

ARTICLES

Checks and Balances in the Criminal Law

*Daniel Epps**

The separation of powers is considered essential in the criminal law, where liberty and even life are at stake. Yet the reasons for separating criminal powers are surprisingly opaque, and the “separation of powers” is often used to refer to distinct, and sometimes contradictory, concepts.

This Article reexamines the justifications for the separation of powers in criminal law. It asks what is important about separating criminal powers and what values such separation serves. It concludes that in criminal justice, the traditional Madisonian approach of separating powers between functionally differentiated political institutions—legislature, executive, and judiciary—

* Associate Professor of Law, Washington University in St. Louis. For helpful conversations and comments at various stages, I'm grateful to Susan Appleton, Rachel Barkow, Will Baude, Jeff Bellin, Mitch Berman, Maggie Blackhawk, Sam Bray, Kevin Collins, Dan Deacon, Danielle D'Onfro, Rick Garnett, Adam Gershowitz, Jack Goldsmith, Daniel Hemel, Carissa Hessick, Joseph Hoffman, Aziz Huq, John Inazu, Andrea Katz, Randy Kozel, Genevieve Lakier, Robert Leider, Daryl Levinson, Richard McAdams, Merritt McAlister, Will Ortman, Jeff Pojanowski, John Rappaport, Ganesh Sitaraman, David Sklansky, David Strauss, Brian Tamanaha, and Ron Wright; participants in workshops at the University of Chicago Law School, Washington University School of Law, William & Mary School of Law, Indiana University Maurer School of Law, Notre Dame Law School, University of Florida Levin College of Law, University of Pennsylvania School of Law, CrimFest at the Cardozo School of Law, and the Southeastern Junior-Senior Workshop at University of Georgia School of Law; and the editors of the *Vanderbilt Law Review*. Rhys Johnson and Samantha Kobor provided excellent research assistance.

bears no necessary connection to important values like preserving liberty, preventing tyranny, and safeguarding the rule of law. Not only is adhering to the traditional Madisonian approach to separation of powers insufficient to promote these values, it is likely unnecessary to protect them as well.

Instead of the separation of powers, the organizing principle for the structure of the criminal justice system should be the distinct idea of “checks and balances.” A checks-and-balances approach would emphasize the diffusion of decisionmaking power among different social and political interests in society; functional duplication and overlapping jurisdiction between different decisionmakers; insulation of decisionmaking power by individual actors within single institutions, along with more formal checking roles for non-state actors; and careful design to optimize electoral accountability.

INTRODUCTION.....	3
I. THE TRADITIONAL APPROACH.....	8
A. <i>Intellectual Origins</i>	9
B. <i>Separated Criminal Powers and the Constitution</i>	12
C. <i>Separated Criminal Powers in Judicial Discourse</i>	14
D. <i>Separated Criminal Powers in the States</i>	19
E. <i>Scholarly Views</i>	22
II. SEPARATING OUT SEPARATED POWERS	26
A. <i>What Does Separation Mean?</i>	26
1. Separated Functions Versus Checks and Balances	27
2. Formal Separation and Political Power	29
3. External Versus Internal Separation	30
B. <i>Why Separate Criminal Powers?</i>	32
1. Worst-Case Scenarios	33
2. Agency Costs	34
3. The Rule of Law	35
4. Negative Liberty	37
5. Specialization and Efficiency	38
6. Producing Better Policy	39
III. AWAY FROM SEPARATED CRIMINAL POWERS	40
A. <i>Separated Powers as Insufficient</i>	40
B. <i>Separated Powers as Unnecessary</i>	51
C. <i>Separated Functions Without Separated Power</i>	55
IV. TOWARDS CHECKS AND BALANCES	58
A. <i>Diffusing Power Among Interests</i>	60
1. Federalism and Localism.....	62
2. Felon Disenfranchisement and the Prison Lobby	63

3.	Criminal Law’s Reach.....	65
4.	Criminal Juries.....	66
5.	Racial, Ethnic, and Tribal Groups.....	68
B.	<i>Functional Duplication and Shared Decisionmaking</i>	70
C.	<i>Internal Separation and External Checking</i>	73
D.	<i>Designing Electoral Accountability</i>	78
E.	<i>A Few Applications</i>	79
1.	<i>Chevron</i> and Federal Criminal Law	79
2.	The Judicial Role	81
3.	<i>Gundy</i>	83
CONCLUSION		83

INTRODUCTION

In no legal realm is the separation of powers considered more essential than in the criminal sphere. Liberty faces great threats from the “terrifying force of the criminal justice system,”¹ and, as a result, the power to inflict criminal sanctions is carefully parceled out among institutions. At least in theory, a defendant can be punished only when several different political institutions perform their designated functions: the legislature must make conduct criminal, a separately elected or appointed executive-branch prosecutor must bring charges, an independent judiciary must agree that the alleged conduct falls within the terms of a criminal statute, and a jury drawn from the community must make a finding of factual guilt.² Such a division of

1. *Robertson v. United States ex rel. Watson*, 560 U.S. 272, 273 (2010) (Roberts, C.J., dissenting).

2. *See, e.g.*, Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1914 (1999) (“[C]riminal punishment is meted out only when all three branches (plus a jury representing private citizens) concur that public force may be used against the individual.”); Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. CRIM. L. & CRIMINOLOGY 1, 4 (2017) (observing that “a conviction requires structural protections consistent with separation of powers principles” including “a concurrence of the tri-partite branches”); Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 NOTRE DAME L. REV. 1373, 1447 (2002) (“The framers created a federal criminal justice system in which all three branches must act before an individual may be incarcerated for a crime.”); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 397 (1995) (“[I]n criminal cases . . . all branches of government must ordinarily concur in the application of state power.”).

power is supposed to “provide a structural balance”³ and guard against “tyranny.”⁴

The importance of separating criminal powers among different institutions has deep intellectual roots, extending back to thinkers like Montesquieu and Cesare Beccaria.⁵ Today, courts and scholars are virtually unanimous in extolling the virtues of the separation of powers in criminal justice and relying on it as a justification for various decisions. This is not to say, of course, that everyone agrees the American criminal justice system adheres to separation-of-powers principles in practice. Far from it; observers often decry our system’s failure to honor the separation of powers while blaming overly concentrated power for various failings. One leading complaint, prominently and eloquently articulated by Rachel Barkow, is that the plea bargaining process has allowed prosecutors to accumulate power that properly belongs to other branches.⁶ Such critics, though, typically do not question separated powers; instead, they start from our Constitution’s premise that it is essential, and they lament that our system has lost sight of separation’s demands.

Yet if one is willing to question the Founders’ wisdom, one finds that exactly *why* the separation of powers in criminal justice is so important is not obvious. For one thing, though observers often stress the importance of the “separation of powers,” they often use that term to refer to several distinct—and in some cases arguably contradictory—concepts. Nor is there consensus on which values, exactly, the separation of powers is supposed to protect; the preservation of liberty and the prevention of tyranny get the most lip service, but separation of powers is often said to serve other purposes as well. And even when the relevant values are specified, courts and scholars do not offer clear accounts of the causal mechanisms by which separating power among distinct political institutions will ensure protection for those values. Such an account is critical, though, as public-law thinkers have begun to call into question some of the assumptions underlying the American approach to separated powers.⁷

3. Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1073 (2017).

4. *Mistretta v. United States*, 488 U.S. 361, 381 (1989).

5. See *infra* Section I.A (discussing the intellectual origins of separation of powers in relation to criminal punishment).

6. See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 997, 1053 (2006) (“[P]rosecutors make the key decisions in criminal matters without a judicial check and without any of the structural and procedural protections that govern other executive agencies.”).

7. See *infra* Section III.A (discussing the potentially faulty theoretical foundations on which the American approach to separation of powers rests).

This Article questions traditional thinking about separation of powers in criminal justice. While there may be good reasons for distributing certain functions among different individual decisionmakers, the traditional Madisonian approach of separating functions among distinct political institutions—especially with respect to a separately elected legislature and executive branch—has no necessary relationship to protecting liberty, preventing tyranny, or producing the other supposed benefits of the separation of powers. This does not mean that we should consolidate all political power over criminal justice in the hands of one person. Far from it; such consolidation is rife with danger. But when it comes to diffusing power, we should not simply recite Madison’s command to cabin power into discrete functions. Instead, we should more directly seek to diffuse decisionmaking authority among individuals, institutions, and social and political interests with incentives to effectively check state power.

In other words, I argue, the central organizing idea for the structure of the criminal justice system should be “checks and balances” instead of the “separation of powers.” Although these two phrases are often used interchangeably in American constitutional discourse, they are not synonymous.⁸ Properly understood, they represent different strategies for limiting government power, and they draw on different intellectual traditions.⁹ The idea of separation of powers—most famously developed by Montesquieu—stresses the necessity of each branch of government performing only its specified government functions. Checks and balances, by contrast, emphasizes the importance of permitting different government actors and institutions to check each other’s exercise of power. While the American constitutional system famously blends the two strategies, they need not travel together.

A checks-and-balances perspective on criminal justice has many implications. It suggests various possibilities for how decisionmaking power should be distributed and allocated across society. It allows us to imagine institutions that combine powers that the traditional way of thinking about separation of powers would dictate must be kept separate. And it suggests that, rather than insisting on strict functional separation between institutions, we should be far more open to functional *duplication* between different government actors or

8. See Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 435 (1987) (“The joinder of these themes is so familiar in the rhetoric of American constitutionalism that it may initially seem odd to view them as distinct.”).

9. See *infra* Section II.A.1 (disentangling the origins of the phrases “checks and balances” and “separation of powers”).

institutions in order to enable appropriate checking. Such strategies could more effectively protect liberty and other values than would dividing political power across functionally differentiated institutions. When it comes to criminal justice, ensuring fidelity to the values separation of powers is supposed to protect may require rejecting the traditional American understanding of the separation of powers.

This Article will develop that claim in four parts. Part I begins by canvassing prior thought about the role of separated powers in criminal justice and its role in the American constitutional system. Section I.A discusses the intellectual history of the separation of powers. The idea of different interests in society checking each other has roots in the ancient world, where the idea of “mixed government” first developed. Yet the tripartite division of power into three functional branches taken for granted today did not emerge until roughly the seventeenth century in England. The dangers posed by the state’s power to punish were often front and center in early discussions of separated powers.

Section I.B then discusses separated criminal powers in American constitutional law. Our Constitution seems to embody an assumption that the separation of powers is a necessary protection for liberty in criminal justice. Yet in designing the constitutional structure, the Framers combined the ancient tradition of mixed government with more modern notions about the separation of powers, creating a hybrid system in which each functionally defined branch would check the exercise of power by the other branches. Today, separation-of-powers ideas continue to have significant currency in judicial discourse, often serving to justify various doctrines.

Section I.C then briefly reviews modern scholarship on the relationship between the separation of powers and criminal justice. The importance of the separation of powers in criminal justice is a widespread view. Some scholars, most significantly Barkow and Shima Baradaran Baughman,¹⁰ have offered strong critiques of our system’s failure to respect constitutional provisions regarding the separation of powers. These scholars focus on our system’s lack of checks on power, but they tend to assume that following the constitutional design more closely would provide sufficient checks. The only significant skepticism of the importance of the traditional separation of powers has come from Dan Kahan, who controversially proposed that Department of Justice

10. See Barkow, *supra* note 6, at 1053 (“Greater enforcement of the Constitution’s separation of powers would prevent this perverse state of affairs.”); Baughman, *supra* note 3, at 1073 (“Unfortunately, these constitutional checks are not functioning, most markedly in the criminal justice system.”).

(“DOJ”) interpretations of federal criminal statutes should receive *Chevron* deference.¹¹

In order to help frame the inquiry, Part II then tries to separate out a number of distinct concepts. First, Section II.A tries to disentangle multiple possible meanings of the “separation of powers” in the context of criminal law. First, though “separation of powers” and “checks and balances” are sometimes used interchangeably, they are different, sometimes contradictory, strategies. Second, as recent scholarship in public law has made clear, understanding how power is actually distributed in government requires going beyond the *formal* separation of powers and looking at how power is actually distributed in a democratic society. Third, while traditional approaches to the separation of powers assume separation at the level of government institutions, recent work on the “internal separation of powers” has shown how power can be diffused and channeled within single chains of political accountability.

Section II.B then asks why we might think separating power in some sense is important in criminal justice. Specifically, I identify a number of potential values, including avoiding tyranny, minimizing agency costs, promoting rule-of-law norms, protecting a vision of negative liberty by making state action more difficult, maximizing efficiency through specialization, and furthering good policy. While these values may all be worth protecting, it is not obvious that the traditional approach to the separation of powers will accomplish that goal.

Part III then examines whether the traditional American approach to the separation of powers—the Madisonian strategy of dividing government power into distinct, functionally differentiated political institutions—will in fact protect those values. Section III.A concludes that Madisonian separation is not a sufficient strategy for protecting any of those values. On close examination, the relationship between protecting each value and Madisonian separation is highly contingent if not nonexistent. Section III.B goes further, arguing that Madisonian separation is also not *necessary* to protect those values. Examples from both the United States and abroad show that it is possible to maintain fidelity to rule-of-law values, avoid tyranny, and so on within single political institutions, so long as appropriate internal checks are put into place. Section III.C then explains why the separation of functions between different individual decisionmakers is still possible even in regimes that do not separate functions between

11. See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996).

different *institutions*. Rejecting the Madisonian approach to the separation of powers does not require embracing a single decisionmaker acting as judge, jury, and executioner.

Part IV then offers a number of tentative ideas about what a criminal justice system reoriented around checks and balances might look like. Section IV.A explains that a key design principle would be the appropriate diffusion of power among individuals and interests with different incentives in order to ensure the appropriate checks on state power. This perspective brings together a number of seemingly unrelated debates in criminal justice over localism, felon disenfranchisement, and the role of the jury. Section IV.B then argues that a checks-and-balances approach would embrace functional *duplication* and overlapping jurisdiction, rather than strict functional separation, in order to increase the likelihood that a bad decision or policy would be appropriately checked.

Section IV.C then explores the idea of internal separation of powers, discussing various strategies in which different interests could be brought to bear within an institution charged with criminal justice policy. That Section also briefly explores the importance of encouraging checking by external, non-state actors. Section IV.D then explores ways to enhance the right kinds of electoral accountability in criminal justice. Oddly, while the diffusion of power has long been assumed to be critical, that same diffusion of responsibility may actually impede appropriate checking by the electorate on abuses. Certain kinds of consolidation of power might, strangely, better protect separation-of-powers values than the traditional separation of powers itself. Finally, Section IV.E closes with a few examples of how the checks-and-balances approach might apply to particular concrete questions.

I. THE TRADITIONAL APPROACH

This Part provides an overview of past and modern thinking about separated powers in criminal law. Section I.A analyzes the intellectual history of the separation of powers in relation to criminal punishment. Section I.B explores the role of separated powers in criminal justice in relation to the American constitutional system. Section I.C reviews modern scholarship on separated powers in criminal justice.

At the outset it is important to stress that “separation of powers” is often used to refer to distinct, perhaps conflicting, concepts. Sometimes it means separating government power among distinct, functionally differentiated political institutions—in my view, the core meaning of the phrase. At other times, though, it is used to refer to an

idea that is better labeled “checks and balances”—the diffusion of government power between different interests or institutions that check the others. Part II will seek to disentangle the separate concepts, but for now each is an object of concern.

A. *Intellectual Origins*

The notion that the power to impose criminal punishment must be divided among distinct decisionmakers has ancient roots. Consider the venerable criminal jury, an institution that requires the assent of a group of citizens before the government can impose punishment. Versions of the criminal jury were used in classical Athens and Rome.¹² But these classical societies did not seek to divide political power among functionally differentiated branches—executive, legislative, judicial—in the way that we take for granted today. To the extent that classical political philosophers emphasized diffusing state power, they thought to distribute it among different groups in society, rather than divvying it up among functionally differentiated institutions—an approach known as “mixed government.”

The idea of mixed government is a constitutional design in which “the major interests in society [are] allowed to take part jointly in the functions of government, so preventing any one interest from being able to impose its will upon the others.”¹³ Such a system might, for example, formally divide power between a ruling monarch, a wealthy aristocracy, and the common people, giving each some means to check the other in order to avoid any one from dominating the rest of society. Importantly, in such a system, power is not separated by governmental function;

12. See, e.g., Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 957–58 (2003) (discussing Athenian and Roman versions of the criminal jury).

13. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 37 (Liberty Fund, Inc., 2d ed. 1998) (1967). Although the *strategy* of a mixed government dates back to ancient Greece, it is unclear the extent to which early Greeks actually understood the system’s value in terms of different social interests checking each other. By “mixed,” the Greeks meant a mixture of the “three basic or ‘pure’ forms of the state—monarchy, aristocracy, and democracy.” SCOTT GORDON, CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY 80 (1999). For an argument that the Greeks did not think of mixed government in modern terms as a means of diffusing state power, see *id.* at 82–84. The idea of mixed government as a system in which distinct classes check each other is often traced back to the Greco-Roman historian Polybius, who wrote during the second century B.C. He argued that the lawgiver Lycurgus, in designing the Spartan constitution,

united in it all the good and distinctive features of the best governments, so that none of the principles should grow unduly and be perverted into its allied evil, but that, the force of each being neutralized by that of the others, neither of them should prevail and outbalance another, but that the constitution should remain for long thanks to the principle of reciprocity.

6 POLYBIUS, THE HISTORIES 317 (W.R. Paton trans., 2011).

instead, each class of society has “its own representative body that share[s] in all the decisions of government.”¹⁴

The idea of separating government power into *functionally* distinct branches did not emerge until more modern times. That doctrine finds its roots in England, where it slowly developed over a long period. By the fifteenth century, for example, English thinkers recognized “[t]he need for the independence of the judiciary from the king and his other servants.”¹⁵ In the seventeenth century, separation of powers “emerged for the first time as a coherent theory of government.”¹⁶ It was then that thinkers began to analyze the various powers of government and to sort them into the tripartite conceptual framework—executive, legislative, judicial—taken for granted today. This way of thinking, though, “was not generally accepted until the second half of the 18th century.”¹⁷

Criminal punishment loomed large in English thinking as the modern doctrine of separation of powers emerged. The Reverend George Lawson explicitly referred to “Execution by the Sword” when laying out the three distinct functions of government.¹⁸ John Locke modified Lawson’s framework, treating judicial power as a form of executive power, but then separating what we think of as the executive power into distinct “executive” and “federative” (i.e., foreign relations) functions.¹⁹ The state’s power to impose criminal penalties was of paramount importance to Locke; he began his *Second Treatise* by defining “political power” as “a right to make laws—with the death penalty and consequently all lesser penalties—for regulating and preserving property, and to employ the force of the community in enforcing such laws and defending the commonwealth from external attack.”²⁰

Intellectual historians debate how much credit Locke deserves for the American way of thinking about separated powers, but one leading account has it that his theory “embodied the essential elements

14. Martin H. Redish & Elizabeth J. Cisar, “If Angels Were to Govern”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 458 (1991).

15. W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 5–6 (1965).

16. VILE, *supra* note 13, at 3.

17. GWYN, *supra* note 15, at 5.

18. GEORGE LAWSON, *AN EXAMINATION OF THE POLITICAL PART OF MR. HOBBS HIS LEVIATHAN* 8 (London 1657) (“[T]here is a threefold Power civil, or rather three degrees of that Power. The first is Legislative. The second judicial. The third Executive. For Legislation, Judgment, and Execution by the Sword, are the three essential acts of supreme Power civil in the administration of a state.”). The aforementioned “Sword” did not exclusively refer to criminal punishment, however, as Lawson made clear that “the Sword of War and justice are but one Sword.” *Id.*

19. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* §§ 143–48 (1689).

20. *Id.* § 3.

of the doctrine of the separation of powers.”²¹ Without question, though, Locke was a major influence on Montesquieu. Building on Locke’s foundation, Montesquieu, in his *Spirit of the Laws*, became the thinker “most closely associated with separation of powers.”²²

Montesquieu in particular emphasized criminal punishment when discussing the dangers of consolidated power. “All would be lost,” he warned, if the powers of “making the laws . . . of executing public resolutions . . . and of judging *the crimes* or the disputes of individuals” were united in “the same man or the same body of principal men.”²³ Montesquieu saw significant danger in permitting the executive to imprison individuals without judicial process and argued that this power should be strictly limited:

If the legislative power leaves to the executive power the right to imprison citizens who can post bail for their conduct, there is no longer any liberty, unless the citizens are arrested in order to respond without delay to an accusation of a crime the law has rendered capital; in this case they are really free because they are subject only to the power of the law.

But if the legislative power believed itself endangered by some secret conspiracy . . . it could, for a brief and limited time, permit the executive power to arrest suspected citizens who would lose their liberty for a time only so that it would be preserved forever.²⁴

More generally, Montesquieu saw the proper administration of the criminal law as perhaps the most important component of the preservation of liberty. “[T]he citizen’s liberty depends principally on the goodness of the criminal laws.”²⁵ It was thus critical to design a system of criminal law in which procedural rules would preclude the conviction of the innocent²⁶ and in which penalties would not “ensue from the legislator’s capriciousness but from the nature of the thing.”²⁷ And he expressed concerns about the dangers posed by bills of attainder, though he refused to categorically rule out their use.²⁸

Other influential early writing on criminal punishment emphasized separation-of-powers concerns. Beccaria, perhaps the first person to systematically think about the structure of government in

21. VILE, *supra* note 13, at 72.

22. Redish & Cisar, *supra* note 14, at 461.

23. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 157 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds., Cambridge Univ. Press 1994) (1748) (emphasis added).

24. *Id.* at 159.

25. *Id.* at 188.

26. *See id.* (“When the innocence of the citizens is not secure, neither is liberty.”); *see also id.* at 189 (arguing that two witnesses attesting to guilt should be necessary before capital punishment can be imposed).

27. MONTESQUIEU, *supra* note 23, at 189.

28. *See id.* at 204 (discussing the problems with bills of attainder but noting that “the usage of the freest peoples that ever lived on earth makes me believe that there are cases where a veil has to be drawn, for a moment, over liberty, as one hides the statues of the gods”).

criminal punishment, stressed the importance of a division between legislative and judicial power:

[L]aws alone can decree punishments for crimes, and . . . this authority resides only with the legislator, who represents the whole of society united by the social contract. No magistrate (who is a member of society) can justly establish of his own accord any punishment for any member of the same society.²⁹

Beccaria also stressed a narrow conception of the judicial role, one that left little room for interpretive discretion by judges.³⁰

B. Separated Criminal Powers and the Constitution

The precise relationship between the separation of powers and criminal punishment in the Framers' thinking is not fully clear; they rarely seem to have specifically referenced criminal punishment when discussing the benefits of separated powers in constitutional design generally.³¹ The Founding generation was, however, unquestionably familiar with the English tradition discussed above, as well as with Montesquieu's and Beccaria's insights.³² And certainly they thought that dividing up authority among institutions would help prevent serious abuses of the state's power over citizens' life and liberty.³³ As Madison argued, "The accumulation of all powers, legislative, executive,

29. See CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 12 (Richard Bellamy ed., Richard Davies & Virginia Cox trans., 1995) (1764).

30. See *id.* at 14 ("Nor can the authority to interpret the laws devolve upon the criminal judges, for the same reason that they are not legislators."). Leaving judges free to rule based on the spirit of law, Beccaria argued, would subject citizens to "the petty tyrannies of the many individuals enforcing the law." *Id.* at 15.

