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Convictions as Guilt

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ARTICLE

CONVICTIONS AS GUILT

Anna Roberts*

A curious tension exists in scholarly discourse about the criminal legal system. On the one hand, a copious body of work exposes a variety of facets of the system that jeopardize the reliability of convictions. These include factors whose influence is pervasive: the predominance of plea bargaining, for example, and the subordination of the defense. On the other hand, scholars often discuss people who have criminal convictions in a way that appears to assume crime commission. This apparent assumption obscures crucial failings of the system, muddies the role of academia, and, given the unequal distribution of criminal convictions, risks compounding race- and class-based stereotypes of criminality. From careful examination of this phenomenon and its possible explanations, reform proposals emerge.

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INTRODUCTION

The way in which we speak about the criminal legal system is often in tension with the way in which we speak about those who have been through it.¹ Facets of the system that jeopardize its reliability often seem to be forgotten when we speak of those with convictions; legal guilt (which I use here to mean conviction) often seems to provoke an assumption of factual guilt (which I use here to mean commission of the crime). Thus, even when we urge more favorable treatment of those with convictions—that they should receive a second chance, redemption, rehabilitation, and so on—we risk obscuring flaws in the conviction-production process and reinforcing harmful stereotypes about where guilt resides.

Who is “we”? In previous scholarship, I have written about assumptions of guilt, and assumptions about the meaning of convictions, on the part of

1. For more information about the phrase “criminal legal system,” see *infra* note 407 and accompanying text.

police officers,² jurors,³ judges,⁴ defense attorneys,⁵ legislators,⁶ prosecutors,⁷ and members of the public.⁸ One can only point elsewhere for so long. In this Article, I focus on the role of legal scholars. Some who work within the criminal system may be constrained in their ability to question the reliability of convictions.⁹ But the scholarly role is surely different and critically important.

Legal scholars have, on the one hand, generated an expansive literature exploring factors that can jeopardize the reliability of convictions as markers of factual guilt. These factors include those that are identified by innocence scholars as the primary contributing causes of “false convictions.”¹⁰ But they extend further, into areas more central to this Article’s focus. Whereas the “Innocence Movement” has focused on “wrong-man convictions,”¹¹ scholars have pointed out that one can be factually innocent of a crime for a number of reasons other than being the “wrong man.”¹² One may be the right man, to the extent that there is one, but lack the mens rea (mental state) that constitutes part of that crime.¹³ One may be the right man but have a winning

2. See Anna Roberts, *Reclaiming the Importance of the Defendant’s Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 865–66 (2016).

3. See Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1530 (2015) [hereinafter Roberts, *Asymmetry as Fairness*]; Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 2015 (2016) [hereinafter Roberts, *Conviction by Prior Impeachment*].

4. See Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 998 (2019).

5. See *id.*

6. See Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 586 (2014).

7. Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 U.C. DAVIS L. REV. 1359, 1404 (2012).

8. See Roberts, *supra* note 4, at 1018–19.

9. See Charles Nesson, *The Evidence or the Event?: On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1358 (1985) (“Successful projection of a legal rule depends on a court’s ability to cast a verdict not as a statement about the evidence presented at trial, but as a statement about a past act—a statement about what happened.”); see also Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1393 (1997) (“[A]n adjudicatory system has to operate on the premise that those duly convicted are guilty.”); *id.* at 1334 (“Even if innocents are convicted, the criminal justice system cannot formally acknowledge this because it will undermine society’s faith in the system.”).

10. See Samuel Gross, *What We Think, What We Know, and What We Think We Know About False Convictions*, 14 OHIO ST. J. CRIM. L. 753, 772 (2017) (discussing mistaken witness identification, false accusation, false confession, forensic evidence, and official misconduct).

11. See Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1157 n.1 (2010) (offering definitions of the Innocence Movement); Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1085 (2011).

12. See Erik Lillquist, *Balancing Errors in the Criminal Justice System*, 41 TEX. TECH L. REV. 175, 184 (2008).

13. See Givelber, *supra* note 9, at 1327–28 (explaining that the narrow definition of innocence as “‘factual innocence,’ meaning that the defendant was not the perpetrator . . . leaves out several important categories of convicted innocents, such as those lacking the appropriate mens rea, those possessing a complete defense, and those erroneously convicted in an error-free trial”).

affirmative defense.¹⁴ This Article focuses on two facets of our system that are recognized within legal scholarship as jeopardizing the reliability of convictions even if the right man might be on the hook: the predominance of the guilty plea and the subordination of the defense.

The incentives that tend toward guilty pleas,¹⁵ and the lack of safeguards involved in the plea process,¹⁶ create a significant risk of convictions incurred in the absence of factual guilt.¹⁷ The proportion of convictions that are the product of guilty pleas—as high as 97 percent in some courts¹⁸—illustrates the importance of this concern. In both plea bargaining and the trial process, the subordinate status of defense representation—in areas that include caseloads, resources, standards, and incentives—creates a significant risk that convictions will be imposed in the absence of guilt. Again, given the prevalence of defense representation (including indigent defense representation),¹⁹ the reach of this issue is immense. Indeed, where there is no defense representation, defendants may be still more vulnerable.

The scholarship highlighting these two factors (plus the scholarship focused on those factors more commonly associated with “innocence”) should reveal the problematic nature of an assumption that convictions connote crime commission. Of course, one cannot come up with a figure that quantifies a “mismatch” between crime commission and crime conviction.²⁰ To answer the question of whether a crime occurred requires not only detailed knowledge of the law but also detailed knowledge of the facts. In

14. See 1 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 21 (2019) (“Possible bars to conviction include alcoholism, alibi, amnesia, authority to maintain order and safety, brainwashing, chromosomal abnormality, consent, convulsion, custodial authority, defense of habitation, defense of others, defense of property, de minimis infraction, diplomatic immunity, domestic (or special) responsibility, double jeopardy, duress, entrapment, executive immunity, extreme emotional disturbance, hypnotism, immaturity, impaired consciousness, impossibility, incompetency, insanity, intoxication (voluntary and involuntary), involuntary act defenses, judicial authority, judicial immunity, justification, law enforcement authority, legislative immunity, lesser evils, medical authority, mental illness (apart from insanity), military orders (lawful and unlawful), mistake (of law and fact), necessity, official misstatement of law, parental authority, plea bargained immunity, provocation, public duty or authority, reflex action, renunciation, self-defense, somnambulism, the spousal defense to sexual assaults and theft, statute of limitations, subnormality, testimonial immunity, the unavailable law defense, unconsciousness, and withdrawal.”).

15. See David Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 39 (1984).

16. See Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1114 (2015) (arguing that plea bargaining “offers no protection for the innocent”).

17. See Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919, 939 (2016) (stating that the American legal system, which “makes it in the interest of defense attorneys as well as prosecutors and judges to convince defendants to plead guilty,” is “nearly perfectly designed to convict the innocent”).

18. See U.S. District Courts—Criminal Defendants Disposed of, by Method of Disposition, U.S. CTS., http://www.uscourts.gov/sites/default/files/data_tables/Table5.04.pdf [<https://perma.cc/7MDU-E92L>] (last visited Apr. 12, 2020).

19. See *infra* note 187 and accompanying text.

20. See Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 835–36 (2010). My thanks to Michael Risinger for particularly helpful discussions on this point.

addition, it frequently requires normative judgment²¹ and, thus, whether a crime occurred may be unknowable in an objective sense.²² But the inability to quantify these concerns should not lead to the conclusion that they are nugatory.²³

And yet, legal scholarship often proceeds as if these facets of the system, and the concern that they should provoke, do not exist.²⁴ Legal scholarship often seems to present those with convictions as if they can be assumed to be factually guilty. Thus, one finds explicit statements about the prevalence of guilt, the reliability of convictions, and the relatively small (or at least calculable) proportion of convictions that are wrongful.²⁵ One also finds statements about the criminal system, and those convicted under it, that risk conveying an implicit message that convictions can be assumed to correspond to lawbreaking.²⁶

21. See D. Michael Risinger, *Searching for Truth in the American Law of Evidence and Proof*, 47 GA. L. REV. 801, 812 (2013) (“[S]ome issues are not, in the end, facts at all but rather particularized value judgments”); *id.* at 828–29 (“Take negligence, for one. The conclusion that an act (or failure to act) was negligent is a value judgment organized around such notions as ‘reasonable person’ and ‘careful enough.’ If we had a full color, full feel, full smell hologram of the events alleged to constitute ‘negligence,’ complete with a cap that would induce experience of the conscious subjective states of the actors from instant to instant, we would still need some mechanism to make the normative judgment. In such cases the jury acts, under official delegation and warrant, not only as factfinder but also as the source of normative judgment.”); *id.* at 832 (“Most state-of-mind judgments that we expect juries to make, such as negligence, recklessness, or insanity, carry a more or less explicit normative warrant.”).

22. As John Mitchell puts it, [t]here are cases where factual and legal guilt merge. You may know all the facts in a self-defense case, but whether the defendant was ‘reasonable’ or not in employing the force he did will be a conclusion of the trier of fact. On the other hand, whether he was ‘reasonable’ will be central to the question of his factual guilt. John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 296–98 n.12 (1980); see also Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 130 (1987) (“[T]he kind of historical fact with which the law is concerned may not even exist in any meaningful way independent of the method of proof.”); Shapiro, *supra* note 15, at 44 (“[S]uch matters as state of mind are so subjective and ephemeral that it is hard to speak of a reality distinct from the finding of the trier of fact.”).

23. See *Preliminary Report on Race and Washington’s Criminal Justice System*, 47 GONZ. L. REV. 251, 264 (2011/12) (“Conviction rates are not a valid proxy for commission rates.”); see also Keith Findley, *Adversarial Inquisitions*, 56 N.Y.L. SCH. L. REV. 911, 912 (2011/12) (noting that “[i]f one were asked to start from scratch and devise a system best suited to ascertaining the truth in criminal cases,” “[i]t is inconceivable that one would create a system bearing much resemblance to the criminal justice process we now have in the United States”).

24. See Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 146 (2011) (“The prospect of error is generally ignored or denied by those entrusted with governing the criminal justice system, and is not adequately recognized in the scholarly debate.”).

25. See, e.g., Paul Cassell, *Overstating America’s Wrongful Conviction Rate?: Reassessing the Conventional Wisdom About the Prevalence of Wrongful Convictions*, 60 ARIZ. L. REV. 815, 847 (2018) (“To avoid any suggestion of false precision, the wrongful conviction rate might be stated as a range . . . of 0.016% to 0.062%.”).

26. See *infra* notes 304–18 and accompanying text.

One thing that complicates the project of highlighting this issue within one's own field is that some of the statements that could be read as taking factual guilt as a given are made by scholars pushing for much-needed reform and reframing. So, for example, scholars advance the propositions that all those with convictions should have a chance at rehabilitation and redemption,²⁷ that character is not static,²⁸ that poverty is criminogenic,²⁹ and that we need more "lenient" treatment not just of "non-violent drug offenders"³⁰ but also of "violent offenders"³¹ and "sex offenders."³² They assert that "sex offenders" and "juvenile offenders" should not be subjected to permanent exile³³ and that maybe adult offenders more generally should not be.³⁴ After all, they say, the "recidivism" rate of "sex offenders"—viewed as a crucial bit of data—is less "frightening and high" than is often feared.³⁵ They emphasize the centrality of the problem of overcriminalization.³⁶ Of the misdemeanor system, they say that it delivers "assembly-line justice" rather than accurate adjudication.³⁷

Much of this is true, important, and a needed response to the kind of primitive attitudes that preceded it and survive it.³⁸ And yet, when we speak

27. See, e.g., Regina Austin, *"The Shame of It All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 180 (2004).

28. See *infra* note 307 and accompanying text.

29. See *infra* note 315 and accompanying text.

30. See Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 271 (2018) (describing the "non-violent" drug offender as the "poster child" of those concerned about "overcriminalization" and "overincarceration").

31. Valuable work has been done, for example, in pointing out that the "violence" required for something to be classified as a "violent offense" falls considerably short of mainstream conceptions of "violence." See, e.g., *id.* at 313. Even as important points are made about the messiness, error, and ambiguity in deciding who is which kind of offender, one can sometimes lose track of similar vulnerabilities in deciding who is an offender in the first place.

32. See, e.g., Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 56 (2017).

33. See, e.g., *id.* ("If Graham and Miller are to be taken seriously, courts and policymakers may not deliver juvenile offenders into permanent exile without considering the social context in which they committed their crimes."); Asmara Tekle-Johnson, *In the Zone: Sex Offenders and the Ten-Percent Solutions*, 94 IOWA L. REV. 607, 614 (2009) (asserting "a need for rational discourse that truly focuses on protecting children and the larger public from dangerous sex offenders without trampling on the Constitution and common sense in the process").

34. See Binder & Notterman, *supra* note 32, at 56 ("Extending the same standard of decency to adult offenders is the next frontier of Eighth Amendment sentencing proportionality.").

35. See Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 496, 500–05 (2015).

36. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1358 (2012) (stating that in criminal law, the "traditional story has been destabilized by the overcriminalization critique").

37. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 619 (2014) (stating that "[t]he classic criticism of lower courts is that they delivery 'assembly-line justice'" (quoting Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 586 (1997))).

38. See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 49 n.106 (2012) ("Ronald Reagan provides an example of the

without complication about “offenders,” their “recidivism,”³⁹ their redemption, and their rehabilitation; when we emphasize the harms being wrought by overcriminalization;⁴⁰ and when we portray character or poverty as causes of crime, we risk reinforcing the notion that conviction and crime commission are the same thing. When we wrangle about how severely to punish different categories of “offenders,” we may seem to take for granted that all are “offenders” in a factual as well as legal sense. When we emphasize the extent to which misdemeanor convictions track something other than factual guilt, we risk suggesting that, in the felony context, we need not be significantly concerned vis-à-vis the relationship between conviction and factual guilt.⁴¹ And when we speak of those without convictions as having lived law-abiding lives,⁴² we risk endorsing a flip-side assumption that absence of conviction equals factual innocence.

If there is indeed a tendency to fuse legal and factual guilt once convictions are imposed, it is important to understand why that might be. Some internal tendencies pushing in that direction may be widely shared. One may yearn for clarity, simplicity, finality, safety, and to be at peace with the systems in which one lives.⁴³ To equate crime conviction with crime commission may serve those desires. Combined with those internal forces are external ones, such as education and media,⁴⁴ which reinforce this fusion. From as early as arrest, the media imparts messages of guilt,⁴⁵ which by the point of

point of view to which progressives are reacting: ‘Choosing a career in crime is not the result of poverty or of an unhappy childhood or of a misunderstood adolescence; it’s the result of a conscious, willful, selfish choice made by some who consider themselves above the law, who seek to exploit the hard work and, sometimes, the very lives of their fellow citizens.’”).

39. See, e.g., Binder & Notterman, *supra* note 32, at 41 (“The most important assumption of penal incapacitation is that past offenders are likely to reoffend.”); Cecelia Klingele, *Measuring Change: From Rates of Recidivism to Markers of Desistance*, 109 J. CRIM. L. & CRIMINOLOGY 769, 769 (2019) (“Accepting recidivism as a valid, stand-alone metric imposes on the criminal justice system a responsibility beyond its capacity, demanding that its success turn on transforming even the most serious and intractable of offenders into fully law-abiding citizens.”).

40. See Natapoff, *supra* note 36, at 1358–59 (describing the overcriminalization critique and identifying some features that it lacks).

41. See Stephen B. Bright & Sia A. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2152 (2013) (“Every day in thousands of courtrooms across the nation, from top-tier trial courts that handle felony cases to municipal courts that serve as cash cows for their communities, the right to counsel is violated. Judges conduct hearings in which poor people accused of crimes and poor children charged with acts of delinquency appear without lawyers. Many plead guilty without lawyers. Others plead guilty and are sentenced after learning about plea offers from lawyers they met moments before and will never see again. Innocent people plead guilty to get out of jail.”); Alice Ristroph, *Farewell to the Felony*, 53 HARV. C.R.-C.L. L. REV. 563, 569 (2018) (noting that “some critics of misdemeanor jurisprudence hold out felony jurisprudence as a salutary alternative representing criminal law at its best”).

42. See, e.g., Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 963, 990 (2013) (“[Expungement] laws recognize that a person should not be forever judged and burdened by his or her criminal record. Thus, the laws benefit those who have demonstrated a commitment to living a law-abiding life.”).

43. See *infra* notes 336–39 and accompanying text.

44. See *infra* note 359 and accompanying text.

45. See generally Roberts, *supra* note 4.

conviction, are powerful. Even in discussions of “innocence,” it may be that the high-profile “wrongful conviction,” for all its awfulness, reinforces the notion that the others are rightful.⁴⁶ After all, if (as is commonly declared) convictions involve proof beyond a reasonable doubt,⁴⁷ and if (as is commonly declared) our system errs in favor of freeing the innocent,⁴⁸ there must not be too much to worry about.

Some additional trends may be felt particularly intensely by those within legal academia. To be in legal academia is (with exceptions) to have a law degree, to be successful, and to lack a criminal record.⁴⁹ Truly to stare at and acknowledge the inadequacy of defense representation, and fully to contemplate its implications, might leave those of us who have law licenses, but who focus on work other than alleviating the representation gap, uncomfortable.⁵⁰ There are disincentives, too, to asking provocative questions about the existing distribution of criminal convictions and the extent of their accuracy. After all, the status quo has kept us (generally) successful and conviction-free, despite the assumed prevalence⁵¹—some say universality⁵²—of crime commission.

There are several reasons to be concerned about this potential obscuring of the extent to which convictions fail to connote crime commission. The first pertains to the function of legal scholarship. Our role matters in regard to the criminal system. We are here not to perpetuate state-supported portrayals of the system but rather to perform and model more complex tasks, such as questioning binaries and grappling with uncertainty. Additional reasons relate to the consequences for others. Detecting and responding to

46. See Ristroph, *supra* note 41, at 612 (“Wrongful convictions scholarship and advocacy is premised on the idea of a rightful conviction.”).

47. See *infra* note 260 and accompanying text.

48. See *infra* note 410 and accompanying text.

49. See Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 14 (2009) (“The typical path to the law professoriate is either through legal practice or a series of status markers based on one’s performance as a law student (good grades and law review, leading to a prestigious judicial clerkship and an impressive first job).”).

50. See Joseph W. Bellacosa, *Ethical Impulses from the Death Penalty: “Old Sparky’s” Jolt to the Legal Profession*, 14 PACE L. REV. 1, 2 (1994) (noting lawyers’ role as “guardians of justice” and arguing that all lawyers should do something to respond to the disproportionality of resources between the government and the defense in death penalty cases and the “enormous” professional ethics concerns that are implicated).

