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Arrests as Guilt

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An arrest puts a halt to one's free life and may act as prelude to a new process. That new process—prosecution—may culminate in a finding of guilt. But arrest and guilt—concepts that are factually and legally distinct—frequently seem to be fused together. This fusion appears in many of the consequences of arrest, including the use of arrests in assessing "risk," in calculating "recidivism," and in identifying "offenders." An examination of this fusion elucidates obstacles to key aspects of criminal justice reform. Efforts at reform, whether focused on prosecution or defense, police or bail, require a robust understanding of the differences between arrest and guilt; if they run counter to an implicit fusion of the two, they will inevitably falter.

INTRODUCTION

Approximately eleven million arrests are made in this country per year.[1] Some arrests lead to prosecutions, some do not;[2] some prosecutions lead to convictions, some do not.[3] Some arrests—let us assume—correspond to crime commission, some do not.[4] Thus, an arrest does not connote legal guilt

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1. *See 2016 Crime in the United States*, U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-18 (last visited Mar. 13, 2019).

2. Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 3 (2000) ("[I]n a number of large jurisdictions, the majority of criminal cases at the state level, both misdemeanors and felonies, are dismissed without prosecution.").

3. *See* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 649 (2014) ("Approximately half of misdemeanor case dispositions in 2012 were convictions."); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 562 (2018) ("One-third of arrests lead to dismissal or acquittal.").

4. *See infra* Subpart I.A.

or factual guilt, nor is it supposed to. It is supposed merely to be supported by "probable cause," a standard that is relatively low[5] and that does not require an adjudication of guilt.[6] This standard is applied on the assumption that things like exculpatory information and defenses are for a later time.[7]

And yet, in a wide range of ways, in a wide range of contexts, and in the assumptions of a wide range of people, arrests appear to be fused with guilt. The stage that is supposed to lie between arrest and adjudication—that period of diligent investigation, zealous representation, exploration of defenses, and possible dismissal—has too often collapsed in our implicit, and sometimes explicit, understandings of the criminal legal system. This fusion appears in consequences of arrest; discussions of "recidivism" and assessments of "risk" that seem to treat an arrest as equivalent to guilt; and linguistic and statistical "slips" that confuse "offenders" with arrestees and "crimes" with alleged crimes.

Given the many differences—factual and legal—between arrest and guilt, such a fusion demands explanation and critique. In addition, its potential consequences need to be identified and resisted.

Part I lays out key ways in which arrests are distinct from guilt, whether factual guilt (commission of the crime charged) or legal guilt (conviction for the crime charged). Part II identifies a number of manifestations of an apparent fusion of arrest and guilt. Part III explores how the fusion of arrest and guilt might have come about, discussing the influences of plea-bargaining, diversionary programs, and media, as well as the desire to comfort ourselves that our criminal legal system makes sense and does justice—or at least isn't unjust nonsense.

Part IV identifies one crucial set of reasons why such a fusion matters. Vital reform of the criminal legal system relies on a robust understanding of the

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5. *See* 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."); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1349 (2012) (describing probable cause as "a standard which demands less than a preponderance of the evidence, and which 'means less than evidence which would justify condemnation'" (quoting Illinois v. Gates, 462 U.S. 213, 235 (1983))); *id.* ("[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. It is precisely by rolling back the evidentiary checking mechanisms which ensure both accuracy and transparency that the system effectively permits criminal convictions on such thin bases."); William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 559 (2016) ("Probable cause to arrest . . . ' does not require the fine resolution of conflicting evidence that a reasonable-doubt *or even a preponderance standard demands*.' While some states use a stricter formulation of probable cause, many others accord with federal law. When a 1981 survey of judges asked respondents to reduce 'probable cause' to a specific probability, moreover, the average was 45.78%." (footnote omitted) (quoting Gerstein v. Pugh, 420 U.S. 103, 121 (1975))).

6. *See* Krause v. Bennett, 887 F.2d 362, 372 (2d Cir. 1989); Natapoff, *supra* note 5, at 1349 (describing the probable cause standard as requiring "less than a fifty-fifty chance[] of guilt").

7. *See* Finigan v. Marshall, 574 F.3d 57, 63 (2d Cir. 2009) (rejecting the idea that "an officer must have proof of each element of a crime and negate any defense before an arrest").

difference between arrest and guilt. If this distinction has indeed collapsed, even for those committed to criminal justice reform, an array of perhaps otherwise puzzling failures of reform—in areas that include defense representation, prosecutorial conduct, police conduct, and preadjudication suffering—may make more sense. Exposing this fusion is a necessary first step toward a new stage of reform.[8]

I. ARRESTS ≠ GUILT

Whether one is concerned primarily with "factual guilt" or with "legal guilt," an arrest is, of course, quite distinct from guilt. While definitions of both "factual" and "legal" guilt are myriad,[9] this Part lays out a working definition of each, before discussing the multiple ways in which each differs from arrest.

A. Arrests ≠ Factual Guilt

While alternative definitions will be discussed below,[10] this Article describes someone as "factually guilty" regarding Crime X if she committed Crime X.[11] In other words, to be factually guilty of Crime X, each of the elements of Crime X must be satisfied (including *actus reus* and *mens rea* requirements), and there must be no defense that negates guilt.[12] While selecting this definition removes some complications,[13] it leaves one large one. Since there is sometimes no definitive answer to the question "Did she commit the crime?", it will sometimes be impossible to resolve the question of factual guilt.[14] For example, there may be no definitive answer to the question of

8. For scholarly neglect of arrests, see Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 814 (2015) (noting that arrests "remain surprisingly understudied").

9. *See* David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 44 (1984) (describing the distinction as "a very controversial one").

10. *See infra* Subpart III.C.

11. *See* John Lawrence Hill, *What Does it Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 362 n.28 (1991) ("[T]he term 'guilty' is used to denote both individuals who have committed a crime, whether or not they are convicted—this is 'factual guilt'—and those who are convicted of a crime, even if they did not in fact commit the crime—'legal guilt.'").

12. *See, e.g.*, Shapiro, *supra* note 9, at 44 ("For me, factual guilt embraces the questions whether the accused committed the acts with which he is charged *and* whether he committed them with the requisite mens rea and without legal justification.").

13. *See infra* Part I.B.

14. Or, 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." *The Ethics of the Criminal Defense Attorney–New Answers to Old Questions*, 32 STAN. L. REV. 293, 297 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

whether someone was "reasonable" in using force in self-defense.[15] This caveat does not alter the fact that there are several reasons why an arrest does not equal factual guilt.

First, an arrest is at its core a governmental act, rather than the act of a suspect;[16] its occurrence, therefore, cannot in and of itself establish that a suspect is guilty of anything.[17] (Of course, an arrest is generally claimed to be made *in response to* a suspect's act, but that is a different thing.) While this point may seem obvious, that it needs to be made is suggested by the many contexts—discussed below[18]—in which an arrest is portrayed as the act of a suspect.

Second, even if we view an arrest as a response to a suspect's alleged act, an act is rarely sufficient to establish factual guilt.[19] Recall that factual guilt is defined here as commission of a crime, and recall that in our legal system crimes generally require, in addition to particular acts (or omissions), other elements such as mental states,[20] and also require the absence of successful defenses. An arrest may speak to law enforcement's assertion vis-à-vis an alleged act (and allegations about alleged acts may suffice to establish probable cause),[21] but that falls far short of a demonstration of factual guilt.[22]

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proof."); *id.* at 133 ("[T]here is no truth regarding criminal liability *independent* of the truth determined at trial, and trials are more truth-producing than truth-finding events."); Shapiro, *supra* note 9, 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."); Note, *Costs and the Plea Bargaining Process: Reducing the Price of Justice to the Nonindigent Defendant*, 89 YALE L.J. 333, 348 n.85 (1979) ("Frequently it is impossible for either the defendant or his lawyer to know before the trial whether the defendant's actions fit the elements of the crime. For such a defendant the concepts of factual and legal guilt tend to merge and the objective truth exists only as it emerges from the fact-determining process at trial." (citation omitted)).

15. *See* Jenny E. Carroll, *Graffiti, Speech, and Crime*, 103 MINN. L. REV. 1285, 1342–43 (2019).