31. That may, in part, be because the benefits of separated powers in the criminal context were so widely agreed on that they did not provoke argument during the drafting and ratification processes. For example, as the Supreme Court has observed, "The provisions outlawing bills of attainder were adopted by the Constitutional Convention unanimously, and without debate." *United States v. Brown*, 381 U.S. 437, 441 (1965) (citing JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787, at 449 (Gaillard Hunt & James Brown Scott eds. 1920)).

32. Although there is debate over precisely how much Montesquieu's ideas shaped the framing of the Constitution, there is no doubt his influence on the founding generation was significant. See VILE, *supra* note 13, at 133–35 (discussing the "great controversy . . . around the extent to which the American colonists and the Founding Fathers were influenced by Montesquieu in their adoption of the separation of powers as a fundamental of good government"). Indeed, "Montesquieu was invoked more often than any other political authority in eighteenth-century America." Redish & Cisar, *supra* note 14, at 461. On Beccaria's influence, see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 301–03 (1998) (discussing early American criminal codification efforts inspired by Beccaria).

33. This concern is exemplified, for example, by insisting that Congress, rather than the president, has the power to suspend the writ of habeas corpus. See U.S. CONST. art. I, § 9, cl. 2.

and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”³⁴

The Founders also were unquestionably concerned about the dangers posed by the state’s power to criminally punish. Some of the complaints enumerated in the Declaration of Independence involved abuses of the criminal process.³⁵ And though the original, unamended Constitution largely omitted any individual-rights protections, some of the few included dealt with criminal punishment—such as Article III’s jury-trial requirement,³⁶ the limits on when and to what extent treason could be punished,³⁷ and the bar on bills of attainder by both federal³⁸ and state³⁹ governments. In defending the Constitution in *The Federalist*, Alexander Hamilton emphasized its precautions against “the favorite and most formidable instruments of tyranny” such as “the creation of crimes after the commission of the fact” and “the practice of arbitrary imprisonments.”⁴⁰ And many of the amendments in the original Bill of Rights addressed criminal punishment.⁴¹

More generally, the very structure of the Constitution seemed designed to protect liberty by dividing the power to punish among separate institutions. As Akhil Amar explains:

Congress would be obliged to define in advance, via generally applicable statutes, which misdeeds deserved punishment. Because branches independent of Congress would ultimately apply these laws . . . legislators would have strong incentives to define punishable misconduct with precision and moderation . . .⁴²

As a general matter, the particular strategy the Framers took in implementing the separation of powers in the Constitution was unusual. Rather than simply implementing Montesquieu’s vision of strict separation of powers, the Constitution instead accepted some blending of powers between the different branches of government, in

34. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

35. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (complaining of deprivations of “in many Cases, of the Benefits of Trial by Jury” for Americans while also bemoaning the use of “mock Trial[s]” to prevent the punishment of British soldiers who killed Americans).

36. See U.S. CONST. art. III, § 2, cl. 3 (guaranteeing a jury for the trial of “all Crimes, except in Cases of Impeachment”).

37. See *id.* art. III, § 3 (limiting the definition of treason, requiring “the testimony of two witnesses to the same overt act” or “confession in open court,” and limiting the punishment that can be imposed).

38. See *id.* art. I, § 9, cl. 3.

39. See *id.* art. I, § 10, cl. 1.

40. THE FEDERALIST No. 84, *supra* note 34, at 511–12 (Alexander Hamilton).

41. See U.S. CONST. amend V (addressing grand jury, double jeopardy, and self-incrimination protections); *id.* amend. VI (guaranteeing criminal jury, confrontation, right to compulsory process, and right to counsel); *id.* amend. VIII (prohibiting cruel and unusual punishment, excessive fines, and excessive bail); see also *id.* amend. IV (imposing restrictions on searches and seizures).

42. AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 63 (2006).

order to give each branch a limited ability to police the others. For example, the executive would participate in the legislative process using the veto; the Senate would offer advice and consent for the appointment of executive officers, and participate in the treaty-making process, and so on. These “celebrated departures from pure separation” are “usually dubbed checks and balances.”⁴³

In designing this system, James Madison and the other Framers were drawing on the long tradition of mixed government, an approach that is quite distinct from Montesquieuan ideas about strict separation between different functions of government. The Madisonian approach “combines these two design strategies”—Montesquieu’s formal separation and mixed government’s checking by different societal interests—“in a distinctive way.”⁴⁴ Power was divided among branches of government; and, in theory, each branch would check the other, preventing too great an accumulation of power—the strategy taken by mixed government. Yet the branches were defined purely in terms of function, as suggested by Montesquieu, without being connected to different underlying social and political interests. Thus, “branches had been substituted for interests.”⁴⁵ Under Madison’s theory, “ambition” would cause officials to jealously guard their branch’s own prerogatives and “resist encroachments of the others.”⁴⁶

C. Separated Criminal Powers in Judicial Discourse

Madison’s approach to separation of powers may rest on questionable premises—a problem I will revisit later. Nonetheless, the importance and efficacy of the Madisonian approach to the separation of powers have become articles of faith in American constitutional discourse, and particularly in judicial opinions. The Supreme Court has repeatedly “given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.”⁴⁷

This dogma is frequently invoked in the context of criminal law. Observers often stress, for example, how our constitutional system requires the assent of multiple institutions before punishment can be

43. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1132 (2000).

44. Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 95 (2016).

45. *Id.*

46. THE FEDERALIST NO. 51, *supra* note 34, at 321–22 (James Madison).

47. *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

imposed. As the Court put it in *United States v. Brown*,⁴⁸ a case overturning a criminal conviction because it was premised on an impermissible bill of attainder:

The Constitution divides the National Government into three branches—Legislative, Executive and Judicial. This “separation of powers” was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.⁴⁹

The separation of powers does not merely require the concurrence of multiple branches before punishment can be imposed. It also requires that each branch restrict itself to performing only its designated functions. From early in the republic, the judiciary would stress that its power was limited because certain functions were the responsibilities of other branches. In 1812, the Supreme Court declined to permit federal courts to adjudicate common-law crimes, reasoning that “[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence” before a prosecution could commence.⁵⁰ Several years later, the Court in *United States v. Wiltberger* justified “the rule that penal laws are to be construed strictly” on the ground that “[i]t is the legislature, not the court, which is to define a crime, and ordain its punishment.”⁵¹

Courts continue to rely on separation-of-powers rationales to justify various doctrines in criminal law. In *Whalen v. United States*,⁵² for example, the Court explained that a federal court “imposing multiple punishments not authorized by Congress . . . violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty.”⁵³ Similarly, the Court has at times grounded the vagueness doctrine—which permits invalidating on due process grounds vague laws vulnerable to discriminatory enforcement—in separation-of-powers concerns.⁵⁴

48. 381 U.S. 437 (1965).

49. *Id.* at 442–43.

50. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

51. 18 U.S. (5 Wheat.) 76, 95 (1820).

52. 445 U.S. 684 (1980).

53. *Id.* at 689.

54. *See United States v. Reese*, 92 U.S. 214, 221 (1875):

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be

Courts routinely invoke the separation of powers as a justification for refusing to order prosecutors to bring criminal charges those prosecutors have declined to prosecute.⁵⁵ Perhaps most importantly, courts frequently insist—continuing a long tradition perhaps begun in *Willberger*—that the separation of powers forbids them from interpreting a criminal statute to cover more conduct than the plain text suggests.⁵⁶

The separation of powers is not solely a shield for criminal defendants, however. Sometimes it provides 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. For example, in *United States v. Armstrong*,⁵⁷ the Supreme Court erected high barriers for defendants wishing to obtain discovery to establish the basis of a selective-prosecution claim. Among other rationales, the Court stressed its desire “not to unnecessarily impair the performance of a core executive constitutional function.”⁵⁸ And in *Earl v. United States*, the U.S. Court of Appeals for the District of Columbia Circuit—in an opinion by later-Chief Justice Warren Burger—refused to permit defendants to obtain favorable witness testimony through court-ordered grants of immunity, arguing that such an order would intrude on “one of the highest forms

rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

(emphasis added).

55. See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973) (“The primary ground upon which this traditional judicial aversion to compelling prosecutions has been based is the separation of powers doctrine.”); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965):

[A]s an officer of the executive department . . . [a U.S. Attorney] exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

For a harsh critique of the separation-of-powers reasoning in *Cox*, see KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 210 (1976) (“This reason is so clearly unsound as to be almost absurd.”).

56. See, e.g., *United States v. Santos*, 553 U.S. 507, 514 (2008) (“[The rule of lenity] keeps courts from making criminal law in Congress’s stead.”); *United States v. Alpers*, 338 U.S. 680, 685–86 (1950) (Black, J., dissenting):

Our system of justice is based on the principle that criminal statutes shall be couched in language sufficiently clear to apprise people of the precise conduct that is prohibited. Judicial interpretation deviates from this salutary principle when statutory language is expanded to include conduct that Congress might have barred, but did not, by the language it used.

57. 517 U.S. 456 (1996).

58. *Id.* at 465.

of discretion conferred by Congress on the Executive.”⁵⁹ Other examples of courts refusing to intrude on the prerogatives of the other branches abound.⁶⁰

Perhaps most significantly, the Court has also pointed to the separation of powers as a reason why courts cannot *narrow* criminal statutes in ways not consistent with their text as written by Congress. In *Brogan v. United States*,⁶¹ for example, the Supreme Court held that courts could not recognize an “exculpatory no” defense to a statute criminalizing false statements in a federal investigation. Because the defense was not contemplated by the plain text of the statute, it was Congress’s prerogative alone to create the defense; the role of a court is limited simply to interpreting the language Congress has written.⁶²

To be sure, the federal judiciary has not invariably insisted on a strict separation of powers when criminal justice is at issue. Kahan has argued, for example, that significant swaths of federal criminal law must be understood as a form of common law, in which lawmaking power has been delegated to the judiciary.⁶³ Moreover, in some of the most significant cases directly presenting separation-of-powers issues, the Supreme Court has used “a flexible analysis to allow great blending of government power,” as Barkow notes.⁶⁴ *Mistretta v. United States*⁶⁵ upheld the United States Sentencing Commission against a separation-of-powers challenge concerning how the Commission intermingled judicial, legislative, and executive functions. *Morrison v. Olson*⁶⁶

59. *Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir. 1966).

60. *See, e.g., United States v. Fokker Servs.*, 818 F.3d 733, 741–46 (D.C. Cir. 2016) (holding that district courts lack authority to withhold approval of deferred prosecution agreements because of disagreement with the executive’s charging decisions); *United States v. Scott*, 631 F.3d 401, 406 (7th Cir. 2011) (“In order to ensure that prosecutorial discretion remains intact and firmly within the province of the Executive, judicial review over prosecutorial discretion is limited.”); *United States v. Chavez*, 566 F.2d 81, 81 (9th Cir. 1977) (dismissing appeal seeking investigation into whether federal prosecution violated Attorney General’s announced policies because “under the doctrine of separation of powers federal courts have no discretion to conduct such an investigation”).

61. 522 U.S. 398 (1998).

62. *Id.* at 405 (“The objectors’ principal grievance . . . lies . . . 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.”).

63. *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 370–81 (attempting “to show just how pervasive delegated lawmaking has been and continues to be in federal criminal jurisprudence”). Some of Kahan’s observations may be less applicable nearly three decades on. For example, Kahan points to expansive understandings of mail fraud generally and to the “honest services” theory in particular. *See id.* at 376–77. The Supreme Court, however, dramatically limited the reach of the honest services statute, 18 U.S.C. § 1346, in *Skilling v. United States*, 561 U.S. 358 (2010).

64. Barkow, *supra* note 6, at 1002.

65. 488 U.S. 361, 412 (1989).

66. 487 U.S. 654 (1988).

approved the independent counsel provisions of the Ethics in Government Act over a fierce dissent by Justice Scalia, who argued that the Act's deviation from the constitutional framework presented a grave threat to liberty.⁶⁷ And *Loving v. United States*⁶⁸ held that Congress did not violate the separation of powers by delegating to the president the power to define aggravating factors necessary to impose capital punishment in the military justice system.⁶⁹

Yet even if the Supreme Court may not always apply the separation of powers in practice, the idea of separated powers still does meaningful work. It bears note that when sanctioning an apparent deviation from the formal division of power laid out in the Constitution, the Court is still careful to pay lip service to how separating powers preserves liberty.⁷⁰ Moreover, separation of powers could assume an even greater place in Supreme Court jurisprudence in the years to come. Justice Gorsuch, one of the Court's newest members, stressed separation-of-powers concerns in criminal cases while serving as a circuit judge.⁷¹ Justice Gorsuch may already be having some influence: After he joined the Court, it decided to hear argument in *Gundy v. United States*,⁷² which presented the question whether the Sex Offender Registration and Notification Act ("SORNA") improperly delegated legislative power by permitting the Attorney General to determine the applicability of the statute to sex offenders convicted before the statute's enactment. Then-Judge Gorsuch, while serving on the Tenth Circuit, had expressed a strong view that such a delegation would violate the Constitution⁷³—a view that he reiterated at the Supreme Court.⁷⁴ A plurality in *Gundy* ultimately rejected Justice Gorsuch's

67. *Id.* at 732–34 (Scalia, J., dissenting).

68. 517 U.S. 748 (1996).

69. *Id.* at 768–69.

70. *See, e.g., id.* at 756 (“Even before the birth of this country, separation of powers was known to be a defense against tyranny.”).

71. *See, e.g., United States v. Games-Perez*, 695 F.3d 1104, 1117 (10th Cir. 2012) (Gorsuch, J., dissenting from the denial of rehearing en banc) (“There can be fewer graver injustices in a society governed by the rule of law than imprisoning a man without requiring proof of his guilt under the written laws of the land.”).

72. 139 S. Ct. 2116 (2019).

73. *See United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring) (adopting an alternative reading of the statute in light of the constitutional problems posed by the defendant's reading).

74. *Gundy*, 139 S. Ct. at 2132 (Gorsuch, J., dissenting).

view,⁷⁵ but he managed to attract the votes of Chief Justice Roberts and Justice Thomas.⁷⁶

Moreover, the objection that the federal system fails to meaningfully adhere to separation of powers ultimately underlines the importance of the inquiry here. The simplistic model of separated powers extolled by formalist judges and observers may be only a just-so story that fails to accurately describe both the past and the present state of our institutional arrangements. Yet it could remain true that as a myth, the story of separated criminal powers has great power, preventing us from understanding how our system really works—and, perhaps, how it could be improved.

D. Separated Criminal Powers in the States

The story I've told thus far has largely focused on federal courts and the U.S. Constitution. Yet things may look quite different in the states, where the overwhelming bulk of criminal prosecutions actually take place.⁷⁷ And indeed, there is reason to think that the story of the separation of powers in state criminal justice systems diverges from the federal account.

For example, though federal courts rejected judicial crime creation early in American history,⁷⁸ state courts continued to recognize that power for much longer.⁷⁹ In fact, as Carissa Byrne Hessick has

75. See *id.* at 2129–30 (plurality opinion) (concluding that the congressional delegation was constitutional because the statute confined the Attorney General's discretion and the delegated authority was "distinctly small-bore").

76. Justice Gorsuch's views could still ultimately prevail at the Court. Justice Kavanaugh did not participate in the case, and Justice Alito indicated that he might have agreed with the dissent had there been a majority willing to reconsider the nondelegation doctrine. See *id.* at 2130–31 (Alito, J., concurring). It is possible that Justice Alito preferred to reconsider the issue in a civil case, given that he usually favors government interests in criminal cases. See Michael A. McCall & Madhavi M. McCall, *Quantifying the Contours of Power: Chief Justice Roberts & Justice Kennedy in Criminal Justice Cases*, 37 PACE L. REV. 115, 139 (2016) (describing Justice Alito as "the Court's most conservative member in criminal justice issues"). It also bears note that since *Gundy* was decided, Justice Ginsburg has been replaced by Justice Barrett, who is likely to adopt more formalist positions in separation-of-powers cases.

77. See Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 801 (2003) ("Roughly 95% of felony cases are disposed of in state court. When one includes misdemeanors and violations, the figure exceeds 99.5%.")

78. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.")

79. For a discussion of the slow decline of judicial crime creation in the states, see John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190–95 (1985). For a particularly late example of a court recognizing a common-law crime, see *Commonwealth v. Mochan*, 110 A.2d 788 (Pa. 1955).

observed, some state constitutions *continue* to permit it.⁸⁰ And beyond the context of outright crime creation, some state courts take a more active role in shaping the content of criminal law through statutory interpretation as compared to federal courts.⁸¹

Moreover, there is certainly significant variety in the precise details of state constitutional systems. For example, state systems tend to divide executive power into more separately elected institutions and offices than the federal system does.⁸² Some states also formally assign powers to different branches than the federal system; some state constitutions provide that local prosecutors are part of the *judicial* rather than the executive branch.⁸³ One state—Nebraska—uses a unicameral legislature.⁸⁴ And one significant difference that may have significant implications for criminal justice is many states' reliance on an elected judiciary.⁸⁵

Nonetheless, the separation-of-powers ideas I have explored thus far still have great relevance to states. All state constitutional structures start from the basic Madisonian premise of a division of power between legislative, executive, and judicial branches.⁸⁶ No state,

80. See Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 978–92 (2019) (“Judicial crime creation is still explicitly permitted in several states. And even in those jurisdictions that have abrogated criminal common law, we can find criminal prosecutions that can only be explained in terms of judicial crime creation.”).

81. Consider one example. Though a number of state legislatures have adopted reforms based on the Model Penal Code, state courts have “frequently disregarded them” or have “construe[d] those interpretive provisions themselves in a way that undercuts their effect.” Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 293 (2012).

82. In most states, for example, the attorney general is elected separately from the governor. See Note, *Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 HARV. L. REV. 973, 982 (2014) (“Today, forty-three states elect their attorneys general.”). In addition, most states rely on elected local prosecutors as well. See CARISSA BYRNE HESSICK, THE PROSECUTORS & POL. PROJECT, NATIONAL STUDY OF PROSECUTOR ELECTIONS 4 (Feb. 2020), <https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf> [https://perma.cc/CM7Z-WGS5] (“Forty-five states elect prosecutors on the local level.”).

83. Neil C. McCabe, *Four Faces of State Constitutional Separation of Powers: Challenges to Speedy Trial and Speedy Disposition Provisions*, 62 TEMP. L. REV. 177, 209–10 & n.259 (1989) (citing Texas and Florida as examples of states that consider prosecutors part of the judiciary).

84. See *History of the Nebraska Unicameral*, NEB. LEGISLATURE, https://nebraskalegislature.gov/about/history_unicameral.php (last visited Oct. 26, 2020) [https://perma.cc/323B-3QFC] (“Nebraska’s legislature is unique among all state legislatures in the nation because it has a single-house system.”).

85. See *Judicial Election Methods by State*, BALLOTPEDIA, https://ballotpedia.org/Judicial_election_methods_by_state (last visited Oct. 26, 2020) [https://perma.cc/FAS8-2W4X] (cataloguing which states elect judges).

86. See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1190 (1999) (“Separation of powers is a bedrock principle to the constitutions of each of the fifty states.”); see also McCabe, *supra* note 83, at 179 (“All of the early state constitutions regarded separation of powers as ‘an article of faith’ and incorporated the theory in some form.” (footnote omitted)).

for example, uses a parliamentary constitutional structure.⁸⁷ In addition, some federal constitutional constraints—such as the bans of bills of attainder and ex post facto laws,⁸⁸ and the Fourteenth Amendment Due Process Clause’s rule against vague criminal statutes⁸⁹—effectively impose some separation-of-powers rules on state governments.

Moreover, state courts, just like federal courts, often rely on separation-of-powers principles to reject innovations they see as intruding on one or another branch’s prerogatives.⁹⁰ And while more states could in theory reject the federal system’s approach to the judicial role in statutory interpretation, most seem to find the federal approach persuasive. Abbe Gluck’s influential study of state-court interpretive methods found a wide consensus around the use of a textualist approach.⁹¹ In one example, she notes that the Texas Court of Criminal Appeals relied on federal case law to insist on a textualist approach—to the point of refusing to apply a state statute instructing the court to consider legislative history even when a statute seems textually unambiguous.⁹² The federal system’s approach to separation of powers casts a long shadow.⁹³

Finally, the existence of the states is all the more reason to think harder about the value of the separation of powers. State constitutions may permit greater structural experimentation than the federal system

87. Eugene Volokh, *Separation of Powers in the States*, VOLOKH CONSPIRACY (May 13, 2020 12:22 PM), <https://reason.com/2020/05/13/separation-of-powers-in-the-states/> [<https://perma.cc/7W4M-V2R2>].

88. U.S. CONST. art. I, § 10.

89. *See, e.g.*, *Kolender v. Lawson*, 461 U.S. 352, 353–54 (1983) (holding a state statute impermissibly vague).

90. *See, e.g.*, *Meshell v. State*, 739 S.W.2d 246, 257 (Tex. Crim. App. 1987) (holding that a statute requiring prosecutors to go to trial within set time period violated separation of powers); *People v. Thomas*, 109 P.3d 564, 568 (Cal. 2005) (holding that a law requiring a judge to obtain the prosecutor’s consent before committing a juvenile defendant to the Youth Authority violated separation of powers).

91. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010) (examining the various approaches to judicial interpretation adopted by specific state courts and concluding that textualism is a prevalent method).

92. *Id.* at 1787–89.

93. As another example, consider that some state courts have followed the logic of *Brogan*, discussed *supra* at Section I.C, in rejecting the “exculpatory no” defense to state statutes criminalizing false statements—even though the Supreme Court’s interpretations of federal criminal law are in no way binding on state courts interpreting state law. *See* *People v. Ellis*, 765 N.E.2d 991, 1001 (Ill. 2002) (rejecting the “exculpatory no” doctrine); *State v. Reed*, 695 N.W.2d 315, 327 (Wis. 2005) (finding no exculpatory denial exception in an obstruction statute).

does,⁹⁴ but the prestige and importance of the federal model may blind us to alternative arrangements that are inconsistent with the Madisonian design.⁹⁵ Indeed, state courts, like federal courts, routinely extol the virtues of the separation of powers and use it to justify various decisions.⁹⁶

E. Scholarly Views

Among scholarly observers, there is broad agreement about the importance of the separation of powers for preserving liberty in the criminal process. Frequently, the separation of powers serves as a component in an argument for or against a particular doctrine or proposal.⁹⁷ Rarely does the separation of powers in criminal law itself get close scrutiny. To the extent that observers bother to justify the separation of powers itself, they gesture towards the dangers of consolidated power⁹⁸ or reiterate the idea that requiring each branch of government to assent before punishment can be imposed protects liberty.⁹⁹

Yet such assertions are not typically accompanied by explanations of the causal mechanisms by which separating powers into

94. For a recent argument by one of the nation's leading federal judges that state constitutions deserve greater attention from lawyers and legal scholars, see JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

95. As Stephanos Bibas has noted, the federal model looms larger than life in legal scholarship addressing criminal justice. Bibas, *supra* note 77, at 800–04.

