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## THE OVERLOOKED BENEFITS OF THE BLACKSTONE PRINCIPLE

*John Bronsteen\** & *Jonathan S. Masur\*\**

There are two ways to read Daniel Epps's fascinating and provocative article, *The Consequences of Error in Criminal Justice*.<sup>1</sup> One way is this: the article shows that the Blackstone principle — the principle that more effort should be made to avoid false convictions than false acquittals — may well produce many consequences that are often overlooked. Some of those overlooked consequences are positive, others are negative, and it is unclear whether those overlooked consequences make the principle more or less desirable on the whole than it was previously thought to be.<sup>2</sup> We agree with those points, and in making them Epps contributes significantly to the literature on criminal justice.

The other way to read Epps's article is this: the article claims that the Blackstone principle may well have bad overall consequences, or at least that the principle has worse consequences (especially for innocent criminal defendants) than it is typically assumed to have. We do not think those conclusions follow from the principle's overlooked effects that Epps identifies. So in our view, the best way to read his article is the first way: Epps shows that the Blackstone principle has more complicated effects than people realize, and those effects may be positive, negative, or neutral on the whole.

Because Epps focuses almost exclusively on the negative features of the overlooked effects, we focus on their positive features. First, we discuss the crime reduction and other benefits that could result from the effects Epps identifies. Second, we explain how social science evidence on prison and well-being reveals unappreciated benefits of the Blackstone principle. Epps is right that the Blackstone principle should be viewed from a dynamic perspective. But that perspective may serve to reveal the principle's unnoticed strengths, even more than its weaknesses.

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<sup>1</sup> 128 HARV. L. REV. 1065 (2015).

<sup>2</sup> Indeed, the answer may depend at least in part on what one's previous view of the principle was. The principle has many defenders but also, as Epps notes, some staunch critics. *E.g., id.* at 1089–92.

## I. POSITIVE DYNAMIC EFFECTS

The main argument against the Blackstone principle is that it increases crime.<sup>3</sup> That is, if procedural safeguards make it harder to convict those accused of crimes, then there will be less deterrence and incapacitation and therefore more law-breaking. One of Epps's main points is that this increase in crime harms not only potential victims but also criminal defendants — the very people the Blackstone principle is supposed to help.<sup>4</sup> This occurs, according to Epps, in large part because society responds to increased crime by broadening criminal statutes, reducing other procedural protections, and, most importantly, increasing the length of prison sentences.<sup>5</sup>

If Epps is right about all of this, however, then the broader criminal statutes, reduced procedural protections, and longer prison sentences of the Blackstonian world themselves reduce crime via deterrence and (perhaps especially) incapacitation relative to the alternatives in the non-Blackstonian world. So if the picture Epps paints is right, then the Blackstonian world is one in which any would-be criminal will be harder to convict in some ways but easier to convict in other ways, and will face a longer sentence if convicted. Whether that arrangement is better or worse than the one in a non-Blackstonian world — in terms of crime reduction or otherwise — is utterly uncertain. On the one hand, one might argue that certainty of punishment deters crime more than does severity of punishment, and that criminals are more likely to be convicted and punished in the non-Blackstonian world (though that is far from certain).<sup>6</sup> On the other hand, one might argue that keeping would-be recidivists locked up for long periods of time without having to release them, catch them again, and convict them again each time, gives the Blackstonian world an advantage. It is not clear which system, Blackstonian or non-Blackstonian, is preferable.

In addition, a major benefit of the Blackstone principle is that some potential innocent defendants are not even charged in a world with the principle but would be charged and acquitted in a world without it.<sup>7</sup> Being charged and acquitted is typically *much* worse for someone than not being charged at all. The decision to charge imposes substantial burdens on the accused, burdens that do not entirely dissipate even if the individual is eventually acquitted.<sup>8</sup> Epps disagrees,

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<sup>3</sup> See, e.g., *id.*

<sup>4</sup> See *id.* at 1099–1102.

<sup>5</sup> See *id.* at 1102–06.

<sup>6</sup> E.g., *id.* at 1095.

<sup>7</sup> *Id.* at 1111, 1114 n.239.

<sup>8</sup> See Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1301–14 (2000).

dismissing the concern with only this sentence: “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.”<sup>9</sup> This rejoinder is surprising, however, because Epps himself acknowledges the potential weakness of his claim about changes in stigma: “[S]ome 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.”<sup>10</sup> If Epps is right that there would not be much difference between the stigma of being charged but acquitted in a Blackstonian and non-Blackstonian world, it undercuts his claim that the benefit of avoiding a charge in a non-Blackstonian world is “likely not large.”<sup>11</sup>

On the other hand, if the stigma of an arrest — as well as that of a conviction<sup>12</sup> — turns out to be much smaller in a world without the Blackstone principle, then the Blackstone principle creates an overlooked deterrent benefit by increasing the stigmatic harm that would-be criminals face if they are caught. This factor belongs in Epps’s calculus of costs and benefits because it is Epps himself who argues that the factor exists.<sup>13</sup> Once these additional benefits are added to the accounting, the idea of moving to a non-Blackstonian world becomes less appealing. Indeed, it is possible that a dynamic analysis of the type Epps suggests would provide even stronger justification for the Blackstone principle than scholars have previously supposed.