16. *See* Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 94 (2017) ("Arrest is an action taken by police officers under authority of the state.").

17. *See* Kohler-Hausmann, *supra* note 3, at 630 ("We can never directly interpret arrest rates as an index of underlying criminal behavior because reporting and police practices mediate criminal events and arrests.").

18. *See infra* notes 124–42 and accompanying text.

19. *See, e.g.*, Michelson v. United States, 335 U.S. 469, 482 (1948) ("Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty.").

20. *See* Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1052 (2013) (mentioning the *mens rea* requirement that exists "in all but a handful of cases").

21. *See* Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525, 1526 (2018) ("Police observe what they believe is criminal conduct, and the officers make the decision on the spot whether to arrest the individual.").

22. *See* Marks v. Carmody, 234 F.3d 1006, 1009 (7th Cir. 2000) ("Issues of mental state and credibility are for judges and juries [and not police officers] to decide.") (first citing Spiegel v. Cortese, 196 F.3d 717, 725 (7th Cir. 1999); and then citing Hebron v. Touhy, 18 F.3d 421, 423 (7th Cir. 1994)); Tillman v. Wash. Metro. Area Transit Auth., 695 A.2d 94, 95–97 (D.C. 1997); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1161 (2008) ("Petty charges often stem from police observation of supposed crime, not police investigation of crime reports. If the defendant is innocent, it is frequently because the police saw something and wrongly assumed that it was criminal." (footnote omitted)); *id.* at 1161 n.224 ("Tres-

Third, factors other than a belief in guilt incentivize police officers to arrest.[23] Law enforcement officers may experience pressure—external and/or internal—to increase the volume of their arrests for job advancement (or job preservation).[24] Arrests can also bring other financial benefits, whether by allowing officers to claim overtime pay[25] or to seize property by means of civil forfeiture,[26] or by increasing agency revenue.[27] In addition, arrests may offer a

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passing is the clearest example. Usually, if the defendant is innocent, it is because she had permission to be at the location, not because another individual trespassed.").

23. *See* Alicia M. Hilton, *Alternatives to the Exclusionary Rule After* Hudson v. Michigan*: Preventing and Remedying Police Misconduct*, 53 VILL. L. REV. 47, 70–71 (2008); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 293 (2014) ("The pressure on police to exercise discretion to make arrests for minor offenses, such as enjoying a beer on one's own stoop on a summer evening, has significantly increased the number of individuals in the lower criminal courts that the public might deem to be normatively innocent."); *id.* at 318 n.181 (discussing pressures on police to meet quotas).

24. *See* Gershowitz, *supra* note 21, at 1532 ("[P]olice sometimes make warrantless arrests for their own benefit. Police departments track arrest statistics to prevent officers from ducking work and wasting their shifts. Officers therefore might arrest an individual to improve their arrest numbers." (footnotes omitted)).

25. *See id.* at 1532–33 ("[I]n some jurisdictions, because police officers are paid overtime for appearing in court, they have an incentive to make arrests that will lead to court pay. One prosecutor (who wished to remain anonymous) explained that some police officers are more prone to arrest if they think they will be paid overtime to testify in court, even if the case is weak." (footnote omitted)); Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 360 (2016) (stating that police departments "use arrest numbers as a measure of productivity and a basis for overtime pay").

26. *See* Jain, *supra* note 8, at 819 ("Arrests can . . . give police officers the opportunity to respond to incentives that have little to do with crime control—such as seizing property through civil forfeiture laws or responding to arrest quotas."). Note that forfeiture can occur even when there has been no arrest, *see* Scott Rodd, *Should Police Be Allowed to Keep Property Without a Criminal Conviction?*, PEW CHARITABLE TRS. (Feb. 8, 2017), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/02/08/should-police-be-allowed-to-keep-property-without-a-criminal-conviction, but an accusation of criminal wrongdoing may serve to justify such forfeiture, *see* Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 289–90 (2017).

27. *See* Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., dissenting from denial of certiorari) (observing that many states, and the federal government, allow law enforcement to keep 100% of the value of forfeited property); Karena Rahall, *The Green to Blue Pipeline: Defense Contractors and the Police Industrial Complex*, 36 CARDOZO L. REV. 1785, 1800 n.103 (2015) (stating that certain federal grants were awarded to police departments "based entirely on the number of drug arrests made by each department and drug arrests skyrocketed as a result"); Michelle Alexander, Opinion, *Why Police Lie Under Oath*, N.Y. TIMES (Feb. 2, 2013), http://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html ("In the war on drugs, federal grant programs like the Edward Byrne Memorial Justice Assistance Grant Program have encouraged state and local law enforcement agencies to boost drug arrests in order to compete for millions of dollars in funding. Agencies receive cash rewards for arresting high numbers of people for drug offenses, no matter how minor the offenses or how weak the evidence."); Derek Draplin & Kahryn Riley, Opinion, *'Innocent Until Proven Guilty' Should Mean What it Says*, USA TODAY (Mar. 10, 2017), https://www.usatoday.com/story/opinion/2017/03/10/civil-asset-forfeiture-michigan-police-column/98522526/ (noting, regarding civil asset forfeiture, that "[m]ost states allow law enforcement to keep at least 45% of the value of forfeited property, while in Michigan police get to keep up to 100%"); Shelby Grad, *Ferguson, Mo.'s, Alleged Revenue Scams Echo in Southeast L.A. County*, L.A. TIMES (Mar. 5, 2015, 9:11 AM), http://www.latimes.com/local/lanow/la-me-ln-ferguson-missouri-abuses-echo-southeast-los-angeles-county-20150305-story.html (describing the Ferguson Police Department's use of arrests as a "revenue-generating scheme").

way to control a situation,[28] conduct searches,[29] give new recruits experience and training,[30] or collect pedigree information for future investigations.[31] Perhaps, one might respond, these incentives exist but have no impact; after all, for them actually to bring about arrests might require police officers to lie. Unfortunately, however, it does appear that police officers sometimes lie,[32] even or especially about important things like probable cause,[33] and that such lies may be encouraged or enabled by the work environment,[34] and legal system,[35] in which they operate. A police statement can be sufficient support for an arrest; evidence of police falsity helps to undermine the notion that an arrest establishes factual guilt.

Finally, while it is impossible to quantify the number of people who have been arrested in the absence of factual guilt, we know that there are at least some.[36] We also know that many arrests do not lead to convictions.[37] Indeed,

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28. *See, e.g.*, Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1701 (2010) ("[T]he officer may have made the arrest only to further some *control* objective. (In which case, the officer already may have extracted the full value of the arrest once the arrestee has been processed fully through central booking.)" (footnote omitted)).

29. *See id.* at 1694–95.

30. *See id.* at 1695.

31. *See id.*

32. *See* Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1348 (1994) (cataloging multiple reasons why the problem persists); Julian Darwall & Martin Guggenheim, *Funding the People's Right*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 619, 637 (2012) ("Articles, studies, legal decisions, and investigative commissions have detailed problems of police misconduct and falsifications. . . . Police officers frame suspects by planting drugs on them or fabricating evidence; assault individuals and then cover their crimes by arresting the victims and falsely accusing them of crimes; and arrange to have evidence falsified in crime laboratories."); Stanley Z. Fisher, *'Just the Facts, Ma'am': Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 12–17 (1993) (cataloging multiple kinds of police lies); Andrew J. McClurg, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying*, 32 U.C. DAVIS L. REV. 389, 417 (1999) ("American law is rife with examples of criminal injustice attributable to police falsification."). Note that police perjury happens often enough that the phenomenon has its own name: testilying. *See, e.g.*, Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 763 (2016).

33. *See, e.g.*, Fisher, *supra* note 32, at 16 & n.73; Alexander, *supra* note 27; Peter Keane, Opinion, *Why Cops Lie*, SFGATE (Mar. 15, 2011), https://www.sfgate.com/opinion/openforum/article/Why-cops-lie-2388737.php ("Police officer perjury in court to justify illegal dope searches is commonplace. One of the dirty little not-so-secret secrets of the criminal justice system is undercover narcotics officers intentionally lying under oath. It is a perversion of the American justice system that strikes directly at the rule of law. Yet it is the routine way of doing business in courtrooms everywhere in America.").