96. *See, e.g.*, State v. Rice, 279 P.3d 849, 857 (Wash. 2012) (“The division of governmental authority into separate branches is especially important within the criminal justice system, given the substantial liberty interests at stake and the need for numerous checks against corruption, abuses of power, and other injustices.”); State v. Cain, 381 So. 2d 1361, 1367 n.8 (Fla. 1980) (“[T]here is considerable authority for the proposition that prosecutorial discretion is itself an incident of the constitutional separation of powers, and that as a result the courts are not to interfere with the free exercise of the discretionary powers of the prosecutor in his control over criminal prosecutions.”); Petition of Padget, 678 P.2d 870, 873 (Wyo. 1984) (holding that a state statute permitting district courts to order prosecution violated the separation of powers because “the charging decision is properly within the scope of duty of the executive branch”); Calvin v. State, 87 N.E.3d 474, 475 (Ind. 2017) (“Judicially rewriting [a habitual offender provision] now would violate separation-of-powers principles and our strict construction of criminal statutes.”).

97. *See, e.g.*, Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 725–30 (2017) (justifying a clear-statement rule for criminal statutes on separation-of-powers grounds); McConkie, *supra* note 2, at 25–39 (arguing that the separation of powers justifies more rigorous discovery obligations on prosecutors); Julie Rose O’Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021, 1089–91 (2018) (arguing that separation of powers concerns require a presumption against extraterritorial application of criminal statutes).

98. *See, e.g.*, Hopwood, *supra* note 97, at 725 (“With diffuse power, no single branch can accumulate the ability under the criminal law to act as prosecutor, jury, and judge.”); O’Sullivan, *supra* note 97, at 1089–90 (“It would be a dangerous concentration of power for life tenured judges to both propound the law and to preside over its interpretation and administration.”).

99. *See* sources cited *supra* note 2.

distinct functional branches of government will protect liberty and produce other benefits. To some degree, this may be driven by an intuitive revulsion against the perceived opposite of the separation of powers—the prospect of one person or institution exercising total, consolidated power over criminal justice (think of the proverbial “judge, jury, and executioner”). It may also be a reflection of how constitutional faith in our system’s approach to the separation of powers is deeply engrained in public consciousness.

Among the few scholars to have addressed the justifications for separation of powers in criminal justice in depth is Barkow, whose article *Separation of Powers and the Criminal Law* is the leading work on the subject.¹⁰⁰ Barkow begins by observing how when it comes to criminal law, the Supreme Court has largely rejected a formalist analysis of the separation of powers in favor of a flexible balancing test.¹⁰¹ She then argues that adherence to the traditional separation of powers is even more important in the criminal context than in the administrative realm, given the absence of legislatively created checking processes providing review of prosecutorial decisionmaking,¹⁰² as well as the lack of effective political accountability for prosecutors.¹⁰³ Because of our system’s failure to respect the separation of powers, Barkow argues that prosecutors have accumulated power that properly belongs to other branches of government through their control of the charging and plea bargaining process.¹⁰⁴ In response, she urges a stricter adherence to formal separation-of-powers rules in criminal cases.¹⁰⁵

Along related lines, Baughman contends that the “separation of powers is failing” in criminal law.¹⁰⁶ Though the constitutional design “carefully divides power between the three branches and allows the

100. Barkow, *supra* note 6; see also McConkie, *supra* note 2, at 20 (noting that the Supreme Court cited Barkow’s article in its opinion in *Missouri v. Frye*, 566 U.S. 134, 144 (2012)).

101. See Barkow, *supra* note 6, at 1002–09.

102. See *id.* at 1021–25 (noting that structural constraints imposed on agency actions are not applied to prosecutors, though prosecutors also wield both adjudicative and executive powers).

103. See *id.* at 1028–31 (arguing that judges and criminal defendants voice weak opposition to prosecutors’, victims’ rights groups’, and the public’s calls for expansive criminal laws).

104. See *id.* at 1025–28, 1033–34 (“The same prosecutor who investigates a case can make the final determination about what plea to accept. There is therefore no structural separation of adjudicative and executive power, and defendants have no right to a formal process or internal appeal within the agency.”).

105. See *id.* at 997, 1053–54 (arguing the government encounters different “structural, institutional, and political checks when it proceeds criminally as when it proceeds in a civil regulatory action, so the Constitution’s separation of powers takes on greater significance in the criminal context because it provides the only effective check on systemic government overreaching”).

106. Baughman, *supra* note 3, at 1139.

three branches to counterbalance each other,” she argues, “the criminal justice system has changed from what was envisioned as a slow-moving apparatus—where divergent interests balanced each other—to a machine that processes many individuals extremely quickly.”¹⁰⁷ Blaming this failure on the unwillingness of the branches to check each other, Baughman thus urges the creation of various “subconstitutional checks”—reforms not explicitly required by the Constitution that would “compensate for the lack of functioning structural checks in modern criminal justice.”¹⁰⁸

These scholars are deeply critical of our system’s failure to adhere to the separation of powers in practice. And Barkow and Baughman both see the system as failing because it lacks sufficient checking mechanisms to prevent abuses and excessive punishment. Both also argue for various institutional reforms that would provide the checking that they see as missing in our current system. As will become clear, I share much common ground with both Barkow and Baughman on these points.

Where we may disagree, however, is on the precise way to diagnose our system’s failings—a difference that may suggest a divergence of prescribed remedies. Both seem to accept our constitutional premise that following the formal separation of powers along functional lines would provide meaningful checking.¹⁰⁹ Barkow urges a return to the constitutional separation of powers,¹¹⁰ whereas Baughman urges subconstitutional reforms as a kind of second-best alternative to a properly functioning constitutional system.¹¹¹ In this way, neither asks whether the American approach towards the separation of powers in criminal justice is a sensible one.

Indeed, few pose that question at all. One possible exception is the work of William Stuntz. In his seminal account of how prosecutors and legislatures cooperate to expand the scope of substantive criminal law, Stuntz observed that the division of lawmaking and law-enforcement power between the two branches “is less important, and

107. *Id.* at 1078.

108. *Id.* at 1122.

109. That approach makes some sense, assuming one is working within the existing system and making arguments designed to potentially appeal to courts—the Supreme Court in particular—which are unlikely to question the wisdom of the Founders’ vision.

110. *See* Barkow, *supra* note 6, at 997, 1053.

111. *See* Baughman, *supra* note 3, at 1122 (“[S]ubconstitutional checks in the three branches may compensate for the lack of functioning structural checks in modern criminal justice.”). Barkow, for her part, has extensively argued for such reforms in other work. *See infra* note 246.

less substantial, than one would think.”¹¹² Yet Stuntz offered no larger theory of, or proposed alternative to, the separation of powers.

The most significant dissenting voice to question the traditional separation of criminal powers is Kahan, who argues that DOJ interpretations of federal criminal statutes should receive *Chevron*¹¹³ deference.¹¹⁴ Though inconsistent with the classical understanding of separated powers, Kahan claims such a regime would actually better protect the values underlying the separation of powers than current arrangements.¹¹⁵ Kahan argues that in our current system of federal criminal law, judges exercise such an extensive amount of interpretive discretion that the system is really “a regime of delegated common law-making.”¹¹⁶ He contends that extending *Chevron* deference to interpretations of federal criminal statutes articulated by the DOJ would actually advance rule-of-law values. In particular, he suggests that deference would actually moderate federal criminal law because “Main Justice” would be likely to preclude interpretations that would otherwise be advanced by overreaching local U.S. Attorneys.¹¹⁷ Individual U.S. Attorneys are more likely to be captured by parochial political interests than high-level officials in Washington, D.C. would be, Kahan contends.¹¹⁸

While offered as a proposal for one particular doctrinal result, Kahan’s arguments serve as a critique of dominant wisdom about the separation of powers in criminal law more generally. Yet for the most part, Kahan’s arguments have been taken as a provocative thought experiment, rather than internalized as a meaningful challenge to our system’s premises.¹¹⁹ Whatever the merits of his argument about *Chevron* in particular, Kahan rightly recognizes that we cannot analyze

112. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 535 (2001). For a similar insight, see Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009) (“While in theory the separation of powers should check prosecutors, in practice it does not.”).

113. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

114. See Kahan, *supra* note 11, at 469–71 (urging that application of the *Chevron* doctrine is the proper mechanism by which to enable the executive branch to act as an “authoritative law-expositor”).

115. *Id.* at 471.

116. *Id.* at 470.

117. See *id.* at 496–97 (“But under *Chevron*, prosecutorial readings would be entitled to deference only if endorsed and defended in advance by the Justice Department itself.”).

118. See *id.* at 496–99 (“Distant and largely invisible bureaucrats within the Justice Department lack the incentives that individual U.S. Attorneys have to bend the law to serve purely local interests.”).

119. One piece of evidence for this claim is the fact that Barkow’s seminal article cites Kahan only once, and then merely to briskly dismiss his arguments. See Barkow, *supra* note 6, at 1049 n.321 (“The threat prosecutors pose to individual liberty would be magnified even further if one were to give the Department of Justice *Chevron* deference to its interpretations of criminal law.”).

the institutional division of power in criminal justice by using rigid, formal categories like “executive” versus “legislative.” Instead, we must analyze the system in terms of how it will actually operate under realistic and contingent assumptions about how power is distributed and exercised.

II. SEPARATING OUT SEPARATED POWERS

Having surveyed the terrain in the previous Part, this Part will now clear the brush by trying to clarify some important questions involved in analyzing the separation of powers in criminal law. First, Section II.A tries to understand what exactly the “separation of powers” means. Drawing on recent work in public law, Section II.A explores understandings of, and approaches to, the goal of separating government power. Section II.B then identifies and explores different potential rationales for separating power over criminal justice. The goal of this Part is to enable a critical reappraisal of the separation of powers in criminal law—an effort that can only be completed once we better understand what, exactly, the separation of powers might mean, and what benefits it is supposed to provide.

A. What Does Separation Mean?

In American legal discourse, it is common to argue that the separation of powers dictates or forbids a particular approach. But the “separation of powers” is often used as shorthand for different concepts. Most significantly, observers often use “separation of powers” interchangeably with the notion of “checks and balances” as if the ideas were identical or complementary, when in fact—as this Section will explain—they are at best orthogonal, perhaps even contradictory. Understanding how the American approach to separated powers mixed these two distinct ideas is critical to any normative analysis. This Section then goes on to explain how recent work in public law has further complicated traditional thinking about the separation of powers by showing how formal separations of power need to be “passed through” to underlying allocations of power in society and by identifying ways in which government power can be checked and diffused within

the confines of single political institutions—the so-called “internal separation of powers.”

1. Separated Functions Versus Checks and Balances

As explained above, the American constitutional design combined two different, and distinct, approaches when laying out the allocation of power at the structural level.¹²⁰ The first approach was Montesquieu’s ideas about the importance of strictly separating the core government functions—executive, legislative, judicial—into distinct branches. The second was the tradition of mixed government, in which different groups in society are each given a role in decisionmaking so that each can serve as a check on the others, thus preventing any one group from dominating and abusing power. Thus, rather than strictly confining each branch to its designated function, the American Constitution permits some intermingling of functions in order to permit the branches to provide a check on their counterparts—with “ambition” providing the appropriate incentive for each branch’s officials to serve the checking function.¹²¹

Disentangling the two threads that the Founders wove together leads to significant insights. Tracing the conflation of the two distinct approaches from the Founding forward,¹²² Elizabeth Magill concludes that the project of diffusing *power* in public law has no necessary logical relationship to separating government *functions* according to the executive, legislative, and judicial branches (even assuming such functions can be neatly defined).¹²³ Although these two ideas have long been treated interchangeably by scholars and courts discussing the separation of powers, the two strategies do not inevitably travel together. The problem, Magill explains, is that it is far from obvious why separating branches along functional lines is key to creating the “tension and competition” needed to effectuate meaningful checks on power:

Distinct institutional identities that arise from the allocation of government functions may be an ingredient in fostering tension and competition. Then again, one might

120. See *supra* Section I.A (discussing the mixed government model and functional separation of powers proposed by Locke, Montesquieu, and Beccaria).

121. See *supra* Section I.B (noting that the separation of the power to punish among the branches protects personal liberty).

122. See Magill, *supra* note 43, at 1161–67 (providing historical context about the intellectual development of separation of powers and checks and balances).

123. *Id.* at 1197–98. Magill separately argues that such functions lack precise definitions. See M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604 (2001) (“[W]e have no way to identify the differences between the powers in contested cases, and we are not likely to have one soon.”).

question whether it is functional separation that creates distinct institutional identities. One can easily imagine competition and tension among departments without any functional differentiation. Imagine three separate institutions all devoted to a functional task called lawmaking. All are assigned the same job of making law, but the three institutions have different structures: distinctive selection systems (elected on a local, state, or national basis, or appointed), varying terms of office (two years, four years, six years, life tenure), different internal structures, and—largely, it would seem, as a result of these differences—different institutional identities. One would expect there to be competition and tension among those institutions arising not from the three entities performing different government functions, but as a result of the distinctive structures, and hence characters, of the institutions.¹²⁴

Functional differentiation may even *undermine* interbranch competition, Magill suggests. “As compared to two institutions engaged in the same function, institutions that are assigned different tasks might be less competitive with one another—with different tasks, each would have an independent sphere of competence.”¹²⁵

Many implications flow from Magill’s insight. Most significantly, it becomes clear that there are various alternative design strategies, other than dividing political power by function, that might effectively diffuse state power. Looking back to the lessons of mixed government, and its division of power according to class, some recent thinkers have examined how structural reforms might “directly incorporate[] economic class into government structure.”¹²⁶ Ganesh Sitaraman has explored ideas like wealth caps for senators as potential strategies for countering the disproportionate power monied interests wield in our political system.¹²⁷ Similarly, Kate Andrias argues that “law reform should focus on facilitating the participation of countervailing organizations in government, as well as moderating the role of money in campaigns, increasing transparency, and protecting individual voting rights.”¹²⁸ In her vision, nongovernment institutions like labor unions and political parties could provide the checking function that the branches were supposed to provide under the Madisonian vision.¹²⁹

There are many more possible strategies for diffusing state power. In our system, Congress *duplicates* the legislative function

124. Magill, *supra* note 43, at 1171–72 (emphasis omitted).

125. *Id.* at 1172.

126. Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1518 (2016).

127. *See id.* at 1519–26 (arguing that “constitutional engineers could focus on wealth requirements” for both the House of Representatives and the Senate); *see also* GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION* 276–79 (2017) (proposing a wealth cap for members of the House of Representatives and proposing that one senator from each state fall below a certain wealth level).

128. Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 495 (2015).

129. *See id.* (“[O]ther systems have allocated power across informal political substructures, like parties, unions, and social groups, in order to promote democratic decisionmaking.”).

through the strategy of bicameralism, enabling the House and Senate to each check the other by giving each an effective veto on legislation.¹³⁰ Similarly, federalism—the division of power between different levels of government—provides overlapping authority, and observers often suggest that it offers some of the same benefits as the separation of powers.¹³¹ Other countries have experimented with a strategy known as consociationalism, in which power is formally dispersed among different ethnic or religious groups within a diverse society.¹³² And Jacob Gersen has argued for “political institutions that exercise functionally blended authority in topically limited domains” as an alternative to Madisonian separation of functions.¹³³ Separating formal power along functional lines is by no means the only strategy for diffusing state power.

2. Formal Separation and Political Power

To understand how power is actually concentrated, analyzing the formal and institutional allocations of power laid out in a constitution is not enough. Instead, as Daryl Levinson argues, understanding where state power truly resides requires “‘passing through’ the power of each institution to the underlying interests that control its decisionmaking.”¹³⁴ Structural analysis of government power must not ask merely which government actor formally exercises power over a particular situation, but also which interest groups and other democratic-level forces influence and constrain that official’s decisionmaking in practice.

This perspective can show how some formal divisions of power might be useful, some might be counterproductive, and some might be entirely irrelevant:

Sometimes, shifting power at the level of government institutions really will have no consequences at all for interest-level power. If a dominant interest group or single-minded majority can equally well control decisionmaking in Congress, the White House,

130. See Sargentich, *supra* note 8, at 436 (“[T]he bicameralism requirement . . . amounts to an internal check on the legislature.”).

131. See, e.g., Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 104 (2002) (“[T]he values to be protected in horizontal separation of powers and vertical federalism are quite similar.”).

132. See AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 1–2, 25–52 (1977) (providing case studies of consociational democracy in Austria, Belgium, the Netherlands, and Switzerland); Sujit Choudhry, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES 3, 13–19 (Sujit Choudhry ed., 2008) (discussing Arend Lijphart’s consociational democracy model).

133. Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 303–04 (2010).

134. Levinson, *supra* note 44, at 83.

administrative agencies, or anywhere else, then moving institutional-level power around will make no difference.¹³⁵

For this reason, analyses that consider only the formal separation of powers will be unable to make useful predictions about whether a particular constitutional design will prove effective. Put another way, no particular formal division of power can be relied on to predictably protect particular values, since the efficacy of formal arrangements will turn on contingent social and political facts. As Aziz Huq puts it, “The effects of structural choice on first-order goods are mediated through a sufficiently dense scrim of political, institutional, and legal effects that they cannot often provide secure guidance for the attainment of those first-order goods.”¹³⁶

Consider one particularly accessible example. A reason that Madisonian separation of powers has proven less effective than Madison expected, Levinson and Richard Pildes argue, is the rise of political parties. Under the Madisonian approach, separating powers among functionally differentiated institutions would preserve liberty so long as “those who administer each department” possessed “the necessary constitutional means and personal motives to resist encroachments of the others.”¹³⁷ “Ambition” would “counteract ambition,”¹³⁸ the theory went. Yet because government officials in American society typically act in accordance with the preferences of the political parties to which they belong—rather than in line with the interests of the governmental institution they happen to work for—“single-party control of multiple branches of government will tend to create cross-branch cooperation among like-minded officeholders,” rather than the careful checking and balancing that formal separation of functions is supposed to create.¹³⁹ “The high school civics model of the separation of powers is therefore false.”¹⁴⁰

3. External Versus Internal Separation

A final important insight into the separation of powers is that the project of checking and diffusing state power can be effectively accomplished within single institutions—such as the executive branch

135. *Id.* at 85.

136. Aziz Z. Huq, *Libertarian Separation of Powers*, 8 N.Y.U. J.L. & LIBERTY 1006, 1038–39 (2014).

137. THE FEDERALIST NO. 51, *supra* note 34, at 321–22 (James Madison).

138. *Id.* at 322.

139. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2323 (2006).

140. Kermit Roosevelt III, *Detention and Interrogation in the Post-9/11 World*, 42 SUFFOLK U. L. REV. 1, 31 (2008).

or particular administrative agencies. To be sure, it has long been understood that *functions* can be separated within one unified chain of political power, as contemplated by the Administrative Procedure Act for certain kinds of administrative-agency decisionmaking.¹⁴¹ But more recently, scholars have drawn their attention to other ways that power is diffused within the executive branch that do not necessarily involve separating functions in the traditional way. Such “mechanisms that create checks and balances within the executive branch” are typically called “internal separation of powers.”¹⁴² Such arrangements are often offered as second-best alternatives to the traditional tripartite separation of powers envisioned by the Founders.¹⁴³ Such internal constraints might also serve as a complement to the traditional, external separation of powers, with each mutually reinforcing the other to more effectively check state power.¹⁴⁴

Consider a few examples. Jon Michaels has argued that the traditional, three-branch separation of powers of the Founders’ design has been supplanted by “a secondary, subconstitutional separation of powers that triangulates administrative power among politically appointed agency leaders, an independent civil service, and a vibrant civil society.”¹⁴⁵ As Michaels tells it, civil servants and civil society serve as “a secondary, administrative system of checks and balances” that “check presidentially appointed agency leaders potentially indifferent, if not hostile, to statutory directives and apt to prioritize partisan interests.”¹⁴⁶ Thus, administrative governance—far from being the constitutional abomination the skeptics bemoan—in fact sits “firmly within the constitutional tradition of employing rivalrous institutional

141. For the classic treatment, see Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 759–61 (1981). For an even more classic treatment, see Kenneth Culp Davis, *Separation of Functions in Administrative Agencies*, 61 HARV. L. REV. 389, 389–90 (1948).

142. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2318 (2006); see also, e.g., Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 428–29 (2009) (noting that the internal separation of powers mechanisms work within one branch, particularly the executive branch because of “broad delegations of power to the Executive Branch that characterize the modern administrative and national security state”); Metzger, *supra*, at 427–34 (defining and explaining the concept of internal separation of powers).

143. Katyal, *supra* note 142, at 2316 (“The first-best concept of ‘legislature v. executive’ checks and balances must be updated to contemplate second-best ‘executive v. executive’ divisions.”).

144. See Metzger, *supra* note 142, at 425–26 (discussing “the crucial relationship between internal and external checks on the Executive Branch”).

145. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 520 (2015).

146. *Id.* at 534.

counterweights to promote good governance, political accountability, and compliance with the rule of law.”¹⁴⁷

A similar story can be told about the national security state. A bevy of critics argue that unchecked executive power over national-security matters poses a grave threat to liberty. Not so, argues Jack Goldsmith. Instead, in his account, a presidential “synopticon”—“courts, members of Congress and their staff, human rights activists, journalists and their collaborators, and lawyers and watchdogs inside and outside the executive branch”—constantly monitors the president’s actions in the national-security context.¹⁴⁸ These watchers extract information, ensure that the executive branch operates within the confines of the law, and play a significant role in influencing policy. The resulting system significantly constrains executive power yet also simultaneously (and paradoxically) empowers the executive by increasing the president’s credibility.¹⁴⁹

To take one final example, Jean Galbraith has described a diffuse set of legal, institutional, and political checks on presidential power in the realm of international commitmentmaking. These checks—which include “international organizations, administrative agencies, and occasionally even US states”¹⁵⁰—“look very little like the check built into the original constitutional design.”¹⁵¹ Despite their lack of constitutional pedigree, in practice these checks “serve as robust structural safeguards on presidential power.”¹⁵²

As these examples suggest, in a number of contexts there have emerged effective governmental checking mechanisms that are distinct from the formal divisions of power among the branches written into the Constitution. These novel checking mechanisms have, at least according to some accounts, proven effective notwithstanding the fact that they do not track the Madisonian division of power between functionally differentiated institutions.

B. Why Separate Criminal Powers?

The previous Section sought to untangle the multiple possible meanings of the concept of separated powers. But to evaluate how and

147. *Id.* at 520.

148. JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* 207 (2012).

149. *Id.* at 207–08.

150. Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675, 1681 (2017).

151. *Id.* at 1700.

152. *Id.*

whether to separate power in criminal justice, we must also understand what we hope to accomplish by separating powers. To that end, this Section explores possible justifications for the separation of powers in criminal law. Commentators tend to see the separation of powers as critical for preserving a number of values. The leading argument involves the preservation of “liberty” and the prevention of “tyranny.” But observers often argue for other benefits of separated powers, which are distinct and perhaps in tension with the primary goal of liberty-preservation and tyranny-prevention.¹⁵³ This Section will try to identify all the potential values protected by separation of powers with precision, while later evaluating whether separation of powers actually works as suggested.

