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ESSAY

ONE LAST WORD ON THE BLACKSTONE PRINCIPLE

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IN the American legal system, the party that bears the burden of persuasion usually gets the last word. Prosecutors and plaintiffs get final closing statements before their cases go to the jury, appellants are permitted rebuttals during oral argument, movants get to file reply briefs. It thus seems particularly fitting for me to offer just a few more words in light of Joel Johnson's well-done and thoughtful response[1] to my article, The Consequences of Error in Criminal Justice ("CECJ").[2] Fitting, that is, both because CECJ implicates questions about evidentiary burdens and, more importantly, because the article itself faces a concededly heavy burden in its attempt to disrupt settled thinking.

In this short reply, I offer some thoughts on Johnson's arguments, while also addressing two other recent responses to CECJ. While I will use this opportunity to clarify and defend some of my claims, my gaze faces forward, not behind me. I hope to help frame further conversations about the Blackstone principle while also offering a few larger thoughts on criminal justice scholarship. I will focus my attention on three points: First, I will address criticism of CECJ's core argument about the costs and benefits of the Blackstone principle. Second, I will explore the im-

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[1] Joel S. Johnson, Note, Benefits of Error in Criminal Justice, 102 Va. L. Rev. 237 (2016).

[2] Daniel Epps, The Consequences of Error in Criminal Justice, 128 Harv. L. Rev. 1065 (2015).

plications of CECJ's analysis for rules of criminal procedure. Third, I will discuss the relationship between the Blackstone principle, equality, and political structure in our criminal justice system.

I. THE CONSEQUENTIALIST CALCULUS

CECJ critiqued the "Blackstone principle"—shorthand for a rule about how errors in criminal justice should be distributed. Simply put, the Blackstone principle instructs that in distributing errors in criminal punishment, our justice system should strive to minimize false convictions, even at the expense of creating more false acquittals and more errors overall.[3] As I showed, the traditional arguments for this principle are, at the least, undertheorized and incomplete.[4] As relevant here, CECJ called into question the most common argument for the Blackstone principle: a consequentialist account that justifies the principle on the ground that false convictions are more costly than false acquittals.[5] CECJ argued that this justification is inadequate because it myopically focuses on the costs of errors in individual cases. When it comes to system design, rather than asking whether, and how much, *one* false conviction is worse than *one* false acquittal, we must instead ask whether a *system* that strongly prefers to create false acquittals leads to better consequences, on balance, than a system with no such preference.

CECJ took a first cut at that latter question. It did so by making an imaginative comparison between two systems: one that adhered to the Blackstone principle and one that did not.[6] While recognizing the considerable amount of speculation inherent in that exercise, CECJ tried to show that the costs of following the Blackstone principle might plausibly outweigh the benefits, even focusing solely on the class of people that the principle is supposed to protect: innocent defendants.[7] For example, while the Blackstone principle helps some innocent defendants go free, it may result in harsher punishment for other innocents, given that the probability of conviction and the severity of punishment are substitutes for deterrence purposes.[8]

[3] Id. at 1068–69.
[4] See id. at 1087–1140.
[5] See id. at 1087–1124.
[6] See id. at 1094.
[7] See id. at 1110–24.
[8] See id. at 1110–13.

Here, Johnson enters the fray. Johnson accepts CECJ's basic approach; he works within a consequentialist framework, and he also agrees that my "dynamic" perspective is the right way to evaluate the Blackstone principle.[9] Where he quarrels with CECJ, however, is on how to conduct the dynamic analysis. He argues that CECJ's consequentialist accounting was one-sided; that it overstated the extent of the principle's perverse effects for the innocent, while ignoring or minimizing significant benefits for innocent defendants. Johnson carefully walks through a number of the dynamic effects CECJ identified, and tries to weaken the argument that the Blackstone principle could hurt innocent defendants. He disputes, for example, CECJ's claims about how various actors in the criminal justice system—police, prosecutors, legislators, and voters—will respond to the Blackstone principle in ways that counteract the principle's benefits.[10] As Johnson argues, many of the forces CECJ identifies will exist regardless of whether the system is designed to skew errors in favor of false acquittals.[11]

Professors John Bronsteen and Jonathan Masur, in another response to CECJ, offer a critique that is in some ways similar to Johnson's. Drawing on their extensive research into the social science of happiness and its implications for law and legal theory,[12] they offer additional reasons to think the magnitude of some of the Blackstone principle's perverse effects may be smaller than CECJ suggests. They argue, for example, that hedonic psychology studies suggest that *whether* a person is convicted has a much greater impact on his well-being than the length of his sentence.[13] For this reason, they argue that even if CECJ is correct that the Blackstone principle results in more severe punishments for some number of innocent defendants, this cost is likely outweighed by the benefits to other innocents who avoid conviction entirely.[14]

Both Johnson and Bronsteen & Masur offer powerful critiques of CECJ's argument. To be sure, I could quarrel with each somewhat. While Johnson endorses CECJ's dynamic approach, he seems unwilling to embrace fully the implications of that perspective. CECJ observed

[9] See Johnson, supra note 1, at 246–47.

