

**NOTE**

BENEFITS OF ERROR IN CRIMINAL JUSTICE

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## INTRODUCTION

ENROLL in law school and you will be taught, within the first year, a revered maxim of criminal law: “[B]etter that ten guilty persons escape, than that one innocent suffer.”<sup>1</sup> This particular articulation belongs to English jurist William Blackstone, but the general notion that the criminal justice system should prefer false acquittals to false convictions predates Blackstone. Nevertheless, the maxim is generally referred to as the Blackstone principle. The ratio itself is unimportant. No one contends that we ought to ensure exactly ten guilty defendants are acquitted for every innocent defendant that is convicted.<sup>2</sup> Rather, the slogan is recited to convey a more general principle: When imposing criminal punishment, we ought to tip the scales to favor false negatives (acquittals of the guilty) for the sake of minimizing false positives (convictions of the innocent), despite a likely decrease in overall accuracy.<sup>3</sup>

The Blackstone principle’s most familiar doctrinal formulation is the beyond-a-reasonable-doubt standard, which prosecutors must meet to secure a conviction. Indeed, the Supreme Court justified the beyond-a-reasonable-doubt standard as a constitutional requirement on the basis of the Blackstone principle.<sup>4</sup> Other defendant-friendly rules of criminal procedure also find their footing on the Blackstone principle,<sup>5</sup> but the beyond-a-reasonable-doubt standard is most obvious and most important for present purposes.

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<sup>1</sup> 4 William Blackstone, Commentaries \*358.

<sup>2</sup> See D. Michael Risinger, *Tragic Consequences of Deadly Dilemmas*, 40 Seton Hall L. Rev. 991, 999 (2010).

<sup>3</sup> See Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 Harv. L. Rev. 1065, 1068 (2015); J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 Vand. L. Rev. 1099, 1109 (2014).

<sup>4</sup> See *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>5</sup> In all federal and most state courts, for example, only a unanimous jury can support a conviction. See Fed. R. Crim. P. 31(a); see also *Johnson v. Louisiana*, 406 U.S. 356, 369 (1972) (“In an unbroken line of cases reaching back into the late 1800’s, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of federal jury trial.” (emphasis omitted)). The criminal appeals process likewise is informed by the principle: Defendants may appeal convictions, but the government may not appeal acquittals. See *Fong Foo v. United States*, 369 U.S. 141, 143 (1962). Even the rule of lenity, a canon of statutory construction that resolves ambiguities in favor of criminal defendants, is consistent with a preference for false acquittals insofar as it creates a systematic preference in favor of defendants. More examples could fill the page. But the point has been made: The Blackstone principle pervades the rules of our criminal justice system.

For a long time, the merits of the Blackstone principle were assumed. But of late, some have questioned whether the Blackstone principle produces desirable results, and others have offered justifications for it. Yet both sides of the debate have assumed that the Blackstone principle benefits innocent defendants, regardless of its other costs and benefits. Recently, however, that assumption has come under fire. Daniel Epps suggests the Blackstone principle might, in fact, harm innocent defendants. One can adequately assess the Blackstone principle, Epps argues, only by “systematically account[ing] for all the ways in which following the Blackstone principle might affect the workings of the criminal justice system as a whole.”<sup>6</sup> He charges contemporary discourse with being confined to a “static” perspective that “erroneously holds too many variables constant” and “ignores that the distribution of errors can itself have systemic consequences.”<sup>7</sup>

Epps offers a first attempt at comprehensive analysis. He identifies six of the Blackstone principle’s systemic—or “dynamic”—consequences<sup>8</sup> and argues that these effects might actually make innocent defendants worse off.<sup>9</sup> In evaluating these consequences, Epps posits an imaginary world in which the Blackstone principle is not followed—where accuracy is the dominant value—in order to compare it to our criminal justice system, which purports to operationalize the Blackstone principle.<sup>10</sup> After identifying the dynamic effects, Epps argues that the Blackstone principle might systematically harm innocent defendants.<sup>11</sup> Aware that his inquiry is speculative, Epps is careful not to “reach any definitive conclusion about the Blackstone principle’s costs and benefits,” but the general aim of his argument is to unsettle the basic assumption that the Blackstone principle benefits innocent defendants.<sup>12</sup> Indeed, Epps seeks to reduce our “confidence that adhering to the Blackstone principle will actually help the innocent at all.”<sup>13</sup>

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<sup>6</sup> Epps, *supra* note 3, at 1093.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1087–124; see *infra* Subsection I.C.1. By “dynamic” Epps refers to the effects of adhering to the principle for the system as a whole rather than its effect in individual cases. See Epps, *supra* note 3, at 1070.

<sup>9</sup> A preference for false acquittals might, for example, affect voter attitudes in such a way as to increase punishment. Epps, *supra* note 3, at 1102–06. It might also increase the social stigma associated with a conviction. *Id.* at 1099–102.

<sup>10</sup> See *id.* at 1094.

<sup>11</sup> *Id.* at 1110.

<sup>12</sup> *Id.* at 1124.

<sup>13</sup> *Id.*

This Note offers a first response to Epps on his own terms. The move to a dynamic framework is welcome and overdue, but the analysis needs to be refined. Although Epps offers a “more complete analysis of the Blackstone principle’s dynamic consequences,”<sup>14</sup> he does not adequately account for the important roles played by various actors in the criminal justice system. His arguments for why innocent defendants might be better off without the Blackstone principle rely on questionable assumptions about police officers, prosecutors, legislatures, and citizens. Pressing on these assumptions, this Note challenges the systemic effects Epps has identified. The Note then introduces an affirmative reason to prefer the Blackstonian world, arguing that the Blackstone principle benefits innocent defendants insofar as it promotes equality. Given the speculative and indeterminate nature of the inquiry, no conclusions can be reached with certainty. Nevertheless, this Note ultimately attempts to shore up the proposition that the Blackstone principle significantly benefits innocent defendants.

The Note contains three Parts that proceed as follows. Part I traces the historical origins of the Blackstone principle, lays out the traditional justifications, and introduces Epps’s dynamic critique. Part II challenges the assumptions on which Epps’s analysis relies and raises significant doubts that the Blackstone principle creates negative systemic effects for defendants. Part III then introduces an affirmative rationale by arguing that the Blackstone principle benefits innocent defendants because it promotes equality.

#### I. TRADITIONAL JUSTIFICATIONS AND THE DYNAMIC CRITIQUE

This Part provides the backdrop for the argument. It traces the origins of the Blackstone principle, describes the traditional justifications and criticisms, and briefly summarizes Epps’s contribution, the dynamic critique.

##### *A. Origins*

The notion that a criminal justice system ought to produce more false negatives than false positives often is attributed to Blackstone, but it has deep roots in the Western tradition.<sup>15</sup> American lawyers have long cred-

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<sup>14</sup> *Id.* at 1094.

<sup>15</sup> For a longer discussion of the Blackstone principle’s historical origins, see *id.* at 1077–81; Alexander Volokh, *Aside, n Guilty Men*, 146 U. Pa. L. Rev. 173, 177–83 (1997).

ited Blackstone simply because several generations of Americans first encountered the principle in Blackstone's *Commentaries*, which "served as the first book for most Americans entering the legal profession in the nineteenth century. . . . [Many] American lawyers may very well have read little else."<sup>16</sup> But even before Blackstone published the fourth volume of his *Commentaries* in 1770, the principle was pervasive in early America.<sup>17</sup> The Blackstone principle also appears in English legal literature that predates Blackstone. Indeed, when Blackstone articulated the maxim, he was summarizing Matthew Hale, who had written over forty years earlier: "[I]t is better five guilty persons should escape unpunished, than one innocent person should die."<sup>18</sup> Blackstone does not explain why he doubled Hale's ratio, but variations in the ratio were frequent and are beside the point. What is important is the general principle that false positives are worse than false negatives.

The roots go deeper still. In the thirteenth century, medieval theologians introduced the "safer path" doctrine, which instructs one to "choose the safer path" when "there are doubts."<sup>19</sup> Applying the theological doctrine to criminal law, continental judges developed the *in dubio pro reo* rule ("in doubt you must decide for the defendant").<sup>20</sup> There is no indication these judges had a ratio in mind, but the rule itself indicates a preference for false negatives by demanding more than a preponderance of the evidence to support a conviction.<sup>21</sup> The medieval theologians extracted the principle from the classical world and Judeo-Christian tradition. Aristotle wrote that "every one of us would rather acquit a guilty man as innocent than condemn an innocent man as guilty . . . [f]or when

<sup>16</sup> Paul D. Carrington, Law as "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley, 49 *Stan. L. Rev.* 495, 516 (1997).

<sup>17</sup> See John Adams, *Wemms Trial* Argument for the Defense, in 3 *Legal Papers of John Adams* 242, 242 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), in 11 *The Works of Benjamin Franklin* 11, 13 (John Bigelow ed., 1904); James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* 193 (2008).

<sup>18</sup> 2 Matthew Hale, *The History of the Pleas of the Crown* 289 (George Wilson ed., London, Sollow Emlin, new ed. 1778) (1736). Although the work was not published until 1736, Hale wrote it in the 1670s. See Bruce P. Smith, *The History of Wrongful Execution*, 56 *Hastings L.J.* 1185, 1194 (2005).

<sup>19</sup> Whitman, *supra* note 17, at 116–17 (citation omitted). The doctrine has been attributed to thirteenth-century Pope Innocent III, but it seems to have originated earlier, in the directives of Pope Clement III. *Id.* at 117.

<sup>20</sup> See *id.* at 122.

<sup>21</sup> These judges required "proof 'clearer than the midday sun' before sending a person to blood punishment." *Id.* at 123.

there is any doubt one should choose the lesser of two errors.”<sup>22</sup> The principle appears in the Old Testament as well, both in Genesis and Exodus.<sup>23</sup> Relying on these passages and other evidence of the principle’s deep historical roots, several commentators have dated the principle to the beginning of time.<sup>24</sup> On this view, we have come full circle, for describing the “laws of eternal justice” is precisely what Blackstone set out to do when writing the *Commentaries*.<sup>25</sup>

### B. Traditional Justifications

Tracing the genealogy of the Blackstone principle tells us how it came to be so prominent, but it does not tell us why it ought to be followed. Without a compelling justification, continued reliance on the Blackstone principle would seem a mere historical accident.<sup>26</sup> History is little help because, for Blackstone and others before him, the principle was a self-evident truth not in want of justification that arose from criminal justice systems much different from our own.<sup>27</sup> In Blackstone’s

<sup>22</sup> Aristotle, *Problems* bk. XXIX, at 145 (W.S. Hett trans., Harvard Univ. Press rev. ed. 1957). The Romans likewise “deemed [it] better to absolve the guilty than to risk sentencing an innocent to death.” François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 *Am. J. Comp. L.* 107, 111 (2010).

<sup>23</sup> In Genesis, before destroying Sodom, God assured Abraham that if there were ten righteous inhabitants in the city, He “[would] not destroy it for ten’s sake.” Genesis 18:32 (King James). When Sodom was destroyed, no innocent people were destroyed along with it. Only four were found righteous, and they were spared. See *id.* at 19:15. Lot’s wife likely would have been the fifth, but she was transformed into a pillar of salt when she disobeyed God’s command not to look back at the city. See *id.* 19:26. This passage may not be the best example since the all-knowing and all-powerful God of the Bible was imposing the punishment: He need not worry about error distribution and may do as He pleases. But the principle shows up again in Exodus, this time as an absolute command from God to men: “[T]he innocent and righteous slay thou not,” Exodus 23:7 (King James), which Maimonides, a twelfth-century rabbi and philosopher, interpreted to mean, “it is better . . . to acquit a thousand guilty persons than to put a single innocent man to death once.” 2 *Sefer Ha-Mitzvoth* of Maimonides, *The Commandments* 270 (Charles B. Chavel ed. & trans., 1967); see also Volokh, *supra* note 15, at 178. The New Testament, however, turns the Blackstone principle on its head: The one truly innocent is killed for the sake of the many who are guilty. The very fact that the Christian narrative offends the Blackstone principle may help explain both why the narrative is so jarring and why the Blackstone principle has been followed in societies tied to the Christian tradition.

<sup>24</sup> Volokh, *supra* note 15, at 181.

<sup>25</sup> 1 William Blackstone, *Commentaries* \*40.

<sup>26</sup> As Oliver Wendell Holmes famously stated, “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.” Oliver Wendell Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 469 (1897).

<sup>27</sup> See Epps, *supra* note 3, at 1081.

England and in many earlier legal systems, death was the exclusive punishment for many crimes, even those that would be minor today.<sup>28</sup> When juries were forced to choose between capital punishment and setting the defendant free, they often acquitted even where there was clear evidence to support a conviction.<sup>29</sup> By way of jury nullification, in other words, the results of cases involving capital punishment were generally consistent with the Blackstone principle. When a defendant's life was not at stake, however, false convictions were much more prevalent.<sup>30</sup> In our criminal justice system, of course, capital punishment is much rarer, yet we continue to rely on the Blackstone principle irrespective of the degree of punishment.<sup>31</sup> If the Blackstone principle's historic usage was tied to the death penalty, using it to justify defendant-friendly procedures in the face of all levels of punishment might seem dubious.<sup>32</sup> A better justification is needed.

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<sup>28</sup> See J.M. Beattie, *Crime and the Courts in England, 1660–1880*, at 450 (1986) (noting the high percentage of death sentences issued in seventeenth-century England due to the lack of available alternatives); John Wilder May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 *Am. L. Rev.* 642, 651–52 (1876) (framing the high evidentiary standards required in criminal cases in England as, in part, a product of a harsh penal code); see also *S. Union Co. v. United States*, 132 S. Ct. 2344, 2361 (2012) (Breyer, J., dissenting) (“[I]n England before the founding of our Nation the prescribed punishment for more serious crimes, *i.e.*, felonies, was typically fixed—indeed, fixed at death.” (internal quotation marks omitted)).