1. Worst-Case Scenarios

Perhaps the most commonly identified justification for the separation of powers—especially where criminal law is at issue—is the need to prevent the threat of tyrannical government. Montesquieu stressed this danger, warning that “[a]ll would be lost” if the power to punish were held in its totality by “the same man or the same body of principal men.”¹⁵⁴ The Founders parroted this admonition, with Madison urging that a system without separated powers “may justly be pronounced the very definition of tyranny.”¹⁵⁵ The Supreme Court has repeated it whenever separation of powers have been at issue.¹⁵⁶ Scholars emphasize this value as well.¹⁵⁷

The English tradition that influenced the founding generation was worried about the dangers of “the rule of an absolute monarch subject to no will but his own.”¹⁵⁸ Under such a regime, neither life nor

153. Scholars rarely acknowledge the potential tensions between the different values that separation of powers is supposed to protect in criminal justice, or even that the separation of powers itself might be in tension with other, deeper values. For an exception, see Paul H. Robinson, *The Moral Vigilante and Her Cousins in the Shadows*, 2015 U. ILL. L. REV. 401, 405 (2015) (noting that interests such as “maintaining a proper separation of powers” can conflict with the criminal justice system’s goal of doing justice).

154. MONTESQUIEU, *supra* note 23, at 157.

155. THE FEDERALIST NO. 47, *supra* note 34, at 301 (James Madison).

156. *Loving v. United States*, 517 U.S. 748, 756 (1996) (“Even before the birth of this country, separation of powers was known to be a defense against tyranny.”); *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (“[W]e simply have recognized Madison’s teaching that the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch.”); *United States v. Brown*, 381 U.S. 437, 443 (1965) (observing that the separation of powers “was . . . looked to as a bulwark against tyranny” by the Framers).

157. See, e.g., Barkow, *supra* note 6, at 1012–13 (discussing safeguards against the legislature’s exercise of judicial power).

158. GWYN, *supra* note 15, at 18.

property would be secure, as English thinkers demonstrated by pointing to examples of arbitrary rule in other lands.¹⁵⁹ That fear seems, if anything, more well-founded today than it did in the seventeenth century.

Indeed, the last century provided numerous examples of tyrannical governments in which the criminal justice system was used as a tool of oppression. Nazi Germany—an example of tyranny if ever there was one—established a “People’s Court” that was used “not to implement impartial justice, but to ruthlessly expurgate . . . enemies of the Reich.”¹⁶⁰ The court served as anything but an independent check on executive power. “The Führerprinzip, or leadership principle, required judges to adhere to the Führer’s policies and programs. They derived their powers and prerogatives from Hitler and were responsible to rule in accordance with his dictates.”¹⁶¹ Soviet Russia under Stalin similarly used the power to punish as a powerful weapon against dissidents and other political enemies.¹⁶² Similar stories can surely be told about other totalitarian societies as well.

These societies differed significantly in their ideologies, but they are united by the absence of meaningful checks, formal or informal, on state power more generally and on the power to punish in particular.¹⁶³ Avoiding such worst-case scenarios seems like the very minimum one might hope separating powers would accomplish.

2. Agency Costs

The goal of avoiding tyranny, and its converse, preserving “liberty,” is about more than simply avoiding true despotism. Separation of powers is often also understood to prevent smaller tyrannies—more minor abuses of power. If too much power over criminal punishment were given to one individual decisionmaker, that

159. *See id.* at 18–22 (citing many English thinkers pointing to rulers such as King Louis XIV).

160. Matthew Lippman, *The White Rose: Judges and Justice in the Third Reich*, 15 CONN. J. INT’L L. 95, 140–41 (2000).

161. *Id.* at 114.

162. For example, Soviet Russia famously relied on “show trials” in which politicians who had run afoul of Stalin were forced to publicly confess to crimes against the state before being sentenced to execution or long terms of imprisonment. PETER H. SOLOMON, JR., *SOVIET CRIMINAL JUSTICE UNDER STALIN* 238 (Stephen White ed., 1996).

163. Justice Scalia was fond of making this point, which he detailed by enumerating the individual-rights guarantees found in the Soviet Constitution. Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417, 1418 (2008). As he put it, such provisions “were not worth the paper they were printed on . . . because the *real* constitutions of those countries—the provisions that establish the institutions of government—do not prevent the centralization of power in one man or one party, thus enabling the guarantees to be ignored.” *Id.*

person might use that power against the wrong people out of bad motives. Or that decisionmaker might devote insufficient time and resources towards correctly identifying the guilty, and thus end up punishing innocent people. Separation of powers might prevent these kinds of abuses and failures by ensuring that multiple independent decisionmakers are involved in the punishment process.

On this account, separation of functions serves as a device to limit *agency costs*. Under this framework, government agents work on behalf of the public, the principal. Because the agents do not perfectly share the principal's interests, a variety of devices—of which separation of powers is merely one possibility—serve to incentivize good behavior by agents and to detect bad behavior so faithless agents can be punished or removed.

As Tom Ginsburg and Eric Posner explain:

[T]he separation of powers makes it harder for one group to control all the branches of government, and hence reduces the risk of wayward agents. More broadly, separating powers means that each serves as the monitor of the other powers, minimizing the risk [that] anyone can deviate too far from the interests of the principal.¹⁶⁴

As to criminal justice in particular, some version of this argument lies behind many critiques of the breadth of prosecutorial power—especially when it comes to the plea bargaining process. As Barkow argues, prosecutors' unchecked power to obtain guilty pleas means "the state can selectively target groups and individuals for prosecution in a manner that avoids *both* political and judicial oversight. . . . The Framers recognized dangers such as this and required a strong judicial role in criminal cases to prevent it."¹⁶⁵

3. The Rule of Law

The separation of powers in criminal law is also often claimed to protect important "rule of law" values. To be sure, the rule of law is a fuzzy concept; what it requires may be difficult to pin down with great specifics. In broad outlines, though, it suggests a system in which all people—both "government officials and the populace"—"are generally bound by and abide law."¹⁶⁶ This general requirement may imply some more specific prescriptions (though this is subject to debate). For example, for the people to be able to follow the law, it seems important

164. Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1590 (2010).

165. Barkow, *supra* note 6, at 1049.

166. *E.g.*, Brian Tamanaha, *Functions of the Rule of Law 1* (Wash. Univ. Sch. of L. Legal Stud. Rsch. Paper Series, Paper No. 18-01-01, 2018), <https://ssrn.com/abstract=3113820> [<https://perma.cc/M3R6-RXTQ>].

for the law to be made up of general rules that are available publicly, capable of being understood, and subject to change only prospectively.¹⁶⁷ This is not to say that our legal system perfectly respects these requirements—retroactive common-law regulation by courts, for example, seems hard to square with the notion that law should be changed only by public statutes prospectively¹⁶⁸—but the rule-of-law ideal at least provides a yardstick against which a legal system can be measured.

The Montesquieuan strategy of dividing functions between institutions seems, at first glance, designed to facilitate some of these values. Consider the requirement, just mentioned, that legal rules be general, public, comprehensible, and prospective. Such a requirement seems especially important when it comes to criminal law, where liberty and life are at stake. And in theory, requiring that criminal law be made by a legislature, enforced by a separate executive branch, and interpreted by an independent judiciary seems likely to operationalize these values. As Amar puts it, the Framers' vision of separated powers would "embody the rule of law":¹⁶⁹

Because branches independent of Congress would ultimately apply these laws . . . legislators would have strong incentives to define punishable misconduct with precision and moderation All persons seeking to obey the law and avoid punishment would be able to learn what their legal duties were. For his part, the president could prosecute only those who ran afoul of legislatively defined standards The judiciary . . . would be required to follow the laws as laid down by a separate branch and to treat like cases alike regardless of party identity.¹⁷⁰

This rule-of-law conception of the separation of powers has influenced thinkers for centuries.¹⁷¹ And it continues to have significant purchase today, with both judges¹⁷² and commentators¹⁷³ continuing to explicitly link the two ideas together. I will express skepticism of this

167. For the classic explication of some of these requirements, see LON L. FULLER, *THE MORALITY OF LAW* 46–49, 51–65 (rev. ed. 1969).

168. For an argument that common-law reasoning might not actually involve prospective lawmaking, see Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 534–35, 568–70 (2019).

169. AMAR, *supra* note 42, at 63.

170. *Id.*

171. For a discussion of early British thinkers who emphasized this conception, see GWYN, *supra* note 15, at 56–57.

172. *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 241 (1995) (Breyer, J., concurring in the judgment) (“[T]he authoritative application of a general law to a particular case by an independent judge, rather than by the legislature itself, provides an assurance that even an unfair law at least will be applied evenhandedly according to its terms.”).

173. *See, e.g.*, Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 304–11 (1989).

rationale later on,¹⁷⁴ but for now it suffices to note that it is one conceivable—and significant—benefit of the separation of powers.

Thus far, I have considered the separation of powers as purely instrumental in terms of accomplishing rule-of-law values. But there is one account in which the separation of powers into Montesquieuan functional branches is an end unto itself. Jeremy Waldron argues that each government function has an inherent “integrity” that deserves respect.¹⁷⁵ On this account, “the dignity of legislation, the independence of the courts, and the authority of the executive” each have their own “role to play in the practices of the state.”¹⁷⁶ Moreover, “[a]part from the integrity of each of these phases, there is a sense that power is better exercised, or exercised more respectfully so far as its subjects are concerned, when it proceeds in th[e] orderly sequence” suggested by the separation of powers.¹⁷⁷

Waldron’s efforts to reconstruct the justifications for Montesquieu’s approach to the separation of powers are commendable; he ably demonstrates why other justifications for separation-of-powers ideas more generally—such as the diffusion of power and the need for checks and balances—do not serve to justify the functional separation Montesquieu saw as so critical.¹⁷⁸ Nonetheless, his efforts to construct a stable foundation for the separated-functions approach are not obviously palatable to those who do not share his intuition about the “integrity” of distinct stages of lawmaking.

4. Negative Liberty

Another possible justification for the separation of criminal powers is a preference for negative liberty. As noted above, many have emphasized how the separation of powers means that multiple branches of government need to agree before the state can punish someone.¹⁷⁹ As Judge Frank Easterbrook puts it, “criminal punishment is meted out only when all three branches (plus a jury representing private citizens) concur that public force may be used against the

174. See *infra* Section III.A (discussing the insufficiency of separation of powers in preserving Madisonian values).

175. Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 459–66 (2013).

176. *Id.* at 434.

177. *Id.* at 435.

178. See *id.* at 440–42 (noting that goals of power diffusion and checks and balances do not alone account for the separation of powers in its adopted form).

179. See *supra* note 2 and accompanying text (discussing separation of powers in the context of criminal prosecutions).

individual.”¹⁸⁰ Similarly, the Washington Supreme Court has explained: “Separation of powers ensures that individuals are charged and punished as criminals only after a confluence of agreement among multiple governmental authorities, rather than upon the impulses of one central agency.”¹⁸¹

This justification seems to embody a general preference against the use of criminal sanctions. In theory, imposing more veto gates before government can exercise coercive power should make action more costly and thus less likely to occur.¹⁸² As Barkow puts it, “[I]ncreased costs are in a very real sense the point of separation of powers.”¹⁸³ By making it more challenging to bring criminal prosecutions, she argues, the separation of powers means that “the government has to think about where and when” it will exercise its powers to punish.¹⁸⁴

5. Specialization and Efficiency

On the negative-liberty account, the separation of powers builds a kind of inefficiency into government, requiring the state to pass through multiple veto gates before acting. But there is also an account on which the separation of powers—in its Montequieuian, separation-of-functions variety—actually makes government *more* efficient. This was one of the early justifications for separated powers. As Paul Verkuil puts it, “It was difficult for a legislature or parliament to execute laws due to the cumbersomeness of size, the lack of secrecy and the infrequency of sessions. The executive became a logical necessity for government to function effectively.”¹⁸⁵ As far as criminal law is concerned, a separate executive branch conducting trials before an independent judiciary might actually be able to punish criminals more

180. Easterbrook, *supra* note 2, at 1914.

181. *State v. Rice*, 279 P.3d 849, 857 (Wash. 2012) (en banc).

182. In a somewhat related vein, consider Richard Fallon’s response to Jeremy Waldron’s critique of judicial review. Waldron argued that, under certain assumptions, “the case for consigning . . . disagreements [about individual rights] to judicial tribunals for final settlement is weak and unconvincing, and there is no need for decisions about rights made by legislatures to be second-guessed by courts.” Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1360 (2006). Fallon’s response is that even if Waldron is correct that legislatures are better able to resolve rights questions than are courts, his argument would still fail “if some rights deserve to be protected by multiple safeguards or veto powers.” Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 *HARV. L. REV.* 1693, 1699 (2008). Like the negative-liberty argument considered above, the critical assumption in Fallon’s argument is a presumption against action by the state: one of his assumptions is that “errors of underprotection — that is, infringements of rights — are more morally serious than errors of overprotection.” *Id.*

183. Barkow, *supra* note 6, at 1052.

184. *Id.*

185. Verkuil, *supra* note 173, at 303.

quickly than a supreme legislature proceeding via bills of attainder. On this account, the virtue of the separation of powers is that it forces *specialization*.

Specialization could have a number of benefits. One potential benefit is accuracy in the distribution of criminal punishment. Ensuring that there are different actors or institutions with defined roles and identities might lead to more accurate decisionmaking. This rationale seems particularly applicable to the separation of functions between prosecutors and judges. It seems plausible that the skills and mindset needed to be an effective prosecutor—such as zealous advocacy—are inconsistent with the approach needed for effective judging (or finding facts as a juror). Moreover, the ways in which power is separated might actually *create* distinct role identities: defining one branch’s role as “neutral adjudication” could, for example, encourage the people occupying that role (judges) to internalize their responsibility to be neutral more than they would if functions were not differentiated among different decisionmakers.

6. Producing Better Policy

Finally, one could think that the separation of powers will somehow lead to better government decisionmaking on the whole—that each branch checking the others will somehow produce policy that is wiser than that produced by one actor or institution acting alone. Here, too, one can trace a line back to early English thought on the separation of powers. As W.B. Gwyn explains, the “liberty” that the British thinkers like George Lawson invoked when discussing the powers of government was not merely a thin, procedural conception of the rule of law; it involved a substantive vision of the “rule of *just* law”—“moral law, natural law, the law of God.”¹⁸⁶

Modern commentators tend to not endorse natural law, but they do contend that insufficient attention to the separation of powers makes our criminal law substantively worse. Baughman, for example, argues that the failure of the separation of powers has led to significant substantive problems with criminal law—in particular, mass incarceration. She contends that “the lack of structural constitutional checks on prosecutors” has created a system in which prosecutors bring too many charges and seek penalties that are far too severe.¹⁸⁷ Baughman also attributes other problems like overcriminalization and

186. GWYN, *supra* note 15, at 12 (emphasis added).

187. Baughman, *supra* note 3, at 1112.

overly harsh laws to the absence of meaningful checking in our system.¹⁸⁸

Barkow makes a similar point. The separation of powers is supposed to make criminal prosecution costly, so the power will be exercised wisely, she argues. “If it comes cheaply, it will be used too often, and the political process will be unable to stop it.”¹⁸⁹ In Barkow’s telling, the separation of powers is not being rigorously enforced due to the rise of plea bargaining, meaning that prosecution has become too cheap—and incarceration rates are skyrocketing as a result.¹⁹⁰

III. AWAY FROM SEPARATED CRIMINAL POWERS

Having better clarified what separation of powers might mean, and what values it is supposed to advance, the next two Parts turn towards normative evaluation. This Part questions conventional thinking about the need for separation of criminal powers among functionally differentiated political institutions. Section III.A argues that the traditional approach to separated powers is insufficient to protect liberty and other important values recognized in the previous Part. Section III.B then argues that Madisonian separated powers is *unnecessary* to protect those values, and that alternative arrangements would not inevitably lead to the “tyranny” that observers fear. Section III.C then disentangles arguments for the separation of *functions* from the separation of *powers* at the institutional level; even if the former is a necessary ingredient of a healthy criminal process, the latter may not be.

A. Separated Powers as Insufficient

Above, I identified a number of values supposedly protected by the separation of powers.¹⁹¹ But will the Madisonian separation of powers actually serve those values? At the outset, it is important to reiterate what the precise question before us is. I am not asking whether *some form* of diffused power in government is important. Part IV will consider a range of such strategies that might be particularly effective for producing the goods we value in the criminal context. Here, the question is whether the separation of powers into three functionally

188. *See id.* at 1074, 1121 (explaining how a major spike in prison rates is due to prosecutors requesting longer sentences and increasing the number of charges).

189. Barkow, *supra* note 6, at 1052.

190. *See id.* (arguing that increased costs serve as a check on prosecutorial powers by forcing the government to prioritize more important prosecutions).

191. *See supra* Section II.B (discussing traditional justifications for the separation of powers).

distinct branches at the institutional level is a desirable strategy when it comes to criminal justice. Upon analysis, there is reason to suspect that Madisonian separation is not a reliable method for protecting the values we care about.

Begin with tyranny—a particularly frightening threat when it comes to the state’s power to punish. If one person or interest obtained total control of the criminal justice machinery, punishment could become a dangerous weapon against disfavored minorities, opposition political groups, and so on. The system should be designed to prevent such an outcome.

Yet it is not obvious why Madisonian separation of powers is the solution. For the separation of powers to serve as a tyranny-limiting mechanism, the different branches of government must be controlled by individuals or interests with the appropriate incentives to check each other. But nothing about separating the government *into distinct functional branches* makes that checking inevitable. As Levinson explains, “there is no linkage between the branches and any of the underlying social and political interests that might be in need of representation and protection. Nothing prevents the same factional interest from controlling all of the branches and using them in concert to work its will.”¹⁹²

This is not to say that how government power is (or is not) divided at the institutional level is irrelevant: “[D]ividing power at the institutional level does, in fact, create a systemic tendency toward diffusing and balancing power among a range of interests. The more government decisionmaking institutions, the greater the probability that multiple interests will participate in governance”¹⁹³ The point, though, is that nothing about division into *functional* branches makes that diffusion more likely. To illustrate this point, Levinson relies on his and Pildes’s earlier work on the “separation of parties,”¹⁹⁴ discussed above. That theory posits that “the degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by political party.”¹⁹⁵

A logical response might be that during periods of unified government—single-party control of the branches—we *don’t* inevitably see the criminal justice system used as a weapon of political oppression.

192. Levinson, *supra* note 44, at 100.

193. *Id.* at 109.

194. *See id.* at 90–91 (citing Levinson & Pildes, *supra* note 139, at 2315) (explaining that “separation of parties” theorizes that patterns of partisan control drive the main conflicts between the branches of government).

195. Levinson & Pildes, *supra* note 139, at 2315.

Despite recent concerns about politicization of the Justice Department,¹⁹⁶ for example, the most prominent federal prosecution that happened in the first two years of the Trump Administration—a period in which all three branches of government (including both houses of Congress) were controlled by Republicans¹⁹⁷—was a criminal investigation into the campaign of the Republican President by Special Counsel Robert Mueller. Why was the investigation permitted to continue until its conclusion¹⁹⁸ when the President almost certainly had the formal power to order the firing of Special Counsel Robert Mueller?¹⁹⁹ The apparent explanation is that the President’s ostensible Republican allies in Congress signaled that they would not have tolerated such a course.²⁰⁰ Doesn’t that mean the separation of powers worked?

Yes and no. The Mueller example—and, more generally, the President’s failure to turn the DOJ into a weapon against his enemies (all his tweeting notwithstanding²⁰¹)—illustrates the importance of diffusing state power among different individuals and institutions. It is not obviously a story about the success of the Madisonian design per se.

196. See, e.g., Andrew Cohen, *‘Lock Her Up’: Jeff Sessions’s Politicization of Justice*, BRENNAN CTR. FOR JUST. (July 26, 2018), <https://www.brennancenter.org/blog/jeff-sessions-politicization-justice/> [<https://perma.cc/NF29-ULQJ>] (arguing that Sessions has turned the Justice Department into a “partisan enforcement tool”).

197. In the case of the Supreme Court, it is perhaps fairer to say that the Court is controlled by Republican-appointed Justices.

198. Special Counsel Mueller delivered a report summarizing his conclusions to the Attorney General in March 2019. See 1 ROBERT S. MUELLER, III, U.S. DEP’T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019), <https://www.justice.gov/storage/report.pdf> [<https://perma.cc/S2BE-MTR7>] (completed report on the criminal investigation into Donald Trump’s 2016 presidential campaign).

199. Mueller was appointed by reference to (though not formally pursuant to) DOJ regulations implemented in 1999 that purported to impose some limits on the attorney general’s ability to remove a special counsel. See 28 C.F.R. § 600.7 (2019) (establishing that a special counsel can be disciplined or removed by the attorney general for cause, including for “violation of Departmental policies”). But Neal Katyal, who drafted the DOJ regulations, has himself acknowledged that notwithstanding the regulations President Trump could have ordered Mueller to be fired, either by claiming to identify some misconduct or by ordering the regulations to be overturned. See Neal Katyal, *Trump or Congress Can Still Block Robert Mueller. I Know. I Wrote the Rules.*, WASH. POST (May 19, 2017, 5:00 AM CDT), <https://www.washingtonpost.com/posteverything/wp/2017/05/19/politics-could-still-block-muellers-investigation-i-know-i-wrote-the-rules/> [<https://perma.cc/SHN2-97Q4>] (explaining that the president could order the attorney general to fire the special counsel or order the repeal of the special counsel regulations).

200. See, e.g., Elana Schor & Burgess Everett, *GOP Senators Break Ranks to Protect Mueller from Trump*, POLITICO (Apr. 11, 2018, 6:14 PM EDT), <https://www.politico.com/story/2018/04/11/trump-mueller-republican-senate-516431> [<https://perma.cc/RPR6-LMJC>].

201. See, e.g., Alexandra Ma, *‘Come on Jeff, You Can Do It!’: Trump Calls on Sessions and the DOJ to Investigate ‘the Other Side’ in Mocking Tweets*, BUS. INSIDER (Aug. 24, 2018, 6:21 AM), <https://www.businessinsider.com/trump-calls-on-jeff-sessions-doj-investigate-other-side-in-mocking-tweets-2018-8> [<https://perma.cc/XX8T-CSGF>] (discussing a number of Trump’s tweets encouraging Jeff Sessions to investigate Hillary Clinton).

Senate Republicans' support for the Mueller probe, such as it was, seems explained by the fact that those senators represent political constituencies whose preferences do not perfectly overlap with the President's personal interests.²⁰² It is not obviously explained by the fact that they are exercising *legislative* power in particular.²⁰³

Moreover, the account offered above may give too much credit to Congress and not enough to the President. There is no doubt that President Trump wanted the investigation (“witch hunt”²⁰⁴) to end and that he had the formal power to end it. But his failure to exercise that power may have as much to do with what he (and perhaps more importantly, his advisors) saw as the political costs for the President's own reelection chances if he were to fire Mueller, given how the public might have reacted. In this way, this story may provide an example of how “de facto constraints arising from politics” can prevent tyranny more effectively than formal legal constraints on power.²⁰⁵

Finally, a significant part of the Mueller story, and of the larger story about President Trump's failure to fully politicize the Justice Department (at least immediately²⁰⁶), has nothing to do with the separation of powers at the institutional level. With respect to the Mueller inquiry, it was not Congress that was investigating the Trump campaign; it was a prosecutor appointed by Deputy Attorney General

202. For an interesting examination of the different political constituencies that legislators and presidents serve, see Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006).

203. One can imagine, for example, a different system, in which an attorney general was elected separately from the president. See, e.g., Garrett Epps, *Picking the People's Lawyer*, SLATE (June 4, 2012, 5:01 PM), <https://slate.com/news-and-politics/2012/06/fixing-the-constitution-electing-the-attorney-general.html> [<https://perma.cc/ND9U-27D4>] (proposing that the Constitution be amended to make the attorney general an elected position). Even in instances of single-party control over both offices, that attorney general might still support an investigation of the president—but only if the underlying political incentives supported that course.

