

## Separation of Powers versus Checks and Balances in the Criminal Justice System: A Response to Professor Epps

Carissa Byrne Hessick

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### Recommended Citation

Hessick, Carissa Byrne () "Separation of Powers versus Checks and Balances in the Criminal Justice System: A Response to Professor Epps," *Vanderbilt Law Review En Banc*: Vol. 74: Iss. 1, Article 12. Available at: <https://scholarship.law.vanderbilt.edu/vlreb/vol74/iss1/12>

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## RESPONSE

### Separation of Powers Versus Checks and Balances in the Criminal Justice System: A Response to Professor Epps

*Carissa Byrne Hessick\**

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Separating powers between the three different branches of government serves an important role in the criminal justice system: It helps to protect individual liberty. Separation of powers provides that protection because it requires multiple and diverse actors to agree that a person should be punished before that person can be convicted of a crime. First, the legislature has to decide to criminalize particular conduct.<sup>1</sup> Second, the executive must decide to prosecute a particular individual. Third, the judge must decide whether the defendant's conduct falls within the scope of the criminal statute and the jury must decide factual guilt. Finally, the executive has the power of clemency—the power to wipe out convictions with a pardon or reduce punishment with commutation.<sup>2</sup>

If any of these actors believe that the specific behavior should not be criminalized or that the particular defendant should not be

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1. The legislature must also either convince the executive to sign legislation or overcome a veto. Because this is arguably a “check” on the legislature’s power to make laws, I have omitted it from the separation of powers analysis on the theory that Professor Epps would not include it in his definition of “separation of powers.” See Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 13–14.

2. One might argue that the executive’s clemency powers are a “check” on the judiciary’s decision to convict and impose sentence. On the other hand, clemency has long been viewed as an executive prerogative. I do not have a firm view on the matter, and in any event, it is not important to my overall point to resolve that question.

punished, then the defendant will not be convicted. In other words, we give each of these institutions a “veto” over the decision to punish. Distributing the veto power across institutions thus protects liberty by making it difficult to impose punishment.

Why is it so important to protect liberty when it comes to criminal punishment? One reason might be because we do not trust government with the awesome power of criminal prosecution. After all, the whole point of a criminal prosecution is to punish a person, often through a deprivation of liberty—a term of imprisonment, or sometimes a sentence of death. Even the *threat* of punishment is a limit on liberty because it prohibits people from engaging in certain conduct. And the threat to liberty from criminal laws is greater than the threat from civil laws and administrative regulations because “the executive has the exclusive power to enforce criminal laws in the federal system.”<sup>3</sup>

But there is another, in my mind, more important reason: ordinary political forces and human passions often favor punishment.<sup>4</sup> We are quick to condemn people when they have done something wrong. And the desire to “make someone pay” when others are hurt can overcome concerns about fairness or mercy.<sup>5</sup> In other words, we need structural protections, like the separation of powers, which we adopt at moments of reflection, in order to counterbalance our desire to punish in the heat of the moment.

In his thought-provoking article, Professor Dan Epps pushes back against this (admittedly) conventional view of the separation of powers in the criminal justice system.<sup>6</sup> Drawing on insights from other fields, such as administrative law and constitutional law, Epps argues that separating powers between the three branches of government is insufficient, if not unnecessary, to protect liberty and other important values. Instead of focusing so much on separating powers, Epps argues, the criminal justice system should adopt more checks and balances—an idea that he tells us is related to, but distinct from, the mere separation of powers.

According to Epps, the separation of powers is about diffusing functional power between the three branches of government—the

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3. See F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 307 (2021) (cataloguing the reasons that criminal laws pose a greater risk to liberty than noncriminal laws).

4. See *generally* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019).

5. For example, people’s desire for harsh punishment can overcome their sense of fairness, especially when they do not deliberate. See, e.g., Daniel A. Yudkin et al., *Reflexive Intergroup Bias in Third-Party Punishment*, 145 J. EXPERIMENTAL PSYCH. GEN. 1448 (2016) (observing this phenomenon in the context of a study of in-groups and out-groups).

6. Epps, *supra* note 1, at 14.

legislature has the legislative power, the executive has the executive power, and courts have the judicial power. While each of these branches plays a role in the conviction and punishment of an individual, the roles they play are different and separate based on their functions.<sup>7</sup> In contrast, Epps defines checks and balances as those structural features that ensure overlapping jurisdiction by different social and political interests over the same decision. That overlap can occur across branches—such as when the President can veto legislation passed by Congress—within a single branch—such as when one executive official can overrule another—or even outside of the government all together—such as when reporters provide transparency for and criticism of government actions.<sup>8</sup>

There are many things about which Professor Epps and I agree. We agree that the phrase “separation of powers” is sometimes used to convey different ideas, and we agree that it is worth being precise about which meaning is intended in order to have a more substantive and informed conversation.<sup>9</sup> We also agree that strictly separating the functions between different branches does not necessarily lead to a more robust system of checks and balances.<sup>10</sup> Perhaps most importantly, we agree that the modern criminal justice system does a poor job of protecting individual liberty.<sup>11</sup>

But there are also a number of important issues on which we do not agree.<sup>12</sup> Professor Epps and I do not agree about what fundamental purpose structural protections are supposed to serve in the criminal justice system. We do not agree on whether more attention to the separation of powers, standing alone, would significantly improve the

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7. *Id.* at 11–14, 26–28.

8. *Id.* at 26–28.

9. *Compare* Epps, *supra* note 1, at 8 (noting “that ‘separation of powers’ is often used to refer to distinct, perhaps conflicting, concepts” including the idea of “separating government power among distinct, functionally differentiated political institutions” and “an idea that is better labeled ‘checks and balances’—the diffusion of government power between different interests or institutions that check the others”), *with* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 1006–07 (2019) (“The phrase ‘separation of powers’ is often used to refer to two related but distinct ideas about the allocation of power in American government . . . the fact that the text of the Constitution assigns different powers to different branches of government [and] . . . the idea that the different branches of government serve to check and balance one another.”).

10. *Compare* Epps, *supra* note 1, at 16 (explaining how separation of powers is sometimes used as “a justification for courts’ refusal to limit criminal punishment or to provide rights for defendants when doing so would require the court to intrude on the functions assigned to other branches”), *with* Hessick, *supra* note 9, at 1015 (stating that “even though common law crimes allow judges to perform more than one function, that does not mean they provide fewer checks and balances than” a system in which the legislature is solely responsible for recognizing new crimes).

11. *Compare* Epps, *supra* note 1, at 44, *with* Hessick, *supra* note 9, at 1015–17.

12. As is the convention when academics discuss each other’s work, I will focus on those disagreements far more than the points on which we agree.

criminal justice system's protection of liberty. We do not agree on whether reforms that separate functions within an institution or a branch of government will provide a similar level of protection to liberty as separating functions between different branches. And, underlying some of these other disagreements, is a failure to agree about the precise nature of the powers that are (or at least were) distributed across the three branches.

#### I. STRUCTURAL CHECKS IN THE CRIMINAL JUSTICE SYSTEM

One of Professor Epps's great contributions in this article is to summarize several decades worth of non-criminal law scholarship on the separation of powers and checks and balances.<sup>13</sup> Those of us who write in criminal law often do not take the time to keep abreast of scholarship in other fields. Perhaps that is why, as Professor Epps notes, those criminal law scholars who write about the separation of powers have continued to embrace the idea that functional separation will protect liberty, while scholars in other fields have largely abandoned that idea. Instead, as Epps notes, the scholars in other fields offer more nuanced and complex ideas about government design—ideas that use structural features other than the separation of powers to ensure that various interests are represented in government decisionmaking.

As a criminal law scholar who was not familiar with the administrative law and constitutional law literature that Professor Epps summarizes, I found myself interested and informed by the work of these non-criminal law scholars. But as I read the summary of their work, it became clear why that work has not gained much ground within the criminal law community. It is not merely that specialization leads us to ignore work outside of the criminal law field, but rather that there is an important difference between government action in criminal law and in other fields.