34. *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1345 n.87 (1997) ("[I]t is at least arguable that lying on the part of police in drug cases reflects the combination of the radical criminalization of drug offenses, racial bias, and a culture of policing which protects, rather than exposes, miscreants within the force."); Alexander, *supra* note 27 ("[T]he police have a special inclination toward confabulation, . . . [and] disturbingly, they have an incentive to lie.").

35. *See, e.g.*, Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOK. L. REV. 1329 (2012) (discussing how evisceration of civil rights remedies promotes police misconduct).

36. *See* Natalie Lyons, *Presumed Guilty Until Proven Innocent: California Penal Code Section 851.8 and the Injustice of Imposing a Factual Innocence Standard on Arrested Persons*, 43 GOLDEN GATE U. L. REV. 485, 489 (2013).

as Issa Kohler-Hausmann puts it, in some contexts "arrest without conviction is not only possible, but is the norm."[38] Legal guilt is an imperfect proxy for factual guilt,[39] but it is the primary proxy that we have, as the next Subpart will discuss.

B. Arrests ≠ Legal Guilt

Legal guilt is defined in this Article as a procedurally valid conviction.[40] Our system for determining legal guilt, which sets up various processes and protections that must be honored in order to permit a valid declaration of legal guilt, is the primary proxy that we have for factual guilt.[41] For all its imperfections,[42] it is the best that we currently have. Only an all-seeing, all-

37. *See* Brady, *supra* note 2, at 3 ("[I]n a number of large jurisdictions, the majority of criminal cases at the state level, both misdemeanors and felonies, are dismissed without prosecution."); Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014), https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408 415402 (stating that 47% of those arrested are not convicted).

38. Kohler-Hausmann, *supra* note 3, at 641.

39. *See* Bowers, *supra* note 28, 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)); Research Working Grp., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 671 (2012) ("Arrest and conviction rates do not correlate precisely with criminal behavior rates and cannot serve as a proxy for criminality."); Irene Merker Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the MaHaRaL of Prague*, 90 MICH. L. REV. 604, 613 (1991) ("Factual guilt has always seemed elusive. The best one can do in a criminal trial is to approximate truth, and only rather grossly at that." (footnote omitted)); *id.* at 624–25 ("[I]n our imperfect world there is only one kind of ascertainable guilt, and that is legal guilt. The search for more is nothing less than arrogance." (footnote omitted)); Carla Spivack, *Killers Shouldn't Inherit from Their Victims—Or Should They?*, 48 GA. L. REV. 145, 204–05 (2013) ("[P]lea bargaining is commonly acknowledged to be a flawed proxy for actual guilt.").

40. *See* William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 844 (1988) (under the concept of "legal guilt," a person "is deemed to be guilty only after the state establishes this fact by meeting all the procedural demands of the system"); William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 331 n.4 (1995) ("If convicted, whether factually guilty or not, one is legally guilty."); Stefano Maffei & David Sonenshein, *The Cloak of the Law and Fruits Falling from the Poisonous Tree: A European Perspective on the Exclusionary Rule in the* Gäfgen *Case*, 19 COLUM. J. EUR. L. 21, 24 n.11 (2012) ("A person may be factually guilty, in that he actually committed the crime, but at the same time not be legally guilty, because the conviction was obtained in violation of the law."); Mykola Sorochinsky, *Prosecuting Torturers, Protecting "Child Molesters": Toward a Power Balance Model of Criminal Process for International Human Rights Law*, 31 MICH. J. INT'L L. 157, 166 (2009) ("The pronouncement of legal guilt is only possible where there is not only a factual finding supporting the guilt, but where this finding is also made through proper procedures.").

41. *See* David Blumberg, Note, *Habeas Leaps from the Pan and into the Fire:* Jacobs v. Scott *and the Antiterrorism and Effective Death Penalty Act of 1996*, 61 ALB. L. REV. 557, 569 (1997) ("Legal guilt presumes factual guilt . . . .").

42. *See* Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. SCH. L. REV. 911, 912 (2011–2012) ("If one were asked to start from scratch and devise a system best suited to ascertaining the truth in criminal cases, and to ensuring that, to the extent any unavoidable errors in fact-finding occur, they do not fall on the shoulders of innocent suspects, what would that system look like? It is inconceivable that one would create a system bearing much resemblance to the criminal justice process we now have in the United States."); Russell M. Gold et al., *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1616 (2017) ("The lack of procedures regulating plea negotiations means that the criminal system cannot effectively sort the innocent from the guilty during those negotiations. And the extremely high punishments

knowing entity could speak with absolute accuracy and authority on factual guilt,[43] and as mentioned earlier,[44] even she would be unable to provide a definitive answer regarding certain charges that have an inescapably subjective component.[45] As with factual guilt, there are several ways in which an arrest is distinct from legal guilt.

First, a finding of legal guilt requires different—and more elaborate—process than does an arrest. At trial, a declaration of legal guilt comes from a guilty verdict reached by judge or jury.[46] Far more commonly, it is declared by a judge, as a result of a guilty plea.[47] Arrests, by contrast, are typically effected by police officers and typically require advance approval by neither judges nor prosecutors.[48]

These different processes bring with them different standards. An arrest is not supposed to occur unless law enforcement has probable cause to be-

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imposed after conviction sometimes lead innocent defendants to plead guilty to avoid the risk of receiving those high sentences."); Eugene R. Milhizer, *Confessions After* Connelly*: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1, 9 (2008) ("While the data varies somewhat from study to study, the consistent conclusion of the research is that innocent defendants are convicted with disturbing frequency."); Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 47 (1964) ("It seems clear both as a matter of logical inference and of demonstrable fact that a defendant who is out on bail and who enjoys the services of a lawyer is less likely to plead guilty than is one who lacks one or both of these advantages."); Donald H. Zeigler, *Harmonizing Rules 609 and 608(b) of the Federal Rules of Evidence*, 2003 UTAH L. REV. 635, 689 n.297 ("Guilty pleas may be coerced by threatening lengthy incarceration or high bail if a defendant asserts her innocence, while offering a short sentence or even probation if the defendant pleads guilty.").

43. *See* Eleanor J. Ostrow, Comment, *The Case for Preplea Disclosure*, 90 YALE L.J. 1581, 1585 n.16 (1981) ("[F]actual guilt can never be fully known . . . .").

44. *See supra* Subpart I.A.

45. *See* Robert P. Mosteller, *Why Defense Attorneys Cannot, but Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 58 (2010) ("Even if we know what happened, many cases turn on issues of human motivation and responsibility, which may remain uncertain or which may properly be viewed from different perspectives."); George C. Thomas III, *"Truth Machines" and Confessions Law in the Year 2046*, 5 OHIO ST. J. CRIM. L. 215, 227–28 (2007) (proposing the idea of subjecting suspects to a "truth machine," and in light of complications that this would involve—"[W]hat if the issue is mens rea? Now the fact in the universe about guilt begins to grow fuzzy. What if the crime under investigation is a white collar crime rather than a common law crime? *Is* there a fact in the universe about, for example, conspiring to restrain trade?"—suggesting that it might be "useful for investigating some crimes and not others").

46. *See* Josh Bowers, Lafler, Frye, *and the Subtle Art of Winning by Losing*, 5 FED. SENT'G REP. 126, 129 (2012) ("[T]rial . . . is the best mechanism for the determination of legal guilt . . . ."); Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Conviction*, 38 CAL. W. L. REV. 333, 334 (2002) ("The jury verdict is our almost sacred test for whether one is guilty or innocent.").

47. *See* Findley, *supra* note 46, at 334–35.