[10] See id. at 252–75.

[11] See id. at 253, 259, 265–67.

[12] See generally John Bronsteen et al., Happiness and the Law 3–6 (2015) (discussing how the science of happiness can affect the law).

[13] See John Bronsteen & Jonathan S. Masur, The Overlooked Benefits of the Blackstone Principle, 128 Harv. L. Rev. F. 289, 292 (2015).

[14] See id. at 293.

that "if a Blackstonian system produces more crime than a non-Blackstonian system, that will affect the total number of arrests and 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."[15] Yet even though this possibility alone could wipe out the Blackstone principle's putative benefits, Johnson ignores it.

For their part, Bronsteen and Masur also seem unable to fully escape the pull of the static perspective. Their argument depends on research into the negative effects of conviction and punishment on convicted defendants.[16] Yet one of CECJ's key points was that the substance and social meaning of criminal convictions are partially constructed by the way in which the system is perceived to create errors. The formerly incarcerated will suffer worse collateral consequences from their convictions in a society where it is believed that the innocent are rarely punished than in a society more willing to acknowledge the risk of false convictions. And so to the extent that Bronsteen and Masur treat the costs of conviction as constants, based on research into how criminal punishment functions in our own, putatively Blackstonian system, they seem to me to be fighting the premise of CECJ's imaginative exercise.

Ultimately, however, this is mostly quibbling. Both Johnson and Bronsteen and Masur make trenchant—and well taken—criticisms of some of CECJ's more speculative claims. They offer good reasons to think that CECJ's dynamic analysis was incomplete and one-sided, and that it did not carry the weighty burden of persuading readers that the Blackstone principle is, on balance, harmful to innocent defendants. Yet I think that CECJ's key contribution stands nonetheless.

Let me try to recapitulate what I see as CECJ's core insight. The Blackstone principle is justified by intuitions about individual cases. If any of us were acting as combined judge and jury in a case where serious punishment was on the line, we might strongly prefer—likely for a mix of consequentialist and nonconsequentialist reasons—to err in favor of not punishing. Yet if we are approaching this question not as an individual judge or juror, but instead from the perspective of the system designer, those individual case-based intuitions provide surprisingly little useful guidance. Even if we think that one false conviction is ten times

[15] See Epps, supra note 2, at 1112–13.
[16] See Bronsteen & Masur, supra note 13, at 292–93.

worse than one false acquittal, it does not follow that in each criminal trial we necessarily want jurors to err strongly in favor of letting the guilty go free. Even if protecting the innocent is the sole or paramount value, a Blackstonian system is not inevitably better for the innocent than a non-Blackstonian one. Criminal justice is a complex system with many moving parts, and so to evaluate the costs and benefits of any particular rule, one needs some theory of how that rule will affect the system as a whole. And yet for centuries, criminal justice theorists and judges have extolled the virtues of the Blackstone principle, relying on myopic arguments based on the perspective of the individual case.[17] My hope was to show the inadequacy of this approach.

To be sure, CECJ did try to persuade the reader that the Blackstone principle *might* hurt the innocent on balance.[18] But my ultimate goal was not to conclusively establish that the Blackstone principle has bad effects—a conclusion that depends on empirical questions that CECJ did not even try to answer. Instead, the goal was only to make it seem *plausible* that the Blackstone principle's second-order effects could swamp the benefits of its first-order protections for the innocent. Just raising some doubt about the extent of the principle's benefits is enough to establish that, in thinking about the justifications for the Blackstone principle, we simply have not been asking the right questions. To the extent that CECJ reads at points as if it was trying to establish conclusively that the Blackstone principle is socially costly, that was a mistake of tone and framing. Simply showing the shortcomings of our old ways of thinking was enough.

