

HARVARD LAW REVIEW

© 2015 by The Harvard Law Review Association

ARTICLE

THE CONSEQUENCES OF ERROR
IN CRIMINAL JUSTICE

Daniel Epps

CONTENTS

INTRODUCTION 1067

I. SITUATING THE BLACKSTONE PRINCIPLE 1072

 A. *Framing the Question* 1072

 B. *Historical Background* 1077

 C. *Lessons from the Past?* 1081

 1. *Death as the Exclusive Punishment* 1081

 2. *Harsh Procedures* 1086

II. ERROR COSTS AND THE DYNAMIC CRITIQUE 1087

 A. *The Traditional Account of the Costs of Errors* 1088

 1. *The Core Case* 1088

 2. *The Conventional Response* 1089

 3. *A Static Perspective* 1092

 B. *The Dynamic Effects of Criminal Errors* 1094

 1. *Crime, Punishment, and Policing* 1095

 2. *Social Meaning* 1099

 3. *Voter Attitudes* 1102

 4. *Law-Enforcement Behavior* 1106

 5. *Legislative Behavior* 1108

 6. *Procedural Subversion* 1108

 C. *Assessing the Dynamic Effects* 1110

 1. *Benefits and Burdens for Innocent Defendants* 1110

 (a) *Hidden Costs* 1110

 (b) *Overestimated Benefits* 1112

 2. *Exacerbating Political Process Pathologies* 1115

 (a) *The Political Process Failure Narrative* 1115

 (b) *Reinforcing Failure* 1117

 D. *The Dynamic Critique* 1121

III. ALTERNATIVE JUSTIFICATIONS 1124

 A. *Alternative Consequentialist Arguments* 1125

| | |
|--|------|
| 1. <i>The Double Tragedy</i> | 1125 |
| 2. <i>Punishment Costs</i> | 1128 |
| 3. <i>Diffuse Harms</i> | 1130 |
| B. <i>Deontological Justifications</i> | 1131 |
| 1. <i>Moral Harm</i> | 1131 |
| 2. <i>The Social Contract</i> | 1138 |
| 3. <i>Retributive Duties</i> | 1140 |
| C. <i>The Case Against the Blackstone Principle</i> | 1142 |
| IV. BEYOND THE BLACKSTONE PRINCIPLE | 1143 |
| A. <i>Implications for Existing Procedural Rules</i> | 1143 |
| B. <i>Coping Mechanisms</i> | 1148 |
| CONCLUSION | 1151 |

THE CONSEQUENCES OF ERROR IN CRIMINAL JUSTICE

*Daniel Epps**

“Better that ten guilty persons escape, than that one innocent suffer” is a revered adage in the criminal law. It serves as shorthand for an important rule about punishment: minimizing wrongful convictions is more important than overall accuracy. This “Blackstone principle” accords with most people’s deeply felt intuitions about criminal justice. This Article challenges that fundamental precept. It begins by situating the Blackstone principle in the history of Anglo-American criminal law. That history shows how the principle gained prominence — most notably, because in Blackstone’s time and earlier, death was the exclusive penalty for many crimes — but provides no compelling justification today. The leading modern argument for the Blackstone principle is that false convictions are simply more costly than false acquittals. But that argument is incomplete, because it focuses myopically on the costs of errors in individual cases. A complete analysis of the Blackstone principle requires taking stock of its dynamic effects on the criminal justice system as a whole. That analysis reveals two significant but previously unrecognized drawbacks of the Blackstone principle: First, its benefits to innocent defendants are smaller than usually assumed; it could even make those defendants worse off. Second, the principle reinforces a widely recognized political process failure in criminal justice, hurting not just defendants but society as a whole. The magnitude of these effects is uncertain, but they could more than cancel out the principle’s putative benefits. The Article then analyzes alternative justifications for the Blackstone principle. None is satisfactory; each rests on dubious empirical assertions, logical errors, or controversial normative premises. There is thus no fully persuasive justification for the principle today. Rejecting the Blackstone principle would require us to rethink — although not necessarily redesign — various aspects of our criminal procedure system.

INTRODUCTION

“[B]etter that ten guilty persons escape, than that one innocent suffer”¹ is perhaps the most revered adage in the criminal law, exalted by

* Climenko Fellow and Lecturer on Law, Harvard Law School. I am indebted to many people for helpful conversations and comments: William Baude, Stephanos Bibas, Mark Bjorkman, Andrew Blair-Stanek, Darryl Brown, Michael Coenen, Danielle D’Onfro-Epps, Garrett Epps, Richard Fallon, Talia Fisher, Jacob Gersen, Jack Goldsmith, Jon Hanson, Steven Horowitz, Bert Huang, Orin Kerr, Michael Klarman, Joshua Kleinfeld, Adriaan Lanni, Sanford Levinson, John Manning, Noah McCormack, William Ortman, Matthew Owen, David Pozen, John Rappaport, Richard Re, Daniel Richman, Louis Michael Seidman, David Sklansky, Holger Spamann, Carol Steiker, Jeannie Suk, Cass Sunstein, Elisabeth Theodore, Susannah Barton Tobin, Adrian Vermeule, Robert Weisberg, Adam Winkler, participants in workshops at Harvard and the University of Chicago, and the editors of the *Harvard Law Review*. Gillian Gamberdell provided excellent research assistance. I am especially grateful to Daryl Levinson, who generously read multiple drafts and provided critical guidance at various stages; and to the late William J. Stuntz, who sparked my interest in criminal justice and who provided encouragement as these ideas first began to take shape.

¹ 4 WILLIAM BLACKSTONE, COMMENTARIES *352.

judges² and scholars³ alike as “a cardinal principle of Anglo-American jurisprudence.”⁴ Of course, no one maintains that our system produces exactly ten false acquittals⁵ for every false conviction — nor do many hold that out as a serious goal.⁶ But the constant recitation of Blackstone’s ratio matters, even if the numbers themselves do not. The maxim is “a slogan meant to convey a message quickly and memorably,”⁷ standing for a more general rule, which I’ll call the “Blackstone principle”: in distributing criminal punishment, we must strongly err in favor of false negatives (failures to convict the guilty) in order to minimize false positives (convictions of the innocent), even if doing so significantly decreases overall accuracy.⁸ As Richard Fallon puts it:

² See, e.g., *Furman v. Georgia*, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring) (quoting William O. Douglas, *Foreword to JEROME FRANK & BARBARA FRANK, NOT GUILTY* 11–12 (1957)); *Coffin v. United States*, 156 U.S. 432, 456 (1895); *United States v. Doyle*, 130 F.3d 523, 538 (2d Cir. 1997); SONIA SOTOMAYOR, *MY BELOVED WORLD* 208 (2013) (“Blackstone’s famous ratio . . . still speaks to a deep-seated sense of what is just.”).

³ See, e.g., Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1523 (1996); Bryan A. Liang, *Shortcuts to “Truth”: The Legal Mythology of Dying Declarations*, 35 AM. CRIM. L. REV. 229, 255 (1998); Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CALIF. L. REV. 721, 775 (2007).

⁴ *United States v. Greer*, 538 F.2d 437, 441 (D.C. Cir. 1976). Nor is this sentiment unique to Anglo-American law; as Alexander Volokh has amusingly documented, many legal and religious thinkers over the centuries have endorsed similar ratios. See Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 173–74 (1997).

⁵ I use this phrase “false acquittals” to include events that are not acquittals per se, but that represent some other kind of failure by the justice system to impose punishment on a person whom authorities initially and correctly identified as guilty, such as a prosecutor’s decision not to press charges after an arrest or a judge’s order dismissing an indictment.

⁶ See D. Michael Risinger, Essay, *Tragic Consequences of Deadly Dilemmas: A Response to Allen and Laudan*, 40 SETON HALL L. REV. 991, 999 (2010) (“[F]ew people have urged with any serious reflection the [literal] use of the Blackstone ratio . . .”). If the ratio were treated as the sole benchmark for the success of the criminal justice system, it would permit absurd results. For example, a system that, out of 100 trials, convicted 9 innocent people and acquitted 91 guilty people (and thus rendered no accurate adjudications at all) would technically comply with the principle. See Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 75–77 (2008).

⁷ 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, Spring 1990, at 226, 227. A quick note to avoid confusion: Reiman and van den Haag are coauthors of their article, but within it each offers his own take on the Blackstone principle — Reiman is “pro”; van den Haag is “con.” *Id.* at 226 n.*. For that reason, subsequent discussion of the article will refer to particular points as made by Reiman or by van den Haag alone.

⁸ See, e.g., Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 136 (2008) (“While [Blackstone’s] ratio is not meant to create a rigid mathematical formula . . . the maxim does at least express a value preference that . . . [w]rongful conviction of the innocent is a greater constitutional wrong than is failure to convict the guilty.”); Risinger, *supra* note 6, at 1002 (“[Blackstone’s] expression . . . was meant as a general declaration that, for any given crime, an error that convicts an innocent person is much worse morally than an error that acquits a guilty person.”); Hon. J. Harvie Wilkinson III, Essay, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1109 (2014) (“At its core, the ratio is not about the proper statistical distribution of convictions and acquit-

[E]rrors that result in the conviction of the innocent are more morally disturbing than errors that result in acquittals of the guilty. In light of that assessment, we have adopted a system that minimizes the most morally grievous errors, even if that system leads to more of the less grievous errors, and indeed to more total errors, than would an alternative.⁹

Commentators and jurists frequently affirm the importance of this idea and use it to explain pro-defendant procedural asymmetries.¹⁰

Yet for all the lip service this idea receives, and for all its importance in justifying entrenched rules, it has been subject to surprisingly little rigorous analysis. Some have noted that the idea's "foundations . . . are conspicuous for their lack of supporting authority."¹¹ And a few scholars — most prominently, Larry Laudan¹² — have contended that the principle is overly protective of criminal defendants at the expense of victims.¹³ But serious and sustained discussions of the principle's costs and benefits are few and far between. Most simply treat it as a self-evident truth.

This Article seeks to give the Blackstone principle the careful attention it deserves. It provides a comprehensive account of the principle, tracing its history and analyzing its justifications. More importantly, the Article offers a novel critique of the Blackstone principle. Though previous critics have taken the principle's purported benefits to innocent defendants at face value while emphasizing the

tals The ratio is about balancing the twin aims of our criminal justice system: How do we punish as many of the deserving guilty as possible while ensnaring as few of the innocent as possible?"

⁹ Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1706 (2008).

¹⁰ See, e.g., *Bunnell v. Sullivan*, 947 F.2d 341, 352–53 (9th Cir. 1991) (en banc) (Kozinski, J., concurring in the judgment); GLANVILLE WILLIAMS, *CRIMINAL LAW* 871 (2d ed. 1961); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 694 (1968); Robert P. Mosteller, Essay, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1711 (1997); Jon O. Newman, Lecture, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 980–81 (1993).

¹¹ James R. Acker, *Foreword*, 74 ALB. L. REV. 1067, 1070 (2011). Similarly, Evan Tsen Lee has wondered:

Why do we not regard incorrect outcomes in the criminal justice system as fungible? It would not be irrational in the least to engineer the criminal justice apparatus to convict innocent people at roughly the same rate that guilty people are freed. . . . Amazingly, political morality has never supported any such proposition.

Evan Tsen Lee, *On the Received Wisdom in Federal Courts*, 147 U. PA. L. REV. 1111, 1117 (1999).

¹² Over recent years, Laudan has written a book and a number of articles (some coauthored with Ronald Allen) that strongly question the idea behind the Blackstone ratio. See LARRY LAUDAN, *TRUTH, ERROR, AND CRIMINAL LAW* (2006) [hereinafter LAUDAN, *TRUTH, ERROR*]; Allen & Laudan, *supra* note 6; Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 CHI.-KENT L. REV. 23 (2010); 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 (Leslie Green & Brian Leiter eds., 2011) [hereinafter Laudan, *The Rules of Trial*].

¹³ See, e.g., Richard L. Lippke, *Punishing the Guilty, Not Punishing the Innocent*, 7 J. MORAL PHIL. 462 (2010); Reiman & van den Haag, *supra* note 7, at 240–48.

harm it does to innocent crime victims, this Article takes a different tack: it analyzes the principle from a *dynamic perspective*, taking account of the principle's effects on the criminal justice system as a whole. That approach reveals two significant but previously unrecognized drawbacks of the Blackstone principle: First, its benefits to innocent defendants are smaller than usually assumed; it could even make those defendants worse off. Second, the principle reinforces a widely recognized political-process failure in criminal justice, hurting not only defendants but also society as a whole. These effects may be significant enough to outweigh the principle's putative benefits. Nor is there another fully satisfying justification for the principle. We should thus reject the principle as a theory of the proper distribution of punishment.

The Article proceeds to that conclusion in four parts. After briefly clarifying the problem posed by the Blackstone principle, Part I examines the principle's historical origins. Far from revealing a clear justification for the principle today, this inquiry suggests that our professed allegiance to the Blackstone principle is yet another example of how we "live under a criminal procedure for which we have no adequate theory."¹⁴ Anglo-American criminal law before and during Blackstone's time differed from our criminal justice system in important respects. Capital punishment was often the *only* punishment available, even for some relatively minor offenses. Yet today, punishment is rarely so binary. Moreover, English criminal procedure was in many ways surprisingly harsh to defendants, making modern reliance on the Blackstone principle to justify various defendant-friendly procedures anachronistic.

A justification for the Blackstone principle today is thus needed, and Part II begins to look for one. Section II.A lays out the most traditional and straightforward argument: that the principle accurately reflects the relative costs of false convictions and false acquittals. Several commentators have criticized this theory on the ground that it inappropriately discounts the interests of crime victims.¹⁵ But assessing the costs of the Blackstone principle is more complicated than previous commentators on either side of the debate have recognized. An accurate calculus requires accounting for the Blackstone principle's effects on the criminal justice system as a whole.

The remainder of Part II performs that analysis, and in so doing offers the Article's key insight: the dynamic critique of the Blackstone principle. Section II.B catalogues the ways in which the principle could affect the overall operation of the criminal justice system: in-

¹⁴ JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 9 (2003).

¹⁵ See *infra* section II.A.2, pp. 1089–92.

creased punishment for convicted defendants; higher levels of stigma created by convictions and acquittals; shifts in voter attitudes towards criminal justice; changes in the attitudes and behavior of law-enforcement officers; legislative efforts to circumvent the principle's protections; and procedural subversion by judges and prosecutors.

Section II.C normatively assesses these effects; it concludes that they lead to two sets of previously unrecognized costs. First, the Blackstone principle helps innocent defendants less than it first appears: while some innocent defendants avoid punishment, others face harsher penalties or increased social stigma; and other effects make determining how many innocents actually avoid punishment difficult. Second, the principle reinforces a widely recognized political failure in criminal justice. Numerous commentators have observed that the political system produces suboptimal and unjust results because most voters do not imagine ever facing criminal sanctions. The Blackstone principle exacerbates those problems, because it makes law-abiding voters even less likely to anticipate criminal punishment while simultaneously making them more concerned about crime.

Section II.D then summarizes the dynamic critique of the Blackstone principle. Although we cannot conclusively determine the magnitude of the dynamic effects, it is at least plausible that they could be large enough that the Blackstone principle is a net cost for society. The principle also has significant drawbacks from distributional and fairness perspectives.

Having rejected the traditional error-cost argument as incomplete, the Article turns to alternative justifications in Part III. Section III.A considers other consequentialist arguments; although these justifications are flawed for their failure to take a dynamic perspective, they also fail when considered on their own terms. At best they turn on dubious empirical premises and at worst they involve logical errors. Section III.B evaluates deontological justifications for the principle, which would show why we must follow it even if its costs outweigh its benefits. These arguments, too, are unsatisfactory; most notably, the deontological case fails to appreciate the important distinction between intentional and unintentional punishment of the innocent. We must look to nondeontological considerations in determining how to balance the obligation to minimize *unintentional* punishment of the innocent (some of which is an inevitable result of any criminal justice system) against another moral constraint — the state's obligation to protect its citizens from crime. Section III.C summarizes the case against the Blackstone principle.

Part IV then considers what implications rejecting the Blackstone principle would have for our procedural system. Section IV.A explains that we shouldn't rush to eliminate existing pro-defendant asymmetries. Those asymmetries might have different consequences for error distribution than we might think. And they also might have justifications

that are independent of the Blackstone principle. These possibilities require further investigation. If those asymmetries have no good justification other than the Blackstone principle, we might want to think about eliminating them. But even if rethinking the Blackstone principle doesn't lead us to change our system, it will help us better understand the system.

Section IV.B then explores a more moderate response than rewriting the procedural system: creating "coping mechanisms" to blunt some of the costs of the Blackstone principle's dynamic effects. While working out the details of such proposals would be complex, various reforms could ameliorate some of the Blackstone principle's drawbacks even if our procedural rules largely continue to track the principle. The simplest change we can and should make, however, is to stop reciting the Blackstone principle like a mantra. A number of dynamic costs are the result of the public's belief that false positives are unlikely, and constant reminders that our system is designed to make false convictions unlikely only exacerbates that problem. Simply increasing public *perception* of the likelihood of false convictions could improve the status quo.

I. SITUATING THE BLACKSTONE PRINCIPLE

Section A briefly defines the Blackstone principle in order to frame the question at issue. Section B then situates the principle in the history of English and American criminal law. Section C analyzes whether that history reveals a compelling justification for our continued reliance on the Blackstone principle today.

A. Framing the Question

As suggested in the Introduction, Blackstone's ten-to-one ratio and its variations can't be taken literally. There's no way to measure the exact ratio between the false convictions and false acquittals our system creates, and no one seriously advocates that it is critical to strive for exactly ten false acquittals for every false conviction. Instead, the ratio serves as shorthand for a less precise — but still important — moral principle about the distribution of errors: we are obliged to design the rules of the criminal justice system to reduce the risk of false convictions — even at the expense of creating more false acquittals and thus more errors overall.¹⁶

¹⁶ See Fallon, *supra* note 9, at 1706; see also James Bradley Thayer, *The Presumption of Innocence in Criminal Cases*, 6 YALE L.J. 185, 187 (1897) ("Obviously [various versions of the Blackstone ratio] are not to be taken literally. They all mean the same thing, differing simply in emphasis — namely, that it is better to run risks in the way of letting the guilty go, than of convicting the innocent.").

Consistent with that notion, American criminal procedure rules incorporate numerous formal asymmetries that tilt in favor of defendants and thus, at least in theory, in favor of false acquittals and against false convictions. Most are considered so fundamental that they are either explicitly enshrined in constitutional text or have been found implicit in the guarantees of due process. Among the most important: the prosecution must prove beyond a reasonable doubt that the defendant committed the crime charged.¹⁷ In the federal system¹⁸ as well as in most states,¹⁹ every member of a jury must vote to convict before a defendant can be found guilty; if even one juror insists on acquittal, the result is a hung jury and the defendant may not be punished (though he may be retried).²⁰ A defendant may appeal his conviction, but the government may not appeal an acquittal, even if manifestly erroneous.²¹ The list could go on, but in short, “the rules of the game are stacked in favor of innocent defendants.”²²

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.²³ And even those asymmetries that ostensibly skew errors away from false convictions may have justifications other than the Blackstone principle.²⁴ A further complication is that even if we were certain that the formal rules governing trials implement the Blackstone principle, it would still be unclear how much our system actually complies with the principle in practice. The vast majority of convictions in our system are the product of plea bargains,

¹⁷ *In re Winship*, 397 U.S. 358, 364 (1970).

¹⁸ See FED. R. CRIM. P. 31(a); see also *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356, 369–71 (1972) (Powell, J., concurring in the judgment).

¹⁹ See Michael H. Glasser, Comment, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 671 (1997) (noting that only two states permit conviction by nonunanimous juries). The unanimity requirement is one of only a few provisions of the Bill of Rights not incorporated against the states. See *Apodaca*, 406 U.S. at 406 (plurality opinion); *Johnson*, 406 U.S. at 369–77 (Powell, J., concurring in the judgment). This result is widely viewed as anomalous, and the Supreme Court itself recently intimated that it may be incorrect. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.14 (2010) (noting that *Apodaca* “was the result of an unusual division among the Justices”). The Court has, nonetheless, refused to take up challenges to the *Apodaca* rule since *McDonald*. See, e.g., *Herrera v. Oregon*, 131 S. Ct. 904 (2011) (mem.), denying cert. to *State v. Herrera*, No. A141205 (Or. Ct. App. Feb. 22, 2010).

²⁰ See, e.g., David Paul Nicoli, Comment, *Federal Rules of Criminal Procedure 23(b) and 24(c): A Proposal to Reduce Mistrials Due to Incapacitated Jurors*, 31 AM. U. L. REV. 651, 674 n.156 (1982).

²¹ *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam).

²² Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1950 (1992).

²³ See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 25–31 (1997).

²⁴ See *infra* section IV.A, pp. 1143–48.

not trials.²⁵ And the degree to which the dynamics of plea bargaining distort the distribution of errors supposedly produced by rules governing trials is far from clear.

For these reasons, it's critical to stress that the immediate target here is not particular procedural rules. Rather, this Article is critiquing an *idea* about how criminal punishment should be distributed, one that may not actually be consistent with the way our system operates. The Article will discuss the implications of the analysis here for our procedural system in Part IV. Until then, however, it's critical not to conflate the Blackstone principle with the procedures it is sometimes called upon to explain. For now, it suffices to note that, regardless of how much it actually explains about our procedures, the Blackstone principle is an idea that has unquestionable power. Scholars and judges frequently pay allegiance to it and use it to justify procedural asymmetries.²⁶ And the public at least appears to *think* that our system complies with the Blackstone principle, whatever the reality: opinion polls show that many people believe the guilty too often go free, while far fewer worry about false convictions.²⁷ As discussed below, this perception may have significant implications for our system even if it is inaccurate.²⁸

Having clarified what the Blackstone principle is, the question becomes why it is important. The principle makes the criminal sphere relatively unusual; for the most part, rules outside of the criminal context are not designed to skew errors asymmetrically. For example, in most civil cases the burden of persuasion is set at the preponderance of the evidence standard²⁹ and both sides have equal rights to appeal adverse judgments.³⁰ The apparent background assumption is that "a failure to find for a deserving plaintiff is no less harmful than holding liable a nonculpable defendant."³¹ While it's possible to debate the

²⁵ See sources cited *infra* note 236.

²⁶ See sources cited *supra* notes 2–4, 10.

²⁷ In one study of Chicago citizens, 80% of respondents agreed that "[t]he courts are too easy on criminals" while only 24% agreed that "[m]any innocent people are convicted by the courts." Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 850 tbl.1 (1998). In a nationwide poll, 70% of respondents said "yes" when asked, "Do you believe the criminal justice system makes it too hard for the police and prosecutors to convict people accused of crimes, or not?" GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1993, app. at 232 (1994).

²⁸ See *infra* section II.B, pp. 1094–109.

²⁹ See *Dowling v. United States*, 493 U.S. 342, 348–50 (1990).

³⁰ See Robert Wilson, *Free Speech v. Trial by Jury: The Role of the Jury in the Application of the Pickering Test*, 18 GEO. MASON U. C.R. L.J. 389, 403 (2008).

³¹ Frederick Schauer & Richard Zeckhauser, *On the Degree of Confidence for Adverse Decisions*, 25 J. LEGAL STUD. 27, 34 (1996); see also Richard D. Friedman, *Squeezing Daubert out of the Picture*, 33 SETON HALL L. REV. 1047, 1049–50 (2003). Where particularly strong interests are at stake in civil cases, however, the law exhibits greater concern for avoiding false positives by requiring a higher burden of persuasion. See *infra* section II.A.1, pp. 1088–89; cf. Issachar Rosen-Zvi

degree to which these largely symmetrical civil procedure rules *maximize* accuracy,³² it's difficult to dispute that criminal procedure exhibits a greater concern for skewing errors in one direction than does its civil counterpart.

There are some legal domains beyond criminal law where there is support for highly asymmetrical error distribution. Consider, for example, the "precautionary principle," which has many adherents in the global regulatory community. Government should err on the side of regulating too much, the theory goes, because environmental disasters, public health crises, and so on are costlier than unnecessary regulations.³³ First Amendment doctrine likewise seeks a lopsided distribution of errors, although it reflects the opposite view towards the costs of government action versus inaction: it treats the risks of banning potentially valuable speech as much greater than the risks posed by permitting potentially dangerous speech, relying on doctrinal tests designed to make the first type of error rare.³⁴

Commentators have criticized these asymmetrical approaches. The precautionary principle has come under sustained attack for being perverse³⁵ as well as incoherent.³⁶ Similarly, some have argued that the First Amendment should permit the government to restrict more potentially dangerous speech.³⁷ Whatever the merits of those debates, criminal law needs its own justification for its preference for lopsided error distribution — that is, for its own version of the precautionary

& Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 84 (2008) (arguing that we should "replace the current bifurcated civil-criminal procedural regime with a model that runs along two axes that are more compatible with the actual goals of our justice system: the balance of power between the parties and the severity of the sanction or remedy").

³² There is a significant literature analyzing the preponderance standard and its relationship to accuracy in civil cases. See David Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation*, 1982 AM. B. FOUND. RES. J. 487; Steven Shavell, *Uncertainty over Causation and the Determination of Civil Liability*, 28 J.L. & ECON. 587 (1985).

³³ See CASS R. SUNSTEIN, *LAWS OF FEAR* 13 (2005).

³⁴ See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 935–36 (1999) (arguing that in the First Amendment context, "error risk [is not] distributed equally," *id.* at 935); Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1020 (1978) (noting that the First Amendment doctrine assumes it "is preferable to risk allowing some 'unprotected' speech to take place than to risk curtailing the individual's right to speak"). Frederick Schauer has explained how this feature of First Amendment law can be thought of as either an instantiation or a rejection of the precautionary principle, depending "on what we take to be the catastrophic occurrence." Frederick Schauer, *Is It Better to Be Safe than Sorry?: Free Speech and the Precautionary Principle*, 36 PEPP. L. REV. 301, 305 (2009).

³⁵ See Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 WASH. & LEE L. REV. 851, 851–52 (1996).

³⁶ See SUNSTEIN, *supra* note 33, at 4.