<sup>29</sup> 7 William Edward Hartpole Lecky, *A History of England in the Eighteenth Century* 318 (AMS Press 1968) (1893); see also Cynthia B. Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* 143, 145 (1987) (describing juries in seventeenth-century England as reluctant to convict in the face of decreasing control over potential punishments).

<sup>30</sup> See Bruce P. Smith, *The Presumption of Guilt and the English Law of Theft, 1750–1850*, 23 *Law & Hist. Rev.* 133, 135 (2005) (describing how English law was much less concerned with false convictions when capital punishment was not on the table).

<sup>31</sup> See Epps, *supra* note 3, at 1084–85; see also *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008) (holding that the Eighth Amendment forbids death sentences for “crimes against individuals . . . where the victim’s life was not taken”); Hindelang Criminal Justice Research Ctr., Univ. of Albany, *Sourcebook of Criminal Justice Statistics Online* tbl. 6.79.2011 (2011), <http://www.albany.edu/sourcebook/pdf/t6792011.pdf>.

<sup>32</sup> See, e.g., 1 James Fitzjames Stephen, *A History of the Criminal Law of England* 438–39 (London, MacMillan & Co. 1883) (arguing that the persistence of the Blackstone principle is due to the severity of early English criminal law); Epps, *supra* note 3, at 1081–83 (emphasizing the link between the Blackstone principle and capital punishment); Richard L. Lippke, *Punishing the Guilty, Not Punishing the Innocent*, 7 *J. Moral Phil.* 462, 470 (2010) (acknowledging that Blackstone’s logic seems more defensible in a harsh criminal system, but rejecting that logic for less harsh, modern systems). One could argue, however, that the underlying concern still remains. With respect to capital punishment, juries were worried about the irreversible nature of imposing death as a penalty. Although contemporary criminal jus-

History may not provide a justification for continued adherence to the Blackstone principle, but modern commentators do. They make two types of arguments: (1) deontological and (2) consequentialist. Because this Note aims to mount a rejoinder to Epps's dynamic critique, an argument that sounds in consequentialist terms, the deontological arguments are not important for present purposes. Accordingly, this Note brackets them.<sup>33</sup> Consequentialist arguments often come in the form of utilitarianism, logic, or a simple weighing of costs and benefits. These diverse forms of consequentialist reasoning promise certainty, but they are riddled with assumptions and often ignore the moving parts inherent to the world they aim to describe. For present purposes, a summary of the basic utilitarian argument will suffice.<sup>34</sup>

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tice rarely imposes death, it does impose penalties that are practically irreversible, namely long prison sentences in conjunction with rarely successful collateral attacks. If this deeper concern—irreversibility—was the driving force behind the Blackstone principle, perhaps continued reliance on it has some historical support.

<sup>33</sup> For those sympathetic to them, deontological justifications function as a trump card on any consequentialist argument. See, e.g., H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, 8 *Inquiry* 249, 253–55 (1965) (arguing that a utilitarian view of punishment entails at least some unjust, albeit useful, punishments). Professor Ronald Dworkin has provided the most straightforward, and perhaps most well-known, deontological justification. He argues that false convictions carry with them a “moral harm.” Ronald Dworkin, *Principle, Policy, Procedure, in Crime, Proof, and Punishment: Essays in Memory of Sir Rupert Cross* 193, 201 (1981). Because the harm is objective—occurring irrespective of whether the person bearing it “knows or cares about it”—it “escape[s] the net of any utilitarian calculation.” *Id.* at 202–03. Instead of premising our rules of criminal procedure on a basic utilitarian calculus, we thus must “pay[] a price in accuracy to guard against a mistake that involves greater moral harm than a mistake in the other direction.” *Id.* at 210 (emphasis omitted). Epps rejects Dworkin’s argument, relying on arguments made by Professors Cass Sunstein and Adrian Vermeule. See Epps, *supra* note 3, at 1132–33; see also Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omission, and Life-Life Tradeoffs*, 58 *Stan. L. Rev.* 703, 720, 724–28 (2005) (arguing that the act/omission distinction is incoherent when applied to state action “because government cannot help but act, in some way or another, when choosing how individuals are to be regulated”). Sunstein and Vermeule’s arguments, however, have been heavily criticized. See, e.g., Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 *Stan. L. Rev.* 751, 755–56 (2005) (arguing that Sunstein and Vermeule’s conclusions regarding civil regulation break down when applied to criminal justice). And they sound in consequentialist rather than deontological terms. See Daniel R. Williams, *Commentary, The Futile Debate over the Morality of the Death Penalty: A Critical Commentary on the Steiker and Sunstein-Vermeule Debate*, 10 *Lewis & Clark L. Rev.* 625, 626 (2006) (comparing Sunstein and Vermeule’s consequentialist argument with Steiker’s deontological argument).

<sup>34</sup> For a fuller discussion of the traditional consequentialist arguments, see Epps, *supra* note 3, at 1125–31.



In a sentence, the utilitarian justification for the Blackstone principle is that “the disutility of convicting an innocent person far exceeds the disutility of finding a guilty person to be not guilty.”<sup>35</sup> In this formulation, the “disutility of convicting an innocent person” encompasses two severe effects—the loss of liberty<sup>36</sup> and the stigma that comes with conviction<sup>37</sup>—generally considered far worse than the effects of false acquittals.<sup>38</sup> The Supreme Court has used this very rationale to justify the beyond-a-reasonable-doubt standard.<sup>39</sup>

Critics of the basic utilitarian justification insist the theory undervalues the costs of false acquittals. For these commentators, the costs of letting the guilty go free are at least equal to the costs associated with convicting the innocent because false acquittals decrease deterrence, and therefore yield more crime victims.<sup>40</sup> A false conviction, they argue, is no worse than the criminal victimization that follows a false acquittal.<sup>41</sup>

<sup>35</sup> Lawrence B. Solum, *You Prove It! Why Should I?*, 17 *Harv. J.L. & Pub. Pol’y* 691, 701 (1994).

<sup>36</sup> See Michael D. Pepsen & John N. Sharifi, *Lego v. Twomey: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 *Am. Crim. L. Rev.* 1185, 1195–96 (2010) (noting the magnitude of criminal defendants’ liberty interest in criminal adjudications).

<sup>37</sup> See *In re Winship*, 397 U.S. 358, 363 (1970) (noting the “certainty that [a criminal defendant will] be stigmatized by [a] conviction”).

<sup>38</sup> See *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (“[T]he interests of the [criminal] defendant are of such magnitude that historically and without any explicitly constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.” (internal quotation marks omitted)).

<sup>39</sup> Justice Harlan, in his concurring opinion in *In re Winship*, expressly justified the beyond-a-reasonable-doubt standard on a utilitarian basis: “Because the standard of proof affects the comparative frequency of [false positives and false negatives], the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.” 397 U.S. at 371 (Harlan, J., concurring). He continued, “In a criminal case . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.” *Id.* at 372.

<sup>40</sup> See Jeffrey Reiman & Ernest van den Haag, *On the Common Saying That It Is Better That Ten Guilty Persons Escape than That One Innocent Suffer: Pro and Con*, 7 *Soc. Phil. & Pol’y* 226, 246 (1990) (arguing that abandoning the Blackstone principle would increase deterrence and thus reduce the suffering caused by crime more than the additional convictions would increase the suffering of criminals and innocents); see also Adriaan Lanni & Adrian Vermeule, *Precautionary Constitutionalism in Ancient Athens*, 34 *Cardozo L. Rev.* 893, 907 (2013) (“The critics [of the Blackstone principle] . . . urge that discharging the guilty in high ratios is itself an error that creates unacceptable collateral risks of other crimes to innocent third parties.”).

<sup>41</sup> Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 *Tex. Tech L. Rev.* 65, 83 (2008). Larry Laudan estimates that “every false acquittal [for violent crimes] enables more

Most commentators now recognize that the basic utilitarian justification for the Blackstone principle does not sufficiently account for the harms that flow from false acquittals.<sup>42</sup>

### *C. The Dynamic Critique*

Useful as it may be, the utilitarian justification suffers from a problem common to all traditional consequentialist arguments. It evaluates criminal errors from a “static” perspective.<sup>43</sup> As Daniel Epps observes, the framework within which the traditional consequentialist arguments have been advanced treats “the costs of false convictions and of false acquittals as fixed quantities to be weighed against each other.”<sup>44</sup> It is “static” insofar as it fails to account for the indirect effects the Blackstone principle yields.<sup>45</sup> In comparing the harms, commentators have assessed the relative disutility of each type of error in individual cases, balancing the costs of letting the guilty go free against the costs of false conviction—liberty deprivation and reputational harm.<sup>46</sup> By analyzing only the costs of individual errors, the static perspective “ignores that the distribution of errors can itself have systemic consequences.”<sup>47</sup> A proper evaluation of the Blackstone principle would take such consequences into account because they may actually make innocent defendants worse off.<sup>48</sup> A

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than thirty-six crimes (including on average seven violent ones) during the time when, but for the false acquittal, the defendant would have been incapacitated.” Larry Laudan, *The Rules of Trial, Political Morality, and the Costs of Error: Or, Is Proof Beyond a Reasonable Doubt Doing More Harm than Good?*, in 1 *Oxford Studies in Philosophy of Law* 195, 202 (2011). But Laudan’s methodology can be challenged insofar as it “doesn’t account for the possibility that the falsely acquitted defendant might be caught and convicted when committing a later crime.” Epps, *supra* note 3, at 1090–91. Laudan also overlooks the replacement phenomenon: “[S]ome fraction of the crimes that would have been committed by incarcerated individuals are committed by nonincarcerated offenders.” Emily G. Owens, *More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements*, 52 *J.L. & Econ.* 551, 568 (2009). Moreover, Laudan ignores that the recidivism rate varies among crimes. See Charles H. Rose III, *Should the Tail Wag the Dog?: The Potential Effects of Recidivism Data on Character Evidence Rules*, 36 *N.M. L. Rev.* 341, 344–45 (2006). Furthermore, Laudan’s estimates are higher than recent empirical studies on the benefits of incapacitation. See David S. Abrams, *The Prisoner’s Dilemma: A Cost-Benefit Approach to Incarceration*, 98 *Iowa L. Rev.* 905, 938–39 (2013).

<sup>42</sup> Epps, *supra* note 3, at 1092.

<sup>43</sup> *Id.* at 1092.

<sup>44</sup> *Id.* at 1093.

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1121–22.

preference for false acquittals might, for example, affect voter attitudes in such a way as to increase punishment.<sup>49</sup> It might also increase the social stigma associated with a conviction.<sup>50</sup> These and other systemic consequences call into question the fundamental assumption at the heart of the discussion, that a preference for false acquittals benefits innocent defendants. By challenging the truth of this widely held article of faith, Epps forces even its strongest advocates to reconsider the value of the Blackstone principle.

To advance his challenge, Epps moves the discussion beyond the static framework into new territory, which he calls the “dynamic perspective.”<sup>51</sup> This new expansive framework can “systematically account for all the ways in which following the Blackstone principle might affect the workings of the criminal justice system as a whole.”<sup>52</sup> From this perspective, Epps purports to offer a “complete analysis of the Blackstone principle’s dynamic consequences.”<sup>53</sup> Ultimately, he contends that the Blackstone principle might in fact harm innocent defendants.

### *1. Identifying the Dynamic Effects*

The analysis begins with a catalogue of the Blackstone principle’s various systemic consequences for defendants. Epps divides these consequences into six categories: (1) crime, punishment, and policing; (2) social meaning; (3) voter attitudes; (4) law enforcement behavior; (5) legislative behavior; and (6) procedural subversion.<sup>54</sup> In order to evaluate the systemic consequences, Epps posits an imaginary world in which the criminal justice system does not adhere to the Blackstone principle. He uses this non-Blackstonian world as a foil against which he can contrast our existing criminal justice system, which purportedly adheres to the Blackstone principle.<sup>55</sup> For each of the six categories, Epps concludes that innocent defendants are worse off in a Blackstonian world.

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<sup>49</sup> Id. at 1102–06.

<sup>50</sup> Id. at 1099–1102.

<sup>51</sup> Id. at 1093.

<sup>52</sup> Id.

<sup>53</sup> Id. at 1094.

<sup>54</sup> Id. at 1094–109.

<sup>55</sup> Id. at 1094. Although Epps admits that this comparison “obviously involves a generous dose of speculation,” he contends that speculation is better than blindly assuming the Blackstone principle yields no negative systemic consequences. Id. (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *Yale L.J.* 1909, 1932 (1992) (imagining a world without plea bargaining)) (internal quotation marks omitted).

Epps brackets a further complication. There may be good reason to doubt that our criminal justice system adheres to the Blackstone principle in practice. But this is beyond the scope of Epps's inquiry, as the dynamic critique is "agnostic about the degree to which our system today actually complies with the Blackstone principle."<sup>56</sup> It is instead concerned with the effects of formal Blackstonian rules.

*a. Crime, Punishment, and Policing*

Epps first argues that the Blackstone principle increases crime, raises the severity of punishment, and leads to more policing.<sup>57</sup> Because the Blackstone principle makes convictions more difficult to obtain, the argument goes, crime is more prevalent in a Blackstonian world than it would be in a non-Blackstonian world in which more criminals would be incapacitated and more future offenders deterred.<sup>58</sup> The increase in crime, he argues, not only requires additional resources for law enforcement but also negatively affects the accuracy of judgments made by actors in the criminal justice system.<sup>59</sup> Epps further contends that, because a Blackstonian system convicts fewer defendants, those who are convicted likely suffer greater punishments than they would if the resources for punishment were spread more thinly in a non-Blackstonian world.<sup>60</sup>

*b. Social Meaning*

Epps then suggests that the Blackstone principle harms innocent defendants by negatively affecting the social meaning of convictions and acquittals. Convictions undoubtedly carry a social stigma,<sup>61</sup> and according to Epps, the stigma is greater in a Blackstonian world because convictions are seen as more certain proof of guilt than they would be in a non-Blackstonian world.<sup>62</sup> "[A] perceived increase in the probability of convicting the innocent," Epps argues, would lead to "a decrease in the stigma penalty for conviction," an effect that would benefit innocent de-

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<sup>56</sup> Id. at 1095.