204. See Sahil Chinoy, Jessica Ma & Stuart A. Thompson, *Trump's Growing Obsession with the 'Witch Hunt'*, N.Y. TIMES, <https://www.nytimes.com/interactive/2018/08/22/opinion/trump-cohen-mueller-investigation.html> (last updated Aug. 23, 2018) [<https://perma.cc/WDX2-CYFU>] (providing a timeline of events in the Mueller investigation and Trump's tweets calling the investigation a “witch hunt”).

205. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 176 (2010).

206. Politicization concerns increased during the tenure of Trump's second attorney general, William Barr. His actions, including his handling of the Mueller Report, have received significant scrutiny and criticism. See, e.g., Chris Smith, *“It Would Be Ridiculously Naïve Not to Be Concerned”*: *Trump Has Politicized the DOJ. How Long Can the SDNY Hold Out?*, VANITY FAIR (July 8, 2019), <https://www.vanityfair.com/news/2019/07/trump-has-politicized-the-doj-how-long-can-the-sdny-hold-out> [<https://perma.cc/55R5-K37G>] (claiming that Barr's handling of the Mueller report is just one way the DOJ has been weaponized for partisan purposes); Benjamin Wittes, *Bill Barr's Low Moment*, LAWFARE (Apr. 10, 2019, 11:42 PM), <https://www.lawfareblog.com/bill-barrs-low-moment> [<https://perma.cc/4W5U-4UAW>] (analyzing Barr's comments about the FBI spying on the Trump campaign).

Rod Rosenstein—a Republican political appointee in the executive branch.²⁰⁷ Rosenstein’s decision to appoint Mueller was likely driven by a complex set of motives, both personal and professional, that did not align with President Trump’s interests. More generally, various structural features of the DOJ, a web of extralegal norms, and the complex professional identities maintained and cultivated by federal prosecutors and other federal law-enforcement agents ensure that the federal criminal apparatus does not immediately bend at the will of whoever happens to occupy the White House.²⁰⁸

This example shows how “the number and variety of interests participating in government decisionmaking is not just a function of the formal, constitutional divisions among the branches.”²⁰⁹ Whether a criminal justice system will be used tyrannically, then, seems to depend on whether enough distinct interests have a hand in controlling the system’s machinery to prevent any one interest from consolidating power and abusing it—which is a function of how power is actually distributed at the level of interests in society.²¹⁰ Whether government power is formally divided into three functional branches, or arranged in some other way, is not obviously what matters.

A similar analysis applies to the goal of limiting agency costs—which can be understood as more petty tyrannies. Ensuring that a multitude of interests take part in governing may help minimize agency costs, if the various interests have incentives to check each other. But dividing government power into three distinct functional branches provides no guarantee such checking will occur.

What about preserving the rule of law? Won’t separating the lawmakers, law enforcers, and law interpreters ensure that “legislators . . . have strong incentives to define punishable misconduct with precision and moderation,” that the executive will prosecute only those who violate “legislatively defined standards,” and that the judiciary “treat[s] like cases alike regardless of party identity,” as Amar argues?²¹¹ Perhaps, but the formal structure of government does not itself provide those incentives. When one interest controls all three branches of government, what is to stop the legislature from drafting

207. Katie Benner & Adam Goldman, *A Darker Portrait Emerges of Trump’s Attacks on the Justice Department*, N.Y. TIMES (Apr. 19, 2019), <https://www.nytimes.com/2019/04/19/us/politics/justice-department-trump-attack-mueller.html> [<https://perma.cc/TA5R-MD93>] (“Mr. Rosenstein . . . had an inside look at the investigation as its overseer and at Mr. Trump’s behavior as a top political appointee . . .”).

208. That said, the traditional separation of powers may have played a role here, if Rosenstein was concerned about a possible investigation by Congress.

209. Levinson, *supra* note 44, at 110.

210. *See id.* at 111 (“[F]ormal institutional divisions need not reflect divergent interests.”).

211. AMAR, *supra* note 42, at 63.

broad, vague statutes, the executive from enforcing those statutes selectively against political enemies or disfavored groups, and the judiciary from putting an interpretive stamp of approval on those prosecutions? Formal division of power into functional branches does not, by itself, preclude that strategy.²¹²

Nor will Madisonian separation of powers necessarily build in a presumption in favor of liberty. To be sure, spreading government power over multiple institutions may increase the likelihood (though not guarantee) that different interests play a role in effecting government policy.²¹³ But nothing about *functional* separation per se makes that effect more likely. If anything, dividing institutions by function seems less likely to protect negative liberty than a system in which power is dispersed among institutions charged with the *same* function. Functional separation means that each institution performs a different role which limits any given institution's ability to act as a meaningful veto gate.

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. If protecting liberty through the creation of veto gates is the goal, the best strategy might not be functional separation but functional *duplication*, a point explored at more length below.²¹⁴

As for accuracy, it is almost certainly true that a system that separates functions between decisionmakers is more accurate than one in which all decisionmaking power is consolidated within one decisionmaker—not just judge, jury, and executioner, but also legislator and prosecutor. But that obvious truth tells us almost nothing about

212. Cf. Jeffries, *supra* note 79, at 202–03 (exploring how the separation-of-powers problems created by judicial lawmaking can be recreated when legislators draft vague statutes).

213. See Levinson, *supra* note 44, at 109 (“The more government decisionmaking institutions, the greater the probability that multiple interests will participate in governance and that complete control over policy outcomes will not be in the hands of a single interest.”).

214. See *infra* Section IV.B (discussing how functional duplication can protect negative liberty by requiring multiple decisionmakers to sign off before a power can be exercised).

how functions should be distributed at the level of *institutions*; as I will discuss shortly, a system can separate functions among different individuals within a single political institution.²¹⁵

Nor does dividing power by functions necessarily produce better behavior, as the goal of specialization suggests. That is, simply creating a branch with a functionally defined identity provides no guarantee for how the officials who occupy that branch will behave. We cannot assume that a particular label attached to a government office or institution will necessarily imply certain kinds of behavior or incentives for the actors who fill that role. Labels and roles may shape incentives and behavior, but they also may not, and that effect cannot be taken for granted. (Consider, for example, the seemingly naïve Madisonian assumption that each branch will seek to maximize its own power instead of the partisan policy interests of the individuals who control those branches.²¹⁶)

Finally, that brings us to substantive policy. Will a system that separates power over criminal justice into distinct functional branches be more likely to produce good policy in criminal justice? It is not obvious why that would be so. Will the underlying democratic interests that control the three functional branches be different than in a system that consolidates power into a single institution, or diffuses power among institutions that are not functionally differentiated? There is no reason to assume that will be the case.

In response, someone might emphasize the importance of the independent, life-tenured judiciary and its role in checking the excesses of the political branches. Yet even this account does not provide a defense of *functional* separation of powers. One could imagine a different institution, not defined in terms of function, but one that was given the power to veto various criminal statutes and federal prosecutions and whose members were insulated from electoral politics with life tenure. Would that institution provide a more meaningful or less robust check on the scope of criminal power? One cannot answer that question without knowing more about what kinds of individuals would occupy that institution and how they would be chosen; the formal function assigned to an institution does not provide the answer.

Thus, it is hard to have any confidence that separating powers into functionally distinct institutions will protect the values we care

215. See *infra* Section III.C (discussing examples of separated functions within an administrative agency and within the military justice system).

216. See generally Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 950–53 (2005) (describing the Madisonian conception of competition between the branches and the political reality that party affiliation better predicts behavior than branch affiliation).

about. So far, though, the argument has progressed at the level of theory. How has the separation of powers actually fared in terms of producing good results in our own criminal justice systems?

At least according to the scholarly consensus, not very well. Perhaps few would argue that our system is truly tyrannical, at least in the same sense as the criminal justice systems in authoritarian societies. But there is significant criticism of various features of our current system. As numerous critics note, plea bargaining has created a system in which significant amounts of power are concentrated in the hands of prosecutors.²¹⁷ Legislatures delegate to prosecutors by passing broad criminal statutes with harsh penalties, prosecutors then resolve most cases through plea deals, and the judiciary provides little supervision of the process. That system is hard to square with rule-of-law values,²¹⁸ creates serious potential for abuse of power, and raises substantial concerns about accuracy.

Nor has the separation of powers been able to limit the scope of state power over criminal justice or to produce good policy, given the rise of mass incarceration despite formal respect for tripartite division of power in both state and federal governments.²¹⁹ And despite significant attention towards problems like unreasonable shootings and excessive force by police officers, as well as a spate of false convictions—many of which have been caused by prosecutorial misconduct—legislators have (at least until quite recently) seemed surprisingly uninterested in supervising or checking abuses by executive-branch law-enforcement officials.²²⁰

217. See, e.g., John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 124 (1992) (arguing that plea bargaining is a coercive system that transfers power to prosecutors); William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 557 (2016) (arguing that plea bargaining changes the balance of power in the criminal justice system by taking power away from judges and juries and giving it to prosecutors).

218. Carissa Hessick has made the rule-of-law point particularly well. As she puts it:

The conventional wisdom assumes that criminal statutes are better than criminal common law at vindicating rule-of-law values. But . . . our current system is not a system of precisely written statutes that target only particular harmful behavior. Our system of imprecisely defined crimes, broadly written statutes, and overly harsh punishments empowers prosecutors to make ad hoc and low-visibility decisions about the scope of criminal law. This current system fails to vindicate rule-of-law values

Hessick, *supra* note 80, at 996–97.

219. The literature on mass incarceration is vast. For a helpful guide to sources, see Nicole P. Dyszlewski, Lucinda Harrison-Cox & Raquel Ortiz, *Mass Incarceration: An Annotated Bibliography*, 21 ROGER WILLIAMS U. L. REV. 471 (2016).

220. See BRANDON L. GARRETT, *CONVICTING THE INNOCENT* 168–70 (2011) (noting that *Brady* violations by prosecutors have occurred in a number of convictions subsequently found to be false). In the wake of the police killing of George Floyd, there has been greater interest among politicians in police reform. See, e.g., Claudia Grisales, Susan Davis & Kelsey Snell, *Democrats Unveil Police Reform Legislation Amid Protests Nationwide*, NPR (June 8, 2020, 5:00 AM ET),

The typical response of those who recognize these problems is to acknowledge that the separation of powers is currently failing, but to argue that the problem is simply insufficient adherence to the separation of powers. If only courts would more rigorously enforce constitutional limits—say, by imposing more constraints on plea bargaining—the Founders’ design could help improve criminal justice.²²¹ The problem with this argument, though, is that 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. Consider Adrian Vermeule’s response to similar arguments by separation-of-powers purists in administrative law:

The classical Constitution of separated powers, cooperating in joint lawmaking across all three branches, *itself* gave rise to the administrative state. When critics . . . call for a return to the classical Constitution, they do not seem to realize they are asking for the butterfly to return to its own chrysalis.²²²

Much the same could be said to those who long for a return to the traditional separation of powers in criminal justice. The three-branch system of the Founders’ design is the same system that produced modern plea bargaining. Plea bargaining did not arise despite judicial opposition; far from it, as George Fisher has shown, courts were key players in the rise of plea bargaining precisely because plea bargaining makes judges’ jobs easier.²²³ Likewise, as Stuntz argued, legislators eagerly hand prosecutors broader and harsher criminal law because the two branches have aligned interests—prosecutors want broader laws, and legislatures trust prosecutors not to bring charges in situations that would create political blowback.²²⁴ One way to think about this state of affairs is to say that the separation of powers has failed. But perhaps it is more accurate to say that the separation of powers is working as we should expect it to.

<https://www.npr.org/2020/06/08/871625856/in-wake-of-protests-democrats-to-unveil-police-reform-legislation> [<https://perma.cc/WU8K-PQYU>] (describing the Justice in Policing Act of 2020, which represents “one of the most comprehensive efforts in modern times to overhaul the way police do their jobs”). Whether this interest in reform will prove lasting remains to be seen, however.

221. See, e.g., Barkow, *supra* note 6, at 1044–50 (noting that discretionary acts by prosecutors are virtually unreviewable by the other branches of government); Baughman, *supra* note 3, at 1132–36 (arguing for stricter judicial review of plea deals and for judges to enforce the constitutional rights of defendants).

222. ADRIAN VERMEULE, *LAW’S ABNEGATION* 46 (2016).

223. See GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 111–36 (2003) (exploring the historical development of the modern plea bargaining system and discussing the judiciary’s role in shaping the modern system).

224. See Stuntz, *supra* note 112, at 534–35 (“Lawmaking and law enforcement are given to different institutions, in part to diffuse power, but the institutions are usually seeking the same ends.”).

That is because, as discussed, the American approach to the separation of powers seems to rest on a faulty theoretical foundation. The Madisonian idea that ambition will check ambition—that each functionally separated branch will have incentives to check the others—does not appear to be a safe assumption. Dividing power into distinct legislative and executive branches may meaningfully check state power under certain circumstances—particularly, in times of divided government when it comes to issues on which the dominant political parties of the day disagree. But when those conditions do not prevail, separating power between a legislature and an executive branch may not make as much of a difference in terms of policy than the original theory seems to suggest.

Criminal justice illustrates the point all too well. Criminal justice policy appears to be one issue on which the two leading political parties have not always offered strikingly different visions. During some time periods, such as the 1980s through at least the early 2000s, both major political parties advanced generally tough-on-crime policies—presumably because those views enjoyed widespread support among the public.²²⁵ This has meant that, even during periods of divided government, the separation of power between distinct legislative and executive branches has provided an insufficient check on the scope of criminal justice—insufficient, at least, if the near-consensus view of the problems with mass incarceration is correct. This should not be surprising given the problematic assumptions underlying the Madisonian approach.

Many critics of the current state of criminal justice envision a significant role for the judiciary in meaningfully checking the political branches. Yet here too the underlying theory founders. The judiciary is itself ultimately constituted by the political process. To the extent that voters and their elected representatives have particular views about criminal justice policy, we should expect judges—who are elected themselves or appointed by other elected officials—to share those same views. Simply expecting judges to provide a meaningful check on the other branches because they are part of “the judiciary” is little more than magical thinking.²²⁶

In short, we should recognize that the failure of the three branches to consistently provide a meaningful limit on criminal justice

225. For an excellent overview of tough-on-crime politics and the rise of mass incarceration, see RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 105–24 (2019).

226. See Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1764 (2013) (“[J]udges do not stand outside the system; judicial behavior is an endogenous product of the system.”).

is not some unexpected bug; it is exactly what we should expect from the constitutional design. 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.

Under some circumstances, separation of functions at the level of elected political institutions might prove not merely futile but actually perverse. One argument in favor of separating powers rests on the toxic, tough-on-crime nature of criminal politics. On this account, separating powers may put a check on voters' worst impulses. And yet at the same time, electoral accountability over government actors is one important tool for protecting liberty, in criminal justice no less than in other domains. An unaccountable criminal justice apparatus is no less a threat to liberty; one need only recall Justice Scalia's famous dissent in *Morrison v. Olson*²²⁷ to recognize that threat. But separating powers can decrease the information available to voters. As Posner and Vermeule explain, "Because the agents usually must cooperate in order to achieve an outcome, the public will have trouble distinguishing each agent's contribution. Failure and success will be attributed to both, which means that the public cannot punish the agents on the basis of their performance" ²²⁸

Diffusing political responsibility for criminal justice policy into distinct branches may dilute accountability for bad policies, making voters' monitoring ability more challenging. Prosecutors can blame legislators for passing bad laws that must be enforced; legislators can blame prosecutors for bringing improper prosecutions. While some mix of accountability and insulation is probably optimal, there is no reason to be confident our system strikes the correct balance.

Moreover, to the extent that dividing power among different institutions creates an illusory safeguard for liberty—for all the reasons outlined above—that could be a dangerous illusion. Separation could make the public feel more comfortable with policies (such as broad criminal laws combined with selective prosecution) than it would if those policies were advanced by a single political institution. It is also possible that dividing power into functional branches could push policy in unproductive directions. Defining distinct branches based on function may encourage particular crime-control strategies that are amenable to both branches. Lawmakers may prefer passing broad laws

227. See 487 U.S. 654, 704–15 (1988) (Scalia, J., dissenting) (arguing that the president should have at-will removal power over executive officers, such as prosecutors, because the Constitution vested all executive power in the president).

228. POSNER & VERMEULE, *supra* note 205, at 119.

(for which they can take credit), thus giving prosecutors bigger weapons for obtaining convictions (for which the prosecutors can take credit) rather than alternative strategies that do not generate spoils for the executive branch. In this account, agency costs lead to government actors selecting policies that are not optimal from the perspective of the public as principal.

Ultimately, though, whether the traditional separation of powers is counterproductive is not critical; it suffices to show that Madisonian separation is an insufficient tool for protecting liberty and other values.

B. Separated Powers as Unnecessary

Even if the traditional separation of powers along functional lines is not a reliable strategy for protecting liberty and other important values, it still might be a necessary requirement of a society with a well-functioning criminal justice system. But it is not clear that even this much is true.

Consider the goal of avoiding tyranny more generally. If Madisonian separation of powers were necessary to prevent this worst-case scenario, that alone would be reason enough to support it. But the evidence for this claim is poor. In fact, around the world, countries like the United States that divide legislative and executive power into separately elected branches have actually fared *worse* than parliamentary systems (which combine legislative and executive power) in preventing *coups d'état*.²²⁹

As to criminal justice in particular, other countries show that different approaches can protect important values. Consider England, a country that, with its system of parliamentary supremacy, does not rely on the Madisonian separation of powers. The director of public prosecutions is an officer who answers to the attorney general.²³⁰ The attorney general is herself both an important executive official and (usually) a member of Parliament, and thus part of the legislature as well.²³¹ While a meaningful comparison of the English system and our own is beyond the scope of what is possible here, there is certainly no consensus view that the English criminal justice system compares

229. See Jonathan Zasloff, *The Tyranny of Madison*, 44 UCLA L. REV. 795, 811–12 (1997) (reviewing failure rates of presidential and parliamentary systems).

230. ATT'Y GEN.'S OFF., PROTOCOL BETWEEN THE ATTORNEY GENERAL AND THE PROSECUTING DEPARTMENTS 2–3 (2009).

231. CONSTITUTIONAL AFFAIRS COMMITTEE, CONSTITUTIONAL ROLE OF THE ATTORNEY GENERAL, 2006-7, HC 306, ¶ 1 (UK) (“All Attorneys General were, with the exception of only the most recent two past Attorneys General and the current Attorney General, also Members of Parliament who sat in the House of Commons.”).

unfavorably with our own in terms of the various values discussed above—let alone that it is tyrannical.²³²

Of course, the English system is not one in which legislative and prosecutorial power are truly held in the same hands. Though English prosecutors ultimately answer to the attorney general, an official who exercises both executive and legislative power, their decisionmaking over individual cases is insulated from political control by a layer of norms and rules that limit the attorney general's ability to interfere.²³³ Such an arrangement is a form of diffused and separated power. But it is not the "separation of powers" into *separately accountable political institutions* that American observers reflexively insist is so critical. Instead, it is something more like the *internal* separation of powers discussed above.²³⁴

But we need not look beyond our own shores for examples of systems that respect important values without dividing political power into the distinct functional branches envisioned by Madison. Within the American legal system, administrative agencies make rules, prosecute violations, and adjudicate disputes—all within the confines of one institution ostensibly exercising executive power.²³⁵ Those agencies do not, however, simply exercise undifferentiated power. Instead, power is diffused formally among different decisionmakers through separation-of-functions rules.²³⁶ And—on Michaels's account—administrative power is also diffused informally among political leadership, civil-service employees, and the greater public.²³⁷ Although constitutional

232. One leading comparative study of the American and British criminal justice systems identified ways in which the British system might be superior to our own. Although finding that "English procedures . . . are much less permeated with sensitivity to the rights of suspects and defendants than are American procedures," the author concluded that "the smoothness and civility of the process, the range of options offered to defendants, including the election of a summary trial, and the absence of the worst excesses of advanced plea bargaining, are real merits" in comparison to the American system. Graham Hughes, *English Criminal Justice: Is It Better than Ours?*, 26 ARIZ. L. REV. 507, 608, 611 (1984).

233. See ATT'Y GEN.'S OFF., *supra* note 230, at 5 ("Other than in [certain] exceptional cases . . . decisions to prosecute or not to prosecute are taken entirely by the prosecutors. The Attorney General will not seek to give a direction in an individual case save very exceptionally where necessary to safeguard national security.").

234. See *supra* Section II.A.3.

235. Whether administrative agencies exercise purely executive power—as opposed to also exercising judicial and legislative power, thus leading to possible constitutional problems under the nondelegation doctrine—has generated a fierce debate. For the leading argument that administrative agencies exercise purely executive power, see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

236. See generally Asimow, *supra* note 141 (explaining how federal agencies separate their functions within one decisionmaking body).

237. See Michaels, *supra* note 145, at 530–51 (arguing that the administrative state has evolved to include separation of powers principles).

formalists bemoan the rise of the administrative state,²³⁸ administrative law shows it is possible to implement protections for basic rule-of-law values within one chain of political accountability.

There are, to be sure, arguments that status-quo arrangements in administrative law provide insufficient protections for important values.²³⁹ And no doubt there is also a range of performance across agencies depending on the professionalism of their staffs and their precise institutional structures. Moreover, administrative regimes are usually backed by some prospect of independent judicial review, which can lend the enterprise legitimacy and check extreme abuses. Thus, one cannot say that administrative law shows us how law can function entirely without reliance on the traditional tripartite division of institutional power. Yet at the very least administrative law suggests—at minimum to those who are not deeply skeptical of the entire administrative state—the possibility that institutions that combine distinct functions of government can act consistently with important values.

Of course, criminal law is an area that is usually treated as categorically different from the domains in which our legal system uses an administrative approach. Despite repeated calls over the years for the imposition of rules governing the administrative process onto the criminal justice system,²⁴⁰ at present the protections of the Administrative Procedure Act “do not apply to the actions of key governmental officials and agencies exercising criminal power, particularly prosecutors.”²⁴¹ Indeed, the deeply held assumption that the criminal process is somehow unique or special, and not a proper area for administrative governance, is part of what makes Kahan’s

238. The leading criticisms of the administrative state include PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014), and Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994). For one answer to Hamburger’s question, see Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015) (reviewing HAMBURGER, *supra*). For an in-depth analysis of the current debates raging over the administrative state, see Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8–51 (2017).

239. Cass Sunstein, for example, has argued that the New Deal-era designers of modern administrative law were too eager to reject “the institutional system of tripartite government and checks and balances,” and thus calls for “a system of aggressive legislative, judicial, and executive control—a system in which the three institutions bring about something close to the safeguards of the original constitutional framework without retreating to anachronistic understandings of ‘limited government.’” Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 424, 429 (1987).

240. See, e.g., DAVIS, *supra* note 55, at 224–25 (stating that prosecutors should engage in agency-like rulemaking to inform the public of what will or will not be prosecuted); BARRY FRIEDMAN, *UNWARRANTED: POLICING WITHOUT PERMISSION* 92–113 (2017) (advocating for set rules, written in advance, to govern policing decisions).