³⁷ See, e.g., John H. Wigmore, *Abrams v. U.S.: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 ILL. L. REV. 539, 550–61 (1920).

principle.³⁸ Are we obliged to design the criminal justice system to err strongly in favor of false acquittals in order to minimize false convictions?³⁹

This question is of more than academic interest. In recent years there has been much discussion of whether the criminal justice system is sufficiently equipped to deal with accused terrorists, or whether another approach — such as military tribunals — would be better.⁴⁰ Some argue that the criminal justice system is ill-equipped for combating terrorism in part because it (supposedly) follows the Blackstone principle, and that false positives and false negatives must be weighed differently in a context where one false negative — that is, the failure

³⁸ Adrian Vermeule, *A New Deal for Civil Liberties: An Essay in Honor of Cass R. Sunstein*, 43 TULSA L. REV. 921, 927 (2008) (noting that Blackstone's ratio "is a precautionary principle").

³⁹ Two brief definitional points: First, I use "error" to refer to factually incorrect outcomes (convictions of the actually innocent or failures to convict the truly guilty), not legally erroneous rulings. Many of the errors at issue here result not from legal mistakes but are instead the products of adherence to legal rules designed to reduce the risk of erroneous convictions — such as where a jury acquits an actually guilty person because it applies the reasonable doubt standard. Second, the analysis includes all errors that are endogenous to the rules governing criminal adjudication. That includes trials that lead to the conviction of actually innocent (or acquittal of actually guilty) people, but it also includes dispositions short of actual trial, such as a prosecutor's decision to drop charges upon determining that she could not prove guilt beyond a reasonable doubt; such an outcome is the product of the rules that govern trials even if no trial occurs. See Shawn D. Bushway, *Estimating Empirical Blackstone Ratios in Two Settings: Murder Cases and Hiring*, 74 ALB. L. REV. 1087, 1091 (2011) ("[U]pstream actors in the criminal justice system know the standards of conviction and will not bring forward cases, or even make arrests, that will not meet this standard."). Some errors are, however, exogenous to the rules of trial; many crimes go unpunished simply because police can't identify the wrongdoer. It doesn't make sense to lump those "errors" together with the errors resulting from, say, a highly demanding burden of proof; confining the focus to errors endogenous to adjudicative rules puts the focus on the degree to which procedural rules should seek to skew the distribution of errors. Expanding the lens to include all of the justice system's failures to correctly identify wrongdoers would implicate a much broader set of normative tradeoffs — such as how much society should invest in policing as opposed to other social goals — that needlessly complicate the inquiry.

Some commentators seem to ignore this distinction. See, e.g., Brian Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, 74 ALB. L. REV. 1209, 1210 (2011) (comparing number of wrongful convictions to all "felony offenses that do not end in conviction"). If that is the correct metric, however, for crimes with low rates of detection the criminal adjudicative process could be designed to produce false convictions and false acquittals at equal rates, since the low chance of detection is already doing the necessary work to skew errors in favor of guilty persons going free. For example, burglary had a nationwide clearance rate of only 12.5% in 2009. See U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2009 (2010), <http://www2.fbi.gov/ucr/cius2009/offenses/clearances/index.html> [<http://perma.cc/X3ZY-CTZB>]. This suggests that if the procedural rules were modified to make convictions of accused burglars much easier, and even if many of those arrested were in fact innocent, many guilty burglars would still go free for every innocent person convicted of burglary.

⁴⁰ See, e.g., Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008).

to apprehend a terrorist — could result in many lives lost.⁴¹ Given this debate about the Blackstone principle's proper domain, the time is right to assess the principle's costs and benefits in the traditional criminal context.

B. Historical Background

Although Blackstone gets most of the citations today, the directive to avoid the erroneous punishment of the innocent has much older roots. As Alexander Volokh observes, the idea extends at least as far back as the Old Testament.⁴² In *Genesis*, Abraham pleads with God to spare Sodom in order to avoid “slay[ing] the righteous with the wicked.”⁴³ God agrees that he will not destroy the city if as few as ten righteous persons are found there.⁴⁴ Similarly, in *Exodus*, God commands, “[T]he innocent and righteous slay thou not.”⁴⁵ Interpreting this latter commandment, the twelfth-century rabbi and philosopher Maimonides concluded, “[I]t is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death once.”⁴⁶

The idea that convicting an innocent person is a more morally serious error than acquitting a guilty person was also prevalent in the classical world. Aristotle wrote, “[E]very one of us would rather acquit a guilty man as innocent than condemn an innocent man as guilty, in a case where a man was accused of enslaving or murder. . . . For when there is any doubt one should choose the lesser of two errors.”⁴⁷ Similarly, under Roman law, “It was deemed better to absolve the guilty than to risk sentencing an innocent to death.”⁴⁸

Drawing on these various traditions, medieval theologians developed the “safer path” doctrine, most famously attributed to the thirteenth-

⁴¹ See, e.g., *Esmail v. Obama*, 639 F.3d 1075, 1077–78 (D.C. Cir. 2011) (Silberman, J., concurring); ALAN M. DERSHOWITZ, *PREEMPTION* 22–23 (2006); Vermeule, *supra* note 38, at 928; see also Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1643–44 (2009).

⁴² See Volokh, *supra* note 4, at 173–74, 177–78. This section owes a significant debt to Volokh, whose article pointed the way to numerous sources.

⁴³ *Genesis* 18:25 (King James).

⁴⁴ *Id.* at 18:32.

⁴⁵ *Exodus* 23:7 (King James).

⁴⁶ 2 MOSES MAIMONIDES, *THE COMMANDMENTS* 270 (Charles B. Chavel ed. & trans., Soncino Press 1967) (n.d.); see also Volokh, *supra* note 4, at 178.

⁴⁷ 2 ARISTOTLE, *PROBLEMS* bk. XXIX, at 145 (W.S. Hett trans., Harvard Univ. Press rev. ed. 1957) (n.d.). There is dispute over the authorship of *Problems*. See Volokh, *supra* note 4, at 181 n.45.

⁴⁸ François Quintard-Moréas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMP. L. 107, 111 (2010) (citing DIGEST OF JUSTINIAN 48.19.5); see also John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1199 n.152 (1996) (“The concept that the application of horrific criminal sanctions merited special caution was centuries old. Continental authority extends back to the classical Roman sources.”).

century Pope Innocent III: “When there are doubts, one must choose the safer path.”⁴⁹ Applying this principle, Continental judges developed the rule “*in dubio pro reo*”: “in doubt you must decide for the defendant.”⁵⁰ Although not cast in terms of a numerical ratio, the rule seems to have necessitated some tradeoff between freeing many guilty and saving fewer innocents (as opposed to merely governing situations where evidence is in equipoise), given that it was linked to the notion that judges needed “proof ‘clearer than the midday sun’ before sending a person to blood punishment.”⁵¹

At approximately the same time that the *in dubio pro reo* rule was formulated,⁵² the first precursor to Blackstone’s ratio appeared in English legal literature. In 1470, Sir John Fortescue, who served as Chief Justice of the King’s Bench during the reign of Henry VI, published *De Laudibus Legum Angliae* (Commendation of the Laws of England). Written while Fortescue was in exile in France, the work had the ostensible purpose to instruct Edward of Westminster, the Prince of Wales, in the laws he would administer once he acceded to the British throne.⁵³ In one passage, Fortescue justified capital defendants’ right to peremptory juror challenges thus: “Indeed, one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally.”⁵⁴

While Fortescue may not deserve all the credit, the idea behind his ratio appears to have become familiar to English jurists by the sixteenth or, at the latest, the seventeenth century. According to Sir William Holdsworth, “Both the common law courts and the Star Chamber sometimes professed to believe in the maxim that it is better to let many guilty escape than convict one innocent person.”⁵⁵ By the early eighteenth century, the idea appeared to be in wide circulation: in 1724, Bernard Mandeville criticized the “mighty Saying, that it is bet-

⁴⁹ JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT* 117 (2008) (internal quotation marks omitted); *see also id.* at 116–22. The doctrine actually originated somewhat earlier in the directives of Pope Clement III. *Id.* at 117.

⁵⁰ *Id.* at 122 (internal quotation marks omitted); *see also id.* at 123.

⁵¹ *Id.* at 123.

⁵² *See id.* (“Aegidius Bossius . . . was the first to turn the phrase ‘in dubio pro reo’ in the fifteenth century . . .” (footnote omitted)).

⁵³ *See* F.J.C. Hearnshaw, *Legal Literature*, in 8 *THE CAMBRIDGE HISTORY OF ENGLISH LITERATURE* 309, 314 (A.W. Ward & A.R. Waller eds., 1912).

⁵⁴ JOHN FORTESCUE, *COMMENDATION OF THE LAWS OF ENGLAND* 45 (Francis Grigor ed. & trans., Sweet & Maxwell 1917) (c. 1543) (emphasis omitted).

⁵⁵ 5 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 196 (3d ed. 1945). The earliest recorded instance of which I am aware comes from 1607. *See* Volokh, *supra* note 4, at 182 & n.59 (citing *Robinson v. Nethersall* (Eng. Camera Stellata 1607), *reprinted in* *LES REPORTES DEL CASES IN CAMERA STELLATA 1593 TO 1620*, at 319, 320 (William Paley Baildon ed., 1894)).

ter that five hundred Guilty People should escape, than that one Innocent Person should suffer.”⁵⁶

In a work written in the 1670s but not published until 1736,⁵⁷ noted English jurist Sir Matthew Hale provided what became perhaps the second-most famous formulation of the maxim: “it is better five guilty persons should escape unpunished, than one innocent person should die.”⁵⁸ Hale used the maxim to argue for caution in the use of “presumptive” (that is, circumstantial) evidence.⁵⁹ He was especially troubled by the prospect of defendants being found guilty for crimes that never occurred; he pointed to two cases in which, after the defendants had been convicted of murder and executed, the supposed “victims” turned up very much alive.⁶⁰

It was not until 1770 that Blackstone offered his formulation of the maxim in the fourth volume of his *Commentaries*. He did so rather offhandedly in the course of describing the differences between English civil and criminal evidentiary standards. Indeed, aside from changing the value of “*n*,”⁶¹ Blackstone merely paraphrased Hale:

The doctrine of evidence upon pleas of the crown is, in most respects, the same as that upon civil actions. There are however a few leading points, wherein, by several statutes and resolutions, a difference is made between civil and criminal evidence. . . .

[A]ll presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer. And sir Matthew Hale in particular . . . lays down two rules, most prudent and necessary to be observed: 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods: and, 2. Never to convict any person of murder or manslaughter, till at least the body be found dead; on account of two instances

⁵⁶ 1 BERNARD MANDEVILLE, *THE FABLE OF THE BEES* 309 (London, J. Tonson 3d ed. 1724); see also Margaret Sampson, *Laxity and Liberty in Seventeenth-Century English Political Thought*, in *CONSCIENCE AND CASUISTRY IN EARLY MODERN EUROPE* 72, 86 (Edmund Leites ed., 1988) (paraphrasing Mandeville as arguing that the maxim “had become such a shibboleth that it made a mockery of the deterrent intent of the criminal law”).

⁵⁷ See Bruce P. Smith, *The History of Wrongful Execution*, 56 *HASTINGS L.J.* 1185, 1194 (2005).

⁵⁸ 2 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 289 (George Wilson ed., 1778) (1736). English courts continued to cite Hale even long after Blackstone published his *Commentaries*. See, e.g., *R v. Berens*, (1865) 176 Eng. Rep. 815 (Cent. Crim. Ct.) 817–18; *Queen v. Franz*, (1861) 175 Eng. Rep. 1195 (Croydon Summer Assizes) 1197.

⁵⁹ HALE, *supra* note 58, at 289.

⁶⁰ *Id.* at 290. For interesting background on one of these cases, see Smith, *supra* note 57, at 1190–92. Such cases formed the impetus for the *corpus delicti* doctrine — “the rule, applicable in modern Anglo-American jurisdictions, that the prosecution must carry the burden of proving that a crime has actually been committed before a jury may decide on a defendant’s guilt or innocence.” *Id.* at 1195.

⁶¹ See Volokh, *supra* note 4.

he mentions, where persons were executed for the murder of others, who were then alive, but missing.⁶²

Some form of the Blackstone principle, then, has a long history in English legal scholarship, of which Blackstone's version is merely one example. It seems wrong to credit any one person for the rule; instead, it appears to have simply been "in the air" of English legal thought.⁶³

The principle was also well known across the Atlantic. In 1693, Increase Mather, a leading figure in the Massachusetts Bay Colony, published a book critical of the Salem Witch Trials. One of his objections was that authorities had not required sufficient proof before executing the alleged witches, for "[i]t were better that Ten Suspected Witches should escape, than that one Innocent Person should be Condemned."⁶⁴

The maxim was familiar to the framing generation. John Adams, in defending the British soldiers charged with murder in connection with the event known as the Boston Massacre, urged the jury to look to "the rules laid down by the greatest English Judges, who have been the brightest of mankind; We are to look upon it as more beneficial, that many guilty persons should escape unpunished, than one innocent person should suffer."⁶⁵ Similarly, Benjamin Franklin wrote in a letter: "That it is better a hundred guilty persons should escape than one innocent person should suffer, is a maxim that has been long and generally approved; never, that I know of, controverted."⁶⁶

A number of early American judges recited some variation of the maxim,⁶⁷ in one case elevating it to a "Divine precept."⁶⁸ Blackstone's formulation quickly became the canonical version. Although Blackstone, like Hale, offered his ratio in the context of discussing circumstantial evidence, it became a go-to justification for various other defendant-friendly rules — most notably, the reasonable doubt

⁶² 4 BLACKSTONE, *supra* note 1, at *350–52.

⁶³ WHITMAN, *supra* note 49, at 193 (citing BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE" 22–25 (1991)). Whitman's quote refers to the reasonable doubt rule, but the point seems equally apt applied to the Blackstone principle.

⁶⁴ INCREASE MATHER, CASES OF CONSCIENCE CONCERNING EVIL SPIRITS 66 (Boston, Benjamin Harris 1693).

⁶⁵ 3 LEGAL PAPERS OF JOHN ADAMS 242 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

⁶⁶ Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), *in* 11 THE WORKS OF BENJAMIN FRANKLIN 11, 13 (John Bigelow ed., 1904).

⁶⁷ *See, e.g.*, Middleton v. Commonwealth, 2 Watts 285, 286 (Pa. 1834) ("[S]o rigid is the general observance of [Blackstone's] maxim . . . every doubt is universally resolved in favour of humanity."); *In re Spier*, 12 N.C. (1 Dev.) 491, 503 (1828) (quoting Blackstone's ratio while granting habeas relief on double jeopardy grounds).

⁶⁸ State v. Baldwin, 6 S.C.L. (1 Tread.) 289, 308 (1813) (opinion of Brevard, J.) (relying on "that Divine precept which declares, that 'it is better ten guilty persons should escape, than one innocent suffer'" in arguing that defendants should have the right to examine jurors during voir dire).

standard. The popularity of Blackstone's version of the maxim and the frequency with which it is cited are likely due to Blackstone's out-sized influence on the American legal profession more generally. As Paul Carrington has noted, "Blackstone's *Commentaries* served as the first law book for most Americans entering the legal profession in the nineteenth century. Indeed, more than a few American lawyers may very well have read little else."⁶⁹ But whatever the reason, in relatively short order Blackstone's maxim came to be seen as "a fundamental premise of Anglo-American criminal justice."⁷⁰

C. *Lessons from the Past?*

The Blackstone principle's history may explain why the principle gained prominence, but provides no compelling justification for the rule today. The first and most obvious problem is that Blackstone and his predecessors made little effort to justify the principle. They, like most commentators today, simply treated it as self-evident. But that problem aside, there are other reasons why history provides limited help.

1. *Death as the Exclusive Punishment.* — There are many differences between our criminal justice system and the one known to Blackstone and his predecessors, but perhaps none is as significant as the change in available punishments. In eighteenth-century England and earlier, numerous crimes, including many we would consider minor today (if we recognized them as crimes at all⁷¹), were punishable *exclusively* by death. That is, judges and juries often faced a stark choice between sentencing a defendant to death or setting him free.⁷² The written law was particularly harsh during Blackstone's lifetime,

⁶⁹ 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).

⁷⁰ Adam Heder & Michael Goldsmith, *Recantations Reconsidered: A New Framework for Righting Wrongful Convictions*, 2012 UTAH L. REV. 99, 104.

⁷¹ Blackstone took special exception to the capital felony of being "seen for one month in the company of persons who call themselves, or are called, Egyptians." 4 BLACKSTONE, *supra* note 1, at *4. Apparently, "Egyptians" was a reference to those who have more recently been called 'gypsies.'" Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 707 n.61 (2003).

⁷² See J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1880, at 450 (1986) (noting that at the time of the Restoration, "[w]ith few exceptions, prisoners convicted of treason or of a felony . . . could only be sentenced to death"); CYNTHIA B. HERRUP, THE COMMON PEACE 143 (1987); John Wilder May, *Some Rules of Evidence*, 10 AM. L. REV. 642, 651-52 (1876) ("When these rules began to take form and consistency, the penal code of England was a fearfully bloody code. Death, without benefit of clergy, was denounced against a multitude of misdoings which would now be considered, if offences at all, offences of a comparatively trivial character."); 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.").

as Parliament extended capital punishment to numerous offenses⁷³ and made an important safety valve, the “benefit of clergy,”⁷⁴ unavailable for many crimes.⁷⁵ And although penal transportation (banishment to the colonies) was quickly becoming a more common punishment, it was formally available only for crimes for which benefit of clergy was permitted.⁷⁶

The system’s harshness predictably distorted trial outcomes. Petit juries’ assessments of guilt or innocence varied significantly based on whether death was the expected punishment, becoming more lenient when capital punishment was on the table.⁷⁷ As one historian put it, “A natural result of . . . laws [requiring capital punishment] was the constant perjury of juries. Unwilling to convict culprits for small offenses which were made punishable by death, they frequently acquitted in the face of the clearest evidence.”⁷⁸ Even defendants who were convicted often escaped execution, given the frequency of royal pardons.⁷⁹ Thus, while the law became ever harsher on paper, “the proportion of death sentences actually carried out was small and declining.”⁸⁰ Blackstone himself bemoaned the fact that “these outrageous penalties, being seldom or never inflicted, are hardly known to be law by the public.”⁸¹

⁷³ See Arthur Lyon Cross, *The English Criminal Law and Benefit of Clergy During the Eighteenth and Early Nineteenth Centuries*, 22 AM. HIST. REV. 544, 545 (1917).

⁷⁴ Benefit of clergy was “[o]riginally a device for preserving ecclesiastical criminal jurisdiction over clerics,” but “it became by 1706 a privilege that anyone convicted of a common law felony could claim in order to obtain exemption from the imposition of the death penalty.” John H. Langbein, *Albion’s Fatal Flaws*, 98 PAST & PRESENT 96, 117 (1983). Convicts who successfully claimed benefit of clergy were branded so that they could not obtain the benefit a second time. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 514–15 (4th ed. 2002). Originally, brands were placed on the thumb, but a 1699 statute required brands on the cheek so they could not be hidden. See BEATTIE, *supra* note 72, at 490.

⁷⁵ See Cross, *supra* note 73, at 545; see also BAKER, *supra* note 74, at 515.

⁷⁶ See Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 125 (1999). Transportation was nonetheless used to punish many ostensibly capital offenders, such as when juries “found defendants guilty of lesser crimes than the one charged to avoid having to reach a verdict mandating death.” *Id.* at 128.

⁷⁷ See HERRUP, *supra* note 72, at 145; see also THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800, at 122 (1985) (noting that English juries became more willing to convict over time, as benefit of clergy became available for more defendants).

⁷⁸ 7 WILLIAM EDWARD HARTPOLE LECKY, A HISTORY OF ENGLAND IN THE EIGHTEENTH CENTURY 318 (New York, D. Appleton & Co. 1893).

⁷⁹ See BEATTIE, *supra* note 72, at 431. For a general discussion on the importance of pardons in legitimating the English monarchy, see K.J. KESSELRING, MERCY AND AUTHORITY IN THE TUDOR STATE (2003).

⁸⁰ Joanna Innes & John Styles, *The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England*, 25 J. BRIT. STUD. 380, 403 (1986).

⁸¹ 4 BLACKSTONE, *supra* note 1, at *4.

Accordingly, through jury nullification and other mechanisms, English criminal law produced results consistent with Blackstone's command in capital cases. Today, we think of the Blackstone principle as a constraint on all forms of criminal punishment — whether the crime at issue is capital murder or shoplifting.⁸² Yet there is good reason to think that the principle was tied uniquely to the death penalty context. Early formulations of the ratio, such as Hale's and Fortescue's, explicitly referred to capital punishment.⁸³ Although Blackstone referred only to innocents "suffer[ing]"⁸⁴ rather than being executed (which may further explain why his formulation became especially prominent), it is impossible to extricate his maxim from the context in which it arose. Sir James Fitzjames Stephen offered precisely this explanation for England's allegiance to the principle.⁸⁵ Even well into the nineteenth century, John Stuart Mill opposed the abolition of capital punishment precisely because it encouraged English judges assiduously to avoid wrongful convictions.⁸⁶

Further supporting the notion that the Blackstone principle was bound up with capital punishment is that when a defendant's life was *not* at stake, English law was significantly more willing to risk false

⁸² Formally, "the bulk of criminal procedure applies identically to crimes of every ilk." Note, *Comparative Domestic Constitutionalism: Rethinking Criminal Procedure Using the Administrative Constitution*, 119 HARV. L. REV. 2530, 2536 (2006). In practice, our system may not treat all crimes similarly, however. Alexandra Natapoff has argued that in misdemeanor prosecutions, courts effectively employ a "presumption of guilt, in which evidence is required to *halt* the process of conviction." Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1370 (2012).

⁸³ See, e.g., FORTESCUE, *supra* note 54, at 45 ("Indeed, one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally." (emphasis omitted)); 2 HALE, *supra* note 58, at 289 ("[I]t is better five guilty persons should escape unpunished, than one innocent person should *die*." (emphasis added)); MATHER, *supra* note 64, at 67 ("The Word of God directs men not to proceed to the *Execution of the most capital offenders*, until such time as upon searching diligently the matter is *found to be a Truth, and the thing certain*." (first emphasis added)).

⁸⁴ 4 BLACKSTONE, *supra* note 1, at *352.

⁸⁵ See 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 438–39 (London, MacMillan & Co. 1883) ("I think it probable that the length to which this sentiment [the Blackstone principle] has been carried in our criminal courts is due to a considerable extent to the extreme severity of the old criminal law . . ."); see also Lippke, *supra* note 13, at 470 ("[T]he ten to one ratio may have been more defensible in historical contexts in which the sanctions employed by the criminal justice system were uniformly harsh.").

⁸⁶ In a debate in the House of Commons, Mill argued:

Our rules of evidence are even too favourable to the prisoner: and juries and Judges carry out the maxim, "It is better that ten guilty should escape than that one innocent person should suffer," not only to the letter, but beyond the letter. . . . The very fact that death punishment is more shocking than any other to the imagination, necessarily renders the Courts of Justice more scrupulous in requiring the fullest evidence of guilt.

191 PARL. DEB., H.C. (3d Ser.) (1868) 1053–54. For a modern spin on this argument, see Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597 (2012) (arguing that increasing the severity of sanctions can protect the innocent by making factfinders more cautious).

convictions. Those defendants charged with minor offenses could be tried in “summary” proceedings in which defendants had no right to either an indictment or a jury.⁸⁷ Bruce Smith argues that, at least in the late eighteenth and early nineteenth centuries, defendants in summary proceedings “did *not* benefit from a presumption of innocence but, rather, struggled against a statutory presumption of *guilt*.”⁸⁸

For felonies, however, Blackstone and his predecessors had good reason to urge caution before finding a defendant guilty and therefore eligible for death. Although there is much disagreement over whether capital punishment is ever permissible, most people agree that death sentences require special solicitude.⁸⁹ Death sentences are also seen as more final and irrevocable than other punishments.⁹⁰ The case for caution was particularly strong given the theological background of English criminal law. Church doctrine preceding and during Blackstone’s time instructed judges and juries to err strongly in favor of life. As James Whitman has shown, English jurors literally feared damnation if they erroneously sent an innocent defendant to death.⁹¹

Moreover, given that English judges and juries faced binary punishment options, the Blackstone principle was consistent with simple notions of deterrence. Where only one level of punishment for crime is available, and where that punishment is quite harsh, following something like the Blackstone ratio would make good sense, especially when relatively minor crimes are at issue. As legal economists have observed, imposing a particularly severe penalty on a small percentage of rulebreakers is one way to deter violations.⁹² Just as imposing a massive fine on a few double-parkers might adequately deter double-parking, executing a few thieves while falsely acquitting (or pardoning) the rest might have been sufficient to deter theft (even if morally troubling to modern sensibilities).

But while Blackstone’s maxim might have once made sense, the modern American criminal justice system does not resemble the system that Blackstone and his predecessors knew. Death sentences are a vanishingly small fraction of the criminal punishments meted out each

⁸⁷ See BAKER, *supra* note 74, at 511.

⁸⁸ Bruce P. Smith, *The Presumption of Guilt and the English Law of Theft, 1750–1850*, 23 LAW & HIST. REV. 133, 135 (2005).

⁸⁹ See, e.g., Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 149 (2002) (“[S]ociety may want a higher degree of certainty of guilt before sentencing someone to death than in other, non-capital cases.”).

⁹⁰ See, e.g., Radin, *supra* note 34, at 1023.

⁹¹ See WHITMAN, *supra* note 49, at 4.

⁹² See, e.g., A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880, 886–87 (1979); see also A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887–96 (1998) (arguing that punitive damages are appropriate based on the likelihood that the tortious conduct would go undetected).

year by American courts. The Supreme Court has forbidden capital punishment for (at least most) nonhomicide crimes.⁹³ And even for homicides, it is quite rare; there is fewer than one execution for every hundred such crimes committed.⁹⁴ Instead, incarceration — a punishment that had not yet attained dominance in Blackstone’s time⁹⁵ — is the most common means of punishment today, at least for serious crimes.⁹⁶ Fines are also relatively common.⁹⁷

Such forms of noncapital punishment have their flaws, but they do not implicate precisely the same moral quandaries as the conscious decision to end a life. And thus it is not obvious that they merit precisely the same degree of caution.⁹⁸ More importantly, our system of sanctions is no longer binary in the way the system known to Blackstone was. Courts can now precisely calibrate levels of punishment by adjusting terms of imprisonment or fine levels.⁹⁹ Whereas English judges and juries had only one potential punishment to work with in many cases, we now have a range of options. We could, for instance, punish a small number of burglars with heavy sentences. Or we could punish more of them but give each one a lighter sentence. It’s not clear which option is better, but the ability to adjust sentences gives our system of sanctions flexibility unavailable in Blackstone’s time.

⁹³ See *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”).