In criminal law, “successful” government action always results in punishment, while in other fields it can result in a range of outcomes. Social welfare spending, the development of environmental standards, and countless other government actions can be framed as infringements on liberty—people have to pay taxes and companies must stop polluting, etc.<sup>14</sup> But those non-criminal government actions are also

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13. Epps, *supra* note 1, at 25–39.

14. See, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 169–71 (1974) (comparing income taxes to “forced labor” because they represent an unjust theft by the state of an individual’s property); Arthur J. Cockfield & Jonah Mayles, *The Influence of Historical Tax Law Developments on Anglo-American Laws and Politics*, 5 COLUM. J. TAX. L. 40, 65 n.207 (2013) (acknowledging that

easily understood as tradeoffs in which the welfare and liberty of the many are secured with minimal inconvenience to others.<sup>15</sup>

Criminal prosecutions cannot be framed the same way. A successful prosecution ends in conviction and some form of punishment. The conviction and punishment do not provide an immediate tangible benefit, even to the individual victim that the defendant harmed.<sup>16</sup> Instead, the defendant is deprived of liberty as a form of punishment or in the hope that there will be some future benefit from the punishment—namely the reduction of future crime through deterrence, rehabilitation, or incapacitation.<sup>17</sup>

This fundamental difference—that criminal prosecutions are *always* about the deprivation of liberty—means that the conversation about institutional structure will always look different in the criminal justice system than elsewhere. We may, for example, want to prioritize efficiency when it comes to non-criminal law structures, such as the structures surrounding environmental regulations, because those regulations quite clearly protect the welfare of many and their liberty impact is minimal. But liberty is never a minimal concern in the criminal justice system.<sup>18</sup>

In addition to the liberty concerns, criminal law is also different because human passion and ordinary politics almost always favor more punishment.<sup>19</sup> Powerful political interests will often line up on both sides of non-criminal law issues, such as social welfare spending and

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taxes “arguably inhibit liberty by constraining an individual’s choice to pursue productive activities”).

15. Cockfield & Mayles, *supra* note 14, at 65 n.207 (discussing “the complex interaction between tax laws and individual liberty: even good taxes arguably inhibit liberty by constraining an individual’s choice to pursue productive activities, yet tax laws raise revenues that, within democracies, promote liberty by expanding choices and opportunities for other individuals”).

16. Discussions about the purposes of punishment sometimes talk about the convictions as affirming the moral worth of the crime victim, see, for example, Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992), but aside from quasi-criminal remedies, such as restitution, the criminal process is simply not designed to restore the victim to her pre-crime state. Indeed, it is this perceived shortcoming of the criminal justice system that has led some to champion restorative justice measures as an alternative to the traditional system of convictions and punishment. See, e.g., LESLIE SEBBA, *THIRD PARTIES: VICTIMS AND THE CRIMINAL JUSTICE SYSTEM* 25, 55–56 (1996) (describing the traditional criminal justice system as ignoring the needs of victims and treating them as no more than an “evidentiary tool”).

17. See, e.g., SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* 79–105 (8th ed. 2007) (compiling materials addressing the various purposes punishment is thought to serve).

18. See Hessick & Hessick, *supra* note 3, at 307–08 (explaining why the “threat from combining legislative and executive powers is more pronounced in criminal cases than in civil cases”).

19. See BARKOW, *supra* note 4, at 105–24 (describing the “populist politics” of punishment); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 161–83 (2017) (describing the “broken politics of punishment”).

environmental regulations. But that is almost never true in the criminal justice system.<sup>20</sup> As a result, legislation creating new crimes or lengthening sentences has continued to pass even as partisan gridlock has made other types of legislation more difficult.<sup>21</sup>

In short, while it is bit of a cliché for scholars to say that their field is different—such claims are often derided as “exceptionalism”<sup>22</sup>—for criminal law generally, and for structural protections within criminal law more specifically, the exceptionalism claim appears to be true. In addition to the arguments I have offered above, the courts have repeatedly crafted special doctrines just for criminal law on the theory that criminal laws are different.<sup>23</sup>

This criminal law exceptionalism matters because it suggests that the lessons from outside of criminal law should not simply be accepted or adopted full cloth. It also suggests that some of Professor Epps’s arguments—arguments that rely on non-criminal law scholarship about the separation of powers—may not be as persuasive in the criminal law context.

Take, for example, his argument about the Special Counsel investigation by Robert Mueller into President Donald Trump.<sup>24</sup> He offers the Special Counsel investigation as an example of how the functional separation of powers may be less effective at preventing tyranny than checks and balances within a particular branch. Epps notes that the story of the Special Counsel investigation—that the investigation was permitted to conclude even though President Trump obviously wanted to fire Mueller—was “not obviously a story about the

20. As Bill Stuntz explained:

In other fields, legislation is about tradeoffs and compromises. When writing and enacting criminal prohibitions, legislators usually ignore tradeoffs and rarely need to compromise. Save for law enforcement lobbies, few organized, well-funded interest groups take an interest in criminal statutes; criminal defendants’ interests nearly always go unrepresented in legislative debates. Legislators thus have little reason to focus carefully on the consequences of the prohibitions they write.

WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 173 (2011); *see also* Rachel E. Barkow & Kathleen M. O’Neil, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1980 (2006) (explaining that, with the exception of those who care about white collar crime, “the groups that seek shorter sentences and more flexible sentencing authority do not wield much political power”).

21. *See* Hessick & Hessick, *supra* note 3, at 327 (documenting that “[l]egislatures generally, and Congress in particular, have proven to be remarkably proficient and efficient in the enactment of criminal laws”).

22. *See, e.g.*, Christopher J. Walker, *Chevron Deference and Patent Exceptionalism*, 65 DUKE L. J. ONLINE 149, 149 (2016) (criticizing “administrative law exceptionalism” and defining the term as “the misperception that a particular regulatory field is so different from the rest of the regulatory state that general administrative law principles do not apply”).

23. *See* Hessick & Hessick, *supra* note 3, at 300–05 (describing these doctrines in detail).

24. Epps, *supra* note 1, at 41–43.

success of the Madisonian design per se.”<sup>25</sup> Perhaps the support of Senate Republicans for the investigation kept Trump from firing Mueller.<sup>26</sup> Perhaps it was a triumph of de facto political constraints rather than formal legal constraints.<sup>27</sup> Or perhaps the Special Counsel story should be seen as a triumph of the diffusion of power within the executive—after all, Mueller was only appointed because Trump’s own political appointee within the Department of Justice (“DOJ”), Deputy Attorney General Rod Rosenstein, decided that such an appointment was necessary.<sup>28</sup>

I don’t have a considered opinion on how we ought to view the fact that President Trump did not fire Robert Mueller. But I do have an opinion on the relevance of the Mueller investigation on the question of separation of powers and the criminal justice system—namely, that the continuation of a criminal investigation against the wishes of the elected official who is theoretically responsible for that investigation is not an example of the separation of powers succeeding in the protection of liberty. If anything, it shows how diffusing power within a branch of government can prevent that branch from acting as a veto on the decision to punish. The head of the executive branch, the President, did not wish to investigate or prosecute certain individuals, and it is only because the executive branch has adopted regulations that can help to shield certain investigations from political pressure that the prosecutions proceeded. Indeed, once Robert Mueller concluded his investigation, President Trump used his clemency powers to nullify most of those prosecutions, and in so doing to criticize and attempt to discredit the entire investigation.<sup>29</sup>

Many people probably disagree with President Donald Trump’s view of the Russia investigation. Personally, I was deeply concerned by the allegations of Russian interference and obstruction of justice that Robert Mueller investigated. And I was appalled by the Justice Department’s decisions to intervene in the cases of Michael Flynn and Roger Stone after the Mueller investigation was concluded and before they were pardoned.<sup>30</sup> But the fact that I think those particular

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25. *Id.* at 42.

26. *Id.*

27. *Id.* at 43.

28. *Id.*

29. See Amber Phillips, *Trump’s Pardon of Paul Manafort Brings Full Circle the Undermining of the Russia Investigation*, WASH. POST (Dec. 24, 2020), <https://www.washingtonpost.com/politics/2020/12/24/trumps-pardon-paul-manafort-brings-full-circle-undermining-russia-investigation/> [https://perma.cc/H4QT-JGSQ].