In this effort, CECJ was not breaking totally new ground. Professors Lewis Kaplow and Steven Shavell, for example, have noted that scholars evaluating legal rules often fail to account for relevant effects because they take an "ex post perspective" that "focus[es] on particular outcomes."[19] And Kaplow has shown that across both civil and criminal law, which burden-of-proof rule best advances social welfare turns not on theorizing about the relative costs of errors, but instead on "empirical facts that are likely to be quite difficult to ascertain and that . . . vary by context."[20] Yet these insights have not been sufficiently internalized in criminal law, where—as CECJ recounted—the simplistic, individual

[17] See Epps, supra note 2, at 1077–81, 1088–89.
[18] See id. at 1112–24.
[19] Louis Kaplow & Steven Shavell, Fairness Versus Welfare 48–49 (2002).
[20] Louis Kaplow, Burden of Proof, 121 Yale L.J. 738, 763, 771 (2012).

case-based argument about the relative costs of errors prevails as the leading justification for the Blackstone principle.[21] CECJ hoped to show that, given its inattention to systemic effects, this conventional argument cannot carry the weight of the Blackstone principle. And, despite valid criticism by Johnson and Bronsteen & Masur, I believe it succeeded in that goal.

II. OTHER JUSTIFICATIONS AND PROCEDURAL RULES

If I am right about that last point—if CECJ did show that the most common argument for the Blackstone principle relies on an incomplete perspective—where do we go from there? We should not be ready to immediately abandon the Blackstone principle. There are other potential grounds for the principle, including potential nonconsequentialist justifications even if the traditional costs-of-errors argument is insufficient. Moreover, showing that the leading consequentialist argument *for* the Blackstone principle rests on questionable empirical assumptions is not the same thing as making a strong consequentialist case *against* the principle. Given that the burden of proof is usually placed on the person arguing for changing the status quo, we might desire a lot more confidence that the Blackstone principle hurts the innocent before rejecting it.

For these reasons, it would be quite premature for me to advocate any actual changes to our justice system. Two less drastic steps, however, seem advisable. First, we should think more carefully about different kinds of justifications for the Blackstone principle. CECJ analyzed those that have been offered thus far, and found them generally lacking.[22] But it may be that these arguments have not been sufficiently developed simply because the traditional costs-of-errors argument has been bearing so much weight. Second, we should try to clarify some of our thinking about the relationship between the Blackstone principle and particular rules of criminal procedure (which can have both Blackstonian and non-Blackstonian justifications), and try to figure out what the Blackstone principle's real role in our procedural system is. CECJ took small steps in this direction,[23] but more needs to be done.

Because the intuition underlying the Blackstone principle is so deeply entrenched in our thinking, both of these tasks are surprisingly difficult.

[21] See Epps, supra note 2, at 1088–89.
[22] See id. at 1131–42.
[23] See id. at 1143–48.

On the justification front, the fact that the principle is so universally assumed to be true tends to impede careful and rigorous examination of the arguments for and against it. On the procedural implications, the principle has become so synonymous with defendant-friendly rules (most importantly, the reasonable doubt standard) that commentators often find it hard to disentangle the two.

A response to CECJ by Professor Laura Appleman[24] provides apt examples of both of these problems. First, Appleman shows why serious analyses of the Blackstone principle are so few and far between. In responding to CECJ, Appleman briefly tries to explain the justifications for the Blackstone principle. But she mostly manages to convey only her fervent belief that the principle is so obviously correct that it needs no justification. For example, she accuses CECJ of "gloss[ing] over" the fact that in criminal law "the two parties involved . . . are the accused and the State,"[25] a fact which in Appleman's view makes all the difference. But this claim is puzzling, because CECJ spent many pages grappling with deontological arguments expressly premised on the special role of the state in criminal punishment.[26] She goes on to stress: "[O]nly in the criminal justice system does conviction result in loss of liberty, privacy, and sometimes life."[27] Yet as CECJ argued, in a world where punishment is never a binary choice between freedom and death, the severity of criminal sanctions does not require a Blackstonian approach; there is a choice between punishing a smaller number of people harshly or a larger number more leniently.[28] Appleman also objects to CECJ's "cost-benefit analysis" by asserting that criminal justice is "about the public good."[29] Yet this is a nonsequitur. Precisely *because* the criminal justice system is meant to advance the public good, it is critical to evaluate the system in terms of its effects on overall welfare.

[24] Laura I. Appleman, A Tragedy of Errors: Blackstone, Procedural Asymmetry, and Criminal Justice, 128 Harv. L. Rev. F. 91 (2015).

