
A TRAGEDY OF ERRORS: BLACKSTONE, PROCEDURAL
ASYMMETRY, AND CRIMINAL JUSTICE

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Mantras have power, in and out of law. The best of them resonate throughout the ages: “Veni, Vedi, Vici”; “All for One and One for All”; “Liberty or Death”; “A House Divided Cannot Stand”; “I Have a Dream.” Daniel Epps’s article, *The Consequences of Error in Criminal Justice*,¹ tackles the Mount Everest of legal mantras, critiquing the famous Blackstone adage, “[b]etter that ten guilty persons escape, than that one innocent suffer,”² and calling for its eradication.

Like many a scholar before him, Epps is interested in diagnosing and solving the ills of the modern criminal justice system. More originally, Epps seeks to tie many, if not all, of the problems of America’s criminal system onto that hoary old Blackstonian koan. He primarily does so by linking the use of the principle to the well-recognized costs of false acquittals and false convictions, as well as more broadly indicting a political process failure in criminal justice.³

Epps is comprehensive in his exploration of the Blackstone principle’s dynamic effect on the criminal justice system, and convincingly traces its effect from earliest lawmaking to the modern day. He also points out — as part of his argument that principles can have unintended, underappreciated, and counterintuitive results — that the actual application of the Blackstone principle might end up harming defendants more than helping them. Despite this, however, the implications of his Article, if taken to their rational conclusion, point to eradicating the asymmetry currently favoring defendants in criminal procedure. This is an extremely troubling result.

In addition, Epps proposes restrictions of constitutional requirements in his desire to provide more equity to the criminal justice system, at a time when the Supreme Court is similarly eradicating many Fourth and Fifth Amendment protections. The results of the criminal justice system he envisions, largely stripped bare of defendant-friendly protections, would be disastrous in actual effect, and would fail to help soften the heavy burden of criminal punishment we currently impose.

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¹ Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065 (2015).

² 4 WILLIAM BLACKSTONE, COMMENTARIES *352.

³ Epps, *supra* note 1, at 1070–71.

This Response proceeds in two parts. Part I looks at Epps's misunderstanding of the modern structure of criminal procedure, and how the relatively recent shift from jury trials to guilty pleas makes it all the more critical to retain some asymmetry favoring the defendant. Part II critiques the author's suggestion to model the criminal law more equitably, with the goal of eliminating some of the false acquittals and false convictions that are arguably the result of the Blackstonian model. This second Part also focuses on Epps's incomplete comprehension of the true costs of the criminal law on our most vulnerable members of society. This Response concludes by endorsing Epps's desire to expose and fix the flaws of our current criminal justice system, but urging deliberation and mercy instead of harsh justice.

I. TWENTY-FIRST-CENTURY CRIMINAL JUSTICE

One systemic problem with Epps's vision is that it relies upon an antiquated form of the criminal justice system. Although Epps acknowledges that most criminal indictments are resolved by guilty pleas, not by jury trials, he fails to truly integrate this knowledge into his model of a purely equitable criminal justice system. This failure to do so demonstrates a pervasive underestimation of the defendant-unfriendly aspects of our current system and seriously undermines his assumption that our system is extensively structured according to the Blackstone principle.

This failure to fully integrate the actual workings of criminal procedure into an overarching criminal theory is not, of course, limited only to Epps. The relatively recent change in adjudication from criminal trial to criminal guilty plea has not been accompanied by an equal shift in punishment theory, and many criminal theorists incorrectly assume a criminal justice system that is both trial-based and flexible in assigning punishment.

Even if we accept without cavil Epps's fundamental assertion — that Blackstone's maxim has had a tremendous structural effect on criminal law and the criminal justice system — the Article ultimately fails to accept plea bargaining's triumph,⁴ where the advantage is unquestionably and overwhelmingly to the prosecutor. No amount of formalized asymmetry toward the defendant can possibly overcome the tremendous forces arrayed against the average criminal offender.

It is worth briefly reviewing Epps's arguments concerning plea bargains, considering that some ninety-five to ninety-eight percent of criminal indictments are adjudicated through the guilty plea process. First, Epps claims that, like the use of torture in medieval adversary trials, the Blackstone principle is one of the forces driving the use of

⁴ See generally GEORGE FISHER, PLEA BARGAINING'S TRIUMPH (2003).

plea bargains, since trials are now too costly.⁵ More specifically, Epps contends that the more the formal rules of criminal procedure skew toward false acquittals, as he believes they do, then the more that plea bargaining becomes the standard workaround.⁶ Indeed, Epps repeatedly links the use of the Blackstone principle to the rise of plea bargaining.⁷ Granted, Epps concedes that plea bargaining might seriously distort the distribution of errors produced by trial rules,⁸ and rather grudgingly admits “it’s at least possible that procedural subversion is dramatically reducing the benefits of trial rules that are supposed to protect the innocent . . . while leaving in place [the Blackstone principle’s] acknowledged costs.”⁹ His major contention, however, is that plea bargains are the canaries in Blackstone’s coal mine.