51. See Michael J. Coyle, *Transgression and Standard Theory: Contributions Toward Penal Abolition*, 26 CRITICAL CRIMINOLOGY 325, 331 (2018) (“[M]ost people habitually violate the law, and whether on the job, at home or on the street, commit a variety of both violent and non-violent ‘crimes’ in their lifespan. One counting of such empirical data claims that in the U.S. more than 90% of all Americans have committed at least one ‘crime’ for which they could be incarcerated.” (citations omitted)).

52. See Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 498 (2019) (“Everything is a crime, and everyone is a criminal. (Well, almost.) That has become the refrain among a growing chorus of critics who decry the phenomenon of ‘overcriminalization.’”); L. Gordon Crovitz, Opinion, *You Commit Three Felonies a Day*, WALL ST. J. (Sept. 27, 2009, 11:09 AM), [wsj.com/articles/SB10001424052748704471504574438900830760842](https://perma.cc/9MEV-74MU) [https://perma.cc/9MEV-74MU].

criminal wrongdoing is a core function of the criminal system.⁵³ If that core function is failing, to an unknown but potentially large extent, that ought to be made clear.⁵⁴ In addition, assumptions that convictions connote crime commission—and that a lack of convictions bespeaks innocence—are neither race-neutral nor class-neutral.⁵⁵ Convictions are disproportionately imposed on poor people and people of color.⁵⁶ Thus, assumptions that convictions correspond to factual guilt risk compounding the stereotyping of people of color and poor people as lawbreakers,⁵⁷ including assumptions of their dangerousness.⁵⁸ Meanwhile, whites benefit disproportionately from the flip-side assumption, thus becoming the beneficiaries of still more “White credit.”⁵⁹ Finally, if those who are assumed to have committed crimes lose some portion of the empathy that they might otherwise inspire,⁶⁰ assumptions that convictions connote crime commission risk lessening concern in a number of important reform areas, such as jail and prison conditions, sentencing, and other consequences of conviction.

So, this Article suggests that even as important claims are made about the need for reform initiatives, such as nonpunitive approaches, care should be taken to combine them with reminders that, in some unknown but potentially large number of cases, there is nothing to punish. Such efforts not to erase the system’s fallibility can take the form of explicit caveats; they can also

53. See Carissa Byrne Hessick, *DNA Exonerations and the Elusive Promise of Criminal Justice Reform*, 15 OHIO ST. J. CRIM. L. 271, 277 (2017) (“[O]ur criminal justice system exists in order to sort the guilty from the innocent.”).

54. See George C. Thomas III, *History’s Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 546 (“How many times is an innocent defendant convicted? No one knows because we have no independent method for determining who is innocent other than the very small number of almost random successful DNA claims made after a conviction has become final.”).

55. See Natapoff, *supra* note 36, at 1365 (“[N]ot only do bulk arrest practices discriminate against minorities, they potentially fill the system with innocent people of color who are then wrongly labeled ‘criminal.’ . . . [This] dynamic is an important ingredient in the racialization of crime.”).

56. See Janet Moore et al., *Privileging Public Defense Research*, 69 MERCER L. REV. 771, 773 (2018).

57. See Kenneth L. Karst, *Local Discourse and the Social Issues*, 12 CARDOZO STUD. L. & LITERATURE 1, 18 (2000) (stating that the most typical middle-class assumptions about race and ethnicity “associate poverty with a black or brown face, with crime, with immorality . . . and with a preference for handouts over work”); Justin Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 190 (2010) (explaining that mock jurors held “strong associations between Black and Guilty, relative to White and Guilty, and [that] these implicit associations predicted the way mock jurors evaluated ambiguous evidence”).

58. See Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 509–10 (2012).

59. Montré D. Carodine, “*The Mis-characterization of the Negro*”: *A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 527 (2009) (“When Blacks are unfairly ‘taxed’ in the criminal system with perceived criminality, Whites receive an undeserved ‘credit’ with a perceived innocence or worthiness of redemption.”).

60. Radley Balko, Opinion, *The Case for Releasing Violent Offenders*, WASH. POST (Aug. 14, 2017, 11:23 AM), <https://www.washingtonpost.com/news/the-watch/wp/2017/08/14/the-case-for-releasing-violent-offenders/> [<https://perma.cc/DQX2-665U>] (“We want to punish criminals. We want them to suffer. We create hostile prison environments rife with violence, racial resentment and rape.”).

take the form of increased care with terms such as “felon,” “criminal,” and “offender” that, along with their other downsides, risk merging legal guilt with factual guilt. Finally, they can involve efforts to ensure that neither definitions of words like “innocence” and “wrongful conviction”⁶¹ nor attempts to quantify those phenomena contribute to an overly narrow view of innocence. To point out the problem of assuming the guilt of those who may not be guilty is not to endorse any of the extant consequences for those who are both legally and factually guilty. But recognizing both the flawed nature of the system and our tendencies to make it seem otherwise is an important part of figuring out how to respond to the flaws.

Part I will address the predominance of the plea and the subordination of the defense. It will explain their potential—alongside a host of other factors—to leave us uncertain but concerned about the prevalence of convictions imposed in the absence of factual guilt. Part II will describe a variety of ways in which legal scholarship often tends, either explicitly or implicitly, toward a portrayal of convictions as things that generally connote crime commission. Part III will explore potential causes of this apparent fusion of legal and factual guilt. Part IV will explore implications of fusing legal and factual guilt, explaining first why this fusion matters and, second, what might be done to address the situation.

I. FACTORS JEOPARDIZING THE RELIABILITY OF CONVICTIONS

This Part will examine two factors whose analysis within legal scholarship reveals their potential to contribute to the phenomenon of convictions detached from factual guilt. These factors—the predominance of the plea and the subordination of the defense—are chosen in part because of their widespread applicability and in part to counteract the tendency to think of innocence narrowly, as involving only “wrong man” scenarios,⁶² and thus perhaps to think that innocence concerns cluster solely around those factors identified by the Innocence Project as the leading contributors to “wrongful convictions”: things like eyewitness misidentification, improper forensics, and so on.⁶³ For all that the recognition of “innocence” among those with convictions has been an important contributor to reform,⁶⁴ the way in which it is sometimes framed runs the risk of suggesting that those who are factually

61. See, e.g., Lillquist, *supra* note 12, at 184 (“When most of us think about wrongful convictions, we are primarily concerned with cases involving incorrect identifications. These are cases where the claim is ‘I did not do the crime’ rather than ‘no crime was committed.’ But even in cases in which we are certain that we have the right person, there can still be good reason to believe that the system was wrong about the defendant’s culpability for the acts the defendant committed.”).

62. Samuel Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 190 (2008) (“Inevitably, our image of false convictions is formed by the cases we know . . .”).

63. See *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <https://www.innocenceproject.org/causes-wrongful-conviction/> [https://perma.cc/NF7E-TM7A] (last visited Apr. 12, 2020).

64. Simon, *supra* note 24, at 145.

innocent but convicted are a group of relatively small size affected by a discrete set of factors. This Article hopes to unsettle that notion.

A. *The Predominance of Plea Bargaining*

There is a reason that up to 97 percent of convictions are the product of guilty pleas.⁶⁵ Indeed, there are many reasons. Plea offers are designed to be so appealing that you would throw a bunch of constitutional rights out the window⁶⁶ and admit that you committed a crime, even while knowing that punishment will follow. Their appeal is not limited in its effect to “the guilty.”⁶⁷ As this section will explain, trial is always a gamble; several factors mar the chances even of “the innocent”; the risks attending loss at trial are significant; and what a plea bargain offers is a relatively certain sentencing outcome and one that potentially avoids some of the worst aspects of loss at trial (and indeed, some of the worst aspects of pretrial hardship). Nor is it the case that existing safeguards prevent guilty pleas from being entered in the absence of guilt.

1. Chances at Trial

If those who are factually innocent felt that their chances of being found not guilty at trial were sufficiently good, this would of course reduce the desirability of guilty pleas. But the risks of trial are plentiful, even for those who are factually innocent.

Aspects of the jury process contribute to the risk of convictions in the absence of factual guilt. Subordinated groups are vulnerable to exclusion from criminal juries just as they are vulnerable to criminal charges.⁶⁸ A dynamic where those from an “in-group” sit in judgment of an “out-group” member fosters bias,⁶⁹ and bias can influence determinations of guilt.⁷⁰ That white jurors are viewed by at least some accused people as embodiments of bias as opposed to neutral fact finders is illustrated by the use of the white jury as a tool to persuade suspects to confess.⁷¹

65. See *supra* note 18 and accompanying text.

66. See Roberts, *Asymmetry as Fairness*, *supra* note 3, at 1545.

67. See Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 476 (1980) (stating that “plea bargaining may actually function perversely, placing the greatest pressure on defendants who are factually innocent”); *id.* at 477 (noting that “the rational choice may well be to enter a guilty plea despite factual innocence”); *id.* at 497 (mentioning “the fact that plea bargaining systematically undercuts the factual reliability of criminal judgments”).

68. See Jocelyn Simonson, *The Criminal Court Audience in a Post-trial World*, 127 HARV. L. REV. 2173, 2189–90 (2014) (mentioning exclusion from juries of people of color, people with felony convictions, poor people, and homeless people).

69. Roberts, *supra* note 2, at 866–67.

70. Levinson et al., *supra* note 57, at 207.

71. See Andrew Cohen, *Confessing While Black: When the Threat of a White Jury Is an Interrogation Tool*, MARSHALL PROJECT (Dec. 12, 2014, 8:37 AM), <https://www.themarshallproject.org/2014/12/12/confessing-while-black> [https://perma.cc/T77N-ELSZ].

Nor can jury instructions cure the most troubling tendencies of jurors. Jurors may fail to understand instructions,⁷² they may be unable to comply with them,⁷³ and they may consciously override them.⁷⁴ The presumption that juries follow instructions is, as Alex Kozinski puts it, “more of a guess.”⁷⁵ This goes for even the most fundamental instruction—the one that telegraphs how much is being done to ward off wrongful convictions—namely the instruction not to convict where any reasonable doubt exists.⁷⁶ Similarly, the instruction that jurors should presume innocence until all the evidence is heard fails to serve its purpose.⁷⁷ Jurors have of course convicted many people who were later deemed “innocent” in the narrow, wrong-man sense,⁷⁸ and if one expands one’s view of innocence to encompass those who, for example, lacked the mens rea required by the crime or were not guilty because some other defense applied, one finds additional indications of juries’ vulnerability. Jody Armour has identified mens rea deliberations as a hotbed of juror bias.⁷⁹ With regard to defenses, as will be explained,⁸⁰ they play an undervalued role in cultural understandings of what crime is. There is reason to be concerned that they may also be undervalued by laypersons plucked off the streets to serve as jurors.

Maybe one would worry less about the fact finders in one’s case if one had a broader sense of trust in the ability of the legal system to demonstrate the kind of qualities that seem necessary for a fair and accurate trial: things like an interest in protecting the individual from unfairness; an awareness of what is at stake for the individual; openness to the fact that the individual might be innocent (and indeed is presumed innocent); effective and well-informed advocacy from the individual’s representative; an interest in accuracy; and a willingness to listen to what the individual has to say. But up until the point

72. Dan Simon, *More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms*, 75 LAW & CONTEMP. PROBS., no. 2, 2012, at 167, 174–75 (explaining that comprehension rates range from 13 to 73 percent).

73. See, e.g., Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant’s Previous Criminal Record: A Simulation Study*, 2000 CRIM. L. REV. 734, 738 (“[I]t cannot be assumed that jurors will follow an instruction on the use of evidence of previous convictions.”).

74. See Lillquist, *supra* note 12, at 184–85 (mentioning, in connection with the risk of wrongful conviction, a concern that jury instructions are unhelpful and sometimes worsen the situation).

75. Alex Kozinski, Preface, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC., at iii, viii (2015).

76. See Vida B. Johnson, *Presumed Fair?: Voir Dire on the Fundamentals of Our Criminal Justice System*, 45 SETON HALL L. REV. 545, 557 (2015).

77. See *id.*

78. For examples, see NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> [<https://perma.cc/VR7Z-SKLE>] (last visited Apr. 12, 2020) (currently detailing 2572 exonerations).

79. See Jody Armour, *Where Bias Lives in the Criminal Law and Its Processes: How Judges and Jurors Socially Construct Black Criminals*, 45 AM. J. CRIM. L. 203, 217 (2018) (“Only through radically overhauling the prevailing *mens rea* paradigm can we shed light on the enormous number of opportunities that exist in criminal trials for jurors’ racially biased moral judgments to result in the biased social construction of black criminals.”).

80. See *infra* note 141 and accompanying text.

at which a defendant must decide whether she will take a chance on the possibility of a fair and accurate adjudication, if, like a disproportionate number of those who are prosecuted in this country, she is poor and a person of color,⁸¹ it is unlikely that she has experienced any of those things from the government authorities,⁸² including the law enforcement authorities,⁸³ with whom she has interacted. For example, the lives of those who are poor (including, and perhaps particularly, those who have been directly impacted by the criminal system) are not imbued with signals that the government cares vis-à-vis them about respect,⁸⁴ accuracy,⁸⁵ their stories,⁸⁶ their protection,⁸⁷ their presumptive innocence,⁸⁸ or the stakes for them of governmental action.⁸⁹ If their stance by the time of their plea decision is

81. See *supra* note 56 and accompanying text.

82. See Shelley C. Chapman, *I'm a Judge and I Think Criminal Court Is Horrifying*, MARSHALL PROJECT (Aug. 11, 2016, 10:00 PM), <https://www.themarshallproject.org/2016/08/11/i-m-a-judge-and-i-think-criminal-court-is-horrifying> [https://perma.cc/4DKT-4UFS] (“I was shocked at the casual racism emanating from the bench. The judge explained a ‘stay away’ order to a Hispanic defendant by saying that if the complainant calls and invites you over for ‘rice and beans,’ you cannot go. She lectured some defendants that most young men ‘with names like yours’ have lengthy criminal records by the time they reach a certain age.”).

83. See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2125 (2017) (suggesting that “incentives to arrest might . . . bring more people into contact with aggressive policing” and that “[e]ven if those people are never arrested, and even if they do not become suspects of any particular crime, this contact might have negative effects on their perceptions of police, reminding them of their relative worthlessness in the eyes of the state”).

84. See M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 339 (2018); Sarah Lustbader & Vaidya Gullapalli, *The Waiting Game: NYPD Ripped 1-Year-Old from Mother, but Why Did the Benefits Office Expect Her to Wait for Hours, Standing Up, with a Child?*, APPEAL (Dec. 13, 2018), <https://theappeal.org/the-waiting-game-nypd-ripped-1-year-old-from-mother-but-why-did-the-benefits-office-expect-her-to-wait-for-hours-standing-up-with-a-child/> [https://perma.cc/E7VC-Q9XU] (“In courtrooms, jails, and benefits offices around the country, low-income people are told to wait. For hours. They are not told to return in an hour, or that someone will call them when it’s their turn, or to take a seat, have a cup of water, and read a book. In criminal court, defendants and their families are often forced to wait for hours. They must do so silently, and are not allowed to read a newspaper, let alone check their phone. There is simply no regard for their time.”).

85. See MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 10 (1979) (“There was little independent investigation of facts.”).

86. See Hanan, *supra* note 84, at 339 (mentioning “‘a court culture of indifference, disrespect, and hostility’ toward criminal defendants” (quoting Nicole Gonzalez Van Cleve, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT 55 (2016))); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1456–57 (2005).

87. See Cecelia Trenticosta & William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 125, 138 (2011).

88. See FEELEY, *supra* note 85, at 9 (mentioning “court-oriented criminal justice with its . . . assumption that riffraff are probably guilty”).

89. See *id.* at 3 (“[Lower criminal courts] are chaotic and confusing; officials communicate in a verbal shorthand wholly unintelligible to accused and accuser alike, and they seem to make arbitrary decisions, sending one person to jail and freeing the next.”).

one of legal estrangement,⁹⁰ it would not be a surprise. It would also be unsurprising if, instead of leaving their fate in the hands of a combination of some or all of judge, prosecutor, government-funded attorney, and jurors, they chose to act as their own condemner.

Then there is the fact that the government is not just the overseer of the process but also the adversary. As discussed in the next section, defendants' resources are usually significantly inferior to those of the government,⁹¹ in areas that include legal representation,⁹² investigation,⁹³ and the ability to locate and compel witnesses.⁹⁴ While defendants do have access to something that the government does not—their ability to testify—they are all too easily damned if they do and damned if they don't.⁹⁵ Defendants who testify at trial are vulnerable to attacks of all sorts: they may lack the education, testimonial training, and jury appeal that the government's witnesses have,⁹⁶ and they may be vulnerable to scathing cross-

90. See Bell, *supra* note 83, at 2125; Rebecca Buckwalter-Poza, *New Sheriff; Old Problems: Advancing Access to Justice Under the Trump Administration*, 127 YALE L.J. FORUM 254, 262 (2017) ("The demographics of those who mistrust government, unsurprisingly, correspond to those most affected by the justice gap—those living in poverty, people of color, women, immigrants, the elderly, people with disabilities, and LGBT individuals.").

91. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 33 (1997).

92. See George C. Thomas III et al., *Is It Ever Too Late for Claims of Innocence?: Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 273 (2003) ("If many innocent suspects do not meet their lawyer until he arrives with a plea bargain in hand, . . . some might be tempted to take the offer. After all, if you are innocent, it would not inspire much confidence in your lawyer if you meet him for the first time only when he has already assumed your guilt and bargained a jail sentence for you.").

93. See Givelber, *supra* note 9, at 1360, 1375–76 ("Defense counsel has far fewer resources and less access to incriminating witnesses than the prosecution. When representing an indigent, defense counsel needs the permission of the court to expend any monies on investigators or experts. While the defendant has a right to subpoena witnesses, enforcing those subpoenas frequently requires the active participation of the police or court officers. Thus, defense counsel must depend frequently upon the goodwill of the state or the judge."); Simon, *supra* note 72, at 172 ("The vast majority of criminal defendants lack the resources, expertise, and legal authority to investigate crimes effectively."); David Alan Sklansky, *Autonomy and Agency in American Criminal Process* 18 (Stanford Pub. Law Working Paper No. 2849226, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849226 [<https://perma.cc/DPQ3-GN6E>] ("In a criminal case, though, the parties have vastly different investigatory resources. The prosecution has the police; the defense does not Lawyers representing indigent defendants, in particular, often lack the means to conduct any kind of independent investigation.").

94. See Givelber, *supra* note 9, at 1375–76.

95. See, e.g., Alan Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 11–12 (1997) ("When [a hypothetical person who is poor, African-American and from the inner city] is arrested and charged the third time, he is more likely to face imprisonment. At that point, [he] may wish to plead 'not guilty' and go to trial. If he does so, he will have two choices: (1) He may elect to testify and deny his guilt, in which case his prior convictions may be used to impeach and he will likely be convicted; or (2) He may elect to forego his right to testify in order to prevent his prior convictions from coming before the jury, in which case he is likely to be convicted." (footnotes omitted)).