48. *See* Jain, *supra* note 8, at 854 ("An arrest needs only a single police officer's determination of probable cause."); Gershowitz, *supra* note 21, at 1531 ("Police officers are not legally trained and thus may not understand that prosecutors will be unable to prove an element of the offense." (footnote omitted)); *id.* at 1527 ("Even if we assume that most police officers are well intentioned—which I do—they are not infallible in deciding whom to arrest. Police receive very little legal training about their state's criminal code. And officers rarely consult with prosecutors at the moment of arrest to ask whether it will be feasible to successfully prosecute the individual who is being arrested. Put simply, police are offered little guidance on arrests and must exercise their best judgment in determining whom to take into custody and whom to send on their way." (footnotes omitted)).

lieve that the suspect committed a crime.[49] This standard is a relatively low one.[50] Those applying it, for example, may disregard exculpatory evidence.[51] Arrests differ still further from legal guilt in that many arrests fail to meet even the relatively low standard of probable cause.[52]

By contrast, trial convictions are not supposed to occur unless the fact-finders are convinced of the defendant's guilt beyond any reasonable doubt; at trial, the defense has the right not only to challenge the prosecution's ability to prove one or more of the elements but also to mount affirmative defenses. As for the guilty plea, while it does not require proof beyond a reasonable doubt,[53] it requires more than an arrest does. For example, a court is not supposed to accept a guilty plea unless it is "supported by a factual basis and . . . the defendant's waiver of her right to trial is voluntary and knowing."[54] A guilty plea also typically involves an admission of guilt.[55]

This difference in process and standards corresponds to a difference in permissible consequences: punishment can follow a finding of legal guilt but cannot follow a mere arrest.[56] After arrest, there are necessary precursors to a

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49. *See* Tennessee v. Garner, 471 U.S. 1, 7 (1985).

50. *See* sources cited *supra* note 5.

51. *See* Criss v. City of Kent, 867 F.2d 259, 263 (6th Cir. 1988) ("A policeman . . . is under no obligation to give any credence to a suspect's story nor should a plausible explanation in any sense require the officer to forego arrest pending further investigation if the facts as initially discovered provide probable cause."); Fisher, *supra* note 32, at 30 (noting, during a discussion of his examination of police reports, that none of the training materials that he examined addresses "the importance of investigating, reporting, or recording exculpatory facts" and that instead they "reflect a psychological set in which the arrestee's guilt is presumed, and the only use of notes and reports in the criminal process is to ensure conviction"); Givelber, *supra* note 34, at 1374 ("Police investigations and reports are incomplete and, generally, police do not consider it their obligation to discover, investigate and record exculpatory matters."). *But see* Bigford v. Taylor, 834 F.2d 1213, 1218 (5th Cir. 1988) ("As a corollary . . . of the rule that the police may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause." (footnote omitted)).

52. *See* Harmon, *supra* note 25, at 341 ("[T]he vast majority of arrestees . . . are arrested for petty offenses en masse, often without probable cause."); Natapoff, *supra* note 5, at 1331 ("A growing literature indicates that urban police routinely arrest people for reasons other than probable cause, that high-volume arrest policies such as zero tolerance and order maintenance create a substantial risk of evidentiarily weak arrests, that mechanisms for checking whether arrests are based on probable cause are sporadic, and finally that, if those mechanisms do kick in, police sometimes lie about whether there was sufficient evidence for an arrest.").

53. *See* Shapiro, *supra* note 9, at 43.

54. Gold et al., *supra* note 42, at 1622 n.57 (citing FED. R. CRIM. P. 11); *see also* Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 165 (2011). Note that some states have not adopted the "factual basis" requirement. *See* Shapiro, *supra* note 9, at 42 & n.72.

55. *See* Ortman, *supra* note 5, at 564 ("In a typical guilty plea, the defendant solemnly admits in open court that he is guilty of the crime charged, and a judge finds a 'factual basis for the plea.'" (footnote omitted)); *id.* at 564 n.302 ("*Alford* pleas, in which the defendant pleads guilty without confessing guilt, are an uncomfortable exception.").

56. *See* Erica K. Beutler, *A Look at the Use of Acquitted Conduct in Sentencing*, 88 J. CRIM. L. & CRIMINOLOGY 809, 843 (1998) ("When the legislature statutorily classifies specific conduct as criminal, it can only punish that behavior by recourse to the criminal justice system established by the Constitution. A conviction is a necessary prerequisite to punishment based on that conduct. While not always an accurate barometer of factual guilt, conviction symbolizes legal guilt, thereby legitimizing the government's authority

finding of legal guilt, and thus to the imposition of punishment: a prosecutor must first decide to file a charge; if a prosecution begins, defense is supposed to follow, ideally involving effective defense counsel, as well as things like defense investigation, defense strategies, and the possible mounting of defenses.[57]

II. THE FUSION OF ARREST AND GUILT

If it seemed obvious that an arrest is distinct from guilt, whether legal or factual, then it may be surprising that the concepts of arrest and guilt often appear to be fused. The extent of this fusion demands explanation and merits concern. This Part lays out a variety of indications of such a fusion before Part III suggests some explanations and Part IV addresses one particularly urgent set of concerns.

A. Consequences of Arrest

An arrest brings what Adam Gershowitz calls "a huge litany of consequences for the arrestee."[58] Many of them appear to rely on an assumption of criminal guilt, and this Subpart presents several of these, including consequences imposed through law by the government, consequences imposed privately, and stigma imposed through both governmental and private acts.

The legal consequences of arrest that appear to rely on an assumption of guilt (or an assumption that one's likelihood of guilt is far higher than the low threshold that probable cause represents) are numerous. They include a permanent record that is accessible to the police and to others,[59] violations of

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to deprive a person of his life, liberty or property." (footnotes omitted)); Michael Edmund O'Neill et al., *Past as Prologue: Reconciling Recidivism and Culpability*, 73 FORDHAM L. REV. 245, 268 (2004) ("The American criminal justice system presumes innocence, not guilt. It is therefore abhorrent to base punishment merely upon the existence of an arrest, without more.").

57. *See* Jain, *supra* note 8, at 820 ("Criminal procedure is intended to place important safeguards between a police officer's decision to make an arrest and its subsequent consequences. Defendants in criminal cases have the right to constitutionally adequate counsel, the right to suppress evidence that was illegally obtained, and the right to cross-examine witnesses, including testifying police officers." (footnotes omitted)).

58. Gershowitz, *supra* note 21, at 1530 (mentioning "incarceration, the need to post bail, internet-accessible arrest records, mug shots, immigration and housing consequences because agencies track arrest records, the prospect of job loss because of incarceration, and difficulty in finding new work because of arrest records"). Harmon points out that an arrest can also "affect child custody rights, it can trigger deportation, and it can get a suspect kicked out of public housing." Harmon, *supra* note 25, at 314. Jain notes that an arrest can subject students at schools and universities to discipline. Jain, *supra* note 8, at 812.

59. *See* Jain, *supra* note 8, at 823 ("Absent robust sealing laws, police departments and others may widely disseminate criminal records, including arrests that did not result in conviction."); *id.* at 824 ("Every state now either requires or permits criminal histories to be released to noncriminal justice agencies, such as those that grant licenses and provide social services. Commercial vendors also collect, store, and search arrest information. A number of states make arrest information publicly accessible, and some allow anyone who pays a fee to access an arrested individual's criminal history. And the Federal Bureau of Investigation's

probation and parole,[60] occupational license suspension,[61] civil asset forfeiture,[62] bars on public benefits,[63] and threats to child custody.[64] An arrest on one's record can make one ineligible for jury service.[65] It can also make one ineligible for legal relief,[66] as exemplified by a New York case in which a judge dismissed misdemeanor charges in the interests of justice for those defendants who had no arrest record, but declined to dismiss for those who had such a record.[67] Referring to the arrest records as "record[s] of prior unlawful activity,"[68] the judge explained his dichotomous decision: dismissal was appropriate where the defendants had previously led "a law abiding life,"[69] but in cases "where a defendant previously has had or exercised that opportunity, but has thereafter again disregarded the law, a different matter is presented. Defendants whose criminal records or records of prior unlawful activity thereby present a history of disregard of the law, will not be permitted to benefit" from dismissal.[70]

Privately imposed deprivation that appears to stem from an assumption of guilt following arrest includes adverse employment consequences.[71] These consequences can include refusals to hire,[72] disciplinary actions,[73] suspen-

(FBI's) fingerprint database—which was designed to provide law enforcement officials with the criminal histories of arrested individuals—has long been used outside the criminal justice system, such as by employers who conduct background checks." (footnotes omitted)).

60. *Id.* at 825.