241. Barkow, *supra* note 6, at 1024.

suggestion for *Chevron* deference for DOJ interpretations of federal criminal statutes so controversial.²⁴²

But from another perspective, we may already have an administrative system of criminal justice. As Gerard Lynch argues, our current criminal justice system—in which the overwhelming majority of cases are resolved by pleas rather than criminal trials—is in practice a largely administrative process, with prosecutors serving the role of administrative adjudicators.²⁴³ Others have recognized the ways in which the plea bargaining process deviates from the ideal of a criminal trial in which all three branches of government, as well as a jury, are confined to their proper roles.²⁴⁴

What we can see from Lynch's vantage point, however, is that the problem with plea bargaining may not be a failure to respect the traditional separation of powers. Instead, the problem may be that our de facto administrative process is not currently subject to rules channeling administrative discretion and formalizing the process of administrative adjudication.²⁴⁵ On this account, what is wrong with our current system is not that the executive branch controls too much of the process at the expense of other branches. It is that we have not designed the formal rules to take account of the reality that most of the power lies within the executive branch.²⁴⁶

242. Kahan, *supra* note 11.

243. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2120, 2127 (1998).

244. The literature criticizing plea bargaining is vast. For a sampling, see Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 *CALIF. L. REV.* 652 (1981); Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 *LAW & SOC'Y REV.* 527 (1979); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 *CRIM. L.Q.* 67 (2005); John H. Langbein, *Torture and Plea Bargaining*, 46 *U. CHI. L. REV.* 3 (1978); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 *YALE L.J.* 1979 (1992); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 *U. PA. L. REV.* 79 (2005).

245. See Lynch, *supra* note 243, at 2124 ("Because our governing ideology does not admit that prosecutors adjudicate guilt and set punishments, the procedures by which they do so are neither formally regulated nor invariably followed.").

246. Barkow herself highlights this problem. See Barkow, *supra* note 6, at 993 ("[U]nlike the administrative law context . . . the government faces almost no institutional checks when it proceeds in criminal matters."). In her article, *Separation of Powers and the Criminal Law*, Barkow seems to treat the first-best solution as a stricter enforcement of the traditional separation of powers. *Id.* Much of her other work, however, is oriented towards identifying practical checking mechanisms, such as those found in administrative law. See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *STAN. L. REV.* 869 (2009) [hereinafter Barkow, *Policing of Prosecutors*]; Rachel E. Barkow, *Foreword: Overseeing Agency Enforcement*, 84 *GEO. WASH. L. REV.* 1129 (2016) [hereinafter Barkow, *Agency Enforcement*]. To the extent we disagree, it is not about whether checking mechanisms are necessary; it is about whether the traditional Madisonian separation of powers, if followed carefully, would provide meaningful checking.

C. Separated Functions Without Separated Power

I should reiterate that the target of this Part has been the Madisonian separation of powers—the division of functions at the level of political institutions. Rejecting Madisonian separation does not imply a world in which all criminal decisionmaking power is vested in one person’s hands—a frightening prospect. Instead, one could easily imagine a criminal justice system that operated within one chain of political accountability, much like an administrative agency, but that still respected some form of the separation of functions by dividing responsibility for various decisions among distinct individuals. Such a system would avoid what seems most frightening about consolidating criminal power—the idea of a single individual with sole power to impose punishment (the feared “judge, jury, and executioner”)—without diffusing ultimate political accountability for criminal justice between distinct institutions.

This recognition suggests a different way of thinking about what might be wrong with our system. We divide political power over criminal justice between distinct political institutions—the legislature, the executive branch, and the judiciary—and yet in practice we have been left with a system in which significant amounts of the relevant decisionmaking—prosecution, adjudication, and even some degree of lawmaking—often takes place not just within the executive branch, but under the control of one individual (a prosecutor) due to the prevalence of plea bargaining and the tacit or explicit cooperation of the other branches. In the administrative system, by contrast, even when these functions take place within the same political institution, they are parceled out among different individuals according to separation-of-functions rules. The criminal justice system separates formal power while effectively consolidating functions when the opposite approach might be preferable.

Some have suggested reforms that would separate discrete functions within prosecutors’ offices. Barkow, for example, has argued that the prosecutors responsible for investigating and determining whether to proceed with a criminal case should not be the same prosecutors who then bring those cases to trial.²⁴⁷ Stephanos Bibas has argued that more hierarchical office structures, with greater internal review and supervision, could improve the quality of criminal prosecution.²⁴⁸ A better understanding of the limits of separated criminal powers reinforces those insights.

247. Barkow, *Policing of Prosecutors*, *supra* note 246, at 895–906.

248. Bibas, *supra* note 112, at 1000–07.

Much more could be said on this topic, but for now I will emphasize three points. First, separating functions need not be thought of as some kind of second best, a replacement for a working separation of powers at the institutional level.²⁴⁹ Far from it; separated functions, if accompanied with appropriate incentives for those performing different functions to act in the public's interests, could be the first best design alternative. At the very least, it is not obvious why a criminal justice system that looks like the idealized version of eighteenth-century criminal justice—with a full-dress jury trial being the norm—is superior to a well-regulated and well-designed administrative process.

Second, a system that unites political accountability over criminal justice into one political institution does not necessarily mean that any one person would, for practical purposes, exercise complete control over all individuals performing discrete functions within that institution. Even within one agency nominally controlled by a political official subject to presidential control, many factors can limit the degree to which political officials can control outcomes in particular cases. Informal norms about improper interference, civil-service protections, standards of professionalism, and many other forces can provide meaningful limits on the de facto ability of a higher-level political decisionmaker to influence particular decisions by actors on the ground. That is, some diffusion of power among different decisionmakers is possible even within single institutions.

Our system of military justice supports the point. When members of the armed forces are accused of crimes, they are not tried within the traditional three-branch criminal justice system. Instead, they are prosecuted and tried within the confines of the executive branch, through the military justice system.²⁵⁰ While the finer details are complex, for present purposes the key point is that for typical military defendants the process takes place entirely within the constitutional bounds of the executive branch, with most or all of the actors playing various roles being military officers ultimately accountable to the president.²⁵¹ Yet despite its seeming failure to

249. See generally William Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061 (2019).

250. See Uniform Code of Military Justice, 10 U.S.C. §§ 801-946a.

251. In a typical court-martial, the military judge, the prosecution and defense attorneys, and the "members" of the court-martial (the jurors) are all members of the military. 1 DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 8.3 (10th ed. 2019). Military defendants may, however, appeal their convictions to the Court of Criminal Appeals for their service branch, and then ultimately to the Court of Appeals for the Armed Forces ("CAAF"). 10 U.S.C. §§ 866-867. These courts are Article I tribunals, the judges of which are civilians appointed by the president and who serve for fixed terms but do not enjoy life tenure. In rare cases,

respect the separation of powers at the institutional level, the military justice system is not inevitably condemned as tyrannical. This is in large part because a complex set of informal norms and formal rules ensure that the results of courts-martial do not simply reflect the wishes of officers higher in the hierarchy, let alone the president, as commander in chief of the military. Instead, decisionmaking power is meaningfully diffused among different decisionmakers with different responsibilities and interests, rather than being wholly consolidated in the hands of one person at the top of the chain of command.

Consider a powerful example of how this system works in practice. The doctrine of “unlawful command influence” governs when “a superior substitutes (or attempts to substitute) his or her judgment for that of a subordinate who should be allowed to exercise independent judgment” in a court-martial.²⁵² The Court of Appeals for the Armed Forces “has shown on many occasions that it ‘is willing to address issues of unlawful command influence with severe and even drastic remedies, including setting aside the findings and sentence with prejudice.’ ”²⁵³ Given protections like these, one leading commentator on military justice concludes that the system “in many respects provides greater protection for an accused than does the civilian system.”²⁵⁴

Finally, a system that separates functions may not necessarily need to track Montesquieu’s tripartite structure since that precise division of functions does not appear to rest on any particularly stable theoretical foundation. Instead, particular functions should be separated when the costs of dividing responsibility (inefficiency and so on) are outweighed by the benefits of different decisionmakers (for example, where the risk of bias due to an earlier decision might infect decisionmaking at a later stage). Whether separating functions between rulemaking and prosecution is necessary, or whether particular prosecutorial functions need to be subdivided (such as investigation and advocacy, as suggested by Barkow²⁵⁵) turns on that

a military defendant can obtain Supreme Court review of a decision by the CAAF by writ of certiorari. Such grants of certiorari are rare enough that one observer “awards a ‘Golden CAAF’ to any counsel who gets a cert grant to review a CAAF decision.’ ” Steve Vladeck, *The Supreme Court’s Troubling Neglect of Courts-Martial*, JUST SECURITY (May 9, 2016), <https://www.justsecurity.org/30944/supreme-court-grant-servicemembers-cert-petition-time-1996> [<https://perma.cc/FF9K-5KK4>].

252. 1 SCHLUETER, *supra* note 251, § 6.3(C).

253. Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937, 946 (2010) (quoting Mark L. Johnson, *Confronting the Mortal Enemy of Military Justice: New Developments in Unlawful Command Influence*, ARMY L., June 2007, at 67).

254. 1 SCHLUETER, *supra* note 251, § 1.1(A).

255. See Barkow, *Policing of Prosecutors*, *supra* note 246, at 895–905 (arguing for separation of power between prosecutors making investigatory decisions and prosecutors making adjudicative decisions).

cost-benefit analysis, rather than on lofty declarations about the definition of tyranny.

IV. TOWARDS CHECKS AND BALANCES

The goal of the last Part was to argue that the traditional American understanding of the separation of powers—division of authority between three functionally differentiated political institutions—is not the only possible way to design a well-functioning criminal justice system. The question then becomes what the alternative organizing principle for the structure of criminal justice should be. This Part argues that “checks and balances” rather than the “separation of powers” should be the dominant paradigm in criminal justice. The values the separation of powers is supposed to protect would be better served by dividing authority over criminal justice not along functional lines, but instead by ensuring it is shared among different decisionmakers with the appropriate incentives to check each other.

Section IV.A considers various strategies for diffusing decisionmaking power over different interests in society. Section IV.B explores how encouraging the duplication of functions between individuals or institutions might better protect liberty than would ensuring that each player only performs one particular function. Section IV.C discusses various strategies involving “internal” separation of powers that diffuse power within the context of a single political institution, while also exploring the notion that non-state actors can provide meaningful checking. Section IV.D reviews ways the system could better promote effective electoral accountability.

These strategies could all provide useful guidance in designing a system that meaningfully checks and limits state power over criminal justice. I note, however, that they may not all serve as complements; some may serve as alternatives and they may directly conflict with each other in some contexts.

Before diving in, I will offer three important caveats. First, my concern here is with questions of constitutional and institutional design, not with immediate doctrinal reform. Some theories of constitutional interpretation—such as particularly rigid forms of originalism—may take off the table some of the design possibilities discussed here. But trying to theorize the ideal structure of the system can be valuable even if attaining that ideal is impossible for various practical reasons. Moreover, at least some of the ideas I discuss here could translate into smaller changes within the current constitutional

framework.²⁵⁶ In addition, as noted above, state constitutions may permit significantly more experimentation than the federal Constitution does.²⁵⁷ The states are important for another reason, too—their significant variation in the institutional details of their criminal justice systems can already provide examples of various checks-and-balances approaches, which can be better identified and understood through the framework offered here.

A second, related concern is that the ideas considered here could very well run into significant political obstacles if entertained as serious proposals for reform. To the extent that the current structure of the criminal justice system has led to insufficient checks on penal severity and other problems, it is far from clear why that same political system would adopt structural reforms to address those problems. Ignoring this problem would involve a significant fallacy,²⁵⁸ and for this reason this Part is largely agnostic about the feasibility of the possibilities addressed here.

That said, reform may be easier at some moments than others. Indeed, there is reason to think that American criminal justice is currently in the midst of a window in which reform that might have seemed unthinkable even a decade ago is possible. Within recent years, voters have elected a number of reform-oriented prosecutors;²⁵⁹ Congress passed an important reform reducing the severity of federal criminal law;²⁶⁰ and nearly two-thirds of Florida voters approved a measure restoring voting rights to felons.²⁶¹ Even more recently, the

256. To take one example: the discussion of duplication of functions may suggest that separation-of-powers arguments against judicial creation of defenses to criminal statutes should be reconsidered. See *infra* Section IV.E.

257. See *supra* Section I.D.

258. See Posner & Vermeule, *supra* note 226, at 1746–47 (“The analyst must account not only for the demand side of the problem (what solution a benevolent social planner would desire to institute) but also for the supply side of the problem (who will have the incentives to supply that solution, *given* the analyst’s diagnosis of the problem).”).

259. Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-police Groups Aren’t Happy.*, NBC NEWS (Aug. 19, 2019, 3:47 AM), <https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286> [<https://perma.cc/5GY8-LFNH>].

260. See Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next> [<https://perma.cc/5N8E-LEQS>] (describing the FIRST STEP Act, a significant piece of legislation for criminal sentencing reform).

261. German Lopez, *Florida Votes to Restore Ex-felon Voting Rights with Amendment 4*, VOX (Nov. 7, 2018), <https://www.vox.com/policy-and-politics/2018/11/6/18052374/florida-amendment-4-felon-voting-rights-results> [<https://perma.cc/H4HM-YV5Z>]. This measure was soon defanged by the Florida legislature, which passed a bill requiring felons to pay all court-ordered fines, fees, and restitution before regaining their right to vote. Lori Rozsa, *Florida Governor Signs Bill Making It Harder for Felons to Regain Voting Rights*, WASH. POST (June 28, 2019, 9:30 PM CDT),

political movement galvanized by the police killing of George Floyd has made once unthinkable reforms—such as transforming accountability mechanisms for police—into real possibilities.²⁶² Understanding the role of structure can help suggest where reform efforts could be directed during windows when change is possible.²⁶³ Perhaps more importantly, understanding structure may help us understand which reforms are likely to have staying power as the political winds change.

My final caveat is that the larger lesson of recent scholarship on the separation of powers is that it is impossible to make any bottom-line judgment on the costs and benefits of a particular government structure in a vacuum. Given how much turns on facts on the ground,²⁶⁴ we cannot have confidence about the real-world effects of various different structures without a richer analysis of political dynamics than I can perform here. Thus, while this Part will offer some thoughts on what a criminal justice system more oriented towards checks and balances rather than the separation of powers would look like, arguments that such reforms would actually lead to better results are necessarily speculative and at the very least highly contingent.

A. Diffusing Power Among Interests

If meaningfully diffusing and limiting state power over criminal justice is the goal, we need to start thinking about that project from a different perspective. Institutions could be structured so that decisionmaking power is shared and diffused among different *interests* in democratic society, rather than among functionally distinct institutions. This conception looks to the tradition of mixed government and its later instantiation as the idea of checks and balances for a blueprint for the structure of the criminal justice system. Other scholars have recently explored modern versions of mixed government's approach of directly incorporating class into government to limit the

https://www.washingtonpost.com/politics/florida-governor-signs-bill-making-it-harder-for-felons-to-regain-voting-rights/2019/06/28/5e446828-9a0b-11e9-916d-9c61607d8190_story.html [https://perma.cc/V6MJ-HQ93].

262. See, e.g., Weihua Li & Humera Lodhi, *Which States Are Taking on Police Reform After George Floyd?*, MARSHALL PROJECT (June 18, 2020), <https://www.themarshallproject.org/2020/06/18/which-states-are-taking-on-police-reform-after-george-floyd> [https://perma.cc/8SSBY-AJ9A].

263. Cf. Andrias, *supra* note 128, at 502 (arguing that understanding the structural effect of wealth on the constitutional order can provide ideas “if and when significant political and governance reform becomes possible”).

264. Cf. Huq, *supra* note 136, at 1038 (“The first-order preference for negative liberty yields only ambiguous and contingent lessons for the constitutional designer of governmental structures.”).

ability of the wealthy to control the political process.²⁶⁵ A similar approach, in which power is divided among distinct social interests with competing ideas about criminal justice, could be a useful model.

At least according to leading accounts of the state of the politics of criminal justice, our system does a poor job diffusing power among distinct interests. Observers argue that voters and their elected representatives consistently choose severe policies without sufficient regard for the people who bear the costs of those policies.²⁶⁶ On this account, the problem is a kind of process failure, explained by the fact that ordinary voters can imagine themselves as victims of crime but do not expect to be on the receiving end of criminal sanctions.²⁶⁷ This common lament about the toxicity of criminal politics can be understood as an observation about the role of interests—one tough-on-crime interest holds sway over criminal justice policy given the preferences of voting majorities.

Even if this account is correct about the state of voters' preferences, however, different structural arrangements might reduce or exacerbate some of these tendencies. It is not the case that every American has identical preferences for harsh policies; instead, preferences almost certainly vary depending on numerous factors like race, class, age, gender, zip code, and previous exposure to the system. Moreover, a number of powerful and organized interests—prosecutors' organizations, prison guard unions, for-profit companies that profit off of prison labor, and so on—may amplify and reinforce tough-on-crime preferences.²⁶⁸ One could imagine alternative ways of distributing power over criminal justice policymaking authority that would mute some of these political forces and amplify interests that would push policies in the other direction.

This way of thinking about the criminal justice system—understanding the distribution of power over criminal justice among social interests as an alternative strategy to the traditional separation of powers—recasts various debates. In this light, numerous seemingly distinct questions about the allocation of decisionmaking power are really separation-of-powers-type questions, of certainly no less—and

265. *E.g.*, Andrias, *supra* note 128; Sitaraman, *supra* note 126.

266. *See, e.g.*, BARKOW, *supra* note 225, at 105–23 (describing the political response to violent crime).

267. *See* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1090–93 (1993) (discussing the public's perception of crime); *see also* Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1115–17 (2015) (summarizing the literature on the political-process critique).

268. *See* BARKOW, *supra* note 225, at 112–19 (discussing the role of interest groups in criminal justice politics).

likely much more—importance than whether power over criminal justice is divided between functionally differentiated institutions. Consider a few examples.

1. Federalism and Localism

At what level of the political community should criminal justice policy be chosen? Town? County? State? The entire country? The answer in our current system seems to be “all of the above.” Policing is typically local, with decisionmaking controlled at the town or city level. Prosecutors are typically elected at the county level. Criminal laws are drafted at the state level (and to a somewhat lesser degree at the local level as well). And on top of all that is an overlapping federal criminal apparatus, with U.S. Attorneys (who superintend judicial districts that are either the totality of, or a subdivision of, a state) chosen by the nationally elected president in consultation with the Senate.

Is this the optimal approach for criminal justice policy? It is hard to know. One approach would be to treat all crime policy as a truly local matter. But one jurisdiction’s crime-control policies may create significant externalities given the mobility of potential criminals between jurisdictions. Whatever the right answer is, it seems likely that choices about how to distribute decisionmaking power have serious implications for criminal law. Statewide officials, as well as prosecutors elected by larger counties that include affluent suburbs, for example, may be more punitive than those elected by voters strictly within a city’s boundaries.²⁶⁹

More generally, a number of scholars have pointed to ways in which the distribution of policymaking power between different levels of government influences criminal justice policy. For example, David Ball has shown how some counties choose to punish well in excess of what their crime rates suggest is appropriate.²⁷⁰ As Ball explains, this problem may be driven by what Franklin Zimring and Gordon Hawkins have called the “corrections free lunch”—the fact that though “local officials, not state officials, control the inflow into prison,” it is state officials who are responsible for prison budgets.²⁷¹

269. In one well-known example, Bronx District Attorney Robert Johnson appeared to categorically rule out seeking the death penalty, leading Governor George Pataki to supersede his authority in a high-profile murder case. See, e.g., John A. Horowitz, Note, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 *FORDHAM L. REV.* 2571, 2581–87 (1997).

270. W. David Ball, *Tough on Crime (on the State’s Dime): How Violent Crime Does Not Drive California Counties’ Incarceration Rates - and Why It Should*, 28 *GA. ST. U. L. REV.* 987 (2012).

271. *Id.* at 991 (quoting FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 211 (1991)).

Another example is Stuntz's argument about the role of local democracy in criminal justice over the twentieth century. In his account, "when local politics governed the amount and distribution of criminal punishment, the justice system was stable, reasonably lenient, and surprisingly egalitarian."²⁷² As control over criminal justice shifted to higher levels of government—and thus to larger geographic areas where many of the voters would not directly bear the brunt of harsh policies—both severity and discriminatory punishment increased.²⁷³

Both of these accounts involve a story about interests and incentives. In the "corrections free lunch" story, county-level decisionmakers do not take into consideration the fiscal costs of their punitive decisionmaking. In Stuntz's argument, it is county and state-level decisionmakers who fail to internalize the *human* costs of the policies they pursue. Whether either (or both) of these accounts is right is not my present concern. I choose these examples, instead, to show how choices about geography *might* have significant implications for criminal justice policy. Choices about what vertical level of government at which decisions are made could matter as much, or more, than horizontal separation of powers between institutions.

2. Felon Disenfranchisement and the Prison Lobby

As noted above, some accounts of the harshness of criminal law in this country turn on statements about voter preferences. Yet *who* gets to vote on criminal justice policy is itself a contested question. All but two states forbid currently imprisoned felons from voting in elections.²⁷⁴ The majority of states forbid people on probation or parole to vote; a few states permanently disenfranchise all felons, while others permanently forbid some felons from voting or require them to reapply to restore their voting rights.²⁷⁵

A number of scholars and activists have drawn attention to this problem. A particular problem that commentators stress is such laws' troubling racial impact; given the racial disparities in how our system doles out punishment, the inevitable result of such laws is a racially skewed impact on the electorate.²⁷⁶ This effect—and its predictable

272. William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1973 (2008).

273. *See id.*

274. *See* CHRISTOPHER UGGEN, SARAH SHANNON & JEFF MANZA, THE SENT'G PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010, at 3 (2014), http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf [<https://perma.cc/6JEL-MHQ8>].

275. *Id.* at 2.

276. *See, e.g.*, George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1900 (1999); Daniel S. Goldman, *The Modern-Day Literacy*

consequences for partisan politics—is not lost on politicians on both sides, who either endorse or oppose disenfranchisement based on whether it helps or hinders their party.

Felon disenfranchisement surely has consequences for all kinds of policies,²⁷⁷ but its consequences on criminal justice policy are likely particularly serious. If it is a problem that most voters cannot imagine themselves as potential criminals, excluding the people most able to see things from the perspective of the convict is particularly damaging. As criminal law sweeps in more and more people with felony convictions, the electorate charged with power over policy would grow ever smaller.

Making matters worse, however, other hydraulic forces may push in favor of penal severity. Both corrections officer unions and the private prison industry have strong financial incentives to push back against efforts to reduce the prison population.²⁷⁸ This relative disparity in representation may result in criminal justice policies that are more punitive than what is really in the public's interest. These kinds of questions—who gets to vote on criminal justice policies and how much power organized interests have to advocate for their preferred policies—may be more consequential for the scope and shape of criminal law than which government institution formally exercises power.

These considerations suggest that decisionmaking institutions in criminal justice could be designed to reduce some of these effects, at least if muting their impact is seen as desirable policy. One conclusion might be that this is the best case for a muscular judicial role in criminal justice policy. Judicial insulation from politics and the relatively stringent rules about ex parte contacts in the judicial process may make the judiciary less susceptible to lobbying and less beholden to tough-on-crime voting blocs.²⁷⁹ At the same time, however, judges are themselves chosen by other political actors, and thus powerful interests

Test?: Felon Disenfranchisement and Race Discrimination, 57 STAN. L. REV. 611, 614 (2004); Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 730 (1998); J. Whyatt Mondesire, *Felon Disenfranchisement: The Modern Day Poll Tax*, 10 TEMP. POL. & C.R. L. REV. 435, 437 (2001).