96. See Simon, *supra* note 72, at 171 (mentioning "the credibility advantage that police officers enjoy over criminal defendants"); see also Alexandra Natapoff, *Gideon Skepticism*,

examination⁹⁷ on subjects such as criminal records.⁹⁸ Whereas impeachment of a defendant with her prior convictions is supposed to be done only for the purpose of attacking her truthfulness as a witness, such impeachment has the effect, and some would say the purpose, of encouraging propensity-based reasoning.⁹⁹ If defendants instead take the path of remaining silent, they get punished by jurors who want to hear both sides of the story.¹⁰⁰ One study of exonerees revealed that the most common reason for their waivers of the right to testify was their fear that their prior convictions would be used to crush them. While this fear was well-founded,¹⁰¹ from their silence followed their conviction.¹⁰²

2. Risks After Trial

Paired with the risks that trial will end in a guilty verdict are the risks of what that might entail.¹⁰³ Of course there is the sentence, frequently inflated beyond what was offered pretrial, thanks to the “trial penalty.”¹⁰⁴ The desire to lessen sentencing exposure is a huge driver of guilty pleas¹⁰⁵ and does not

70 WASH. & LEE L. REV. 1049, 1080 (2013) (mentioning that “most of the criminal justice population is poor, undereducated, suffering from substance abuse and/or mental health challenges, and thus in a poor position to understand their legal options or advocate for themselves”).

97. See PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 89 (2009).

98. John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 489 (2008).

99. See *id.*; see also Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 296 (2008) (“Scholarly commentary in the modern era has resolutely derided prior conviction impeachment as a mean-spirited penalty imposed on criminal defendants—nothing more than a thinly veiled effort by prosecutors (condoned by ‘law and order’ courts and legislators) to introduce otherwise prohibited evidence of a defendant’s criminal propensities through the back door of credibility impeachment.”).

100. See Givelber, *supra* note 9, at 1369.

101. See Blume, *supra* note 98, at 493 (stating that his data “confirm[ed] that threatening a defendant with the introduction of his or her prior record contributes to wrongful convictions either directly—in cases in where the defendant is impeached with the prior record and the jury draws the propensity inference—or indirectly—by keeping the defendant off the stand.”).

102. See *id.*

103. See John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 226 (2013) (“For all but the simplest crimes, prosecutors can pile up charges to the point where the incentive to plea bargain becomes overwhelming.”).

104. See generally NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [https://perma.cc/T5Q9-PPMX]. Note also the slimness of the protection against vindictive prosecution. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978) (finding no constitutional violation where the rejection of a plea offer of five years in prison was followed by the invocation of a “recidivist” statute threatening a life sentence).

105. See Hessick, *supra* note 53, at 279 (saying of the innocent defendant who is at risk of a five-year prison term that “[i]f she estimates that she has an 80% chance of acquittal at trial, she should accept any plea bargain that offers her less than one year in prison”).

dissolve in the presence of innocence.¹⁰⁶ The threat of mandatory minimum sentences, for example, may provoke guilty pleas even by those who are not factually guilty.¹⁰⁷

There are also myriad consequences other than the formal sentence that can contribute to the relative desirability of a guilty plea, even when someone is innocent. The question of which “collateral consequences” will attach to a guilty plea is a powerful ingredient of plea bargaining,¹⁰⁸ including consequences relating to one’s immigration status,¹⁰⁹ ability to work,¹¹⁰ and presence on a state “offender” registry.¹¹¹ Prosecutors have enormous leverage, thanks in part to a wide variety of qualitatively different experiences that they can offer: a life sentence instead of death,¹¹² a misdemeanor conviction instead of a felony conviction,¹¹³ no incarceration instead of incarceration,¹¹⁴ a disposition that will not get you deported,¹¹⁵ one that will get you drug treatment,¹¹⁶ one that will spare a loved one from prosecution,¹¹⁷ or one that will not require you to register as a “sex offender” for the rest of your life.¹¹⁸ Buried among the array of prosecutorial tools is likely to be one that can make you buckle.¹¹⁹

3. Risks Before Trial

For many people (guilty or not), it is the risks posed pre-adjudication, such as pretrial detention, that provide the most immediate incentive to accept a

106. See Lucian E. Dervan, *Bargained Justice: Plea-Bargaining’s Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 84–86 (asserting that “it is clear that plea-bargaining has an innocence problem” and surveying estimates).

107. See Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2184 (2013) (“Prosecutors, using the legal apparatus of expansive criminal liability, recidivist statutes, and mandatory minimums, coerce guilty pleas by threatening defendants with vastly disproportionate punishment if they go to trial.”).

108. See Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901, 905–14 (2017).

109. See Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 960–61 (2018).

110. See *id.*

111. See Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 119–20 (2009).

112. See Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221, 234 (2012).

113. Ristroph, *supra* note 41, at 597.

114. See Natapoff, *supra* note 36, at 1346.

115. See Jain, *supra* note 109, at 960–61.

116. See John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173, 218 (2015).

117. See Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 157 (2011) (describing “wired” pleas).

118. See Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 856 (2019) (“There are many reasons the defense attorney wants to avoid registration, but the most important one is that being on the sex offender registry will exclude the defendant from shelters, group homes, and public housing.”).

119. Daniel Richman, *Framing the Prosecution*, 87 S. CAL. L. REV. 673, 679 (2014).

plea.¹²⁰ Indeed, Jocelyn Simonson has suggested that it is the setting of bail that serves as our most important adjudicative moment.¹²¹ A guilty plea can often shorten the duration of one's confinement¹²² and thus can offer the prospect of not just liberty but all that liberty can permit: life with loved ones¹²³ and other potential ingredients of a sustainable life.¹²⁴ Pleading guilty can also lead to the possibility of what John Blume calls "a less restrictive custodial environment"¹²⁵ by getting you out of the local jails, where conditions may be horrendous.¹²⁶ In addition, pretrial confinement limits or destroys one's ability to aid in the preparation of one's defense¹²⁷—particularly if one's lawyer never visits¹²⁸—thus making any nonplea option seem still less viable.¹²⁹

Nor are the pressures to end a case—guilt or no guilt—confined to those in custody. Court appearances are generally scheduled in disregard for—and perhaps in an eagerness to disregard¹³⁰—a defendant's other commitments.¹³¹ Assigned with hundreds of others to a courtroom docket, one may have to wait all day, only to be instructed to return on another day¹³²

120. See Gross, *supra* note 10, at 776 (saying of a group of exonerees who pled guilty, that most appear to have done so "to get out of jail"); Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [<https://perma.cc/6AJK-9UGP>] (citing data in support of the conclusion that "bail makes poor people who would otherwise win their cases plead guilty").

121. See Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 585 (2017) ("[F]or indigent defendants, [bail] often serves the function that a real trial might, producing guilty pleas and longer sentences when an individual cannot afford to pay their bail.").

122. For a discussion of the paltry nature of speedy trial protections, see Roberts, *supra* note 4.

123. See Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), <https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html> [<https://perma.cc/YD6Q-EZV2>] ("As a mother myself, I do not think there's anything I wouldn't plead guilty to if a prosecutor told me that accepting a plea was the only way to get home to my children.").

124. See Natapoff, *supra* note 96, at 1051 ("Innocent defendants may plead guilty because they cannot afford bail pending trial and will lose jobs, homes, or children by remaining incarcerated, or they may plead because the trial penalty is too great relative to the plea offer.").

125. See Blume, *supra* note 98, at 496 n.70 ("There are many reasons to question whether many defendants are in fact guilty of the underlying offense [to which they plead guilty]. For example, due to jail overcrowding and large criminal dockets in major metropolitan areas, many defendants plead guilty in order to obtain their immediate release or to get to a less restrictive custodial environment rather than spending a substantial amount of time in a local jail awaiting a trial date.").

126. See Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 877 (2018) ("As a general matter, conditions in jails are much worse than prisons nationwide . . .").

127. See Verified Petition for Class Certification & Declaratory & Injunctive Relief at 2–4, *Allen v. Edwards*, No. 655079 (La. Dist. Ct. Feb. 6, 2017) [hereinafter Verified Petition].

128. See *id.*

129. See *id.*

130. See FEELEY, *supra* note 85, at 276–77.

131. *Id.* at 272–75.

132. See Jain, *supra* note 109, at 959–60 ("Misdemeanor courts are too often plagued by delays, meaning that defendants who want their day in court face repeated postponements. The upshot of all this is that many defendants choose to waive their right to counsel and plead

and once again put in jeopardy one's ability to be a parent, caregiver, worker, student, or patient.¹³³ Unless, that is, one decides to end the case via plea.¹³⁴

4. Lack of Safeguards

One could perhaps counteract these pressures if one set up meaningful safeguards against the entering of guilty pleas in the absence of factual guilt. But such safeguards are lacking, a fact that is unsurprising given the incentives on the part of all the repeat players—courts, prosecutors, and defense attorneys—to resolve a large number of cases via plea.¹³⁵

Naturally, defendants are themselves potential safeguards: they can refuse to plead guilty if it is unacceptable to them to admit guilt.¹³⁶ One should remember, however, that the criminal law is a complex, inaccessible thing. There is a colloquial sense of what crimes are¹³⁷—murders are killing people, for example¹³⁸—and then there are the nuances, where you can kill without committing a murder,¹³⁹ and even without committing a crime,¹⁴⁰ depending on things that help define what is and is not a crime, such as *mens rea* and affirmative defenses.¹⁴¹ If we acknowledge that crime commission is a complex thing resting on the resolution of a variety of legal, factual, and normative questions, it is easier to see that defendants may not know whether they have committed a crime,¹⁴² particularly if they lack well-resourced counsel to investigate and advise. They may know they were there; they may know they did something; they may know that in the colloquial sense that's

guilty as quickly as possible.”); David Feige, Opinion, *Waiting and Waiting . . . for Justice*, N.Y. TIMES (May 1, 2013), <https://www.nytimes.com/2013/05/02/opinion/waiting-and-waiting-for-justice.html> [<https://perma.cc/2MER-QEHJ>].

133. See Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U. L. REV. 779, 833 (2018) (“[M]any people—including innocent people—accept plea offers even when out of jail, to avoid coming back to court (and thus losing work days and possibly their jobs).”).

134. See *id.*

135. See Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919, 939 (2015/2016) (stating that the American legal system, which “makes it in the interest of defense attorneys as well as prosecutors and judges to convince defendants to plead guilty” is “nearly perfectly designed to convict the innocent”); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 714 (1981).

136. See Symposium, *Stealing Innocence: Juvenile Legal Issues and the Innocence Project*, 18 CARDOZO J.L. & GENDER 577, 586 (2012).

137. See Simon, *supra* note 72, at 176.

138. See Roberts, *supra* note 4, at 1017 (describing the phenomenon whereby homicides are routinely described as “murders” in accordance with a colloquial sense of what crime is).

139. This is the case, for example, with manslaughter. See Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L.J. 351, 424 (2005).

140. This is the case, for example, with a killing carried out in self-defense. See Kimberly Kessler Ferzan, *Self-Defense and the State*, 5 OHIO ST. J. CRIM. L. 449, 451 (2008).

141. Note that the constitutional requirement regarding pre-plea advice relating to the components of a crime is limited to elements rather than defenses. See Shapiro, *supra* note 15, at 37 (“[A] plea of guilty, to be invulnerable to direct or collateral constitutional attack, must be knowingly and voluntarily made. This standard requires the defendant to be informed of the essential elements of the crime as well as of certain constitutional rights.”).

142. See Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415, 1431 (2016) (reasons for pleading include “misunderstanding what is required by the elements of the offenses” and “misunderstanding what intent is required”).

on the way, or all the way, to crime. But in the nuanced sense of whether, under the law, a crime occurred, that question—if even answerable¹⁴³—requires not just factual but also legal know-how, so defendants cannot always act as their own safeguards.

This brings us to defense attorneys. Of course, all across this country there are zealous attorneys who are made queasy by repeatedly entering guilty pleas, perhaps particularly when they detect innocence,¹⁴⁴ and who fight their hardest to prevent guilty pleas being taken by those who are innocent. But there are also defense attorneys who are inclined to assume guilt¹⁴⁵ and who may, as a result, resist guilty pleas with something less than alacrity.¹⁴⁶ Even absent attorneys' assumptions of guilt, there are resource deficiencies that may mean that defense attorneys are unable to conduct a rigorous screening for guilt¹⁴⁷ or that they confront the prospect that they would be outgunned at trial and therefore conclude that a guilty plea is the best option for their client¹⁴⁸—even where they detect innocence. And in thousands of guilty plea proceedings, there are no defense attorneys at all.¹⁴⁹

The prosecutorial duty to do justice includes a duty to avoid the conviction of the innocent.¹⁵⁰ But prosecutors have only limited access to evidence

143. See *supra* note 22 and accompanying text.

144. See M. Chris Fabricant, *Rousting the Cops*, VILLAGE VOICE (Oct. 30, 2007), <https://www.villagevoice.com/2007/10/30/rousting-the-cops/> [https://perma.cc/DYC4-CXHY] (“[W]ell over half of my cases are misdemeanors, and I have had a disgraceful number of innocent clients, many of whom plead guilty . . .”).

145. See ALAN M. DERSHOWITZ, *THE BEST DEFENSE*, at xiv (1982) (“Any criminal lawyer who tells you that most of his clients are not guilty is either bluffing or deliberately limiting his practice to a few innocent defendants.”); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1269 n.121 (1993) (“[T]here is evidence that public defenders and criminal defense lawyers themselves believe that the vast majority of their clients are guilty of some wrongdoing.”); David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER (Sept. 7, 2009), http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann [https://perma.cc/YYP2-62AD] (quoting the attorney for Cameron Todd Willingham, who may have been wrongly executed for murdering his three children, as saying, “[e]veryone thinks defense lawyers must believe their clients are innocent, but that’s seldom true Most of the time, they’re guilty as sin”).

146. Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer’s Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315, 327 (2009).

147. See Myrna S. Raeder et al., *Convicting the Guilty, Acquitting the Innocent: Recently Adopted ABA Policies*, CRIM. JUST., Winter 2006, at 14, 19 (“Although prosecutors’ offices are themselves underfunded, the situation is still worse for defense counsel, and the resulting disparities make it particularly hard for them to uncover the sorts of unintentional errors, omissions, and biases that can result in mistaken convictions.”).

148. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1170–71 (2008).

149. See Hughes, *supra* note 11, at 1113–14 (explaining how pro se defendants are particularly dependent on courts to tell them “that by pleading guilty they risk overlooking a viable defense and/or the opportunity to obtain an independent opinion on whether it is wise to plead guilty, [because] once the plea is final, it is exceedingly difficult to ‘undo’ the conviction through post-conviction litigation” and that, despite this, the Supreme Court has ruled that courts have no constitutional obligation to provide such information).

150. See Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 634 (1999) (mentioning the objective of “avoiding punishment of those who are innocent of criminal wrongdoing”).

relating to mens rea or potential affirmative defenses.¹⁵¹ In addition, office incentives tend to reward convictions.¹⁵² Finally, tunnel vision may increase the extent to which prosecutors are inclined to assume guilt and to discount information that is in tension with that assumption.¹⁵³

Then there is the judge and the law that she interprets. There, too, the protections against pleas being allowed in the absence of factual guilt can be thin, whether one focuses on the trial level or the appellate stages.¹⁵⁴ At trial, the burden of proof that fact finders are instructed to apply is proof beyond a reasonable doubt, which is a standard justified in terms of its potential to prevent the conviction of those who are innocent.¹⁵⁵ But when it comes to evaluating the basis for a plea, the standard appears to be one at the other end of the criminal justice spectrum: probable cause,¹⁵⁶ a standard that has been described as requiring “less than a fifty-fifty chance of guilt”¹⁵⁷ and, indeed, “little more than heightened suspicion.”¹⁵⁸ While many states require a guilty plea to have a “factual basis,”¹⁵⁹ legal scholars have exposed the thinness of this requirement.¹⁶⁰

151. Roger Koppl & Meghan Sacks, *The Criminal Justice System Creates Incentives for False Convictions*, 32 CRIM. JUST. ETHICS 126, 149 (2013) (pointing out that prosecutors “don’t always see all of the evidence” and may miss “refuting evidence”).

152. *See id.* at 148 (“[P]rosecutor performance is often measured by conviction rates.”).

153. *Id.* at 149.

154. *See* Samuel Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT’L ACAD. SCI. 7230, 7230 (2014) (“Few [felony guilty pleas] are ever subject to any review whatsoever. . . . [T]he appeals that do take place are usually perfunctory and unrelated to guilt or innocence.”).

155. *See In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (“I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”).

156. *See* Shapiro, *supra* note 15, at 43–44.

157. *See* Natapoff, *supra* note 36, at 1349 (“[A]n innocent person can be legally arrested, sail through the weak screening processes of the prosecutorial and public defender offices, go to jail, and succumb to the pressure to plead guilty, all based on no more than a probability (less than a fifty-fifty chance) of guilt.”).

158. *See* Albert W. Alschuler, *Straining at Gnats and Swallowing Camels*, 88 CORNELL L. REV. 1412, 1413–14 (2003) (“The plea bargaining system effectively substitutes a concept of partial guilt for the requirement of proof of guilt beyond a reasonable doubt. It is marvelously designed to secure conviction of the innocent.”); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 680–81 (“Probable cause is little more than heightened suspicion, and it is not even remotely sufficient to screen out individuals who are factually not guilty.”).

159. 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.4(f) (4th ed. 2017).

160. *See* Bowers, *supra* note 148, at 1170–71 (“Courts have allowed defendants to plead guilty to daytime burglaries to satisfy lesser charges, even when the crimes indisputably occurred in dark of night. Courts have upheld pleas to ‘hypothetical crimes’ that exist in no penal code and require impossible mens rea.” (footnote omitted)); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 721 (2006); Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 212–13 (2006) (noting that “[a]t present, the factual basis inquiry into the plea is often perfunctory”).