30. Carissa Byrne Hessick, *What the Judge Overseeing Michael Flynn’s Case Can Do Now*, SLATE (May 15, 2020), <https://slate.com/news-and-politics/2020/05/michael-flynn-plea-judge-special-treatment.html> [https://perma.cc/3JXR-E5YV] (“The Justice Department should not have



individuals received unduly lenient treatment—treatment that the DOJ has not afforded to other similarly situated defendants who are not political allies of President Trump—does not change the fact that the Special Counsel prosecution arguably evaded a veto gate. In other words, whatever the Mueller investigation may tell us about our political system, it does not show that diffusion of power will protect individual liberty unless the diffusion is styled as the power to veto, rather than the power to overturn a veto.

To be fair to Epps, he offers the Special Counsel investigation as an example of avoiding tyranny, not protecting liberty.<sup>31</sup> To the extent that he is referring to tyranny simply as the concentration of power in the hands of one individual, then *any* diffusion of power within the executive branch will, by definition, avoid tyranny. But I do not think that the mere concentration of power is what is meant by the term “tyranny” when it is used in connection with the criminal justice system.<sup>32</sup> If it were, then presidential pardons are, by definition, a form of tyranny. And I simply cannot imagine that most people would use the word “tyranny” to refer to an act of leniency or mercy.

Instead, I think tyranny is used in the context of criminal law as a shorthand for the idea of the concentration of the *power to inflict punishment* into the hands of a single individual.<sup>33</sup> Actually, to be quite truthful, the term is probably used more as a rhetorical device than a precise argument about government structure. In any event, the very idea of veto gates relies on the idea that the decision of one institution—or even one individual—not to punish is able to override the desire of others to punish.

The Special Counsel investigation example exposes a disconnect between Epps’s discussion of separation of powers and my own view. Because he is drawing on the non-criminal law literature, he is juggling

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one set of procedures for friends and allies of the president and another set of procedures for everyone else. That’s not justice—it’s injustice.”).

31. Epps introduces the discussion of the Mueller investigation with a discussion of whether the functional separation of powers is effective “as a tyranny-limiting mechanism,” Epps, *supra* note 1, at 43, and he notes that the Russia investigation “may provide an example of how ‘de facto constraints arising from politics’ can prevent tyranny more effectively than formal legal constraints on power.” *Id.* at 42–43.

32. Epps sort of hints at this when he characterizes tyrannical governments as “united by the absence of meaningful checks, formal or informal, on state power more generally and on the power to punish in particular.” *Id.* at 33.

33. See, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012–14 (2006) (discussing the Framers’ concern with “tyranny” in the criminal justice system as concern about particular practices—such as bills of attainder, ex post facto laws, and the suspension of habeas corpus—that would have resulted in less liberty and more punishment); Hessick & Hessick, *supra* note 3, at 306–07 (discussing Madison’s reference to tyranny in Federalist 47 in the context of explaining how delegation of criminal lawmaking threatens individual liberty).

several reasons *other than* the protection of liberty that people have given in favor of separating powers—protecting against tyranny, limiting agency costs, preserving the rule of law, ensuring specialization and efficiency, and producing better policy.<sup>34</sup> As a result, some of the arguments in his article were directed at those other, non-liberty reasons.

But those non-liberty reasons are at best of secondary concern to the criminal law community. Those of us who have talked about the need for functional separation of powers in the criminal justice system have done so by invoking the concept of liberty and veto gates.<sup>35</sup> The liberty argument is the view that is most clearly articulated in the criminal law commenters to whom Epps is most visibly responding—namely Rachel Barkow and Shima Baradaran Baughman.<sup>36</sup> Indeed, Epps himself acknowledges that the “leading argument” for the separation of powers is about protecting liberty and avoiding tyranny.<sup>37</sup> If his argument is that criminal law scholars ought to reorient our view of the separation of powers, then it seems unnecessary for him to address arguments that criminal law scholars have not made when discussing the functional separation of powers.

This discussion about which separation of powers arguments ought to matter obscures perhaps a more important point—that Epps himself does not appear to buy-in to the negative liberty goal of separating powers. Obviously, he does not think that the functional separation of powers is necessary or effective in protecting negative liberty—a point that I address below. But he also does not appear to think that the goal of structural protections should be to protect negative liberty by making it more difficult to convict and punish people. Instead, he appears to think that structural protections should make it easier to punish some defendants at least some of the time.

I have used the word “appear,” because I may be misunderstanding Professor Epps on this point. He often frames his inquiry as how to best ensure the involvement of different “interests” in government who represent “competing ideas about criminal justice,”<sup>38</sup> rather than the particular interest of protecting negative liberty. At times, he talks about wanting to “protect the values we care about” and

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34. Epps, *supra* note 1, at 32–39.

35. See, e.g., Barkow, *supra* note 33, at 1017, 1030–31; Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1077–78, 1083–84 (2017); Hessick, *supra* note 9, at 1015–17.

36. Epps, *supra* note 1, at 22–23.

37. *Id.* at 32.

38. *Id.* at 40–41, 43–44, 56, 60–61.

produce “good results.”<sup>39</sup> I take these statements to suggest that, in his view, some failures of criminal justice system structures include decisions to punish too little, rather than too much.

Further evidence that Epps does not think protecting liberty should be the main goal of separating powers in the criminal justice system comes from his discussion of functional duplication—a term that he defines to mean assigning the same function to different decisionmakers within the system.<sup>40</sup> Professor Epps notes that functional duplication could cure a rule-of-law deficiency in some systems—namely the “failure to subject powerful elites to criminal punishment.”<sup>41</sup> He notes that “a system could be designed to reduce that failure by giving multiple different decisionmakers, drawn from different parts of society, the power to decide whether to bring charges, with a decision by one proving sufficient.”<sup>42</sup> I cannot tell whether Epps would endorse such a system or not. But this does not seem like the sort of suggestion that would be offered by a person who thinks structures ought to exist primarily to protect liberty.

Perhaps the best evidence that Epps does not agree with my view that structural features of the criminal justice system should prioritize the protection of negative liberty is his discussion of the media as an “external check.” He praises media attention as an external check that can inform “the public about the criminal justice system’s failure to provide sufficient punishment.”<sup>43</sup> As Epps notes, media coverage of the criminal justice system is more often aimed at ensuring that there is *more* punishment, not less.<sup>44</sup>

These passages suggest to me that Epps may be doing more than simply responding to non-criminal law arguments about the separation of powers. They suggest that Epps is more interested in structures that will result in what he perceives of as good outcomes from a social utility standpoint, rather than structures that protect negative liberty and may result in the non-prosecution or acquittal of some guilty people. (Some of his previous scholarship suggests that this may be the view

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39. *Id.* at 46; *see also id.* at 47 (“Nor has the separation of powers been able to . . . produce good policy . . .”); *id.* at 49 (“Separating political power into discrete functional branches of government is not, at least standing alone, a particularly reliable strategy for limiting the power of the state, *producing good policy*, and protecting liberty.”) (emphasis added).

40. *Id.* at 70.

41. *Id.* at 72.

42. *Id.* at 72–73.

43. *Id.* at 63.

44. “Media attention is not only useful for drawing attention to unjust convictions; it also can inform (and almost certainly more often does inform) the public about the criminal justice system’s failure to provide *sufficient* punishment.” *Id.*

that he takes.<sup>45</sup>) If Epps does believe structures ought to be calibrated to produce better outcomes—even when those outcomes result in less protection of liberty—then not only is the disagreement I have with him likely intractable, but his argument is unlikely to persuade many others in the criminal law field who also view the separation of powers primarily as a way to protect liberty.