61. *See id.* at 840 ("As a matter of due process, a licensee may be entitled to a hearing before a license is revoked, but not necessarily before an unpaid license suspension. Until 2006, New York City taxi drivers, for instance, had their licenses automatically suspended for a wide range of arrests, including misdemeanor welfare fraud or forgery." (citing Nnebe v. Dause, 644 F.3d 147, 159 (2d Cir. 2011) ("[W]e think that in any given case, an arrest for a felony or serious misdemeanor creates a strong government interest in ensuring that the public is protected in the short term, prior to any hearing [for an arrested taxi driver].")).

62. *See id.* at 819 ("Arrests can . . . give police officers the opportunity to respond to incentives that have little to do with crime control—such as seizing property through civil forfeiture laws or responding to arrest quotas.").

63. *See id.* at 825.

64. Harmon, *supra* note 25, at 314.

65. *See* Dobyne v. State, 672 So. 2d 1319, 1330–31 (Ala. Crim. App. 1994) (not plain error to excuse a prospective juror on the basis of an arrest, where state's exclusion statute requires that one be "generally reputed to be honest and . . . esteemed in the community for integrity, good character and sound judgment").

66. See, for example, New York's Adjournment in Contemplation of Dismissal (ACD), which permits delayed dismissal (and sealing) as long as one is not arrested in the interim. *See* Kohler-Hausmann, *supra* note 3, at 648.

67. *See* People v. Ben Levi, 565 N.Y.S.2d 404, 406 (Crim. Ct. 1990); Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 357 (2017) (discussing the case).

68. *Ben Levi*, 565 N.Y.S.2d at 406.

69. *Id.*

70. *Id.*

71. *See* Josephine Ross, *"He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 260 n.140 (2004) ("The fact that people are refused employment simply for being arrested attests to the presumption of guilt."); Fields & Emshwiller, *supra* note 37.

72. Ross, *supra* note 71, at 260 n.140.

73. *See* Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265, 2287 (2018).

sions,[74] reassignments,[75] and terminations.[76]

Finally, arrests can lead to stigmatizing acts by both governmental and private entities.[77] These acts include publication of arrests in print and electronic media,[78] including the distribution of "mug-shots"[79] and the phenomenon of the "perp walk"[80]: the parading of an arrestee by law enforcement, frequently in coordination with members of the media.[81] "Perp" is, of course, short for "perpetrator," and both the act and the terminology used to describe it suggest an assumption that an arrest equals guilt.[82] As JaneAnne Murray puts it, "[t]his walk is an embodiment of the presumption of guilt, and the criminal justice system's faith in the screening role police officers play in separating the culpable from the innocent."[83]

In light of these consequences, one may wonder about the extent to which the doctrinal prohibition on pre-conviction punishment[84] is honored. Indeed, the law sometimes seems to acknowledge that the criminal process can inflict punishment in advance of adjudication. Thus, for example, when New York established its groundbreaking standards for judges to apply when

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74. *See* Jain, *supra* note 8, at 815 ("Employers may suspend or fire an arrested worker, even when prosecutors or judges determine that a rogue police officer made a false arrest.").

75. *See id.* at 812.

76. *See id.* at 840 ("Some employers suspend or terminate at-will employees based on the arrest.").

77. *See* Shayna Jacobs et al., *Hate-fueled Baltimore Man Saw First Victim as 'Practice' To 'Kill Additional Black Men' in Times Square*, N.Y. DAILY NEWS (Mar. 23, 2017), http://www.nydailynews.com/new-york/white-supremacist-killer-planned-carnage-times-square-article-1.3006719?cid=bitly ("Jackson was led into court wearing a white Tyvek suit for a second straight day, with his hands cuffed and his feet shackled.").

78. *See* François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMP. L. 107, 147 (2010) (referring to a New York Post front page showing "an accused in shackles with the headline 'Monster in Chains,'" and noting that "the distinction between accused persons and convicted offenders has become staggeringly blurred in the United States").

79. *See* Tim Stelloh, Opinion, *Innocent Until Your Mugshot Is on the Internet*, N.Y. TIMES (June 3, 2017), https://www.nytimes.com/2017/06/03/opinion/sunday/innocent-until-your-mug-shot-is-on-the-internet.html.

80. *See* JaneAnne Murray, *A Perfect Prosecution: The People of the State of New York Versus Dominique Strauss-Kahn*, 8 CRIM. L. & PHIL. 371, 373 (2013) ("Strauss-Kahn experienced the presumption of guilt in the early stages following his arrest, most memorably in a humiliating 'perp walk,' the prosecutors' opposition to bail, and the swift decision to indict."); *id.* at 378 ("There are . . . few countries that subject high-profile arrestees to the humiliation of the 'perp walk.' Rightly condemned worldwide as abhorrent to the ethos of the presumption of innocence, the images of Strauss-Kahn paraded in handcuffs carried enormous potential to sear him in the public's imagination as guilty. These events are not accidents; they are orchestrated as a reward to the investigating officers." (footnote omitted)).

81. *See* Ryan Hagglund, *Constitutional Protections Against the Harms to Suspects in Custody Stemming from Perp Walks*, 81 MISS. L.J. 1757, 1767 (2012) ("Perp walks are a natural outgrowth of the symbiotic relationship between law enforcement and the media. Accordingly, the police often assist the media's efforts to obtain images of a suspect in custody." (footnote omitted)); *id.* at 1769 ("In the most egregious instances, the police will stage a perp walk, moving a suspect for a short distance and returning him to the place where he is being held, for no reason other than the creation of an opportunity for the press to observe the suspect being moved while in custody.").

82. *See* Scott Sayare et al., *French Shocked by IMF Chief's "Perp Walk,"* N.Y. TIMES (May 16, 2011), http://thelede.blogs.nytimes.com/2011/05/16/french-shocked-by-i-m-f-chiefs-perp-walk/.

83. Murray, *supra* note 80, at 378.

84. *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979).

deciding whether to dismiss prosecutions in the interests of justice, one of the factors for them to consider was the "punishment already suffered by the defendant."[85] Even when the statutory language changed,[86] the factor maintained its relevance in the case law of that state and others,[87] with courts freely using the term "punishment" to refer to preadjudication harms, including harms from and related to arrest, such as postarrest confinement.[88] Thus, these consequences of arrest, and the ways in which the case law portrays them, hint at a regime in which the arrest represents the adjudicative moment,[89] and punishment follows therefrom.[90]

B. "Recidivism"

The legal definition of "recidivism" is relatively straightforward. It means a return to criminal conduct.[91] How to measure recidivism is a much bigger issue,[92] particularly given the importance of the concept.[93] Experts view recidivism as crucial to both the study of individuals[94] and the study of policy

85. People v. Clayton, 342 N.Y.S.2d 106, 110 (App. Div. 1993); *see also* People v. James, 415 N.Y.S.2d 342, 346 (Crim. Ct. 1979) ("Each of these defendants has been arrested and spent at least some time incarcerated awaiting arraignment. The Court considers this enough punishment to satisfy this element of *Clayton*."); Roberts, *supra* note 67, at 372 & n.330 (discussing these cases).

86. *See* N.Y. CRIM. PROC. LAW §§ 170.40, 210.40 (McKinney 2007).

87. *See, e.g.*, People v. Gragert, 765 N.Y.S.2d 471, 476 (Crim. Ct. 2003) ("[D]ue to the erroneous warrant, the defendant has already suffered a 'punishment' far greater than what would have resulted from her conviction in this case.").

88. *See, e.g.*, State v. Smith, 480 A.2d 236, 239 (N.J. Super. Ct. Law Div. 1984) (dismissing case alleging bubble gum theft where "[t]he consequences which have already attended the arrest of this defendant are more punitive than those which would follow conviction"); People v. Doe, N.Y. L.J., April 6, 1979, at 12 (N.Y. Crim. Ct. 1978) ("The defendant has been subjected to punishment by virtue of his incarveration [sic] from the time of his arrest at approximately 5:40 A.M. on Sept. 22, 1978, until his release from custody upon parole at approximately 8:30 P.M. later that day, a period of about 14 hours."); *id.* (stating that postarrest life "effectively amounted to . . . emotional and psychological incarceration").

89. Jocelyn Simonson has explored the idea that the setting of bail often marks the true adjudicative moment. *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.").