Epps’s attempt to pin the crisis of plea bargaining on the use of the Blackstone principle belies a misunderstanding of the workings of criminal procedure. Indeed, the entire endeavor of plea bargaining illustrates quite the opposite of what Epps is trying to argue: instead of simply obfuscating how much we actually follow the Blackstone principle,¹⁰ plea bargaining suggests that we fail to adhere to the principle in any systematic way. The Blackstone principle — were it truly operative — would not only structure trial procedures (as Epps seems to suggest¹¹), but also operate on informal procedures like plea bargaining and on pre-prosecution criminal procedure.

It is all of a piece: a system truly committed to the Blackstone principle would be demonstrably defendant-friendly not just in trials, but at all other stages of the process. Since we certainly do not observe any such systemic pro-defense bias in the rest of criminal procedure, either before or after indictment, it’s unlikely that the criminal justice system treats the Blackstone principle as anything other than a well-worn platitude.

Epps is also concerned that the Blackstone rule is no longer applicable, in part because our current criminal justice is not as harsh as it once was.¹² However, our modern criminal justice system still exhibits extreme severity in its unregulated plea and sentence bargaining. As I have noted elsewhere, when the prosecutor unilaterally decides inno-

⁵ Epps, *supra* note 1, at 1109.

⁶ *Id.* at 1113–14.

⁷ *Id.* at 1122–23.

⁸ *Id.* at 1144.

⁹ *Id.* at 1114.

¹⁰ *See id.* at 1144.

¹¹ *See id.* (“[P]lea bargaining *may* seriously distort the distribution of errors that trial rules would otherwise produce.”).

¹² *Id.* at 1086.

cence or guilt along with the charged offense and sentence, plea profers tend to become coercive.¹³

Moreover, because the criminal defendant often does not have the same access to information as the prosecutor — as is true in discovery rules¹⁴ — the prosecutor often acts as the sole judge and jury of the case. These realities alone are enough to even out any advantage a defendant might get from the formal structure of our criminal process. As Professor William Stuntz astutely observed, “criminal settlements do not efficiently internalize the law.”¹⁵

In large part, Epps’s careful exploration of the power of false acquittals and the problems with the asymmetrical nature of the criminal justice system (which he pins to overreliance on the Blackstone maxim) has more limited relevance in a world of guilty pleas, where the advantage has long gone to the prosecutor. Although Epps tries to turn this stumbling block into an asset by arguing that criminal justice actors would be less keen to resort to plea bargaining if the Blackstone principle didn’t structure trials and inform people’s perceptions of the system,¹⁶ ultimately he is never able to demonstrate that the Blackstone principle truly motivates our actual practice of criminal justice, instead of just the formalized world of criminal trials. Our system of criminal justice as practiced has turned from an open community process into a backdoor regime of insider machination,¹⁷ a problem that far overwhelms any false conviction/acquittal conundrum.

In addition, Epps’s assumption that our criminal procedure rules lean toward the defendant essentially ignores the past twenty to thirty years of Supreme Court rulings on the protections of the Fourth and Fifth Amendments. Although the basic structure of our criminal procedure originally formalized some extra safeguards for the accused, our recent criminal procedures have tilted heavily away from the defendant’s protection, whether they address the exclusionary rule,¹⁸ the right

¹³ See Laura I Appleman, *The Plea Jury*, 85 IND. L.J. 731, 750 (2010).

¹⁴ For example, under 18 U.S.C. § 3500 (2012), a federal prosecutor need not disclose any prior statements or reports of prosecution witnesses to the defendant. Additionally, many states have completely lopsided criminal discovery statutes. See, e.g., N.Y. CRIM. PROC. L. Art. 240 (McKinney 2014) (criminal defendant in New York not entitled to basic discovery in advance of trial, including police reports, names and contact information of prosecution witnesses, witnesses’ prior testimony and statements).

¹⁵ William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548 (2004) (emphasis omitted).

¹⁶ Epps, *supra* note 1, at 1123.