## II. SEPARATING POWER AND PROTECTING LIBERTY

Whatever his views on the purposes of functional separation of powers, Professor Epps also roundly rejects the argument that separating of powers within the criminal justice system does a good job creating veto gates and protecting liberty. More specifically, while he acknowledges that distributing power across multiple institutions *can* diffuse that power,<sup>46</sup> he does not think that “division into functional branches makes that diffusion more likely.”<sup>47</sup>

He argues that “nothing about *functional* separation per se” makes it more likely that “different interests play a role in effecting government policy.”<sup>48</sup> To the contrary, he argues, because the different branches are supposed to exercise different functions, they are not in a position to second-guess the decisions made by the other branches. He gives the following example:

What if, for example, a legislator passes an oppressive law, and the executive chooses to bring charges? Even if the judiciary is controlled by interests more sympathetic to the defendant than the other two branches, the court’s power to act as a meaningful veto is constrained by the separation of powers. If the defendant’s conduct falls within the language written by the legislature—and does not otherwise violate a constitutional prohibition—and so long as the prosecution has not committed such serious misconduct as to justify dismissal of the charges, the judiciary is powerless to act as a veto. That is not a side effect of the separation of powers; it is the whole point of the separation of powers, as each branch is supposed to stay within its own lane and limit itself to its own function.<sup>49</sup>

Epps’s example of the more lenient but powerless judge is not merely a hypothetical. He also points his readers to a real world example, *Brogan v. United States*,<sup>50</sup> in which the Supreme Court refused to recognize an “exculpatory no” defense to the federal crime of

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45. Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065 (2015) (arguing that modern society should reject the famous “Blackstone principle,” namely “[b]etter that ten guilty persons escape, than that one innocent suffer”).

46. Epps, *supra* note 1, at 34.

47. *Id.*

48. *Id.* at 37.

49. *Id.* at 45.

50. *Id.* at 17, 81 (discussing *Brogan v. United States*, 522 U.S. 398 (1988)).

making a false statement.<sup>51</sup> The *Brogan* Court said it did not have the power to give a statute a more narrow meaning than what is written in the text. *Brogan* has the added wrinkle of raising the question of criminal defenses, and that is the purpose for which Professor Epps cites it.<sup>52</sup>

Epps is certainly correct that the Supreme Court will sometimes invoke the separation of powers as a reason for it not to intervene on behalf of criminal defendants. It did so in *Brogan*, it has done so in other cases when refusing to construe a statute narrowly.<sup>53</sup> It has also done so in cases where defendants sought an intervention that would have encroached on a prosecutor's charging power.<sup>54</sup> Professor Epps presumably sees these examples as evidence that the functional separation of powers does not protect liberty.

But I see those examples differently. Rather than seeing them as proof that functional separation of powers does not protect liberty, I see them as failures of the modern Supreme Court's separation of powers doctrine—in particular, I see them as examples of the Court's ahistorical understanding of what the “judicial power” includes.

Take, for example, *Brogan* and other cases in which the Supreme Court has refused to narrowly construe what appears to be an overly broad statute—that is, a statute that is written more broadly than whatever problem the legislature was trying to address. The Supreme Court tells us that it must interpret the statute only according to the plain meaning of the text in that statute. To do otherwise, the Court says, would impinge upon Congress's power to legislate.<sup>55</sup>

These sorts of cases ignore the fact that, for centuries, judges routinely claimed the power to construe penal statutes more narrowly than they were written.<sup>56</sup> Indeed, the practice dates to common law

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51. 18 U.S.C. § 1001.

52. See Epps, *supra* note 1, at 17.

53. See, e.g., *Brogan*, 522 U.S. at 405–08; *Smith v. United States*, 508 U.S. 223, 229 (1993).

54. See *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (refusing to grant plaintiffs discovery in their selective prosecution claim because it could interfere with executive decisions about whether to prosecute, which is a “a core executive constitutional function”).

55. *Brogan*, 522 U.S. at 405 (“The objectors’ principal grievance on this score, however, lies not with the hypothetical prosecutors but with Congress itself, which has decreed the obstruction of a legitimate investigation to be a separate offense, and a serious one. It is not for us to revise that judgment.”).

56. See, e.g., *Yates v. United States*, 574 U.S. 528 (2015) (refusing to affirm the conviction of a fisherman whose actions fell within the plain text of 18 U.S.C. § 1519); *State v. Norfolk S. R.R. Co.*, 82 S.E. 963, 966 (N.C. 1914) (“It is an ancient, but just and equitable, doctrine which extends a penal statute beyond its words in favor of a defendant, while holding it tightly to its words against him.”); *State v. Barefoot*, 31 S.C.L. 209, 211 (S.C. App. L. 1845) (“The statute, being penal, shall be construed favorably.”); *Reed v. Davis*, 25 Mass. 514, 533 (Mass. 1829) (“The statute is highly penal, and should therefore be limited in its application, to the object the legislature had in view.”); *Myers v. State*, 1 Conn. 502, 505 (Conn. 1816):

England.<sup>57</sup> Why should we assume that this practice was not considered part of the “judicial power” that the Constitution assigns to the courts?

The same may also be true for the modern Supreme Court’s deference to prosecutorial decision-making. The Court routinely refuses to subject prosecutorial charging and bargaining decisions to judicial review,<sup>58</sup> a refusal that it sometimes supports by reference to the separation of powers.<sup>59</sup> But it is far from clear that the modern deference to prosecutorial discretion is consistent with the historical understanding of functional separation of powers. In particular, modern deference may be based on an overly narrow understanding of the judicial power.

For example, the modern Supreme Court has accepted the constitutionality of plea bargaining, including the power of prosecutors to promise leniency to defendants in return for those defendants cooperating with law enforcement and testifying against their confederates.<sup>60</sup> But it is far from clear that the historical understandings of the executive power and the judicial power would have permitted such practices. Before plea bargaining became normalized,<sup>61</sup> the Wisconsin Supreme Court suggested that some plea bargaining practices represented an infringement on the judicial power by the executive. In particular, it said that a prosecutor promising leniency in return for defendants testifying against their confederates was a “usurpation” of judicial authority because only judges have the power “to countenance the escape of an accomplice from punishment, for giving evidence against those indicted with him” and “a public

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Recourse may, therefore be had to the spirit, or reason, of the law, for the purpose of exempting from its operation, one, who is within the letter of it; but this, generally speaking, cannot be done in order to bring within the penalty, one, who is not within the letter. Hence it results, as a general proposition, to which there have been but very few exceptions, that no man can be subjected to the penalty of a statute, unless he is within both the letter and spirit of it.

See also F. Andrew Hessick & Carissa Byrne Hessick, *Constraining Criminal Laws*, 106 MINN. L. REV. (forthcoming 2022) (tracing this history).

57. See, e.g., *Raynard v. Chase*, 97 Eng. Rep. 155, 158 (1756) (Mansfield, C.J.) (concluding that a defendant should not be punished, even though his actions violated the text of the statute).

58. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607–08 (1985); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

59. See *supra* note 56.

60. See *Wade v. United States*, 504 U.S. 181, 185–86 (1992) (concluding that courts should not treat a prosecutor’s power to control whether a defendant receives a shorter sentence for cooperating with law enforcement “differently from a prosecutor’s other decisions”—namely, that courts should review prosecutorial decisions not to show leniency only if “the refusal was based on an unconstitutional motive”).

61. For an excellent account of how plea bargaining was normalized, see William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435 (2020).

prosecutor has no authority to make any such agreement with a defendant.”<sup>62</sup>

These historical examples matter because they suggest that the problem might not be the functional separation of powers insufficiently protecting liberty, but rather the modern Supreme Court’s mistaken (or at least ahistorical) understanding of what those powers entail. In particular, they suggest that the Supreme Court has developed an overly cramped view of what the “judicial power” is supposed to look like in criminal cases.