[25] Id. at 95.

[26] See Epps, supra note 2, at 1131–40.

[27] Appleman, supra note 24, at 96.

[28] See Epps, supra note 2, at 1084–85. Moreover, as Kaplow notes, the severity of criminal sanctions "make erroneous acquittals more troublesome as well; note that multiplying the consequences on both sides of a balance by a common factor has no effect on which way the scale tips." Kaplow, supra note 20, at 744.

[29] Appleman, supra note 24, at 95.

Appleman concludes by invoking a biblical command: "Justice, justice, shall you pursue."[30] Yet, like many others, Appleman is so transfixed by the Blackstone principle that she is unable—or unwilling—to recognize that the very question of *what justice requires* is a surprisingly difficult one. And this is the very problem that CECJ sought to lay bare. The Blackstone principle may well be a morally necessary element of a system of punishment. But if so, its proponents need to develop more sophisticated arguments to explain why that is the case.[31]

In defending old ways of thinking, Appleman also illustrates the muddled nature of conventional wisdom about the relationship between the Blackstone principle and procedural rules. As CECJ explained, that relationship is complicated; only some pro-defendant procedural rules even purport to be justified by the Blackstone principle, and those may also have good non-Blackstonian justifications.[32] Yet Appleman is uninterested in separating out these distinct conceptual threads. For example, blowing past CECJ's extensive caveats, she reads the article as a full-throated call for the abolition of any procedural rules favoring defendants.[33] She also repeatedly lumps all pro-defendant rules together, without attending to whether those rules have any connection to the Blackstone principle. For example, she repeatedly refers to Fourth Amendment protections,[34] even though in criminal cases that amendment protects only the guilty, not the innocent (via the exclusionary rule).[35] But if we are to think carefully about the Blackstone principle and its role in our procedural system, we cannot just think about rules in terms of which team—defendants or the government—they help. We need to identify which rules, precisely, the Blackstone principle justifies, try to decide whether those rules have other good justifications, and do our best to figure out if supposedly Blackstonian rules are actually work-

[30] Id. at 98 (quoting Deuteronomy 16:20) (internal quotation marks omitted).

[31] Indeed, that effort is already underway. See generally Alec Walen, Proof Beyond a Reasonable Doubt: A Balanced Retributive Account, 76 La. L. Rev. 355 (2015) (offering a careful and insightful retributivist defense of a high burden of proof in criminal punishment and engaging closely with CECJ's arguments).

[32] See Epps, supra note 2, at 1144–47.

[33] See Appleman, supra note 24, at 97 (reading CECJ as "seeking to remove some of the protections currently afforded to the defendant, whether ascribable to the Blackstone principle or not").

[34] See id. at 91, 94, 95.

[35] See Epps, supra note 2, at 1073.

ing the way we want them to. None of this is straightforward or easy, but it is necessary if deeper understanding is the goal.

In Appleman's sharp reaction to CECJ's arguments, I believe there is something more at work than simply reflexive adherence to conventional wisdom. I believe that those of us who study or work in the criminal justice system on behalf of defendants sometimes suffer from what is best understood as a "siege mentality."[36] After the high-water mark of the Warren Court's criminal procedure revolution, recent decades have seen the Supreme Court slowly and continually chipping away at defendants' rights.[37] At the same time, the law has become harsher and broader, while subjecting more and more people to severe punishment.[38] Seeing all this can have the same effect as living in a real state of siege: Those afflicted are likely to perceive threats and negative intentions where none are present.[39] Thus, an argument for reevaluating a theoretical principle underlying some pro-defendant procedural rules is treated instead as a Trojan horse whose purpose is to eradicate defendants' remaining, hard-earned procedural protections.

This mentality is, I think, understandable. There is little to praise in the state of our criminal justice system today. And it is hard to dispute that the judiciary has been too deferential to the political branches in criminal cases over recent decades. Nonetheless, this mentality should be resisted. First of all, if the goal of scholarship is to increase our understanding, rather than merely to advocate particular policies, we must be willing to follow ideas to their conclusions, regardless of any distaste for the substantive outcomes to which such inquiry might lead. More importantly, though, even those whose main goal is protecting the rights of defendants should avoid the way of thinking I have described. For reasons I will explain in a moment, the very forces that have led to the siege mentality are themselves reasons why we should be more willing to evaluate ideas and proposals that might initially seem unpalatable.

[36] For a definition of this phenomenon, see Daniel Bar-Tal, Siege Mentality, *in* 3 The Encyclopedia of Peace Psychology 996, 996–97 (Daniel J. Christie ed., 2012).

