexisting data, the variables that could be incorporated into a logistic regression statistical model informed by theoretical assumptions were carefully selected. These variables were further divided into three sets corresponding with different levels of explanations (cultural transmission, stakes in the criminal justice system, and individual beliefs).

Such a design appears fit to overcome the gaps left by its predecessors in that it employs a representative sample of the studied population (cf. Sommer et al., 1991; Scurich, 2015; Ricciardelli 2009), moves from exploration to theory-driven explanations (cf. Xiong et al., 2017), and avoids the underlying assumptions made in the studies applying the 'open question' (cf. Sommer et al., 1991; De Kejiser et al., 2014). It also uses statistical inference alongside a plain description of findings (cf. Ekins, 2016). To our knowledge, the study at hand is the first attempt to investigate the views on the subject held by German society.

In the first step, the institutional factors were included to study the effect of cultural transmission on the choice between false positives and false negatives. The underlying assumption is

that the restrictive rule is a normative social institution whose prevalence depends on its cultural and historical anchoring that might be stronger or weaker depending on the social context (Scott, 1995; Senge, 2006). It is also an expression of certain values that might enjoy varying recognition across different sectors of society. The attitudes towards these values are partly shaped by historical experiences and often outlive the structural conditions that originally produced them. As procedural safeguards were virtually absent from GDR criminal process, the principle might be less culturally embedded in the country's East (Herz, 2008), whose society was furthermore found to be more punitive relative to their Western neighbours (Reuband, 2008). Liberal values, enshrined in the restrictive rule, are also conveyed by the educational system, and there is evidence from the previous research that those with more years of formal education were less willing to trade civil liberties for national security (Darren & Silver, 2004). Therefore, dummy variables 'East German' and 'Abitur'[1] were deployed to account for these macro-cultural factors.

H1: Respondents based in East Germany are more likely than their Western neighbours to consider erroneous acquittals worse than wrongful convictions.
H2: The study participants who successfully passed *abitur* examination state preference for wrongful conviction less often than those who did not.

The second group of variables is set out to study the hypothesis according to which the responses might also differ between various stakeholders and their groups. Depending on their social, ethnic, and economic status, individuals may see themselves as members of a particular group whose interest are not necessarily in line with the interests of other subpopulations. Volokh (1997, p. 211) recalls a story of a law professor who, confronted with the idea that "it is better that ninety-nine guilty men go free than that one innocent man be executed", asked "better for whom?"; both wrongful convictions and erroneous acquittals entail risks (respectively: risk of undeserved punishment and the risk of victimisation by a falsely acquitted offender) that are unequally distributed among the population[2]. An immigrant worker, unable to speak in court or hire a lawyer in case of the prosecution, might primarily fear a wrongful conviction, while social groups marked by high fear of crime are perhaps more concerned with the erroneous acquittal of potentially dangerous offenders.
Some of these concerns have a firm foundation in objective risks – younger murder suspects are particularly prone to false confession (Gross, 2008), which might put them at greater risk of wrongful convictions. Defendants with ethnic minority backgrounds are another high-risk group – innocent Black Americans are seven times more likely than white Americans to be falsely convicted (Gross et al., 2017). Those represented by underpaid public defence might also run a higher risk of wrongful conviction since assigned counsel generally secures less favourable trial outcomes than privately retained attorneys (Cohen, 2011). Conversely, high levels of fear of crime have been reported by women and the elderly who (Holst, 2001; Reuband, 2009), at the same time, are rarely indicted, and thus might prioritise the punishment of the guilty over the non-punishment of the innocent. Since any such distinctions are defined by

[1] German high school examination. The successfully passed *abitur* is a requirement for admission to university courses and a vast majority of its holders continue their education at the tertiary level.
[2] Another illustration of this is found in Allen and Laudan (2008): 'It is one thing to claim that false positives are far less desirable than false negatives; however, it is unclear that one would still hold such a preference if one were personally forced to endure the consequences of a false negative (e.g., being victimized) rather than a false positive (i.e., wrongfully convicted)'.

affiliation to a particular segment of society (situated between the institutions of the society as a whole and personal beliefs) the stakeholder variables are situated between cultural factors and individual attitudes. In order to test the corresponding hypotheses, the model involves three further variables: age, gender, income, foreign citizenship. The observations were split into two gender categories (women and other), whereas income was increased by 1 and log-transformed to avoid skew.