To some extent, I think that Epps may agree with me about how the legal understanding separation of powers has shifted over time. Epps focuses on the power of juries—who exercised an important piece of the “judicial power” assigned to the court in the Constitution. Epps speaks of the jury and its unanimity requirement as emblematic of his view of a “check” within government that incorporates many different and diverse interests. And he notes that, at the Founding, the jury’s power to nullify was considered important.<sup>63</sup> But modern doctrine disfavors nullification.<sup>64</sup>

But the fact that the jury used to serve the role that Epps praises is not, in his mind, evidence of the fact that Madisonian separation of powers can effectively protect liberty. Instead, he views the weakening of the jury as proof that functional separation of powers does not work because the jury no longer serves as an appropriately robust check now that it has been confined merely to fact finding.<sup>65</sup>

But I think that Epps’s critique of how the jury power has been diluted misses the point. The idea of separation of powers is not simply that *some* powers should be assigned to different branches. It is that *certain* powers should be assigned. For the jury, it was the power not only to find facts, but also to shape the content of the criminal law through the power to nullify.<sup>66</sup> Just as with judges, the powers of the jury have been inappropriately narrowed over time.

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62. *Wight v. Rindskopf*, 43 Wis. 344, 350 (1877).

63. Epps, *supra* note 1, at 67–69.

64. See, e.g., *Sparf v. United States*, 156 U.S. 51, 101–02 (1895) (affirming a conviction of a defendant whose attorney was not permitted to inform the jury of their power to nullify on the theory that “it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence”).

65. Epps, *supra* note 1, at 56–57; 60–61.

66. See, e.g., Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1415–18 (2017) (discussing the centrality of the jury in early America, including the jury’s ability “to both create and control the content of the colony’s substantive law”); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 50–61 (2003) (explaining how the jury’s power to nullify served “as a potent check on the legislature”).

Indeed, *Brogan v. United States*<sup>67</sup>—the very case that Epps cites for the proposition that judges are powerless in the face of a punitive law and an aggressive prosecutor—contains evidence that even the modern Supreme Court does not view judges as powerless to constrain the decisions made by legislatures and prosecutors. The *Brogan* Court refused to intervene in the prosecution of what reasonable people could believe is an unjust prosecution, but at the same time it affirmed a continuing role for Article III courts in narrowing criminal law through their judicial power.

The *Brogan* Court acknowledged two separate examples of this continuing role. First, the *Brogan* majority admitted that the Supreme Court will sometimes interpret statutes more narrowly than written—such as when a statute does not contain a *mens rea* requirement, the Court will sometimes read one in.<sup>68</sup> When the Court insists on reading a *mens rea* requirement into a criminal statute, it is not merely determining whether a “defendant’s conduct falls within the language written by the legislature—and does not otherwise violate a constitutional prohibition.”<sup>69</sup> Instead, it is making a value judgement that defendants should not be convicted under certain circumstances. In other words, the Court is vetoing the decision of prosecutors (and perhaps the legislature) that a culpable mental state is not necessary to punish.

Second, the *Brogan* majority also conceded that courts recognize affirmative defenses without any existing statutory authority.<sup>70</sup> Indeed, the *Brogan* Court did not merely concede that courts *may* recognize defenses in the absence of statutes—it actually did so itself. The majority opinion says that the dissent is correct to state “that the present statute does not ‘mak[e] it a crime for an undercover narcotics agent to make a false statement to a drug peddler’” because “[c]riminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law.”<sup>71</sup> But the majority does not cite a federal statute

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67. *Id.* at 17, 81 (discussing *Brogan v. United States*, 522 U.S. 398 (1988)).

68. *Brogan*, 522 U.S. at 406 (citing *Staples v. United States*, 511 U.S. 600, 619 (1994)); see also Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 401–06 (2019) (describing how the Supreme Court has come “tantalizingly close to adopting a clear statement rule” for mens rea in criminal statutes).

69. Epps, *supra* note 1, at 45.

70. In particular, the *Brogan* Court cites *Sorrells v. United States*, 287 U.S. 435 (1932), for the proposition that courts may construe a statute “not to cover violations produced by entrapment.” *Brogan*, 522 U.S. at 406. The *Sorrells* Court addressed head on the question whether it could and should recognize the entrapment defense to a federal statute even though there was no federal statute creating such a defense. 287 U.S. 435, 443–452. Questions about the proper role of courts versus legislatures were raised in that case, and yet the Court nonetheless affirmed the judicial power to recognize non-statutory defenses.

71. *Brogan*, 522 U.S. at 406 (1998).



for that proposition—indeed because there does not appear to be such a statute.<sup>72</sup> It instead cites a treatise for the idea that “[e]very American jurisdiction recognizes some form of law enforcement authority justification.”<sup>73</sup>

Just as with the practice of reading *mens rea* limitations into a statute, creating new affirmative defenses shows that courts are not, as Professor Epps tells us, “powerless to act as a veto.” They can—and do—use the judicial power to veto decisions by legislatures and prosecutors. To be clear, the courts do not use this power often enough.<sup>74</sup> The abandonment of the rule of strict construction for penal statutes and the watering down of the rule of lenity are both examples of how the modern courts have failed to sufficiently wield their power to protect negative liberty. But that is a failure of modern statutory interpretation doctrine, not a failure of the Madisonian separation of powers.

Epps anticipates this argument as the “typical response” of those to whom he is responding—I am, after all “argu[ing] that the problem is simply insufficient adherence to the separation of powers” and I am specifically saying that the courts need to better understand and “more rigorously enforce constitutional limits.”<sup>75</sup> In other words, I am essentially the target audience for Epps’s separation of powers critique.

So what is Epps’s reply to the “typical response”? He criticizes it because, in his view, “it fails to fully grapple with the fact that our system of separated powers has in fact generated the very defects that the critics bemoan.”<sup>76</sup> In other words, because the modern system came about despite the Madisonian separation of powers, merely separating powers cannot ensure the protection of liberty.

Indeed, Epps goes a step further to say that, when different branches share the same interests—*e.g.*, when the legislature and prosecutors both want broader and harsher criminal laws—then we should expect Madison’s prediction of ambition counteracting ambition to fail.<sup>77</sup> He says that we should expect this failure because the same political forces that lead the legislature and executive to favor broader and harsher criminal laws will not spare judges. Judges are influenced by politics, if not through direct elections by voters, than through the

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72. LAFAYETTE, SUBSTANTIVE CRIMINAL LAW § 10.7(d) (noting that the defense has “seldom been . . . made the subject of legislation”).

73. *Brogan*, 522 U.S. at 406 (citing 2 PAUL ROBINSON, CRIMINAL LAW DEFENSES § 142(a), at 121 (1984)).

74. See generally Hessick & Kennedy, *supra* note 68 (arguing that courts should use their interpretive power to adopt more criminal law clear statement rules).

75. Epps, *supra* note 1, at 48.

76. *Id.*

77. *Id.* at 48–49.

political appointment process. Thus, as Epps tells us, “expecting judges to provide a meaningful check on the other branches because they are part of ‘the judiciary’ is little more than magical thinking.”<sup>78</sup>

Epps’s reply to the “typical response” leaves me quite dissatisfied. First, the argument appears to be an example of hindsight bias<sup>79</sup>—the separation of powers failed to protect liberty in this instance, so the argument goes, and that is proof it was destined to fail. It is certainly true that we currently have a separation of powers doctrine that does not sufficiently protect individual liberty in the criminal justice system.<sup>80</sup> But that does not mean separating powers is necessarily a bad way to protect liberty or that we should have expected Madison’s plan to fail.

To the contrary, functionally separating powers seems to have done a relatively decent job at protecting liberty for much of our country’s history. It is only since the mid-twentieth century that the Supreme Court endorsed plea bargaining<sup>81</sup> and began to defer to prosecutorial decision making.<sup>82</sup> And the Court’s insistence that it cannot (or should not) narrowly construe statutes is even more recent—it is part of the Court’s embrace of textualism in the last thirty or so years.<sup>83</sup> And, despite that embrace, the Court still manages to find reasons to construe at least some statutes it does not like narrowly.<sup>84</sup>

One recommended cure to hindsight bias is to encourage people to imagine and describe how outcomes that did not happen could have occurred. Apparently that exercise helps counteract the usual inclination to discount information that suggests a different outcome

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78. *Id.* at 49.