<sup>57</sup> See id. at 1095–99.

<sup>58</sup> Id. at 1095.

<sup>59</sup> Id. at 1097–99.

<sup>60</sup> Id. at 1098.

<sup>61</sup> See David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 2009 BYU L. Rev. 1277, 1312.

<sup>62</sup> Epps, *supra* note 3, at 1099.

defendants.<sup>63</sup> Turning to the social meaning of acquittals, Epps argues that those acquitted in a Blackstonian world endure a less favorable social stigma than would those acquitted in a non-Blackstonian world.<sup>64</sup> Because a Blackstonian society knows many guilty defendants go free, acquittals are not seen as a strong indication of innocence and “indeed may be taken as evidence of guilt.”<sup>65</sup>

*c. Voter Attitudes*

Besides its effects on social meaning vis-à-vis individual defendants, Epps claims that the Blackstone principle affects voter attitudes in two ways that harm the innocent. First, because a Blackstonian system stacks the deck in favor of false acquittals, law-abiding, self-interested voters have little reason to fear criminal sanctions, making them less sympathetic toward defendants and thus more likely to impose harsher treatments.<sup>66</sup> Self-interested voters in a non-Blackstonian world, by contrast, would be more hesitant to impose harsh punishments because they would more likely be convicted.<sup>67</sup> Second, the Blackstone principle makes voters more concerned about crime because it under-deters, reduces incapacitation, and fosters worry about victimization.<sup>68</sup>

*d. Law Enforcement Behavior*

Epps next argues that the Blackstone principle harms innocent defendants because it causes actors within the criminal justice system to feel less responsible for preventing false convictions than they would in a non-Blackstonian world.<sup>69</sup> As a result, prosecutors’ offices are more likely “hyper-adversarial,”<sup>70</sup> and police officers are more likely to commit perjury in trial.<sup>71</sup> In both instances, Epps contends, government ac-

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<sup>63</sup> Id. (quoting Katherine J. Strandburg, *Deterrence and the Conviction of Innocents*, 35 *Conn. L. Rev.* 1321, 1349 (2003)) (internal quotation marks omitted).

<sup>64</sup> Id. at 1100–02.

<sup>65</sup> Id. at 1100.

<sup>66</sup> Id. at 1103–04.

<sup>67</sup> Id.

<sup>68</sup> Id. at 1105–06.

<sup>69</sup> See id. at 1106.

<sup>70</sup> Id. (quoting Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 *San Diego L. Rev.* 401, 423 (2011)) (internal quotation marks omitted).

<sup>71</sup> See id. at 1106–07.

tors may feel obligated to ensure defendants whom they perceive as guilty do not go free because of Blackstonian procedures.<sup>72</sup>

*e. Legislative Behavior*

Epps argues further that the Blackstone principle encourages legislatures to increase the breadth and depth of criminal codes by making “an end run around the beyond-a-reasonable-doubt standard.”<sup>73</sup> That legislatures engage in this sort of behavior is not a new idea. The late Professor William Stuntz first identified the problem, providing the following example:

Suppose a given criminal statute contains elements *ABC*; suppose further that *C* is hard to prove, but prosecutors believe they know when it exists. Legislatures can make it easier to convict offenders by adding new crime *AB*, leaving it to prosecutors to decide when *C* is present and when it is not. Or, legislatures can create new crime *DEF*, where those elements correlate with *ABC* but are substantially easier to prove.<sup>74</sup>

Epps builds on Stuntz’s descriptive claim, arguing that the Blackstone principle’s higher standard of proof may increase the likelihood that legislatures will create more crimes.<sup>75</sup> Although the Blackstone principle might guard against false convictions under the additional statutes, in a non-Blackstonian world, Epps argues, the additional statutes might not exist in the first place.<sup>76</sup>

*f. Procedural Subversion*

Epps then claims that the Blackstone principle encourages government actors to engage in procedural subversion.<sup>77</sup> In particular, prosecutors may use plea bargaining to circumvent Blackstonian procedural

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<sup>72</sup> See *id.*

<sup>73</sup> See *id.* at 1108 (quoting William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 *J. Contemp. Legal Issues* 1, 14 (1996) [hereinafter *Stuntz, Civil-Criminal Line*]) (internal quotation marks omitted).

<sup>74</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505, 519 (2001) [hereinafter *Stuntz, Pathological Politics*].

<sup>75</sup> See Epps, *supra* note 3, at 1108.

<sup>76</sup> *Id.*

<sup>77</sup> See *id.* at 1108–09.

safeguards.<sup>78</sup> Because trials are costly, in part because of higher Blackstonian procedural safeguards, prosecutors threaten longer sentences in order to cause defendants to waive their trial rights.<sup>79</sup> Innocent defendants are made worse off, Epps argues, because plea bargaining—a process with fewer procedural protections than trial—is more prevalent.<sup>80</sup>

## 2. *Assessing the Dynamic Effects*

After cataloguing the dynamic effects, Epps makes two evaluative claims: (1) the Blackstone principle “provides fewer benefits to innocent defendants than it seems, perhaps even making them worse off overall”; and (2) it “reinforces troubling political pathologies, distorting criminal justice policy.”<sup>81</sup> Ultimately, the second claim supports the first: Distorting criminal justice policy is a problem because it harms innocent defendants. Epps suggests these costs outweigh the benefits the Blackstone principle provides to innocent defendants.<sup>82</sup>

It is important not to overstate Epps’s claim. He understands that the speculative nature of his inquiry precludes certitude and admits that each of the “dynamic costs may be fairly marginal.”<sup>83</sup> Yet, although he maintains that “we ultimately can’t reach any definitive conclusion about the Blackstone principle’s costs and benefits,” the general aim of his argument is to unsettle the assumption that the Blackstone principle benefits innocent defendants.<sup>84</sup> And the implication is that the current procedural asymmetries, which favor defendants, should be eliminated.<sup>85</sup> Epps argues that, although each dynamic effect may be marginal, the combination of harms, viewed in the aggregate, adds up to something significant.<sup>86</sup>

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<sup>78</sup> *Id.* at 1109.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1110.

<sup>82</sup> See *id.* at 1121–24.

<sup>83</sup> *Id.* at 1122.

<sup>84</sup> *Id.* at 1124.

<sup>85</sup> Professor Laura Appleman agrees. See Laura I. Appleman, A Tragedy of Errors: Blackstone, Procedural Asymmetry, and Criminal Justice, 128 *Harv. L. Rev. F.* 91, 91 (2015) (“[T]he implications of [Epps’s] Article, if taken to their rational conclusion, point to eradicating the asymmetry currently favoring defendants in criminal procedure. This is an extremely troubling result.”).

<sup>86</sup> See Epps, *supra* note 3, at 1122. The slight increase in crime caused by the Blackstone principle, for example, may not cause much harm by itself, but when added to other small harms, such as a slight increase in stigmatization, it may be significant.

## II. ACTORS OF CRIMINAL JUSTICE

Epps's move to the so-called dynamic perspective is useful to the extent that it has forced both sides to reconsider the dogmatic assumption on which past debate has rested—that the Blackstone principle significantly helps innocent defendants—and has widened the scope of the consequentialist inquiry. But the analysis is lacking. Because Epps draws heavily from economic reasoning, his analysis shares the virtue and vice of all abstract economic arguments: Although it tells us the direction of harms, it does not tell us their magnitudes.<sup>87</sup> The increase in crime in a Blackstonian world, for example, may be significant or it may be trivial. The difference matters a great deal, but Epps's reasoning does not provide a measuring stick.

The root of the problem is that determining the amount of harm is ultimately an empirical inquiry. A speculative comparison to a nonexistent world that relies on intuitions is necessarily inadequate. But when an empirical investigation is impossible, as is the case here, the intuitions on which speculation is based ought to be sharpened as much as possible. This Part takes up that task. By looking to other parts of the criminal justice system, we can better estimate the amount of harm, if any, the Blackstone principle yields. Ultimately, this Part concludes that each of the dynamic consequences is marginal or nonexistent. There is thus little reason to think the innocent would be better off in a non-Blackstonian world. Indeed, there are concrete reasons to think they would be worse off.

Although Epps's analysis is more complete than the traditional accounts, it is not comprehensive.<sup>88</sup> He gives short shrift to the role of various actors in the criminal justice system. His arguments for why the Blackstone principle might harm innocent defendants rely on questionable assumptions about police officers, prosecutors, legislatures, and citizens. Pressing on these assumptions, this Part responds to Epps. In accordance with his critique, this defense of the Blackstone principle compares a non-Blackstonian world to our own criminal justice system,

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<sup>87</sup> For this general criticism of economic reasoning, I am indebted to Professor John C. Jeffries, Jr., who raised it in two federal courts lectures in the fall of 2014. I imagine others have dealt a similar blow to economic reasoning, but I first learned of the criticism from Jeffries and feel an obligation to cite him.

<sup>88</sup> Indeed, Epps recognizes that “the possibility also remains that the Blackstone principle has bigger-picture dynamic effects for which [his analysis] has failed to account.” Epps, *supra* note 3, at 1124.



which purports to operationalize the Blackstone principle. Rather than framing the discussion in terms of the various potential effects of the Blackstone principle, however, this Part focuses on the relevant actors in the criminal justice system. By exposing the assumptions Epps makes about these actors, it challenges the claim that the systemic consequences of the Blackstone principle harm innocent defendants.

#### *A. Police Officers*

Some of Epps's arguments depend on a questionable assumption about policing practices. In particular, Epps fails to consider that arrest practices and the procedural rules governing investigations would remain the same in both worlds. The Blackstone principle serves as a justification for defendant-friendly procedural safeguards related to the determination of guilt or innocence, not those related to the legitimacy of investigative and arrest practices.<sup>89</sup> Investigative protections based on the Fourth and Fifth Amendments are justified on liberty grounds and concerns about investigative police behavior.<sup>90</sup> Indeed, because of the way these safeguards are enforced in adjudication—through the exclusionary rule—they generally benefit the guilty, not the innocent. Epps recognizes this point,<sup>91</sup> but his analysis is often blind to it. Many of the negative effects he identifies—social stigma, voter attitudes, law enforcement behavior—are, in large part, the result of police practices rooted in investigative procedures rather than the Blackstone principle. Because investigative practices would be the same in both worlds, their effects would be as well.

##### *1. Arrest Behavior and Incentives*

In making arrests, police are biased toward recidivists. (The term “recidivists” refers to those with a criminal record; they need not have

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<sup>89</sup> See *id.* at 1073.

<sup>90</sup> See Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 25–31 (1997). In her response to Epps, Laura Appleman does not account for this feature of the criminal procedure protections rooted in the Fourth and Fifth Amendments. She argues that “the past twenty to thirty years of Supreme Court rulings,” which have reduced Fourth and Fifth Amendment protections, is evidence that our system is not Blackstonian. See Appleman, *supra* note 85, at 94.

<sup>91</sup> See Epps, *supra* note 3, at 1073 (“To be sure, not every procedural asymmetry in our system is supposed to protect innocent defendants; the Fourth Amendment exclusionary rule, for example, helps only the guilty in order to provide good incentives for police.”).

committed the crime under present investigation.) When a crime occurs, these repeat players are the most obvious first targets because they are either familiar to police or more likely to look like criminals.<sup>92</sup> The bias affects arrests for petty offenses and serious crimes alike.<sup>93</sup> It is especially prominent in the frequent use of mug-shot books consisting only of pictures of prior arrestees, giving crime victims a choice between recidivists or no one at all.<sup>94</sup> Put simply, when police need to solve crimes—or even when they need to boost arrest numbers—they “round up the usual suspects.”<sup>95</sup>

Because arrests are based on probable cause, which is not informed by the Blackstone principle, one would expect police practices to be the same in a non-Blackstonian world.<sup>96</sup> If anything, a non-Blackstonian world may exacerbate the recidivist bias. If convictions would ultimately be easier to attain with a lower standard of proof, police officers would have a greater incentive to arrest those whom they presume more likely to be criminal offenders. Regardless, the fact of recidivist bias in arrests significantly alters Epps’s analysis of voter attitudes and social meaning.

Recall that Epps argues that self-interested voters would be more sympathetic in a non-Blackstonian world and, as a result, would support more lenient punishments.<sup>97</sup> The idea is that an increase in accuracy would entail a greater likelihood that law-abiding citizens would be

<sup>92</sup> Josh Bowers, *Punishing the Innocent*, 156 U. Pa. L. Rev. 1117, 1125 (2008) [hereinafter Bowers, *Punishing the Innocent*]; accord David A. Dana, *Rethinking the Puzzle of Escalating Penalties for Repeat Offenders*, 110 Yale L.J. 733, 753 (2001); see also Richard O. Lempert & Stephen A. Saltzburg, *A Modern Approach to Evidence* 217 & n.47 (2d ed. 1982) (discussing police focus on suspects with a past criminal history); cf. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. Rev. 956, 986–87 (1999) (“[P]olice officers often proceed on the basis of ‘traits’ that, they assert, correlate with criminal behavior.”).

<sup>93</sup> Bowers, *Punishing the Innocent*, supra note 92, at 1125–26.

<sup>94</sup> See id. at 1126; Dana, supra note 92, at 752–53; Lempert & Saltzburg, supra note 92, at 217.

<sup>95</sup> Captain Renault announces this in *Casablanca* (Warner Bros. Pictures 1942). I have borrowed the reference from Bowers, *Punishing the Innocent*, supra note 92, at 1126; Bowers borrowed it from Lempert & Saltzburg, supra note 92, at 217 n.47.