Many judges will accept a guilty plea only if an admission of guilt is made, but this can again be a charade rather than an effective screen.¹⁶¹ And indeed in most states, an *Alford* plea is permitted¹⁶²—a guilty plea nestled inside which is the defendant’s assertion of innocence—thus perhaps laying bare the minimal extent to which, for a guilty plea, guilt needs to be clear.¹⁶³ Nor is this necessarily wrong in the system that exists. Professor Josh Bowers argues that it is precisely *right*.¹⁶⁴ What incentivizes judges to accept pleas even in these wobbly circumstances may be not just the pragmatic desire to move things along, or a tendency to assume the guilt of defendants, but a recognition that accuracy may need to be sacrificed in order to prevent grossly excessive exposure to punishment or other consequences.¹⁶⁵ Truth is a luxury that not everyone can afford.¹⁶⁶

Thus, the kinds of screens that one might hope would be in place to prevent guilty pleas in the absence of factual guilt—those applied by defendants, defense attorneys, prosecutors, and judges—are often minimal.¹⁶⁷ And such screens tend to be still more minimal on appellate review,¹⁶⁸ as this Article further explores in Part I.C.¹⁶⁹ If we examine the National Registry of Exonerations,¹⁷⁰ we find numerous examples of those who pled guilty,¹⁷¹ and scholars such as Professor Samuel Gross have suggested that guilty pleas might mask the innocence of a huge other group of people.¹⁷² Nor should

161. See Garrett, *supra* note 142, at 1421 (“Judges may ask a defendant to provide an ‘allocation’ before pleading guilty, but the admission of guilt need not be under oath or very detailed, and it may just involve an in-court agreement that the defendant committed acts satisfying the legal elements of the crime.”); see also *id.* at 1427 (“An admission to having satisfied the elements of the crime . . . does not reach the question of whether any defenses might defeat criminal liability.”); *id.* at 1421 (“[T]he defendant may say little or nothing at all of any substance . . . [and] some courts even tolerate plea bargains en masse . . .”).

162. See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1372 n.52 (2003) (forty-seven states and the District of Columbia).

163. See *North Carolina v. Alford*, 400 U.S. 25, 32 (1970).

164. See Bowers, *supra* note 148, at 1123–24.

165. See Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 344–46 (2017) (describing judicial dismissals motivated by these reasons).

166. See Hessick, *supra* note 53, at 279 (“Plea bargaining puts a price tag on sorting the innocent from the guilty, and it makes that price too high for most defendants.”).

167. So too with grand juries. See Ristorph, *supra* note 41, at 597 (noting that “a slight majority of states do not require grand juries to review felony charges, and where grand jury proceedings persist, they have been structured to favor the prosecutor and rarely fail to deliver indictment”).

168. See Gross, *supra* note 10, at 777.

169. See *infra* note 239 and accompanying text.

170. See, e.g., Roberts, *supra* note 133, at 783–84 (“There is general consensus that documented exonerations in serious felony cases are only the ‘tip of the [wrongful conviction] iceberg.’” (quoting Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 531 (2005))).

171. See Colin Miller, *Why States Must Consider Innocence Claims After Guilty Pleas*, 10 U.C. IRVINE L. REV. 671, 673 (2020) (stating that “74 out of 166 (44.6%) DNA and non-DNA exonerees in 2016 were individuals who had been convicted after guilty pleas”).

172. See Samuel Gross & Barbara O’Brien, *Frequency and Predictors of False Conviction: Why We Know so Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 930–31 (2008) (“[I]t is entirely possible that most wrongful convictions—like 90 percent or

any of this be taken as suggesting that trial is a panacea.¹⁷³ After all, in many instances it is a well-justified fear of the fallibilities of trial that helps to impel pleas—all the features of trials laid out above¹⁷⁴—and indeed the bulk of cases contained within the exonerations registry involved convictions at trial.¹⁷⁵

B. *The Subordination of the Defense*

Defense representation is vitally important as a means of protecting defendants' rights¹⁷⁶ and warding off convictions.¹⁷⁷ Defense attorneys have an array of means by which they can reduce the risk of conviction in the absence of factual guilt.¹⁷⁸ They can, for example, communicate skillfully with their clients, obtaining information and dissuading guilty pleas, whether through expressing or displaying the reasons to hold firm. They can also advocate for pre-adjudication release and other pretrial conditions that will permit a client both to withstand the pressures to plead guilty and to assist with trial preparation.¹⁷⁹ In addition, they can locate and talk to witnesses with the help of investigators;¹⁸⁰ obtain and deploy knowledge of the

more of all criminal convictions—are based on negotiated guilty pleas to comparatively light charges, and that the innocent defendants in those cases received little or no time in custody. If so, it may well be that a major cause of these comparatively low-level miscarriages of justice is the prospect of prolonged pretrial detention of innocent defendants who are unable to post bail.”).

173. See Gerard Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123 (1998) (pointing out the problems that exist for the “poor and ill-represented” at trial, including disparate resources and juror prejudice); Simon, *supra* note 24, at 222 (“[T]he adjudicative process falls short of reliably distinguishing between guilty and innocent defendants.”).

174. See *supra* notes 67–101 and accompanying text.

175. Approximately 55 percent of the 2016 exonerations, for example. See NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016, at 7 (2017), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf [<https://perma.cc/Q9QJ-VJZA>].

176. See James Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make?: The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 213 (2012) (“Effective counsel is a prerequisite to the assertion of nearly every other right in the criminal justice system.”); Natapoff, *supra* note 96, at 1056 (recognizing defense counsel as “the preeminent existing safeguard for defendant rights and accurate outcomes”); see also Gross, *supra* note 10, at 773–74 (stating that a quarter of the exonerations in the National Registry of Exonerations are coded as involving “Inadequate Legal Defense,” but regarding many additional exonerees, it is thought that they “would not have been wrongfully convicted if their lawyers had done good work defending them”).

177. See, e.g., James Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1850 (2000) (finding ineffective defense lawyering to be the biggest contributing factor to the wrongful conviction of capital defendants over a twenty-three-year period).

178. See Adele Bernhard, *Effective Assistance of Counsel*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 220, 227 (Saundra Westervelt & John Humphrey eds., 2001) (“It is the defense counsel’s responsibility to protect [the innocent] from the mistakes of others: from witnesses’ misidentifications, police officers’ rush to judgment, and prosecution’s reluctance to reveal potentially exculpatory material.”).

179. See Janet Moore, *Reviving Escobedo*, 50 LOY. U. CHI. L.J. 1015, 1016 (2019).

180. See Myron Beldock et al., *Opinion, The Death of the “Hurricane” and the Criminal Justice System’s Failures*, LAW.COM (Apr. 14, 2014, 12:00 AM), <https://www.law.com/nationallawjournal/almID/1202652582104/the-death-of-the-hurricane-and-the-criminal->

intricacies of the criminal law and all that it offers to the defense; negotiate with the prosecutor, and argue to the judge, for dismissal;¹⁸¹ and argue to the jury for acquittal. They can also make effective use of discovery,¹⁸² analyze the evidence, conduct skillful jury selection, prepare their lay and expert witnesses to testify persuasively, educate the jurors through the use of lay and expert witnesses, conduct a cross-examination that exposes inaccuracies in the government's evidence,¹⁸³ put together powerful direct examinations and demonstrative aids, and so on.

But this all takes time, skill,¹⁸⁴ money,¹⁸⁵ experience, investigation, training,¹⁸⁶ clout, zeal, incentives that allow that zeal to flourish, and the backing of the law as interpreted by the court. Attorneys for many criminal defendants, including many who are indigent,¹⁸⁷ lack some or all of these.¹⁸⁸ Aspects of this crisis include deficits in time,¹⁸⁹ skill,¹⁹⁰ money,¹⁹¹

justice-systems-failures/ [https://perma.cc/742S-3Z8V] (listing remedies “to significantly cut down the number of wrongful convictions” and mentioning that “poor defendants need adequately funded and trained defense counsel who have full investigative and technical experts to support them”).

181. See Roberts, *supra* note 133, at 834.

182. See Richard Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 252 (“A good lawyer cannot guarantee that an innocent person will not be convicted, but an aggressive advocate might discover exculpatory evidence, or might uncover fatal flaws in the prosecution’s case, either of which can change the balance to make it less likely that an innocent person will be convicted.”).

183. Note the common description of cross-examination as “the greatest legal engine ever invented for the discovery of truth.” *California v. Green*, 399 U.S. 149, 158 (1970).

184. See Sklansky, *supra* note 93, at 14 (“Defendants suffer all the time because of their attorneys’ incompetence; that is the natural if disconcerting result of allowing a procedural system to place great weight on lawyerly skill.”).

185. See Donald Dripps, *Does Liberal Procedure Cause Punitive Substance?*, 87 S. CAL. L. REV. 459, 466 n.24 (2014) (mentioning Stuntz’s recommendation that courts should promote accurate verdicts by, for example, encouraging funding for indigent defense).

186. See Beldock et al., *supra* note 180.

187. 80 to 85 percent of criminal defendants are indigent. See Lisa Pruitt & Beth Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 222 n.14 (2010).

188. See Natapoff, *supra* note 86, at 1454 n.17 (“Recent studies of indigent defense indicate that poor defendants often receive little or no meaningful representation.”). Note that these concerns extend to other defense attorneys as well. See *infra* note 202 and accompanying text.

189. See Jain, *supra* note 109, at 959 (“Overworked defense attorneys—in egregious cases, representing upwards of two thousand clients per year—provide no meaningful advice.”); Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1045 (2013) (“[O]verworked public defenders typically advise clients to accept pleas based on aggregate criteria such as the ‘market price’ for that offense in that jurisdiction, rather than the individual evidence . . .”); Stuntz, *supra* note 91, at 40 (“In a system in which . . . public defenders represent hundreds of felony defendants per year, defense lawyers’ most important job is triage: deciding which (few) cases to contest somewhat, which (very few) cases to contest seriously, and which ones not to contest at all.”).

190. See David Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 29 (2017).

191. See Natapoff, *supra* note 86, at 1454 n.17 (“[T]he overwhelming evidence indicates that state public defender offices and appointed counsel are overburdened and underresourced.”); Stuntz, *supra* note 91, at 11 (stating that the “pay scales” of defense counsel “seem to preclude more than nominal litigation in more than a tiny number of cases”).

experience,¹⁹² investigation,¹⁹³ and training,¹⁹⁴ as well as incentives that point toward placating the prosecutor,¹⁹⁵ mollifying the judge,¹⁹⁶ not taking time away from other clients,¹⁹⁷ and seeking the quickest resolution possible,¹⁹⁸ which is often a guilty plea.¹⁹⁹ Caseloads can reach into the thousands,²⁰⁰ and the average standard of representation of those who are poor is low.²⁰¹ Underfunding and overwork mean that, according to one national report, public defenders “cannot interview their clients properly, effectively seek their pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally would be undertaken by a lawyer with sufficient time and resources.”²⁰² Legal and resource constraints also threaten defense

192. See Givelber, *supra* note 9, at 1360 (“The prosecution typically has the more experienced lawyers . . .”).

193. See Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. (forthcoming 2020) (manuscript at 33), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3477482 [<https://perma.cc/QB7Z-SREL>] (“Many defendants plead guilty to serious crimes without their attorneys’ ever having conducted real investigations.”).

194. *Id.* (“Studies repeatedly reveal that indigent defense delivery systems are woefully underfunded and accordingly staffed by defense attorneys who often lack adequate training or supervision and whose caseloads are impossible for any attorney to manage effectively.”).

195. See F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent*, 16 BYU J. PUB. L. 189, 211 (2002).

196. Alexandra Natapoff, *Gideon’s Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 463–64 (2015); Primus, *supra* note 193 (manuscript at 33) (stating that often “the defense function is not sufficiently independent of the judges, such that defense lawyers are poorly equipped to withstand judicial pressure to process cases quickly—pressure that sometimes includes judges punishing defense attorneys for investigating cases, filing motions, or asserting their clients’ rights”).

197. See George C. Thomas III, *How Gideon v. Wainwright Became Goldilocks*, 12 OHIO ST. J. CRIM. L. 307, 322 (2015).

198. *See id.*

199. Koppl & Sacks, *supra* note 151, at 150 (noting that all three systems of government-funded defense representation lack “an incentive to provide the best defense possible” and involve “a strong incentive to plea bargain”).

200. ROBERT BORUCHOWITZ ET AL., *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* 9 (2009), https://www.opensocietyfoundations.org/uploads/9b7f8e10-a118-4c23-8e12-1abcc46404ac/misdemeanor_20090401.pdf [<https://perma.cc/X57L-4GM4>] (“In Chicago, Atlanta and Miami, defenders carry more than 2,000 misdemeanor cases per year.”); Stuntz, *supra* note 91, at 70 (“[C]ounsel must bear caseloads that require them to start with a strong presumption against any significant investment in any given case.”).

201. See Hessick, *supra* note 53, at 275.

202. NAT’L RIGHT TO COUNSEL COMM., *JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* 7 (2009), <http://www.constitutionproject.org/pdf/139.pdf> [<https://perma.cc/SM3T-6PGV>]; see also Tigran Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 335 (2013) (noting that the crisis is not limited to public defenders but rather that “lawyers who represent indigent defendants under contracts with the government, or who receive appointments directly from the court, too frequently engage in subpar performance on behalf of their clients”); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 570 n.242 (2001) (“Legislatures . . . fund appointed defense counsel at levels that require an enormous amount of selectivity—counsel

attorneys' ability to gain access to discovery,²⁰³ including discovery of exculpatory material,²⁰⁴ and to expert witnesses,²⁰⁵ as well as their ability to select an impartial jury,²⁰⁶ confront witnesses in a meaningful way,²⁰⁷ and attempt certain defenses.²⁰⁸

Legal rules and standards often fail to impose a meaningful check on any of this. Ethical rules governing defense attorneys set a low bar,²⁰⁹ and failures to clear the bar often go unremedied.²¹⁰ Regarding the U.S. Constitution, the U.S. Supreme Court's declaration of a right to counsel does not include a funding mandate²¹¹: the process that has evolved for poor defendants as a result is, as Professor William Stuntz put it, "a scandal."²¹² And while the standard that the Supreme Court set out in *Strickland v. Washington*²¹³ requires that defense counsel be effective, this standard has been described as meaningless.²¹⁴ It is worse than meaningless if it serves to

can contest only a very small fraction of the cases on their dockets, and can investigate only a small fraction of the claims their clients might have The consequence is to steer criminal litigation away from the facts, and toward more cheaply raised constitutional claims. Those claims tend not to correlate with innocence; or if they do, the correlation may be perverse."'). David Sklansky points out that this kind of problem exists with privately retained attorneys too. See Sklansky, *supra* note 93, at 11 ("Attorneys can undermine their clients' chances by investigating cursorily, by questioning witnesses ineffectively, and by arguing unpersuasively. The lawyers appointed to represent indigent criminal defendants damage their clients' cases too often in all of these ways. A distressing number of privately retained defense attorneys fail their clients in similar fashion.").

203. See Beldock et al., *supra* note 180 (mentioning that "defense counsel must have access to both police investigators and witnesses pretrial" while listing remedies "to significantly cut down the number of wrongful convictions").

204. See Kozinski, *supra* note 75, at xxvi (explaining that, of the "three ingredients" required "before we can be sure that the prosecution has met its *Brady* obligations under the law applicable in most jurisdictions," the first is "a highly committed defense lawyer with significant resources at his disposal").

205. See Givelber, *supra* note 9, at 1376.

206. See, e.g., Verified Petition, *supra* note 127, at 2–4 ("Without access to the effective assistance of counsel, the poor stand alone against the full unchecked power of the State. They are denied not only their right to a fair trial, but are powerless to exercise the other fundamental rights guaranteed by the Constitution, such as the right to speedy trial, to confront witnesses, to impartial juries; the rights against unreasonable search and seizure and self-incrimination; and the right to be free from excessive bail, fines, and cruel and unusual punishment.").

207. See *id.*

208. See Richard Delgado, *Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation*, 3 LAW & INEQ. 9, 38 (1985) ("[I]nsanity has been called the 'rich man's defense.'" (quoting WAYNE LAFAVE & AUSTIN SCOTT, HANDBOOK ON CRIMINAL LAW 272 (1972))).

209. See Raeder et al., *supra* note 147, at 18.

210. See *id.* at 19.

211. See William Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 93 (1995) ("[T]he Court has effectively ensured that *Gideon* guarantees little more than the presence of a person with a law license alongside the accused during trial.").

212. Stuntz, *supra* note 91, at 76 ("Making *Gideon* a formal right only, without any ancillary funding requirements, has produced a criminal process that is, for poor defendants, a scandal.").

213. 466 U.S. 668 (1984).

214. See Hessick, *supra* note 53, at 276 ("That our current ineffective assistance doctrine is incapable of capturing those lawyers whose representation includes a failure to perform

demean the Sixth Amendment.²¹⁵ It is worse than meaningless if it feeds off its own awfulness: to meet *Strickland*'s first prong, one must identify lawyering that is worse than average, and, as Professor David Sklansky puts it, "the average quality of indigent defense lawyering is scandalously low."²¹⁶ To meet its second prong, one must show a reasonable probability that, without the subpar representation, the result would have been different. But, the worse the defense attorney, the stronger the prosecutorial evidence that pours into the record and thus the harder it is to satisfy this prejudice test.²¹⁷ Further, in many cases where convictions are imposed, there is no defense attorney,²¹⁸ so the question of effectiveness becomes moot. Risky though it may be to represent oneself,²¹⁹ when the provision of public defense comes with a fee attached—as often happens²²⁰—there is more of an incentive to go it alone.

This is but a brief review of some of the inadequacies of defense representation—inadequacies that can enable the conviction of the

'basic tasks' shows how meaningless our current legal standards are."); Raeder et al., *supra* note 147, at 16 ("Inadequate defense counsel played a significant role in the rising tide of wrongful convictions. We say 'inadequate' because counsel can meet the constitutionally minimal requirement of *effectiveness* while still failing to provide the level of quality representation that a system concerned with a reasonable degree of error-avoidance should expect.").

215. See Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1883 (1994) (stating that the Supreme Court's "acceptance of the current quality of representation in capital cases as inevitable or even acceptable demeans the Sixth Amendment").

216. Primus, *supra* note 193 (manuscript at 63) ("[D]octrine in this area should be willing to treat norms as *normative*, rather than solely as descriptive of the lowest common denominator of legal representation in a given jurisdiction."); see also Sklansky, *supra* note 93, at 20.

217. See Bright, *supra* note 215, at 1864 ("Nor are reviewing courts able to determine after the fact the difference made by other skills that are often missing in the defense of criminal cases—such as conducting a good voir dire examination of jurors, effective examination and cross-examination of witnesses, and presenting well-reasoned and persuasive closing arguments.").

218. See, e.g., Jain, *supra* note 109, at 959 ("Defendants are not entitled to counsel or jury trials in all low-level cases."). Note also that even where the federal Constitution does guarantee counsel, judges do not always respect those guarantees. See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, RUSH TO JUDGMENT: HOW SOUTH CAROLINA'S SUMMARY COURTS FAIL TO PROTECT CONSTITUTIONAL RIGHTS 6 (2017), <https://www.nacdl.org/Document/RushToJudgmentSCSummaryCourtsDontProtectConstRight> [<https://perma.cc/E6NZ-AP36>].

219. Sklansky, *supra* note 93, at 11 ("Defendants generally make a hash of representing themselves, often spectacularly so.").