79. As Christopher Leslie has helpfully summarized:

The potential for hindsight bias exists when a person is tasked with determining the ex ante probability of an event after the fact. If people learn that the event did not, in fact, occur, they are more likely to believe that the *before-the-fact* probability of the event occurring was relatively low. Conversely, if people learn that the event did later occur, they are more likely to say that the event was highly probable—perhaps inevitable—all along. This phenomenon is hindsight bias: the “using [of] known outcomes to assess the predictability at some earlier time of something that has already happened.” Because of hindsight bias, “[p]eople overstate their own ability to have predicted the past and believe that others should have been able to predict events better than was possible.”

Christopher R. Leslie, *Hindsight Bias in Antitrust Law*, 71 VAND. L. REV. 1527, 1532–33 (2018).

80. See generally Barkow, *supra* note 33.

81. See *Santobello v. New York*, 404 U.S. 257 (1971).

82. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *Oyler v. Boles*, 368 U.S. 448, 455–56 (1962).

83. See Diarmuid F. O’Sannlain, “We Are All Textualists Now”: *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN’S L. REV. 303 (2017) (tracing the emergence and embrace of textualism to the confirmation of Justice Antonin Scalia in 1986).

84. See, e.g., *Yates v. United States*, 574 U.S. 528 (2015); *Bond v. United States*, 572 U.S. 844 (2014).

was equally possible, and it results in a more nuanced perspective of the causal chain of events.<sup>85</sup>

So please indulge me as I describe an outcome that could have happened under the functional separation of powers—an outcome in which plea bargaining did not come to dominate the criminal justice system. If things had played out slightly differently, plea bargaining would not have flourished, and much of the concentration of power in the hands of prosecutors (and the breakdown of separation of powers that it has wrought) would not have occurred.

Right now, plea bargaining dominates the criminal justice system. More than ninety-five percent of the convictions in this country are the result of plea bargains,<sup>86</sup> leading the Supreme Court to declare that “plea bargains have become so central to the administration of the criminal justice system” that plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>87</sup> Plea bargaining empowers prosecutors, allowing them to circumvent juries and, to a great extent, judges in securing convictions and selecting the punishment in their own cases.<sup>88</sup> Put differently, plea bargaining has largely given prosecutors the “judicial power” of conviction and imposing sentence.

The present-day domination of plea bargaining obscures the fact that plea bargaining is largely a modern phenomenon.<sup>89</sup> As Albert Alschuler,<sup>90</sup> Will Ortman,<sup>91</sup> and others have documented, plea bargaining was incredibly disfavored by the elite legal community through at least the mid-1930s. When widespread plea bargaining was

85. See Neal Rouse & Kathleen Vohs, *Hindsight Bias*, 7 PERSPS. PSYCH. SCI. 411 (2012).

86. NACDL, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT (2018) (“[O]ver the last fifty years, trial by jury has declined at an ever-increasing rate to the point that this institution now occurs in less than 3% of state and federal criminal cases.”).

87. *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992)).

88. Barkow, *supra* note 33, at 1047–50; Baughman, *supra* note 35, at 1083–84.

89. To be clear, we can find examples of plea bargaining that date back to the first half of the nineteenth century. See GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 21–22 (2003). But the conventional wisdom is that plea bargaining occurred in only a small fraction of cases until the late nineteenth century. See *id.* at 112–13; LAWRENCE M. FREIDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870–1910, at 192–95 (1981) (noting that, although plea bargaining was “well established” by 1890, the trend increased during the next three decades and only began to dominate the system by the mid-twentieth century); Albert W. Alschuler, *Plea Bargaining and Its History*, 13 L. & SOC’Y REV. 211, 223 (1979) (noting that, in New York, guilty plea rates increased steadily during the mid- and late-nineteenth century).

90. See Alschuler, *supra* note 89, at 223–227 (explaining how appellate courts disfavored plea bargaining in the early twentieth century).

91. See Ortman, *supra* note 61, at 1460–63 (describing judicial disdain toward plea bargains).

uncovered in several surveys of local criminal justice systems, the response was overwhelmingly negative.<sup>92</sup> For example, there was a call to immediately remove three trial judges in Chicago, who were reported to have allowed defendants to plead guilty in exchange for a reduction of felony charges to misdemeanors. The trial judges were allowed to keep their jobs only after a committee of appellate judges conducted an inquiry and said that the prosecutors, and not the judges were to blame.<sup>93</sup> Hostility to plea bargaining was quite common among appellate court judges. Several state supreme courts held the practice unconstitutional.<sup>94</sup> The U.S. Supreme Court expressed animosity towards the practice in a few late-nineteenth cases,<sup>95</sup> but it did not have the opportunity to rule on the constitutionality of the practice.

Let us imagine that those U.S. Supreme Court cases had played out differently—that one of the three anti-plea bargaining cases had squarely presented the question of plea bargaining’s constitutionality. Because plea bargaining would have been prohibited, less of it would have occurred. And, perhaps more importantly, to the extent it did occur, it would happen in secret, rather than as an accepted feature of the criminal justice system.

If less plea bargaining had occurred, or if plea bargaining had only been occurring in secret, then the Supreme Court would have been much less likely to have endorsed it in the 1970s. For one thing, the Court tends to follow precedent, rather than overrule previous cases. For another, the reasons that the Court gave in upholding the constitutionality of plea bargaining would not have been as compelling. The ubiquity of plea bargaining and its ability to allow the criminal justice system to dispose of cases efficiently played a major role in the Court’s decision to declare the practice constitutional in the 1970s.<sup>96</sup> But if plea bargaining had not been a widespread and open practice in the 1970s, then the Court might have come out the other way. At a minimum, the Court likely would have been willing to recognize serious limits on the practice if there was a prior decision declaring the practice unconstitutional.

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92. *Id.* at 1455–63.

93. Alschuler, *supra* note 89, at 232; Ortman, *supra* note 61, at 1460–61.

94. See Alschuler, *supra* note 89, at 224–26 (collecting and describing cases).

95. *Id.* at 226–27 (describing *The Whiskey Cases*, 99 U.S. 594 (1878), *Insurance Co. v. Morse*, 87 U.S. 445 (1874), and *Hallinger v. Davis*, 146 U.S. 314 (1892)).

96. See *Santobello v. New York*, 404 U.S. 257, 260 (1971) (noting that, without plea bargaining, “the States and the Federal Government would need to multiply by many times the number of judges and court facilities”); see also C.J. Warren Burger, *State of the Judiciary 1970*, 56 A.B.A. J. 929, 931 (1970) (describing, in dire economic terms, what would happen if even a small number of defendants who pleaded guilty instead decided to insist on their right to a trial).

While we can never know for certain how alternate facts would have affected history, this counterfactual seems sufficiently plausible to cast doubt on the inevitability of the modern dominance of plea bargaining. If a slightly different mix of cases had made their way to the U.S. Supreme Court in the late nineteenth century, then plea bargaining might have remained an unsanctioned and disfavored practice in busy urban courts, rather than a ubiquitous practice that has skewed the balance of power between the branches. And so it seems unwarranted to assume that a system of functionally separated powers would necessary have ended up concentrating power in the hands of the executive.

In addition to assuming that ours is the only way that the separation of powers could have played out, Epps is also too quick to dismiss the idea that the judiciary will behave differently than the political branches.<sup>97</sup> To be clear, there is reason to think that judicial elections will result in some judges who are unwilling to be “soft on crime.” There are examples of interests groups seeking to advance non-criminal law ends using state judges’ pro-criminal-defendant rulings in attack ads.<sup>98</sup> But those same judicial election dynamics are not at play in systems with life tenure for judges, and so there is reason to doubt that those judges will cave to the same “tough on crime” politics with which elected officials must contend.

Nor should we expect “tough on crime” politics to affect the nominations and confirmations of judges the same way they affect elections of legislators and executive officials. That is because the separation of powers issues on which judges must rule do not neatly map onto modern fights about political ideology and the courts. Judicial confirmation fights are often framed in terms of constitutional methodology, and tend to focus on issues like abortion, rather than on questions of criminal law. As a result, a “tough on crime” president might nominate a “constitutional conservative” who rules in favor of criminal defendants on constitutional issues. Justice Gorsuch, for example, has relied on the separation of powers to arrive at some defense-friendly and liberty-protecting decisions.<sup>99</sup> Justice Scalia

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97. Epps, *supra* note 1, at 40–41.