⁹⁴ See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.6.79.2011 (2011), <http://www.albany.edu/sourcebook/pdf/t6792011.pdf> [<http://perma.cc/SX5W-RLCY>]. This figure includes both murders and manslaughters. *Id.*

⁹⁵ See Hannah T.S. Long, Note, *The “Inequability” of Incarceration*, 31 COLUM. J.L. & SOC. PROBS. 321, 322 n.2 (1998) (“[I]ncarceration did not become the staple punishment for serious crime until well into the nineteenth century.”).

⁹⁶ See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 2003, at 451 tbl.5.47 (Ann L. Pastore & Kathleen Maguire eds., 2005) (stating that 68% of all state-court felony convictions led to incarceration); *id.* at 428 tbl.5.25 (stating that 61,102 out of 74,850 defendants sentenced in federal court received incarceration).

⁹⁷ See Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 796 (1997) (“[I]mprisonment and monetary fine have become the dominant modes of criminal punishment . . .”).

⁹⁸ For example, it is not obvious that a criminal fine merits the same extreme caution applied to situations involving life and death. Punitive damages, although noncriminal, are similar to fines in some respects. Yet our system imposes them on defendants based only on a preponderance of the evidence showing. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991) (rejecting argument that due process requires clear and convincing evidence standard for punitive damages).

⁹⁹ To be sure, even a short period of incarceration is a difficult fate, and criminal convictions of any kind carry serious stigmatic harms as well as serious collateral consequences. For this reason, a two-year sentence may not be twice as bad as a one-year sentence. But as discussed below, some of these features of punishment may be partially endogenous to how the criminal justice system distributes punishment — that is, the way false positives and false negatives are distributed in the criminal process can affect the precise level of stigma involved in a conviction. See *infra* section II.B.2, pp. 1099–102. Accordingly, when assessing the costs of different types of errors, we can’t treat these aspects of punishment as entirely fixed.

2. *Harsh Procedures.* — There's another important disanalogy between our system and the one known to Blackstone and his predecessors. While procedural rules today formally favor defendants in many ways, the procedures used in English criminal trials of Blackstone's era were quite harsh to defendants.

For example, although the prosecution had always been permitted counsel, defendants were rarely extended that privilege until the 1730s.¹⁰⁰ Even then, it was only “as a matter of grace”;¹⁰¹ Parliament did not make assistance of counsel a legal right until 1836.¹⁰² The use of hearsay testimony against the accused was common.¹⁰³ Even though defendants' lives were at stake, trials were brisk, casual affairs, often lasting mere minutes.¹⁰⁴ Jurors would often hear a dozen or more cases in a row before retiring to decide on all the cases at once.¹⁰⁵ Even once it became routine in the 1730s for the jury to deliberate at the conclusion of each trial, deliberations lasted “a few seconds or a few minutes.”¹⁰⁶

And while Blackstone's maxim is most often cited as justification for the reasonable doubt requirement, that standard “was not clearly formulated until the nineteenth century.”¹⁰⁷ The first reasonable doubt instructions in English trials do not appear until the 1780s — more than a decade after Blackstone published the final volume of his *Commentaries*, and several centuries after Fortescue articulated his 20:1 ratio.¹⁰⁸ Cases prior to that point “seem[] impossible to square with a high standard of proof.”¹⁰⁹ Moreover, as noted above, for cer-

¹⁰⁰ See John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700–1900*, at 13, 32–33 (Antonio Padoa-Schioppa ed., 1987).

¹⁰¹ BAKER, *supra* note 74, at 510.

¹⁰² *Id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.* (“The unseemly hurry of Old Bailey trials even in the early nineteenth century was disgraceful . . .”); BEATTIE, *supra* note 72, at 378 (estimating that the average length of trial at the Summer 1751 Surrey Assizes was thirty minutes); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 277–78 (1978).

¹⁰⁵ BEATTIE, *supra* note 72, at 380.

¹⁰⁶ Langbein, *supra* note 100, at 27.

¹⁰⁷ Langbein, *supra* note 104, at 266; see also LANGBEIN, *supra* note 14, at 262.

¹⁰⁸ See WHITMAN, *supra* note 49, at 193–94. Given that records of pre-1780s trials are incomplete, it is possible, however, that the instructions appeared earlier. See Thomas P. Gallanis, *Reasonable Doubt and the History of the Criminal Trial*, 76 U. CHI. L. REV. 941, 962 (2009) (reviewing WHITMAN, *supra* note 49).

¹⁰⁹ LANGBEIN, *supra* note 14, at 262. There is disagreement on this point. See Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 509–13 (1975) (arguing that the standard of proof prior to the introduction of the reasonable-doubt standard was *more* defendant friendly).

tain noncapital offenses the law effectively created “a statutory presumption of guilt.”¹¹⁰

For these reasons, it is hard to know the degree to which the English system actually put the Blackstone principle — at least, the broad version of that principle that is endorsed today — into practice. It is true that acquittal rates were high, and defendants also had the right to strike peremptorily a large number of potential jurors.¹¹¹ But it’s unclear the degree to which those defendant-friendly aspects of the system cancelled out other ways in which defendants were “at a considerable disadvantage compared with the prosecution.”¹¹² Perhaps the Blackstone principle was merely an offsetting adjustment for pro-government asymmetries. Or maybe Blackstone’s maxim was simply a rhetorical flourish, designed to distract attention from the ways in which the system was fundamentally unfair to defendants.

Either way, the degree to which English criminal procedure of Blackstone’s time and earlier was hostile to defendants should give us pause before we rely on the Blackstone principle to justify all the pro-defendant aspects of the modern criminal procedure system. Instead, we may be anachronistically relying on the principle to defend modern practices. That should not be surprising: reliance on an earlier principle to justify subsequent procedural innovations has a venerable history in Anglo-American criminal law. Centuries ago, the right to a jury trial in English law was “enshrined in the anachronistic interpretation later placed on the provision in Magna Carta that no free man should be punished ‘except by the lawful judgment of his peers.’”¹¹³

II. ERROR COSTS AND THE DYNAMIC CRITIQUE

The history outlined above helps explain why the Blackstone principle gained its prominence. But history provides no obvious *justification* for the principle today. This Part confronts the most common argument for (and the flashpoint for the most common criticism of) the Blackstone principle: that it reflects the fact that the social costs of false convictions are many times higher than those of false acquittals. Section A summarizes that argument and its shortcomings and concludes that assessing the argument requires a more thorough accounting of the Blackstone principle’s consequences than has previously been undertaken. This Part then sets itself to that task, evaluating the Blackstone principle from a dynamic perspective. Section B catalogs dynamic effects of the Blackstone principle — ways in which follow-

¹¹⁰ Smith, *supra* note 88, at 135 (emphasis omitted).

¹¹¹ BAKER, *supra* note 74, at 509.

¹¹² *Id.*

¹¹³ *Id.* at 508 (quoting MAGNA CARTA, ch. 39 (1215)).

ing the rule has systemic consequences on the criminal justice system. Section C explores the principle's costs and benefits in light of the dynamic effects. Section D sums up the dynamic critique.

A. *The Traditional Account of the Costs of Errors*

1. *The Core Case.* — The most common and straightforward argument 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.”¹¹⁴ This argument emphasizes the severity of criminal sanctions: A wrongly convicted defendant can lose his liberty or even his life,¹¹⁵ and also faces the stigma of being officially branded as a wrongdoer.¹¹⁶ Because such weighty interests are at stake, the argument goes, we should be especially cautious before judging a defendant guilty. So reasoned the Supreme Court in *Santosky v. Kramer*¹¹⁷:

When the State brings a criminal action to deny a defendant liberty or life, “the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.”¹¹⁸

This argument is appealing, because it explains why criminal law exhibits a stronger bias against false positives than do other areas of law: typical civil remedies (damages or injunctions) are less severe than criminal sanctions, meaning that false positives in the civil arena are less costly. Justice Harlan, concurring in *In re Winship*,¹¹⁹ stressed this point:

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. . . . [F]or example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. . . .

¹¹⁴ Lawrence B. Solum, *You Prove It! Why Should I?*, 17 HARV. J.L. & PUB. POL'Y 691, 701 (1994).

¹¹⁵ See, e.g., Michael D. Pepson & 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 (2010) (“The rationale undergirding the requirement of an enhanced standard of proof in criminal cases is bottomed on the nature of what is at stake[,] i.e., the accused's liberty or, at times, life . . .”).

¹¹⁶ See *In re Winship*, 397 U.S. 358, 363 (1970).

¹¹⁷ 455 U.S. 745 (1982).

¹¹⁸ *Id.* at 755 (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

¹¹⁹ 397 U.S. 358.

In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.¹²⁰

Or as Judge Wilkinson put it recently, “[W]rongfully depriving an innocent man of his liberty is a worse outcome than wrongfully picking his pocket with an erroneous civil judgment.”¹²¹ Consistent with this understanding, the law tends to require proof by “clear and convincing” evidence when civil remedies tread into territory normally occupied by criminal law¹²² or are otherwise unusually serious — that is, in situations where false positives appear likely to have high costs.¹²³

Numerous commentators have relied on this theory to explain criminal law’s attitude towards false positives. Judge Posner, for example, has suggested that the differing costs of false positives shows how the “difference in the standards of proof followed in criminal and civil cases may be entirely consistent with economic theory.”¹²⁴ Margaret Jane Radin contends that “the cost or gravity”¹²⁵ of false convictions explains “the requirement that guilt be established beyond a reasonable doubt, even where it is more likely than not that the accused is guilty.”¹²⁶ Many other scholars agree.¹²⁷

2. *The Conventional Response.* — The most common response to the error-costs argument is straightforward: critics contend that the theory is insufficiently sensitive to the costs of false *acquittals*. One of the earliest such critics was Jeremy Bentham. Though he agreed that judges should err in favor of false acquittals, he nonetheless warned “against those sentimental exaggerations which tend to give crime impunity, under the pretext of insuring the safety of innocence.”¹²⁸ More

¹²⁰ *Id.* at 371–72 (Harlan, J., concurring). The *Santosky* majority relied on Justice Harlan’s *Winship* concurrence. See 455 U.S. at 755.

¹²¹ Wilkinson, *supra* note 8, at 1112; see also Edgar H. Haug, *A Courtroom Standard Full of Doubt?*, in BEYOND A REASONABLE DOUBT 55, 57 (Larry King & Henrietta Tiefenthaler eds., 2006).

¹²² See, e.g., *Addington*, 441 U.S. 418 (requiring clear and convincing evidence standard in civil commitment proceedings).

¹²³ See, e.g., *Santosky*, 455 U.S. 745 (requiring clear and convincing evidence standard in proceedings to terminate parental rights).

¹²⁴ Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 415 (1973).

¹²⁵ Radin, *supra* note 34, at 1019.

¹²⁶ *Id.* at 1019–20.

¹²⁷ See, e.g., Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 461 (1989); Wilkinson, *supra* note 8, at 1112; Jonathan Levy, Note, *A Principled Approach to the Standard of Proof for Affirmative Defenses in Criminal Trials*, 40 AM. J. CRIM. L. 281, 283 (2013).

¹²⁸ JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 198 (M. Dumont ed. & trans., London, J.W. Paget 1825). As Bentham saw it:

Public applause has been, so to speak, set up to auction. At first it was said to be better to save several guilty men, than to condemn a single innocent man; others, to make the maxim more striking, fixed on the number *ten*; a third made this *ten* a hundred, and a fourth

recently, Ernest van den Haag contended that relaxing the system's emphasis on avoiding false convictions "would increase deterrence and thus reduce the suffering caused by crime more than [it] would increase the suffering of criminals and innocents."¹²⁹ Ronald Allen and Larry Laudan have offered a particularly compelling version of this critique:

In what sense can it be worse to be wrongfully convicted of murder than to be murdered? For that matter, is it really worse to be wrongfully executed by the state than by a private citizen? Is it really worse to be wrongfully convicted of a brutal assault than to be brutally assaulted? Or gang raped? Or just raped? We doubt many would share these apparent implications of the position that wrongful conviction is a worse harm than criminal victimization, at least where serious violent crimes are concerned.¹³⁰

And even if being wrongfully convicted once is worse than being the victim of a single violent crime, that would not necessarily justify the Blackstone principle. Laudan, using some back-of-the-envelope math, estimates that when violent crimes are at issue "every false acquittal enables more 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."¹³¹ Laudan argues that most people, if squarely confronted with this tradeoff, would reject the Blackstone principle.¹³²

Laudan's approach is imprecise, to say the least. For example, it doesn't account for the possibility that the falsely acquitted defendant

made it a thousand. All these candidates for the prize of humanity have been outstripped by I know not how many writers, who hold, that, in no case, ought an accused person to be condemned, unless the evidence amount to mathematical or absolute certainty. According to this maxim, nobody ought to be punished, lest an innocent man be punished.

Id.

¹²⁹ Reiman & van den Haag, *supra* note 7, at 246; *see also, e.g.*, STEVEN E. LANDSBURG, MORE SEX IS SAFER SEX: THE UNCONVENTIONAL WISDOM OF ECONOMICS 222 (2007) (criticizing Blackstone for "defiantly refus[ing] to think about the trade-offs that go into designing a criminal justice system" and chiding legal scholars who "for two centuries . . . have cited Blackstone's *refusal* to think and mistaken it for an example of a *thought*"); Adriaan Lanni & Adrian Vermeule, *Precautionary Constitutionalism in Ancient Athens*, 34 CARDOZO L. REV. 893, 907 (2013) ("The critics [of the Blackstone ratio] . . . urge that discharging the guilty in high ratios is itself an error that creates unacceptable collateral risks of other crimes to innocent third parties.").

¹³⁰ Allen & Laudan, *supra* note 6, at 83.

¹³¹ Laudan, *The Rules of Trial*, *supra* note 12, at 202. Laudan reaches these calculations relying on a study which concluded that "the best estimate of the number of felonies committed annually by the typical criminal ranges between ten and fifteen, of which between two and four are violent crimes." *Id.* at 201 (citing 1 CRIMINAL CAREERS AND "CAREER CRIMINALS" 5, 352 (Alfred Blumstein et al. eds., 1986)). Laudan takes the lower range of this estimate (ten crimes, two of which are violent) and multiplies it by the average sentence for a person convicted of a violent crime (3.6 years, by his numbers) in order to arrive at his final count. *See id.* at 202.

¹³² *See id.* at 205-06.

might be caught and convicted when committing a later crime.¹³³ Nor does it consider the replacement phenomenon — the possibility “that some fraction of the crimes that would have been committed by incarcerated individuals are committed by nonincarcerated offenders.”¹³⁴ These omissions suggest Laudan’s estimate may err on the high side. And indeed, his numbers are higher than those found by some recent empirical studies attempting to quantify the benefits of incapacitation.¹³⁵ On the other hand, Laudan does not even attempt to quantify the additional crimes that might be committed by *other* offenders insufficiently deterred as a result of false acquittals, a factor which cuts in the other direction.

Another problem involved in understanding the costs of false acquittals is that those costs likely vary significantly among crimes. For one thing, different crimes have quite different recidivism rates. For example, one study found that property crimes had a nearly 50% recidivism rate, compared with less than 7% for homicide.¹³⁶ Such variation suggests that the benefits of incapacitation differ depending on the crime at issue. Incapacitation is only one benefit of conviction, of course, in addition to both specific and general deterrence. But the difference in potential incapacitative effects across crimes at least suggests that the costs of false acquittals may be fairly crime specific.

A further complication is how to assess the costs of false acquittals for so-called “victimless” crimes, such as drug possession. The problem is that for many such crimes, the social benefit of individual convictions is more attenuated and complex than the benefit corresponding to more paradigmatic crimes involving obvious victims. While the deterrence benefits of convicting one robber may be hard to quantify, there’s a good chance that that robber might have gone on to commit additional robberies, which incarceration prevents. For a crime like drug possession, though, there’s not even a putative incapacitation benefit; society incarcerates drug users not to incapacitate them from using drugs as such, but because we think the net effects of criminalizing drugs will prove beneficial for society. Even if one agrees with Allen and Laudan that it is not “worse to be wrongfully convicted of

¹³³ It also doesn’t consider crimes that the incarcerated individual might commit while in prison, which can’t be excluded from the analysis.

¹³⁴ Emily G. Owens, *More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements*, 52 J.L. & ECON. 551, 568 (2009).

¹³⁵ See David S. Abrams, *The Prisoner’s Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 937–39 (2013) (reviewing recent studies).

¹³⁶ 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) (summarizing recidivism rates among various categories of crimes and specific crimes).

murder than to be murdered,”¹³⁷ most people would conclude that it’s probably worse to be wrongfully convicted of drug possession than to allow one person to use drugs without penalty.

These complexities aside, however, most people — even those who support the Blackstone principle — seem to recognize that the Blackstone principle likely imposes significant costs in terms of lost deterrence, at least for paradigmatic violent crimes like robbery. And so Laudan’s exercise, for all its imprecision, is useful in helping us think about the scale of the Blackstone principle’s potential costs in some situations. Even if Laudan’s estimate were, say, five times too high, taking Blackstone’s ten-to-one ratio at its word could require believing that the social costs of one false conviction for robbery are greater than the costs of dozens of crimes — something some people might find implausible.

3. *A Static Perspective.* — Criticisms like Laudan’s are not without force. When carefully examined, the Blackstone principle’s costs seem potentially disproportionate to its benefits — at least for some crimes. Perhaps most people have not carefully thought through the tradeoffs required, and if confronted with an accurate accounting they would reject the principle.

The problem with the standard critique, however, is that it turns on how to weigh two very different types of harm. While calculating and comparing the ultimate costs of false convictions and false acquittals in terms of their effects on human well-being is theoretically possible,¹³⁸ such an endeavor would be controversial. The reasons why people find false convictions especially troubling (as compared to being a crime victim) may be at least partly tied up with contested ideas about the proper role of the state in connection to its citizens. And if so, the Blackstone principle’s proponents and critics may simply be talking past each other.

But there is a way around this apparent impasse. If the Blackstone principle doesn’t actually help innocent *defendants* as much as people assume it does, then even the principle’s fiercest advocates might be forced to reconsider their position. The rest of this Part will explore that possibility. To set the stage for that argument, however, it’s necessary to highlight the ways in which the previous arguments for, and criticisms of, the Blackstone principle have been incomplete. Specifically, most previous commentary on the Blackstone principle,

¹³⁷ Allen & Laudan, *supra* note 6, at 83.

¹³⁸ See generally John Bronsteen et al., *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L.J. 1603 (2013) (proposing “well-being analysis” as a means of evaluating the effects of different policies on people’s quality of life).

pro and con, has taken a “static” perspective. In analyzing the principle, both advocates and critics treat the costs of false convictions and of false acquittals as fixed quantities to be weighed against each other. Consider, for example, Laudan’s reasons why “[t]here are ample grounds for accepting the hunch that false convictions are much more costly than false acquittals”¹³⁹:

The principal cost of a false acquittal is that a guilty felon goes free, unpunished, perhaps to commit other crimes; justice fails to be done; the victim of the crime is given no closure and comes away from the experience embittered because justice has not been done. The message is sent to prospective criminals that they, too, may be able to avoid prosecution for their crimes. . . . But false convictions carry other, much weightier costs. They imply that the good name of an innocent person is permanently stained, that he is denied his liberty for the time of his incarceration These costs are awesome and are clearly greater than those associated with a false acquittal. Because they are, we want to make it harder to convict an innocent person than to acquit a guilty one.¹⁴⁰

This approach seems initially sensible. But the static perspective erroneously holds too many variables constant. By simply analyzing the costs of individual errors, this approach ignores that the distribution of errors can itself have systemic consequences. For example, the severity of criminal sanctions — and thus, the harm of any particular false conviction — may depend on whether the system follows the Blackstone principle; if it is harder to punish, the people who are nonetheless punished may receive harsher punishments than they would otherwise.¹⁴¹

In ignoring such possibilities, commentators have relied on “incomplete characterizations of situations.”¹⁴² It isn’t enough to weigh the relative costs of false convictions and false acquittals in the abstract. Instead, accurately evaluating the Blackstone principle requires a *dynamic perspective*: one has to systematically account for all the ways in which following the Blackstone principle might affect the workings of the criminal justice system as a whole. Commentators, including Sir

¹³⁹ LAUDAN, TRUTH, ERROR, *supra* note 12, at 69.

¹⁴⁰ *Id.* Laudan’s later work has been harsher in its criticism of the Blackstone principle. See Allen & Laudan, *supra* note 6.

¹⁴¹ See *infra* section II.B.1, pp. 1095–99.

¹⁴² Cf. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 49 (2002). Kaplow and Shavell criticize “fairness-oriented analysts” for exclusively taking an “ex post perspective,” *id.* at 48, and “ignor[ing] important aspects of ex ante behavior” that are influenced by legal rules, *id.* at 49.

James Fitzjames Stephen,¹⁴³ Bernard Mandeville,¹⁴⁴ and, more recently, Katherine Strandburg,¹⁴⁵ have offered arguments in that direction, but a more complete analysis of the Blackstone principle's dynamic consequences is needed. It is to that task that this Part now turns.

B. *The Dynamic Effects of Criminal Errors*

Adherence to the Blackstone principle could have profound consequences for many aspects of a criminal justice system, going beyond the quantity and type of errors generated. Identifying and understanding those consequences is necessary to evaluating the Blackstone principle's costs and benefits. This section catalogues a number of those dynamic effects. It does so by making an imaginative comparison between two criminal justice systems: on the one hand, a system fundamentally committed to erring in favor of letting the guilty go free, as ours purports to be; and on the other hand, a system that has no such commitment and whose procedural system would be more committed to minimizing total errors rather than to skewing errors in any particular direction. Such a comparison "obviously involves a generous dose of speculation,"¹⁴⁶ but speculation is preferable to implicitly assuming that the Blackstone principle has no systemic consequences at all. This section's goal is positive; it seeks solely to map out the potential systemic consequences of the Blackstone principle, leaving the normative analysis of those effects to sections C and D. Moreover, though the following discussion draws on examples from our criminal justice system in order to demonstrate the plausibility of

¹⁴³ Stephen argued that the Blackstone principle's advocates erred by "assum[ing] . . . that modes of procedure likely to convict the guilty are equally likely to convict the innocent":

[I]t thus resembles a suggestion that soldiers should be armed with bad guns because it is better that they should miss ten enemies than that they should hit one friend. In fact, the rule which acquits a guilty man is likely to convict an innocent one. Just as the gun which misses the object at which it is aimed is likely to hit an object at which it is not aimed.

1 STEPHEN, *supra* note 85, at 438. Stephen did not, however, further elaborate on his intriguing suggestion that the Blackstone principle makes convictions of the innocent more likely.

¹⁴⁴ Mandeville suggested that designing rules to accept the possibility that some innocents would be executed:

[W]ould be a vast Advantage to a Nation, not only as to the securing of every ones Property and the Peace of the Society in general, but it would likewise save the Lives of Hundreds, if not Thousands, of Necessitous Wretches, that are daily hanged for Trifles, and who would never have attempted any thing against the Law, or at least not have ventured on Capital Crimes, if the hopes of getting off, should they be taken, had not been one of the Motives that animated their Resolution.

1 MANDEVILLE, *supra* note 56, at 309.

¹⁴⁵ Strandburg has explained how "a perceived increase in the probability of convicting the innocent" will cause "a decrease in the stigma penalty for conviction," and thus could harm deterrence. Katherine J. Strandburg, *Deterrence and the Conviction of Innocents*, 35 CONN. L. REV. 1321, 1349 (2003).

¹⁴⁶ Cf. Scott & Stuntz, *supra* note 22, at 1932 (imagining the consequences of the abolition of plea bargaining).

various dynamic effects I identify, this Part intends to remain largely agnostic about the degree to which our system today actually complies with the Blackstone principle in practice; Part IV will discuss the implications of this analysis for the actual operation of our system.

1. *Crime, Punishment, and Policing.* — The Blackstone principle makes convictions harder to obtain. One would expect it to have the straightforward effect of making crime more prevalent than it would be in a world without the principle. Convictions incapacitate wrongdoers and deter other offenders; as it becomes harder to convict, the system should do a worse job of preventing crime. That's especially true given that "the perceived certainty of punishment — that is, the likelihood of being caught and held responsible for criminal behavior — is the single most important variable in deterring misconduct."¹⁴⁷ Letting many guilty go free necessarily makes punishment less certain. Perhaps more importantly, a system that purports to respect the Blackstone principle is one in which punishment will be *perceived* to be less certain than a system without the principle. One would therefore expect the principle to significantly undermine deterrence.

Some proponents of the Blackstone principle defend the opposite proposition, however. As they see it, adherence to the principle is necessary to ensure the citizenry's confidence in the criminal justice system. If people "come to believe that [their] government is not very concerned about preventing punishment of the innocent," Jeffrey Reiman argues, they might be less willing "to respect, pay for, and cooperate with government voluntarily — which, in turn, [might] reduce the criminal justice system's capacity to deter crime."¹⁴⁸ Justice Brennan, defending the reasonable doubt standard in his majority opinion in *Winship*, seemed to have a similar concern in mind when arguing that "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."¹⁴⁹ This argument has a distinguished lineage in American law; John Adams, in the Boston Massacre trial, offered this justification for the notion that it is "more beneficial, that many guilty persons should escape unpunished, than one innocent person should suffer":

¹⁴⁷ Adam M. Gershowitz, 12 *Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases*, 2011 U. ILL. L. REV. 961, 989; see also 4 BLACKSTONE, *supra* note 1, at *17 ("[C]rimes are more effectually prevented by the *certainty*, than by the *severity*, of punishment."); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 379 (1997).

¹⁴⁸ Reiman & van den Haag, *supra* note 7, at 237.

¹⁴⁹ *In re Winship*, 397 U.S. 358, 364 (1970); see also *Herrera v. Collins*, 506 U.S. 390, 420 (1993) (O'Connor, J., concurring) ("Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent.").