[37] For a discussion of how the Burger and Rehnquist Courts subtly eroded the Warren Court's landmark criminal procedure rulings, see Carol S. Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 Mich. L. Rev. 2466 (1996).

[38] See William J. Stuntz, The Collapse of American Criminal Justice 251–67 (2011).

[39] See Bar-Tal, supra note 36, at 997.

III. EQUALITY AND POLITICAL STRUCTURE

Let me address one more charge by Appleman: that CECJ "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."[40] As it happens, I see that as the central problem with criminal justice today. I see it as a problem in its own right, but I also see it as a self-reinforcing cause of the problems with criminal justice. That is, criminal law treats the underprivileged badly—and precisely because those that the law treats badly *are underprivileged* is why these problems are so difficult to fix within the political process.

This claim should not be particularly controversial. As CECJ notes, it is essentially the consensus view among criminal law and procedure scholars.[41] From Professor John Hart Ely on, the conventional prescription for this problem has been to argue that courts must fill the void. If the political process cannot sufficiently protect defendants' interests, it falls to judges to do so.

The problem with this argument, however, is that courts are themselves influenced by the same political defects that justify judicial involvement in the first place. As Professors Eric Posner and Adrian Vermeule put it: "[J]udges do not stand outside the system; judicial behavior is an endogenous product of the system."[42] Although Supreme Court Justices serve for life and do not stand for election, they are appointed by an elected President and confirmed by an elected Senate. For that reason, there is little reason to hope that they can form a permanent bulwark against a rising political tide. To be sure, under the right circumstances you can get the Warren Court—for a while. Over time, however, the political forces conspiring against defendants will shape the composition of the judiciary; Supreme Court Justices will look less like William Brennan and more like Samuel Alito, and defendants' rights will diminish accordingly. And indeed, as I suggested above in discussing the siege mentality phenomenon, I believe this is exactly what has happened in our system over recent decades.

[40] Appleman, supra note 24, at 97.

[41] See Epps, supra note 2, at 1115–17.

[42] Eric A. Posner & Adrian Vermeule, Inside or Outside the System?, 80 U. Chi. L. Rev. 1743, 1764 (2013).

If courts cannot be relied upon to consistently counteract political defects plaguing criminal justice, what can be done? There is an alternative. What if structural changes to the system could counteract those political defects? Political forces do not exist in a vacuum; they are shaped by the governmental and social structures in which they operate. And so it seems possible that different structural arrangements might ameliorate—or exacerbate, as the case may be—some of the political problems that cause our system to treat criminal defendants poorly.

To be sure, this strategy is not immune to the inside/outside critique leveled above against the idea that the judiciary will serve as defendants' protector. Structural changes require assent of political actors; won't the same political pathologies we are seeking to correct simply prevent structural fixes from being adopted in the first place? But I think there is a story one can tell in which structural changes are a more viable and durable strategy than relying on courts. It is plausible that there may be certain moments when tough-on-crime passions temporarily cool, making positive reform possible. If such reforms were actually effective at reshaping political forces, and so long as they were entrenched in some way, either formally or functionally,[43] they could solve the political problems in criminal justice going forward. Relying on courts to protect defendants, by contrast, demands constant judicial supervision. This creates the risk that when support for reform recedes, and as the composition of the judiciary changes, victories for defendants will fade away.

There are many plausible structural changes to our system that might improve the politics of criminal justice. Ending felon disenfranchisement is a good example of such a strategy that many would support; if it is a problem that voters do not sufficiently identify with criminal defendants, removing the voters who have experienced criminal punishment from the electorate can only be making the problem worse. But there are many other possible reforms. One potentially radical strategy—and this is where my own work comes in—is to try to change the system to better expose politically powerful groups to the downsides of criminal punishment. If, as the conventional story tells us, a problem with the politics of criminal justice is that ordinary voters just cannot imagine being arrested or going to prison, perhaps our system might be more just if

[43] For a fascinating analysis of methods for informal, functional entrenchment mechanisms, see Daryl Levinson & Benjamin I. Sachs, Political Entrenchment and Public Law, 125 Yale L.J. 400 (2015).

it threatened criminal sanctions more broadly. Oddly, increasing the apparent severity of the system could actually make it more lenient in practice.