220. See ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 12 (2010) ("In practice, defender fees often discourage individuals from exercising their constitutional right to an attorney—leading to wrongful convictions, over-incarceration, and significant burdens on the operation of courts."); J. D. King, *Privatizing Criminal Procedure*, 107 GEO. L.J. 561, 571 (2019) (stating that by 2017, "at least forty-three states had adopted the practice" of "charging criminal defendants for court-appointed counsel").

innocent²²¹—that have been explored within legal scholarship.²²² What is curious is that, as with the predominance of the plea, flaws that are acknowledged when the focus is upon them often seem to be obscured—to lie hidden in their silos²²³—when scholars discuss people with convictions.²²⁴ The next section will examine the kinds of contexts in which, once a conviction has been imposed, the scholarly assumption often seems to be that it can reliably be understood as connoting factual guilt. But first, this Article addresses the question of whether the concerns raised above cannot be ironed out postconviction, so that one can at least safely assume that a final conviction connotes factual guilt.

C. Inadequacy of Postconviction Safeguards

Both the predominance of the plea and the subordination of the defense mean that preconviction screening for innocence may be minimal or absent. But perhaps one could rely on a presumption that a conviction, once final, connotes factual guilt, if one felt that our appellate and postconviction mechanisms generally serve to correct any errors that may have occurred at the plea or trial stage. Some indeed take that position.²²⁵ But legal scholars have pointed out many reasons why such mechanisms seem unable to serve that function.

While it is true that a variety of potential stages of review exist—direct appeals in state courts²²⁶ and collateral postconviction proceedings in state and federal courts²²⁷—at each, the chance of a successful claim is generally

221. See Adele Bernhard, *Ineffective Assistance of Counsel and the Innocence Revolution: A Standards-Based Approach*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION* 226, 226 (Daniel S. Medwed ed., 2017) (“Studies of the DNA exoneration dataset show that poor defense lawyering is a major factor in the conviction of the innocent.”); Gabriel J. Chin, *Unjustified: The Practical Irrelevance of the Justification/Excuse Distinction*, 43 U. MICH. J.L. REFORM 79, 94 (2009) (finding that, given factors that include “overburdened” defense attorneys, “verdicts do not always reflect underlying truth”).

222. Note also that the Innocence Project website currently features six “causes” of wrongful convictions, one of which is “inadequate defense.” See *The Causes*, INNOCENCE PROJECT, <https://www.innocenceproject.org/#causes> [<https://perma.cc/7R8J-SCQY>] (last visited Apr. 12, 2020).

223. See Dan Simon, *Criminal Law at the Crossroads: Turn to Accuracy*, 87 S. CAL. L. REV. 421, 444–45 (2014) (“[T]he criminal law debate has much to gain from taking a bird’s-eye view of how the entire system operates as a whole . . .”).

224. For the notion that none of this is a secret, see, for example, Sklansky, *supra* note 93, at 20, which notes that the resources devoted to representation for those who cannot afford to hire a lawyer are “scandalously inadequate,” and the problem is “well known and persistent.” See also *id.* at 11 (explaining that “the average quality of the legal representation provided to poor defendants is notoriously low”).

225. See Thomas et al., *supra* note 92, at 294 (“[S]cholars and jurists have long believed that situations of erroneous incarceration are relatively rare, especially once the rights to appeal and collateral review are taken into account.”).

226. Note, however, that “only death-sentenced inmates enjoy an appeal-as-of-right to the highest state court following conviction at trial.” Carol Steiker & Jordan Steiker, *The Death Penalty and Mass Incarceration: Convergences and Divergences*, 41 AM. J. CRIM. L. 189, 206 (2014).

227. Simon, *supra* note 72, at 201.

slim,²²⁸ even for “the innocent.”²²⁹ There is an absence of effective procedures for establishing that a conviction is false.²³⁰ At the appellate stage, arguments tend toward procedure rather than substance,²³¹ and if a substantive argument is attempted, the appellant faces particularly high standards.²³² At the habeas stage, relief is rare,²³³ thanks to a combination of statutes, such as the Antiterrorism and Effective Death Penalty Act of 1996²³⁴ (AEDPA), and aspects of the caselaw, such as the Supreme Court’s reluctance to declare a right to a freestanding claim of innocence.²³⁵ Other obstacles include delays that deter litigation,²³⁶ governmental resistance to postconviction claims of innocence,²³⁷ daunting burdens of proof,²³⁸ lack of representation,²³⁹ and difficulty in obtaining the knowledge or evidence

228. Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1941, 1980 (2019) (mentioning “a ratio of about eight appeals for every ten thousand misdemeanor convictions in state trial courts, or *one in 1250*” and pointing out that “only one conviction or sentence out of every ten thousand misdemeanor judgments [was] actually disturbed on appeal”); Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. PA. L. REV. 277, 311 (2020) (“[J]ust a fraction of convicted defendants challenge their convictions or sentences on appeal, and an even smaller proportion pursue postconviction review.” (footnote omitted)).

229. See Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Postconviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 472 (2009) (noting that “the legal process holds out little hope for wrongfully convicted defendants, especially in the absence of help from prosecutors”); Thomas et al., *supra* note 92, at 289 (describing low rates of success at each stage).

230. See Givelber, *supra* note 9, at 1321–22 (stating that “[t]he absence of effective procedures for establishing that a conviction is false means that few prisoners can verify their innocence” and that “[t]he paucity of such cases in turn reinforces the belief that innocent people are not convicted and justifies the criminal justice system’s failure to provide effective remedies”).

231. See Rosen, *supra* note 182, at 284 (stating that, on direct appeal, defendants “cannot present new evidence of innocence or argue that the jury got it wrong”); Stuntz, *supra* note 91, at 42–43.

232. See Stuntz, *supra* note 91, at 61 (“[J]udicial review targeted at potential errors on the merits—at cases where the wrong person was convicted—has been surprisingly muted.”).

233. See Thomas et al., *supra* note 92, at 289.

234. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S.C.); see Kozinski, *supra* note 75, at xlii (stating that AEDPA “effectively removes federal judges as safeguards against miscarriages of justice”); Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1214–15 (2015) (“[U]nder AEDPA, even in cases with gutting evidence of possible innocence, courts have deferred to the state’s right to kill possibly innocent persons on the ground that finality of a conviction must take priority over other moral and constitutional considerations.”).

235. See *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (stating that “the threshold showing for such an assumed right would necessarily be extraordinarily high”).

236. Murray, *supra* note 228, at 311 n.221.

237. See Jon B. Gould & Richard A. Leo, *The Path to Exoneration*, 79 ALB. L. REV. 325, 332 (2016).

238. See Murray, *supra* note 228, at 311–12 (“[E]ven when defendants who have well-founded claims of prejudicial error do seek appellate or postconviction relief, there is a risk that courts reviewing those claims will reject them anyway due to deficient pleading or briefing (especially at the postconviction stage, where most defendants have to proceed pro se), incentives to preserve finality, the stringent burden of proof that defendants must satisfy under *Bagley*, *Strickland*, and related cases, and other reasons.” (footnotes omitted)).

239. Daniel Givelber notes that, in order to obtain collateral relief on the basis of a prosecutorial failure to turn over exculpatory evidence, “the defendant must discover the

necessary to make a viable claim.²⁴⁰ In addition, it is dangerous to claim innocence if one may need to show remorse.²⁴¹

Additional difficulties cluster around the two vulnerabilities on which this Article focuses: pleas and counsel. Pleading guilty leads to significant restrictions on the possibility of a subsequent claim of innocence.²⁴² The guilty plea may involve waivers of most of the salient appellate issues²⁴³ and of the ability to appeal.²⁴⁴ And in regard to those who may have had inadequate defense representation, the courts hold defense attorneys to meager standards²⁴⁵ and litigation delays deter their invocation.²⁴⁶ In addition, rules relating to unpreserved errors²⁴⁷ and procedural default²⁴⁸ further penalize those with subpar counsel.²⁴⁹

existence of exculpatory evidence.” Givelber, *supra* note 9, at 1389–90. “As a practical matter, this requires [among other things] a lawyer prepared to engage in post-conviction litigation.” *Id.* at 1390; Simon, *supra* note 72, at 201 (“[T]he majority of inmates conduct their post-conviction affairs without the benefit of legal counsel.”); Steiker & Steiker, *supra* note 226, at 206 (“Although all state prisoners are nominally afforded the right to litigate constitutional claims in federal habeas corpus, only death-sentenced inmates are statutorily afforded counsel in cases of indigency. The same is true in most states regarding representation in state post-conviction proceedings.”).

240. See Kozinski, *supra* note 75, at xv; Murray, *supra* note 228, at 311 n.221 (mentioning that “some defendants simply lack knowledge about the errors that might support a claim for relief—particularly when the type of error in question is the suppression of *Brady* evidence, which is by its nature hidden from view unless and until the concealed evidence is fortuitously discovered”).

241. Rosen, *supra* note 182, at 282–83.

242. See Miller, *supra* note 171, at 4 (“[A] number of states have interpreted their postconviction statutes to prohibit pleading defendants from (1) seeking DNA testing and/or (2) presenting freestanding claims of actual innocence based upon non-DNA evidence.”).

243. See Hessick, *supra* note 53, at 281 (“Prosecutors can condition a plea bargain on a defendant’s waiver of her right to DNA testing, and they can also require defendants to waive any rights to appeal or to otherwise challenge their convictions. There are plenty of examples of innocent defendants who have pleaded guilty rather than wait for DNA testing because prosecutors refused to keep the plea bargain offer open until the tests came back and defendants knew the results might be inconclusive.”); Hughes, *supra* note 11, at 1111 (stating that “defendants who plead guilty forego most of their salient appellate issues in the process of pleading guilty”); Sklansky, *supra* note 93, at 12 (stating that “waivers of the right to appeal and the right to seek habeas review are common features of plea agreements”).

244. See Hessick, *supra* note 53, at 281.

245. See *id.* at 275 (“The courts have continued to apply exactly high standards of review to ineffective assistance claims. So even though judges now know for certain that an ineffective defense attorney can significantly increase the chances of an innocent person being convicted, those judges are still unlikely to grant a new trial to a defendant with a hopelessly bad lawyer.”).

246. See Primus, *supra* note 193 (manuscript at 24 n.117) (“Most defendants have no incentive (or even ability) to file post-conviction challenges to their trial attorneys’ performance, because it takes years to get to post-conviction review and the defendants are released from custody before post-conviction review becomes possible.”).

247. See, e.g., FED. R. EVID. 103(e).

248. See Sklansky, *supra* note 93, at 12 (explaining that attorney negligence can lead to the forfeiture of some of the rights to seek review of a conviction).

249. See Bright, *supra* note 215, at 1862 (“So long as counsel’s performance passes muster under *Strickland*, those cases in which the accused received the poorest legal representation will receive the least scrutiny on appeal and in postconviction review because of [the] failure of the lawyer to preserve issues.”); see also *id.* (“Failure of counsel to recognize and preserve

In reviewing the universe of factors, both pre- and postconviction, that jeopardize reliability, it might almost appear that the system is not that interested in accuracy.²⁵⁰ Indeed, some scholars have arrived at that conclusion.²⁵¹

From the broad applicability and severe nature of the weaknesses within plea bargaining, defense representation, and the postconviction opportunities to assess accuracy, this Article draws the conclusion that there is no reason for blanket assumptions that conviction connotes crime commission and every reason to assume that some unknown but potentially large proportion of convictions are imposed in the absence of factual guilt. As will be discussed below, many scholars attempt to quantify, or at least estimate, the proportion of convictions that are imposed in the absence of factual guilt.²⁵² This Article urges attention to the limitations of such attempts, particularly in light of the concept of “innocence” presented in this Article, namely the situation where one did not commit the crime in question, with crime understood in its full definition, including elements such as *mens rea* and the absence of defenses. This Article posits instead that one should admit ignorance as to the number of convictions imposed in the absence of factual guilt and not rush from ignorance to an assumption that the number must be very small.²⁵³ Yet even though factors contributing to the unreliability of convictions are widely discussed within legal scholarship,²⁵⁴ in a variety of contexts legal scholars talk about those with convictions in ways that appear to assume reliability. The next Part will discuss this apparent barrier between understandings of the criminal system and views of those who pass through it.

an issue, due to ignorance, neglect, or failure to discover and rely upon proper grounds or facts, even in the heat of trial, will bar federal review of that issue.”).

250. See Rebecca Shaeffer, Remarks at the ABA Eleventh Annual Criminal Justice Section Fall Institute (Nov. 2, 2018) (event attended by author) (discussing how, due to the societal interest in truth-finding and building a record, most countries, but not the United States, limit the kinds of cases eligible for plea bargaining).

251. See Givelber, *supra* note 9, at 1336 (“[V]irtually everything known about the actual operation of the criminal justice system points to a level of indifference regarding the accuracy of fact determination which routinely condemns the innocent and frees the guilty.”); Simon, *supra* note 24, at 204 (“One of the most complicated and underappreciated features of the criminal justice process is the low value it assigns to the accuracy of its factual determinations—or, in legal parlance, the finding of truth.”); *id.* at 205–06 (giving numerous examples of how “[t]he relegation of factual accuracy manifests itself throughout the criminal justice process”); *id.* at 210 (“It is noteworthy that despite the pervasive relegation of the correct determination of facts, proponents of the criminal justice process swear by the accuracy of its outcomes.”).

252. See Cassell, *supra* note 25, at 817 (“[W]hile staking out a position of unknowability, many of the same scholars have been willing to venture specific estimates of a false conviction rate . . .”).

253. See Natapoff, *supra* note 36, at 1330 (stating that for a “large and crucial subset of the [criminal court] docket,” the conclusion that convictions are valid “is more leap of faith than demonstrable fact”).

254. See, e.g., Primus, *supra* note 193 (manuscript at 1) (“Everyone knows that the conditions under which indigent defense services are provided often make effective representation impossible.”).

II. FUSION OF LEGAL AND FACTUAL GUILT

Despite the vulnerabilities laid out in Part I—vulnerabilities that this Article argues should leave a question mark hanging over the reliability of criminal convictions as markers of factual guilt—legal scholarship often appears to take that factual guilt as a given. This Part will give examples, first of explicit statements voicing confidence in the correspondence between legal and factual guilt and, second, of situations where the factual guilt of those with convictions appears to be assumed. Since it is sometimes said that the factual guilt of those with convictions must be taken as a given by some of those who work within the criminal system,²⁵⁵ this Part will end by considering the distinct role of legal scholars.

A. Explicit Statements

As this section will show, scholars often assert that those with convictions are for the most part factually guilty;²⁵⁶ indeed, scholars often assert that most *defendants* are guilty²⁵⁷ and that the core work of the defense bar is to represent the guilty.²⁵⁸ In addition, legal scholars sometimes try to pin down or cabin the proportion of convictions that are “wrongful” through invocation of statistics in a way that risks downplaying the extent of the problem.

First, despite the fact that the standard of proof required for guilty pleas best approximates probable cause,²⁵⁹ it is not unusual for legal scholars to assert that convictions are necessarily the product of proof beyond a reasonable doubt.²⁶⁰ Some then move from a confidence in the procedures that have preceded convictions to an assertion that the reliability of the convictions is high. Thus, Professor Victor Gold states that because convictions are the result of either guilty pleas or trials, the misconduct said

255. See *supra* note 9 and accompanying text.

256. See, e.g., Gross, *supra* note 10, at 779 (“For the most part, inmates in American prisons are guilty. The African Americans among them may have been victims of discrimination by the police or in court, but the overwhelming majority are imprisoned for crimes they did commit.”).

257. See Stuntz, *supra* note 91, at 34 (“The large majority of defendants presumably are guilty . . .”).

258. See, e.g., Givelber, *supra* note 9, at 1396 (“It is, after all, a commonplace that the role of defense counsel is to defend the guilty, not the innocent.”).

259. See Shapiro, *supra* note 15, at 43–44.

260. See GEORGE FISHER, EVIDENCE: TEACHER’S MANUAL 183 (3d ed. 2013) (stating that “[b]y definition, crimes introduced under Rule 609 [the federal evidence rule permitting impeachment by prior conviction, whether the conviction was the product of trial or a guilty plea] have been proved beyond a reasonable doubt”); Chin, *supra* note 221, at 90 (stating that “a valid conviction represents a finding that every element of a particular offense has been proved beyond a reasonable doubt”); Findley, *supra* note 11, at 1196 (“[P]resumably every one of the prosecutors in the 270 plus DNA exonerations at one time believed, and convinced a fact finder beyond a reasonable doubt, that the defendant was guilty . . .”); Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2310 (1994) (“Any doubts that the witness [being impeached with her conviction] committed the crime in question are negligible since a conviction rests on satisfaction of the most demanding burden of proof [i.e., proof beyond a reasonable doubt].”).

to have been committed by the defendant “is almost certain to have occurred.”²⁶¹

Many legal scholars are comfortable asserting that those who await adjudication of their charges—that is, those who are still defendants—are mostly guilty, thus indicating by implication that a still higher proportion of those who are convicted are guilty.²⁶² It is also common to state that the role of the defense attorney is to represent the guilty.²⁶³ Of course, given the elusive nature of factual guilt,²⁶⁴ it is hard for scholars who assert the predominance of factual guilt to support those claims. They either offer no support, point out that Alan Dershowitz said it,²⁶⁵ or provide figures representing *legal* guilt (that is, convictions),²⁶⁶ as opposed to factual guilt.

261. 28 VICTOR J. GOLD ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 6118 (2d ed. 2019) (“Evidence admitted under Rule 609 relates to witness misconduct that is almost certain to have occurred since it was the subject of a criminal conviction.”); see also Victor Gold, *Two Jurisdictions, Three Standards: The Admissibility of Misconduct Evidence to Impeach*, 36 SW. U. L. REV. 769, 775 (2008) (claiming that there is “no serious question” about the witness’s guilt, “since a conviction must be based on either the witness’ guilty plea or on proof of guilt beyond a reasonable doubt”); Edward Imwinkelried & Miguel Méndez, *Resurrecting California’s Old Law on Character Evidence*, 23 PAC. L.J. 1005, 1034 (1992) (“[I]n the case of convictions the evidence is reliable. The accused either admitted committing the crime by a plea of guilty or has been found guilty of the crime beyond a reasonable doubt.”).