[G]uilt and crimes are so frequent in the world, that all of them cannot be punished; and many times they happen in such a manner, that it is not of much consequence to the public, whether they are punished or not. But when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, it is immaterial to me, whether I behave well or ill; for virtue itself, is no security. And if such a sentiment as this, should take place in the mind of the subject, there would be an end to all security whatsoever.¹⁵⁰

On its surface, this argument is not implausible. A key factor in whether citizens obey the law is their belief that law is morally legitimate.¹⁵¹ And procedural fairness can play a significant role in influencing perceptions of legitimacy.¹⁵² Thus, if public perceptions of legitimacy depend on adhering to the Blackstone principle, it would be necessary even if it appears to be costly in individual cases — lest we risk “an end to all security whatsoever.”¹⁵³

Upon scrutiny, however, the legitimacy thesis’s flaws become apparent. The argument depends on the empirical assumption that most people think the Blackstone principle is necessary. But we have no good reason to be confident that that’s true; in fact, the available evidence suggests otherwise. In one nationwide poll, 56% of respondents *disagreed* with the proposition that it’s “better for society to let some guilty people go free than to risk convicting an innocent person.”¹⁵⁴ Only 41% agreed, with only 17% expressing strong agreement.¹⁵⁵ While answers to survey questions aren’t proof of how people would really respond to a system without the Blackstone principle, these results are at least hard to square with the idea that the principle has such widespread support that abandoning it would seriously undermine criminal law’s deterrent force.

It’s important to stress that *intentionally* punishing innocents isn’t at issue. There are good arguments that even strict utilitarians should reject such a regime, because it would undermine the deterrent purpose of punishment.¹⁵⁶ Instead, what’s at issue is *unintentional* punishment of the innocent resulting from procedures designed to accurately assess guilt and innocence. Why can we assume that such errors inevitably sap the legitimacy of the justice system? There is, no

¹⁵⁰ 3 ADAMS, *supra* note 65, at 242.

¹⁵¹ See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

¹⁵² See Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 345–49 (2011).

¹⁵³ 3 ADAMS, *supra* note 65, at 242; cf. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 457 (1997) (arguing that utilitarians should support desert requirements because such constraints are necessary for popular moral respect).

¹⁵⁴ GALLUP, JR., *supra* note 27, at 231–32.

¹⁵⁵ *Id.*

¹⁵⁶ See, e.g., John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 10–12 (1955).

doubt, public concern for the plight of the falsely convicted. But there is also public concern when apparently guilty defendants go free. When high-profile defendants like Casey Anthony¹⁵⁷ go unpunished despite significant evidence of guilt, there is often public outrage, both at the specific result and at the procedural system that produced it.¹⁵⁸ The argument ignores the fact that obeying the Blackstone principle itself creates legitimacy costs; the populace might have *more* confidence in government if the justice system did not respect the principle.¹⁵⁹

Even if the Blackstone principle doesn't *undermine* deterrence, it's hard to believe that a world without it would do a worse job of preventing crime — especially given the evidence about the importance of the perceived certainty of punishment. Numerous areas of law (like tort and antitrust) don't follow anything resembling the Blackstone principle, yet seem able to deter violations of law. At the very least, it is implausible that a non-Blackstonian world would do so much worse at deterrence as to cancel out the incapacitative benefits of more reliably imprisoning criminals. Thus, until more persuasive evidence for the legitimacy thesis emerges, it seems likely that the Blackstone principle increases crime.

Accompanying an increase in crime would be a reduction in the accuracy of the criminal process. The amount of resources society is willing to commit may not increase in full proportion to increases in crime. Increased burdens on the various actors in the criminal justice system are likely to lead to worse outcomes. Even if resource commitment kept pace with rising levels of crime, increases in crime would still be likely to result in decreased accuracy. Because there is

¹⁵⁷ Anthony's acquittal on the charge of murdering her daughter, Caylee, generated substantial public outrage. See, e.g., Lizette Alvarez, *Casey Anthony Not Guilty in Slaying of Daughter*, N.Y. TIMES, July 5, 2011, <http://www.nytimes.com/2011/07/06/us/06casey.html>.

¹⁵⁸ Alan Wertheimer offers a potential explanation for the legitimacy argument:

A policy which risks frequent punishment mistakes is likely to be heavily criticized, not only because of the injustices entailed, but because of an important behavioral distinction between the benefits and costs of such a policy. The benefits are, of course, those crimes that do not occur, but the benefits are not directly observable and therefore may be underestimated. On the other hand, the costs of the policy are the punishment mistakes, and whenever a punishment mistake is discovered, it will generate considerable publicity, concern, and outrage. Each punishment mistake which is discovered will have a proper name, unlike the potential victims of crime who have benefited by the policy.

Alan Wertheimer, *Punishing the Innocent — Unintentionally*, 20 INQUIRY 45, 63–64 (1977). But this explanation seems unsatisfying, because while potential victims lack faces and names and thus will be treated as mere statistical persons, see *infra* section III.A.3, pp. 1130–31, defendants who are seen to be guilty yet are acquitted will be salient to the public.

¹⁵⁹ See Peter J. Cohen, *How Shall They Be Known?* Daubert v. Merrell Dow Pharmaceuticals and *Eyewitness Identification*, 16 PACE L. REV. 237, 273 (1996) (“Blackstone’s noble thoughts are not accepted by all, whether they be attorney, judge, or ‘ordinary’ citizen. Indeed, it is unclear whether a *majority* of today’s population would subscribe to these sentiments.”).

not an infinite supply of skilled workers in any profession, there is likely some point after which each marginal prosecutor, police officer, and public defender hired is less effective at her job than the average such professional in a world with less crime. Worse policing and worse lawyering will almost certainly reduce the accuracy of criminal judgments.

The degree to which crime would be higher in a Blackstonian world will depend on the magnitude of another likely effect: on average, punishment should be more severe than in a non-Blackstonian world. 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.¹⁶⁰ And the fact that severity is a less effective deterrent than certainty suggests that punishments would have to be significantly harsher to compensate for the decrease in certainty. A further reason for heightened punishment in a Blackstonian world is that punishment “channels retributive anger,”¹⁶¹ and therefore those who are punished must bear a larger share of the public’s rage when more wrongdoers go free. In addition, as explained below, the Blackstone principle will incline voters to prefer harsher treatment of convicts.¹⁶² Thus, while more defendants in a Blackstonian world would avoid prison, we should expect those who do go to prison to spend a longer time there.

A Blackstonian system could also compensate for the heightened difficulty of convicting by investing more in law enforcement than it would otherwise. Greater investment in policing could prevent crime before it occurs. Better investigative work could also lower the overall rate of error in convictions, mitigating the harm to deterrence produced by skewing errors in favor of false acquittals. There’s no reason to expect the Blackstone principle’s deterrence costs to be fully ameliorated through better policing, however. Resources spent on additional policing have to come from somewhere. If x amount of resources are available for policing in a non-Blackstonian system, it isn’t clear why more resources would be available in a Blackstonian world. Perhaps following the Blackstone principle would make policing a higher priority than it would otherwise be, but that would require spending less on some other important social goal.¹⁶³ Moreover,

¹⁶⁰ See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 183–84 (1968).

¹⁶¹ Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. COLLOQUY 355, 360 (2008).

¹⁶² See *infra* section II.B.3, pp. 1102–06.

¹⁶³ The Blackstone principle could result in some savings to the extent that it saves on costs of punishment. But evaluating the Blackstone principle’s effect on spending requires analyzing its effect on crime rates and its effects on the severity of punishment. See *infra* section III.A.2, pp.

there's evidence "that when crime increases, law enforcement funding does not increase enough to prevent the expected penalty [anticipated by lawbreakers] from declining, which increases crime still further."¹⁶⁴ Thus, there's reason to think that better law enforcement will not sufficiently cancel out the other two effects discussed above (higher crime and higher penalties). The key point, however, is that unless the legitimacy thesis is right and the Blackstone principle is essential for deterrence, then letting more guilty people go free must result in *some* combination of increased crime, heightened punishment, and greater investment in policing.

2. *Social Meaning.* — Whether the criminal justice system follows the Blackstone principle affects how many convictions and acquittals the system produces. But it also should affect how society *views* convictions and acquittals. That is, how errors are distributed among the outputs produced by the criminal process can affect those outputs' social meanings.¹⁶⁵

Take convictions first. "Criminal conviction is not only a process leading to direct sentencing and collateral legal consequences — it also represents a serious social stigma, one of society's most effective ways of broadcasting that a particular individual engaged in deviant conduct."¹⁶⁶ That stigma can lead to lost employment opportunities and can damage the convict's "relationships with family, friends, colleagues, and other acquaintances."¹⁶⁷

Precisely how stigmatizing a conviction is, however, should vary depending on how the system distributes errors. In a system that errs heavily in favor of letting the guilty go free, a conviction will be seen as nearly certain evidence of guilt; thus, it will carry a particularly heavy stigmatic burden. But "a perceived increase in the probability of convicting the innocent" should lead to "a decrease in the stigma penalty for conviction."¹⁶⁸

One can see some evidence for this proposition by observing that in our society, civil judgments carry less stigma than criminal convictions.¹⁶⁹ Part of the reason is that criminal sanctions are supposedly

1128–30. If the principle results in higher crime rates and more severe penalties, it seems likelier to increase the overall costs of the criminal justice system than to reduce them.

¹⁶⁴ Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 520 (1996); see also *id.* at 520 n.3 (citing sources).

¹⁶⁵ A workable definition of "social meaning" is "the semiotic content attached to various actions, or inactions, or statuses, within a particular context." Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995).

¹⁶⁶ David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 2009 BYU L. REV. 1277, 1312.

¹⁶⁷ *Id.* at 1313.

¹⁶⁸ Strandburg, *supra* note 145, at 1349.

¹⁶⁹ See, e.g., Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1065 (1993) ("[C]riminal conviction,

reserved for morally objectionable wrongs, and thus involve societal condemnation that civil penalties do not.¹⁷⁰ But the fact that criminal law, unlike tort or contract law, purports to observe the Blackstone principle may also play a role. False positives are seen as prevalent in civil justice,¹⁷¹ and thus we're less likely to think of a tort judgment as certain proof of wrongdoing. That is, because civil judgments "impos[e] stigma on everyone who is more likely than not to deserve punishment, all who are subjected to punishment have plausible deniability."¹⁷²

Similarly, the knowledge that false positives were more prevalent could somewhat reduce the stigma of a criminal conviction, as observers would harbor slightly more doubts about whether the convict was actually guilty. That's not to say a criminal conviction would carry no stigma in a non-Blackstonian world; that would be unrealistic as well as undesirable. But the point is that the degree of stigma would be at least slightly lower.¹⁷³

The Blackstone principle will also shape the social meaning of acquittals. When it's believed that many guilty people go free, an acquittal is not seen as a strong indication of innocence — and indeed may be taken as evidence of guilt. This appears true of our system; as Andrew Leipold puts it: "Given our deeply rooted preference for ac-

even for a relatively minor offense, carries a stigma not associated with the imposition of even large civil judgments.").

¹⁷⁰ See, e.g., Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1352 (1991) ("[A] criminal conviction, unlike civil judgment, carries with it the stigma, or brand, of societal condemnation."); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1205 (1985) ("Almost every criminal punishment imposes some nonpecuniary disutility in the form of a stigma There is no corresponding stigma to a tort judgment."). Of course, there is a significant body of criminal law that governs activities that are not typically considered morally blameworthy (*mala in se*), and are instead merely *mala prohibita*. See, e.g., *United States v. Urfer*, 287 F.3d 663, 666 (7th Cir. 2002) (Posner, J.) (explaining this distinction). For an argument that many so-called "regulatory offenses" are in fact not "morally neutral," see Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997).

¹⁷¹ See, e.g., Francis E. McGovern, *Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano*, 80 CORNELL L. REV. 1022, 1024 (1995) (noting the existence of a "generally accepted belief that there are significant numbers of false positive cases currently filed in 'normal' torts").

¹⁷² Michael Abramowicz, *A Compromise Approach to Compromise Verdicts*, 89 CALIF. L. REV. 231, 280 (2001).

¹⁷³ Some scholars have suggested the possibility that increasing the number of false convictions would lead to a reduction in stigma significant enough to harm deterrence. See Strandburg, *supra* note 145, at 1349. While it's difficult to speculate, it seems implausible that the deterrence benefits of making the system more accurate would be entirely cancelled out by a reduction in the stigma penalty for conviction — especially given the evidence that certainty of punishment plays a large role in deterrence.

quitting guilty people to convicting the innocent, we strongly suspect that many defendants who are acquitted were in fact guilty.”¹⁷⁴

The legal system reinforces this perception by permitting acquitted defendants to be held civilly liable in later tort suits based on the same alleged conduct. Inconsistent judgments are possible because tort law does not adhere to the Blackstone principle and thus uses a preponderance of the evidence standard.¹⁷⁵ The most famous example of such inconsistency involved O.J. Simpson: after Simpson was acquitted of the murders of Nicole Brown and Ron Goldman, he was found civilly liable in a wrongful death action brought by Goldman’s parents.¹⁷⁶ Such incidents (correctly) contribute to the popular view that an acquittal is not an adjudication of innocence.¹⁷⁷

Compounding the problem is the fact that most American jurisdictions have no legal mechanism that acquitted defendants can use to clear their names — that is, to receive some sort of official recognition that they are factually innocent rather than merely “not guilty.”¹⁷⁸ Occasionally, a court will declare, while dismissing an indictment or reversing a conviction, that a defendant is innocent.¹⁷⁹ But such examples are unusual. Rarer still is an official statement from a prosecutor, rather than a judge, that a defendant is actually innocent. Defendants have on occasion received such declarations, such as when the North Carolina Attorney General announced that three Duke lacrosse players accused of rape were innocent.¹⁸⁰ In most jurisdictions there is no

¹⁷⁴ Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1299 (2000).

¹⁷⁵ See *Dowling v. United States*, 493 U.S. 342, 348–50 (1990) (holding that an acquittal in a criminal case does not preclude the relitigation of an issue in the civil context, in which it is subjected to a lower burden of proof).

¹⁷⁶ See *Rufo v. Simpson*, 103 Cal. Rptr. 2d 492 (Ct. App. 2001).

¹⁷⁷ See Alan M. Dershowitz, *Casey Anthony: The System Worked*, WALL ST. J., July 7, 2011, <http://online.wsj.com/news/articles/SB10001424052702303544604576429783247016492> (“[I]t was perfectly rational, though difficult for many to understand, for a civil jury to have found O.J. Simpson liable to his alleged victim, after a criminal jury had found him not guilty of his murder.”).

¹⁷⁸ California is an exception. Under California law, “[i]f, after considering the evidence, the court finds that ‘no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made,’ the records are expunged, and the defendant is entitled to treat the whole matter as if it never occurred.” Leipold, *supra* note 174, at 1324 (quoting CAL. PENAL CODE § 851.8(b) (Supp. 2014)). However, “in practice the rule is rarely used because it permits a finding of innocence only when no reasonable prosecutor could have brought the charge.” Richard E. Myers II, *Requiring a Jury Vote of Censure to Convict*, 88 N.C. L. REV. 137, 175 (2009).

¹⁷⁹ See, e.g., *United States v. Thompson*, 484 F.3d 877, 878 (7th Cir. 2007) (Easterbrook, C.J.) (“After concluding that Thompson is innocent, we reversed her conviction so that she could be released.”).

¹⁸⁰ After Crystal Gail Mangum accused three members of Duke University’s lacrosse team of rape, Durham County prosecutor Mike Nifong doggedly pursued them despite a lack of evidence. The case was ultimately taken over by North Carolina Attorney General Roy Cooper, who dropped the charges and released a statement saying that the defendants were actually innocent of the crime.

formal process for obtaining official declarations of innocence.¹⁸¹

This state of affairs creates significant problems for innocent, acquitted defendants.¹⁸² Given the widespread belief that the system allows many guilty persons to go free, such defendants are treated by many as if they are guilty, and suffer a number of consequences as a result. Most commonly, this happens when acquitted defendants apply for jobs, housing, or admission to educational institutions. Employers, landlords, and schools need to know whether applicants are likely to commit criminal acts. And to the extent that such institutions are willing to err, they would prefer to err in the direction of false positives. But records of conviction, one possible measure of criminality, are simply not accurate enough for such purposes; something less weighted against false positives is necessary. Employers and the like thus often look to arrest records as a proxy for criminality.¹⁸³ That metric effectively screens out criminals who were identified by police but who could not be convicted due to the vagaries of the system. Unfortunately, it also screens out the genuinely innocent who were accurately acquitted.

In a non-Blackstonian world, however, acquittals would function differently. If an acquittal were equated with a finding of innocence, the system might not permit acquitted defendants to be held liable in civil proceedings. But more importantly, acquittals would have a different social meaning. It would not be a commonly held assumption that many guilty people go free; thus, the acquitted would be at least somewhat more likely to be seen as actually innocent.

3. *Voter Attitudes.* — Whether a criminal justice system follows the Blackstone principle should affect the underlying political economy of criminal justice. As numerous scholars have observed, most voters in our society have little expectation of ever facing criminal sanctions. Criminal defendants are largely drawn from groups that do not participate heavily in the political process,¹⁸⁴ and in the case of

Nifong was subsequently disbarred. See generally Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 *FORDHAM L. REV.* 1337 (2007) (documenting background of the case).

¹⁸¹ Pardons based on innocence are "rare," because typically "a pardon actually presupposes the guilt of the petitioner." Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 *STAN. J. C.R. & C.L.* 253, 289 (2010). And pardons based on innocence do not "erase the underlying conviction," at least in the federal system. Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 *TEX. L. REV.* 561, 580 n.78 (2001).

¹⁸² See Samuel Bray, Comment, *Not Proven: Introducing a Third Verdict*, 72 *U. CHI. L. REV.* 1299, 1309–10 (2005); Leipold, *supra* note 174, at 1301–14.

¹⁸³ See Bray, *supra* note 182, at 1309–11, 1311 n.65 (citing, inter alia, Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 *SOC. PROBS.* 133, 136 (1962)).

¹⁸⁴ See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *STAN. L. REV.* 989, 995 (2006).

most crimes, “voters identify with the victim, not the criminal.”¹⁸⁵ From these observations, many commentators conclude that the political process will inevitably fail to produce desirable or just outcomes in the criminal arena. Section II.C explores the normative implications of the dynamic critique for those who hold that view. Here, the goal is merely to describe how we should expect the Blackstone principle to interact with voter preferences. The Blackstone principle should have two key effects. First, it should make the average voter more inclined towards harsh punishment for criminals. It will be common knowledge that the rules were designed to make false convictions unlikely — and law-abiding voters will have little reason to worry about the prospect of facing criminal sanctions themselves. This knowledge should make them more comfortable with harsh treatment of defendants because they will have less reason to fear ever experiencing such treatment.

The Blackstone principle should also lead voters to feel less sympathy for defendants, because it will enhance the perception that defendants are almost uniformly guilty. In a world without the Blackstone principle, by contrast, the law-abiding would be exposed to a slightly greater risk of actually suffering criminal punishment — because the system would be more tolerant of false positives — and would be more likely to think of convicted defendants as possibly innocent.

William Stuntz’s description of the criminal process as a “giant funnel”¹⁸⁶ is helpful in fleshing out this point:

Entering the broad end of the funnel are the tens of millions of men and women whom the police search or seize each year, most of them guilty of nothing worse than a traffic offense. Slide down the funnel, and that broad pool of suspects narrows considerably, producing a smaller pool of criminal defendants: about two million per year charged with felonies, and several million more charged with misdemeanors. Most of these *are* guilty, but not all, and a sizeable fraction of even the felons are let off with essentially no punishment. Slide down a bit farther and the pool narrows more, to the 700,000 who enter prison each year. Sadly, there are innocents here too — but presumably their number is small, and no one knows who they are. Notice the pattern: as one proceeds from policing to adjudication to punishment, the system’s targets grow fewer, less politically attractive, and less likely to vote.¹⁸⁷

The Blackstone principle makes the sides of the funnel steeper. By making it harder to punish, the Blackstone principle concentrates criminal punishment on a more discrete group of people. And it

¹⁸⁵ Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1138 (2001).

¹⁸⁶ William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 782 (2006).

¹⁸⁷ *Id.* at 782–83 (footnotes omitted).

makes the group of people being punished less politically attractive, because it ensures that a higher percentage of them will be guilty (or at least *seen as* guilty). We should thus expect the Blackstone principle to increase political tolerance for harsh treatment of convicted criminals.

And indeed, there is evidence that criminal lawmaking functions differently when political decisionmakers are more likely to think of themselves as potential suspects or defendants. Craig Lerner has documented how the fact that legislators often face criminal investigation and prosecution has led them to enact a number of pro-defendant reforms.¹⁸⁸ Lerner attributes this phenomenon partly to naked self-dealing,¹⁸⁹ but also to the cognitive bias known as the “availability heuristic”¹⁹⁰: “the modern legislator . . . casts her gaze on the ills of those near to her and concludes . . . that those ills are rampant.”¹⁹¹ Whatever the causal mechanism, however, there is good reason to think that, as with legislators, increasing voters’ potential exposure to criminal punishment will change the outputs of the political process.

Moreover, the effect goes beyond simple self-interest; the Blackstone principle influences how voters are likely to feel about the practice of criminal punishment even if it does not make them any more concerned about actually going to prison themselves. As Robert Ferguson observes, “[I]t is easier to relegate someone to such a secular hell [as prison] when that person appears to be different from you.”¹⁹² For example, a recent experiment showed that white voters’ support for harsh penal sanctions and tough crime-control policies varied based on how they perceived racial disparities in the prison-inmate population — those subjects primed to think that the prison population included more black (and thus fewer white) convicts were less inclined to support lenient reforms.¹⁹³ While implicit racism is likely part of the explanation, this result is consistent with the hypothesis that support for harsh policies increases when voters feel they have less in common with criminal convicts. Given that most voters do not think of themselves as criminals, they should be more likely to favor the

¹⁸⁸ See Craig S. Lerner, *Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 632–56.

¹⁸⁹ *Id.* at 628.

¹⁹⁰ The availability heuristic is the tendency to be “influenced in estimating the probability of an event by whether an event similar to that in question comes readily to mind.” Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 754 (1990).

¹⁹¹ Lerner, *supra* note 188, at 631.

¹⁹² ROBERT A. FERGUSON, *INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT* 181 (2014).

¹⁹³ See Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL. SCI. 1949 (2014).

harsh treatment of the convicted where they perceive that there are few innocents among the pool of defendants. Where the perceived number of innocents is high, by contrast, voter support of harsh punishment should wane. For example, there is evidence that heightened awareness of false convictions in capital cases reduces public support for the death penalty.¹⁹⁴

In addition to changing political attitudes towards criminal punishment, the Blackstone principle will also make voters more concerned about *crime*. Most obviously, this effect will occur to the extent that the Blackstone principle reduces deterrence and criminal incapacitation,¹⁹⁵ increasing crime rates and thus making crime prevention a higher political priority. But the principle should have more subtle effects as well. Likely due to the availability heuristic, highly salient anecdotes are powerful forces in shaping criminal justice policy,¹⁹⁶ as the many criminal laws that are named after specific victims demonstrate.¹⁹⁷ The Blackstone principle should interact with this bias. By design, the system will create more high-profile acquittals of defendants who are commonly considered guilty — think of O.J. Simpson, Casey Anthony, or George Zimmerman — than high-profile convictions of defendants who are seen as innocent. Moreover, such high-profile false negatives will tend to be explained to the public, and understood by them, as the result of the system's commitment to letting many guilty people go free to protect the innocent. These effects should reinforce the perception that many guilty people go free, and thus that crime is prevalent — perhaps to a greater degree than the facts support. As opinion polls reveal, “[p]eople inaccurately estimate the rate of crime, usually thinking that violent crime rates are higher than they actually are.”¹⁹⁸

¹⁹⁴ See Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 HOW. L.J. 525, 544 (2009) (“[R]ecent public opinion polls indicate that respondents overwhelmingly report that concerns about innocence have affected their views regarding capital punishment.”).

¹⁹⁵ See *supra* section II.A.2, pp. 1089–92.

¹⁹⁶ See, e.g., Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1292–93 (2005).

¹⁹⁷ See, e.g., Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1076–78 (2012) (describing the passage of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Megan's Law, and the Adam Walsh Child Protection and Safety Act); see also JOEL BEST, *RANDOM VIOLENCE* 28–71 (1999) (discussing the role of media in publicizing high-profile crimes and how that shapes policy).

¹⁹⁸ Tyler, *supra* note 27, at 854; see also *id.* at 854–55 (“It is widely believed that the courts let too many guilty people go free because of legal technicalities.”); Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 107 (1999) (“O.J. Simpson's acquittal . . . still lingers in the minds of many as evidence that the judicial system is too lenient.”).

Thus, the Blackstone principle likely causes voters to be more worried about being victims of crime while making them less sympathetic to the convicted and less concerned about facing criminal punishment themselves. Both effects will make voters more eager to treat convicted criminals harshly. That means harsher sentences for the convicted. But it also means that the *quality* — as opposed to the quantity — of their punishment will be worse for them, as well. There will be less public support for reforming prison conditions, for example, in a world where the public believes that those in prison all deserve to be there.

4. *Law-Enforcement Behavior.* — The Blackstone principle could also influence the behavior of law-enforcement actors. Efforts to increase procedural fairness can have the unintended effect of reducing individual decisionmakers' senses of responsibility. In *Caldwell v. Mississippi*,¹⁹⁹ for example, the Supreme Court reversed a death sentence where jurors had been told that an appellate court would review their sentencing decision; the Court reasoned that such an instruction might lead jurors to think they could “more freely ‘err because the error may be corrected on appeal.’”²⁰⁰ Similarly, the Blackstone principle could lead actors within the system to feel less responsibility for preventing false convictions because those actors will know that the procedural system is already designed to guard against such outcomes.

In this way, the Blackstone principle could reinforce “the hyper-adversarial culture of some prosecutors' offices.”²⁰¹ Prosecutors might see the procedural system itself as providing all the protection to defendants that is necessary, freeing them up to focus on victory above all other concerns. Similar pressures could also shape police behavior. Scholars have lamented the scourge of “testilying” — police perjury designed to ensure the conviction of defendants who officers believe to be guilty but might go free due to procedural violations.²⁰² One factor contributing to that phenomenon is that police lack respect for judicially crafted constitutional criminal procedure rules, believing that they allow too many guilty persons to escape punishment.²⁰³ The Blackstone principle could have a similar effect, encouraging

¹⁹⁹ 472 U.S. 320 (1985).

²⁰⁰ *Id.* at 331 (quoting *Maggio v. Williams*, 464 U.S. 46, 55 (1983) (Stevens, J., concurring in the judgment)); see also Adam M. Gershowitz, Essay, *The Diffusion of Responsibility in Capital Clemency*, 17 J.L. & POL. 669, 697 (2001); cf. Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 12 (2010) (“State court judges may be more inclined to refuse to grant evidentiary hearings if they know that the federal courts will hold hearings later and clean up the mess.”).

²⁰¹ Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 423 (2011).

²⁰² See, e.g., Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041–42 (1996).