H3: Compared with younger respondents, the older study subject is more concerned about letting the guilty free than by punishing the innocent.
H4: Female participants are more likely to state preference for wrongful convictions relative to the rest of the sample.
H5: The lower the income the higher the chances that a respondent finds wrongful convictions worse than erroneous acquittals.
H6: The lack of German citizenship is associated with an increased tolerance for the erroneous acquittal.

Additionally, personal beliefs such as legalism and revanchism may serve as further independent variables to explain the attitude towards the principle. They can reveal individual motivations behind the preference for false positives, and are located at the lowest level of analysis. An individual may believe that the legal order requires the punishment of the guilty to strengthen the norms even at the price of a possible miscarriage of justice. Conversely, the standards of proof are legal principles themselves and their rejection by self-identified legalists can raise questions as to what is understood as law by those who believe it should always be complied with. Thus, I hypothesise that those who agreed with the sentence 'laws should be obeyed with no exception' are less likely to reject the restrictive rule. A possible explanation for the preference for false positives is the revanchist attitudes which give retribution in its visceral dimension precedence over other objectives of criminal justice. The cultures that favour revenge have been considered more punitive, e. g. more supportive of the death penalty (Bakken, 2008). Such a position is operationalized by the statement 'If someone does harm to me it is important that I make them suffer' with which the respondents could either agree or disagree. Alongside legalism, it is included in the third set of variables. Both are coded as dummy variables.

H7: In comparison with those who acknowledge exceptions from the obedience by the law, legalists are less likely to state preference for false positives.
H8: Relative to the rest of the sample, revanchists are more likely to prioritise the punishment of the guilty over the non-punishment of the innocent.

The dependent variable was dichotomized whereby it assumed positive value for those who stated preference for wrongful conviction and a negative value in all other analysed cases. The latter included both responses in accord with the restrictive rules but also the participants who claimed they did not know which judicial error is worse. Following Perry and Whitehead (2021), such coding was adopted to provide a more conservative test of the research hypotheses and to include a larger number of cases.

5. Findings

The data originates from the 2016 survey of nationally representative sample for Germany obtained by GESIS (2016) through two-stage disproportionate random sampling in Eastern and Western Germany. Descriptive statistics show that a substantial majority of respondents either stated preference for false negatives or claimed they cannot decide which error is worse (65 % and 14 % respectively) and around 21 % rejected the restrictive rule. The proportion of the latter respondents did not change significantly since the last ISSP Role of Government survey but was still much higher than in the editions prior to 2006[3].

Table 1. East-west divide and preference for either error

Origin	Type I worse		Type II worse		Cannot say		Total
	N	% of row	N	% of row	N	% of row	
West Germany	745	67%	211	19%	148	13%	1 104
East Germany	339	59%	138	24%	93	16%	570
Total	1 084	65%	349	21%	241	14%	1674
Chi-Square Test: χ^2= 10.621, df = 2, *p*-value = 0.005							

Table 2. Secondary educational achievement and preference for either error

Secondary Education	Type I worse		Type II worse		Cannot say		Total
	N	% of row	N	% of row	N	% of row	
Abitur	364	73%	69	14%	66	13%	499
Other	720	61%	280	24%	175	15%	1 175
Total	1 084	65%	349	21%	241	14%	1 674
Chi-Square Test: χ^2= 24.849, df = 2, *p*-value < 0.001							

Adopting a top-down approach, the first model included cultural variables only. East Germans were found to be more likely to choose Type II over Type I Error (Table 1). The opposite was established for *abitur* holders – the passed examination highly significantly decreased the odds that a respondent regards wrongful convictions worse than erroneous acquittals (Table 2). The proportion amounted to 14 % in the subsample of abitur holders and 24 % among other respondents. While those two variables had opposed effects on the dependent variable, the effect of *abitur* was not only stronger than that of East Germany but also had higher statistical significance (Table 3).