262. See, e.g., JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY* 216 (4th ed. 2011) (“[M]ost defendants are guilty of some crime.”); H. RICHARD UVILLER, *THE TILTED PLAYING FIELD: IS CRIMINAL JUSTICE UNFAIR?* 119 (1999) (“[N]early all defendants are in fact guilty . . .”); Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 182 (1983) (“[M]ost defendants are guilty of something along the lines of the accusation.”); Bowers, *supra* note 148, at 1162 (“[M]ost defendants are in fact guilty . . .”); Joshua Dressler, *The Wisdom and Morality of Present-Day Criminal Sentencing*, 38 AKRON L. REV. 853, 865 (2005) (“[M]ost criminal defendants are guilty . . .”); Robinson O. Everett, *Foreword, LAW & CONTEMP. PROBS.*, Winter 1995, at 1, 8 (“[M]any assume—probably correctly—that most criminal defendants are guilty of some crime.”); Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 288 (2011) (offering as the first of two “basic truths about the criminal justice system” the fact that “most criminal defendants are guilty”); Jeffries, *supra* note 103, at 225 (“Most criminal defendants are guilty of something . . .”); Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL’Y REV. 61, 99 (2015) (“[E]xperienced judges know that most defendants are guilty . . .”); Michael O’Hear, *What’s Good About Trials?*, 156 U. PA. L. REV. PENNUMBRA 209, 209–10 (2007) (referring to “the reality that most defendants are guilty”); Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 971 (1985) (“Most defendants are guilty and lack a credible defense . . .”); Kenworthy Bilz, *The Fall of the Confession Era*, 96 J. CRIM. L. & CRIMINOLOGY 367, 376 (2005) (reviewing LAWRENCE M. SOLAN & PETER M. TIERSMA, *SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE* (2005)) (“[M]ost criminal defendants are guilty.”).

263. See *supra* note 258 and accompanying text.

264. See *supra* note 22 and accompanying text.

265. DERSHOWITZ, *supra* note 145, at xxi (stating that the first of the “Rules of the Justice Game” is “[a]lmost all criminal defendants are, in fact, guilty” and that “[a]ll criminal defense lawyers, prosecutors and judges understand and believe” that to be true).

266. See, e.g., Frederick Schauer, *The Miranda Warning*, 88 WASH. L. REV. 155, 162 & n.36 (2013). Schauer asserts that

most criminal defendants are guilty of the crimes with which they have been charged, and that many of those who are not guilty of the crimes with which they are charged are guilty of other crimes, crimes often identical to or resembling or associated with the crimes with which they have been charged.

Finally, legal scholars sometimes cite statistics in an effort to quantify the problem of convictions being imposed in the absence of factual guilt. Such attempts to cabin the phenomenon risk downplaying its extent, at least when the underlying research is cited without much context.²⁶⁷ The kinds of figures that get circulated as the proportion of people with convictions who are “wrongfully convicted” or “innocent” undercount in a variety of ways. When calculated on the basis of actual cases that came to light, for instance, they are likely to exclude those who lacked the representation,²⁶⁸ incentive,²⁶⁹ written record,²⁷⁰ knowledge,²⁷¹ or the correct procedural vehicle²⁷² to get recognition that their conviction was wrongful.²⁷³ They are also generally restricted to certain kinds of “wrongful conviction”²⁷⁴ or “innocence,”²⁷⁵ such as “wrong-man” scenarios.²⁷⁶ Further, they are often limited to those—the vast minority of those who may be innocent—who are able to obtain an exoneration²⁷⁷ or the even smaller group able to obtain a DNA-based exoneration.²⁷⁸ Lastly, they may exclude, or largely exclude,

Id. He further claims:

[t]his conclusion is an extrapolation from existing figures on guilty pleas (some of which will admittedly be by innocent defendants) and on conviction rates at trial (some of which will be erroneous) . . . but even the most conservative extrapolation is sufficient to support the point in the text.

Id. However, no support is given for that final redemptive assertion.

267. See Gould & Leo, *supra* note 20, at 832 (“Virtually no one denies the existence of wrongful convictions, while the several studies on this question cap estimates at around 3% to 5% of convictions.”).

268. See Roberts, *supra* note 133, at 780.

269. See Findley, *supra* note 11, at 1170 n.58.

270. See Gross & O’Brien, *supra* note 172, at 939.

271. See Roberts, *supra* note 133, at 812.

272. See *id.* at 813.

273. See Gould & Leo, *supra* note 20, at 834 (stating that “‘lesser’ felonies, and certainly misdemeanors, may lack the record and interested advocates to investigate and pursue exonerations”).

274. See Givelber, *supra* note 9, at 1327 (pointing out that commentators take a conservative approach to defining this term).

275. *Id.*

276. See D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 762 n.2 (2007) (carving out of his influential estimates those who have “undoubtedly performed the actus reus of a crime for which they are not culpable, either because of insanity or the absence of some other required indicium of culpability, usually a particular required mental state”).

277. See Gross, *supra* note 10, at 785 (“[T]he number of false convictions is far higher than the number of exonerations.”); *id.* (noting that almost no misdemeanor exonerations occur); see also ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 111 (2008) (“Innocence projects almost never take misdemeanor cases.”). See Gross et al., *supra* note 154, at 7234, for a definition of “exoneration” as “an official determination that a convicted defendant is no longer legally culpable for the crime for which he was condemned.”

278. Note that the 5 percent “ceiling” often drawn from Risinger was limited to DNA-exoneration cases, and that Risinger cautions against extrapolating from DNA cases since they are not a random sample of all cases of criminal conviction. Risinger, *supra* note 276, at 770. DNA exonerations “are almost entirely rapes and murders.” Findley, *supra* note 11, at 1167; see also Gould & Leo, *supra* note 20, at 835 (stating that many exonerations have been based on DNA testing, yet “fewer than 20% of violent crimes involve biological evidence, and in the vast majority of past cases, biological evidence was not properly collected and held for future testing”); Robert Schehr et al., *Contemporary Perspectives on Wrongful Conviction:*

those who, even if able to obtain exoneration, obtained an exoneration whose existence was unknown to the researchers,²⁷⁹ and those who took pleas rather than going to trial.²⁸⁰

These limitations often go unmentioned when the underlying studies are discussed. In addition, figures drawn from studies that may have been limited to particular time periods,²⁸¹ particular types of convictions,²⁸² or small sample sizes,²⁸³ or that may be “wildly unrepresentative”²⁸⁴ or explicitly described by their authors as unsuitable for generalization,²⁸⁵ often get discussed without these sorts of qualifications,²⁸⁶ as if they can provide nationwide “wrongful conviction” figures.²⁸⁷ Further, even when

An Introduction to the 2015 Innocence Network Conference, Orlando, Florida, 3 TEX. A&M L. REV. 179, 180 (2015) (“DNA exonerations are just a small percentage of wrongful convictions.”).

279. See Gross, *supra* note 10, at 784–85 (“No American jurisdiction has any system for recording exonerations; we have to go out and find the stories by whatever means we can devise.”); see also *id.* at 761 (“For many exonerations, avoiding attention may be a goal of all the professional participants in the case.”).

280. See, e.g., Risinger, *supra* note 276, at 773 (presenting an analysis based on a study solely of trials); see also Findley, *supra* note 11, at 1167 (stating that it is quite likely that a huge proportion of false convictions are the product of pleas in cases other than rapes and murders).

281. See, e.g., Risinger, *supra* note 276, at 762 (presenting an analysis based on a study of trials that occurred from 1982 through 1989).

282. Gould & Leo, *supra* note 20, at 836. “[M]ost of what we know concerns errors in the most serious criminal cases—rapes and murders, and capital trials at that,” but it could be that “errors are more common, and more commonly accepted, in cases where neither police nor prosecutors have as much time, resources, or pressure to investigate cases thoroughly and in which the lesser stakes of punishment do not command as many or as zealous advocates to investigate cases postconviction.” *Id.*; see also Findley, *supra* note 11, at 1168 (“Offenders convicted of rape make up less than ten percent of state prisoners and offenders convicted of murder or non-negligent homicide compose only thirteen percent of state prisoners.”); Gould & Leo, *supra* note 20, at 862 (explaining that in the most serious cases “courts are most likely to step in and reverse a faulty conviction”); Samuel Gross & Barbara O’Brien, *Letters to the Journal*, 8 OHIO ST. J. CRIM. L. 273, 275 (2010) (“Ninety-five percent of known false convictions—exonerations—occur in cases of murder or rape, the two most serious common crimes of violence, which, between them, account for only about two percent of felony convictions. That means that we know very little about false convictions for any other crimes of violence and virtually nothing about false convictions for non-violent felonies and misdemeanors. (And even among rape cases, the false convictions we know about are concentrated among the minority of defendants who receive very long prison sentences.”).

283. In regard to Risinger’s influential study, Professor Paul Cassell states, for example, that “[i]t is important to note that Risinger’s conclusions ultimately rest on a very small number of wrongful convictions—a total of only 11.” Cassell, *supra* note 25, at 828.

284. See Gross, *supra* note 10, at 785.

285. See Risinger, *supra* note 276, at 784–85 (stating that even though an average number might “salve our consciences,” one “cannot jump from a 3–5% factual wrongful conviction rate in capital rape-murders in the 1980s to a general factual wrongful conviction rate for crimes,” in part because there “probably would be [] contexts and kinds of crime in which the rate of factual innocence was higher, perhaps shockingly so”).

286. See, e.g., Tiffany R. Murphy, “*But I Still Haven’t Found What I’m Looking For*”: *The Supreme Court’s Struggle Understanding Factual Investigations in Federal Habeas Corpus*, 18 U. PA. J. CONST. L. 1129, 1131 n.51 (2016) (“[R]esearchers suggest the rate of wrongful convictions in this country is 2–5 percent of the current prison population.”).

287. See Risinger, *supra* note 276, at 783 (arguing that one should “resist the temptation to expend much effort in pondering . . . a general average factual wrongful conviction rate”).

researchers come up with figures that they describe as floors, they sometimes appear in secondary literature as estimates of *the* figure²⁸⁸ or even of a *ceiling*.²⁸⁹ These figures, in other words, are sometimes presented as if this simply *is* innocence²⁹⁰ and simply *is* the scale of the innocence problem.

Professor Samuel Gross cautions that “[p]atchy and unrepresentative data can mislead”²⁹¹ and that “[o]n this topic they’ve led smart people to say that convictions of innocent defendants are vanishingly rare—which is demonstrably false.”²⁹² And yet the estimates continue, most recently from Professor Paul Cassell,²⁹³ who presents the contestable nature of previous estimates not as a reason to hold back but as a justification for trying once again.²⁹⁴

B. Embedded Implications

Ground into our core definitional text is an assumption that legal guilt connotes factual guilt. *Black’s Law Dictionary* defines “offender” as “[s]omeone who has committed a crime; esp., one who has been convicted of a crime.”²⁹⁵ Its portrayal of those convicted is of a Russian doll tucked inside another larger one, which comprises those who committed the crime. The use by legal scholars of “offender” to connote both those who have been convicted of a crime and those who (can be assumed to have) committed it is thus consistent with the dictionary definition²⁹⁶ but, this Article suggests,

288. Compare Gould & Leo, *supra* note 237, at 362 (stating that Risinger’s study puts the estimate for wrongful convictions in capital cases at 3.3 percent), with Risinger, *supra* note 276, at 780 (presenting this figure as an “empirical minimum” with a “fairly generous likely maximum of 5%”).

289. See, e.g., Jane Bambauer, *Other People’s Papers*, 94 TEX. L. REV. 205, 239–40 (2015) (citing the study by Professor Samuel Gross in support of a 1 to 4 percent range). Gross offered the 4.1 percent figure as a minimum. See Gross et al., *supra* note 154, at 7234.

290. See Schehr et al., *supra* note 278, at 180 (“[T]he few studies that have been conducted estimate that between 2.3% and 5% of all prisoners in the U.S. are innocent.”).

291. Gross, *supra* note 10, at 785.

292. *Id.* (adding that patchy and unrepresentative data has also led smart people “to believe that innocent people almost never plead guilty—but we have seen that they do, in large numbers”).

293. See Cassell, *supra* note 25, at 851 (focusing on “wrong person” cases and “violent crimes” and yet proffering an “estimated concrete, empirically grounded wrongful conviction rate range”).

294. See *id.* at 847 (“[L]ack of firm data has not prevented many other scholars from venturing an estimated wrongful conviction rate range. The range presented here rests on at least as firm a foundation as many others that have been presented.”).

295. *Offender*, BLACK’S LAW DICTIONARY (11th ed. 2019).

296. See, e.g., Francis Cullen et al., *Reinventing Community Corrections*, 46 CRIME & JUST. 27, 33 (2017) (“People are in the correctional system because they are offenders. For most, the current arrest and conviction represents only a fraction of the crimes they have committed.”); Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota’s Prison and Jail Populations?*, 38 CRIME & JUST. 201, 263 (2009) (“[O]ffenders released from prison or jail confront family and neighborhood dysfunction, increased risks of unemployment, and other crime-producing disadvantages; this makes them likelier to commit new crimes, and the cycle repeats itself.”); Tekle-Johnson, *supra* note 33, at 613 (“Thrust out of mainstream urban society into a downward trajectory of ‘homelessness and transience,’ the convicted sex offender suffers from increased acute ‘psychosocial stressors,’ which is

is in tension with the factors laid out in Part I. As will be described later,²⁹⁷ what to do about “offenders”—and particularly various subsets of “offenders,” such as “drug offenders,” “sex offenders,” and “violent offenders”—is the subject of robust discussion in legal scholarship.²⁹⁸ Less prominent—perhaps absent thus far—is a discussion of what to do about the term and whether to reject the implicit fusion of legal and factual guilt that its definition endorses.

“Recidivism,” used here to mean a return to criminal conduct,²⁹⁹ is another common topic of debate in legal scholarship that also seems to reveal a tendency to fuse legal and factual guilt. Convictions are frequently used as a metric of both the first “criminal conduct” and the “return to criminal conduct.”³⁰⁰ One finds little or no questioning of the notion that criminal conviction is appropriate as an indicator of the first criminal conduct: rather, the widespread emphasis on the importance of measuring the recidivism of those with convictions appears to take that as a given.³⁰¹ As for the use of convictions to indicate a “return to criminal conduct,” when one sees concerns about that metric, they often involve its *underinclusiveness*.³⁰² One rarely finds concerns about the ways in which, because of factors such as those mentioned in Part I, convictions can be an *overinclusive* marker of crime commission.³⁰³ Of course, in many instances, a conviction followed by a conviction may indeed represent criminal conduct followed by a return thereto. But to hold the view that some, or many, or most situations of this kind involve recidivism is something different from resting on an assumption that that is always the case—or frequently enough that one does not need to mention a caveat.

And then there are a wide variety of propositions made in support of criminal justice reform that, valuable though they may be, risk reinforcing

alarmingly correlated with an increased tendency to reoffend.” (footnote omitted) (quoting JILL S. LEVENSON, SEX OFFENDER RESIDENCE RESTRICTIONS: A REPORT TO THE FLORIDA LEGISLATURE 15 (2005)); Marc Morjé Howard, Opinion, *The Practical Case for Parole for Violent Offenders*, N.Y. TIMES (Aug. 8, 2017), <https://www.nytimes.com/2017/08/08/opinion/violent-offender-parole-sentencing-reform.html> [<https://perma.cc/HC2U-7WV6>] (“This punitiveness makes us stand out as uniquely inhumane in comparison with other industrialized countries. To remedy this, along with other changes, we must consider opening the exit doors—and not just for the ‘easy’ cases of nonviolent drug offenders. Yes, I’m suggesting that we release some of the people who once committed serious, violent crimes. . . . [E]ven for people convicted of violent crimes if they’ve demonstrated progress during their imprisonment. . . . It bears no connection to solid research on how criminals usually ‘age out’ of crime But are prisoners who have served long sentences for violent crimes genuinely capable of reforming and not reoffending?”).

297. See *infra* notes 308–10 and accompanying text.

298. See Levin, *supra* note 30, at 271–72.

299. See Roberts, *supra* note 4, at 1000–07.

300. See *id.*

301. See, e.g., Klingele, *supra* note 39, at 769 (“The system’s success is frequently judged by the recidivism rates of those who are subject to various criminal justice interventions, from treatment programs to imprisonment.”).

302. See Roberts, *supra* note 4, at 1003.

303. See *id.*

assumptions regarding the reliability of criminal convictions as markers of factual guilt.³⁰⁴ Some examples follow.

Legal scholars have made or endorsed the following kinds of proposals: that all those with convictions should be given a second chance;³⁰⁵ that once they have paid their debt to society they should be afforded rehabilitation and redemption;³⁰⁶ that we should acknowledge that character is not static;³⁰⁷ and that people change.³⁰⁸ Similarly, scholars state that “sex offenders” should be spared permanent exile³⁰⁹ since their recidivism rates are not as “frightening and high” as sometimes feared,³¹⁰ that “violent offenders”—and not just “nonviolent drug offenders”—should receive more “leniency,”³¹¹ that “juvenile offenders” too should be eligible for lower sentences because the juvenile brain is different,³¹² and that “offenders” over a certain age should be eligible for release because people “age out” of crime.³¹³ Scholars further argue that we overemphasize individual disposition as a cause of crime³¹⁴ when in fact poverty is criminogenic.³¹⁵ They also urge us to acknowledge that the misdemeanor system, rather than being a system of adjudication, acts as an assembly line.³¹⁶ Finally, they point out that central to “what ails the petty offense process”³¹⁷—and indeed the entire criminal process—is a problem of “overcriminalization.”³¹⁸

Each of these statements responds to an aspect of the criminal system, or a view of those who go through it, that is indeed problematic. And yet, even

304. See Ristorph, *supra* note 41, at 570 (“Much of the theory and discourse of criminal law, including the discourse of ‘reform,’ reproduces or simply takes for granted the ideological structures that make existing law seem moral and necessary.”).

305. See, e.g., Danielle R. Jones, *When the Fallout of a Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 STAN. J.C.R. & C.L. 237, 240 (2015) (“Nearly ten years into this work, I still passionately believe that people deserve a second chance—a chance to redeem themselves, to heal wounds, and to secure work and put roots down in their community.”); see also *id.* at 237 (referring to those who have “paid their debt to society”).

306. See *id.*; *supra* note 27 and accompanying text.

307. See Jon Schuppe, “I Refused to Be Bitter or Angry”: Matthew Charles, Released from Prison and Sent Back Again, Begins Life as a Free Man, NBC NEWS (Jan. 8, 2019, 4:06 PM), <https://www.nbcnews.com/news/us-news/i-refuse-be-bitter-or-angry-matthew-charles-released-prison-n955796> [<https://perma.cc/QCV9-VMTE>] (quoting Professor Shon Hopwood as saying that “I think what Matthew shows is that people can change, character’s not static and people can have redemption if given the opportunity to come out of federal prison and show they are a changed person”).

308. See *id.*

309. See *supra* note 33 and accompanying text.

310. See *supra* note 35 and accompanying text.

311. See Andrea Roth, Opinion, *To End Mass Incarceration, Look Beyond “Non-violent Drug Offenders.”* L.A. TIMES (July 24, 2015, 5:00 AM), <http://latimes.com/opinion/op-ed/la-oe-roth-non-violent-prison-clemency-20150724-story.html> [<https://perma.cc/Y8EU-8VLV>].