²⁰³ See *id.* at 1044.

police to fabricate evidence and cut other corners to aid in obtaining convictions.²⁰⁴

The Blackstone principle could also shape legal actors' attitudes after convictions. Consider the problems faced by wrongly convicted defendants seeking exoneration. As Will Baude has observed, many such defendants "are released only after the prosecutors['] office eventually admits that it made a mistake and/or cooperates in the exoneration."²⁰⁵ Yet prosecutors too often "dig in," refusing to admit the possibility of error.²⁰⁶ Indeed, prosecutors have in many instances insisted on the guilt of defendants who have been exonerated by DNA evidence.²⁰⁷ There are many explanations for this attitude, including prosecutors' incentive structures and the personality characteristics of those attracted to prosecutorial careers.²⁰⁸ But the Blackstone principle may contribute to the problem. Where convictions are difficult to obtain, legal actors will see them as the result of a process that is highly fair to defendants and will think that false convictions are unlikely. Moreover, the significant difficulty of obtaining convictions makes finality especially important — both because convictions will be seen as hard-won victories and because the prospect of a new trial will be unappealing.²⁰⁹

Finally, the principle could influence how government actors respond to acquittals. In a non-Blackstonian world, police and prosecutors would have stronger incentives to keep looking for the guilty party for two different reasons. First, convictions would be less difficult to obtain, therefore increasing the returns on additional investigation. Second, precisely because acquittals would be more likely to be viewed as evidence of underlying innocence, police and prosecutors would feel more political pressure to identify the real perpetrator after an acquittal; they would not be able to deflect blame for the failure to punish a guilty wrongdoer on the system's bias in favor of letting the guilty go

²⁰⁴ Judges, too, might feel these effects. Cf. Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1327 (1999) ("Judges may view police abuse as a necessary evil that allows them to put away bad actors rather than let them escape on technicalities.")

²⁰⁵ Will Baude, *The Unintended Consequences of Compensating the Exonerated*, WASH. POST: VOLOKH CONSPIRACY (Jan. 30, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/30/the-unintended-consequences-of-compensating-the-exonerated> [<http://perma.cc/P3Q8-EPM4>].

²⁰⁶ *Id.*

²⁰⁷ See Orenstein, *supra* note 201, at 410–16.

²⁰⁸ See *id.* at 420–24.

²⁰⁹ See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1333–34 (1997) ("[L]egislatures, courts and executives have shown little tolerance for claims that someone who is incarcerated or about to be executed is factually innocent. All of these institutions share the common belief that a huge social price has been paid by acquitting the guilty person to guarantee that an innocent person is never convicted.")

free. Thus, there might be a greater chance that authorities would ultimately catch and punish the truly guilty culprit.

5. *Legislative Behavior.* — Like police and prosecutors, legislators will also behave differently in a world with the Blackstone principle. Stuntz explained how legislators can broaden criminal liability in order to make “an end run around the beyond-a-reasonable-doubt standard.”²¹⁰ In his 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.²¹¹

The Blackstone principle will likely encourage this phenomenon. Imagine that prosecutors wish to enforce one statute, but because some of the elements are difficult to prove conclusively, the Blackstone principle will prevent them from convicting a sufficient number of the statute’s violators. Legislators can respond by creating a statute covering a broader swath of conduct that includes all who violated the narrower statute. The Blackstone principle would guard against false convictions under the *new* statute — but in a world without the Blackstone principle, that statute might not even exist.

Single-mindedly focusing on false convictions misses the point that, in a world where legislatures are free to create new crimes, the very concepts of guilt and innocence have no independent meaning. They can be defined only with reference to particular statutes. As Henry Hart wondered: “What sense does it make to insist on procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?”²¹²

6. *Procedural Subversion.* — A final potential effect flowing from a system’s formal commitment to the Blackstone principle is outright subversion by judges, prosecutors, and the other actors who run the system. There is historical precedent for such a response. John Langbein has explained how medieval Europe’s overly demanding law of proof — ostensibly supposed to preclude the possibility of false convictions — was ultimately self-defeating.²¹³ The law sought to protect the innocent by requiring either the defendant’s voluntary confession

²¹⁰ William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 14 (1996).

²¹¹ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001).

²¹² Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 431 (1958); see also Douglas N. Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151, 153 (1995).

²¹³ See John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

or two eyewitnesses to the crime to convict.²¹⁴ “In the history of Western culture no legal system has ever made a more valiant effort to perfect its safeguards and thereby to exclude completely the possibility of mistaken conviction.”²¹⁵ Yet, Langbein shows, the safeguards were simply too demanding: “[S]ociety cannot long tolerate a legal system that lacks the capacity to convict unrepentant persons who commit clandestine crimes.”²¹⁶ As a result, lawyers and judges developed a workaround: a system of torture designed to get the defendant to confess.²¹⁷ This system, however, presented all the risks of convicting innocents that the formal rules were supposed to prevent.²¹⁸

Langbein argues that a similar phenomenon has occurred in American criminal justice. Because adversarial criminal trials have become too costly and time consuming, prosecutors, aided by judges, use the threat of longer sentences to induce defendants into waiving their trial rights. The resulting practice of plea bargaining is certainly more efficient than the criminal trial. But it provides significantly fewer safeguards against false convictions.²¹⁹ While rules justified by the Blackstone principle are not the only force making trials costly, they certainly contribute to those costs and thus could contribute to this phenomenon.

For present purposes, it bears note that such subversion might not merely cancel out the benefits of innocence-protective rules; it could actually leave the system *less* defendant-friendly than it would be otherwise. Langbein suggests that our system, like the medieval European one, is “saddled with a lower level of safeguard than it could and would have achieved if it had not pretended to retain the unworkable formal system.”²²⁰ Moreover, precisely because this kind of subversion is, well, subversive — that is, because the system still *supposedly* retains its commitment to protecting the innocent, despite actual practices — it can coexist with (rather than negating) the other dynamic effects described above. Even if the system is in practice doing a poorer job of guarding against false convictions than our professed allegiance to the Blackstone principle would indicate, the system’s formal commitment to the principle could still influence (for example) the social meaning of acquittals and convictions.

²¹⁴ *Id.* at 4.

²¹⁵ *Id.*

²¹⁶ *Id.* at 5.

²¹⁷ *Id.* at 5–7.

²¹⁸ *Id.* at 7–8.

²¹⁹ *See id.* at 8–11.

²²⁰ *Id.* at 21.

C. Assessing the Dynamic Effects

Having identified the dynamic effects of the Blackstone principle, this section normatively evaluates them. It identifies two ways in which the Blackstone principle is more problematic than is usually recognized. First, the principle provides fewer benefits to innocent defendants than it seems, perhaps even making them worse off overall. Second, the principle reinforces troubling political pathologies, distorting criminal justice policy.

1. *Benefits and Burdens for Innocent Defendants.* — Debates about the Blackstone principle often turn on whether it correctly balances the competing interests of innocent crime victims and innocent criminal defendants. The dynamic perspective shifts the debate, revealing that the Blackstone principle does a worse job of protecting innocent *defendants* than is commonly assumed. The principle actually harms two subsets of innocent defendants: those who would be acquitted in either a non-Blackstonian or a Blackstonian universe one (acquitted/acquitted innocent, or AAI defendants), and those who would be convicted in either world (convicted/convicted innocent, or CCI defendants). While the principle does help innocent defendants who would be wrongly convicted under a non-Blackstonian regime but who are acquitted because of the system's adherence to the principle (acquitted/convicted innocent, or ACI defendants), those benefits are less robust than they appear at first glance.

(a) *Hidden Costs.* — Surprisingly, a number of innocent defendants are made worse off by the Blackstone principle. First, consider the AAI defendant, one who is charged with a crime but who would be acquitted²²¹ under either regime. Such defendants suffer in our world because their acquittals' social meaning is shaped by the understanding that many guilty people go free. Without the Blackstone principle, AAI defendants would be at least somewhat better off.

Precisely how much better off is hard to say. As Samuel Bray observes, "[I]f defendants were acquitted only when the evidence for *innocence* was beyond a reasonable doubt, then acquittals would exonerate almost absolutely."²²² A non-Blackstonian system would not skew errors that far in the direction of false convictions, and so an acquittal would not be taken as nearly conclusive proof of innocence. But it would, at the least, be more indicative of innocence. The AAI defendant would have a better chance to obtain education or employment despite the arrest. Similarly, friends, family, and business associates might be less likely to retain doubts about the AAI defendant's

²²¹ As previously noted, *see supra* note 5, I use the term "acquitted" to include various post-arrest events that lead to a defendant avoiding punishment.

²²² Bray, *supra* note 182, at 1325.

innocence. Moreover, in a non-Blackstonian world, authorities might have more of an incentive to catch the truly guilty party after an acquittal,²²³ which could only help the AAI defendant.

One might object that few AAI defendants exist. If the evidence against someone were weak enough that she would be *acquitted* in a non-Blackstonian system, wouldn't she not even be charged in a Blackstonian system? But that won't always be true. Sometimes, initial evidence strongly inculcates a suspect, but then the case falls apart, due to witness credibility issues or other problems. For example, the case against French politician Dominique Strauss-Kahn, who was accused of rape by a hotel maid in New York City, appeared strong before collapsing with remarkable speed.²²⁴ And the intuitions of prosecutors and police will not always match those of jurors; in some cases where government actors think the defendant is obviously guilty, jurors may disagree.

To be sure, AAI defendants would still face hardships in a non-Blackstonian system. Even if the adjudicative system were not designed to skew outcomes in favor of false acquittals, the fact of an arrest without a conviction would still serve as a signal (albeit a weaker one) of potential criminality. In situations where a false negative was costlier than a false positive (such as where an employer is trying to fill a position and has many qualified applicants to choose from), arrest records could still serve as useful, if imperfect, proxies. So the harm caused by the Blackstone principle to any given AAI defendant is nontrivial but perhaps not large. If that were the only cost imposed by the Blackstone principle, the case for the principle might remain strong. But AAI defendants are not the only group of innocent defendants harmed by the Blackstone principle.

Consider the plight of CCI defendants, those innocents who would be charged and convicted even in a Blackstonian world. Such defendants will inevitably exist; even if following the Blackstone principle reduces the number of false convictions, it will not and cannot eliminate them.²²⁵ Moreover, as discussed below,²²⁶ many innocent defen-

²²³ See *supra* section II.B.4, pp. 1106–08.

²²⁴ See John Eligon, *Strauss-Kahn Drama Ends with Short Final Act*, N.Y. TIMES, Aug. 24, 2011, at A1.

²²⁵ In our system, which purports to follow the Blackstone principle, false convictions still happen with some regularity. See, e.g., BRANDON L. GARRETT, CONVICTING THE INNOCENT (2011) (examining case histories of 250 convicts later exonerated by DNA testing); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 779–80 (2007) (estimating wrongful conviction rate in capital rape-murder cases in the 1980s of between 3.3% and 5%); see also Givelber, *supra* note 209, at 1321 (“America’s criminal justice system creates a significant risk that innocent people will be systematically convicted.”).

²²⁶ See *infra* section II.C.1(b), pp. 1112–14.

dants in a Blackstonian world may choose to plead guilty even if the formal rules give them a decent chance of obtaining an acquittal. All these defendants will be worse off in a Blackstonian world.

For one, such defendants likely receive more punishment in our system than they would in a non-Blackstonian system. Limiting the number of people who can be punished requires punishing any individual defendant more to maintain the same level of deterrence, and to satiate the public's desire for retribution.²²⁷ And the Blackstone principle's effects on political economy should reinforce that tendency, as they will make voters more comfortable with harsh treatment of the convicted than they would otherwise be, in terms of both the quantity and quality of punishment.²²⁸ Making matters worse, the social meaning of a conviction will also be more negative in a Blackstonian world — as it will provide stronger evidence of guilt — making it harder for the CCI defendant to move on after serving her sentence.²²⁹ And the Blackstone principle may also make it more difficult for convicted innocents to obtain exoneration later if new evidence throws doubt on their guilt.²³⁰

(b) *Overestimated Benefits.* — One group whom the Blackstone principle unquestionably benefits is ACI defendants, who go free as a result of the principle when they otherwise would be punished. For a number of reasons, however, commentators typically overestimate the extent of these benefits.

First, observers overstate the *magnitude* of the benefit any particular ACI defendant receives from the principle. The reason is the flipside of how the principle harms CCI defendants. As explained, the system's adherence to the Blackstone principle changes the quality and meaning of criminal punishment, increasing sentences and stigma.²³¹ In a non-Blackstonian world, innocents who are convicted would be punished — but not as harshly as convicts in a Blackstonian world, because their sentences would likely be shorter and their convictions would carry somewhat less stigma. Commentators miss this point when they evaluate the costs of false convictions without adjusting for the Blackstone principle's systemic effects.

Second, observers implicitly overestimate the *number* of defendants who receive the benefits of the Blackstone principle. Several phenomena conspire to reduce the quantity of ACI defendants. To begin with, if a Blackstonian system produces more crime than a non-Blackstonian system, that will affect the total number of arrests and

²²⁷ See *supra* section II.B.1, pp. 1095–99.

²²⁸ See *supra* section II.B.3, pp. 1102–06.

²²⁹ See *supra* section II.B.2, pp. 1099–102.

²³⁰ See *supra* section II.B.2, pp. 1099–102.

²³¹ See *supra* section II.B.1–2, pp. 1095–102.

convictions, and thus the opportunities for errors. So even if the Blackstone principle lowers the *rate* of false convictions, it could still increase the total *number* of false convictions.²³² An increase in crime may also reduce the overall accuracy of the criminal process, which could further increase the number of false convictions. And — because inaccurate judgments by the criminal justice system likely reduce deterrence²³³ — the principle should also lead to yet more crime, further exacerbating the problem.

Legislative circumvention will also undermine intended benefits to the innocent. As explained, the Blackstone principle will likely encourage legislators to broaden criminal liability.²³⁴ If so, innocent defendants who might have been charged under narrower statutes will be worse off. Absent the Blackstone principle, those defendants would have had an opportunity to prove their innocence at trial. But because the principle has encouraged legislators to expand liability, a prosecutor will control the adjudication that matters: she can decide to charge the defendant under a broader statute based on her assessment of whether the defendant is guilty of the “real” crime. “[W]hen prosecutors sort based on unwritten elements rather than written ones, the legal process offers almost no protection against screening errors.”²³⁵ This circumvention will also result in some blameless defendants receiving punishment unnecessarily. Because prosecution is decentralized, some prosecutors likely won’t limit the new, broader statutes to a mere proxy for a subset of true criminal conduct, but will charge and convict those guilty only of violating the broader statute. Such defendants are not “innocent”; they violated the criminal statute under which they are charged. But in a world without the Blackstone principle, they would not be guilty of anything and would receive no punishment.

Last, but certainly not least, is the impact of procedural subversion. The more the formal rules of the system skew in favor of false acquittals, the greater the incentives will be for prosecutors, judges, and other actors to find workarounds. Plea bargaining is exactly such a response. Determining empirically how much plea bargaining distorts

²³² Similarly, Kaplow and Shavell observe that more innocent people will be punished in a system that insists on “fair” punishments that are insufficiently harsh to provide optimal deterrence. KAPLOW & SHAVELL, *supra* note 142, at 336–39. “[R]eductions in crime result in reductions in the rate at which punishment must be imposed, which in turn involves a reduction in the rate at which innocents are punished by mistake.” *Id.* at 348 n.107.

²³³ See Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1, 10 (1994).

²³⁴ See *supra* section II.B.5, p. 1108.

²³⁵ Stuntz, *supra* note 211, at 571; see also Daniel C. Richman & William J. Stuntz, Essay, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 628–30 (2005).

the distribution of errors would be difficult, if not impossible, and this Article is not the place for such an attempt. But given that plea bargaining is now our system's default method of dispositive adjudication — approximately 95% of convictions nationwide are made by plea²³⁶ — it's at least possible that procedural subversion is dramatically reducing the benefits of trial rules that are supposed to protect the innocent. That's especially true if — as Stephanos Bibas has suggested — innocent defendants might be more likely than guilty defendants to take pleas.²³⁷ Those innocent defendants might well be *worse* off in a Blackstonian world: as Langbein argues, a world less committed to protection of the innocent in formal adjudication might in practice use procedures that are fairer to defendants than plea bargaining, which offers no protection for the innocent.²³⁸

Even more troubling is the prospect that plea bargaining could in theory eliminate much of the Blackstone principle's benefits while leaving in place its acknowledged costs. If many innocents take pleas while a significant number of guilty defendants go to trial, defendant-friendly procedural rules might inure only to the benefit of the guilty. Making matters worse, many of the principle's dynamic costs (such as the social meaning of acquittals and convictions) exist because of the *perception* that the system follows the Blackstone principle — meaning that those costs would still be present even if the system isn't in practice protecting the innocent well at all. If so, espousing the Blackstone principle would be a particularly dangerous form of hypocrisy, one that makes the innocent worse off by the very act of claiming that they are protected.²³⁹

²³⁶ See THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT PROCESSING STATISTICS, 2006: FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 10 (2010), <http://www.bjs.gov/content/pub/pdf/fdluco6.pdf> [<http://perma.cc/289L-QPNK>] (noting that 95% of felony convictions within one year of arrest in large urban counties were by guilty plea); MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2009, at 12 (2011), <http://www.bjs.gov/content/pub/pdf/fjs09.pdf> [<http://perma.cc/P7QP-QNMQ>] (noting that 97% of convictions in federal system were by plea).

²³⁷ See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2495 (2004).

²³⁸ See Langbein, *supra* note 213, at 21.

²³⁹ One additional group benefits from the Blackstone principle. If it is easier to punish, police should be more willing to make arrests. That means that in a non-Blackstonian world, some innocent people will likely be arrested but ultimately acquitted of crimes, when in a Blackstonian world they'd never have any negative contacts with the criminal justice system. Those defendants — like the innocents who avoid punishment due to the principle — are concededly worse off in a non-Blackstonian world, because they'd have to deal with the stigma associated with being formally accused of a crime. But the costs to such innocents are likely not large, because in a non-Blackstonian system an arrest without a conviction would carry less stigma than it would in our world.

2. *Exacerbating Political Process Pathologies.* — In addition to exposing surprising drawbacks for innocent defendants, the dynamic perspective reveals another set of costs created by the Blackstone principle: harmful effects on the political process.

(a) *The Political Process Failure Narrative.* — To assess the Blackstone principle's political effects, it's necessary to start with the traditional account of criminal justice politics. According to the conventional wisdom, the political process consistently creates outcomes that are suboptimal or unjust when it comes to criminal law. This is because voters and legislators, for one reason or another, have insufficient regard for the interests of criminal suspects and defendants.²⁴⁰ This perceived failure of the political process has become the standard justification for aggressive judicial intervention into criminal law and procedure.

These theories have often drawn on political process theory, a vision of judicial review first suggested in footnote four of *United States v. Carolene Products Co.*²⁴¹ There, Chief Justice Stone suggested that while courts should usually afford legislation a presumption of constitutionality, a "more searching judicial inquiry" might be appropriate for legislation burdening "discrete and insular minorities," because "prejudice" against them "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."²⁴² John Hart Ely, who built a theory of judicial review upon the *Carolene* footnote,²⁴³ argued that a political process failure in the criminal realm justified the Supreme Court's Eighth Amendment jurisprudence. Because the criminal justice "system is constructed so that 'people like us' run no realistic risk" of suffering harsh punishment, Ely contended, "some nonpolitical check on excessive severity is needed."²⁴⁴

Michael Klarman elaborates upon Ely in his reconstruction and defense of political process theory. "If all segments of society were equally likely to come in contact with the criminal justice system, legislative rulemaking would very likely be the norm," Klarman argues; but "[b]ecause the political process does not adequately represent the interests of those societal groups largely populating the criminal class, political process theory demands judicial superintendence."²⁴⁵ Similarly,

²⁴⁰ "It is an axiom of faith among criminal procedure scholars that legislatures are unsympathetic to criminal defendants." Lerner, *supra* note 188, at 601.

²⁴¹ 304 U.S. 144 (1938).

²⁴² *Id.* at 153 n.4.

²⁴³ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

²⁴⁴ *Id.* at 173.

²⁴⁵ Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 766 (1991).

Donald Dripps observes that “the class of persons at risk from false positives is relatively small and restricted to a diffuse and politically disinterested segment of society. The class of people at risk from false negatives is very large, and quite sensibly frightened about crime.”²⁴⁶ Because “the chance of unjust conviction befalling any given person . . . is relatively remote,” voters do not take the interests of the accused into consideration in voting.²⁴⁷

Many scholars have elaborated on the political-process-failure hypothesis. Carol Steiker attributes “widespread public support for unrestrained police power” to the fact that “[t]he ‘average’ . . . citizen is probably more likely to be a victim of crime than a victim of police overreaching.”²⁴⁸ Rachel Barkow urges courts to enforce the separation of powers strictly in criminal cases since political safeguards will be unavailing: “Because the targets of regulation are weak and the voices in favor of broader laws and longer punishments are powerful, the political system is biased in favor of more severe punishments.”²⁴⁹ Dan Kahan and Tracy Meares argue that courts should consider whether an “average citizen” is “subject to [a] burden” created by the criminal justice system in determining how much deference criminal legislation should receive.²⁵⁰ David Sklansky relies on process theory in arguing that equal protection doctrine should limit the disparity between crack and cocaine-powder sentencing.²⁵¹ As Stuntz noted, “If there is a consensus theory of why the Warren Court’s criminal procedure decisions got it right, the *Carolene Products*–Ely argument is it.”²⁵² And although Stuntz thought that the Warren Court got criminal procedure wrong,²⁵³ he too agreed that political process failures explained some problematic aspects of criminal justice. Stuntz argued that constitutional law perversely regulates the areas most responsive to political pressure — that is, police investigative procedures — while leaving unregulated the area least subject to voter concern — criminal punishment.²⁵⁴

²⁴⁶ Donald A. Dripps, Essay, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1093 (1993).

²⁴⁷ *Id.* at 1090.

²⁴⁸ Carol Steiker, Response, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 850 (1994).

²⁴⁹ Barkow, *supra* note 184, at 1030.

²⁵⁰ See Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1173 (1998).

²⁵¹ See David A. Sklansky, Essay, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1298–302 (1995).

²⁵² Stuntz, *supra* note 210, at 21.

²⁵³ See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 216–43 (2011).

²⁵⁴ Stuntz, *supra* note 186, at 783.

Thus, though some accounts put more emphasis on racial and class biases than other accounts,²⁵⁵ there is general agreement that because “people like us” don’t go to prison, voters opt for criminal justice policies that are overly harsh to defendants. Those policies are bad for convicted defendants, but also for society as a whole. Most notably, there is a virtual consensus among criminal justice scholars that America’s “hyper-incarceration” problem is unjust and also an enormous waste of social resources.²⁵⁶

(b) *Reinforcing Failure*. — The narrative of a political market failure in criminal justice, like political process theory as a whole, raises difficult conceptual questions regarding how the political process *should* work ideally,²⁵⁷ as well as whether courts are capable of correcting political failure.²⁵⁸ But bracketing those problems, the point is that the Blackstone principle should reinforce all the tendencies that commentators almost unanimously treat as problematic. This will happen in several ways.

First, as noted, the Blackstone principle makes the “funnel” of criminal justice narrower — concentrating punishment on a more discrete, less politically involved, and less politically attractive group of people.²⁵⁹ Of course, in some cases, legal regimes that shift costs onto small groups of people may be *more* likely to spur political feedback than those regimes that disperse costs more widely.²⁶⁰ That mechanism will likely not work in the criminal context, however, for the

²⁵⁵ See, e.g., Klarman, *supra* note 245, at 766.

²⁵⁶ See, e.g., Robert Weisberg, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425, 1425 (2012) (reviewing STUNTZ, *supra* note 253) (discussing “the large contemporary chorus that has denounced the state of incarceration in America for both its embarrassing magnitude and its ugly disproportionalities”); see also Louis Michael Seidman, *Hyper-Incarceration and Strategies of Disruption: Is There a Way Out?*, 9 OHIO ST. J. CRIM. L. 109, 112–13 (2011).

²⁵⁷ The idea of a political failure presupposes a theory of how criminals *ought* to be treated in the political process and an optimal level of concern that voters *should* have for defendants. But determining that optimal baseline is not easy. Criminal behavior, by definition, subverts the very order that the political process seeks to impose. If all voters thought of themselves as potential criminals, they might not pass criminal statutes in the first place. Here, as elsewhere, process theory “determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values.” Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980).

²⁵⁸ The difficulty with moving from an identified political failure to a prescriptive theory of judging is that “[t]he same motivations that cause legislators, interest groups, and others to behave in self-interested or prejudiced ways will cause those actors to constrain or negate judicial efforts to correct process deficiencies. . . . [J]udges do not stand outside the system; judicial behavior is an endogenous product of the system.” Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1764 (2013). See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* (1994); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991).

²⁵⁹ See *supra* section II.B.3, pp. 1102–06.

²⁶⁰ See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (rev. ed. 1971); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

same reasons that the market failure is thought to appear in the first place. Those individuals most likely to commit crimes are for the most part neither interested in nor effective at political mobilization.²⁶¹

A related effect is the way the principle influences the attitudes of law-abiding voters. Voters will more freely support policies that treat convicted defendants harshly if they feel no risk of ever suffering criminal penalties.²⁶² The concepts of “exit” and “voice” are helpful in explaining this phenomenon. Albert Hirschman explained how in many contexts, retention of the most influential and engaged citizens or consumers — those with the greatest “voice” — is critically important to preserving institutional quality.²⁶³ Thus, creating alternatives to state monopolies can, surprisingly, reduce rather than improve the previous monopoly’s performance. For example, when private schools are a viable option, public schools will be less likely to recover from deterioration.²⁶⁴ “[I]ncreasing numbers of quality-education-conscious parents will send their children to private schools,”²⁶⁵ depriving “the public schools of those member-customers who would be most motivated and determined to put up a fight against the deterioration.”²⁶⁶

Although the analogy is imperfect, the Blackstone principle can be thought of as facilitating the “exit” of vocal and influential political decisionmakers from criminal justice. In a world without the Blackstone principle, voters would worry more about being criminal defendants themselves, would feel more sympathy for the plight of the convicted, and would be more concerned about the treatment of convicts. The Blackstone principle gives voters less reason to care about the convicted. “[L]egislators are likely inclined to enact protections for criminal defendants only when persons close to them personally endure [criminal prosecution’s] hardships,”²⁶⁷ and the same principle should hold true for voters as well.