Table 3. First Model

	B	SE	Exp(*b*)	*p*-value	flag
Constant	-1.27	0.08	0.28	< 0.001	***
East Germany	0.29	0.12	1.34	0.020	*
Abitur	-0.66	0.15	0.52	< 0.001	***

Pseudo-R^2	Observations	Log Likelihood	Akaike Inf. Crit
0.026	1 674	-843.066	1 692.132

[3] For West Germany: 13.2 % in 1985, 18.5 % in 1990, and 14.6 % in 1996. For East Germany: 17.1 % in 1990 and the same percentage in the 1996 survey (Xiong et al., 2017).

The inclusion of the stakeholder variables did not result in major changes to the model (Table 4). The positive effect of the 'East Germany' variable and the negative effect of '*abitur*' variable increased, while the coefficients calculated for various stakeholder groups flew in face of the original hypothesis. Not only was there no significant effect of income, gender, and foreign citizenship on the dependent variable, but also the older participants demonstrated the opposite of what was expected. The number of observations varies across models as the participants with incomplete data were removed from respective analyses.

Table 4. Second Model

	B	SE	Exp(*b*)	*p*-value	flag
Constant	-0.81	0.26	0.45	0.003	**
East Germany	0.33	0.13	1.39	0.009	**
Abitur	-0.75	0.15	0.48	< 0.001	***
Foreigner	0.05	0.30	1.01	0.971	
Woman	0.10	0.12	1.10	0.432	
Age	-0.013	0.004	0.99	< 0.001	***
Log income	0.02	0.12	1.02	0.505	

Pseudo-R^2	Observations	Log Likelihood	Akaike Inf. Crit
0.037	1 666	-835.054	1 684.1

The final model included significant variables from the previous model and the attitudinal variables. The likelihood ratio test proves overall model significant ($\chi^2 = 46.256$). However, the Nagelkerke Pseudo-R^2 value remains below the benchmark of 0.05, thus indicating a weak-to-medium explanatory power of the entire model. Accordingly, while the logistic regression offers some contribution to the explanation of the variation in the dependent variable, it must be acknowledged that it does so only to a limited extent.

Table 5. Final Model

	B	SE	Exp(*b*)	p-value	flag
Constant	-0.81	0.23	0.44	< 0.001	***
East Germany	0.29	0.13	1.33	0.027	*
Abitur	-0.77	0.16	0.46	< 0.001	***
Age	-0.013	0.004	0.987	< 0.001	***
Legalism	0.32	0.13	1.42	0.005	**
Revanchism	0.024	0.04	1.02	0.522	

Pseudo-R2	Observations	Log Likelihood	Akaike Inf. Crit
0.048	1 594	-783.9827	1 580.411

The existing regression coefficients underwent changes in both weight and statistical significance. Crucially, the difference between East and West Germany observed in the cross table above diminished after the control for new variables. Original hypotheses to the contrary, the older participants were less likely to reject the restrictive rule and the coefficient related to revanchist attitudes were utterly negligible. Unlike other attitudinal variables, legalism was found to be related to the preference for false positives. In line with H7, the odds that a legalist

rejects the restrictive rules were 1.42 times higher than the respective odds for other participants. The *Abitur* variable maintained the strongest influence on the dependent variable with a very low *p*-value and the predicted change in odds for an *abitur* holder equaled 0.46.