277. For one example, felon disenfranchisement laws in Florida may have made the difference in the 2000 presidential election. See Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOCIO. REV. 777, 792 (2002) (estimating that, had disenfranchised felons been permitted to vote in the 2000 presidential election, Al Gore would have been the victor in Florida and, therefore, of the electoral college).

278. See Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 104, 107 (2016) (summarizing opposition to decarceration by prison unions and private prisons).

279. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 80 (1991) (discussing the argument that judges are more insulated from outside influences).

can simply lobby for tough-on-crime judges.²⁸⁰ Nor is it guaranteed that political insulation will lead to better decisionmaking absent a clearer theory of what it is that judges maximize.²⁸¹ Whatever the approach, though, a sensible structural design of the criminal justice system would have to take into account the power of various interests in society with motivations to push for particular criminal justice policies.

3. Criminal Law's Reach

As noted above, leading accounts of the process failure in criminal justice emphasize that ordinary people sympathize with crime victims but not criminal suspects and defendants. Yet if true, this statement is not an inevitable, immutable fact about society. Instead, it is a contingent truth that depends on the particular criminal justice policies we have. A system that distributed criminal punishment differently would actually create different kinds of interests within society, and thus different criminal law.

Consider two examples. First, in our system, prosecutors are given a significant amount of discretion and are largely free to decline to bring charges for many reasons. In theory, this arrangement should reinforce a bias towards liberty, with prosecutors acting as a check on unnecessary applications on criminal law. But the problem is, as Stuntz explained, that legislators know about prosecutorial discretion and take it into account when drafting criminal laws.²⁸² As I have argued elsewhere, a system that required or motivated prosecutors to bring all provable charges might change this dynamic if the threat of perfect enforcement transformed the underlying politics of crime definition.²⁸³

Along related lines, consider also our system's preference for minimizing false convictions at the expense of creating false acquittals. This preference flows from deeply held commitments, and some version of it is found in many legal systems over the ages.²⁸⁴ Whatever the merit of this principle, it should reinforce the electorate's bias in favor of severity, given that it will make law-abiding people all the more likely

280. *See id.* at 81–83 (explaining that although judges may not have ongoing political accountability, their appointments are susceptible to interest group influence).

281. *See id.* at 83–87 (noting that political insulation is not necessarily desirable according to interest group theory).

282. Stuntz, *supra* note 112, at 528 (“[D]iscretionary enforcement frees legislators from having to worry about criminalizing too much, since not everything that is criminalized will be prosecuted . . .”).

283. *See* Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 828–31 (2016) (arguing that more adversarial prosecutors may reduce legislative incentives to draft overly broad and overly harsh statutes).

284. *See* Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173 (1997).

to think they have no chance of ever being on the receiving end of criminal sanctions.²⁸⁵ The public will more likely serve as a meaningful check on criminal justice if more people realistically imagine the possibility of experiencing punishment.

Whether that effect is good or bad is not immediately obvious, of course. If the voting public were more concerned about personally facing criminal punishment, that might lead to better or worse policies in terms of overall welfare; it could well make voters too timid, choosing policies that were insufficiently severe to deter wrongdoing. Determining the optimal level of exposure to criminal penalties is difficult and perhaps impossible. The point, though, is that who the system threatens with punishment can play a role in who has a stake in limiting and checking the scope and severity of criminal law.

4. Criminal Juries

A checks-and-balances lens allows us to see more clearly a critically important institution: the criminal jury. Once historically important, the criminal jury has lost its preeminence and power in a world dominated by plea bargaining.²⁸⁶ From my perspective, what is valuable about the jury is not that ordinary citizens are better fact finders than experienced judges; rather, it is that the jury is a limited instantiation of the mixed-government tradition built into our constitutional design. Requiring juries, which are drawn from the population at large, to assent before a defendant can be imprisoned is important because it helps incorporate the views of people from a range of economic classes and backgrounds into the decisionmaking process. By requiring unanimity,²⁸⁷ and thereby permitting any one juror to veto

285. See Epps, *supra* note 267, at 1118 (“Voters will more freely support policies that treat convicted defendants harshly if they feel no risk of ever suffering criminal penalties.”).

286. See FISHER, *supra* note 223, at 179 (explaining that plea bargaining tends to remove from the jury the cases in which the defendant faces the clearest evidence of guilt while leaving for the jury determination of “closer” cases, ultimately hurting the system’s legitimacy).

287. In the federal system, criminal juries must be unanimous. See FED. R. CRIM. P. 31(a) (“The verdict must be unanimous.”); see also *Apodaca v. Oregon*, 406 U.S. 404, 413 (1972) (recognizing that permitting less than unanimous verdicts may lead to convictions “without the acquiescence of minority elements within the community”); *Johnson v. Louisiana*, 406 U.S. 356, 369–71 (1972) (Powell, J., concurring in the judgment) (recognizing that federal criminal juries operate under the unanimity rule). For many years, this requirement was not imposed on state criminal trials. See *Apodaca*, 406 U.S. at 413–14 (plurality opinion) (holding that a state conviction by a less than unanimous jury does not violate the right to trial by jury); *Johnson*, 406 U.S. at 369–77 (Powell, J., concurring in the judgment). The Supreme Court, however, in dicta a decade ago suggested that this anomalous ruling was incorrect. See *McDonald v. City of Chicago*, 561 U.S. 742, 765 n.14 (2010) (“[*Apodaca*] was the result of an unusual division among the Justices.”). Then, last term in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Court finally overturned *Apodaca* and imposed the unanimity requirement on state criminal jury trials.

the imposition of punishment, the jury-trial right permits a larger range of interests to participate in the decision to punish.²⁸⁸

This vision of the jury is one that is more tolerant of jury nullification than our judicial system is today. Despite deep historical roots going back before the Founding,²⁸⁹ courts today view jury nullification with disfavor. At best, it is tolerated as a safety valve for truly rare cases;²⁹⁰ much more common, though, is the view expressed by the Second Circuit, which “categorically reject[ed] the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent.”²⁹¹ Given the jury’s potential as a check, the way in which its power has been cabined may be regrettable.

To be sure, the criminal jury was unquestionably part of the Founders’ original vision. The right to a criminal jury is the only right mentioned in both the original Constitution and the Bill of Rights.²⁹² And many scholars have urged returning the jury to its former prominence. Barkow herself has, for example, argued that the jury has a “structural power to check general criminal laws—to nullify them in particular cases if equity requires.”²⁹³ Here, we certainly agree.

Where we may part ways, however, is in how exactly to diagnose the problem. In Barkow’s view, we have lost sight of the original Madisonian design: in her account, the jury is best understood as part of the judicial branch, and the erosion of its power has upset the division of power between the three branches of government.²⁹⁴ My critique is different. As I will explain at more length in the next Section, the blame for our system’s current attitude towards the jury can be laid at the feet of the functional separation of powers. As our system has increasingly fetishized the separation-of-functions view of the separation of powers

288. The Sixth Amendment jury-trial right only imperfectly provides these benefits, for it guarantees only that the jury be *drawn from* a fair cross-section of the community, not that any particular criminal jury be actually representative of the community. See, e.g., *Duren v. Missouri*, 439 U.S. 357, 367–70 (1979) (ruling that an exemption from jury service that disproportionately affected women violated the Sixth Amendment). In practice, this means that many defendants could have juries that only represent a small slice of interests in the community.

289. For historical background, see Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 169–75 (1972).

290. See, e.g., *United States v. Dougherty*, 473 F.2d 1113, 1134 (D.C. Cir. 1972) (explaining that the jury system is a balance, with the jury acting as a “safety valve” for “exceptional cases”).

291. *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997).

292. See U.S. CONST. art. III, § 2, cl. 3 (providing that criminal trials must be by jury); *id.* amend. VI (providing that in criminal prosecutions the accused has the right to trial by an impartial jury).

293. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 59 (2003).

294. *Id.* at 63–64.

that I have been arguing against, the jury's power has eroded. This view has confined the jury to a narrow and specific function for which it is not well suited: finding facts.

5. Racial, Ethnic, and Tribal Groups

One cannot study America's criminal justice system without realizing that criminal law has very different consequences for different groups in society, and particularly different racial, ethnic, and tribal groups. African Americans in particular have borne the brunt of America's epidemic of mass incarceration,²⁹⁵ but Hispanic²⁹⁶ and Native American²⁹⁷ people have also suffered disproportionately. Beyond punishment, many other aspects of criminal justice—such as traffic stops and police violence—have profoundly disparate effects across groups.²⁹⁸ Any serious attempt to think about how to disperse power over the criminal justice system among discrete interests must take account of these differences.

How might such groups be better empowered to play a role in governance of criminal justice? One strategy relates back to the discussion above regarding the geographic distribution of political power. Given widespread residential racial segregation in the United States,²⁹⁹ placing decisionmaking power at lower, more local levels of government may better empower minority groups (who may constitute *local* majorities) to influence important policy decisions. Indeed, the

295. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 1–2 (rev. ed. 2012) (arguing that African Americans are disproportionately barred from voting and are subject to discrimination in many other respects).

296. See *Hispanic Prisoners in the United States*, THE SENT'G PROJECT 1–2 (2003), <https://www.prisonpolicy.org/scans/sp/1051.pdf> [<https://perma.cc/5NVL-AKQG>] (providing data on the disproportionate treatment of Hispanics in the criminal justice system); MARTIN GUEVARA URBINA & SOFIA ESPINOZA ÁLVAREZ, *ETHNICITY AND CRIMINAL JUSTICE IN THE ERA OF MASS INCARCERATION: A CRITICAL READER ON THE LATINO EXPERIENCE* 133 (2017) (describing the disproportionate representation of Latinos in the criminal justice system).

297. See Jack Ross-Pilkington, *Mass Incarceration and Police Violence in Native American Communities*, ROOSEVELT INST.: CORNELL UNIV. (Nov. 3, 2017), <https://www.cornellrooseveltinstitute.org/dom/mass-incarceration-and-police-violence-in-native-american-communities> [<https://perma.cc/57BD-8DXW>] (describing the disproportionate treatment of Native Americans in the criminal justice system).

298. See, e.g., Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 954–56 (2020) (analyzing racial disparities in police killings); Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE: HUM. BEHAV. 736, 737–44 (2020).

299. See, e.g., Aaron Williams & Armand Emamdjomeh, *America Is More Diverse than Ever—but Still Segregated*, WASH. POST (May 10, 2018), <https://www.washingtonpost.com/graphics/2018/national/segregation-us-cities/> [<https://perma.cc/8JGD-QRKU>].

recent rise of progressive prosecutors has been made possible by the fact that the political constituencies that elect urban prosecutors are more diverse than their states as a whole.³⁰⁰ Predictably, the rise of reformer prosecutors has been met with efforts by state governments to strip some decisionmaking power from local prosecutors.³⁰¹ To the extent that local control—and the greater say in decisionmaking by otherwise less powerful minority groups—is seen as a powerful check on the criminal justice process, such reforms should be resisted.

Criminal juries, too, have a role to play here. Given that juries are made up of members of a community, they create the possibility that members of minority groups that would be otherwise powerless can shape important decisions. Recognizing this power, Paul Butler has argued for widespread nullification by African American jurors in nonviolent drug cases in order to combat racial inequities in the criminal justice system.³⁰² Butler's proposal is controversial,³⁰³ but at the least it demonstrates the way in which juries can bring more interests into the criminal justice system as a check against punishment.

But there are also more direct strategies. Interestingly, federal Indian law provides a unique model within the American system. Under a complex arrangement of tribal law, treaties, and federal statutory law, Native American tribes retain criminal lawmaking and law enforcement power for certain crimes committed by tribe members

300. For example, Philadelphia elected reformer Larry Krasner to office in 2017. See Chris Brennan & Aubrey Whelan, *Larry Krasner Wins Race for Philly DA*, PHILA. INQUIRER (Nov. 7, 2017), <https://www.inquirer.com/philly/news/politics/city/larry-krasner-wins-race-for-philly-da-20171107.html> [<https://perma.cc/DBK7-DN6U>]. The consolidated city-county of Philadelphia from which Krasner was elected is 43.6 percent Black and 15.2 percent Hispanic or Latino, with only 44.8 percent of residents being white alone. *QuickFacts, Philadelphia County, Pennsylvania*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/philadelphiacountypennsylvania> (last visited Sept. 13, 2020) [<https://perma.cc/9X8T-HJV3>]. The state of Pennsylvania as a whole is 81.6 percent white. *QuickFacts, Pennsylvania*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/PA> (last visited Sept. 13, 2020) [<https://perma.cc/4LEN-B74J>].

301. See, e.g., Akela Lacy & Ryan Grim, *Pennsylvania Lawmakers Move to Strip Reformist Prosecutor Larry Krasner of Authority*, INTERCEPT (July 8, 2019, 4:55 PM), <https://theintercept.com/2019/07/08/da-larry-krasner-pennsylvania-attorney-general/> [<https://perma.cc/HC3S-NNE6>]; Jaclyn Driscoll, *Missouri Legislators Will Consider Special Session Violent Crime Bills Individually*, ST. LOUIS PUB. RADIO (Aug. 10, 2020, 10:22 PM), <https://news.stlpublicradio.org/government-politics-issues/2020-08-10/parson-wants-attorney-general-to-intervene-in-st-louis-murder-prosecutions> [<https://perma.cc/2LDG-6XJ9>] (describing efforts by Missouri legislators to curtail prosecutorial power in the state attorney general).

302. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679–80 (1995).

303. For one set of criticisms, see Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109, 111 (1996) (“[W]hile the instinct is understandable, Professor Butler’s proposal is foolish and dangerous.”).

within “Indian country”³⁰⁴ and in some cases beyond those boundaries.³⁰⁵ Tribal autonomy over criminal justice can make a significant difference for tribe members; tribe members subject to Congress’s withdrawal of such autonomy—and consequent imposition of state criminal jurisdiction—in certain regions have reported widespread dissatisfaction with criminal justice.³⁰⁶ While it is hard to imagine extending the Indian-law model to racial and ethnic groups given the constraints of the Equal Protection Clause, there nonetheless may be larger lessons here for the importance of autonomy among distinct groups in shaping criminal justice policy.³⁰⁷

B. Functional Duplication and Shared Decisionmaking

A checks-and-balances approach might also suggest a strategy that is essentially the opposite of Madisonian separation. Rather than confining each decisionmaker in the system to one narrowly defined role, it might be better to encourage decisionmakers to perform the *same* functions (or at least to have some overlapping jurisdiction) in order to increase the chance that more interests can have a role in any particular decision.³⁰⁸ Consider the negative-liberty-protecting rationale discussed above,³⁰⁹ in which separating power among different institutions (prosecutor, legislature, judge, jury) creates more veto gates, thereby making it harder for the state to impose criminal punishment. Yet creating additional veto gates is generally a less effective strategy where each decisionmaker is asked to make a *different* decision, rather than being asked to determine whether other decisionmakers’ decisions were correct.

To be sure, in some places, the Madisonian design contemplates some functional duplication. The most obvious example is the bicameral

304. See 18 U.S.C. § 1151 (defining “Indian country” to include land within Indian reservations, Indian communities within the United States, and all Indian allotments).

305. See Grant Christensen, *The Extraterritorial Reach of Tribal Court Criminal Jurisdiction*, 46 HASTINGS CONST. L.Q. 293, 296–97 (2019) (describing the circumstances under which a tribe’s power may extend beyond the reservation).

306. See Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 697–99 (2006) (reporting comparative study of attitudes among Indian reservation residents subject to state criminal jurisdiction compared to residents of reservations not subject to state jurisdiction).

307. Cf. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1794–95 (2019) (arguing that instead of treating federal Indian law as “sui generis,” scholars should recognize that “public law still has much to learn from federal Indian law”).

308. See H. Jefferson Powell & Jed Rubenfeld, *Laying It on the Line: A Dialogue on Line Item Vetoes and Separation of Powers*, 47 DUKE L.J. 1171, 1202 (1997) (associating a “checks and balances approach” with “overlapping, concurrent jurisdictions among the branches”).

309. See *supra* Section II.B.4.

legislature, in which both the House and Senate exercise a mostly identical legislative function,³¹⁰ with the agreement of both houses being required for a law to be enacted. Even within the tripartite framework, some decisions contemplate overlapping judgments by different branches. Consider Erwin Chemerinsky's account of how separation of powers guards against unconstitutional laws:

The Constitution's structure requires both that two branches of government (the legislative and the executive) participate in creating a law, and that two branches of government (the executive and the judiciary) participate in enforcing a law. Either branch, in either situation, can interpret the Constitution and prevent a law from being enacted (subject to override of the veto by Congress) or from being enforced.³¹¹

Here, each branch is called upon to ask the *same* question—is this law unconstitutional? Where, however, unconstitutionality is not at issue, no branch checks the other's homework. If the judiciary thinks that a criminal statute reflects bad policy, or that a prosecutor is exercising his prosecutorial discretion for bad reasons, the separation of powers makes courts powerless to do anything about it. From this perspective, there is little to justify doctrines that, on separation-of-powers grounds, forbid courts from defining new defenses to criminal statutes.³¹²

Similarly, one could rely on functional duplication arguments to question our system's insistence on extremely broad prosecutorial discretion. Courts routinely point to the separation of powers as a reason to avoid scrutinizing prosecutorial charging decisions³¹³ and noncharging decisions.³¹⁴ Yet we should question such reasoning, as the inquiry thus far has given us no reason to think that strictly following the formal separation of powers advances important values. Allowing for some review of charging and non-charging decisions could promote separation-of-powers values, even if doing so would allow courts to intrude on an area we typically think of as reserved for prosecutors.

The argument in favor of functional duplication also has particular force as to the jury. English and early American juries were powerful entities that played a significant role in taking the edge off of

310. Key differences include the House's prerogative to raise revenue and the Senate's role in ratifying treaties. U.S. CONST. art. I, § 7, cl. 1; *id.* art. II, § 2, cl. 2.

311. Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding Dickerson v. United States*, 149 U. PA. L. REV. 287, 295 (2000).

312. *See supra* text accompanying note 62 (discussing judicial deferral to Congress's determination of applicable defenses in a criminal statute).

313. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (pointing to constitutional separation-of-powers requirements as a reason why courts should presume that a prosecutor has properly discharged her duties).

314. *See, e.g.*, *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973) ("The primary ground upon which this traditional judicial aversion to compelling prosecutions has been based is the separation of powers doctrine.").

unjust laws through acquittals and moderating punishment by finding defendants guilty of lesser charges when the punishment they faced was too severe.³¹⁵ Today, however, the jury's role has been sharply curtailed. The jury is seen as having solely a fact-finding function and no longer has the power to find the law.³¹⁶ And juries are much less able to nullify when punishment is overly harsh because jurors are carefully shielded from any knowledge of the penalties defendants face.³¹⁷ Some scholars³¹⁸ and judges³¹⁹ have argued that juries should be made aware of sentencing consequences to better facilitate the jury's ability to check excessive punishment. A checks-and-balances approach—as opposed to a separation-of-powers perspective—provides support for that view.

All that said, it is impossible to endorse the idea of functional duplication across the board since so much turns on contingent facts. Will having multiple decisionmakers make the same decision lead to more checking, or will each decisionmaker become more comfortable with questionable decisions on the theory that someone else can solve the problem? Robert Ferguson has noted about our system of punishment, in which the power to punish is spread out over many decisionmakers, that “[e]veryone in the process of punishment has the

315. English criminal juries would, for example, falsely find that the value of a stolen good was less than the amount necessary to make the defendant eligible for capital punishment—a practice that Blackstone famously called “pious perjury.” 4 WILLIAM BLACKSTONE, COMMENTARIES *93; see also THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE 282–88 (1985) (discussing historical examples of jury mitigation).

316. See, e.g., *Sparf v. United States*, 156 U.S. 51, 106 (1895):

[I]t [is] the duty of the court to expound the law, and that of the jury to apply the law as thus declared to the facts as ascertained by them. In this separation of the functions of court and jury is found the chief value, as well as safety, of the jury system;

see also Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377 (1999) (tracing the history of the jury's power to find the law and the relatively recent rise of the view that the jury has no law-finding power).

317. See, e.g., *Shannon v. United States*, 512 U.S. 573, 579, 587 (1994) (holding that federal district courts are not required to inform juries about the consequences of not guilty by reason of insanity verdicts).

318. See, e.g., Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction*, 90 B.U. L. REV. 2223, 2230 (2010); Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91, 92 (2005); Milton Heumann & Lance Cassak, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*, 20 AM. CRIM. L. REV. 343, 344 (1983); Chris Kemmitt, *Function over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 97 (2006); Kristen K. Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1233 (1995).

319. See, e.g., *United States v. Polizzi*, 549 F. Supp. 2d 308, 404 (E.D.N.Y. 2008) (“Defendant’s request that the jury be informed of the five-year mandatory minimum should have been granted.”); *United States v. Datcher*, 830 F. Supp. 411, 418 (M.D. Tenn. 1993) (“But Mr. Datcher is entitled to have the jury perform its full oversight function, and informing the jury of possible punishment is essential to this function.”).

courage of someone else's convictions to fall back on."³²⁰ Whether that problem would be better or worse in a criminal justice system that was more tolerant of duplicated functions is hard to know.

One more point. Functional duplication serves most obviously as a way to protect negative liberty by requiring multiple decisionmakers to agree before power can be exercised. Yet there are other ways to imagine functional duplication working that do not build in a bias in favor of negative liberty. Imagine, for example, a system whose main rule-of-law deficiency was its failure to subject powerful elites to criminal punishment. Such 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. In this way, a system could build in a bias in favor of government action, by giving multiple decisionmakers an effective veto on *non*action.

C. Internal Separation and External Checking

A checks-and-balances approach would also encourage various forms of "internal" separation of powers, in which a range of actors within (and without) single political institutions can act to provide meaningful checks on policymaking, even in the absence of meaningful checking by a distinct, functionally differentiated branch. The accounts by Michaels (of the administrative state), Goldsmith (of the national-security state), and Galbraith (of the international commitmentmaking process) summarized above³²¹ illustrate how this is possible.

These accounts also stress the importance of separation-of-powers-type roles for actors outside the formal structure of government. In Michaels's telling, "[E]mpowered and often highly motivated members of civil society use administrative procedures to educate and hold agency leaders (and civil servants) accountable, limiting opportunities for those officials to proceed arbitrarily, capriciously, or abusively."³²² Likewise, Goldsmith stresses the importance of the highly qualified Guantanamo defense bar, which has strongly challenged executive claims of power at every step.³²³ Similarly, Galbraith argues that when making international commitments outside the formal treaty-making process, "the president's traditional diplomatic agents in the State Department" must often coordinate efforts with

320. ROBERT A. FERGUSON, *INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT* 13 (2014).

321. See *supra* Section II.A.3.

322. Michaels, *supra* note 145, at 547.

323. GOLDSMITH, *supra* note 148, at 122–60.

administrative agencies whose cooperation is necessary to ensure a commitment's success—a fact that that provides a meaningful check on presidential power.³²⁴

While a fuller application of these ideas to criminal justice is beyond the scope of this Article, this approach suggests interesting possibilities. In our system today, most criminal cases are resolved solely within the executive branch through the process of administrative adjudication we call plea bargaining.³²⁵ An internal-separation approach might suggest that system could be significantly improved with appropriate structural reforms within the executive branch itself. There may be no easy way to return to a system in which criminal trials are the norm, and perhaps the plea bargaining process is here to stay. But if so, surely the process might work better if prosecutorial decisionmaking were more dispersed among different actors with the incentives to provide some checking function. Barkow has suggested separation-of-functions reforms within prosecutors' offices,³²⁶ which might be wise. But other variations are worth exploring.