Daryl Levinson’s analysis of how institutional designers can use either “rights” or “votes” to protect minority interests is also illuminating. As Levinson explains, “[T]he interests of vulnerable groups in col-

²⁶¹ See, e.g., Barkow, *supra* note 184, at 995 (“Those accused of crimes are among the most politically anemic groups in the legislative process. Criminal defendants do not coalesce into an organized group . . .”). And even if those who are most likely to be affected by criminal punishment were inclined to vote, felon disenfranchisement laws make it difficult for many of them to do so. See SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2014), http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf [<http://perma.cc/3JK7-6HPE>] (summarizing state laws on felon disenfranchisement).

²⁶² See *supra* section II.B.3, pp. 1102–06.

²⁶³ See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 30 (1970).

²⁶⁴ See *id.* at 45–46.

²⁶⁵ *Id.* at 45.

²⁶⁶ *Id.* at 46.

²⁶⁷ Lerner, *supra* note 188, at 661.

lective decisionmaking processes can be protected either by disallowing certain outcomes that would threaten those interests (using rights) or by enhancing the power of these groups within the decisionmaking process to enable them to protect their own interests (using votes).²⁶⁸ In some instances, rights and votes are complementary; “[t]he existence of one can increase the value or likelihood of the other,”²⁶⁹ such as how freedom of speech enables effective participation in the democratic process.²⁷⁰ The analysis here shows, however, how sometimes rights and votes might unexpectedly work at cross-purposes. In order to protect the interests of criminal defendants, we use rights to limit the circumstances under which the state can impose criminal punishment. But doing so may reinforce the very problems that make the substantive-rights protections essential: reducing the number of people who identify themselves as potentially subject to criminal punishment effectively reduces the quantity of “votes” criminal defendants have in the political process.

Another problem is that the Blackstone principle will increase the system’s tendency to generate high-profile false negatives. This effect should reinforce voter concerns about crime.²⁷¹ Louis Michael Seidman describes a related phenomenon. In his account, criminal procedure protections do little to limit prosecutors’ power, but they “make the punishment we inflict on criminal defendants seem more acceptable” and “redirect and exacerbate the popular anger about crime”²⁷²:

Although the [criminal procedure] amendments do little to make the prosecutor’s job harder, people commonly believe that they obstruct the prosecution of dangerous criminals. Some doubt and ambivalence that might otherwise accompany the use of violent and coercive sanctions is thereby dissipated. . . . Because people believe that “legal technicalities” set large numbers of guilty and dangerous criminals free, they think that too many miscreants are escaping punishment. Because they believe that the problem could be brought under control if only the “legal technicalities” were changed, they fail to focus on the bankruptcy of mass incarceration as a crime-fighting strategy.²⁷³

Similarly, here, the Blackstone principle may not always make prosecution significantly more difficult,²⁷⁴ but it will feed the demand for

²⁶⁸ Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1289 (2012).

²⁶⁹ *Id.* at 1350.

²⁷⁰ *See id.* at 1353.

²⁷¹ *See supra* section II.B.3, pp. 1102–06.

²⁷² Louis Michael Seidman, *Criminal Procedure as the Servant of Politics*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 90, 92 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

²⁷³ *Id.*

²⁷⁴ *See supra* section II.C.1(b), pp. 1112–14.

“tough on crime” reforms. Political actors will expand the breadth and severity of criminal law. But as long as the system continues to follow the Blackstone principle, it will inevitably produce some high-profile false negatives that will be blamed on the system’s leniency. This effect should serve as a strong force in favor of tougher punishment.

For these reasons, we should expect the Blackstone principle to make the commonly recognized market failure in the political market for criminal justice *more* of a failure. It will further encourage voters to prefer criminal justice policies that are unnecessarily harsh and thus worse for defendants (both guilty and innocent) and for society as a whole.

This effect could partly explain something that has puzzled scholars of criminal justice: the system’s failure to self-correct after the rise in “tough on crime” policies beginning in the 1970s.²⁷⁵ One can draw an interesting contrast with tort law, which experienced a significant expansion of substantive liability as well as an increase in the severity of sanctions in the second half of the twentieth century²⁷⁶ — one that in some ways mirrors the boom criminal law was undergoing in roughly the same time period. The tort expansion met with significant political blowback, as a number of states passed various tort reform measures.²⁷⁷ Yet retrenchment with respect to criminal law has been much slower to arrive²⁷⁸ — despite near-consensus among informed observers that criminal law’s severity explosion has been socially disastrous.²⁷⁹ Part of the reason may be that, given tort law’s decentralized enforcement and more tolerant attitude towards false positives, politically prominent individuals and corporations are much likelier to be held liable for tort judgments than to be convicted of crimes. While the Blackstone principle can’t have caused American criminal law’s harsh turn in the first place, the principle could have exacerbated it: if criminal law more reliably exposed the politically powerful to the downsides of criminal punishment, the pendulum might well have swung away from harsh policies sooner.

²⁷⁵ See, e.g., TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE* 1 (2014) (“[N]owhere else in the democratic world, and at no other time in Western history, has there been the kind of relentless punitive spirit as has been ascendant in the United States for more than a generation.”); see also JAMES Q. WHITMAN, *HARSH JUSTICE* 2–6 (2003).

²⁷⁶ See, e.g., Stephen P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 *YALE J. ON REG.* 1, 3–5 (1991).

²⁷⁷ See Paul H. Rubin & Joanna M. Shepherd, *Tort Reform and Accidental Deaths*, 50 *J.L. & ECON.* 221, 223 (2007) (“[T]he enactment of tort reforms increased dramatically in the mid-1980s . . .”).

²⁷⁸ There is some reason to believe that the tide has finally begun to turn against escalating harshness. See CLEAR & FROST, *supra* note 275, at 7–11.

²⁷⁹ See Allegra McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 *GEO. L.J.* 1587, 1600 (2012).

To be sure, the Blackstone principle cannot be sole or primary cause for any political failure in criminal justice. Many accounts emphasize race and class biases in the distribution of punishment: because, for many systemic reasons, criminal punishment is unfairly concentrated on the poor and on racial minorities, wealthy whites (who wield disproportionate political clout) have little fear of going to prison.²⁸⁰ Changing the way the system distributes errors will not make such race and class biases in punishment disappear.

Still, it might lessen their sting. Consider Stuntz's explanation for why the criminal justice system disproportionately punishes black drug users and sellers: race and class are (unfortunately) correlated, and downscale drug markets are easier to investigate and prosecute than are upscale ones, thus leading to racially disparate outcomes despite little intentional discrimination.²⁸¹ This account shows how practical obstacles to conviction can create or exacerbate disparities in the distribution of punishment among different social groups.²⁸² The Blackstone principle could thus reinforce preexisting race and class biases: by making it harder to punish, the principle requires prosecutors to be more selective when choosing *whom* to prosecute. There's every reason to think prosecutors focus their efforts on poorer defendants, who are least equipped to put up a strong defense. This phenomenon also likely influences police decisions about arrests. The point, then, is that even if other forces are responsible for the troubling politics of criminal justice, the Blackstone principle could play a role in *exacerbating* bad dynamics.

D. The Dynamic Critique

Previous commentators have assessed the relative disutilities of each kind of error in individual cases, observed that one false conviction appears costlier than a false acquittal, and from that concluded that the Blackstone principle is necessary.²⁸³ That approach, it should now be apparent, is inadequate. One can't seriously evaluate the Blackstone principle without taking stock of its effects on the criminal justice system as a whole. The previous two sections performed such an accounting, and the results dramatically upend the traditional error-cost story. While previous critics have stressed

²⁸⁰ See, e.g., Klarman, *supra* note 245, at 766.

²⁸¹ See William J. Stuntz, Essay, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1799, 1820–22 (1998).

²⁸² Richard McAdams offers an example of a related phenomenon: “If a case of a given strength is easier to win against racial minorities, and prosecutors seek to maximize their conviction rate, then prosecutors who harbor neither racial animus nor stereotypes will nonetheless *intentionally* seek to charge members of racial minorities.” Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 652 (1998).

²⁸³ See *supra* section II.A.1, pp. 1088–89.

the ways in which the Blackstone principle hurts innocent crime victims, the dynamic perspective shows how the principle actually makes some innocent *defendants* worse off. In this way, the Blackstone principle — which, as noted, is criminal law’s own precautionary principle²⁸⁴ — suffers the same flaws of precautionary principles in other contexts. In addition to “produc[ing] collateral risks” (increased crime) the Blackstone principle in some ways “perversely exacerbate[s] the targeted risk” that the principle is supposed to guard against (harm to innocent defendants).²⁸⁵

Having recognized those dynamic costs, the question becomes whether they might outweigh the Blackstone principle’s benefits. Given that this inquiry involves asking what a criminal justice system in a counterfactual universe would look like, it isn’t susceptible to empirical analysis. We don’t know for sure what the relative numbers of ACI, CCI, and AAI defendants are in the overall pool of criminal defendants; nor is there a way to measure things like how much additional punishment each defendant might face due to the Blackstone principle.

Moreover, some of the principle’s dynamic costs may be fairly marginal. For example, the additional stigma that acquitted innocent defendants suffer may be real but small in any given case. And assessing, say, the magnitude of the Blackstone principle’s political effects isn’t easy; the principle likely contributes to voter preferences for harsh punishment, but it surely is not the sole cause of that phenomenon. Even in a world without the Blackstone principle, other kinds of procedural “technicalities” (such as the Fourth Amendment exclusionary rule) might stoke public concern about crime and create the impression that too many guilty people go free.

Yet despite all those caveats, it is at least plausible that the Blackstone principle’s costs could exceed its benefits. Even if the magnitude of many of the dynamic costs is small in isolation, there is no reason to think those effects are nonexistent. And the totality of many small costs, combined together, could be significant enough to outweigh the principle’s putative benefits. The Blackstone principle’s political effects (which could lead to somewhat harsher punishment), combined with its impact on crime rates (and therefore the total number of opportunities for false convictions), could well lead to more and harsher punishment of the innocent overall — especially if the principle also encourages the dominance of an alternative procedural mechanism like plea bargaining, which provides no real safeguards against false

²⁸⁴ See *supra* section I.A, pp. 1088–94.

²⁸⁵ Adrian Vermeule, *Introduction: Political Risk and Public Law*, 4 J. LEGAL ANALYSIS 1, 3 (2012).

convictions. Given how many convictions in our system are resolved by plea rather than trial, it isn't unrealistic to think that a system less *formally* committed to protecting the innocent might actually do a better job of minimizing false convictions. Even if the principle doesn't make innocent defendants *worse* off, any net benefits to the innocent are less significant than they first appear.

Those reduced benefits have to be weighed against the other set of costs the principle creates: as previous critics have observed, the principle likely has significant downsides in terms of lost deterrence and incapacitation, potentially leading to numerous additional crimes.²⁸⁶ Although many think that those costs are justified in the name of protecting the innocent, we need to rethink that calculus given that it is not clear that the principle will protect the innocent to the extent traditionally believed. Perhaps the calculus is different for "victimless" crimes, for which the costs of false acquittals may be less concrete than for paradigmatic violent crimes; but at least for crimes of the latter type, the case for the Blackstone principle is decidedly uneasy.

And indeed, though the analysis thus far has remained largely in the realm of hypotheticals, there is a story one can tell about our system in which the Blackstone principle produces significant costs without any corresponding benefits. The Blackstone principle justifies and explains various aspects of our procedural system, and it's a bedrock assumption in public discourse about our system that it lets the guilty go free to protect the innocent. In practice, of course, most convictions aren't the result of trials, but are the result of plea bargains. There is every reason to think that innocent sometimes plead guilty, since a plea bargain is often a rational and attractive option even for the innocent. Yet those defendants who plead guilty are not seen by society as even possibly innocent, because they have formally admitted their guilt.

Our avowed commitment to the Blackstone principle is part of the problem. We are unwilling to live up to the full promise of the principle, which is partly why plea bargaining is the default means of criminal adjudication today. Yet we are also unwilling to acknowledge the significant number of false convictions that any system of criminal justice will create, which may be why plea bargaining takes the form that it does, hiding the risk of false convictions behind the false assurance of admissions of guilt. If we were willing to be honest about the tradeoffs at issue, perhaps we would implement some kind of criminal case-resolution mechanism offer a level of protection somewhere between the formality of a full trial and the informality of plea bargaining, one that does not shroud the risk of false convictions in the guise

²⁸⁶ See *supra* section II.A.2, pp. 1089–92.

of guilty pleas. In this way, it's possible that a system less *formally* committed to protecting the innocent might actually do a better job of minimizing false convictions.

The dynamic critique also reveals that the Blackstone principle may have significant distributional consequences. As noted, the principle helps some innocent defendants, but likely results in harsher punishment for others. In that sense, the principle singles out one group of people for worse treatment to improve the situation of others. That possibility raises serious fairness concerns. Of course, any criminal justice system will inevitably punish *some* innocent persons. But it isn't obviously better or fairer to ask a small group of innocent people to bear a disproportionately large share of the burdens created by running a criminal justice system. Instead, fairness might suggest that we try to spread those burdens out over more of the population — especially if doing so might actually make society better off.

To be sure, we ultimately can't reach any definitive conclusion about the Blackstone principle's costs and benefits. And the possibility also remains that the Blackstone principle has bigger-picture dynamic effects for which the analysis here has failed to account. The previous sections sought to catalog the principle's effects on the criminal justice system as a whole, but a complete dynamic approach would also take into consideration the principle's consequences for all of society beyond the domain of criminal justice. Perhaps the Blackstone principle has far-reaching cultural benefits that we have not yet identified; we can't rule out the possibility that, for example, the principle creates a sense of reduced stress among the citizenry in interactions with police and other government actors.

The key point, however, is that uncertainty about the Blackstone principle's effects cuts both ways. We can't be certain of the magnitude of the dynamic effects. But we also can't have confidence that adhering to the Blackstone principle will actually help the innocent at all.

III. ALTERNATIVE JUSTIFICATIONS

The previous Part confronted the traditional error-cost argument for the Blackstone principle and explained why it is inadequate because it fails to account for the principle's dynamic effects. The error-cost argument, however, is not the only justification for the Blackstone principle. This Part considers — and ultimately rejects — a number of alternative justifications. Section A briefly discusses consequentialist arguments that are distinct from the traditional error-cost account. Section B discusses deontological justifications, which could support the principle even if its costs exceed its benefits. Section C summarizes the case against the Blackstone principle.

A. *Alternative Consequentialist Arguments*

This section considers consequentialist justifications for the Blackstone principle distinct from the traditional error-cost argument considered in the previous Part. While that Part attempted to provide a complete consequentialist account of the principle's effects, these consequentialist arguments have been offered independently and merit a brief response. Like the error-cost justification, none of these arguments attempt to account for the Blackstone principle's dynamic effects, so in that respect each is incomplete. But even evaluated on their own terms, these arguments suffer from serious flaws.

1. *The Double Tragedy.* — According to some, the case for the Blackstone principle is a matter of simple arithmetic. It's said that each false conviction, unlike a false acquittal, represents a "double tragedy"²⁸⁷ or a "double injustice."²⁸⁸ That is, while both types of error involve a failure to apprehend the guilty party, a false conviction creates *additional* harm to the innocent person who is wrongly punished — and therefore we should strive to avoid false convictions more assiduously than false acquittals. Unlike the more traditional error-cost argument, the double-tragedy justification does not require assigning any specific weight to the costs of false convictions; it merely posits that, as a logical matter, those costs are a superset that includes all the costs of false acquittals — plus more.²⁸⁹ Richard Lippke puts it thus:

[E]ven if Blackstone's ten-to-one ratio is dubious, generally it is worse to punish the innocent than to fail to punish the guilty. Why? Because when we punish the innocent we do two bad things — we inflict unjust suffering on individuals and fail to impose appropriate punishment on those actually guilty of the crimes in question. . . . By contrast, when we fail to punish the guilty, we do (or, perhaps, allow) only the one bad thing of failing to punish the guilty for their crimes.²⁹⁰

²⁸⁷ See, e.g., Press Release, Senator Patrick Leahy, Chairman, Senate Judiciary Comm., Statement on Introduction of the Criminal Justice and Forensic Science Reform Act of 2011 (Jan. 25, 2011), <http://www.leahy.senate.gov/press/leahy-proposes-landmark-forensics-reform-legislation> [<http://perma.cc/578Y-QZ25>].

²⁸⁸ See, e.g., Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 290 (2000).

²⁸⁹ To reduce the argument to a formula: If a false acquittal creates harm H_v , where H_v is the harm to victims of future crimes that would otherwise have been prevented, a false conviction creates harm $H_v + H_i$, where H_i is the additional harm to an innocent person wrongly convicted. As long as $H_i > 0$, then $H_v + H_i > H_v$. Therefore, wrongful convictions are more harmful than wrongful acquittals.

²⁹⁰ Richard L. Lippke, *Adjudication Error, Finality, and Asymmetry in the Criminal Law*, 26 CAN. J.L. & JURIS. 377, 387 (2013); see also, e.g., Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J. CRIM. L. & CRIMINOLOGY 943, 980 (2007) ("Conviction of the innocent . . . allow[s] the real offender to continue roaming the streets . . ."); Laudan, *The Rules of Trial*, *supra* note 12, at 204 ("[A] false conviction would be yet more costly than a false acquittal since almost every false conviction both imposes an unjust harm on an innocent defendant and

This argument doesn't work. First, as a minor point, not every false conviction involves the same deterrence costs as a false acquittal. In many situations where the justice system risks the conviction of an innocent defendant, the question is not "whodunit" but rather whether a crime has occurred at all.²⁹¹ For example, consider a case where a defendant is wrongly charged with murder for an accidental killing. In other situations, uncertainty revolves around whether a defendant is guilty of a particular *degree* of crime; for example, if it's clear that the defendant committed manslaughter but unclear whether the crime rises to the level of first-degree murder. Wrongly convicting the defendant notwithstanding his lack of sufficient criminal intent in such situations would be a bad thing — but would cause no felon to go free.²⁹²

Even if the argument's premises were correct,²⁹³ however, the argument would still rest on flawed reasoning. Assume that each false conviction involves the same deterrence costs as a false acquittal, plus the additional harm to the innocent person being punished. It would still not follow that we should design our procedural rules to minimize false convictions at the expense of accuracy. This is because the harm *caused by* a false conviction is merely part of the harm *associated with* a false conviction. By conflating this distinction, the double-tragedy argument ignores that only some of the costs associated with false convictions can be avoided by changing the rules of the adjudicative system — and as a result it implicitly gives the Blackstone principle more credit than it deserves.

brings almost all the costs of a false acquittal in its wake (since the true culprit usually escapes, to carry on his mischief).")

²⁹¹ See Erik Lillquist, *Balancing Errors in the Criminal Justice System*, 41 TEX. TECH L. REV. 175, 184 (2008) (arguing that these kinds of erroneous convictions receive insufficient attention); see also Henrik Lando, *Does Wrongful Conviction Lower Deterrence?*, 35 J. LEGAL STUD. 327, 329–30 (2006) (distinguishing between "mistakes about identity" and "mistakes about the act").

²⁹² See Laudan, *The Rules of Trial*, *supra* note 12, at 204 n.15 (making a similar observation).

²⁹³ The argument also wrongly assumes that the deterrence costs of false convictions and false acquittals are identical. With respect to a false conviction, even if "[c]riminally inclined folks who know the identity of the real felon will conclude that they too can commit crimes and escape justice," LAUDAN, TRUTH, ERROR, *supra* note 12, at 69, many potential criminals will *not* know the identity of the true perpetrator and will mistakenly believe that the correct person was convicted. An acquittal, on the other hand, is a public event that reveals to all that something has gone awry with the machinery of justice. Either the government has failed to identify the true perpetrator (as with correct acquittals) or it did arrest the right criminal but failed to convict him (as with false acquittals). Of course, to the extent that it became known that many innocents were being punished, the criminal law's deterrent force might suffer. If there is a chance of being punished no matter what one does, the benefits of following the law are reduced. See I.P.L. Png, *Optimal Subsidies and Damages in the Presence of Judicial Error*, 6 INT'L REV. L. & ECON. 101 (1986). But at least where the rate of error overall is not terribly high, there's no reason to think that each false conviction is as costly in terms of deterrence as each false acquittal (let alone many times more costly, as the Blackstone principle seems to assume). This is not to say, of course, that false convictions are a good thing — just that they may be less costly in terms of deterrence than false acquittals.

The following example should illustrate the point. Jones commits a murder. Police mistakenly conclude that Smith is guilty. Smith is charged and tried. But because our system respects the Blackstone principle, it requires proof beyond a reasonable doubt to convict. Although the government has some evidence against Smith, the case is not strong enough to overcome reasonable doubt, and Smith is acquitted. Here, the system's respect for the Blackstone principle has prevented the conviction of an innocent person. But note what has *not* been prevented: the harm that results when a real criminal goes free. That's because there's little reason to expect Smith's acquittal to lead to the apprehension and conviction of Jones. Thus, it's wrong to suggest (as the double-tragedy argument does) that here the Blackstone principle avoids "two bad things."²⁹⁴

That is, the Blackstone principle protects innocent defendants, but it doesn't make punishment of the truly guilty more likely. In most cases, the relevant government actors — given that they were confident enough in the case to seek a conviction — seem likely to conclude that the jury got the case wrong, that the prosecution made strategic mistakes at trial, or that accuracy was the casualty of an overly demanding standard of proof.²⁹⁵ Indeed, given that prosecutors have been known stubbornly to insist on the guilt of previously convicted defendants despite exonerating DNA evidence,²⁹⁶ it would be surprising if prosecutors took jury acquittals as reason to conclude that they had charged the wrong person. And while a false conviction will make police stop looking for a guilty culprit, it could still lead to *more* efforts to identify the real perpetrator than would a false acquittal, because the wrongly convicted defendant and his or her allies would have a continuing incentive to find the guilty party.²⁹⁷ Even if police and prosecutors were to change their minds in light of an acquittal, they might not identify the real perpetrator — let alone amass enough evidence to convict. Indeed, if the authorities managed to catch the right suspect, pro-defendant asymmetries would make it all the harder to obtain a conviction. For example, it may be impossible to

²⁹⁴ Lippke, *supra* note 290, at 387.

²⁹⁵ See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1161 (2008) ("Police and prosecutors do not commonly pursue other suspects once a defendant wins acquittal."); Leipold, *supra* note 174, at 1327–28 ("Prosecutors are more likely to attribute a dismissal or acquittal to bad evidentiary rulings, stupid or naive juries, their own poor performance, unreliable witnesses, and other factors that undermine the ability to prove guilt beyond a reasonable doubt [than to actual innocence]."); see also Lando, *supra* note 291, at 331.

²⁹⁶ See Orenstein, *supra* note 201, at 411–16.

²⁹⁷ See Lando, *supra* note 291, at 331 ("If the police drop the case after an acquittal, there may be no one with the incentive to investigate further or to claim that the actual offender has not been found, while in the case of a wrongful conviction, the wrongly convicted, or the people or organizations safeguarding the interests of the convicted, have the incentive.").

show that the real offender was guilty beyond a reasonable doubt when the evidence was equivocal enough to inculcate a different suspect initially.

Thus, the double-tragedy argument is not sensitive to which costs can be redistributed by changing procedural rules; it ignores the fact that some costs related to false convictions are exogenous to the adjudicative system. The Blackstone principle can prevent only those harms that are caused by the adjudicative system itself. A false conviction may represent a greater tragedy than a false acquittal, but that tells us little about how the justice system should distribute errors.

2. *Punishment Costs.* — Another variation on the traditional error-cost justification focuses on the costs of *imposing* punishment rather than harm suffered by wrongly convicted defendants. Elaborating upon an observation by Judge Posner,²⁹⁸ Matteo Rizzolli and Margherita Saraceno observe that false convictions and false acquittals “cost the same in terms of foregone deterrence” but “have an opposite impact on the costs of punishment” (that is, the dollar costs of maintaining prisons and so on).²⁹⁹ They argue that this disparity supports asymmetry in error distribution: procedural rules should be skewed in favor of false acquittals until the point where “one fewer wrongful conviction will be traded off against too many wrongful acquittals, causing a reduction in deterrence that cannot be further compensated for by the saved costs of punishment.”³⁰⁰ This argument seems attractive because it — much like the traditional error-cost account — purports to explain differing approaches to errors in civil and criminal cases. Remedies in civil cases are merely transfers of entitlements between parties, but criminal sanctions involve significant deadweight loss: the government does not gain the utility that the defendant loses through punishment, but instead has to make considerable expenditures to make punishment possible.³⁰¹ Thus, criminal law should be more averse to false positives than should civil law.

As should already be clear, this argument is problematic because it — like the traditional error-cost argument — evaluates criminal errors from a static perspective. It fails to account for how the Blackstone principle’s effects on underlying crime rates could itself *raise* overall punishment costs. If following the principle increases crime by reducing deterrence and limiting incapacitation, it could result in more *total* convictions even as it reduces the *rate* of convictions — thereby in-

²⁹⁸ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 648 (7th ed. 2007).

²⁹⁹ Matteo Rizzolli & Margherita Saraceno, *Better that Ten Guilty Persons Escape: Punishment Costs Explain the Standard of Evidence*, 155 *PUB. CHOICE* 395, 397 (2013).

³⁰⁰ *Id.* at 407.

³⁰¹ See David D. Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 *U. CHI. L. SCH. ROUNDTABLE* 475, 492 (1995).

creasing punishment costs while also increasing the social costs of crime. Alternatively, it could — through its political dynamics and other effects — increase the severity of punishment, such that total punishment expenditures are higher even if fewer defendants can be punished. Without accounting for the possibility of such effects, the punishment-costs argument is incomplete.

Even evaluated on its own terms, however, the punishment-costs argument falters. It suffers from the same conceptual flaw as the double-tragedy argument: it mistakenly assumes that the lost deterrence associated with false convictions can be ameliorated by skewing errors in favor of false acquittals. Eliminating that assumption, the appropriate question is when the savings created by avoiding punishment exceed the social costs created by letting more guilty people go free.³⁰²

The answer to that question is not obvious, but there is at least some reason to suspect that it does not justify the Blackstone principle. Keith Hylton and Vikramaditya Khanna argue that, given that the total social costs of crime are likely more than an order of magnitude greater than the total costs of imposing punishment, and assuming that the crime rate is at least somewhat responsive to increases in incarceration, the dollar costs of even massive increases in punishment would likely be smaller than the savings generated by improved deterrence.³⁰³ They accordingly find it “improbable that the savings from a measure that reduces crime by improving deterrence, such as moving to the preponderance standard, would be swamped by a rise in sanctioning costs.”³⁰⁴ Thus, the empirical assertion underlying the punishment-costs argument seems flawed.