90. *See generally* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT (1979).

91. Joan Petersilia, *Recidivism*, *in* ENCYCLOPEDIA OF AMERICAN PRISONS 382, 382 (Marilyn D. McShane & Frank P. Williams III eds., 1996) (defining "recidivism" as "an offender's return to crime").

92. *See* John Nally et al., *Post-Release Recidivism and Employment Among Different Types of Released Offenders*, 9 INT'L J. CRIM. JUST. SCI. 16, 20 (2014) ("[F]ive major indicators have been identified as measures of recidivism, including (1) police arrest, (2) a criminal charge for a new offense, (3) a reconviction for a new criminal offense, (4) re-incarceration, and (5) a court-mandated supervision revocation (e.g., a probation or parole violation) . . . .").

93. *See* MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 101 (2015) ("Reducing the recidivism rate now dominates all discussions of justice reinvestment and of penal policy more broadly.").

94. *See, e.g.*, Nally et al., *supra* note 92, at 19 ("Post-release recidivism is regarded as the primary measure of the success of an offender's reentry into the community.").

choices;[95] indeed, it has been called "an existential test of the criminal justice system generally."[96] Its importance stems in part from the variety of prescriptions that may be inspired by recidivism data. These include prescriptions about whether, how, and how long society should punish;[97] what if any rehabilitative or reentry programs should be funded or offered;[98] how probation and supervised release should function;[99] how bail and pretrial detention should be used;[100] whether "diversionary and treatment programs" are working;[101] how policing should happen;[102] and so on.

Certain knowledge of recidivism can be as elusive as certain knowledge of factual guilt[103]—indeed, more so, because one would need to know about at least *two* instances of criminal conduct per person ((1) the initial criminal conduct, and (2) the return to criminal conduct). Therefore, those wishing to

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95. Petersilia, *supra* note 91, at 382 ("Reducing recidivism . . . is one of the most important goals of the criminal justice system."); Laura Ravinsky, *Reducing Recidivism of Violent Offenders Through Victim-Offender Mediation: A Fresh Start*, 17 CARDOZO J. CONFLICT RESOL. 1019, 1026 (2016) ("Recidivism analyses serve a critical societal role by allowing researchers to determine whether resources are being used efficiently and appropriately.").

96. Robert Weisberg, *Meanings and Measures of Recidivism*, 87 S. CAL. L. REV. 785, 788 (2014).

97. *See* U.S. SENTENCING COMM'N, THE PAST PREDICTS THE FUTURE: CRIMINAL HISTORY AND RECIDIVISM OF FEDERAL OFFENDERS 2 (2017) ("Recidivism information is central to three of the primary purposes of punishment as described in the [Sentencing Reform Act]—specific deterrence, incapacitation, and rehabilitation—all of which focus on prevention of future crimes through correctional intervention."); *id.* ("Considerations of recidivism by federal offenders were also central to the [Sentencing] Commission's initial work in developing the *Guidelines Manual*'s criminal history provisions . . . and continue to be a key consideration in the Commission's work today. Recent developments, particularly public attention to the size of the federal prison population and the cost of incarceration, have refocused the Commission's interest on the recidivism of federal offenders." (footnote omitted)); *id.* ("Recidivism measures can provide policy makers with information regarding the relative threat to public safety posed by various types of offenders, and the effectiveness of public safety initiatives in (1) deterring crime and (2) rehabilitating or incapacitating offenders.").

98. *See* Charles H. Rose III, *Should the Tail Wag the Dog?: The Potential Effects of Recidivism Data on Character Evidence Rules*, 36 N.M. L. REV. 341, 342 (2006) ("Governments use recidivism research to develop programs to handle rehabilitation, incarceration, and sentencing."); Cecelia Klingele, *Measuring Change: From Rates of Recidivism to Markers of Desistance*, 109 J. CRIM. L. & CRIMINOLOGY (forthcoming 2019) (manuscript at 14), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3142405 (mentioning decisions about which treatment programs to fund).

99. *See* Nora V. Demleitner, *How to Change the Philosophy and Practice of Probation and Supervised Release: Data Analytics, Cost Control, Focus on Reentry, and a Clear Mission*, 28 FED. SENT'G REP. 231, 232 (2016) (describing "reduction of recidivism" as "the apparent goal of the efforts to improve supervisory mechanisms").

100. *See* U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 7 (2016) ("Recidivism measures are used by numerous public safety agencies to measure performance and inform policy decisions and practices on issues such as pretrial detention, prisoner classification and programming, and offender supervision in the community.").

101. Nora V. Demleitner, *Judicial Challenges to the Collateral Impact of Criminal Convictions: Is True Change in the Offing?*, 91 N.Y.U. L. REV. ONLINE 150, 164 (2016) ("Recidivism has become the hallmark of release decisions and of judging the success of diversionary and treatment programs.").

102. *See* Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 772 (1998).

103. *See* John Pfaff, @JohnFPfaff, TWITTER (June 21, 2017, 10:58 AM) ("None of our recidivism stats actually measure it, whatever 'recid' is. They measure CJ contacts (arrests, etc.), not actually offending.").

measure recidivism rely on proxies. Conviction and incarceration are commonly used as proxies for criminal conduct in the recidivism context.[104] So too, at least in this country, is arrest.[105]

While this Article focuses on the complexities of using arrest, it is worth noting that each proxy has flaws.[106] Conviction, for example, might seem like the best candidate, given that it denotes legal guilt. However, the usefulness of conviction rates to signify rates of "reoffending" is complicated by the influence of disparities in law enforcement.[107] Convictions may also be an overinclusive measure of factual guilt,[108] thanks to, for example, the coercive pressure to take a guilty plea,[109] rules that chill defendants' trial testimony,[110] bias among jurors (and others),[111] the inadequacy (including inadequate re-

104. *See* Rose, *supra* note 98, at 348–49.

105. *See* Demleitner, *supra* note 99, at 236 ("Many U.S. recidivism data sets are based on re-arrest rather than reconviction[,] . . . [but] European recidivism rates, for example, measure only convictions for a new offense, though in some countries violations of conditions of supervision amount to a new offense.").

106. *See* Klingele, *supra* note 98 (manuscript at 15–16) ("[W]hile the criminal justice system purports to measure recidivism, what recidivism data usually measure are rates of re-capture—outcomes that turn as much on luck and policing patterns as they do on deviant behavior."); *id.* (manuscript at 14) (stating that longitudinal studies are the "most effective" way of measuring behavior, and adding that "[i]n such settings, researchers follow subjects over long periods of time—often decades—periodically surveying, interviewing, and gathering third party data about subjects' behavior").

107. *See* Daniel P. Mears et al., *Recidivism and Time Served in Prison*, 106 J. CRIM. L. & CRIMINOLOGY 83, 100 (2016) ("A focus on felony conviction ensures that more serious offending is examined and reduces, but does not eliminate, some of the problems associated with using arrest, such as the greater likelihood that recidivism in such instances includes situations where no offense occurred or measures both reoffending and differential police responses.").

108. *See id.* This means that "recidivism" data that relies on convictions could be doubly overinclusive, since it uses both a first conviction and a second conviction as proxies for factual guilt.

109. *See* Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL'Y 645, 652–53 (2011) ("[E]ven innocent defendants can be persuaded by the staggering incentives to confess one's guilt in return for a bargain. . . . [O]vercriminalization, the phenomenon that initially created swelling dockets and the need for plea bargaining, makes creating the incentives to plead guilty easy by propagating a myriad of broad statutes from which staggering sentencing differentials can be created."); Jain, *supra* note 8, at 822 ("A 2013 study of low-income defendants facing misdemeanor charges relating to petty marijuana possession in the Bronx, New York, depicts a setting in which defendants routinely take plea agreements because it is too costly to contest charges at trial.").

110. *See* Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977 (2016).

111. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (analyzing the numerous stages within criminal case trajectories at which biases can have an effect, including the police encounter, the charge and the plea bargain, the trial, and sentencing); Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 190 (2010) (demonstrating that mock jurors "held strong associations between Black and Guilty, relative to White and Guilty, and [that] implicit associations predicted the way mock jurors evaluated ambiguous evidence"); Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1007 (2013) ("[E]ven where people of color exercise their right to go to trial, there is a greater chance that the fact-finder—whether a jury or a judge—will interpret the facts in a manner consistent with guilt because of the defendant's skin color. Therefore, defendants of color are more likely to plead guilty and to be found guilty at trial due to forces independent of their own culpability or the merits of the case." (footnote omitted)); Ronald J. Tabak, *The Continuing Role of Race in Capital Cases, Notwithstanding President Obama's Election*, 37 N. KY. L. REV. 243, 256–57 (2010).

sources[112] and excessive caseloads[113]) of much defense representation,[114] and restrictions on investigation[115] and discovery.[116] The risk of overinclusiveness applies to trial convictions;[117] it may apply still more forcefully to guilty pleas.[118] Convictions are also often said to be an underinclusive measure of factual guilt,[119] as in this discussion by Joan Petersilia of important precautions to be taken by "those undertaking recidivism research, reviewing it, or comparing or reporting it"[120]:

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112. *See* 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 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.").

113. *See, e.g.*, NAT'L ASSOC. OF CRIMINAL DEF. LAWYERS, MINOR CRIME, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 9 (2009) ("In Chicago, Atlanta and Miami, defenders carry more than 2,000 misdemeanor cases per year. With these massive caseloads, defenders have to resolve approximately 10 cases a day—or one case every hour—not nearly enough time to mount a constitutionally adequate defense." (footnote omitted)).

114. *See* Strickland v. Washington, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting) ("Seemingly impregnable cases can sometimes be dismantled by good defense counsel."); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1036 (2006) ("We now have evidence that overworked and incompetent lawyers contribute to wrongful convictions and that truly well-prepared defense lawyers, with adequate support services, can attack the other causes of wrongful convictions, such as mistakes in eyewitness identifications and insufficient investigations."); William S. 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) ("In 1984, *Strickland v. Washington* effectively discarded *Gideon*'s noble trumpet call to justice in favor of a weak tin horn. Directly contrary to its rhetoric in *Strickland*, the Court has effectively ensured that *Gideon* guarantees little more than the presence of a person with a law license alongside the accused during trial." (footnotes omitted)).

115. *See* Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 277 (1995) ("[A] defendant who lacks the resources to investigate or to hire experts and consequently doubts his ability to establish an affirmative defense or rebut the prosecution's evidence may prefer whatever benefit is offered in a plea bargain over the risks of trial.").

116. *See, e.g.*, Murray, *supra* note 80, at 384 ("[S]uppression or late disclosure of *Brady* material is a recurrent problem nationwide and in New York State courts."); B. Michael Dann, *Free the Jury*, 23 LITIG., Fall 2016, at 5, 6.

117. *Cf.* Givelber, *supra* note 34, at 1386, 1396.

118. *See* John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 496 n.70 (2008) ("There are many reasons to question whether many defendants are in fact guilty of the underlying offense. 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."); Mayson, *supra* note 3, at 556 ("[S]ome number of defendants plead guilty only because they are detained."); Zeigler, *supra* note 42, at 689 ("Defendants plead guilty for many reasons not related to guilt, and the charge pled to may not be the crime actually committed." (footnote omitted)); *id.* at 689 n.297 ("Guilty pleas may be coerced by threatening lengthy incarceration or high bail if a defendant asserts her innocence, while offering a short sentence or even probation if the defendant pleads guilty.").

119. *See* Mia Bird & Ryken Grattet, *Realignment and Recidivism*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 176, 183 (2016) ("Reconviction is a conservative measure of recidivism because it omits criminal activities for which there is insufficient evidence or any number of reasons for abandoning a prosecution.").

120. Petersilia, *supra* note 91, at 384–85 (offering a kind of "checklist" for those "undertaking recidivism research, reviewing it, or comparing or reporting it," which involves "specifying exactly the dimensions that will be used in calculating the recidivism rates," including the "type of recidivism event").

> It is critical that the particular type of recidivism event be specified, although there is no agreement on which type of event is the best measure of recidivism. Some have argued that recidivism is best measured closest to the event (at arrest), since later events take us further away from the offense itself and so many arrests fail to result in conviction—leading to an underestimation of recidivism. But others argue that convictions are a more appropriate measure, since many arrests are unfounded and the definition of arrest differs so widely from one jurisdiction to another.[121]

In work that uses rearrest as a proxy for recidivism, one does sometimes find the kind of careful and explanatory approach that Petersilia recommends. Some authors acknowledge the imperfections of arrests as a measure of recidivism, compare those imperfections to the flaws that are inherent in other measures,[122] and then explain their decision to use arrest rates (perhaps in conjunction with other measures), with caveats attached.[123]

But in other instances, one finds references to recidivism that suggest the same kind of unquestioned fusion of arrest and guilt that is described elsewhere in this Article. Sometimes this fusion appears in explicit (but unsupported) assumptions. In a report on "Federal Child Pornography Offenses,"[124] for example, the Sentencing Commission defined "known recidivism" to include arrests, even where the disposition of the case is unknown.[125] The Commission stated that its study, "like other studies, assumes that false arrests are exceptional and that the typical arrest of an offender on supervision reflects recidivism (including 'technical' violations of the conditions of supervision)."[126]

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121. *Id.* at 384.

122. *See* Laura M. Baber & Mark Motivans, *Extending Our Knowledge About Recidivism of Persons on Federal Supervision*, 77 FED. PROBATION 23, 23 (2013) (justifying decision to use rearrest as a primary outcome measure in part because "unlike convictions, arrests are more available in automated criminal history records").

123. *See, e.g.*, U.S. SENTENCING COMM'N, *supra* note 100, at 7 ("Recidivism is typically measured by criminal acts that resulted in the rearrest, reconviction, and/or reincarceration of the offender over a specified period of time. These are the three recidivism measures used in this report. . . . [M]any rearrests do not ultimately result in a reconviction or reincarceration for reasons relating to procedural safeguards (*e.g.*, the suppression of evidence for an unconstitutional search or seizure), lack of sufficient evidence to convict or revoke, and prosecutorial or judicial resource limitation. . . . Even using the least restrictive measure, rearrest, does not count the full extent of offender recidivism, as many crimes go unreported to police or, if reported, do not result in an arrest." (footnote omitted)).

124. U.S. SENTENCING COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES (2012).

125. *Id.* at 296 n.17.

126. *Id.* "'Technical' violations of supervision encompass a wide range of behavior, including absconding from supervision, refusing to participate in mental health or substance abuse treatment, and failing drug tests. In addition, sex offenders typically are subject to additional restrictions, such as prohibitions on associating with minors or frequenting places where minors regularly appear, and accessing the Internet without permission." *Id.* at 297. Note that recidivism figures on arrest often include not only arrests for alleged crimes, but also "arrests for alleged violations of supervised release, probation, or state parole." U.S. SENTENCING COMM'N, *supra* note 100, at 7. A parole violation is "generally something that is not a crime for anyone who is not on parole—things like going to a bar or visiting a friend who's also an ex-felon." Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime*

More often, an assumption that an arrest equals guilt goes unstated in sources that refer to rearrest as recidivism without caveat, despite the differences between arrest and both factual and legal guilt. This can occur in primary research or in secondary sources that fail to mention the fact that the recidivism data being discussed is based in whole or in part on arrest.[127] When viewed in combination with the other data that this Article describes, this apparent lapse in careful sourcing and critical analysis may be explained by an underlying pull to fuse arrest with guilt, such that the need to identify and describe the underlying data is overlooked.

Since recidivism consists of criminal behavior followed by further criminal behavior, arrests can be—and are—used as a proxy for either initial criminal behavior or subsequent criminal behavior, or in some instances both. Arrests appear fused with *initial* criminal behavior in assertions that judges considering whether to set bail—on a legally innocent defendant—need to consider the risk of "further offenses,"[128] or in assertions that those diverted from the criminal justice system (before guilt is determined) may "recidivate,"[129] or in language that lumps "arrestees" into the family of "offenders"[130]: in the words of one article, "in terms of offenders' likelihood to engage in future criminal conduct, it makes little sense to separate *those offenders who have only arrests* from those who have convictions."[131]

Arrests appear fused with *subsequent* criminal behavior when those arrested after prison are described as "recidivists."[132] These sources equate arrests with "criminal acts,"[133] "antisocial behavior,"[134] "misbehavior,"[135] or "miscon-

Statistics, 30 CONST. COMMENT. 495, 501 (2015). Arrests based on alleged violations, as opposed to alleged crimes, are beyond the scope of this Article.