312. See, e.g., Nancy Gertner, *Miller v. Alabama: What It Is, What It May Be, and What It Is Not*, 78 MO. L. REV. 1041, 1043 (2013).

313. Howard, *supra* note 296.

314. See Binder & Notterman, *supra* note 32, at 42.

315. See Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1066.

316. See Natapoff, *supra* note 196, at 447.

317. Natapoff, *supra* note 36, at 1359 (discussing the incompleteness of the “overcriminalization viewpoint”).

318. *Id.* at 1359–60.

as they advance important goals, each of them risks appearing to take it as a given that those who are “offenders” in the sense of being legally guilty are also “offenders” in the sense of being factually guilty.³¹⁹ After all, having a second chance at life seems to assume that one had a first chance and blew it by committing a crime. “Aging out” of crime, or “recidivating” less than feared, seems to assume that one committed a crime to start with. A plea for “lenient” sentencing suggests that conviction is appropriate, albeit with a more generous sentence than usual. And an argument for redemption or rehabilitation seems to assume that one committed a crime and that, in doing so, one sinned or revealed that one is sick³²⁰ and thus needs fixing.³²¹ If you say that central to our system of mass incarceration is a problem of overcriminalization, or that poverty is criminogenic, you risk suggesting that the way you get to prison (or to a conviction) is by committing a crime.³²² This notion of a direct connection between crime and punishment obscures many layers of influence on the way to punishment, in both the misdemeanor and felony systems. These layers include not only the role of law enforcement in policing and prosecuting but the layers of injustice and vulnerability mentioned earlier—the role of inadequate defense representation³²³ and of crushing power to plead guilty.³²⁴ Poverty may be criminogenic (in the sense of making one a “criminal”) not, or not merely, because it leads to crime commission but because it leads to inadequate or absent lawyers, to government employees (whether police, judges, or prosecutors) unrestrained by fear of accountability,³²⁵ and to plea bargaining, at which one is disadvantaged in every sense. This disadvantage can stem

319. At least in the felony context. *See* Ristorph, *supra* note 41, at 569 (noting that “some critics of misdemeanor jurisprudence hold out felony jurisprudence as a salutary alternative representing criminal law at its best”).

320. *See* Delgado, *supra* note 208, at 73 (“Rehabilitation assumes that offenders are ‘sick,’ psychologically or morally, and may be required to undergo personality modification to regain their health.”).

321. *See id.*

322. *See* Natapoff, *supra* note 36, at 1359–60 (“[T]he overcriminalization viewpoint lacks two features that might otherwise permit it to better account for the misdemeanor debacle. First, overcriminalization does not contemplate actual innocence. Indeed, one of its central complaints is that overbroad codes make everyone guilty. As Stuntz famously put it, overcriminalization means that eventually ‘the law on the books makes everyone a felon.’ It may even be that the persuasiveness of the overcriminalization story has caused scholars to overlook the fact that many convicted misdemeanants are not guilty at all. In this way, overcriminalization is actually at odds with the innocence revolution.” (footnote omitted) (quoting Stuntz, *supra* note 202, at 511)).

323. *See supra* Part I.B.

324. *See supra* Part I.A.

325. *See* Bell, *supra* note 83, at 2125 (“[A]fter getting a plum assignment to an upper-middle-class, predominantly white neighborhood, [a former police officer] would sometimes leave his post to go to a poor, predominantly black neighborhood to make arrests. He needed to meet his expected number of arrests, but even though there were people using drugs and committing other crimes in the neighborhood where he was assigned, he knew there would be ‘trouble’ if he arrested the wrong person.”); David A. Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 512 (2016) (“Prosecutors seem accountable neither to the electorate nor to the legal system.”).

from the clout one has with one's lawyer and with the prosecutor,³²⁶ from the limits on defense counsel's resources, influence, experience, and skill,³²⁷ from the assumptions of guilt and feelings of contempt entertained by decision makers such as judge, juror, and lawyer,³²⁸ from an inability to make bail,³²⁹ and so on.

Why does the fusion of legal and factual guilt matter, particularly where scholars may be advancing important reform goals and correcting important misunderstandings? Part IV addresses that question.

C. Considerations of Role

In many instances, those working within the criminal system may be required to hold back from questioning the reliability of convictions.³³⁰ Thus, it is said that judges, along with others representing "the system," need to project confidence in verdicts.³³¹

On the other hand, activists and advocates for system reform need to simplify, hone, and make clear their messaging with a view to maximizing success on the front at which they fight. This may entail downplaying certain other goals or concerns. So, for example, perhaps you push for "second chances" because you realize that this message is more likely to resonate than an argument that our criminal system fails to provide much by way of a first chance.

This Article urges reflection on the distinct role of legal scholars. We are (generally) not bound by the rules constraining judges or system administrators. We are not—though some fear the risk³³²—propagandists for the criminal system. Of course, the legal academy is full of accomplished advocates.³³³ But it is also a unique space for grappling with the uncertain, the unknowable, and the conflictual, and for acknowledging areas in which data does not exist. In that spirit, this Article of course concedes that the phenomenon of convictions being imposed in the absence of factual guilt is not one that can be quantified³³⁴ but also asserts that it is unwarranted and problematic to infer from this that the concern is nugatory. After Part III explores potential explanations for the fusion described in Part II, Part IV addresses its implications.

326. See Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 19–20 (2016); Janet Moore et al., *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1296 (2015).

327. See Sklansky, *supra* note 190, at 29 ("[E]ven a strong prosecution case can fall apart in court, particularly when attacked by a good defense attorney.").

328. See Givelber, *supra* note 9, at 1330 n.44.

329. See Pinto, *supra* note 120.

330. See *supra* note 9 and accompanying text.

331. See *supra* note 9 and accompanying text.

332. See Alice Ristorph, Remarks at the Law and Society Association Annual Conference: Law at the Crossroads (June 10, 2018) (event attended by author) (raising the question of whether criminal law professors act as system propagandists).

333. It also, of course, includes professors who teach clinical law, and who thus may serve as advocates within the academy.

334. See Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 74 (2003).

III. POSSIBLE EXPLANATIONS

If it is the case that legal scholars often take as a given the factual guilt of those with convictions—despite being on notice of the system’s vulnerabilities—one might wonder why. This Part discusses four possible contributing factors: motivated reasoning, assumptions of guilt that build, mergers of act and crime, and a narrow conception of innocence.

A. *Motivated Reasoning*

Motivated reasoning, meaning “the tendency of people to unconsciously process information—including empirical data, oral and written arguments, and even their own brute sensory perceptions—to promote goals or interests extrinsic to the decisionmaking task at hand,”³³⁵ might fuel the apparent fusion of legal and factual guilt, for a variety of reasons.

First, one is generally drawn to phenomena that facilitate one’s ability to get a handle on life, such as closure,³³⁶ clarity,³³⁷ simplicity,³³⁸ and measurability.³³⁹ If one stares fully at some of the ideas suggested in this Article, one has to confront some complexities that might be troubling. For example, that factual guilt versus nonguilt is quite often a distinction that does not exist in any objective sense.³⁴⁰ Or that, even where factual guilt does exist, its overlap with legal guilt may be a lot smaller than typically assumed and that, as a result, the number of defendants who are convicted, punished, and subjected to myriad other consequences of conviction in the absence of factual guilt is potentially much larger than typically assumed. Further still, that the number of people who are not convicted but who have committed crimes is potentially huge.³⁴¹ This would make core criminal law concepts, such as “offending,” “guilt,” “rehabilitation,” and “recidivism,”

335. Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7 (2011).

336. See Susan A. Bandes, *Closure in the Criminal Courtroom: The Birth and Strange Career of an Emotion*, in EDWARD ELGAR RESEARCH HANDBOOK ON LAW AND EMOTION (Susan A. Bandes et al. eds., forthcoming 2020) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3457952 [<https://perma.cc/7YW6-5KDT>] (“There is an argument to be made that closure isn’t an emotion at all, but rather a set of legal aspirations for the conduct of criminal proceedings.”); see also Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1404 (2000) (“Both people and institutions need closure if they are to function at all, and the most ego-syntonic approach individually and institutionally for all professional participants in the criminal justice system is to treat the legally guilty as factually guilty.”).

337. See Susan A. Bandes, *Framing Wrongful Convictions*, 2008 UTAH L. REV. 5, 9–10 (stating that a version of innocence embodied by DNA exoneration is appealing because “simple categories and clear dichotomies are reassuring”).

338. See Findley, *supra* note 11, at 1207 (“[T]he Innocence Movement has drawn power from the simplicity of the wrong-person story of innocence . . . [B]ut that story alone . . . fails to accommodate the vast majority of innocent people in our justice system.”).

339. See Richard A. Leo, *Has the Innocence Movement Become an Exoneration Movement?: The Risks and Rewards of Redefining Innocence*, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION, *supra* note 221, at 57, 70 (referring to “the human desire to quantify and oversimplify complex social problems”).

340. See *supra* note 22 and accompanying text.

341. See *supra* note 51 and accompanying text.

more complicated to discuss and teach. It is simpler to say that our system generally works well and that the number of times in which legal guilt does not track factual guilt is definable, countable, and bearable. It is simpler to say that we can generally let things rest after the appeals process has played out and focus on how to rehabilitate people. It is simpler to say that we generally lock up those who have committed crimes and that we can assess their rehabilitation by seeing if they recidivate.

Second, one may be drawn more strongly to concepts like closure when they offer comfort about the state of the criminal system and, in turn, of the state of the nation.³⁴² In other words, “just world theory” may be operative here³⁴³—or at least a “just United States theory.”³⁴⁴ It is more comforting to think that those who were subject to conviction, punishment, and other consequences had a “first chance” rather than being (in potentially huge numbers) the victims of a system where phenomena such as plea bargaining’s predominance and the defense’s subordination jeopardize reliability.³⁴⁵ It may also be more comforting to think that the “guilty” have been captured and thus are not at liberty to “reoffend.”

Making some of these pressures still more salient is the identity of scholars who write about the criminal system. Most are lawyers, many have worked within the criminal system, and all could be said to have achieved professional success. It is news when one of us has a criminal record.³⁴⁶ If,

342. See Patricia M. Wald, *International Criminal Courts—a Stormy Adolescence*, 46 VA. J. INT’L L. 319, 342 (2006) (“How [a] nation defines criminal conduct, the punishments for such conduct, and the procedures for determining guilt and innocence go to the root of a country’s identity.”).

343. See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 582 (1998) (“Individuals who subscribe to the just world theory believe that ‘people usually get what they deserve.’” (quoting Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030, 1030 (1978))).

344. Alex Kozinski argues that, instead of knowledge of an error rate, “[w]hat we have is faith that our system works very well and the errors, when they are revealed, are rare exceptions.” Kozinski, *supra* note 75, at xiv–xv (“Much hinges on retaining this belief: our self image as Americans; the pride of countless judges and lawyers; the idea that we live in a just society; confidence in the power of reason and logic; the certainty that none of us or our loved ones will face the unimaginable nightmare of unjust imprisonment or execution; belief in the incomparable integrity and accuracy of our system of justice; faith that we have transcended medieval methods of conviction and punishment so that only those who are guilty are punished, and their punishment is humane and proportionate.”).

345. See Simon, *supra* note 24, at 213 (“There is little doubt that this self-assurance in the process’s diagnosticity caters to important psychological and societal needs. For one, people tend towards favorable assessments of the prevailing social order, deeming it to be just and legitimate. The mere notion that the state can wreck the lives of innocent people casts a disconcerting shadow over the integrity of the system.”); Sklansky, *supra* note 190, at 29 (stating that we “pride ourselves on our ‘adversary system’”).

346. See, e.g., Katherine Long, *Former Bank Robber Helped by Gates Fund Now Professor at Georgetown Law School*, SEATTLE TIMES (Apr. 7, 2017, 2:21 PM), <https://www.seattletimes.com/seattle-news/former-bank-robber-helped-by-gates-fund-now-professor-at-georgetown-law-school/> [<https://perma.cc/57FS-VGL3>]; Lyle Moran, *Re-fingerprinting of California Lawyers Turns Up Thousands of Criminal Records*, ABOVE L. (Mar. 28, 2019, 1:49 PM), <https://abovethelaw.com/2019/03/re-fingerprinting-of-california-lawyers-turns-up-thousands-of-criminal-records/> [<https://perma.cc/5K3K-QMJB>].

despite your legal training and acumen, you choose not to jump in and reduce the lack of counsel for those who are poor, it may be comforting to rest on an assumption that everyone gets a lawyer³⁴⁷—and maybe even an effective one.³⁴⁸ If you have worked within the criminal system, it may be harder to acknowledge the breadth of its vulnerabilities.³⁴⁹ If life has treated you well and, perhaps despite your lawbreaking, you have no criminal record,³⁵⁰ you may not wish to engage in a vigorous questioning of the extant distribution of criminal convictions.³⁵¹ You may not wish to point out that convictions do something other than demarcate the guilty as distinguished from the innocent.

B. Assumptions That Build

As I have pointed out in earlier work, even at the point of arrest,³⁵² and even prebooking,³⁵³ it is common for guilt to be assumed: note, for example, how frequently arrestees are referred to as “offenders.”³⁵⁴ Upon a prosecutorial charge, the next significant milestone in a criminal case, one finds additional assumptions of guilt³⁵⁵ and, again, observes the liberal use of the term “offender”³⁵⁶ even by those committed to system reform³⁵⁷ and to challenging premature assumptions of guilt.³⁵⁸ So if we posit a crescendo of assumptions as a case moves through the system—one that is fueled by education and the media³⁵⁹—it may seem unsurprising that by the point of conviction those assumptions hold firm even in the face of the kind of vulnerabilities described in Part I.

347. See Bellacosa, *supra* note 50, at 39.

348. See DEBORAH L. RHODE, ACCESS TO JUSTICE 122 (2004) (“‘Getting what you pay for’ is an accepted fact of life, but justice, we hope, is different, particularly in criminal cases.”).

349. See Simon, *supra* note 24, at 213 (“The prospect of contributing to a wrongful conviction poses a personal threat to the psyche of the people involved in its operation. Ironically, the prevalent response to threats of this kind is to deny their existence.”).

350. See *supra* note 52 and accompanying text.

351. See JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 53 (2015) (“Consider the vast number of never-arrested people who have committed, but have never been arrested for, insurance or tax fraud; driving while intoxicated; possessing or selling illegal drugs; and engaging in domestic violence and other assaults.”).

352. Roberts, *supra* note 4, at 989.

353. See Anna Roberts, *LEAD Us Not into Temptation: A Response to Barbara Fedders’s ‘Opioid Policing,’* 94 IND. L.J. SUPPLEMENT 91, 92 (2019).

354. See *id.*

355. See Nancy Gertner, *Is the Jury Worth Saving?*, 75 B.U. L. REV. 923, 931 n.44 (1995) (citing a study that found that a “substantial number” of eligible jurors assume that merely because a defendant was accused of a crime, it probably means they are guilty of some crime).

356. See Wisconsin SPD Training, *Judge Mark Bennett—Addressing Unconscious Implicit Bias in Voir Dire*, VIMEO at 4:22, <https://vimeo.com/163018292> [<https://perma.cc/AH7N-LKC4>] (last visited Apr. 12, 2020) (“[F]ifty percent of the offenders [as opposed to ‘defendants’] we try in criminal cases are minority.”).

357. See Mark W. Bennett, *Getting Clamorous About the Silence Penalty*, 103 IOWA L. REV. ONLINE 1, 13 (2018) (noting “the unfairness created by the silence and prior offender penalties” and suggesting reforms).

358. See *id.* at 10 n.59.

359. See Kozinski, *supra* note 75, at xxvii–xxviii.

C. Merger of Act and Crime

The legal scholarship described in Part I points toward a nuanced view of “crime” in which one can recognize the multiple ways in which factors such as the predominance of plea bargaining and the subordination of the defense may stop defendants from bringing to light their lack of factual guilt. For example, a winning *mens rea* argument may go unmade³⁶⁰ or an affirmative defense that could and should triumph may never be investigated or voiced.³⁶¹ By contrast, the apparent fusion of legal and factual guilt described in Part II may be aided by a prevalent pull toward a simpler view of crime: one that focuses on the act component of the crime.

One commonly sees the act-crime merger in public discourse.³⁶² Thus, for example, only some homicides are crimes and only some criminal homicides are murders.³⁶³ It is not unusual, however, for the reporting of homicide rates to betray the assumption that they are crime rates and, indeed, to refer to them as “murder rates.”³⁶⁴

One sees this fusion creeping into legal scholarship, too. For example, among the various definitions given for “factual guilt,” a popular one assigns factual guilt where the defendant “committed the act.”³⁶⁵ It is noteworthy

360. See Francis D. Doucette, *Non-appointment of Counsel in Indigent Criminal Cases: A Case Study*, 31 NEW ENG. L. REV. 495, 496–99 (1997) (describing a Massachusetts marijuana possession prosecution of two unrepresented defendants and, as part of a list of some of the issues that went unexplored in advance of their guilty pleas, mentioning that “[n]o one advised the two defendants that the Commonwealth lacked a certificate of chemical analysis, and that the contraband seized from the vehicle had not even been submitted yet to a laboratory,” “[n]o one advised the two defendants that, since neither one of them had been found in ‘actual possession’ of the alleged contraband, the prosecution at trial would have the more difficult burden of proving ‘constructive possession,’” and “[n]o one advised the two defendants that the evidence of intent to distribute was woefully weak, if not non-existent”).

361. See Delgado, *supra* note 208, at 12–13 (“Generally, a criminal offense is committed whenever an action fulfills a crime’s material elements. Although some would end the inquiry here, our system of criminal law recognizes considerations collectively known as defenses.”).

362. See Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389, 1400 (2004) (“For the police and the public alike, the problem is explaining that a difference exists between the fact of the bad act and the finding of guilt necessary to establish culpability.”).

363. See *supra* notes 137–41 and accompanying text.

364. See Thomas P. Abt, Opinion, *How Not to Respond to the Rising Murder Rate*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/opinion/murder-rate-crime.html> [<https://perma.cc/4H8S-RR5V>] (discussing the rising homicide rate, in contrast to the headline).