Nor does the argument actually explain why civil and criminal law use differing approaches to errors. Criminal sanctioning requires greater expenditures than civil remedies do, but there is surely some reason *why* we choose criminal remedies for particular conduct, despite their costs — presumably because that conduct is itself very costly, or because it is especially hard to deter. It’s a non sequitur to assert that because criminal remedies involve costs, we must necessarily be more tolerant of false negatives in criminal cases than we are in civil cases. Long-term detention of suspected terrorists is quite costly, for

³⁰² The argument’s premise that false acquittals impose the same costs as false convictions in terms of deterrence is also questionable. *See supra* note 293. Thus, it is not clear that, even including punishment costs in the calculus, false convictions are more costly than false acquittals. Given that false acquittals seem more likely to encourage future crime than do false convictions, false acquittals likely create additional policing costs for the state.

³⁰³ Keith N. Hylton & Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 SUP. CT. ECON. REV. 61, 69–71 (2007).

³⁰⁴ *Id.* at 71.

example, but that doesn't prove that we should be more willing to tolerate false negatives in military tribunals adjudicating claims of membership in terrorist organizations than we are in routine civil trials. Punishment costs don't explain the Blackstone principle.

3. *Diffuse Harms.* — Another justification is that the harm of a wrongful conviction befalls one person in particular, whereas the harm of a wrongful acquittal is diffused through all of society: “When a criminal goes free, it is as much a failure of abstract justice as when an innocent man is convicted. Each is a deviation on one side or the other, but an injustice on the one side is spread over the whole of society and an injustice on the other is concentrated in the suffering of one man.”³⁰⁵ Under this argument, the Blackstone principle serves some of the same values as the Fifth Amendment's Takings Clause, which the Supreme Court has said “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”³⁰⁶ Indeed, the Court seemed to echo this mode of thinking in *Santosky v. Kramer*³⁰⁷: “The stringency of the ‘beyond a reasonable doubt’ standard bespeaks the ‘weight and gravity’ of the private interest affected, society’s interest in avoiding erroneous convictions, and a judgment that those interests together require that ‘society impos[e] almost the entire risk of error upon itself.’”³⁰⁸ By contrasting the “private interest” of the accused with the risks of error imposed upon a monolithic society, the Court suggests a dichotomy between the localized harm of false convictions and the diffuse harm of false acquittals.

This justification doesn't survive scrutiny. To begin with, diffuse harms are not inevitably preferable to concentrated ones; the magnitudes of the harms being compared matter. Stealing \$1,000 each from a million people is not necessarily better than stealing \$100,000 from one person; the overall economic damage in the first scenario (\$1 billion) greatly exceeds that in the second, even though the single victim in the second scenario suffers more than any one victim in the first. It's not enough simply to say that harm is diffuse; one needs a method for comparing disutilities.³⁰⁹

³⁰⁵ PATRICK DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 135 (1958).

³⁰⁶ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

³⁰⁷ 445 U.S. 745 (1982).

³⁰⁸ *Id.* at 755 (alteration in original) (emphasis added) (citations omitted) (first quoting *Addington v. Texas*, 441 U.S. 418, 427 (1979), then quoting *id.* at 424). The Court's statements can also be read as suggesting a deontological justification of the skewed distribution of errors, one that draws a moral distinction between “society” and those whom society punishes. I address such arguments in section III.B, *infra*, pp. 1131–42.

³⁰⁹ One could even argue that law should be *more* concerned with diffuse harms than with those that are concentrated in a small number of people, because public choice theory suggests that the

More fundamentally, however, the diffuse-harms argument rests on a false premise: the harms of false acquittals (at least for paradigmatic violent crimes³¹⁰) aren't actually diffused through society. Felons who go free and commit further crimes will cause harm to specific people; they do not impose small harms on each member of society in equal shares. Likewise, other criminals who are emboldened by seeing the guilty go free will harm specific victims. That the legal system cannot identify these victims *ex ante* is no reason to discount harms that they will experience; they are “no less real” — and no more diffuse — “for being unidentifiable in advance.”³¹¹ Indeed, the tendency to sympathize with identified victims more than unidentified ones is a well-known cognitive bias³¹² that has generated criticism of government policies in various areas.³¹³ The diffuse-harms theory thus might explain why people typically think that false convictions are more harmful than false acquittals. But it's not a compelling argument for why we *should* think that.³¹⁴

B. Deontological Justifications

If there isn't a persuasive consequentialist argument for the Blackstone principle, a deontological justification could nonetheless explain why the principle demands respect even if its costs outweigh its benefits. This section considers several such justifications.

1. *Moral Harm.* — A deontological grounding for the Blackstone principle seems promising, because most people share the intuition that there are moral constraints on punishing the innocent even if doing so might be welfare maximizing. Indeed, committed deontologists

latter are more likely to be rectified through the political process. See Ackerman, *supra* note 260, at 722–28.

³¹⁰ Some of the harm of certain “victimless” crimes is in some sense diffuse. We criminalize drugs in part because drug abuse leads to public health problems. Those social costs are spread throughout society in the sense that they are often paid out of the public fisc and thus borne by all taxpayers. This is not true of all costs of those crimes, however — for example, drug addiction can lead to violent crimes and property crimes, which have victims.

³¹¹ Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 727 (2005).

³¹² See George Loewenstein et al., *Statistical, Identifiable, and Iconic Victims*, in BEHAVIORAL PUBLIC FINANCE 32, 33–35 (Edward J. McCaffery & Joel Slemrod eds., 2006).

³¹³ See, e.g., Lisa Heinzerling, Comment, *The Rights of Statistical People*, 24 HARV. ENVTL. L. REV. 189 (2000).

³¹⁴ Perhaps the argument can be reconstructed: one could plausibly think that, all things being equal, we should prefer indirect harm to unknown persons over direct harm to individuals whose identities are known to the government, because the latter involves less risk that the government will use its power to harass disfavored persons or groups. But skewing the distribution of errors across the board in criminal justice to prevent government malfeasance means using an awfully blunt instrument when more targeted reforms might get the job done. Moreover, accepting this argument would require at least some sense of the magnitudes of the costs and benefits being traded off — which has not yet been offered.

frequently turn to hypotheticals involving the framing of innocents in order to illustrate the shortcomings of consequentialist moral theories. For example, H.J. McCloskey argued that because “[w]e may sometimes best deter others by punishing, by framing, an innocent man who is generally believed to be guilty,” committed utilitarians must sometimes endorse such apparent injustices — thus demonstrating the fallacies of utilitarianism.³¹⁵

Ronald Dworkin builds on these intuitions to justify the Blackstone principle. Noting that it would be unquestionably wrong for a prosecutor knowingly to pursue an innocent person,³¹⁶ he argues that there is an “injustice factor”³¹⁷ or a “‘moral’ harm”³¹⁸ associated with being falsely convicted. This harm is objective, existing regardless of whether the person being punished “knows or cares about it,”³¹⁹ and thus “will escape the net of any utilitarian calculation” that fails to account for it.³²⁰ Thus, instead of “submit[ting] questions of criminal procedure to an ordinary utilitarian calculus,”³²¹ when designing procedures we must “pay[] a price in accuracy to guard against a mistake that involves greater moral harm than a mistake in the other direction.”³²²

Critics of the Blackstone principle need a response to Dworkin. The most straightforward would be to argue that the moral harm of a wrongful conviction is no greater than the moral harm associated with failing to punish the guilty. We can find some support in our intuitions for this approach: although there is great injustice involved when the government imposes punishment unnecessarily, we also feel a serious “injustice factor” when the government fails to protect its subjects from crime. For example, judicial decisions refusing to hold government actors accountable for allowing harm to befall vulnerable citizens³²³

³¹⁵ H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, 8 *INQUIRY* 249, 253 (1965); see also E.F. CARRITT, *ETHICAL AND POLITICAL THINKING* 65 (1947) (criticizing utilitarianism on similar grounds); PHILIPPA FOOT, *The Problem of Abortion and the Doctrine of the Double Effect*, in *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 19, 23 (Oxford Univ. Press 2002) (1978) (posing hypothetical involving a judge framing an innocent person to avoid a riot); Rawls, *supra* note 156, at 9–12 (discussing this objection to utilitarianism).

³¹⁶ Ronald Dworkin, *Principle, Policy, Procedure*, in *CRIME, PROOF AND PUNISHMENT* 193, 193 (Colin Tapper ed., 1981).

³¹⁷ *Id.* at 201 (internal quotation marks omitted).

³¹⁸ *Id.*

³¹⁹ *Id.* at 202.

³²⁰ *Id.* at 203.

³²¹ *Id.* at 205.

³²² *Id.* at 210 (emphasis omitted).

³²³ See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (holding that police did not violate woman’s constitutional rights by failing to enforce restraining order against husband who subsequently killed her children); *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989) (holding that state social workers had no constitutional duty to protect child from abuse by his father that led to child’s brain damage).

have received vehement criticism.³²⁴

Cass Sunstein and Adrian Vermeule's argument for why capital punishment would be morally obligatory if proven to deter murders proceeds along these lines. They argue that "[t]he unstated assumption animating much opposition to capital punishment among intuitive deontologists is that capital punishment counts as an 'action' by the state, while the refusal to impose it counts as an 'omission,' and that the two are altogether different from the moral point of view."³²⁵ But the act/omission distinction is incoherent when applied to the state, they argue, because "government cannot help but act, in some way or another, when choosing how individuals are to be regulated."³²⁶ Thus when it comes to capital punishment, the state is obliged to minimize all killings, not merely those directly caused by state action.³²⁷ And even if the act/omission distinction is coherent, it is morally irrelevant, Sunstein and Vermeule argue, for "[t]he government cannot easily claim that it is under no duty to assist people, at least when those people are at risk of criminal violence."³²⁸

Those who embrace Sunstein and Vermeule's approach would likely reject the Blackstone principle. Under their view, the government acts when it punishes the innocent, but it also acts when it allows innocents to be harmed by criminals.³²⁹ Preferring one or the other type of error is arbitrary and unjustified, and therefore the government should adopt whatever procedures minimize the overall risk of harm to citizens.

But not everyone agrees with Sunstein and Vermeule's approach, to say the least. Some defend the relevance of the act/omission distinction for the state.³³⁰ Carol Steiker, for her part, agrees that "[g]overnment, by its very nature, always has a duty to act on behalf of its citizens and thus cannot evade responsibility for omissions merely because they are omissions," but contends that Sunstein and Vermeule err by ignoring a different distinction: that between purposeful and

³²⁴ See, e.g., Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 983 (1996) ("The *DeShaney* holding has engendered a scholarly response that is impassioned and unequivocally negative.").

³²⁵ Sunstein & Vermeule, *supra* note 311, at 707; see also, e.g., Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2284 (1990) ("Government can harm by its inaction and its inadequate action, as well as its direct action.").

³²⁶ Sunstein & Vermeule, *supra* note 311, at 720.

³²⁷ See *id.* at 724–27.

³²⁸ *Id.* at 726.

³²⁹ Sunstein and Vermeule themselves suggest this implication of their theory for the reasonable doubt standard. *Id.* at 727–28.

³³⁰ See, e.g., Eric Blumenson, *Killing in Good Conscience: What's Wrong with Sunstein and Vermeule's Lesser Evil Argument for Capital Punishment and Other Human Rights Violations?*, 10 NEW CRIM. L. REV. 210, 220–23 (2007).

nonpurposeful harms.³³¹ Because intentional killing is more morally troubling than reckless or knowing conduct that results in death, Steiker argues, deontologists should reject capital punishment even if failing to impose it will result in more deaths.³³²

Steiker fleshes out this point by emphasizing the implications of Sunstein and Vermeule's position for the classic "trolley problem" and its variations. In Judith Jarvis Thomson's well-known modification of Philippa Foot's hypothetical,³³³ a runaway trolley is headed for five unsuspecting workers on the track. You are standing next to a switch that will turn the trolley to a side track where only one person is standing. If you turn the trolley, you'll save the five workers, but the person on the side track will die. Though pulling the switch is an action that directly causes a death,³³⁴ most people think doing so is morally correct.³³⁵ But intuitions change when people are asked about pushing a person off a footbridge in front of the trolley's path; most people think pushing the person would be wrong, even though doing so, like pulling the switch, kills one to save five.³³⁶ Deontologists see a moral distinction because of "differences . . . in the attitude the actor has towards the death of the one and in the means the actor uses to bring about that death."³³⁷ By suggesting that "there is merely an emotional rather than a moral difference"³³⁸ between the two hypotheticals, Sunstein and Vermeule gloss over "a core dispute between consequentialist and deontological moral theories," Steiker argues.³³⁹

Steiker's critique shows that some deontologically inclined proponents of the Blackstone principle will not be satisfied by Sunstein and Vermeule's analytical move. If the moral distinctions Steiker draws are correct, then perhaps Dworkin is right that there's greater moral harm when the government purposefully punishes an innocent person than when it recklessly or knowingly fails to protect an innocent vic-

³³¹ Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 757 (2005).

³³² See *id.* at 756–64. Sunstein and Vermeule respond that the purposeful/nonpurposeful distinction, like the act/omission distinction, is incoherent when applied to the state. See Cass R. Sunstein & Adrian Vermeule, *Deterring Murder: A Reply*, 58 STAN. L. REV. 847, 849–52 (2005); see also Youngjae Lee, *Deontology, Political Morality, and the State*, 8 OHIO ST. J. CRIM. L. 385, 393–97 (2011).

³³³ See Judith Jarvis Thomson, Comment, *The Trolley Problem*, 94 YALE L.J. 1395, 1396–97 (1985). In Foot's original version, the subject is the driver of the trolley rather than a person observing it. See FOOT, *supra* note 315, at 23.

³³⁴ Thomson, *supra* note 333, at 1398 ("[I]f the bystander does not throw the switch, he drives no trolley into anybody, and he kills nobody.")

³³⁵ See Sunstein & Vermeule, *supra* note 311, at 742.

³³⁶ See *id.*

³³⁷ Steiker, *supra* note 331, at 761.

³³⁸ *Id.* at 760.

³³⁹ *Id.* at 761.

tim from the risk of crime. Luckily, however, rejecting the Blackstone principle does not require the deontologist to accept Sunstein and Vermeule's position or to abandon his or her core intuitions about situations like the trolley problem. The principle does not inevitably follow from deontological premises.

That's because, in the realm of criminal punishment, *action is unquestionably necessary*. There is, to be sure, significant disagreement over whether punishment qua punishment is a good or bad thing. But most people recognize that it is not merely permissible, but rather obligatory for the state to *protect* its citizens from crime — and at least in the world as it exists now, satisfying that obligation necessarily requires punishing criminals. And any punishment of the innocent at issue implicated by the Blackstone principle is, by definition, unintentional, because it's the result of procedures designed to accurately determine guilt and innocence. “[W]hen the State adopts a set of judicial policies with a certain probability of punishment mistakes, it is not intending to harm anyone.”³⁴⁰ These distinctions mean that neither the act/omission distinction nor the purposeful/nonpurposeful distinction is helpful, and they make the moral issues posed by the Blackstone principle fundamentally different than those raised by framing the innocent and by capital punishment.

In those latter cases, the question is whether a particular kind of intentional action (punishment of a known innocent; deliberate killing) is ever permissible. Deontology can help us answer such questions. But intuitions about the impermissibility of intentionally framing the innocent don't tell us how we should think about *unintentional* punishment of the innocent. As Larry Alexander observes, “[I]f knowingly risking punishing the innocent is morally equivalent to knowingly punishing the innocent, *we can never punish anyone*.”³⁴¹ Instead, once we've determined that a particular type of action is acceptable — as we have with respect to punishment of people determined to be guilty — and the only question is what level of *certainty* is required before we act, deontology shouldn't continue to place a thumb on the scale. The decision whether to act must turn on nondeontological considerations, such as our degree of certainty and the relative costs of errors in either direction.

Barbara Fried makes a similar point in arguing that non-consequentialists have given too much attention to trolley problems,

³⁴⁰ Wertheimer, *supra* note 158, at 62.

³⁴¹ Larry Alexander, *Retributivism and the Inadvertent Punishment of the Innocent*, 2 L. & PHIL. 233, 245 (1983). Some reject the distinction between intentional and unintentional punishment of the innocent. See, e.g., KAPLOW & SHAVELL, *supra* note 142, at 344 n.106. Those espousing that view, however, tend to believe that both kinds of punishment of the innocent are equally *permissible*, and thus would not disagree with the position taken here.

which she calls “an oddball set of cases at the margins of human activity.”³⁴² As Fried observes, in trolley problems “the consequences of the available choices are stipulated to be known with certainty *ex ante*” and “the would-be victims . . . are generally identifiable individuals in close proximity to the would-be actor(s).”³⁴³ Yet the “conduct that . . . accounts for virtually all harm to others,” which non-consequentialist philosophers have largely ignored, is fundamentally different: it is “conduct that is *prima facie* permissible (mowing a lawn, fixing your roof, driving a car down a city street) but carries some uncertain risk of accidental harm to generally unidentified others.”³⁴⁴ Our intuitions about trolley problems simply don’t carry over into “the problem of risk,” Fried contends; instead, those moral questions must “be resolved by some form of aggregation, in which the numbers are doing most or all of the work.”³⁴⁵

So too with criminal punishment: having concluded that morality permits (indeed, requires) some punishment of criminals, we need to rely on typically consequentialist considerations (such as the magnitude of the risks in either direction) to explain how much certainty our procedures should demand and what distribution of errors is optimal. Deontology may, of course, impose constraints on what sorts of procedures for assessing guilt and innocence are sufficiently fair. An adjudicative system that made no attempt to accurately sort between guilty and innocent defendants would violate such a constraint. That issue is distinct from the justification for the Blackstone principle, however; the question here is whether we’re required to make our procedures *less* accurate overall in order to minimize false convictions.³⁴⁶

Dworkin recognizes the distinction between frame-ups and punishment mistakes but nonetheless defends the Blackstone principle, arguing that it is “implausible” that “there is great distinct moral harm when someone is framed, but none whatsoever when he is mistakenly convicted.”³⁴⁷ Dworkin is certainly right that when the state designs rules that will predictably create some false convictions, it can’t disclaim moral responsibility for those errors as “unintended.” But neither can the state disclaim responsibility for harm to innocent victims that is the product of rules that mistakenly allow guilty persons to go unpunished.

³⁴² Barbara H. Fried, *What Does Matter? The Case for Killing the Trolley Problem (Or Letting It Die)*, 62 PHIL. Q. 505, 506 (2012).

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 507; *see also* Barbara H. Fried, *Can Contractualism Save Us from Aggregation?*, 16 J. ETHICS 39 (2012).

³⁴⁶ Cf. Michael Philips, *The Inevitability of Punishing the Innocent*, 48 PHIL. STUD. 389, 390 (1985) (“[S]o long as there is due process, we do not violate the rights of innocent persons when we punish them.”).

³⁴⁷ Dworkin, *supra* note 316, at 203.

This is a true “risk-risk tradeoff[.]”;³⁴⁸ there is a moral equivalence between the two kinds of unintended harms that are the inevitable product of the way any criminal justice system is designed.³⁴⁹

That neither Dworkin nor anyone else seems able to articulate precisely *how much* we’re supposed to prefer errors of nonpunishment to errors of punishment should make us especially skeptical. The proponents of the Blackstone principle simply rely on a vague sense that the former are somehow better — yet not so much better that we should *always* choose inaction. And it’s difficult even to imagine how one could craft an argument for how to derive the Blackstone principle from deontological prohibitions. Does the conclusion that punishing the innocent involves moral harm prove that a false conviction is twice as bad as a false acquittal? Ten times worse? Absent a coherent articulation for the intuition underlying the Blackstone principle — that we should act only if we’re almost certain that action won’t be harmful — the best explanation is that this is a situation where “an ordinarily sensible heuristic, favoring omissions over actions, appears to produce moral error.”³⁵⁰

A variation on the trolley problem might help straighten out our intuitions. Imagine that you are not a random bystander; instead, you are the trolley guard. After a spate of incidents involving murderous trolley drivers, you’ve been charged with watching for deranged conductors and have been instructed to turn the switch if you see one. You see a trolley approaching; it *appears* likely that the trolley will hit the five workers, but you’re not certain; perhaps the driver is planning on braking at the last minute. Imagine also that from your vantage point, it appears that the trolley driver is intentionally targeting the workers; he appears to be laughing maniacally. You aren’t close enough to be certain of the driver’s intentions, however. If you pull a switch, you’ll send the trolley onto a side track that runs into a wall, sparing the workers but harming (though likely not killing) the trolley driver.

Is it really *far* better to err by not pulling the switch, thereby letting a villainous driver kill the workers, than to err by pulling the switch and thus harming a blameless driver who was planning on slowing down? Would that assessment remain the same if there were

³⁴⁸ Sunstein & Vermeule, *supra* note 311, at 707–08.

³⁴⁹ Even if there are differences between the two kinds of unintended harms, these differences cut *against* the Blackstone principle. In the context of the reasonable doubt requirement, for example, the principle is thought to require that the state release defendants who are almost certainly guilty in order to protect a smaller number of innocents from punishment. Considered on the facts of any particular case, the harm likely to result from releasing a person who is probably (but not certainly) a criminal seems *more* intentional, and thus more morally disturbing, than the harm the state causes when punishing an apparently guilty but actually innocent defendant.

³⁵⁰ Cass R. Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531, 540 (2005).

ten workers on the track? Twenty? In this hypothetical, you'd have a duty as the guard to protect workers on the track; you'd have reason to believe that the driver approaching intended to cause harm; and not acting would risk much greater harm than acting would. Insisting on certainty before pulling the switch would not be morally justified. To the extent that others don't share this intuition, there's a risk that some misfiring moral heuristic is at work.

To be clear, this hypothetical is not intended to take a stand on the relative costs of action and inaction. Instead, it's merely designed to show that the decision would turn on nondeontological considerations. In the hypothetical, whether turning the switch is appropriate would depend on how many workers are on the track, the level of danger they face, the possible risk to the driver, and the guard's degree of confidence. The point is merely to illustrate that those consequentialist considerations — and not a deontological bias against action — would be doing the work.

Finally, one's intuitions here will also depend on underlying views about the relationship between the state and its citizens. Those that reject the view that the state has a strong obligation to protect its citizens from crime may remain convinced of the moral harm argument. Thoroughgoing libertarians, who prefer a minimal role for the state in all domains, are particularly unlikely to be persuaded. For the many people who reject those premises, however, and who accept the post-New Deal understanding of the government's positive obligations, the Blackstone principle is difficult to justify on deontological grounds.

2. *The Social Contract*. — Some have argued that the Blackstone principle is an essential element of the social contract. Youngjae Lee propounds this view in the related context of defending the reasonable doubt standard:

The government enjoys an enormous amount of power to interfere with peoples' lives with force and to stigmatize individuals with its stamp of blameworthiness, and it prohibits others from doing the same. And in order for the government to maintain its exclusive status as a legitimate holder of this power, it has to use its force in a certain specified way. That is, before the state can exercise acts of violence and attach stigma to individuals, we demand that the state be able to justify the acts it is about to take by correctly identifying wrongdoers. The proof beyond a reasonable doubt requirement is generated from this demand.³⁵¹

The problem with this argument is that it leaves a key question unanswered — *why* should “we demand” that the state respect particular requirements like the Blackstone principle?³⁵² That question

³⁵¹ Lee, *supra* note 332, at 399.

³⁵² Lee suggests that “[u]nless we treat the constraints against convicting without sufficiently convincing proof and punishing people more than they deserve as close to inviolable, such limita-

needs a good answer, since it's possible that the Blackstone principle is *not* an essential ingredient of the social contract. Parties in John Rawls's original position, for example,³⁵³ might well prefer a system that offered the lowest combined risk of harm from crime and from false conviction, rather than one that minimized the risk of false conviction while not sufficiently protecting citizens from victimization by crime.³⁵⁴ Moreover, the state's reluctance to punish might threaten rather than reinforce the government's monopoly on punishment, as it could encourage vigilantism against wrongdoers who go free.³⁵⁵

Jeffrey Reiman also grounds the Blackstone principle in the social contract but with a different rationale. He concedes that we might prefer a world without the Blackstone principle "if the most rational way to deal with risk were to make no discriminations between its various sources and to aim simply at reducing its overall level,"³⁵⁶ but argues that instead:

[I]t is rational for people to prefer a world with some very secure zones even at the expense of the lowest possible overall risk. But then it seems to me that it is rational to want one's government to be one of these very secure zones. Given that the government is established (authorized, funded, and armed) to protect us, it is rational to want to be able to depend on it, to turn to it without fear that it is also a source of risk.³⁵⁷

This argument, too, is unpersuasive. First, although Reiman himself rejects the relevance of the act/omission distinction,³⁵⁸ he seems to smuggle it back into his argument by assuming that the government is a "source" of risk only when it punishes the innocent and not when it fails to punish the guilty. He ignores that we "depend on" the gov-

tions on criminalization and punishment will give too often and will not be able to provide meaningful limitations on the government's power to criminalize and punish." *Id.* Lee does not offer, however, a theory of what the scope of "such limitations" should be in the first place. It bears note that in more recent work, Lee has criticized strict adherence to the beyond a reasonable doubt standard. See Youngjae Lee, *Reasonable Doubt and Moral Elements*, 105 J. CRIM. L. & CRIMINOLOGY (forthcoming 2015) (arguing that proof beyond a reasonable doubt should not be required for "moral elements" of crimes).

³⁵³ See JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

³⁵⁴ See Allen & Laudan, *supra* note 6, at 79 (discussing the argument that "the social contract obliges the state to minimize the aggregate cost innocent citizens face, which consists of exposure to false conviction as well as criminal victimization"). Of course, there is still a further question about how to price the relevant risks; if a false conviction is really many times more harmful than a false acquittal, persons in the original position might prefer the Blackstone principle. If so, however, the Blackstone principle is justified on consequentialist grounds and no deontological justification is needed.

³⁵⁵ See Kelly D. Hine, *Vigilantism Revisited: An Economic Analysis of the Law of Extra-Judicial Self-Help or Why Can't Dick Shoot Henry for Stealing Jane's Truck?*, 47 AM. U. L. REV. 1221, 1243 (1998).

³⁵⁶ Reiman & van den Haag, *supra* note 7, at 239 (Reiman).

³⁵⁷ *Id.* at 240.