<sup>96</sup> One might think that fewer crimes would mean fewer instances in which police officers have probable cause to make arrests. But keep in mind the types of crimes that would be eviscerated. They are lesser-included crimes (for example, *AB* of *ABC*) and proxy crimes (for example, *DEF*, which correlates with *ABC*) rather than substantively independent crimes. See supra Subsection I.C.1.e; infra Section II.C. Thus, probable cause for the primary crime would likely exist even after the lesser-included crime or proxy crime has been removed from the books.

<sup>97</sup> See Epps, supra note 3, at 1102–04.

falsely convicted, and therefore more sympathetic in their voting.<sup>98</sup> The argument seems plausible at first blush, but when one considers the arrest bias it becomes apparent that the self-interest argument rests on a false premise. It is not necessarily true—nor is it likely—that self-interested, law-abiding voters would be more afraid of suffering criminal sanctions in a non-Blackstonian world. In order to fear the criminal sanctions that await a convicted defendant, one must first fear enforcement. Yet, as we have seen, enforcement of the criminal law is highly biased toward recidivists at the arrest stage. In other words, there is a preference for non-enforcement against law-abiding citizens.

In neither world, of course, do recidivists make up the entire class of arrestees. Some law-abiding citizens will undoubtedly be arrested. Of these, some number that would be acquitted in a Blackstonian world would be convicted in a non-Blackstonian world. But viewed in the abstract, we have no sense of the magnitude of the increase. The recidivist bias gives us a better sense of the magnitude. It at least provides reason to doubt a significant increase in convictions of law-abiding citizens and may even suggest the increase would be marginal.<sup>99</sup> Without much of an increase in their rate of conviction, there would be little increase in the law-abiding voter's self-interest in reducing punishment levels. In short, most voters would not fear harsher punishments because they would not fear punishment's logical antecedent, arrest.

## 2. *Testilying*

Arrest behavior is not all that is relevant. Epps also argues that non-Blackstonian police officers would be less likely to commit perjury—“testilying,” as it is sometimes called<sup>100</sup>—to secure convictions. Though technically true, the seeming improvement would bring no practical benefit to defendants. Epps fails to realize that, from the defendant's perspective, the two worlds are functionally equivalent on this score. The need for police testilying would decrease because convictions would be easier to attain, but the incentive to testily would remain the same.

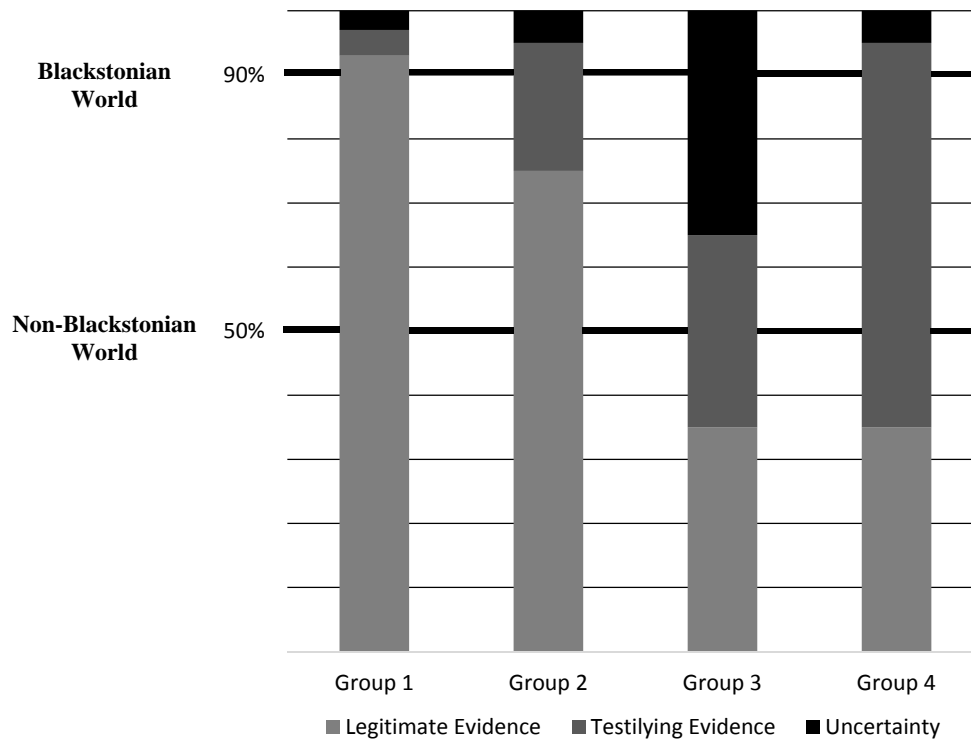
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<sup>98</sup> See *id.* at 1103.

<sup>99</sup> Other features of a non-Blackstonian world will be developed in later sections, strengthening this point. See *infra* Part III.

<sup>100</sup> See, e.g., Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. Colo. L. Rev. 1037, 1040 (1996).

To compare testifying across both worlds, it is useful to divide the cases resulting in convictions into four groups, as in the chart below. Assume for present purposes that the Blackstonian beyond-a-reasonable-doubt standard requires of the fact-finder more than ninety percent certainty, and the non-Blackstonian preponderance standard requires more than fifty percent certainty. Assume further that “legitimate evidence” is evidence other than testifying used to secure a conviction and “testifying evidence” is the evidence testifying yields that is used, in addition to legitimate evidence, to secure a conviction. The weight given to each of these types of evidence for each of the four groups is represented in the chart below. In Group 1, testifying is not necessary to secure a conviction in either world because other legitimate evidence is sufficient. Legitimate evidence clears both the fifty and ninety percent thresholds. In Group 2, testifying is necessary to secure a conviction in a Blackstonian world, but not in a non-Blackstonian world. Legitimate evidence clears only the fifty percent threshold. In Group 3, testifying is necessary to secure a conviction in a non-Blackstonian world but is not sufficient to secure a conviction in a Blackstonian world. The combination of legitimate evidence and testifying evidence clears only the fifty percent threshold. In Group 4, testifying is necessary to secure a conviction in both worlds. Legitimate evidence clears neither threshold, but the combination of legitimate and testifying evidence clears both.

**Figure 1: Testilying Possibilities**

Epps's argument has force only where testilying is a but-for cause of conviction in both worlds. Group 1 is thus irrelevant to our comparison because testilying is not a but-for cause of conviction in either world. Group 2 is also irrelevant because reduced testilying in a non-Blackstonian world would not affect the outcome for defendants since, even in the absence of testilying, they would be convicted. There is a greater likelihood of testilying for Blackstonian police officers in Group 2 only because it is necessary to secure a conviction given the higher standard. Put differently, non-Blackstonian police officers are not faced with the temptation to lie.<sup>101</sup> In Group 3, there is insufficient evidence—

<sup>101</sup> The term "temptation" suggests police officers have knowledge of how much legitimate evidence has been presented and whether it is enough to clear the threshold. But the

even with testilying—to secure a conviction in a Blackstonian world, though the evidence is sufficient in a non-Blackstonian world. It is thus impossible for those in Group 3 to be better off in a non-Blackstonian world; indeed, they are made worse off because they are convicted as a result of testilying *only* in a non-Blackstonian world. What is more, one would expect to see more Group 3 cases than Group 2 cases because the amount of legitimate evidence to get such a case off the ground is not so great. On this assumption, Epps has it exactly backwards, at least between these two categories: Cops in the non-Blackstonian world would lie more, not less, than cops in the Blackstonian world.<sup>102</sup>

Group 4—where testilying is necessary to secure convictions in both worlds—is the only possible group in which the Blackstone principle might increase the desire to testify in a way that harms defendants. In this group, one would expect non-Blackstonian police officers to testify about as often as their Blackstonian counterparts. To the extent testilying results from disrespect for the procedural safeguards afforded defendants, one would expect systematic police disaffection to stem from the procedural safeguards police most often encounter, namely, investigative protections rooted in the Fourth and Fifth Amendments that do not depend on the Blackstone principle. Since these protections would be in place in both worlds, the police officers who testify because they do not respect the investigative procedures that lead to the exclusion of evidence would be just as likely to testify when necessary to secure a conviction. Although this behavior would not be necessary as often in a non-Blackstonian world, the practical effect would be the same for defendants: There would not be fewer convictions. The upshot is that defendants would not likely be made better off in any category in a non-Blackstonian world.<sup>103</sup> But there is one category—Group 3—in which they may be made worse off.

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basic argument works even if they do not have such knowledge. Officers who think testifying *might* be needed to secure a conviction would effectively fall within Group 3.

<sup>102</sup> Again, this assumes that Group 3 police officers know that testilying will not be sufficient to secure a conviction.

<sup>103</sup> It is possible, however, that police testilying is not wholly caused by disaffection with investigative safeguards. To the extent that police testify because they do not respect adjudicative safeguards, such as the beyond-a-reasonable-doubt standard, the incentive to testify may well decrease in a Blackstonian world. But such a decrease seems marginal because the only type of testilying that might be more likely as a result of disaffection with standards of adjudication is that which is related to guilt or innocence, such as fingerprints and DNA evidence. Short of planting evidence, it would be difficult for officers to testify successfully on these matters.

*B. Prosecutors*

Epps also fails to consider adequately prosecutorial behavior in relation to the Blackstone principle. He argues that the Blackstone principle makes prosecutors more adversarial and more likely to pursue plea bargains. Two assumptions are at play here. First, Epps assumes a causal relation between the Blackstone principle and prosecutorial behavior. If other factors produce prosecutorial behavior, abandoning the Blackstone principle would not likely make prosecutors less adversarial. Second, Epps assumes that bad prosecutorial behavior entails a negative consequence for innocent defendants. Specifically, he assumes that because the Blackstone principle yields more plea bargains, innocent defendants are worse off when, in fact, many defendants might prefer a world in which plea bargaining is more prevalent.

*1. Hyper-Adversarial Prosecutors*

Epps claims that the Blackstone principle harms innocent defendants because it causes prosecutors to feel less responsible for preventing false convictions—and thus makes them more “hyper-adversarial”—than they would be in a non-Blackstonian world.<sup>104</sup> But this argument assumes hyper-adversarial behavior is a product of the Blackstone principle. The principle may be partly responsible, but there is reason to think it is not. Prosecutors’ adversarial behavior plausibly results from their wide discretion in bringing charges and aversion to dismissal, both of which are caused by factors unrelated to the Blackstone principle.

Consider first the wide range of discretion prosecutors enjoy when deciding whether to bring charges.<sup>105</sup> As one commentator put it, “No government official in America has as much unreviewable power and discretion as the prosecutor.”<sup>106</sup> Professor Josh Bowers has proposed a

<sup>104</sup> See Epps, *supra* note 3, at 1106.

<sup>105</sup> See *Wayte v. United States*, 470 U.S. 598, 607 (1985) (listing factors making prosecutors best suited for charging decision); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (“[T]he courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.”); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 *Yale L.J.* 1420, 1481 (2008) (describing “the prosecutor’s nearly plenary discretion to charge”); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 *Harv. L. Rev.* 1521, 1540–41 n.71 (1981) (describing “an almost unbroken line of cases upholding prosecutors’ powers to decide who and how to charge”).

<sup>106</sup> Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 *U. Pa. L. Rev.* 959, 960 (2009).

helpful framework for analyzing prosecutorial decision making; he suggests that when deciding whether to bring a case, prosecutors consider: (1) legal sufficiency; (2) administrative considerations; and (3) equitable concerns.<sup>107</sup> Legal sufficiency, a threshold requirement, guides decision making only when a prosecutor decides not to charge an arrestee for a crime because the prosecutor believes the legal elements cannot be proven.<sup>108</sup> Administrative considerations, by contrast, cap the number of cases that can be brought, guiding decision making when a prosecutor declines to bring a case because of insufficient resources.<sup>109</sup> Equitable concerns are frequently determinative because prosecutors, due to limited resources, often must choose to proceed with only some of many legally sufficient cases.<sup>110</sup>

One would expect more legally sufficient cases in a non-Blackstonian world because of the lower standard of proof. One would also expect the same administrative cap in both worlds; a Blackstonian prosecutor would not have more total resources for prosecution, though he likely

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<sup>107</sup> See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 *Colum. L. Rev.* 1655, 1656 (2010) [hereinafter Bowers, *Legal Guilt*]. Other scholars have divided discretion similarly. See, e.g., Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 *Law & Soc. Inquiry* 387, 391 (2008) (offering two broad categories: “[1] predictions about success (‘can I prosecute successfully?’)” and “[2] those [predictions] that arise from concerns about desirability and appropriateness (‘should I try to prosecute successfully?’)”).

<sup>108</sup> Bowers, *Legal Guilt*, supra note 107, at 1656–57 & n.2.

<sup>109</sup> *Id.* at 1657; see Abraham S. Goldstein, *The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea* 3–4 (1981).

<sup>110</sup> Equitable concerns are a necessary part of prosecutorial discretion because of our expansive criminal codes, which consist of wide-ranging provisions that often “cover a good deal of . . . marginal . . . misbehavior.” Stuntz, *Pathological Politics*, supra note 74, at 509; see also Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* 87 (1969) (“[L]egislation has long been written in reliance on the expectation that law enforcement officers will correct its excesses through administration.”); Bowers, *Legal Guilt*, supra note 107, at 1664 (“It is necessary . . . for prosecutors to exercise a measure of discretion because codes are too expansive to do otherwise.”). In the judicial system more generally, a significant degree of equitable discretion is thought desirable because it allows state actors to “mitigate or temper” broad statutes, which are inevitably over-inclusive. Frederick Schauer, *Profiles, Probabilities, and Stereotypes* 251–57 (2003); see also Aristotle, *Nicomachean Ethics* bk. V, at 199 (J.A.K. Thomson trans., Penguin Classics rev. ed. 2004) (c. 384 B.C.E.) (“[T]here are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement . . . the law takes account of the majority of cases, though not unaware that in this way errors are made.”). But see Bowers, *Legal Guilt*, supra note 107, at 1660 (arguing that prosecutorial discretion may not be desirable because there are several reasons to believe that prosecutors are ill-suited to determine the normative merits of potential charges).



would be able to distribute resources across more cases. One would further expect prosecutors to pursue the maximum number of cases under the cap. The result would be an increased emphasis on equitable concerns. In other words, prosecutors would be forced to choose among a greater number of legally sufficient cases when staying under the cap on resources. In short, non-Blackstonian prosecutors would have more discretion than Blackstonian prosecutors, a change that does not seem beneficial to defendants.