In addition, taking the lead from the accounts discussed above, the system could provide a greater role for non-state decisionmakers as an external check on governmental institutions. The media in particular could play a significant role in drawing attention to particularly serious injustices or abuses of power in the criminal justice system. Goldsmith observes that reporters have played an important role in checking the national security state—a phenomenon he describes as “accountability journalism.”³²⁷ A similar story can be told about criminal justice, where investigative journalists regularly draw attention to miscarriages of justice, sometimes prompting responses from political actors.

Consider a few examples. The Supreme Court recently overturned the capital conviction of Curtis Flowers on *Batson*³²⁸ grounds.³²⁹ Prior to the Court's somewhat surprising decision to grant certiorari, the case had garnered significant attention after an investigative podcast provided an in-depth exploration of the troubling

324. Galbraith, *supra* note 150, at 1704.

325. See Lynch, *supra* note 243, at 2118.

326. Barkow, *Policing of Prosecutors*, *supra* note 246.

327. GOLDSMITH, *supra* note 148, at 51–82.

328. *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the Equal Protection Clause prohibits prosecutors from challenging potential jurors solely on the basis of their race).

329. See *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019) (overturning Flowers's conviction based on state's pattern of striking prospective Black jurors).

prosecution.³³⁰ The press coverage may have made the Justices more interested in hearing the fact-bound dispute—a possibility Justice Thomas himself suggested in dissent.³³¹ Along similar lines, the journalist Radley Balko regularly draws attention to troubling instances of police misconduct.³³² In one well known case, he publicized the unjust conviction of Cory Maye, who was sentenced to death after mistakenly shooting a police officer after officers broke into his house to execute a drug warrant at night and without announcing themselves.³³³ The publicity seems to have played a role in the Mississippi Supreme Court’s decision to grant Maye a new trial,³³⁴ at least indirectly.³³⁵

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. Judge Aaron Persky became the first California judge recalled by voters in eighty-six years after his decision to sentence Brock Turner to only six months in prison for sexual assault.³³⁶ More recently, the *Miami Herald* publicized the unusually lenient plea bargain given to serial child sex abuser Jeffrey Epstein by Alexander Acosta while he was serving as the U.S. Attorney for the Southern District of Miami.³³⁷ In an even more unusual move, the U.S. Attorney for the Southern District of New York indicted Epstein

330. See APM Reports, *In the Dark: Season Two*, AM. PUB. MEDIA, <https://www.apmreports.org/in-the-dark> [<https://perma.cc/S9VU-ADHS>] (discussing the Flowers case).

331. See *Flowers*, 139 S. Ct. at 2254 (Thomas, J., dissenting) (“[P]erhaps the Court granted certiorari because the case has received a fair amount of media attention.”).

332. Balko, who previously wrote for *Reason*, is now a regular opinion writer for the *Washington Post*. Radley Balko, WASH. POST., https://www.washingtonpost.com/people/radley-balko/?utm_term=.978b8ba57e61 (last visited Oct. 29, 2020) [<https://perma.cc/P9T2-WVM9>].

333. Radley Balko, *The Case of Cory Maye*, REASON (Oct. 2006), <https://reason.com/2006/10/01/the-case-of-cory-maye-2> [<https://perma.cc/9UV8-L82J>].

334. *Maye v. State*, 49 So. 3d 1124 (Miss. 2010) (reversing Maye’s conviction and ordering a new trial).

335. See Smorgan, *Cory Maye: Drug War Victim Gets a New Trial*, STOPTHEDRUGWAR.ORG (Nov. 23, 2009, 11:48 PM), <https://stopthedrugwar.org/print/23502> [<https://perma.cc/6PBW-HTX9>] (“Radley Balko’s initial coverage of the case . . . ignited national interest in Maye’s plight. The case drew the attention of an attorney at the prestigious law firm Covington & Burling, which offered to represent Maye pro bono. That changed everything.”).

336. See Christal Hayes & John Bacon, *Judge Aaron Persky, Who Gave Brock Turner Lenient Sentence in Rape Case, Recalled from Office*, USA TODAY (June 6, 2018, 2:43 AM), <https://www.usatoday.com/story/news/2018/06/06/judge-aaron-persky-who-gave-brock-turners-lenient-sentence-sanford-rape-case-recalled/674551002/> [<https://perma.cc/UV4B-6ZWR>].

337. Julie K. Brown, *How a Future Trump Cabinet Member Gave a Serial Sex Abuser the Deal of a Lifetime*, MIA. HERALD (Nov. 28, 2018), <https://www.miamiherald.com/news/local/article220097825.html> [<https://perma.cc/D6K7-ETUZ>].

notwithstanding the earlier deal—and, in doing so, cited the help of “excellent investigative journalism.”³³⁸

A well-functioning system would be designed to make such external checking more possible. Transparency and disclosure requirements are one mechanism for enabling checking by journalists; at present, aspects of our criminal justice system are often surprisingly opaque.³³⁹ To take just one example, there is no national database of, or consistent disclosure requirements regarding, fatal police shootings, which has required media entities to go to great lengths simply to catalogue them.³⁴⁰ The system could do more to make these external checking entities’ tasks easier. The system could also create better incentives for whistleblowers within bureaucracies to raise the alarm about abuses of power.³⁴¹ Prosecutors who seek to report misconduct by other prosecutors or by police may have little protection from retaliation;³⁴² the law could do more to protect, or even encourage, such whistleblowing.

Taking the lead from the jury model, other forms of direct citizen involvement could provide meaningful checking. Citizen review boards are a tool used in a number of jurisdictions to regulate policing; citizen members “examine officer complaints and make disciplinary

338. Michael Calderone, *Jeffrey Epstein Prosecutors Aided by ‘Excellent Investigative Journalism,’* POLITICO (July 8, 2019, 7:03 PM EDT), <https://www.politico.com/story/2019/07/08/jeffrey-epstein-prosecutors-aided-investigative-journalism-1402221> [https://perma.cc/7ELH-JUNR]. The work by Julie Brown of the *Miami Herald* was important not simply in drawing attention to the case, of course, but also because it identified additional accusers who were willing to tell their stories. See Tiffany Hsu, *The Jeffrey Epstein Case Was Cold, Until a Miami Herald Reporter Got Accusers to Talk*, N.Y. TIMES (July 9, 2019), <https://www.nytimes.com/2019/07/09/business/media/miami-herald-epstein.html> [https://perma.cc/NM9W-ZR7X] (explaining that Brown’s “work identified some 80 alleged victims”).

339. For a discussion of the opacity of the criminal justice system, see Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006).

340. See, e.g., *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/> (last updated Aug. 10, 2020) [https://perma.cc/T659-3QBC] (cataloguing police shootings); *The Counted: People Killed by Police in the US*, GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited Oct. 29, 2020) [https://perma.cc/2M3X-ZX2M] [hereinafter *The Counted*] (providing data on people killed by the police in the United States).

341. Cf. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165–67, 171–73 (1984) (arguing that the reactive, incentive-based oversight through which non-state actors utilize congressionally authorized procedures to police the federal bureaucracy is more effective than a top-down, “police-patrol” system of congressional oversight).

342. To take one prominent example, consider *Garcetti v. Ceballos*, 547 U.S. 410 (2006). In that case, a deputy district attorney alleged that supervisors retaliated against him for writing a memo raising concerns about a warrant affidavit in a pending criminal case. *Id.* at 413–15. The Supreme Court concluded that any retaliation would not have violated his First Amendment rights because he wrote the memo in question “pursuant to his duties” in the prosecutor’s office. *Id.* at 421.

recommendations for police misconduct occurring within the community.”³⁴³ Such boards typically lack independent investigative authority, however,³⁴⁴ and have fairly limited mandates with respect to policing more generally.³⁴⁵ A checks-and-balances approach might suggest more power, and a broader mandate, for such institutions.

A similar model could also provide a check on prosecution. Grand juries once served an important screening function on prosecutions by enabling the dismissal of charges before trial, but in modern times they have largely become captured by prosecutors.³⁴⁶ A checks-and-balances approach might support restoring the grand jury to a place of greater prominence.³⁴⁷ But there are other parts of the process in which citizens could have input. Laura Appleman has proposed a “plea jury,” in which members of the lay public would review the factual basis for the plea and the appropriateness of the sentence.³⁴⁸ Such a procedure might make plea bargaining a less objectionable practice—not because it would restore the separation of powers, but because it would introduce more checks and balances.

One could also imagine creating particular offices with the defined responsibility to argue for particular interests. At the level of individual criminal trials, our system already does this: we give indigent defendants a government-paid lawyer,³⁴⁹ which can be understood as one kind of check against abuses of power and bad outcomes. That strategy could be generalized. One can imagine creating professional offices responsible for advocating for the interests of criminal suspects and defendants at various points within different institutions, such as at the formulation of criminal statutes within the legislature and decisions about charging priorities within the prosecutor’s office. Questions about how exactly to ensure that such

343. Nathan Witkin, *The Police-Community Partnership: Civilian Oversight as an Evaluation Tool for Community Policing*, 18 SCHOLAR 181, 184 (2016).

344. See *id.* at 191–92 (explaining that many citizen review boards lack subpoena power, allowing “uncooperative” officers to thwart their effectiveness).

345. See FRIEDMAN, *supra* note 240, at 20 (“Civilian complaint boards . . . mostly limit themselves to investigating complaints of police misconduct.”).

346. See, e.g., Note, *Restoring Legitimacy: The Grand Jury as the Prosecutor’s Administrative Agency*, 130 HARV. L. REV. 1205, 1210 (2017) (summarizing critiques of grand juries).

347. For an argument that grand juries should have more of a role in determining the reasonableness of prosecutions, see Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319 (2012). See also William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 514–15 (2016) (arguing that the historical indictment standard applied by grand juries was more demanding).

348. Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 749 (2010).

349. See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that indigent defendants in state court criminal prosecutions enjoy a Sixth Amendment right to have counsel appointed for them).

officials actually represent those interests are challenging, but the strategy could work as a meaningful check.

D. Designing Electoral Accountability

Although this Article has criticized the Madisonian separation of powers, even James Madison himself recognized that the most important check on government power was not the separation of powers but instead the ballot box. In *The Federalist No. 51*, he named a “dependence on the people” as “the primary control on the government,” while suggesting that the separation of powers provided only “auxiliary precautions.”³⁵⁰ Ensuring that elections can provide appropriate accountability for criminal justice officials is perhaps the best check.

Of course, on leading accounts, the problem with criminal justice is too *much* electoral accountability: the public’s preferences are simply too punitive. Yet a good case can be made that at least some significant problems stem from too little electoral accountability. Consider one problem discussed briefly above: there is often little transparency in criminal justice matters, with significant amounts of decisionmaking taking place in the shadows. Even basic statistics on important questions (like the number of police shootings nationwide) are not routinely kept.³⁵¹ A system designed to encourage better electoral accountability would surely require greater transparency so that the public can evaluate the work that its agents are doing.

But the problem goes deeper still. Think of how power over criminal justice is fragmented between local police officers, county prosecutors, state legislators, unelected judges, sentencing commissions, and so on. There is no particular reason to think that this kind of fragmentation is useful for protecting liberty, and at least some reason to think it is harmful, as it can impede effective electoral accountability. Who is responsible for bad criminal justice policies is often far from clear. Moreover, the fragmentation of power makes it that much harder for reformers to meaningfully effect change, given the difficulty of challenging offices at many different levels of government.

From this point of view, the *diffusion* of power might actually be a significant threat to important values. Oddly enough, that perspective suggests an institution with greater consolidated control over criminal justice could—under certain conditions, and with appropriate electoral checks—better protect separation-of-powers values than our current

350. THE FEDERALIST NO. 51, *supra* note 34, at 322 (James Madison).

351. See *The Counted*, *supra* note 340 (“The US government has no comprehensive record of the number of people killed by law enforcement.”) (click on the “About” tab to display information).

system. Jacob Gersen has argued that “political institutions that exercise functionally blended authority in topically limited domains . . . would arguably produce government behavior more in keeping with underlying constitutional aspirations than Madisonian separation alone.”³⁵²

Would an institution that consolidated criminal powers into one political institution, but then unbundled that authority from policymaking in other domains—a hypothetical “Department of Crime”—be a preferable alternative to our current approach? At this level of generality, no conclusion is possible. But simply imagining such an arrangement allows us space to think through the costs and benefits of different forms of political accountability as a check in criminal justice. And while such a systemic transformation may be unrealistic, the larger lesson is not that power should always be consolidated. Rather, it is that deciding how to allocate government power turns on how that particular arrangement will interact with the political process, rather than stale pronouncements about the definition of tyranny.

E. A Few Applications

The checks-and-balances perspective provides occasion to reevaluate some more practical separation-of-powers questions in criminal justice. To be sure, the larger premise of the approach laid out here—the effectiveness of particular checks depends on various contingent facts about where power lies in society, rather than simply the formal structure of government—makes firm conclusions difficult to draw. Nonetheless, considering a few problems helps show how what kinds of questions a checks-and-balances approach might ask, even if it does not provide easy answers.

1. *Chevron* and Federal Criminal Law

As noted earlier, Kahan argued that the DOJ should have the power to issue interpretations of federal criminal statutes that would receive deference from courts.³⁵³ Barkow contends that “[t]he threat prosecutors pose to individual liberty would be magnified even further” if Kahan’s proposal were accepted because it “would erode the judicial role still further, and it would expand prosecutorial power without

352. Gersen, *supra* note 133, at 303–04.

353. Kahan, *supra* note 11, at 488–506.

creating any checks on its exercise.”³⁵⁴ How should we evaluate Kahan’s argument?

The perspective laid out here provides no definitive answer. But it provides suggestions for how to go about answering it. The answer will inevitably turn on a nuanced and contingent story about how power will be exercised in practice among and within different political institutions. In order to justify his proposal, Kahan tells a story about the differing political incentives of regional U.S. Attorneys compared to those of DOJ attorneys in Washington, D.C. As Kahan explains, “U.S. Attorneys are extraordinarily ambitious and frequently enter electoral politics after leaving office. For this reason, they have strong incentives to use their power while in office to cater to—or to circumvent—local political establishments.”³⁵⁵ Vesting more power in “Main Justice,” Kahan argues, would reduce opportunistic behavior by self-interested U.S. Attorneys, thereby limiting agency costs.

Kahan may not have accurately described the situation on the ground, and he may well be wrong about the likely consequences of a shift in institutional power. One reason for skepticism is that the Department of Justice almost invariably goes out of its way to increase prosecutorial power—such as, for example, by lobbying for expansive criminal laws, as Barkow has observed.³⁵⁶ That fact may suggest that the hope of Main Justice reining in unruly U.S. Attorneys is unrealistic. Moreover, it would likely make little sense to import the *Chevron* doctrine into criminal law without also incorporating the many procedural protections administrative law provides, which are notably absent in the criminal arena.³⁵⁷

My goal here, though, is not to referee the substance of this dispute. It is merely to suggest the playing field on which the contest must be made. Any response to Kahan that rests solely on his proposal’s deviation from the classical separation of powers cannot refute Kahan’s claims. Only a checks-and-balances story can explain why Kahan is wrong about how things will work in practice.

354. Barkow, *supra* note 6, at 1049 n.321.

355. Kahan, *supra* note 11, at 486 (footnote omitted).

356. See Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 314–15 (2013) (“[T]he Department of Justice is a regular player in criminal law issues before Congress.”).

357. See Barkow, *supra* note 6, at 1021–28 (detailing the dearth of procedural checks on prosecutors’ powers).

2. The Judicial Role

As noted, judges in our system routinely point to the separation of powers as the justification for some decision or other. Most commonly, though not exclusively, one finds this rationale offered to justify their refusal to take some action that would help the interests of criminal defendants but which might intrude on the prerogatives of the other branches.³⁵⁸ The inquiry here provides purchase that can help us critique those claims. Many separation-of-powers assertions by judges seem to rest on nothing deeper than the assertion that it is critical to separate institutions by function.

Consider again the Supreme Court's insistence in *Brogan* that "[i]t is not for us to revise [Congress's] judgment" by judicially recognizing new defenses to criminal statutes.³⁵⁹ Well, why not? It turns out there is nothing magical about the functional definition of the three branches of government, and it is far from obvious that failure to strictly preserve the three branches of government along structural lines will lead to tyranny. The separation-of-powers rationale for a limited judicial role is especially puzzling in light of the long history of judicial involvement in the definition of crimes.³⁶⁰

This is not to say that a checks-and-balances perspective necessarily implies that judges should take on a more muscular role. Rather, it tells us that we need to provide concrete reasons, and not mere slogans, to explain why one particular distribution of power among institutions is preferable. In evaluating the desirability of giving greater power to judges over the content of criminal legislation, one would consider a number of factors. Those who put heavy weight on a negative-liberty rationale for the separation of powers would be more likely to embrace this kind of judicial creativity, since here duplicating the function of drafting defenses to criminal statutes makes it harder for the state to impose punishment. The question becomes harder, however, if one gives less priority to the goal of protecting negative liberty; for surely the judiciary could err by recognizing a defense to a criminal statute when it should not. This means the question would then become whether letting the judiciary create defenses would, on net, reduce or increase errors—that is, whether the benefits of the

358. See *supra* Section I.C (discussing the judiciary's tendency not to intervene on behalf of criminal defendants where separation of powers issues are at play).

359. *Brogan v. United States*, 522 U.S. 398, 405 (1998).

360. See *supra* Section I.D (describing the more active role of state courts); see also Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 76 (2009) ("The idea that lawmaking by judges cannot be squared with the principle of separation of powers relies . . . upon a brittle conception of that principle that is inconsistent with our entire national experience . . .").

defenses the judiciary would correctly identify would outweigh the costs of those that the judiciary would incorrectly recognize.³⁶¹

The question becomes more complicated still if we expand the lens beyond the narrow question of the judicial role in interpreting criminal statutes. Should courts have the power to issue rulings that intrude on the prerogatives of the executive branch? In some instances, such as where a plaintiff is seeking a court order requiring the executive to prosecute, courts are being asked to impose a veto on another branch's decision *not* to act.³⁶² In the past, courts have resisted such invitations on the ground that it would put judges "in the undesirable and injudicious posture of becoming 'superprosecutors.'"³⁶³

Here, a checks-and-balances approach provides no concrete guidance. Nonetheless, what it does show is that simply resting on the importance of separating functions is not enough to end the argument, at least as a normative matter. If it is undesirable for judges to engage in a form of lawmaking through creative statutory interpretation, or to act as "superprosecutors" by reviewing the executive's charging decisions, a persuasive answer must explain in practical and concrete terms why that is so, rather than just pointing to separation of powers to end the discussion. That is, one must offer a theory of why asking one institution to more closely supervise the conduct or duplicate the work of another institution will lead to worse decisions, or prove too costly, and so on.

By the same token, though, those who are strong proponents of more heavy-handed judicial involvement in criminal justice must themselves offer a theory of why it is realistic to expect the judiciary to reach better, or different, decisions than the other branches.³⁶⁴ Given that judges are selected through a political process, it is not obvious why they should be expected to reliably reach decisions that are different from those that the political branches of government would reach.³⁶⁵ Again, the lesson is that one must be attentive to what will motivate the real human beings who will occupy different roles; simply assuming

361. Cf. Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1863–77 (1998) (suggesting that a rule permitting judges to consider legislative history could cause a net increase in errors).

362. See, e.g., *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973) (refusing to issue an order compelling federal and state prosecutors to bring charges).

363. *Id.* at 380.

364. The leading justification for the Warren Court's aggressive interventions into criminal justice is rooted in the theory of representation reinforcement developed by John Hart Ely. See William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 21 (1996) ("If there is a consensus theory of why the Warren Court's criminal procedure decisions got it right, the *Carolene Products*-Ely argument is it.").

365. See *supra* text accompanying note 226.

that a particular official will behave a particular way because of the functional label attached to her role is not realistic.

3. *Gundy*

As discussed briefly above, *Gundy v. United States* recently upheld Congress's delegation to the attorney general the power to decide whether to make some of SORNA's registration obligations retroactive to defendants convicted before the statute's enactment.³⁶⁶ Constitutional formalists have strong intuitions about the answer to this question. Justice Gorsuch, in dissent, bemoaned what he saw as the law's serious departure from the Madisonian framework:

To allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing—to “‘unit[e]” the “‘legislative and executive powers . . . in the same person’”—would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands.³⁶⁷

Yet from the perspective laid out here, it is anything but obvious that *Gundy* paves the road towards tyranny. Is there reason to think that requiring Congress to make the decision about retroactivity of the registration obligation itself, rather than delegating that decision to the attorney general, will make criminal defendants (or anyone else) better off? Put another way, do we have any reason for confidence that the two institutions will make different decisions—in such a predictable way that we can reliably say that requiring the decision to be made by one institution rather than the other will produce better results? As Magill explains, in some instances, the same interests that shape decisionmaking in one institution will be equally effective in lobbying the other; and, even when that is not true, “such differences will not be stable across time and cannot be used as a basis for predicting the effect of an arrangement.”³⁶⁸

CONCLUSION

The importance of the separation of powers in the criminal law has long been taken for granted. But understood in the Madisonian sense of a division of functional power between distinct political

366. 139 S. Ct. 2116 (2019).

367. *Id.* at 2144–45 (Gorsuch, J., dissenting). Here, Justice Gorsuch echoed his own earlier dissent on the same issue when he was a Tenth Circuit judge. *United States v. Nichols*, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc) (“If the separation of powers means anything, it must mean that the prosecutor isn’t allowed to define the crimes he gets to enforce.”).

368. Magill, *supra* note 123, at 641.

institutions, it is far from obvious that the separation of criminal powers will protect the values it is supposed to guarantee. While some diffusion of government power is unquestionably important, the idea of checks and balances, rather than functional separation of powers, should be the organizing principle when thinking about the structure of the criminal justice system. That perspective helps us identify new strategies for ensuring our system produces good policies and avoids various bad outcomes. And it casts new light on old strategies as well, helping us better see connections between seemingly distinct and unrelated policy and design choices.

Yet the most important check in criminal justice may be one that is not reflected in the formal structure of government, and one that not even a constitutional designer with as free a hand as Madison could design. The best protection for liberty is meaningful political support for fair and just criminal justice policies among the electorate. Where such support thrives, the precise details of how government power is formally allocated among institutions may be less important; where it is wholly absent, even the most inspired constitutional designs will likely be unable to prevent bad outcomes.

That said, this Article is premised on the idea that structure matters—even if structure is not everything. As Stuntz put it: “Criminal law is not just the product of politics; it is the product of a political *system*, a set of institutional arrangements by which power over the law and its application is dispersed among a set of actors with varying degrees of political accountability.”³⁶⁹ Even if the underlying politics of crime are the most important input in producing criminal law, structural and institutional choices can shape policy, too, pushing policy in better or worse directions at the margins. Checks and balances provides the conceptual tools needed to best understand how structure affects criminal law—and, perhaps, how structure can be manipulated to improve criminal law.

369. Stuntz, *supra* note 112, at 528 (emphasis added).