And this is where CECJ, in trying to imagine a world without the Blackstone principle, was coming from. Again, it is agreed that part of the political problem with our system is that ordinary voters do not commit crimes and thus do not anticipate being on the receiving end of criminal sanctions, and also lack sympathy for those who are punished.[44] If so, it seems to follow that changing the perception of whether the system convicts innocent people could affect the politics of criminal justice. A typical voting citizen may feel especially comfortable ignoring the interests of defendants in a system where it is thought that innocents are essentially never punished; that same citizen might feel differently, both as a matter of self-interest and of sympathy, in a world where the risk of false convictions was more widely acknowledged. Or so CECJ argued.[45]

Appleman disagrees; she claims that abandoning the Blackstone principle, rather than ameliorating any political defects, would actually impose an "extra burden on those already marginalized by our communities."[46] Unfortunately, Appleman has not provided a substantial argument to support this assertion. But as luck would have it, Johnson has: One of his Note's central arguments is that eradicating the Blackstone principle would reinforce, rather than eradicate, the inequities that plague our justice system.[47] This challenge demands a response.

Johnson's argument is that in a non-Blackstonian world, the prosecution would bring more cases overall, thus leading to more cases on the border between legal guilt and innocence.[48] This change, he argues, would make poorer defendants worse off relative to wealthier ones. The former group is represented by overtaxed public defenders who can scarcely work any harder, whereas the latter can afford private counsel whose quality would not decline even if the number of borderline cases throughout the system increased.[49] The result, Johnson argues, is that poor defendants would receive even worse representation, relative to

[44] See Epps, supra note 2, at 1102–06.
[45] See id. at 1115–21.
[46] Appleman, supra note 24, at 97.
[47] See Johnson, supra note 1, at 275–82.
[48] See id. at 278–79.
[49] See id. at 279.

wealthy defendants, than they do today—exacerbating the advantages enjoyed by the rich and powerful in criminal justice.

I think Johnson raises a valid concern, but I am not yet convinced. I think Johnson errs by focusing simply on litigated cases at the borderline. Just as important in the comparative exercise, I think, is considering the number of cases that are never brought at all in a Blackstonian world simply because the prosecutor thinks they would be too difficult to prove. In a world (a) with a demanding standard of proof and (b) where defendants' ability to contest charges varies with the quality of counsel they can afford, it is eminently plausible that prosecutors decline to bring otherwise winnable cases when they know that defendants will be represented by top-flight private counsel. Put another way, it is plausible that defendants who can afford high-quality counsel receive a de facto heightened charging standard not enjoyed by the bulk of defendants who rely on appointed counsel or public defenders.[50]

If that is right, then it seems plausible that even if, say, lowering the burden of proof at trial increased the number of borderline cases, it could also have the effect of exposing some wealthy defendants who otherwise would have escaped. It would, however, also have the effect of subjecting some poorer defendants to charges they would have avoided. And so it seems to me that whether this reform helps or hurts the equality problem is an empirical question that turns on which effect predominates: Would the number of new charges brought against wealthy defendants outweigh the number of new prosecutions against less wealthy defendants? And even if so, would that effect trump the borderline-case problem that Johnson identifies? It is not clear. But even if Johnson has not convinced me that abandoning the Blackstone principle would make our system's inequalities worse, he has convinced me that I (and others) need to spend more time thinking about the principle's distributive effects among the pool of potential criminal defendants.

For these reasons, I am nowhere near confident that abandoning our system's professed commitment to the Blackstone principle would have ameliorative effects on the political process, or that any benefits would be large enough to outweigh the costs of that change. I *am* confident, however, that we need to at least be willing to consider arguments like this one. The last few decades should have taught us that we cannot

[50] For a fascinating analysis of charging standards, see William Ortman, Probable Cause Revisited, 68 Stan. L. Rev. 511 (2016).

count on courts to reliably protect defendants and to keep the system's punitive impulses from spiraling out of control. We must keep our minds open to alternative solutions to our system's many problems—even solutions as seemingly off-the-wall as those CECJ offered.

CONCLUSION

I began by noting that I could not resist offering one final word—a closing statement—about the Blackstone principle. Of course, given the principle's historical pedigree and the powerful place it holds in our collective intuitions, it would be foolish to imagine that I—or anyone—could ever have *the* last word about the Blackstone principle. Instead, the best one can hope for is to offer something new to a conversation that has been going on for as long as criminal punishment has existed, and one that will no doubt continue long after the current participants have departed the scene. I am glad to have been able to contribute to that conversation, and I am grateful to Johnson, Appleman, and Bronsteen & Masur for adding their voices after mine.