To the contrary, in light of the recidivist-arrest bias, increased discretion would likely harm a large portion of defendants. Prosecutors have an interest in maintaining good relations with the police with whom they repeatedly interact. Although prosecutors cannot bring charges against every arrestee due to the cap, they can affirm police arrest decisions by bringing charges in proportion to the type of arrestees the police have chosen.<sup>111</sup> Because the pool of arrestees is largely composed of recidivists,<sup>112</sup> the prosecutorial preference for charging reinforces the initial recidivist bias in arrests.<sup>113</sup> In a Blackstonian world, such reinforcement would be less likely because more potential cases against recidivists would be legally insufficient.

Further still, there is little reason to think non-Blackstonian prosecutors would be less adversarial after bringing charges. Prosecutors are averse to dismissing charges for reasons unrelated to the Blackstone principle.<sup>114</sup> One reason is altogether beyond the control of prosecutors. Innocent defendants often cannot persuasively signal their innocence.<sup>115</sup> When the evidence points to guilt, a prosecutor cannot distinguish a guilty defendant from one that is not guilty, in either world, when both insist on innocence. In addition, prosecutors have an administrative incentive not to dismiss charges. This is so because most prosecutors must

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<sup>111</sup> See Bowers, *Punishing the Innocent*, supra note 92, at 1126; George F. Cole, *The Decision to Prosecute*, in *Rough Justice: Perspectives on Lower Criminal Courts* 123, 127 (John A. Robertson ed., 1974). In the absence of a facial deficiency, prosecutors often take the police at their word. Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 *Rutgers L. Rev.* 1317, 1361–62 (1997).

<sup>112</sup> See supra Subsection II.A.1.

<sup>113</sup> Bowers, *Punishing the Innocent*, supra note 92, at 1126–27.

<sup>114</sup> *Id.* at 1127–28.

<sup>115</sup> *Id.* at 1127.

obtain supervisory approval to effectuate a dismissal, a bureaucratic headache in both worlds.<sup>116</sup>

In the context of an adversarial system, moreover, prosecutors are not positioned to engage in an innocence inquiry.<sup>117</sup> Although individual prosecutors might care a great deal about the truth, the institution is premised on principles of adversarial litigation that value winning over determining the truth. Indeed, because a prosecutor's "conviction rate" is frequently used as "the principal measure of prosecutorial job performance,"<sup>118</sup> prosecutors must prioritize winning in order to advance in their careers.<sup>119</sup> If in doubt about the effect of an adversarial system, consider that even in the civil justice system (a non-Blackstonian world) adversarial opponents systematically seek to make the best arguments for their side, not to determine the truth.<sup>120</sup> That difficult task is left to judges and juries.

Taken together, these factors create a potent cocktail, the effect of which is to drive prosecutors to maximize convictions.<sup>121</sup> The Black-

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<sup>116</sup> *Id.* at 1128; see also Robert L. Rabin, Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion, 24 *Stan. L. Rev.* 1036, 1041 (1972) (noting the Justice Department's requirement that U.S. Attorneys seek approval before dismissing an indictment). As Professor Albert Alschuler points out, "[I]t [i]s easier to lose the case than to go through the bureaucratic obstacles preliminary to dismissal." Albert W. Alschuler, The Prosecutor's Role in Plea Bargaining, 36 *U. Chi. L. Rev.* 50, 64 n.42 (1968).

<sup>117</sup> See Bowers, Punishing the Innocent, *supra* note 92, at 1127–28.

<sup>118</sup> Bowers, Legal Guilt, *supra* note 107, at 1711.

<sup>119</sup> See Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 *Harv. L. Rev.* 2464, 2471 (2004) (noting that prosecutors "may further their careers by racking up good win-loss records").

<sup>120</sup> The claim here is not that individual prosecutors do not care about the truth. Many do, and this concern may play a role in their equitable discretion. But this Note is concerned with the systemic effects and institutional incentives, not personal characteristics and preferences.

<sup>121</sup> Bowers, Punishing the Innocent, *supra* note 92, at 1128; see also Bibas, *supra* note 119, at 2471 ("The statistic of conviction . . . matters much more than the sentence."); George T. Felkenes, The Prosecutor: A Look at Reality, 7 *Sw. U. L. Rev.* 98, 114 (1975) ("[A]n individual's success as a prosecutor may be measured by the number of criminal convictions which he has been able to secure."). In the rare instances where dismissals do occur, moreover, they typically do not result from doubts about the charges; rather, they are most often caused by administrative difficulties. Bowers, Punishing the Innocent, *supra* note 92, at 1129. Noncooperation on the part of lay witnesses is the leading cause of dismissals. See Hans Zeisel, The Limits of Law Enforcement 26–28 (1982); Donald A. Dripps, Miscarriages of Justice and the Constitution, 2 *Buff. Crim. L. Rev.* 635, 644–46 & nn.31–35 (1999). Although some innocent defendants may benefit from administrative difficulties, most are forced into either a plea or trial. Bowers, Punishing the Innocent, *supra* note 92, at 1130.

stone principle may garnish that cocktail, but it is not the straw that stirs the drink.<sup>122</sup>

## 2. *Procedural Subversion*

Epps also argues that the Blackstone principle encourages prosecutors to subvert criminal procedures.<sup>123</sup> In particular, he claims that prosecutors use plea bargaining to circumvent Blackstonian procedural safeguards.<sup>124</sup> This argument is flawed not because it is necessarily wrong,<sup>125</sup> but because it assumes plea bargaining harms defendants when, in fact, plea bargaining is often in defendants' interests.

Whether ultimately convicted or not, a defendant is saddled with process costs. These include pecuniary loss and inconvenience from missing work, as well as psychological harm caused by the pending trial and the prospect of conviction.<sup>126</sup> Even in misdemeanor courts, which are known for rapidly processing run-of-the-mill cases, there are significant process costs.<sup>127</sup> Indeed, for many defendants, these process costs are greater than the potential penalty that would accompany a conviction.<sup>128</sup> A 2013 study of defendants facing misdemeanor charges for petty marijuana possession in the Bronx, New York, demonstrates this point.<sup>129</sup> Where arrestees contested charges, the average time for a dismissal was

<sup>122</sup> Put differently, Blackstonian rules of criminal procedure may reinforce the notion that prosecutors are not responsible to inquire into possible innocence, but Blackstonian rules are not the ultimate cause of conviction maximization.

<sup>123</sup> See Epps, *supra* note 3, at 1108–09.

<sup>124</sup> *Id.* at 1109.

<sup>125</sup> Laura Appleman thinks Epps is wrong to “link[] the use of the Blackstone principle to the rise of plea bargaining.” See Appleman, *supra* note 85, at 93. She contends that plea bargaining is simply evidence that we fail to adhere to the Blackstone principle in practice. *Id.*

<sup>126</sup> See Albert W. Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 U. Chi. L. Rev. 931, 932 (1983) (“Plea bargaining makes a substantial part of an offender's sentence depend, not upon what he did or his personal characteristics, but upon a tactical decision irrelevant to any proper objective of criminal proceedings.”); Bowers, Punishing the Innocent, *supra* note 92, at 1132 (describing the types of process costs suffered by defendants); Ian Weinstein, The Adjudication of Minor Offenses in New York City, 31 Fordham Urb. L.J. 1157, 1172 (2004).

<sup>127</sup> See Malcolm F. Feeley, The Process Is the Punishment: Handling Cases in a Lower Criminal Court 3 (1979).

<sup>128</sup> *Id.* at 34.

<sup>129</sup> Bronx Defenders, No Day in Court: Marijuana Possession Cases and the Failure of the Bronx Criminal Courts 2–3 (May 2013), <http://www.bronxdefenders.org/wp-content/uploads/2013/05/No-Day-in-Court-A-Report-by-The-Bronx-Defenders-May-2013.pdf>, archived at <http://perma.cc/HDU9-KN7A>.

270 days from the date of arrest.<sup>130</sup> On average, each defendant appeared in court five times during this period.<sup>131</sup> This class of arrestees almost always chooses to plead guilty or accept court monitoring.<sup>132</sup> Plea bargains are attractive because prosecutors offer relatively lenient penalties at the bargaining table but seek maximum penalties when going to trial.<sup>133</sup>

In the shadow of process costs, plea bargaining can benefit defendants. Indeed, “[i]n low-stakes cases plea bargaining is of near-categorical benefit,” especially to innocent defendants.<sup>134</sup> For all defendants, plea bargaining is a means of avoiding several court appearances and other inconveniences. For innocent defendants charged with low-level offenses, the tradeoff—blemishing one’s criminal record with a conviction or some lesser punishment in lieu of process costs—is often worth it.<sup>135</sup> And because the innocent more often put forward substantive defenses, which require more procedural claims and preparation, their process costs are generally higher than those of the guilty.<sup>136</sup>

In a non-Blackstonian world, plea bargains would likely be less frequent because prosecutors more often would anticipate success at trial.<sup>137</sup> From a defendant’s perspective, this means more trials with a lower standard of proof and fewer procedural safeguards.<sup>138</sup> There thus would be a higher probability of convictions that open the door to maximum punishment. On the whole, innocent defendants seem better off under Blackstonian conditions, where they have a choice between a trial with higher procedural safeguards and a bargaining arrangement in which they can attain lower sentences in exchange for guilty pleas.

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<sup>130</sup> *Id.* at 3, 10.

<sup>131</sup> *Id.* at 10.

<sup>132</sup> See Eisha Jain, *Arrests as Regulation*, 67 *Stan. L. Rev.* 809, 823 (2015); Weinstein, *supra* note 126, at 1172–73 (discussing the advantages of taking a plea).

<sup>133</sup> Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *Stan. L. Rev.* 989, 1046 (2006).

<sup>134</sup> Bowers, *Punishing the Innocent*, *supra* note 92, at 1132.

<sup>135</sup> *Id.* at 1133–34.

<sup>136</sup> *Id.*

<sup>137</sup> One could argue that plea bargains would be more frequent because non-Blackstonian prosecutors could more easily dispose of cases by way of plea bargaining. But disposal would be less desirable when conviction by trial (with a higher sentence) is easier to attain.

<sup>138</sup> Because non-Blackstonian trials would likely be shorter, prosecutors could likely bring more cases. This might be better for the public, but it is worse for defendants.

*C. Legislatures*

Epps's questionable assumptions are not limited to those who enforce the law. He also does not fully account for the role of those who make the law. In arguing that the Blackstone principle encourages legislatures to make "an end run around the beyond-a-reasonable-doubt standard,"<sup>139</sup> Epps makes two oversights. First, he ignores the fact that this sort of legislative maneuvering would also exist in a non-Blackstonian world. Second, even if Epps is correct that there would be a decrease in legislative maneuvering, he assumes the decrease would benefit defendants when it often might be in the best interest of some defendants.

Professor William Stuntz famously argued that institutional incentives function as a "one-way ratchet that makes an ever larger slice of the population felons."<sup>140</sup> One can observe the expansive trend by comparing the number of offenses on the books a century and a half ago to the number of offenses in the twenty-first century.<sup>141</sup> More troubling, perhaps, than the number of offenses is the breadth and depth of conduct covered.<sup>142</sup> Conduct is covered repeatedly, allowing prosecutors to bring multiple charges under various statutes for a single act.<sup>143</sup> To explain the trend, Stuntz points to legislative incentives. Because legislatures want to make it easier for prosecutors to attain convictions, they create more criminal codes, effectively delegating lawmaking authority to law enforcers.<sup>144</sup> Recall Stuntz's example of a legislature making an end run

<sup>139</sup> See Epps, *supra* note 3, at 1108 (quoting Stuntz, *Civil-Criminal Line*, *supra* note 73, at 14).

<sup>140</sup> Stuntz, *Pathological Politics*, *supra* note 74, at 509.

<sup>141</sup> *Id.* at 512–13. Stuntz found that the number of separate offenses in the Illinois criminal code, for example, has increased from 131 to 421. *Id.* at 513–14. In roughly the same time period, the number of offenses in the Virginia criminal code grew from 170 to 495. *Id.* at 514. Other state criminal codes have expanded in a similar fashion. See *id.* The expansion of the federal criminal law is even more pronounced. Stuntz counted 183 separate offenses in the 1873 version of the Revised Statutes, but by the year 2000, criminal conduct was defined in 643 separate sections of Title 18. *Id.*

<sup>142</sup> Various state codes criminalize negligent assault (a simple tort), negligent endangerment (which does not require even the materialization of a risk of injury), possession of burglar's tools (including a screwdriver), and possession of drug paraphernalia (independent from drugs themselves). *Id.* at 516. Federal law criminalizes even more conduct. For example, 100 separate misrepresentation offenses criminalize lying and, in some instances, concealment. *Id.* at 517. Because many of these do not take into account whether the dishonesty is about a trivial or significant matter, a significant chunk of ordinary lying could support a felony conviction. *Id.* at 517–18.