6. Discussion

In the quest for the social antecedents of the preference for wrongful convictions, this study established a strong link between the legalist attitude and the opinion regarding judicial errors. As in American and Chinese samples (Young, 2000; Zhuo, 2021), those who advocate unconditional adherence to law would rather see the innocent condemned than the guilty acquitted. The legalists might hold that upholding the authority of the law as a collective value prevails over the rights of an individual. They possibly believe that each breach of law requires a reaction of the state and the non-punishment of the guilty offender creates a state of disorder that might only encourage further transgression. Young (2000) theorises that legalism and preference for false positives have a common root in the negative vision of human nature. Such pessimists, he argues, "are likely to feel that an occasional conviction of an innocent is a price that must be paid to get rid of the wrongdoers" (ibidem, p. 204). While it is hardly possible to establish the exact causal relationship between those three factors, the very link between legalism and preference for the wrongful conviction is a very puzzling observation and warrants further consideration. For obscure reasons, the meaning of law for many self-declared legalists is limited to the norms of substantive penal law and includes permissiveness towards possibly illegal state actions. This opaque legalism which demands obedience by the law from citizens but expects the judiciary to violate the human rights of possibly innocent defendants in a breach of constitutional-level rules warrants serious questions regarding the legal consciousness in Germany and other countries where similar findings were made.

In contrast with authors who aimed at dissevering the moral judgement from the respondents' position in society hidden behind the veil of ignorance (Scurich, 2015), the study at hand investigated whether and how the views on the miscarriages of justice depend on the risk of suffering negative consequences flowing from either error. The results spoke to the contrary of the initial 'stakeholder hypothesis'. The social groups marked by the higher fear of crime were not particularly averse to erroneous acquittals relative to the rest of the sample. The older manifested the opposite of what was expected, in that they were in fact relatively more supportive of the restrictive rule. Additional analysis has shown that the betas dramatically drop for participants past their 30 and reach the nadir in the cohorts born in the late 1950s and early 1960s, but only for that cohorts (51 to 60 year old) was the difference significant (at $p < 0.05$). This finding is surprising and might reflect experiential differences between cohorts, which cannot be reasonably studied here. Foreigners, who could potentially fear wrongful convictions more than erroneous acquittals, did not vary significantly in their responses. This is somewhat different than in the US, where the voices to immunize the criminal justice against wrongful conviction have been louder among ethnic minorities (Zalman et al., 2012).

The miscarriages of justice, therefore, seem to be a far less divisive question within German society, or, at least, the division lines run across the ethnic, cultural, and economic divides. Moreover, it occurs to be less politicised– notably, the distribution of the responses was almost perfectly even across the left-wing-right-wing spectrum. These results stand in stark contrast

with the American research that found various measures of political orientation strongly correlated with the views regarding judicial errors (Ekins, 2016; Young, 2000; Perry & Whitehead, 2021). In the current empirical results, the belief that letting the guilty go free is a more serious mistake than convicting the innocent had little "political valence" implied by Zalman and colleagues (2012). Possible explanations of the disparate results might arrive from the comparative writings on penal populism, which stressed that Germany has partly avoided turning the penal law into a substance of its daily politics and the power held by lawyers and other experts over the German criminal justice system has remained largely intact whilst many English-speaking jurisdictions were indulging in full-fledged populist punitiveness (Pratt, 2006; Tonry, 2004). It appears that although some German citizens hold punitive attitudes or even disregard the restrictive rule, they do not necessarily translate such views into their political choices.

While the East-West axis is an easy way to divide Germany in many aspects, including general punitiveness (Reuband, 2008), the difference between Western and Eastern states rested to large extent on the varying levels of legalism. The Eastern Germans were more likely than their Western neighbours to support strict obedience by the law (36% and 30% respectively, statistically significant at $p < 0.05$ in a chi-square test), which accounts for the sharp decrease in the significance of the East variable in the final model. As observed above, the self-declared legalists were likely to apply their strictures rather to ordinary citizens than to the institutions of the state. The popularity of legalist attitudes in East Germany might result from the accumulation of the experiences of authoritarian statehood (Prussian absolutism, Imperial militarism, Nazi totalitarianism, and Marxist orthodoxy of the GDR) over the course of centuries, all of which disregarded the humanitarian values that lie at the heart of the presumption of innocence and thus also of the restrictive rule.