98. See JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 1–3 (2012) (collecting recent incidents); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 14 n.74 (1995) (collecting incidents from the 1980s and 1990s).

99. *E.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (Gorsuch J., concurring in part and concurring in the judgment).

sometimes did the same.<sup>100</sup> More liberal Justices sometimes arrive at similar outcomes for different reasons, which is why criminal justice opinions can lead to strange bedfellows.<sup>101</sup>

Moreover, I think that Professor Epps is too quick to dismiss the idea that their professional identity *as judges* is relevant to the decisions judges make. Ron Wright and Kay Levine have done important work on the professional identity of prosecutors.<sup>102</sup> As they explain, “professional identity is likely to change over time, particularly for professionals who make career transitions that require them to display new skills and attitudes.”<sup>103</sup> And there is a social science literature documenting the effect of professionals’ role identity on their decision-making.<sup>104</sup>

In addition to how an individual judge views her professional role identity (as compared to how an executive official views her role), the judicial role itself comes with different formal rules. There are constitutional guarantees about neutral decision-making that apply to judges and that do not extend to the political branches.<sup>105</sup> There are also ethics rules that limit the ability of judges to engage in political activity.<sup>106</sup> That is not to say that politics play no role in the decisions that judges make. But we talk about judges playing politics as something that is not supposed to happen, while it is considered business as usual in the other branches.

### III. DIFFUSING POWER WITHIN BRANCHES

The influence of professional identity on decision-making is one reason that I am skeptical of Professor Epps’s claim that diffusing

100. *E.g.*, *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

101. *E.g.*, *Voisine v. United States*, 136 S. Ct. 2272, 2282 (2016) (in which Justice Thomas’s dissenting opinion was joined, in part, by Justice Sotomayor); *Thornton v. United States*, 541 U.S. 615, 625 (2004) (in which Justice Scalia’s concurring opinion was joined by Justice Ginsburg); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (in which Justice Steven’s majority opinion was joined by Justices Scalia, Souter, Thomas, and Ginsburg).

102. *See generally* Ronald F. Wright & Kay Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667 (2018); Ronald F. Wright & Kay Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 ARIZ. L. REV. 1065 (2014); Ronald F. Wright & Kay Levine, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119 (2012).

103. Wright & Levine, *Prosecution in 3-D*, *supra* note 102, at 1131–32.

104. *See, e.g.*, Carina Schott, Trui Steen, & Daphne Van Kleef, *The Combined Impact of Professional Role Identity and Public Service Motivation on Decision-making in Dilemma Situations*, 84 INT’L REV. ADMIN. SCIS. 21, 28 (2018) (finding that professional role identity affects the decision-making of veterinary inspectors).

105. *Compare* *Tumey v. Ohio*, 273 U.S. 510 (1927), *with* *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980).

106. *See* MODEL CODE OF JUD. CONDUCT §§ 4.1, 4.2, 4.3 (AM. BAR. ASS’N 2020).

power within a single branch can be an effective way to protect liberty. Epps takes as his model the many administrative agencies that make rules, prosecute rule breakers, and adjudicate those claims of rule breaking. To the extent that Epps is endorsing a similar approach to criminal prosecutions—an approach that would give this task to an executive agency—then I have serious reservations about how well the executive will protect liberty.

When people work for one “side” of a criminal prosecution, they are less likely to make decisions that undercut their “side.”<sup>107</sup> This is why some have argued against locating the clemency bureaucracy and forensic science units within law enforcement agencies like the Department of Justice.<sup>108</sup> When pardon attorneys and forensic scientists work within law enforcement agencies, they view themselves as being “on the same team” as police and prosecutors, even though they are supposed to be making independent decisions, and that sense of professional community appears to affect their judgments.

Also, as I mentioned at the end of the previous section, there is reason to think that judges will—and do—respond differently to tough-on-crime politics than do officials in the other branches.<sup>109</sup> Within the political branches, it is seen as a virtue to be responsive to the general public; but in the judiciary, public passions are not supposed to prevent the judge from reaching the appropriate outcome in a particular case. The different professional identities suggest that people will make different decisions depending on the role that they occupy within government.

Indeed, we have examples of people who changed their conduct because their role—and thus their professional identity—shifted. History buffs will no doubt think of Thomas Becket, who aided his ally and close friend King Henry II in consolidating power for the Crown at the expense of the Church until he became Archbishop of Canterbury, radically changed his behavior, and supported the interests of the Church against the English crown.<sup>110</sup> More recently—and more

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107. *E.g.*, Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 792 (discussing the ways in which federal law enforcement agents and federal prosecutors interact with each other and noting that “one ought not underestimate the unifying influence of a shared commitment to “getting the bad guys,” hardened by the adversarial process”).

108. *See, e.g.*, SANDRA GUERRA THOMPSON, COPS IN LAB COATS: CURBING WRONGFUL CONVICTIONS THROUGH INDEPENDENT FORENSIC LABORATORIES (2015); Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271 (2013).

109. *See supra* text accompanying notes 97–101.

110. *See, e.g.*, SIMON SCHAMA, A HISTORY OF BRITAIN: AT THE EDGE OF THE WORLD? 125–34 (2000).

relevantly—we have the example of Justice Sonia Sotomayor. She worked as a prosecutor before becoming a judge, and yet she has proven to be one of the staunchest defenders of the rights of criminal justice on the U.S. Supreme Court.<sup>111</sup>

My skepticism about the diffusion of power across executive institutions is informed by my own research into the states. Unlike the federal system, which concentrates the executive power over criminal justice matters in the Department of Justice, most states have formally diffused executive power across multiple institutions, some of which are fully independent of one another. In those states, the decision to prosecute a case involves multiple actors or institutions.<sup>112</sup> Police make initial decisions about who to bring into the system. The ultimate authority for that decision ordinarily lies with a sheriff, who is independently elected, or a police chief is appointed by or answerable to other locally elected officials.<sup>113</sup> Prosecutors decide whether to pursue a prosecution. In forty-five states, the ultimate authority for that decision lies with a locally elected prosecutor.<sup>114</sup> And in some states the Attorney General or the Governor (also independently elected) have the power to take cases away from local prosecutors.<sup>115</sup> Those three separate institutions are making the same decision—whether to pursue a conviction. When they do not agree, there is no conviction.

How does this diffusion of executive power serve the protection of liberty? Not particularly well. The political pressure from other executive officials seems to push decisionmakers to be more punitive. When prosecutors have announced non-prosecution policies, for example, those decisions have often been met with significant resistance and criticism from law enforcement.<sup>116</sup> And when one Florida prosecutor announced that she would use her discretion to no longer

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111. Interestingly, Justice Samuel Alito also used to be a prosecutor, and he has proven to be one of the most pro-prosecution voices on the Court. So the strength of influence of professional identity likely varies from judge to judge.

112. Depending on the state, police may arrest and then the prosecutor may need to independently file charges. But not all states follow this model.

113. See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1831 (2015).

114. See Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1548–57 (2020) (detailing how the states select their prosecutors).

115. See generally Tyler Q. Yeagain, Comment, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95 (2018).

116. See, e.g., Tim Prudente, *Baltimore Will Stop Prosecuting Marijuana Possession, Mosby Announces*, BALTIMORE SUN (Jan. 30, 2019), <https://www.baltimoresun.com/news/crime/bs-md-mosby-marijuana-prosecution-policy-20190129-story.html> [https://perma.cc/9KY6-E285] (detailing a situation where a prosecutor was isolated for adopting a non-prosecution policy for marijuana-related charges).



seek the death penalty, the state's governor responded by removing all death-penalty-eligible cases from her jurisdiction.<sup>117</sup>

To be clear, diffusing executive power may possibly reduce the number of people convicted. After all, prosecutors often decline to bring charges even when the police have made arrests.<sup>118</sup> But it is also possible that state prosecutors end up bringing charges in more cases than they otherwise would have because they do not have the same opportunities to shape (and narrow) investigations as they do in the more consolidated Department of Justice.<sup>119</sup> Whether greater consolidation in the states or more diffusion in the DOJ would increase or decrease convictions is ultimately an empirical question that neither Epps nor I can answer. But I will note that the states have done far more to fuel mass incarceration than the federal government, even though the states have diffused more power.<sup>120</sup>

Professor Epps also argues that the functional separation of powers may “dilute accountability” and thus make it more difficult for voters to hold their elected officials accountable for policies or outcomes that they do not like.<sup>121</sup> In contrast, if a single agency is performing all of the functions, then that agency could theoretically be held responsible for any outcome that is disfavored.