³⁵⁸ See *id.* at 229.

ernment to keep us safe from crime, not merely to keep us safe from wrongful conviction. Second, there is no meaningful way in which government is a “zone” we can remain in to keep safe; government is an entity that takes or fails to take certain actions, not a place in which citizens can hide. Would it be rational to prefer a higher overall risk of harm simply in order to feel that the government is a safe “zone” in some abstract sense? Finally, Reiman fails to recognize that we can *never* eliminate the possibility that the government will be a “source of risk”; unless we take the government out of the criminal punishment business entirely, there will always be a chance of false convictions.

Given all that, it isn’t obviously wrong to prefer a system that simply minimizes the overall level of risk from all sources, public and private. Of course, a reasonable person in the original position could, as Charles Fried observes, conclude that the “loss of respect” accompanying a false conviction is significant enough that such a risk is worth reducing significantly.³⁵⁹ But a reasonable designer of the social contract would also have to consider the systemic effects of a rule like the Blackstone principle. And depending on how those effects shake out, she could well conclude that the Blackstone principle is not a necessary component of a fair system. The principle does not inevitably follow from social contractarianism.

3. *Retributive Duties.* — The most prominent strain of deontological thinking in criminal law, retributivism, seems at first glance to be in tension with the Blackstone principle. In its strong form (known as “positive” retributivism³⁶⁰), retributivism suggests that there is a moral imperative to punish the guilty. In Kant’s famous example, even if members of an island society were about to “separate and disperse throughout the world . . . the last murderer remaining in prison would first have to be executed.”³⁶¹ If not, “blood guilt [would] cling to the people” and all would “be regarded as collaborators in this public violation of justice.”³⁶² Yet the Blackstone principle commands that we

³⁵⁹ CHARLES FRIED, AN ANATOMY OF VALUES 127 (1970).

³⁶⁰ Negative retributivism . . . holds only that it is morally wrong to punish an innocent person even if society might benefit from the action, *i.e.*, that the retributive principle of just deserts is a necessary condition of punishment. . . . Positive retributivism . . . takes the stronger position that not only must an innocent person never be punished; but, affirmatively, one who is guilty of an offense *must* be punished, *i.e.*, retributive justice is a necessary and sufficient condition of punishment.

Joshua Dressler, *Hating Criminals: How Can Something that Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1451 (1990) (book review).

³⁶¹ IMMANUEL KANT, THE METAPHYSICS OF MORALS § 6:333 (1797), reprinted in PRACTICAL PHILOSOPHY 353, 474 (Mary J. Gregor ed. & trans., 1996).

³⁶² *Id.*

routinely tolerate numerous failures to punish the guilty in order to prevent a smaller number of unintentional convictions of the innocent.

Of course, retributivists also believe that there is a duty not to punish the innocent.³⁶³ Reiman has attempted to show that the balance of these competing obligations supports the Blackstone principle. He argues that we should think of the retributive duty not to punish innocents as owed to innocents themselves and of the duty to punish the guilty as potentially owed to one of three groups: guilty defendants, the innocent victims, or the law-abiding public generally.³⁶⁴ Under each conception, he argues that “the loss that undeserved punishment . . . imposes on the innocent” outweighs “the loss . . . imposed by failure to punish the guilty.”³⁶⁵ If the duty to punish is owed to the guilty, it is “undeniable that it is worse to impose a loss on an innocent person than on a guilty one.”³⁶⁶ If it is owed to the criminal’s victim or to the public generally, then the conclusion is the same, since in Reiman’s view “any given law-abiding person would suffer more from being a victim of undeserved punishment . . . than from having the criminal who victimized him go unpunished.”³⁶⁷

In his colloquy with Reiman, van den Haag explains why Reiman’s argument rests on a mistaken conception of retributivism. “The two duties, to punish the guilty and not to punish innocents, are ends in themselves, independent of the losses or gains of beneficiaries. The duties are categorical, to be carried out unconditionally.”³⁶⁸ But because no justice system can carry out both commands to their fullest extent, retributivists must decide how to design the procedural system by reference to nonretributivist considerations: “[R]etributivism tells us that we have an obligation to punish the guilty and not to punish innocents. We are not told which duty has priority.”³⁶⁹

Prominent retributivists agree with van den Haag’s assessment. For example, according to Michael Moore:

The retributivist might adopt a principle of symmetry here — the guilty going unpunished is exactly the same magnitude of evil as the innocent being punished — and design his institutions accordingly. Or the retributivist might share the common view (that the second is a greater evil

³⁶³ See, e.g., Talia Fisher, *Conviction Without Conviction*, 96 MINN. L. REV. 833, 875–76 (2012) (“Retributivists are concurrently committed to two fundamental principles: punishing the guilty and not punishing the innocent. Deviation from either one of these outcomes is considered a departure from the principles of just desert.” (footnote omitted)).

³⁶⁴ Reiman & van den Haag, *supra* note 7, at 233 (Reiman).

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 234.

³⁶⁸ *Id.* at 242 (van den Haag).

³⁶⁹ *Id.*

than the first) and design punishment institutions so that “ten guilty persons go unpunished in order that one innocent not be punished.”³⁷⁰

Thus, while some positive retributivists endorse the Blackstone principle, they usually do so for reasons not internal to retributivism itself.

To be sure, purely “negative” retributivists, who believe that desert is a necessary but not sufficient condition for punishment, might not be satisfied with van den Haag and Moore’s conclusion.³⁷¹ Unlike traditional retributivists, they do not believe there’s a retributive duty to punish the guilty, and thus might see the Blackstone principle as necessary to prevent the moral wrong that is the punishment of the innocent. My response, however, is essentially the same as the response to the “moral harm” argument. Any system of punishment will inevitably involve some unintentional convictions of the innocent. So long as it is not merely permissible but indeed obligatory to have a criminal justice system to protect citizens from crime, deontological principles like negative retributivism cannot tell us what precise level of risk to innocents we should tolerate; instead, we have to resort to nondeontological considerations.³⁷² Thus, retributivism — in either its positive or its negative flavors — provides no independent justification for the Blackstone principle.

C. *The Case Against the Blackstone Principle*

The previous Part demonstrated that the traditional error-cost justification for the Blackstone principle is incomplete and thus unable to bear the principle’s weight. This Part has sought to show that the other justifications that have been offered for the Blackstone principle are also flawed. The alternative consequentialist arguments fail to account for the principle’s dynamic effects while also falling prey to logical errors or other mistakes. The deontological justifications, for their part, largely rely on intuitions that are difficult to defend when closely analyzed. At best, the deontological case for the Blackstone principle depends on a highly controversial vision of the state’s relationship to its citizens that many supporters of the Blackstone principle would likely reject.

There is, then, no complete and persuasive justification for the Blackstone principle on offer. That’s not to say that such a justifica-

³⁷⁰ MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* 157 n.11 (1997); see also Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 *RUTGERS L.J.* 115, 131 (2000) (“Given that desert is violated by acquitting the guilty as well as by condemning the innocent, it does not appear that desert requires more exacting burdens of proof than does utility.”); Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 *NW. U. L. REV.* 843, 909–23 (2002).

³⁷¹ See Dressler, *supra* note 360, at 1451 (explaining distinction).

³⁷² See *supra* section III.B.1, pp. 1131–38.

tion does not exist; because so many observers have assumed that the relative costs of errors is a satisfactory explanation, other potential arguments may not have received as much attention as they deserve. A compelling argument for the Blackstone principle could well emerge. Until that happens, however, we should reject the principle as a theory of the proper distribution of errors in criminal punishment.

Some will argue that critics of the Blackstone principle have the burden of proving that the principle is unjustified because it has been part of our criminal law for so long. But status quo bias is not an independent argument — especially where, as here, the original justifications for a social practice no longer apply. Moreover, we don't heavily value asymmetrical error distribution in most other areas of law; if we can't articulate a good reason why criminal law should be different — and there seem to be good reasons why it shouldn't be different — then perhaps it makes sense to stop thinking that criminal law must be so different.

IV. BEYOND THE BLACKSTONE PRINCIPLE

The previous Parts have sought to show that there is no compelling justification for the Blackstone principle today. If that effort has been successful, the next question is what practical changes to our criminal justice system might be necessary. This Part evaluates two possibilities. Section A analyzes the consequences of rejecting the Blackstone principle for criminal procedure rules that are ostensibly designed to guard against false convictions. Section B then considers the possibility of “coping mechanisms” — new procedural devices that might ameliorate the costs of the principle's dynamic effects.

A. Implications for Existing Procedural Rules

Rejecting the Blackstone principle entirely would mean better committing ourselves to accuracy in criminal adjudication, without skewing errors towards false acquittals. The implications for criminal procedure could be significant. Though Judge Learned Hand overstated things when he said that “[u]nder our criminal procedure the accused has every advantage,”³⁷³ many criminal procedure rules purport to guard against false convictions. The reasonable doubt standard is the most prominent,³⁷⁴ but other rules, like the Double Jeopardy Clause,³⁷⁵ are also often said to reflect the Blackstone principle.

³⁷³ United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

³⁷⁴ See, e.g., WILLIAMS, *supra* note 10, at 871; Levy, *supra* note 127, at 283.

³⁷⁵ See, e.g., David S. Rudstein, *Prosecution Appeals of Court-Ordered Midtrial Acquittals: Permissible Under the Double Jeopardy Clause?*, 62 CATH. U. L. REV. 91, 137 (2012).

It would be a mistake, however, to rush to the conclusion that criminal procedure would necessarily look like the civil justice system if we rejected the Blackstone principle. Before changing the rules, we'd need to better understand how much our criminal justice system actually adheres to the Blackstone principle in practice.³⁷⁶ That degree of adherence is, for several reasons, surprisingly hard to determine.

The most serious obstacle is that, however much the rules governing criminal *trials* favor defendants, most convictions in our system occur outside of the trial process through plea bargains.³⁷⁷ Plea bargaining likely does not take place fully in the shadow of expected trial outcomes, given (among other reasons) repeat-player advantages of prosecutors and risk aversion by defendants, both of which might unduly encourage innocent defendants to plead guilty notwithstanding the prospect of a trial conducted under defendant-friendly procedural rules.³⁷⁸ As a result, plea bargaining may seriously distort the distribution of errors that trial rules would otherwise produce.

Even putting the plea bargaining problem aside, there are numerous other problems with identifying the way our procedural rules distribute errors. One is the complicated interaction among various defendant-friendly procedural rules. The real ratio of false acquittals to false convictions produced by our system is the product of multiple apparent applications of the Blackstone principle — the reasonable doubt standard of proof plus asymmetrical appeals and so on, combined with underenforcement by police and prosecutors in the shadow of procedural requirements. There's reason to think this isn't the best way to implement the Blackstone principle. Laudan has argued that designing rules other than the standard of proof to produce more false acquittals to false convictions involves an improper form of double counting: having set the standard of proof to produce the preferred mix of errors, "coherence requires us to be utterly indifferent as to whether an acquittal or a conviction occurs in trials governed by such a standard."³⁷⁹ Laudan makes a compelling argument. But, in any event, we'd at least need to take account of the complex interaction of multiple rules motivated by the Blackstone principle to determine our system's current distribution of errors.

Moreover, some pro-defendant asymmetries in our criminal procedure might actually *harm* innocent defendants. For example, some argue that the Fifth Amendment's right against self-incrimination helps

³⁷⁶ This is a difficult task, though some have tried. See, e.g., Bushway, *supra* note 39, at 1088 (estimating a ratio of sixty-one false negatives for every false positive in Chicago murder investigations in 1979).

³⁷⁷ See sources cited *supra* note 236.

³⁷⁸ See Bibas, *supra* note 237, at 2495.

³⁷⁹ LAUDAN, TRUTH, ERROR, *supra* note 12, at 128.

guilty defendants while hurting innocent ones. As Peter Tague puts it, the right “insulates the guilty defendant from revealing his complicity” while “shackl[ing] the innocent defendant from attempting to prove that another person committed the crime.”³⁸⁰ Accounting for the way that procedural rules distribute errors requires adjusting for these cross-cutting effects. Yet, because of the very nature of the problem at issue, we have no effective way to measure the phenomenon empirically (if we could consistently know what errors our system was making, we wouldn’t make them in the first place).

Complicating matters further is that the procedural rules that we think are consistent with the Blackstone principle might distribute errors differently than they appear to. Consider the reasonable doubt standard. Many observers think that the standard of proof necessarily determines the proportion of errors created. For example, it is sometimes suggested that “[i]f society considers the conviction of one innocent person to be as ‘costly’ as the acquittal of exactly 99 offenders, it should require a 99% probability of guilt.”³⁸¹ Even bracketing the difficulties in reducing standards like reasonable doubt to mathematical formulas,³⁸² this view is mistaken. The standard of proof, by itself, tells us nothing about how the system distributes errors.³⁸³ Instead, at least two additional pieces of information are necessary: the accuracy with which juries assess guilt and the percentage of innocent persons among the pool of charged defendants.³⁸⁴

I note this point to illustrate that we can’t reach conclusions about how our system produces errors by looking solely to formal rules. Perhaps some pro-defendant procedural asymmetries merely cancel out the government’s inherent advantages in the investigative and adjudicative process. If, for example, those advantages cause juries to systematically overvalue the case for conviction by some fair mar-

³⁸⁰ Peter W. Tague, *The Fifth Amendment: If an Aid to the Guilty Defendant, an Impediment to the Innocent One*, 78 GEO. L.J. 1, 1 (1989). For an opposing argument that the right against self-incrimination benefits innocent defendants, see Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430 (2000).

³⁸¹ Henrik Lando, *Prevention of Crime and the Optimal Standard of Proof in Criminal Law*, 5 REV. L. & ECON. 33, 33 (2009).

³⁸² See, e.g., Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1372–75 (1971).

³⁸³ See Richard S. Bell, *Decision Theory and Due Process: A Critique of the Supreme Court’s Lawmaking for Burdens of Proof*, 78 J. CRIM. L. & CRIMINOLOGY 557, 573–74 (1987); Michael L. DeKay, *The Difference Between Blackstone-Like Error Ratios and Probabilistic Standards of Proof*, 21 LAW & SOC. INQUIRY 95 (1996).

³⁸⁴ Richard Bell provides a useful method for visualizing these concepts. See Bell, *supra* note 383, at 571–74. A similar model was employed by Laudan and DeKay. See LAUDAN, TRUTH, ERROR, *supra* note 12, at 66–69; DeKay, *supra* note 383, at 101.

gin,³⁸⁵ requiring a higher burden of proof might level the playing field. On this account, the reasonable doubt requirement could, despite appearances to the contrary, *minimize* errors rather than skewing them strongly in favor of false negatives. Richard Lippke has defended that requirement along these lines, arguing that it provides “protection against . . . misuses and abuses of power” by prosecutors and police, “thereby ensuring more accurate sorting.”³⁸⁶

Similar explanations are possible for other procedural asymmetries. One might defend double jeopardy protections, for example, on the theory that they compensate for underlying disparities in time horizons and resource constraints between the government and individual defendants. Perhaps without a bar on retrial, innocent defendants would have insufficient chance of victory. The government could simply wear them down into pleading guilty since they could not endure the expense and delay involved in multiple trials. The Supreme Court may have had this idea in mind when it stressed that the “underlying idea” of the Double Jeopardy Clause is that “the State with all its *resources and power* should not be allowed to make repeated attempts to convict an individual for an alleged offense.”³⁸⁷ None of this is to say that these explanations are correct, but merely that we’d need to evaluate them before we could decide which procedural rules should change if we abandoned the Blackstone principle.

And even if we conclude that a particular rule strongly skews errors in favor of false acquittals, there might be other reasons for adhering to it that have nothing to do with error distribution. For example, a committed originalist might conclude that requiring proof beyond a reasonable doubt in criminal cases is necessary based on her reading of the historical background of the Fifth and Fourteenth Amendments.³⁸⁸ That the rule decreases overall accuracy would be an unfortunate consequence of binding choices made by constitutional ratifiers. Alternatively, one could think reasonable doubt is necessary for providing “moral comfort” to jurors, who otherwise would be too uncomfortable with the grave choices they are called upon to make in

³⁸⁵ A related problem is that prosecutors “come before juries with a democratic wind at their backs.” Daniel Richman, *Framing the Prosecution*, 87 S. CAL. L. REV. 673, 678 (2014). That is, juries are supposed to presume that the defendant is innocent, yet this would require serious cognitive dissonance: “In what other context do we set up a politically accountable bureaucracy (like the police or a prosecutor’s office), ask citizens to take a political interest in its functioning, and then ask some of those same citizens to ‘presume’ that the same bureaucrats have accused the defendant by mere chance in the particular case before them?” *Id.* at 677. The reasonable doubt requirement could compensate for this problem as well.

³⁸⁶ Lippke, *supra* note 13, at 484; *see also* LANDSBURG, *supra* note 129, at 224.

³⁸⁷ *Green v. United States*, 355 U.S. 184, 187 (1957) (emphasis added).

³⁸⁸ That the reasonable doubt rule has such a historical pedigree is far from clear, however. *See, e.g., In re Winship*, 397 U.S. 358, 385–86 (1970) (Black, J., dissenting) (arguing that reasonable doubt standard is not part of the original understanding of due process).

criminal trials.³⁸⁹ As another example, Vikramaditya Khanna has argued that “asymmetric appeal rights may, by limiting the number of times the prosecution can go after and ‘wear down’ a particular defendant, constrain self-interested prosecutors or constrain politically motivated or targeted prosecutions.”³⁹⁰

In short, then, even if we were to reject the Blackstone principle, there would be much work to be done before rewriting the procedural rulebook. All that said, even if our system doesn’t comply with the Blackstone principle in practice that doesn’t mean that the principle isn’t doing actual work. The principle is a foundational assumption of the system, one that is used to explain the outcomes the system creates — for example, when a high-profile case that appears to be a false acquittal occurs, it is explained to the public as the result of our system’s adherence to the Blackstone principle. And so even if it is a false understanding, the belief that our system complies with the Blackstone principle could have significant effects, shaping perceptions of risk, political discourse, and social meanings. It’s possible that simply identifying better, non-Blackstonian justifications for procedural rules and trying to change public perceptions of how the system creates errors could have good effects even if we make no changes to the system itself.

Of course, if it turns out that there are no good non-Blackstonian justifications for procedural asymmetries, we’d need to consider eliminating them. But we still might decide to leave the existing procedural regime in place. Even if we’re confident there would be no good reason to adopt the Blackstone principle if we were able to design the system from scratch, there could be reasons why changing the system would be unwise or impossible. Some of the procedural rules that supposedly implement the Blackstone principle are considered hard-wired into the Constitution. The costs involved in modifying major components of the procedural system might be significant. And some of the Blackstone principle’s dynamic costs — such as its effect on voter attitudes — might be sufficiently ingrained in the culture that changing procedural rules wouldn’t eliminate them.

If we do make changes to our procedural system, however, it would be critical to do so in a systematic, rather than a piecemeal,

³⁸⁹ See WHITMAN, *supra* note 49; see also Cass R. Sunstein, *Reasonable Doubt Is Central to Zimmerman Verdict*, BLOOMBERG (July 15, 2013, 3:51 PM), <http://www.bloombergview.com/articles/2013-07-15/reasonable-doubt-is-central-to-zimmerman-verdict> [<http://perma.cc/GNA2-L4QW>].

³⁹⁰ Vikramaditya S. Khanna, *Double Jeopardy’s Asymmetric Appeal Rights: What Purpose Do They Serve?*, 82 B.U. L. REV. 341, 399 (2002); see also Hylton & Khanna, *supra* note 303, at 72 (“[T]he reasonable-doubt standard is designed primarily to make it harder for individuals and groups to use the criminal process as a mechanism for wealth extraction.”).

fashion. Given that most criminal cases are resolved by pleas, it would be a bad idea to simply change the standard of proof governing criminal trials without consideration of how that change would impact the plea process. One possibility, though, alluded to above,³⁹¹ is that we could come up with a better system for resolving criminal cases across the board — rather than just tinkering with the rules that govern the small sliver of cases that go to trial. If we didn't feel bound by adherence to the Blackstone principle, we might design some kind of adjudicative process less demanding than full-blown trials but with more built-in safeguards than the unregulated plea process, and use that system to resolve all criminal cases. Such a procedural system could do just as good or even a better job of protecting the innocent as ours does in practice — yet because it would be open about the tradeoffs involved, it would not create the various costs that arise from the *perception* that our system adheres to the Blackstone principle. Exploring the details of such a system must be left to future work.

In any event, we should be glad if this inquiry leads us to ask difficult questions about the justifications for various procedural rules. Questioning the Blackstone principle will help us better understand aspects of our system regardless of whether it leads us to change the system.

B. Coping Mechanisms

Even if rebooting our procedural system to eliminate the Blackstone principle is infeasible or undesirable, it's possible to identify less drastic solutions to at least some of the dynamic costs identified in this Article. We could design “coping mechanisms” — new procedural devices designed to compensate for the previously unrecognized costs of skewing errors strongly in favor of false acquittals. Such innovations could attract broader support than would more radical changes to entrenched procedural rules. Moreover, these reforms could be valuable even if we conclude that our system does not comply with the Blackstone principle in practice, because a number of the principle's dynamic costs flow solely from the fact that people *believe* our system protects the innocent, regardless of what it *actually* does.

Leipold, for example, offers a proposal that might mitigate the social stigma felt by AAI defendants as a result of the Blackstone principle. He suggests a rule that would allow defendants to “elect a process that could result in a finding of factual innocence.”³⁹² Where a defendant so chose, jurors would have “three verdict options: guilty,

³⁹¹ See *supra* section II.D, pp. 1121–24.

³⁹² Leipold, *supra* note 174, at 1314.

not guilty, and innocent.”³⁹³ That might help innocent, acquitted defendants by removing some of the stigma they face because they are widely assumed to be guilty.

Although Leipold does not frame it as such, his proposal involves a partial rejection of the Blackstone principle. That’s because acquitted defendants who receive no finding of innocence would be made worse off.³⁹⁴ By classifying some acquitted defendants as truly innocent, the system would, for all intents and purposes, send the message that other acquitted defendants are guilty but not subject to punishment (what other meaning could a verdict of “not innocent” but “not guilty” carry?). Criminal sanctions would thus be effectively bifurcated. With respect to imprisonment, fines, and the other consequences of conviction, the system would risk erring strongly in favor of not punishing. Yet with respect to the sanction (and accompanying extralegal consequences) of branding a defendant a likely criminal (“not guilty,” but decidedly not innocent), the system would not follow the Blackstone principle — indeed, Leipold suggests that the burden should be on the *defendant* to establish entitlement to a declaration of innocence.³⁹⁵ In that way, the proposal might be a good compromise, one that both supporters and critics of the Blackstone principle could live with.

Counteracting the widely recognized political process failure in criminal justice would require especially creative institutional design. In that vein, Lerner offers the intriguing suggestion that the much-maligned Ethics in Government Act of 1978,³⁹⁶ which permitted politically insulated independent counsels to prosecute government officials, may have had systemic benefits precisely because it raised the likelihood that politically powerful classes would face prosecution, thereby “reminding those classes, and a fascinated general public, of the grim realities of the criminal process.”³⁹⁷ That particular mechanism does not appear to have succeeded in improving big-picture conditions in criminal justice; rather than resulting in systemic reforms due to “the widespread exposure of common prosecutorial practices,”³⁹⁸ well-publicized abuses of power merely undermined support

³⁹³ *Id.* at 1315.

³⁹⁴ *Id.* at 1343–44.

³⁹⁵ *See id.* at 1317–19.

³⁹⁶ Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 2, 5, and 28 U.S.C.). The operative provision of the Act lapsed in 1999 and were not renewed by Congress. Lerner, *supra* note 188, at 656 & n.410.

³⁹⁷ Lerner, *supra* note 188, at 661.

³⁹⁸ *Id.* at 660.

for independent counsels and led to the nonrenewal of the statute authorizing them.³⁹⁹

That history suggests that efforts to increase the exposure of politically powerful groups to criminal punishment may not always work as expected. Perhaps we're currently in an equilibrium such that even if we got rid of the rules currently justified by the Blackstone principle, the political process would enact other reforms that would have offsetting effects to maintain similar protections for the innocent. That doesn't mean we should conclude the efforts are hopeless, but does mean that any potential solutions to the political process failure would need to be thought through carefully. More generally, any modification designed to compensate for dynamic effects might have dynamic effects of its own, and here as elsewhere we can't fully understand whether a particular proposal is desirable without trying to account for those effects.

Systematically identifying and evaluating potential solutions to the dynamic effects considered here is a task for later work. For now, there's one coping mechanism that would almost certainly improve the status quo, one that does not actually require changing any procedures at all: we should stop asserting that it's better for many guilty persons to go free to save one innocent from punishment and proclaiming that our system complies with that command.

Doing so would be more honest (since it's anything but clear that it *is* better or that our system actually does a good job of protecting the innocent). But more importantly, getting away from the frequent recitations of Blackstone's maxim might ameliorate some of the drawbacks of our professed preference for false acquittals. The constant assertions that our system heavily skews errors in favor of acquitting the guilty create the impression that false convictions are quite rare and that our procedural system is scrupulously fair to the innocent. Yet some false convictions are inevitable no matter what we do. If people thought such errors were more common, they might be more concerned about harsh treatment of the convicted. Regardless of how the system actually distributes errors, it may make sense to try to downplay the likelihood of guilty persons going free and to increase public perception of the possibility of false convictions. If we do nothing else than stop repeating Blackstone's ratio, that would still be progress.

³⁹⁹ *Id.* at 656–58; *see also* Stuntz, *supra* note 211, at 548 (“Kenneth Starr’s investigation of President Clinton . . . produced a good deal of hostility toward Starr but none at all toward Congress for the scope of federal perjury and obstruction of justice laws.”).

CONCLUSION

Intuition is a powerful force in criminal justice. Usually, our intuitions help us avoid unjust outcomes when we design rules. But occasionally, those intuitions can mislead. Most of us, if required to decide whether someone was guilty of a crime, would almost certainly choose to err strongly against being responsible for wrongly imposing a harsh penalty. Yet that intuition, this Article has sought to show, may not provide helpful guidance when designing how the criminal justice system as a whole should distribute errors. Contrary to our intuitions, a system more avowedly tolerant of convicting the innocent than ours might actually treat innocents better in practice — or, at the very least, might not treat them as badly as we tend to think — while also producing generally saner criminal policies. Acknowledging a greater chance of punishing innocent people in individual cases would surely make us uncomfortable. But that discomfort alone is not sufficient reason to cling to the Blackstone principle if it is making our criminal justice system — and, most importantly, the innocent themselves — worse off.