<sup>143</sup> See *id.*

<sup>144</sup> See *id.* at 519. Only a fraction of the vast number of crimes can be enforced, and this fraction will be defined by law enforcers. See *id.* The delegation of lawmaking authority to

around the beyond-a-reasonable-doubt standard by supplementing crime *ABC* with *AB* or *DEF*.<sup>145</sup>

Building on Stuntz's claim, Epps argues that the Blackstone principle's higher standard of proof may increase the likelihood that legislatures will engage in this behavior. But his analysis is flawed. He treats the beyond-a-reasonable-doubt standard as the engine that drives legislative maneuvering when political pressure and efficiency concerns more plausibly motivate such behavior. A lower standard of proof notwithstanding, there will still be instances where element *C* (of the crime *ABC*) is hard to prove. Feeling political pressure from constituents, legislatures still may be inclined to make an end run around the preponderance standard by enacting *AB* or *DEF*. The impetus is not the standard around which the legislature must maneuver; it is instead tough-on-crime political pressure—which does not reflect the interests of disenfranchised and disfavored felons—that creates the legislative desire to enable prosecutors to attain more convictions.

Nonetheless, legislative maneuvering may be somewhat less frequent in a non-Blackstonian world because in some instances a lower standard of proof might obviate the need for additional crimes. But a net gain for defendants does not follow. Quite the opposite. Where a Blackstonian defendant might be convicted under the newly-enacted *AB*, a non-Blackstonian defendant could instead be convicted under *ABC*, which presumably would carry with it a higher punishment. Thus, even if questionable legislative maneuvering is somewhat less frequent in a non-Blackstonian world, the result for the defendants may be more severe punishment.

#### *D. Citizens*

Some of Epps's arguments depend on a questionable assumption about law-abiding citizens, namely that there is a causal connection be-

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law enforcers is not the only consequence. Prosecutors are delegated a form of adjudicatory power. With so many overlapping offenses, prosecutors are left to decide which particular sets of elements are most likely to maximize convictions. See *id.* at 519–20. What is more, the breadth and depth of criminal law undermine its expressive purpose. See *id.* at 520–21. Many have suggested that the criminal law's most important function is its ability to send signals to the community in order to encourage good conduct norms and discourage bad ones. See *id.* But broad and deep criminal codes make communicating a consistent message impossible. See *id.* at 521.

<sup>145</sup> See *supra* Subsection I.C.1.e; see also Stuntz, *Pathological Politics*, *supra* note 74, at 519.

tween the facts on the ground—specifically, rates of conviction and crime—and public perception. This assumption is central to his argument that convictions and acquittals carry a greater stigma in a Blackstonian world and his argument that the Blackstone principle adversely affects voter attitudes toward defendants. Both arguments further assume that an increase in accuracy in a non-Blackstonian world would result in a change in social meaning. There are several reasons to doubt this. Most importantly, these assumptions sidestep a discussion about the sources of public perception.

### *1. Public Perception*

Social meaning flows from the public's perception of the criminal justice system, and public perception is not informed by the facts on the ground. Although the majority of people do not have first-hand knowledge of the criminal justice system, most think they understand it.<sup>146</sup> Many strands of popular culture—including newspapers, radio and television news broadcasts, and film and television—shape the public's understanding of crime and punishment.<sup>147</sup> News sources are especially important. Multiple studies have found that, although public perception of crime bears little relationship to crime statistics, it tracks closely with news coverage.<sup>148</sup>

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<sup>146</sup> See Leonidas K. Cheliotis, *The Ambivalent Consequences of Visibility: Crime and Prisons in the Mass Media*, 6 *Crime Media Culture* 169, 173–78 (2010); Connie L. McNeely, *Perceptions of the Criminal Justice System: Television Imagery and Public Knowledge in the United States*, 3 *J. Crim. Just. & Popular Culture* 1, 1–6 (1995).

<sup>147</sup> There is a large body of literature concerning the role of newspaper and television news. See, e.g., Richard L. Fox & Robert W. Van Sickel, *Tabloid Justice: Criminal Justice in an Age of Media Frenzy* (2001); Gary W. Potter & Victor E. Kappeler, *Constructing Crime: Perspectives on Making News and Social Problems* (2d ed. 2006); *Media, Process and the Social Construction of Crime: Studies in Newsmaking Criminology* (Gregg Barak ed., 1994). Many have claimed that film and television play a significant role in shaping public perceptions. See, e.g., Nicole Rafter, *Shots in the Mirror: Crime Films and Society* 3–4 (2d ed. 2006); David Wilson & Sean O'Sullivan, *Images of Incarceration: Representation of Prison in Film and Television Drama* 7, 58–59 (2004); Robert Reiner, *Media-Made Criminality: The Representation of Crime in the Mass Media*, in *The Oxford Handbook of Criminology* 302, 315–16, 322–23 (Mike McGuire, Rod Morgan & Robert Reiner eds., 4th ed. 2007).

<sup>148</sup> In 1952, F. James Davis found that public perceptions of crime tracked with newspaper coverage but did not relate to official crime statistics. See *Crime News in Colorado Newspapers*, 57 *Am. J. Soc.* 325, 330 (1952). More recently, researchers found that the spike in public fear of crime between 1992 and 1994 correlated to network news-related variables rather than official crime rates. See Dennis T. Lowry et al., *Setting the Public Fear Agenda: A*

Film and television may be even more influential.<sup>149</sup> Americans consume a great deal of entertainment media, and crime is featured more prominently in film and television than in news media.<sup>150</sup> As a result, entertainment media significantly distorts public perception.<sup>151</sup> In particular, entertainment media misrepresent the type of people committing crimes. Very few of the 1.6 million state and federal prisoners are masochists or psychopaths motivated by revenge, greed, or the sick pleasure of doing evil.<sup>152</sup> But these “psychopathic villains” appear frequently in film and television.<sup>153</sup> The upshot is this: Because news and entertainment media play a significant role in forming public perception and these sources misrepresent the average criminal, the public holds unrealistic expectations about convicted and unconvicted defendants.<sup>154</sup>

In addition to misrepresenting criminals, news and entertainment media misrepresent the types of crimes committed. Although nonviolent crimes, such as theft, larceny, and drug crimes, comprise 88.1 percent of crime in the United States, they are disproportionately underrepresented

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Longitudinal Analysis of Network TV Crime Reporting, Public Perceptions of Crime, and FBI Crime Statistics, 53 *J. Comm.* 61, 62, 72 (2003).

<sup>149</sup> See James M. Carlson, *Crime Show Viewing by Preadults: The Impact on Attitudes Toward Civil Liberties*, 10 *Comm. Res.* 529, 548–49 & tbl.6 (1983); Joseph Turow, *Television Entertainment and the US Health-Care Debate*, 347 *Lancet* 1240, 1240 (1996).

<sup>150</sup> Professor Ray Surette writes:

Within newspapers, crime news accounts for from 4 percent to 28 percent of all the news reported, averaging about 7 percent overall . . . . Crime-and-justice news consistently is found to constitute one of the top five subject categories for newspapers. The range for national television is from 10 percent to 13 percent of total news as crime news.

Ray Surette, *Media, Crime, and Criminal Justice* 67 (2d ed. 1998). As for film, “In most years, around 20 per cent of all films are crime movies, and around half of all films have significant crime content.” Reiner, *supra* note 147, at 312.

<sup>151</sup> See Surette, *supra* note 150, at 47; Linda Heath & Kevin Gilbert, *Mass Media and Fear of Crime*, 39 *Am. Behav. Scientist* 379, 380–81 (1996).

<sup>152</sup> See James Garofalo, *Crime and the Mass Media: A Selective Review of Research*, 18 *J. Res. Crime & Delinq.* 319, 326 (1981); Brendan Maguire, *Image vs. Reality: An Analysis of Prime-Time Television Crime and Police Programs*, 11 *Crime & Just.* 165, 181–82 (1988).

<sup>153</sup> See Samuel J. Leistedt & Paul Linkowski, *Psychopathy and the Cinema: Fact or Fiction?*, 59 *J. Forensic Sci.* 167, 168, 173 (2014) (reporting that in an analysis of 400 feature films depicting psychopaths, cinematic representations usually deviated from clinical realities).

<sup>154</sup> See Cheliotis, *supra* note 146, at 173–76, 178; Lowry et al., *supra* note 148, at 63–64, 72.



in entertainment media.<sup>155</sup> By contrast, violent crimes like murder, rape, and robbery account for just 11.9 percent of crime in the United States, but they dominate film and television.<sup>156</sup> Overrepresentation of violent crime increases the perception of danger, which increases fear and ultimately affects voting behavior.<sup>157</sup>

Media sources greatly distort public perception in our Blackstonian world, to be sure, but is it possible that media sources in a non-Blackstonian world would be different? Might they track more closely with actual rates of crimes and convictions? It seems unlikely.

Professor Joseph Kennedy offers a theory of “monstrous offenders” that helps to explain the current state of entertainment media and gives reason to think it would remain the same in a non-Blackstonian world.<sup>158</sup> Kennedy argues that society’s obsession with “monstrous” crimes and criminals goes deeper than the criminal justice system’s preference for errors.<sup>159</sup> In diverse societies, he argues, there is a need for a “secular sacred,” a set of core values that can be shared by all of society through stories about monstrous offenders who violate it.<sup>160</sup> “Monstrous” crimes and criminals provide something around which all of society can rally and “send symbolic messages reaffirming and defining core values.”<sup>161</sup> Society tells stories, through media sources, about the violation of the

<sup>155</sup> See Fed. Bureau of Investigation, *Crime in the United States 2012*, at tbl.1 (2012), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/1tabledataoverviewpdf>, archived at <https://perma.cc/P5VF-9Q8H>.

<sup>156</sup> See *id.* (noting that murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault comprise approximately 11.1% of the crimes recorded in the Uniform Crime Reports).

<sup>157</sup> See Cheliotis, *supra* note 146, at 173–76, 178; Lowry et al., *supra* note 148, at 63–64, 72.

<sup>158</sup> See Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 *Hastings L.J.* 829, 830–33 (2000).

<sup>159</sup> See *id.*

<sup>160</sup> *Id.* at 834. Kennedy’s theory draws from Emile Durkheim’s concept of the “public temper”:

We have only to notice what happens, particularly in a small town, when some moral scandal has just been committed. They stop each other on the street, they visit each other, they seek to come together to talk of the event and to wax indignant in common. From all the similar impressions which are exchanged, from all the temper that gets itself expressed, there emerges a unique temper, more or less determinate according to the circumstances, which is everybody’s without being anybody’s in particular.

This is the public temper.

Emile Durkheim, *The Division of Labor in Society* 102 (George Simpson trans., MacMillan Co. 1933) (1893).

<sup>161</sup> Kennedy, *supra* note 158, at 831.

secular sacred by scapegoating its worst criminal offenders.<sup>162</sup> Our society has been eager to believe, according to Kennedy, that a “populous category of ‘monstrous offenders,’” such as rapists and serial killers, exists so that it may “project onto those offenders more basic anxieties about social problems.”<sup>163</sup> If Kennedy is correct, there is little reason to think a non-Blackstonian society would be any less likely to construct particular scapegoats by way of news and entertainment media. The societal need to tell stories about monstrous offenders would likely triumph over the increase in accuracy in actual criminal cases.<sup>164</sup>

Even if one does not fully buy Kennedy’s argument, it is difficult to deny the societal anxieties at the heart of his theory. In neurobiological terms, humans are highly susceptible to “pathological states of fear” because the “threshold for detecting fear has simply been set too low and too many stimuli that have a very low probability of being dangerous are misinterpreted as dangerous.”<sup>165</sup> The idea is that the human brain evolved so as to become highly attuned to the predictors of fear that were prevalent in a hunter-gatherer environment. For our ancestors, such predictors may have been events such as the sound of a twig breaking in the forest or the sight of a predator’s footprint. Although these predictors were often false negatives, the cost of taking them seriously was often much lower than the cost of harm in the unlikely event that there was in fact an imminent danger.<sup>166</sup> But in a complex modern society, there is a constant barrage of fear stimuli. Not only does one hear the creaks in his own attic or the gunshot down the street, he is exposed by way of media to violence around the world. It is no surprise that nearly twenty percent of the population suffers from some form of anxiety disorder.<sup>167</sup> Those convicted of crimes are an easy target for a society looking to identify a source of its anxieties, and a shift to a non-Blackstonian world would not likely change that.

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<sup>162</sup> *Id.* at 833.

<sup>163</sup> *Id.*

<sup>164</sup> One could argue that the transition from a Blackstonian world to a non-Blackstonian world would itself be newsworthy and could affect public perception. This may be so, but this is outside the scope of the comparison here because it speaks not to the merits of the non-Blackstonian world but to the effect of transition. One could just as easily argue that a transition from a non-Blackstonian world to a Blackstonian world would be equally newsworthy and would change public perception.

<sup>165</sup> Ralph Adolphs, *The Biology of Fear*, 23 *Current Biology* R79, R89 (2013).

<sup>166</sup> See *id.*

<sup>167</sup> *Id.*

In light of all this, it seems unlikely that public perception would better align with the facts of a non-Blackstonian world. One would expect concern about crime to be about the same. And to the extent real-world facts do influence public perception, non-Blackstonian voters may be *more* concerned about crime because an increase in convictions may bring more attention to the prevalence of crime, particularly if some of the additional convictions are high profile.