¹⁷ See generally LAURA I APPLEMAN, DEFENDING THE JURY (forthcoming Apr. 2015), <http://www.cambridge.org/us/academic/subjects/law/criminal-law/defending-jury-crime-community-and-constitution?format=PB> [<http://perma.cc/NZ9S-LT8T>].

¹⁸ See, e.g., *Davis v. United States*, 131 S. Ct. 2419, 2423–24 (2011) (exclusionary rule not necessary when search conducted in reasonable reliance on binding appellate precedent); *Hudson v.*

to remain silent,¹⁹ custodial interrogation,²⁰ post-arrest strip searches,²¹ or identification evidence,²² to name just a few examples. When this reality is combined with the new guilty plea regime, Epps's focus on the asymmetry of our formal jury trial system, whether based on Blackstone's principle or not, seems shortsighted.

II. EQUAL JUSTICE FOR NONE

Stepping back a moment from the realpolitik of criminal procedure, Epps's desire for the criminal law to resemble the civil law in its equal treatment of parties misses the fundamental difference between the two systems. Put plain, the violence, danger, and death that pervade our system of criminal indictments and convictions, from arrest to conviction to post-release supervision, demand not less asymmetry in favor of the defendant, but more. Epps is quite understandably concerned about the incredible harshness of our modern punishment regime, but bewilderingly, feels that the answer to overcriminalization and sentencing hysteria lies in more similar treatment for all parties, despite the codified inequities in power.

Epps's argument for greater procedural equity is weakened by his balancing of false acquittals against false convictions. In Epps's vision, once we are no longer shackled by procedural asymmetry, defendants and victims would both get a fairer outcome, as both could then be equal parties in the criminal justice process — neither entitled to more than the other. What Epps glosses over, however, is that unlike civil law, which cannot privilege civil plaintiffs over civil defendants, the two parties involved in criminal law are the accused and the State. As our constitutional history teaches us, part of the reason we added the Fourth, Fifth, and Sixth Amendments to the Bill of Rights was in reaction to fears of governmental oppression. We eliminated private prosecution for criminal offenses almost 200 years ago, and in so doing made criminal justice about the public good. In this way, Epps's cost-benefit analysis of false acquittals versus false convictions misses the point.

Michigan, 547 U.S. 586, 602 (2006) (violation of knock-and-announce rule does not require exclusion).

¹⁹ See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259–60 (2010) (defendant must break silence to assert right to silence in custodial interrogation).

²⁰ See *Maryland v. Shatzer*, 130 S. Ct. 1213, 1227 (2010) (imprisonment does not mean custody sufficient to trigger a suspect's rights under *Miranda*).

²¹ See *Florence v. Burlington*, 132 S. Ct. 1510, 1513–14 (2012) (jail strip searches do not require reasonable suspicion).

²² In *Kirby v. Illinois*, 406 U.S. 682 (1972), defendants' Sixth Amendment right to counsel at identification procedures was limited to postindictment, in-person lineups. *Id.* at 690–91; see also *Perry v. New Hampshire*, 132 S. Ct. 716, 730 (2012) (judicial examination of suggestive eyewitness testimony only necessary in cases of police misconduct).

In addition, holding the Blackstone principle as the reason for the criminal law's heightened evidentiary standards, as Epps does in his article, is misleading. It's not so much that we are so afraid of false convictions that we would let ten guilty men go free rather than convict one innocent man. Instead, we are careful with our evidentiary standards of proof because only in the criminal justice system does conviction result in loss of liberty, privacy, and sometimes life.

Indeed, the danger of tampering with the reasonable doubt standard has most recently been demonstrated in the outcry resulting from the application of the new Title IX standards now imposed on college campuses. Under Title IX, any school that accepts federal funding (that is, virtually all schools) is legally required to address sexual harassment and violence on campus.²³ The Department of Education has drafted new rules to address women's safety, some of which have been enshrined into law by Congress, with more legislation likely on the way.

Under cover of these new rules, however, procedures have been put into place that put far more burden on the accused. By federal requirement,²⁴ a student can be found guilty under the lowest standard of proof: preponderance of the evidence. This is a very minimal standard for a finding of criminal conduct, requiring only fifty-one-percent certainty of guilt. Because the punishment for campus sexual assault can be severe,²⁵ many schools had previously used the clear and convincing evidence standard, a significantly higher burden of proof, though still below reasonable doubt. Title IX's new requirements have led to a system that some have alleged lacks "the most basic elements of fairness and due process," a process "overwhelmingly stacked against the accused."²⁶ In other words, removing the special protections we currently provide for the criminally accused, few as they are, can lead to a tremendous derailment of due process.