## II. HEDONICS AND PRISON

We can try to obtain some purchase on the competing dynamic effects of the Blackstone principle by looking to the literature on hedonic psychology. Analysis of the hedonic effects of prison suggests that the Blackstone principle may be helping innocent defendants far more than it harms them. One of Epps’s central points is that there is a tradeoff between the length of prison sentences and the likelihood of conviction. Epps argues that if we were to do away with the Blackstone principle, higher conviction rates would enable shorter prison sentences for individuals who were convicted.<sup>14</sup> This would provide a benefit to innocent defendants who would be convicted in either world, counterbalancing (at least to some degree) the fact that a higher percentage of innocents would be convicted in a non-Blackstonian world. We do not know whether sentences would actu-

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<sup>9</sup> Epps, *supra* note 1, at 1114 n.239.

<sup>10</sup> *Id.* at 1122.

<sup>11</sup> *Id.* at 1114 n.239.

<sup>12</sup> *E.g., id.* at 1099–1102.

<sup>13</sup> *See id.*

<sup>14</sup> *Id.* at 1112.

ally be reduced, but let us suppose that Epps is correct. The question then becomes: How much will innocent defendants benefit from shorter prison sentences in a non-Blackstonian world? Will this benefit be substantial, or will it be dwarfed by the increased risk of wrongful convictions in the first place?

It is impossible to know how many more innocent defendants will be wrongfully convicted in a non-Blackstonian world, so we cannot compute that side of the balance sheet. But research from hedonic psychology sheds considerable light on the issue of how much wrongfully convicted defendants will benefit from shorter prison sentences. As we have explored in depth elsewhere, the difference between the respective harm of long and short prison sentences is far smaller than most people assume<sup>15</sup> — scholars, judges, legislators, and citizens included. There are two reasons for this. First, people adapt to many aspects of life in prison.<sup>16</sup> They form social networks, develop coping mechanisms, and generally become accustomed to life behind bars. The tenth year that someone spends in prison is not nearly as bad for that person as the first. Second, *having been in prison* causes people to suffer a wide variety of negative effects that persist even after they are released.<sup>17</sup> Ex-prisoners have trouble preserving or reestablishing family and social relationships; they have difficulty finding work; and they are often afflicted with serious chronic diseases.<sup>18</sup> Surprisingly, these effects are almost equally pronounced whether the individual spent one year in prison or ten (or twenty).<sup>19</sup> These types of harms are also very difficult to adapt to, and they exert a consistently negative force on former inmates' lives years after they have been released.<sup>20</sup>

This means that even if Epps were right to suggest that a wrongly convicted defendant might face a twenty-year sentence in a Blackstonian world and a ten-year sentence in a non-Blackstonian world, the practical difference between the two sentences would be much smaller than one might imagine. The last ten years in prison are not as bad as the first ten years, and even after a prisoner is released

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<sup>15</sup> John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037 (2009).

<sup>16</sup> See *id.* at 1046–49.

<sup>17</sup> *Id.* at 1049.

<sup>18</sup> See *id.* at 1049–52.

<sup>19</sup> *Id.* at 1050. It is possible that the negative effects of prison on relationships and employment might be ameliorated somewhat if, as Epps postulates, eliminating the Blackstone principle mitigated the stigma associated with prison. However, we suspect that reduced stigma — if in fact it materializes — will have a small impact on these harms. The reason is that they are not caused entirely (or necessarily even predominantly) by stigma. Rather, prison is maladaptive to regular life: the coping strategies that allow prisoners to survive in prison make it harder for them to function on the outside. This, in turn, makes interpersonal relationships and employment more difficult to maintain after release.

<sup>20</sup> *Id.* at 1049–55.

(earlier, in the non-Blackstonian world), the years after release are not as good as one might expect.<sup>21</sup> To be sure, it is very likely worse to serve a longer sentence than a shorter one. But the *amount* by which it is worse is smaller than almost everyone assumes. And that amount is dwarfed by the benefit (to an innocent person) of never having been incarcerated in the first place. Accordingly, if the Blackstone principle decreases the chance that an innocent defendant will go to prison by (for instance) twenty-five percent, but increases by a proportionate amount the sentence that such a defendant will serve if convicted, then that accounting cuts *dramatically* in favor of the Blackstone principle.<sup>22</sup> The sentence reductions in a non-Blackstonian world would have to be enormous and wholly disproportionate to the increased rate of conviction for innocent defendants to benefit.<sup>23</sup>

### III. CONCLUSION

Epps has written a deeply interesting, provocative, and novel article on a topic that many might have felt was well settled. His article is thus a valuable contribution. In this Response, we've endeavored to demonstrate that by focusing almost exclusively on the unexplored negative effects of the Blackstone principle, Epps overlooks the positive effects of the very same phenomena he believes cause the Blackstone principle's negative effects. Of course, it remains impossible to know whether the Blackstone principle's benefits exceed its costs, in large degree because the magnitudes of these competing effects are impossible to determine. Where data do exist, however — in the form of hedonic psychology studies of prison and its effects — those data cut strongly in favor of the Blackstone principle and against any legal change that would send a higher percentage of innocent defendants to prison. In the end, it is not clear whether Epps's dynamic analysis, even if correct, would render the Blackstone principle more or less desirable than it was previously thought to be.

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<sup>21</sup> *Id.*

<sup>22</sup> Indeed, one could argue on this ground that the Blackstone principle should be strengthened and that the status quo does not do enough to protect innocent defendants from wrongful convictions.

<sup>23</sup> The hedonics literature would not necessarily support the Blackstone principle if Epps were right that the principle increases the number (while reducing the rate) of false convictions due to increasing crime. Epps, *supra* note 1, at 1112–13. But as we explained in Part I of this Response, it is utterly uncertain whether the Blackstone principle results in more crime even if Epps is right about the dynamic effects that flow from the principle.