If voter attitudes would go unchanged in a non-Blackstonian world, the purported benefits of many sympathetic voters would be absent as well. Epps suggests that non-Blackstonian punishment would be less severe. In simple economic terms, he argues that Blackstonian punishment is more severe because there are fewer convicted defendants bearing the weight of punishment.<sup>168</sup> This reasoning treats punishment like a pie: If there is *X* amount of punishment, each defendant would bear more of it in a world with fewer convictions. But punishment is not like a pie, and changes in sentencing policies are not fueled by economic reasoning of this sort.<sup>169</sup> Rather, they result from political pressure based on the public's perception of crime, which is primarily informed by news and entertainment media.<sup>170</sup> Put differently, voters do not start with the premise that there is a fixed amount of punishment to be spread over various defendants; they start with intuitions about how much punishment is appropriate for particular defendants on the basis of their own perceptions of crime. In Kennedy's terms, voters use more severe sentencing policies as a way of "scapegoating" in order to "forge a greater sense of solidarity."<sup>171</sup> Indeed, Kennedy attributes the dramatic increase in the severity of criminal punishment during the 1980s and 1990s to this sort of political pressure.<sup>172</sup>

There is another reason why voter interests would not likely align with the interests of the convicted—felony disenfranchisement. As of

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<sup>168</sup> See Epps, *supra* note 3, at 1098 ("When fewer people can be punished, economic reasoning would suggest that those who are punished must be punished more harshly in order to maintain the deterrent force of criminal sanctions.").

<sup>169</sup> This is not to say that economic concerns do not play a role in sentencing policy. Indeed, in recent years the costs of imprisonment have been central to prison reform discussions. But the sort of economic reasoning Epps employs has not become part of the conversation. No one is arguing that there is a predetermined amount of punishment that *must* be doled out regardless of the number of convictions.

<sup>170</sup> See *supra* Subsection II.D.1.

<sup>171</sup> Kennedy, *supra* note 158, at 832.

<sup>172</sup> *Id.* at 831–32.

2014, 5.85 million Americans were not allowed to vote as a result of laws that disenfranchise convicted felons.<sup>173</sup> Although disenfranchisement penalties might be reduced in a non-Blackstonian world because the stigma associated with conviction may well decrease, one would expect these lesser penalties to apply to a greater number of people since the number of convictions would be greater in a Blackstonian world. The net effect would be that felons likely would enjoy no greater voice in a non-Blackstonian world.

## 2. *The Arrest Stigma*

Besides the near equivalence of public perception of crime in both worlds, there is a second reason to doubt a change in social meaning in a non-Blackstonian world. In many civil contexts, the stigma that results from conviction or acquittal is, as a matter of causation, largely irrelevant. The stigma associated with criminal behavior attaches at the earliest moment it appears a person has engaged in criminal conduct, namely arrest. Civil actors use arrest information in many ways at the expense of arrestees.<sup>174</sup> Police departments disseminate criminal records,<sup>175</sup> and the FBI makes available its fingerprint database of arrested individuals.<sup>176</sup> Employers use arrest information to conduct background checks, and the state takes arrests into account when making certain regulatory decisions.<sup>177</sup> Public housing officials, for example, rely on arrests to identify

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<sup>173</sup> Jean Chung, *Felony Disenfranchisement: A Primer*, The Sentencing Project (Aug. 2015), [http://www.sentencingproject.org/doc/publications/fd\\_Felony%20Disenfranchisement%20Primer.pdf](http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf), archived at <http://perma.cc/LT5K-WZRM>.

<sup>174</sup> See Jain, *supra* note 132, at 810–12.

<sup>175</sup> James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. Legis. & Pub. Pol'y 177, 203–04 (2008). Every state permits—some even require—the release of criminal histories to civil agencies. James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 St. Thomas L.J. 387, 395 (2006). Some states make arrests publicly available; others release the information to those willing to pay a fee. *Id.* An arrested individual has no constitutional right to privacy in his arrest information. See *Smith v. Doe*, 538 U.S. 84, 89, 102, 105–06 (2003) (holding that publicly accessible sex offender registries are constitutional); see also *Paul v. Davis*, 424 U.S. 693, 694–97 (1976) (holding that a sheriff did not deprive an arrested individual, who had not pled guilty, of due process by distributing the arrested individual's name and photo to local businesses and describing him as a known shoplifter).

<sup>176</sup> U.S. Dep't of Justice, *The Attorney General's Report on Criminal History Background Checks 3* (2006), [http://www.bjs.gov/content/pub/pdf/ag\\_bgchecks\\_report.pdf](http://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf), archived at <http://perma.cc/63F7-9NEW>.

<sup>177</sup> *Id.*

those who may have breached their leases.<sup>178</sup> Immigration officials use arrests as a proxy for removability.<sup>179</sup> Indeed, an arrest record has been described as a “negative curriculum vitae” because arrest information is so widely used.<sup>180</sup> What is worse, because arrestees are often unaware that civil actors are using their arrest information, they are unable to offer an explanation.<sup>181</sup> This much is clear: The fact of arrest, separate and apart from guilt or innocence, imposes a stigma on arrestees. Even if abandoning the Blackstone principle would lead to a lower degree of stigmatization at the time of conviction or acquittal, the arrest stigma would remain.<sup>182</sup>

To put a finer point on it, consider the employer comparing three job applicants: (1) one without a record; (2) one with an arrest record; and (3) one with a conviction record. The applicants are otherwise identical. If choosing among all three, the risk-averse employer would choose the first applicant. If choosing between (2) and (3), the employer would choose (2). And any decrease in the degree of stigmatization associated with convictions in a non-Blackstonian world would not change the outcome. The convicted applicant always carries a greater stigma than the arrested applicant, and the arrested applicant always carries a greater stigma than the applicant with a clean record. The assumption here is that stigma is categorical rather than continuous, as Epps implicitly assumes. On this view, the difference in degree for one category of stigma is practically irrelevant when that category is compared to another category.<sup>183</sup>

<sup>178</sup> Id. at 19–20. Leases for public housing prohibit a “tenant, member of the tenant’s household, or guest” from participating in “any criminal activity . . . that threatens the health, safety, or right to peaceful enjoyment of the [public housing authority’s] premises.” 24 C.F.R. § 966.4(l)(5)(i)(B)–(ii)(A) (2004). Arrest information puts landlords on notice of conduct that may potentially violate the lease.

<sup>179</sup> Jain, *supra* note 132, at 826–28.

<sup>180</sup> Jacobs & Crepet, *supra* note 175, at 177.

<sup>181</sup> See Jain, *supra* note 132, at 826 (“The arrested individual may be unaware of how her arrest information is being used and may have no ability to contest the facts surrounding the arrest.”).

<sup>182</sup> It is possible, however, that a non-Blackstonian arrest stigma would be lesser in degree. People in a Blackstonian world may attach a greater stigma to arrests because they view them as a better proxy for guilt than conviction. Even so, there is little reason to think the arrest stigma would be eviscerated in a non-Blackstonian world.

<sup>183</sup> This illustration helps to demonstrate the distinction between degree and kind, but it may not map on to all real-world situations. In other words, Epps may be right that stigma is sometimes continuous. Applicants are often not “otherwise equal” and in such cases varying degrees of stigma may thus be relevant. In cases where one’s arrest record is one of many

What is more, there is reason to think defendants may be worse off in a non-Blackstonian world. Recall that when making arrests, police are biased toward recidivists.<sup>184</sup> Another way to articulate the recidivist bias is to say that police officers are more likely to arrest those with a conviction because they carry a stigma. Although abandoning the Blackstone principle might lead to a marginal decrease in the stigma associated with convictions, there would be more recidivists—a greater percentage of whom were falsely convicted—to arrest because of the net increase in convictions.<sup>185</sup> The police would continue to round up the usual suspects because recidivists have *some* stigma and others have none. Just like the employer comparing an applicant with a clean record and an arrest record, the risk-averse police officer will continue to prefer recidivists when making arrests. The increase in the number of defendants stigmatized would seem to overshadow any decrease in degree of stigmatization.

Similar reasoning raises doubts that the Blackstone principle harms acquitted defendants because it devalues the social meaning of acquittals. That there is an arrest stigma indicates that society makes judgments about criminal defendants long before, and apart from, a trial that determines conviction or acquittal.<sup>186</sup> Even if the value of an acquittal would slightly increase in a non-Blackstonian world, *some* stigma resulting from arrest and involvement in the criminal process would remain. Regardless of improvements in the accuracy of adjudication in a non-Blackstonian world, employers would continue to err on the side of caution when dealing with acquitted arrestees.<sup>187</sup> It would be rational for an employer to believe that an arrested-acquitted individual is more likely to cause trouble than an applicant without an arrest record. Because the

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factors considered by an employer, for example, it may be easier in a non-Blackstonian world for the arrested-acquitted applicant to beat out an applicant without a record who is otherwise less qualified. But this possibility does not undermine my basic point: Even in a non-Blackstonian world, an arrest would carry with it some social stigma.

<sup>184</sup> See *supra* Subsection II.A.1.

<sup>185</sup> There would be a net increase in convictions because the lower standard of proof would make convictions easier to attain. This straightforward point runs through Epps's analysis. See, e.g., Epps, *supra* note 3, at 1098 (acknowledging that "fewer people [are] punished" in a Blackstonian world).

<sup>186</sup> The many high-profile criminal defendants—O.J. Simpson, John Hinckley, Jr., the Central Park Five, Jesse Matthew, Steven Avery, to name several—of the past several decades demonstrate the point.

<sup>187</sup> *Contra* Epps, *supra* note 3, at 1102 (arguing that employers "look to arrest records as a proxy for criminality" because of the Blackstone principle).

criminal justice system's distribution of errors is irrelevant to the risk-averse employer, the change in degree of social meaning would often be practically insignificant to the defendant.

### III. EQUALITY AND THE BLACKSTONE PRINCIPLE

So far this Note has pressed on Epps's assumptions about various actors in the criminal justice system in order to render his arguments for the so-called dynamic effects less convincing. In this way, the argument has simply identified oversights in Epps's reasoning. But there are also affirmative reasons to prefer a Blackstonian world. This Part introduces one. The Blackstone principle benefits innocent defendants insofar as it promotes equality. In a certain way, this is an odd claim. Defendant-friendly procedures are Blackstonian precisely because they create an asymmetry between defendants and the state. A non-Blackstonian world would seem to create *procedural* equality between both sides of the litigation.<sup>188</sup> The concern here, however, is not with the equality of procedure, but with equality across various types of defendants.

I start with another of Epps's assumptions. More troubling than his assumptions about actors in the criminal justice system whose behavior affects defendants is his assumption about defendants themselves. Epps groups all defendants in a single class. Although he divides defendants according to whether they are innocent/guilty and convicted/acquitted,<sup>189</sup> he fails to consider that the term "defendants" encompasses a wide range of people from different social classes. His dynamic analysis, therefore, completely ignores the ways abandoning the Blackstone principle might deepen inequality. To be fair, Epps's treatment of defendants is not unusual. The traditional consequentialist arguments make the same move. When balancing the harms of the falsely convicted against society's harm from the falsely acquitted, defendants are treated as a single class. But unlike Epps, the traditional consequentialist arguments do not purport to "tak[e] stock of [the Blackstone principle's] effects on the criminal justice system as a whole."<sup>190</sup> A comprehensive analysis of the

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<sup>188</sup> But this seeming procedural equality is misleading. See Appleman, *supra* note 85, at 95–97 (arguing that in criminal prosecutions, when the resources of the state are brought against a single defendant, unequal procedure is necessary to give both sides a fair shot).

<sup>189</sup> Epps, *supra* note 3, at 1110.

<sup>190</sup> *Id.* at 1121.

Blackstone principle's systemic consequences is incomplete without at least some recognition of variation among defendants.

One can divide defendants in many ways. Focus here on a particular dividing line, socioeconomic status. The systemic consequences Epps identifies affect rich and poor defendants differently. This Part argues that there are indeed two reasons to think a non-Blackstonian world would deepen inequality between these two types of defendants. First, a non-Blackstonian world would more adversely affect the quality of counsel for poor defendants than that of rich defendants. Second, the costs of punishment would reach a greater—and disproportionate—number of poor defendants. In sum, there is an affirmative reason to prefer the Blackstone principle: It promotes equality among defendants with different economic means.

A final introductory remark is in order. Although the equality argument is different from the previous arguments insofar as it is not a direct attack on Epps's dynamic critique, it is the same in kind, a consequentialist argument that takes into account an additional dynamic effect of the Blackstone principle. In this way, this Part expands the dynamic analysis. That the argument is premised on a moral claim—equality should be promoted—does not mean it does not belong in the consequentialist category.<sup>191</sup> All consequentialist arguments rely on moral institutions.<sup>192</sup> The moral overtones are simply more overt here.

#### *A. The Divide in Assistance of Counsel*

According to Ernest Hemingway's fictional account, F. Scott Fitzgerald once declared, "The very rich are different from you and me," to which Hemingway retorted, "Yes, they have more money."<sup>193</sup> In the

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<sup>191</sup> The argument here does not sound in deontological terms, though one can imagine an equality argument that would. Rather, the goal here is to account for the systemic effects of the Blackstone principle across different groups of defendants. Recognizing that not all defendants are alike is important if the ultimate aim of the dynamic analysis is to determine whether the Blackstone principle harms innocent defendants.

<sup>192</sup> Utilitarianism, for example, is the view that an act is morally right because it maximizes the greatest utility. See Julia Driver, *The History of Utilitarianism*, *Stan. Encyclopedia of Phil.* (Edward N. Zalta et al. eds., 2014), <http://plato.stanford.edu/archives/win2014/entries/utilitarianism-history/>. This view is premised on a meta-ethical position about a deep moral question. We often overlook the moral foundation because it is relatively uncontroversial that utility-maximization is a value worth pursuing (though it is controversial whether it should be the highest value).