The troubles stemming from Title IX's new rules minimizing protections for the accused should give us pause when considering the implementation of Epps's ideas. At minimum, moving away from the

²³ Alissa Quart, *The New Weapon Against Campus Rape*, TAKEPART (Nov. 11, 2013), <http://www.takepart.com/article/2013/11/11/new-weapon-against-rape-on-campus> [<http://perma.cc/JQY4-M64N>].

²⁴ Letter from Joseph Cohn, Legislative & Policy Dir., Found. for Individual Rights in Educ., to White House Task Force to Protect Students from Sexual Assault (Feb. 28, 2014), <https://www.thefire.org/wp-content/uploads/2014/03/FIREs-Comment-to-White-House-Task-Force-FEBRUARY-28-2014-.pdf> [<https://perma.cc/ZV5G-8DB3>].

²⁵ See Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES, Nov. 15, 2014, <http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html>.

²⁶ See Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWmNqbM/story.html>.

Blackstone principle would have some serious real-world consequences, something Epps does not fully take into account. Epps's vision of the criminal justice system seems to be one in which all players should be treated more equitably throughout the criminal process, neither side receiving any unfair advantage over the other. Although this theory might work well on paper, it fails on a number of levels in practice.

More damningly, given the tremendous asymmetries in who is arrested, indicted, convicted, and punished, to falsely equalize criminal procedure by eliminating various protections for the accused gives short shrift to problems of race, class, gender, and education that dog the process. Given recent events in Ferguson, Staten Island, and Cleveland, it is naïve to assume that there is a level playing field when it comes to the practice and implementation of criminal justice. At its heart, the system is discriminatory, most particularly in the areas of race and class, and any proposed rethinking of the system cannot be complete without a discussion of how that discrimination will be alleviated or exacerbated, at least in part.

This is a problem that Epps, in large part, fails to address. Although he carefully delineates the costs and benefits of the Blackstone principle in pursuit of a system that maximizes societal utility, Epps never wrestles with the fundamental flaws of modern criminal justice: that its weight falls most heavily on the most challenged among us — the impoverished, the mentally ill, the poorly educated, those on society's edge. By seeking to remove some of the protections currently afforded to the defendant, whether ascribable to the Blackstone principle or not, Epps advocates extra burden on those already marginalized by our communities.

As Professor Robert Cover famously argued in *Violence and the Word*, “[l]egal interpretation takes place in a field of pain and death.”²⁷ To suggest that the criminal law take more of a lead from the civil law, even on a philosophical level, misses the vast gulf between the two systems — the difference between human life, on the one hand, and damages for loss, on the other. Or, to return to Cover, “[n]either legal interpretation nor the violence it occasions may be properly understood apart from one another.”²⁸

CONCLUSION: THE VIOLENCE OF LEGAL ACTS

Overall, the question that lingers after reading Epps's Blackstonian exegesis is one of relevance: what effect does the Blackstone principle really have on the criminal justice system? Put differently, do the out-

²⁷ Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (footnote omitted).

²⁸ *Id.*

comes of the Blackstone principle have any import on the quick-and-dirty world of actual criminal practice?

Epps would say yes, and I would agree to a limited extent. As I said in the beginning: mantras have power. But we fundamentally disagree on the best underlying philosophy to govern the criminal justice system. Epps is concerned with net costs, system errors, adversarial asymmetry, and the social costs of false acquittals and convictions. In contrast, I am more concerned with the treatment of the accused, guilty or innocent, throughout the process. Ensuring procedural justice for all defendants, from arrest to release (and beyond), should be the primary goal in criminal reform, to counter the great unraveling of American criminal justice.²⁹

In the end, with our system of rapid guilty pleas, vast race- and class-based outcome disparities, and harsh mandatory sentencing, we should still desire a little asymmetry favoring the defendant, even for those who are guilty. We may no longer reside in a Blackstonian world, where felony conviction automatically equals death, but we still live a world where felony conviction often means financial dissolution, disenfranchisement, and societal exile. Although Epps does briefly acknowledge the malignant power of felony conviction, his belief that creating more procedural equity would help eradicate some inequities of criminal punishment seems overly hopeful, if not naïve.

Criminal theory — and indeed, criminal justice as a whole — does not exist in a vacuum. Epps is correct when he posits that even small philosophical changes can have large effects in the long run. But before deciding to dispense entirely with Blackstone's principle, perhaps it's time we ponder another ancient but equally noteworthy saying in the criminal law: "Justice, justice, shall you pursue."³⁰

²⁹ See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 1–2 (2011).

³⁰ *Deuteronomy* 16:20.