It is certainly true that legislators can blame prosecutors for unpopular prosecutions, while prosecutors can say that they are merely following the laws that the legislature passed.<sup>122</sup> But such shirking of responsibility is hardly unique to the functional separation of powers. The two major political parties, for example, routinely blame one another for the failure to pass legislation.

In any event, when voters care enough about a particular issue, they seem quite capable of holding multiple branches and officials responsible. For example, when voters in Harris County, Texas were dissatisfied with the county's abusive bail practices, they elected a new sheriff, new judges, and new county commissioners—all of whom supported bail reform. The newly elected officials changed bail practices

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117. Matt Dixon, *Scott Wins Death Penalty Dispute with Soros-backed State Attorney*, POLITICO (Aug. 31, 2017), <https://www.politico.com/states/florida/story/2017/08/31/rick-scott-wins-death-penalty-dispute-with-soros-backed-state-attorney-114240> [<https://perma.cc/J8U7-SH6G>].

118. PFAFF, *supra* note 19, at 129–31.

119. See Richman, *supra* note 107, at 782–83 (discussing the extent to which federal law enforcement will sometimes seek federal prosecutors' counsel and advice in their investigation tactics and actions).

120. PFAFF, *supra* note 19, at 13–16 (explaining that state and local decisions have a much larger impact on mass incarceration than federal decisions).

121. Epps, *supra* note 1, at 41.

122. Hessick & Kennedy, *supra* note 68, at 354 n.7 (collecting sources).

and settled a civil rights law suit that previous officials had spent millions of dollars fighting.<sup>123</sup>

Of course, Professor Epps offers far more in the way of suggested reforms than merely diffusing power within single institutions or branches. He offers a number of different ways of checking decisionmakers in the criminal justice system. Some of them, like giving more voice to non-state actors, seem like good ideas, and we should probably consider adopting them.

But adopting those suggestions would not require us to reorient the conversation away from Madisonian separation of powers. They could simply be adopted on their own terms.

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As a general matter, I have no objection to the idea that there should be more checks and balances in the criminal justice system. In fact, like Professor Epps, I think that the idea of checks and balances has sometimes gotten short shrift in our conversations about the separation of powers. But I diagnose the problem somewhat differently than Professor Epps. He thinks that we should prioritize checks and balances and resign ourselves to the fact that the functional separation of powers was never going to give us the negative liberty protections that we have so long assumed that they would. For my part, I think that the conversation about functional separation of powers has been led astray. We have allowed modern conventions (and preferences) to warp our views of which powers each of the branches is supposed to possess. In particular, we continue to assume that the “judicial power” gave very limited authority to judges and juries and that the “executive power” gave great authority to the executive.

But that is simply not what the people who wrote the Constitution intended. They thought that judges and juries would play a very significant role in the criminal law—that they would have powers that overlapped and thus could check the powers of the legislature and the executive. Thus, I do not think that we need to reject Madisonian separation of powers, because it “confin[es] each decisionmaker in the system to one narrowly defined role,” and replace it with a new system

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123. Michael Barajas, ‘A Watershed Moment’ for Bail Reform in Harris County, TEX. OBSERVER (July 31, 2019), <https://www.texasobserver.org/a-watershed-moment-for-bail-reform-in-harris-county/> [https://perma.cc/XG77-NZD9]; Florian Martin, *Ed Gonzalez Wins Harris County Sheriff’s Race*, HOUS. PUB. MEDIA (Nov. 8, 2016), <https://www.houstonpublicmedia.org/articles/news/2016/11/08/176835/ed-gonzalez-will-be-the-next-sheriff-of-harris-county/> [https://perma.cc/4WM9-JXJT].

in which decisionmakers “have some overlapping jurisdiction.”<sup>124</sup> We do not need to reject Madisonian separation of powers because Madison did not actually design a system with “narrowly defined roles”—instead he designed a system in which the courts already had “overlapping jurisdiction” with both the legislature and the executive.

When the Constitution was written, federal judges possessed the power to recognize common law crimes.<sup>125</sup> And although that power became a casualty of the early partisan battles between the Federalists and Democratic Republicans,<sup>126</sup> this key feature of the judicial role persisted in the states for a long time after—and in some states it continues to this day.<sup>127</sup> The power to recognize non-statutory affirmative defenses is alive and well in both the federal and state courts.<sup>128</sup> Those powers are not consistent with the “judicial minimalism” that we hear about in modern Supreme Court confirmation hearings—they sound too much like judges “making policy,” “acting as legislators,” or whatever else nominees say to reassure Senators that they won’t do things that sound like “judicial activism.” But the history on this point is quite clear—judges had significant authority over the content of the criminal law—and that authority was thought to be part of the “judicial power.”<sup>129</sup>

A similar story can be told about juries and nullification—a story about how American juries were supposed to act as a bulwark against tyranny by refusing to convict if they thought punishment was not warranted. Others have told that story in great detail,<sup>130</sup> and so I will not repeat it here. Instead I will simply note that the nullification power quite clearly overlaps with a prosecutor’s declination power—both have

124. See Epps, *supra* note 1, at 70.

125. See generally Hessick, *supra* note 9 (detailing this power); Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003 (1985) (overviewing the history of federal common law).

126. Federalist judges used their common law authority to convict Republicans in federal courts, and, as a result, federal criminal common law authority became inextricably bound up with those partisan positions. See Jay, *supra* note 125, at 1112, 1030, 1075.

127. Hessick, *supra* note 9, at 979–83.

128. See *supra* text accompanying notes 70–73.

129. Hessick, *supra* note 9, at 1008–13.

130. See, e.g., Barkow, *supra* note 66; Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111 (1999); Harris G. Mirkin, *Judicial Review, Jury Review & the Right of Revolution Against Despotism*, 6 POLITY 38 (1973); John T. Reed, Comment, *Penn. Zenger and O.J.: Jury Nullification-Justice or the “Wacko Fringe’s” Attempt to Further Its Anti-Government Agenda?*, 34 DUQ. L. REV. 1125 (1996); Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389 (1988); Robert J. Stolt, Note, *Jury Nullification: The Forgotten Right*, 7 NEW ENG. L. REV. 105 (1971); Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell’s Case*, 111 YALE L.J. 1815 (2002).

the authority to refuse to punish even when the defendant's behavior fell within the relevant criminal law.

In sum, I agree with Professor Epps that we should talk more about checks and balances. Where we disagree is what role separation of powers ought to play in that conversation. He views the functional separation of powers as something relatively distinct from checks and balances—sometimes the functional separation of powers will result in checks and balances, but it is generally not up to the task of preserving liberty. In contrast, I think that, when the powers are appropriately defined, the separation of powers is itself a great source of checks and balances in the criminal justice system, and it continues to help protect against punishment by creating veto gates.

Rather than abandoning the functional separation of powers to pursue new methods of diffusing power, I think that we can restore a number of checks and balances to the system by rejecting the modern, narrow view of the judicial power. Judges previously used their powers to narrowly construe criminal laws adopted by legislature, and juries previously used their power to prevent unjust prosecutions by the executive. We should do what we can to facilitate a return to that system, including convincing those judges who style themselves originalists that they have failed to appreciate the original understanding of the judicial power.

Finally, we need to recognize that there is only so much that structure will do to cabin the perennial desire to inflict punishment on people who commit crimes. Structural arrangements provide only a blunt tool; they will not prevent all unjust deprivations of liberty. And reorienting the discussion within the criminal law community away from the idea that the separation of powers is meant to protect liberty, towards the idea that it is sometimes supposed to facilitate more prosecutions and convictions, is not a step in the right direction.