<sup>193</sup> Matthew J. Bruccoli, *Scott and Ernest: The Authority of Failure and the Authority of Success* 4 (1978). The fictionalized version of this exchange first appears in Ernest Heming-



context of criminal defense, Hemingway is appropriately blunt: Greater monetary resources generally means better representation. In the words of Justice Black in *Gideon v. Wainwright*, “[T]here are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses.”<sup>194</sup> After *Gideon*, the stark difference in representation—between having an attorney and not having one—no longer exists.<sup>195</sup> But even with a right to some counsel, variation in quality remains.<sup>196</sup> The Supreme Court has recognized the continued divide in the quality of representation, noting twenty-six years after *Gideon* that “the harsh reality [is] that the quality of a criminal defendant’s representation frequently may turn on his ability to retain the best counsel money can buy.”<sup>197</sup> A rich criminal defendant charged with white-collar crimes can afford a legal team from a top-flight law firm, constrained only by the defendant’s pocketbook. An indigent defendant,<sup>198</sup> by contrast, is represented by a public defender, whose limited resources must be apportioned among many criminal defendants, sometimes even hundreds. The combination of a fixed salary and a heavy caseload makes it difficult, if not impossible, for public defenders to perform all of the costly work—meeting with defendants to discuss the case, investigating possible defenses, filing motions, and negotiating with prosecutors—that is necessary to provide zealous advocacy in every case.<sup>199</sup> As a result of a constant flow of new cases, public defenders engage in “assembly-line justice” in which they are “forced to rely on

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way, *The Snows of Kilimanjaro*, in *The Snows of Kilimanjaro and Other Stories* 3, 23 (Scribner 1995) (1936). In the short story, Hemingway’s retort is made through an anonymous character, but Fitzgerald later attributed the response to Hemingway himself. I wish I could take credit for the use of these quotes in connection with criminal representation, but I have borrowed them from Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 *Harv. L. Rev.* 670, 670 (1992).

<sup>194</sup> 372 U.S. 335, 344 (1963).

<sup>195</sup> See *id.* (holding that the right to counsel is a fundamental right).

<sup>196</sup> See *id.*; Scott & Stuntz, *supra* note 55, at 1928.

<sup>197</sup> *Caplin & Drysdale v. United States*, 491 U.S. 617, 630 (1989) (quoting *Morris v. Slappy*, 461 U.S. 1, 23 (1983) (Brennan, J., concurring)).

<sup>198</sup> Importantly, most criminal defendants are indigent. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 *Hastings L.J.* 1031, 1034 (2006) (“Poor people account for more than 80% of individuals prosecuted.”).

<sup>199</sup> Paul T. Crane, *Charging on the Margin*, 57 *Wm. & Mary L. Rev.* (forthcoming 2016) (manuscript at 43–44), available at <http://ssrn.com/abstract=2649229>, archived at <http://perma.cc/2LYJ-3H92>.

stereotypes and quick categorizations of a case as being of a ‘certain kind’ with a certain ‘going rate.’”<sup>200</sup>

Money is not the only difference. Fitzgerald was on to something when he suggested a more nuanced dissimilarity.<sup>201</sup> In the context of assistance of counsel, rich defendants, unlike the non-rich, often have “relational” criminal representation, which begins long before charges are filed against the defendant.<sup>202</sup> In other words, attorneys for rich defendants offer advice for behavior *ex ante*, helping clients exploit gray areas of the law before any conduct occurs.<sup>203</sup> Sometimes, these attorneys help facilitate criminally suspect behavior.<sup>204</sup> The Supreme Court has taken some measures to curb the ability of affluent defendants to employ their resources to exploit vagaries in the criminal law,<sup>205</sup> but the general difference remains. The rich often benefit from relational representation that begins before potentially suspect conduct is committed, while the non-rich—especially indigent defendants—typically are represented only after charges are brought against them.

### 1. *Deepening the Divide*

Abandoning the Blackstone principle would deepen the divide in quality of counsel. Because there would be fewer procedural protections—most notably, a lower standard of proof—more defendants would be dependent on the quality of their counsel.<sup>206</sup> Ready-made procedural safeguards create a floor that protects *all* defendants. No matter where the floor is set, there will be some cases in which evidence is irrefutable and variation in the quality of counsel would hardly matter. But there will also be some cases that fall on the border, where quality of counsel matters a great deal. Lowering the floor would not necessarily increase the proportion of cases on the border, but it would have two effects. First, it would change who is on the border. Borderline defendants in a

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<sup>200</sup> Andrew E. Taslitz, *The Political Economy of Prosecutorial Indiscretion*, in *Criminal Law Conversations* 533, 534 (Paul H. Robinson et al. eds., 2009).

<sup>201</sup> Again, I attribute the literary reference to Pam Karlan. See Karlan, *supra* note 193, at 670–71.

<sup>202</sup> *Id.* at 672.

<sup>203</sup> *Id.* at 671.

<sup>204</sup> *Id.*

<sup>205</sup> See, e.g., *Caplin & Drysdale v. United States*, 491 U.S. 617, 626 (1989) (holding that a defendant has no right to use stolen money to pay for a defense attorney).

<sup>206</sup> See Scott & Stuntz, *supra* note 55, at 1933 (describing how a lawyer’s skill would matter more “in a trial system with a higher error rate than the current one”).

non-Blackstonian world would not be on the border in a Blackstonian world. Second, as the floor lowers, one would expect the number of total cases to increase because prosecutors will bring more cases when a conviction is easier to prove. As a result, there would be more borderline cases in which the quality of counsel matters. Under these circumstances, one would expect poor defendants to be worse off than rich defendants.

Counsel for the rich could more easily handle a great number of borderline cases. More billable hours may be required, but associates are easily added when clients are willing to pay. Private firms would indeed welcome the increase in borderline cases as a business opportunity. The public defender, by contrast, would have no more hours to give. His hours would indeed be fewer since a greater number of his clients would go to trial.<sup>207</sup> Preparation would necessarily be more “slapdash.”<sup>208</sup> Put simply, “The increased impact of skill differences among attorneys would adversely affect poor defendants, since they tend to have the worst lawyers.”<sup>209</sup>

Rich defendants would gain a further advantage through relational representation. When advising their clients *ex ante* in a non-Blackstonian world, attorneys for the rich could easily adapt to the new conditions. Because criminal liability would be easier to prove, their advice would generally become more conservative. Poor defendants, who would not benefit from *ex ante* cautioning,<sup>210</sup> would be more likely to engage in conduct that exposes them to criminal liability. In sum, a non-Blackstonian world would make the difference in quality of representation between rich and poor defendants more pronounced.

## *2. An Indirect Effect: Voter Attitudes*

The deepened divide in the quality of counsel reinforces the earlier claim that there is little reason to think voters would be more sympathetic toward defendants in a non-Blackstonian world.<sup>211</sup> One would expect law-abiding citizens, particularly those with political clout, to have

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<sup>207</sup> See *supra* Subsection II.B.2. My assumption here is that representation at trial will demand more hours than representation during plea bargaining.

<sup>208</sup> Scott & Stuntz, *supra* note 55, at 1933–34.

<sup>209</sup> *Id.* at 1934.

<sup>210</sup> It is possible that cautioning could come from another source, such as the “word on the street.” But such a source would presumably be inferior to advice from a lawyer.

<sup>211</sup> See *supra* Subsection II.D.2.

higher-quality representation than recidivists, who are often poor. Although there would be more false convictions in a non-Blackstonian world, recidivists—more often members of a lower socioeconomic class—would more likely bear their burden than would law-abiding citizens.<sup>212</sup> Contrary to Epps's suggestion, there would be little reason for law-abiding voters to fear punishment, thus little reason to expect them to vote for more lenient punishments.

Non-Blackstonian voters may indeed be *more* likely to impose harsh punishments. Recall that the benefit of a non-Blackstonian world—more accurate results on the whole—comes at the cost of more false convictions. But if law-abiding citizens, the bulk of voters, have no reason to fear false conviction themselves, the promise of greater accuracy may push them toward harsher sentences. Epps argues that, by making it harder to punish, a Blackstonian world focuses criminal punishment on a smaller group of people.<sup>213</sup> He suggests a non-Blackstonian world would spread criminal punishment more thinly because more defendants would be convicted.<sup>214</sup> This may be so, but a non-Blackstonian world where enforcement practices remain the same<sup>215</sup> and inequality in representation is more pronounced would be more perverse than a Blackstonian regime. Although the group bearing punishment would be greater in number, it would be the same in kind. In short, more of the politically unattractive class would be convicted, and worse, more of them would be falsely convicted.

### *B. Costs of Punishment*

As Epps notes, more individuals would be incarcerated in a non-Blackstonian world because convictions would be easier to secure.<sup>216</sup> As a result, Epps argues, sentences would be shorter.<sup>217</sup> Regardless of whether this is true,<sup>218</sup> the ill effects of incarceration would no doubt reach a greater number of people, more of whom are innocent. Given the

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<sup>212</sup> See *supra* Subsection II.A.1.

<sup>213</sup> See Epps, *supra* note 3, at 1103. Epps draws on Stuntz's famous description of the criminal justice system as a "giant funnel." See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 *Harv. L. Rev.* 780, 782–83 (2006).

<sup>214</sup> See Epps, *supra* note 3, at 1103.

<sup>215</sup> See *supra* Subsection II.A.1.

<sup>216</sup> See Epps, *supra* note 3, at 1095.

<sup>217</sup> See *id.* at 1098.

<sup>218</sup> For an argument that it is true, see *supra* Subsection II.D.1.

deepened divide in assistance of counsel, one would expect a greater percentage of incarcerated individuals to come from a lower socioeconomic class. One would further expect the increase in convictions to be felt by recidivists, who are much more likely to endure prosecution.<sup>219</sup>

Besides the straightforward costs of liberty deprivation, incarceration encourages recidivism in a way that deepens inequality. Professor Bruce Western has found that incarceration causes the wages of ex-inmates to be ten to twenty percent lower than they otherwise would be and reduces the rate of wage growth by about thirty percent.<sup>220</sup> Three factors contribute to slower wage growth. First, imprisonment imposes a stigma vis-à-vis future employers, who are less likely to hire ex-convicts than those who have not been imprisoned.<sup>221</sup> Second, job skills are eroded by incarceration such that ex-convicts are generally not as productive as other workers.<sup>222</sup> Skill erosion results from a combination of lack of work experience, exacerbation of physical and mental illnesses, and behavioral prison norms that are inconsistent with work routines.<sup>223</sup> Third, the social contacts necessary for attaining information about job opportunities are often destroyed, and what is worse, connections to gangs are strengthened.<sup>224</sup> Lower wages often correlate with irregular employment, which often leads to more crime.<sup>225</sup> Simply put, prison helps to create repeat offenders. Because those of a lower socioeconomic status would more likely go to prison in a non-Blackstonian world, they would more likely suffer from its effects.

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<sup>219</sup> See *supra* Subsection II.A.1.

<sup>220</sup> Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 *Am. Soc. Rev.* 526, 541 (2002) (“There is strong evidence that incarceration reduces the wages of ex-inmates by 10 to 20 percent. More relevant for the idea of imprisonment as a turning point, incarceration was also found to reduce the rate of wage growth by about 30 percent.”).

<sup>221</sup> *Id.* at 528; see also Harry J. Holzer, *What Employers Want: Job Prospects for Less-Educated Workers* 58–59 (1996) (noting that employers are more willing to hire applicants with a recent history of unemployment or limited education than an applicant with a criminal record); Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 *Soc. Probs.* 133, 135–36 (1962) (finding that criminal records have “a rather graphic” effect on employer hiring preferences).

<sup>222</sup> Western, *supra* note 220, at 528.

<sup>223</sup> See *id.*; John Irwin & James Austin, *It’s About Time: America’s Imprisonment Binge* 180 (4th ed. 2012).

<sup>224</sup> Western, *supra* note 220, at 528; see also John Hagan, *The Social Embeddedness of Crime and Unemployment*, 31 *Criminology* 465, 469 (1993) (discussing the adverse effect of criminal contacts on the likelihood of developing job contacts).

<sup>225</sup> Western, *supra* note 220, at 542.

The effects of incarceration reach beyond incarcerated individuals. Western argues that slow wage growth for ex-convicts, coupled with the prison boom of the last several decades, may deepen inequality in the aggregate.<sup>226</sup> Because some groups have higher rates of incarceration than others, the effects are not only distributed disproportionately but also might be *over*-distributed. For example, because black men who are not highly educated have a high rate of incarceration, the stigma that attaches to imprisonment may extend beyond particular black ex-convicts to non-incarcerated black men.<sup>227</sup> To make the point more broadly, the higher the rate of incarceration for a given group, the greater the risk that stigmatic harm extends to non-incarcerated members of that group. Because there would be more incarcerated individuals in a non-Blackstonian world and a greater percentage of them would be from a lower socioeconomic class, the stigma that comes with incarceration would be more likely to spill over to non-incarcerated individuals within the class. Inequality thus may well be deepened among incarcerated individuals and in society more generally.

#### CONCLUSION

This Note offers a first response to Epps's challenge of the proposition that the Blackstone principle benefits innocent defendants by identifying some defects in his arguments and providing an affirmative defense of the principle that Epps ignores. There are no certainties here because the inquiry deals with questions of an empirical nature whose answers are beyond reach. But the argument does shore up the long-held belief that the Blackstone principle benefits innocent defendants.

Although Epps has usefully widened the scope of the consequentialist inquiry by identifying several systemic consequences, his analysis is speculative and draws heavily from economic reasoning. It thus does little to tell us the degree of any harm the Blackstone principle might cause. This Note makes the inquiry a bit less speculative by considering the role of various actors in the criminal justice system. Pressing on Epps's questionable assumptions about the behavior of these actors reveals, for each of the dynamic consequences, that the harm to innocent defendants is marginal or nonexistent. Indeed, in some cases there may be a benefit. Beyond the defects in Epps's reasoning, moreover, there is

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<sup>226</sup> *Id.* at 527.

<sup>227</sup> *See id.* at 541.

an affirmative reason to think the Blackstone principle benefits the innocent: It promotes equality among defendants.

This Note rebuffs only one attack against the Blackstone principle. It must therefore suspend judgment on whether the Blackstone principle is ultimately justified. There may indeed be good reasons to question strict adherence to it. But the notion that the Blackstone principle does not benefit innocent defendants does not appear to be one of them.