Last but not least, the results suggest that such values are effectively conveyed by the country's educational system, at least on the academic track opened by a passed *Abitur* examination. While in the US respondents with higher educational achievements were found to be less concerned with wrongful convictions (Zalman et al., 2012), the German *Abitur*-holders were far less likely to reject the restrictive rule than those with lower school-leaving qualifications. In institutional terms, this suggests that the procedural safeguards enshrined in the country's law are still supported by its *Bildungsbürgertum* – the educated middle class. Given the role of professional lawyers and legal scholars in shaping German criminal policy (Tonry, 2004), this finding bodes well for the restrictive rule both in terms of substantive law and judicial practice.

7. Conclusion

The German criminal justice system is by no means perfectly immune against wrongful convictions (Dunkel & Kemme, 2016; Darnstädt, 2013) and the proposals to suspend the presumption of innocence in some cases have been made by prominent public figures within the political mainstream (Frankfurter Allgemeine Zeitung, 2007). Even though the belief that it is worse to punish innocent than to let the guilty free is still prevailing in Germany, the country has been a part of the global trend of diminishing support for the restrictive rule (Xiong et al., 2017). This paper was an attempt to explore the social and cultural roots of the preference for the false-positive outcome of the criminal trial.

All in all, the results suggest that the preference for false positives was not determined by one's personal interest in reducing perceived risks of either wrongful conviction or erroneous acquittal, but rather reflected individuals' views on law and order as well as their exposure to the values promoted by the educational system, in particular at the tertiary level. The study succeeded in identifying some differences between the German population studied and prior samples in terms of the antecedents of rejecting the restrictive rule. It does not, however, deliver a comprehensive explanation of the changing support for the rule, which would require a model based on data collected in more than one edition of the original survey. The causal link between certain factors, such as legalism or low academic achievement, and the preference for false positives requires further explanation through theoretical considerations or a qualitative inquiry (cf. Young, 2000). The gathered data does not allow for calculation of 'empirical' Blackstone ratios nor distinction between various offences, which was found to influence the respondents' choice in other jurisdictions (Sommer et al., 1991; De Keijser et al., 2014). It is thus unknown what type of crime the study participants imagined whilst filling the questionnaire (Perry & Whitehead, 2021).

Notably, the dichotomy drawn between wrongful convictions and erroneous acquittal is not necessarily as tragic as this research strand seems to imply. Whilst judges and jurors may face the dilemma in ambiguous cases, effective procedures can reduce the risk of both errors by the same token. As one of the anonymous reviewers pointed out, in a high-quality criminal justice system the well-trained and honest police, prosecutors, judges and defence lawyers can avert Type 1 and Type 2 errors alike. However necessary in judicial practice, restrictive rules of any sort should never overshadow the endeavors to make police investigations and court procedures more accurate and thus resilient against both types of errors.

Against the background of the shift from civil liberties to collective security in the postmodern risk society, the change in how the procedural safeguards are perceived within different societies can be studied by future research to reveal the state of justice in the age of global (in)security. In terms of political science, the results of future studies can fill a research gap by explaining the aspects shaping the readiness to sacrifice the freedom of a (potentially criminal) other to protect the remainder of the society against perceived threats. In conjunction with existing empirical legal research, future researchers can inform a discussion on the extent to which the institutions of liberal criminal law can endure in times of (in)security. From the viewpoint of sociology of law, such studies could deal with the legal consciousness (understood as not only awareness of a given rule but also attitudes towards it) of the Blackstone ratio or, by implication, the preponderance of evidence as a central legal norm in many criminal codifications. For a criminological audience, it might be interesting to cast the light on the procedural aspect of penal populism, that is the rejection of guarantees that are set to avoid the risk of punishing the innocent, but might pose obstacles to effective prosecution.

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Kontakt | Contact

Andrzej Uhl | University of Cambridge | Institute of Criminology | au274@cam.ac.uk