365. See, e.g., William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 845 (1988) (noting that an individual is “factually guilty” when she “performed a given act”); Craig Haney, *Exoneration and Wrongful Condemnations*, 37 GOLDEN GATE U. L. REV. 131, 134, 136 (2006) (explaining that “[f]actual guilt” is “the *actus reus*, the physical or behavioral component of the criminal act,” and adding that “factual guilt is what most laypersons mean when they talk about whether someone is guilty—or in the case of miscarriages of justice and subsequent exonerations, whether an ‘innocent’ person has been wrongly convicted”); Larry May & Nancy Viner, *Actual Innocence and Manifest Injustice*, 49 ST. LOUIS U. L.J. 481, 482 (2004) (“‘[F]actual innocence’ [is] roughly synonymous for ‘did not commit the act that one is accused of having committed.’”); Paul J. Mishkin, *The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 81 n.84 (1965) (“As used throughout this paper, the term ‘factual guilt’ or more simply ‘guilt’ refers to the individual having done the acts which constitute the crime with which he is charged.”).

that this definition has gained so much currency, given that commission of the act in and of itself is typically not enough to establish guilt.³⁶⁶ It is as if there is a concept of crime, constituted by an act, which is in constant tussle with our societal decision to establish via statute that more than just an act is needed.³⁶⁷ Indeed, some scholarship openly espouses the view that mens rea plays an unhelpful role.³⁶⁸

It may well seem unlikely that those who did not do the alleged act would end up, in more than very small numbers, with convictions. Thus, if an act all too easily comes to equal crime, then it would be understandable if concern about widespread occurrence of conviction in the absence of factual guilt was rare.

D. A Narrow Conception of Innocence

The tendency to view the act component of a crime as tantamount to the crime is part of a tendency to view innocence narrowly. This narrow view may be helped along by the dominance and success of the Innocence Movement³⁶⁹ and the tendency to embrace its concept of “innocence.” This concept tends to restrict “innocence” cases to “wrong man” cases.³⁷⁰ If one assumes that you need to be the “wrong man” to be innocent³⁷¹ and that “wrong man” kinds of cases generally come to light, then it is understandable that one would think that generally what we have when we consider those who are convicted are those who committed crimes. That leaves the rest—who may be the right man to the extent that there was one—all too vulnerable to an assumption that they are not innocent.³⁷²

366. See Natapoff, *supra* note 189, at 1052 (mentioning the mens rea requirement that exists “in all but a handful of cases”).

367. For instance, this is evidenced in the common usage of phrases like “unsolved crimes,” or “unsolved murders.” See, e.g., Adam Nossiter, *Yet Another Unsolved Murder Stirs Corsica Against Its ‘Mafia,’* N.Y. TIMES (Oct. 28, 2019), <https://www.nytimes.com/2019/10/27/world/europe/corsica-unsolved-murders-mafia.html> [<https://perma.cc/8V56-CGPD>]. If we were to be true to legal definitions of crimes and murders, there could be no such thing as an unsolved crime or murder, since it is only in the “solving” that we determine whether there was a “crime” or a “murder.”

368. See H. L. A. Hart, *Crime and the Criminal Law* by Barbara Wootton, 74 YALE L.J. 1325, 1325 (1965) (book review) (“Though [Barbara Wootton’s] first investigations were confined to the criminal responsibility of the mentally abnormal her name has now become identified with the claim that the whole doctrine of *mens rea* and the conception of responsibility embodied in it is an irrational hindrance to sound social policy: if, as many would admit, the purpose of the criminal law is to prevent crime, the doctrine should be eliminated or at least allowed to ‘wither away.’”).

369. See Findley, *supra* note 11, at 1157 n.1 (offering definitions of the Innocence Movement).

370. See Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 457 (2001).

371. See Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1060 (2016) (contrasting those who are “completely innocent” with those who may have plausible defenses).

372. See May & Viner, *supra* note 365, at 482.

IV. IMPLICATIONS

Part III identified tendencies, at least among privileged communities, to put a certain amount of faith in the criminal system and to conceptualize guilt expansively and innocence narrowly, and suggested that they may contribute to the apparent fusion mentioned in Part II. This Part explores implications of this fusion, looking first at why it matters and then at what might be done in response.

A. *Why This Matters*

First, it may be useful to explain what this Article is *not* saying about why this fusion matters. It is not the point of this Article to say that it is (only) the innocent (however broadly defined) about whom one needs to be concerned and that if we could just get a close enough match between legal and factual guilt we could rest easy in regard to our criminal system.³⁷³ Far from it.³⁷⁴ Even if legal and factual guilt were as closely matched as possible, a huge list of concerns would remain, including excessive use of the criminal law;³⁷⁵ police, prosecutorial, judicial, and correctional abuse;³⁷⁶ race- and class-based disparities in the application of the criminal law from the point of criminalization onward and in the availability of paths away from criminal conviction;³⁷⁷ harsh and counterproductive sentencing;³⁷⁸ and harsh and counterproductive consequences of arrest, detention, charge, conviction, and sentencing.³⁷⁹ Rather, this Article seeks to increase the prominence within legal scholarship of reminders that a function of the criminal system viewed as central to its work³⁸⁰—matching legal guilt as closely as possible to factual—is shaky to an unknown and potentially large extent.³⁸¹

It is important to acknowledge these vulnerabilities of the system, whether one's viewpoint is that they are ripe for reform or that they help illustrate the structural inequalities that mean that convictions will never equal guilt. It is important not just in service of accurate reflections about the system but also in service of accurate reflections about those convicted by it. Assumptions

373. Thank you to Jocelyn Simonson for raising points to which this section tries to respond.

374. See Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305, 307 (2018) (“Mass incarceration, profound racial and socioeconomic disparities, and the burdens of criminal records and collateral consequences, together with high-profile and seemingly unnecessary uses of force by police officers, have prompted deep criticisms from across the political spectrum.”).

375. See Ristroph, *supra* note 41, at 613.

376. See Levin, *supra* note 52, at 522–23 (mentioning prison conditions and “violent law enforcement”).

377. See, e.g., Pinard, *supra* note 42, at 967–68.

378. See Epps, *supra* note 16, at 1117.

379. See, e.g., Pinard, *supra* note 42, at 969 (noting that “long-lasting legal barriers that attach to each conviction make it difficult or even impossible for individuals to move past their criminal records”).

380. See Givelber, *supra* note 9, at 1386 (describing accuracy of result as “the most fundamental goal of the criminal justice system”); Hessick, *supra* note 53, at 277 (“[O]ur criminal justice system exists in order to sort the guilty from the innocent.”).

381. See Thomas, *supra* note 54, at 546.

that legal guilt connotes factual guilt are not, of course, racially, ethnically, or economically neutral. Convictions are imposed in disproportionate numbers on poor people and people of color.³⁸² To assume that a conviction connotes factual guilt is to downplay the threats to reliability posed by, for example, the plea's predominance and defense counsel's subordination, both of which fall more heavily on those exposed to disadvantage because of their poverty, race, and/or ethnicity.³⁸³ It is problematic to buy into the implication embedded in such an assumption—that criminality occurs disproportionately among those who are poor and of color—without confronting the fact that accurate adjudication is a luxury rarely afforded to defendants who are poor and of color.³⁸⁴ And to the extent that to assume crime commission is to assume risk and danger, this fusion enhances the threats faced by people of color.³⁸⁵ Finally, an assumption that to be free of convictions is to have lived a law-abiding life runs the risk of compounding “White credit” and reinforcing a sense of white innocence,³⁸⁶ all while downplaying the extent to which those endowed with whiteness and/or other forms of privilege can avoid findings of guilt.³⁸⁷

In addition to further jeopardizing those who are targets of race- and class-based stereotypes, an assumed fusion of those who are convicted with those who have committed crimes risks hampering efforts to inspire concern about the fate of those with convictions. Some simply care less about people's suffering or are more desirous of it if they view them as having committed crimes.³⁸⁸ And if, as suggested above, part of a reformist agenda is to reduce correctional abuse, sentences, and the consequences of convictions and sentencing, those efforts may get more traction if care has been taken to resist an assumption that all those convicted committed crimes.³⁸⁹

Finally, there is much need for accuracy within criminal justice analyses, and academics have a crucial role to play in helping to enhance it. From the rough-and-ready way in which the criminal system is sometimes described, you might not know that lives and lifelong consequences are at stake. You might not know that we are speaking of one of the state's gravest functions. So, arrests get treated as guilt,³⁹⁰ homicides as murders,³⁹¹ arrest rates as

382. See *supra* note 56 and accompanying text.

383. See Natapoff, *supra* note 36, at 1346.

384. See *supra* note 167 and accompanying text.

385. See Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1508 (2016) (“African-Americans’ exposure to the police occurs against the background of stereotypes of African-Americans as violent and dangerous, increasing the likelihood that police officers will interact with African-Americans from the perspective that violent force is both necessary and appropriate.”).

386. See Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 873–74 (2015).

387. For an observation about the ability to buy one's way out of certain charges and into diversion, see King, *supra* note 220, at 591.

388. See *supra* note 60 and accompanying text.

389. See Epps, *supra* note 16, at 1150 (“If people thought [false convictions] were more common, they might be more concerned about harsh treatment of the convicted.”).

390. See *supra* notes 352–54 and accompanying text.

391. See *supra* note 364 and accompanying text.

crime rates,³⁹² and so on. In the absence of independent analyses, the state's narrative can easily become the dominant narrative,³⁹³ and yet of course the state has an interest in legitimatizing itself. Academia's role as a source of independent, accurate, well-supported criminal justice research is a vital one.

B. What Might Be Done

This section, too, begins with a caveat: if we are concerned about the reinforcement of assumptions about the criminal system and those on whom it operates, legal scholarship should, of course, not be the only focus of our concern. In earlier work, I have identified unwarranted assumptions of guilt, and unwarranted assumptions about what convictions mean, on the part of jurors, prosecutors, defense attorneys, legislators, and judges.³⁹⁴ It would be strange to exempt one's own group, particularly when one's own group has such an important role to play regarding accuracy, detachment, and rigorous sourcing. In what follows, I offer reform suggestions under three headings, focusing on statistics, vocabulary, and framing.

1. Statistics

In a variety of areas, an understandable desire for statistical insight into the criminal system and its challenges runs the risk of reinforcing assumptions of widespread guilt and a narrow definition of innocence. Even when the statistical research itself is cautious, narrow, and explicit about its lack of generalizability, those caveats are often lost in later use of the results.

Thus, for example, as discussed above, many have been eager to try to pin a number on the percentage of convictions that are "wrongful." When those figures are then circulated without caveat as if they represent the proportion of those with convictions who are "innocent," we are at risk of cabining reliability concerns and thus of reinforcing the notion that the factual guilt of those with convictions can, by and large, be assumed. We are at risk of losing sight, for example, of the broader view of innocence advanced in this Article and thus at risk of undermining key parts of criminal law, such as *mens rea* and affirmative defenses,³⁹⁵ and obscuring key parts of our criminal system, such as the predominance of plea bargaining and the subordination of the defense. We are also at risk of losing sight of the fact that many winning claims of "innocence"—even innocence narrowly defined—may never come to light.³⁹⁶ Thus, those describing the prevalence of "wrongful conviction" or conviction of the "innocent" should be explicit about what they mean by these terms and careful in their use of data.

392. See Roberts, *supra* note 4, at 989.

393. See *id.*

394. See *supra* notes 1–7 and accompanying text.

395. See Natapoff, *supra* note 36, at 1357 ("Much legal theory remains devoted to defining *mens rea* and defenses as a way of capturing deep principles of criminal justice.").

396. See *supra* note 279 and accompanying text.

Similarly, “recidivism rates” are commonly proffered, perhaps because they promise to tell us so much about a topic of wide interest.³⁹⁷ But they bring a whole range of concerns.³⁹⁸ As I have discussed in earlier work, the unquestioned use of arrest as a sign of a “return to criminal conduct” risks endorsing an early assumption of guilt.³⁹⁹ And as this Article suggests, to assume that a conviction represents “criminal conduct” or a “return to criminal conduct” is something that should not be done without caveat. “Recidivism” is, therefore, a term whose metrics need to be made explicit, and the vulnerabilities of the chosen metrics, as they apply to both alleged episode one and two, should be explored, lest silence endorse unwarranted assumptions of guilt and of systemic accuracy.⁴⁰⁰

2. Vocabulary

There are a number of vocabulary items whose use should be complicated or abandoned in light of this Article’s arguments. Several of them are independently objectionable.⁴⁰¹ For example, terms such as “felon,” “criminal,” “murderer,” and “rapist”—even “misdemeanant”—all convey labeling and stigma,⁴⁰² and scholars may avoid them as a result. But this Article suggests an additional reason to jettison them. One reason that they convey stigma is that they convey not just conviction of a crime but commission of a crime. If one comes to doubt the appropriateness of assuming the accuracy of a conviction, one may wish to avoid these terms.

Less obviously stigmatizing, but still highly problematic, is the common term “offender” and all its subcategories (“violent,” “nonviolent,” “persistent,” “repeat,” “sex,” “juvenile,” and so on). Again, one may reject it because of its labeling effect or its suggestion of essentialism and permanence. But, as mentioned earlier, there is another reason to reject it: its definition nestles factual guilt neatly within legal guilt. And in using it, legal scholars seem to follow the dictionary’s lead, gliding from usage that

397. See Roberts, *supra* note 4, at 989.

398. See *supra* notes 299–303 and accompanying text.

399. See Roberts, *supra* note 4, at 989.

400. See Hornstein, *supra* note 95, at 11–12 (“When [a hypothetical person who is poor, African American and from the inner city] is arrested and charged the third time, he is more likely to face imprisonment. At that point, [he] may wish to plead ‘not guilty’ and go to trial. If he does so, he will have two choices: (1) He may elect to testify and deny his guilt, in which case his prior convictions may be used to impeach and he will likely be convicted; or (2) He may elect to forego his right to testify in order to prevent his prior convictions from coming before the jury, in which case he is likely to be convicted. If this scenario has any ring of truth, it ought to lead us to question the validity of such statistical studies as recidivism rates.”).

401. See Victoria Law & Rachel Roth, Commentary, *Names Do Hurt: The Case Against Using Derogatory Language to Describe People in Prison*, REWIRE NEWS (Apr. 20, 2015, 1:53 PM), <https://rewire.news/article/2015/04/20/case-using-derogatory-language-describe-person-prison/> [<https://perma.cc/98VZ-FKEU>] (noting that even news stories that draw attention to criminal system abuses can “undercut[] the humanity of the people featured with derogatory phrases” and criticizing terms that include “offender,” “criminal,” “ex-offender,” “ex-con,” and “felon”).

402. See Ristorph, *supra* note 41, at 566 (stating that “felonies and felons” are subjected to “informal social stigma”).

is, or could be, about legal guilt, to usage that seems to suggest an assumption of factual guilt. If the term is preserved, it would be useful for legal scholars to be clear about whether in using it they mean “person convicted of a crime”⁴⁰³ or “person who committed the crime,” and if they view the latter as wrapped up within the former, to be explicit about why.

Scholars should also be careful and explicit about the definitions of “guilt” and “innocence” with which they are working. Using “factually guilty” to refer to someone believed to have committed the alleged *act*—regardless of other components of the alleged crime and defenses—may contribute to the wasting away of things like *mens rea* and affirmative defenses as crucial components of our definitions of crime. Using “innocent” in a way restricted to those who are believed *not* to have committed the alleged act brings the same risks.

As a flip side of these kinds of vocabulary efforts, one should be alert to language choices that risk conveying an assumption that those without convictions are crime-free. To perpetuate this assumption is to endorse conviction as an appropriate, sufficiently accurate divider between two camps. Thus, instead of referring to those without convictions as those who have lived a law-abiding life,⁴⁰⁴ one could refer to them as people without convictions. So, too, the push for “leniency,” which appears to urge that the government be kinder than usual to certain people with convictions, may unwittingly further a sense that the system in general works well, in terms of both who is convicted and what sentences they receive.⁴⁰⁵

These kinds of language choices matter.⁴⁰⁶ And the desire to explore the assumptions that may lie behind current choices, in order to push for different choices, has parallels in other reform efforts. The drive to rename the “criminal justice system” the “criminal legal system” is one example.⁴⁰⁷ So, too, is the effort to abandon the description of life-changing,⁴⁰⁸ and sometimes life-threatening, consequences of conviction as “*collateral consequences*.”⁴⁰⁹

403. See Pfaff, *supra* note 116, at 179 (stating that, in his article, “‘drug offender’ refers to someone convicted of a drug offense, not someone who commits crimes while on drugs or in furtherance of a drug habit, nor someone who commits violent crimes as a result of the disruptions caused by drug enforcement”).

404. See *supra* note 42 and accompanying text.

405. See Roberts, *supra* note 353, at 102 (mentioning the risk that discussions of “leniency” endorse the notion that the mainstream criminal justice system is normal and fair).

406. See Lynch, *supra* note 173, at 2136 (noting that “the prevailing terminology subtly prejudices our thinking”).

407. See Carol Jacobsen & Lynn D’Orio, *Defending Survivors: Case Studies of the Michigan Women’s Justice & Clemency Project*, 18 U. PA. J.L. & SOC. CHANGE 1, 4 n.12 (2015).

408. See Peter Goldberg, Exec. Dir., Brooklyn Cmty. Bail Fund, Remarks at the Brooklyn Historical Society Event: Petty Crimes and Petty Laws: A Hard Look at the Broken Misdemeanor System (Jan. 28, 2019) (event attended by author) (explaining that so-called “collateral consequences” are in fact big, life-changing consequences).

409. See *id.*

3. Keeping the Caveat in Mind

Finally, those who are persuaded that the vulnerabilities in the system are such as to leave a question mark hanging over the extent of its accuracy may wish to approach with care the kind of progressive statements mentioned in Part II. Because, yes, a second chance is important, but more important is a first; rehabilitation and redemption are good, but only if there was a flaw or sin; lenience is welcome, but no punishment is “lenient” in the absence of guilt; poverty may be criminogenic (in the sense of making one a “criminal”), but part of the “criminogenesis” is that those without money are at risk of crushing pressure to plead guilty with no adequate representative to push back. Even as we strive for better treatment for those with convictions, let us not erase the risk of convictions without guilt.⁴¹⁰

CONCLUSION

We have learned lessons from stories of exoneration, but they have been too narrow. They are too often restricted to a certain type of innocence and their full implications are too often papered over by assumptions that, in general, convictions connote factual guilt. This Article seeks to emphasize the role of legal scholars, both in comprehending the potential breadth of innocence and in exploring the breadth of its implications. It cautions against a language of reform that may, even as it strives toward progressive changes, reinforce regressive assumptions that convictions equal guilt.

410. For an analogous proposal, based on an analogous sense that a particular portrayal of the criminal justice system can be damaging, see Epps, *supra* note 16, at 1150 (stating that “we should stop asserting that it’s better for many guilty persons to go free to save one innocent from punishment and proclaiming that our system complies with that command” and adding that “[t]he constant assertions that our system heavily skews errors in favor of acquitting the guilty create the impression that false convictions are quite rare and that our procedural system is scrupulously fair to the innocent”). For an analogous suggestion that exploration of innocence and other efforts at reform can be “mutually enhancing,” see Roberts, *supra* note 133, at 835.