127. *See* Keith Soothill, *Sex Offender Recidivism*, 39 CRIME & JUST. 145, 159 (2010) ("Assessing sources is tedious but essential work in interpreting recidivism rates.").

128. *See, e.g.*, R.A. Duff, *Pre-Trial Detention and the Presumption of Innocence, in* PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 120 (Andrew Ashworth et al. eds., 2013).

129. *See, e.g.*, Virginia Aldigé Hiday et al., *Effectiveness of a Short-Term Mental Health Court: Criminal Recidivism One Year Postexit*, 37 LAW & HUM. BEHAV. 401 (2013) (discussing "recidivism"—that is, arrest—of participants in a mental health court, into which participants are diverted preadjudication); Jennifer L. Skeem et al., *Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction*, 35 LAW & HUM. BEHAV. 110, 113 tbl.1 (2011) (including within a category labeled as "Contemporary program[s] for *offenders* with mental illness" a "jail diversion" program, in which participants with mental illness are *diverted from jail into treatment, either pre- or post-booking*, and in tracking the "recidivism" rates of its participants, stating that there is "[n]o difference between groups in *re-arrests* over one year" (emphasis added)).

130. *See, e.g.*, Patrick Kenneally, *Legislation to Admit Evidence of Propensity When Prosecuting DUI Recidivists*, 37 N. ILL. U. L. REV. 126, 129 & n.7 (2016).

131. O'Neill et al., *supra* note 56, at 268 (emphasis added).

132. *See, e.g.*, Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994*, 15 FED. SENT'G REP. 58 (2002).

133. *See* U.S. SENTENCING COMM'N, *supra* note 100, at 7 ("Recidivism is typically measured by criminal acts that resulted in the rearrest, reconviction, and/or reincarceration of the offender over a specified period of time.").

134. *Compare* Jason Matejkowski & Michael Ostermann, *Serious Mental Illness, Criminal Risk, Parole Supervision, and Recidivism: Testing of Conditional Effects*, 39 LAW & HUM. BEHAV. 75, 79 (2015) ("By combining rearrests and revocations into a measure of 'recidivism,' we represent the first officially recognized antiso-

duct,"[136] despite the many factors that can lead to an arrest in the absence of crime commission.[137] One article even talks about arrests being "committed."[138] In these sources, record-of-arrests-and-prosecution sheets ("RAP sheets") are given credence as accurate indicators not only of arrests but of criminal conduct lying behind those arrests.[139] Indeed, the words "arrest" and "crime commission" are sometimes used interchangeably, as in this article on "recidivism of prisoners": "Some released prisoners crossed State lines and *committed new crimes. For example, some of the prisoners released in Delaware in 1994 were arrested* for new crimes in Pennsylvania in 1995 . . . ."[140] Arrests appear fused with *both* initial *and* subsequent criminal behavior in sources that detect "recidivism" in the scenario where participation in diversionary programs (absent a conviction) is followed by rearrest.[141]

Thus, in numerous writings on recidivism, one sees arrests being used, without caveat or analysis, as equivalent to guilt. The concepts seem to be fused[142] despite their distinctness and despite the particular need for precision

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cial behavior that is exhibited by the former prisoner . . . ."), *with* MARK H. MOORE ET AL., REPORT OF THE PROJECT ON PUBLIC DANGER, DANGEROUS OFFENDERS AND THE CRIMINAL JUSTICE SYSTEM, ch. III, at 21 (1981) ("A criminal record (whether arrest or conviction) is produced by a social process in which the actual conduct of the individual is a trivial part.").

135. Matejkowski & Ostermann, *supra* note 134, at 79 ("[T]he definition of recidivism used here [rearrest or parole revocation] reflects the first officially recognized misbehavior that is temporally closest to the individual's release date.").

136. *See* Rose, *supra* note 98, at 348 ("[Rearrest] is the first point where verifiable and reliable information identifies and quantifies the substantive contact between convicted criminals and new misconduct that potentially resembles the misconduct that formed the basis for previous conviction(s).").

137. We can assume, conversely, that some crimes are committed without arrests having been made, *see* Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415, 427 (1996) ("Rearrest rates may be underinclusive because they do not reflect undetected crimes. However, at the same time, they may be overinclusive because they equate an arrest with guilt." (footnote omitted)), but there is no reason to believe that these two inaccuracies cancel each other out.

138. Jeffrey C. Sandler et al., *Does a Watched Pot Boil?: A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 PSYCHOL. PUB. POL'Y & L. 284, 284 (2008) ("[O]ver 95% of all sexual offense arrests were committed by first-time sex offenders, casting doubt on the ability of laws that target repeat offenders to meaningfully reduce sexual offending.").

139. *Cf.* U.S. SENTENCING COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES 294–95 (2012) (stating that RAP sheets can "only be used to determine the rate of *known recidivism*," and thus opining that RAP sheets actually "underreport the actual recidivism rate of offenders").

140. Langan & Levin, *supra* note 132, at 60 (emphasis added). For an analogous example of "arrest" and "offense" being used interchangeably, see Teresa L. Welch & Samuel P. Newton, *The History and Problems of Utah's Sex Offender Registry: Why a Move from a Conviction-Based to a Risk-Assessment Approach Better Protects Children*, 47 CRIM. LAW BULL. 1105, 1144 (2011) ("National and Utah statewide statistics do not show a decline in sex offense arrests resulting from the implementation of sex offender registry and notification laws. If the registries were truly effective, we would see a substantial decline in sex offenses within the last ten years based upon the increase in registry requirements. Instead, arrests for sex offenses have basically maintained their numbers." (footnote omitted)).

141. *See supra* note 129 and accompanying text.

142. *Cf.* Roberts, *supra* note 110, at 2015 (suggesting that prior conviction impeachment continues despite all the critiques that it has received because it squares with underlying assumptions that criminal convictions are useful indicators of criminal propensity).

when addressing a topic of this importance.

Some notice this.[143] Some seem annoyed by it.[144] But none seem to have posited an explanation or tied this phenomenon to the other manifestations of an assumption that an arrest equals guilt. This assumption, while always problematic, may be particularly problematic in the recidivism context, given the fact that once one has a criminal record one is particularly vulnerable to rearrest.[145]

C. Risk-Assessment Tools

Risk-assessment tools are used both to help decide whether to detain or set bail on a defendant preadjudication and to help decide what sentence to impose.[146] In both settings, defendants are vulnerable to fusions of arrests with guilt. And in both settings, the tools are gaining significant popularity. Risk-assessment tools in the preadjudication context are found in about forty jurisdictions[147] and in the sentencing context in more than twenty states.[148]

As Jessica Eaglin points out, most risk-assessment tools used at sentenc-

143. *See, e.g.*, Benjamin Levin (@hashtagblevin), TWITTER (Aug. 22, 2017, 8:49 AM), https://twitter.com/hastagblevin/status/900022109136494593 (noting a flaw in the study of recidivism, namely that "rearrest =/= reoffending").

144. *See, e.g.*, Jocelyn Simonson, (@j_simonson), TWITTER (Mar. 22, 2017, 6:26 AM), https://twitter.com/j_simonson/status/844540912504111105 ("Also can law profs & social scientists stop equating an arrest with criminal conduct/'reoffending'/dangerousness?"); John Pfaff (@JohnFPfaff), TWITTER (Mar. 22, 2017, 6:28 AM), https://twitter.com/JohnFPfaff/status/844541272442507265 (retweeting Simonson with appended message, "'Recidivism' is probably the most abused/misused/misunderstood word and statistical measure in all of criminal justice.").

145. *See* MICHAEL D. MALTZ, RECIDIVISM 56–57 (1984) ("[S]uppose that a person convicted of child molesting has actually been rehabilitated. This does not make him immune from arrest; on the contrary, that person may be subject (and subjected) to arrest frequently, whenever a child is molested anywhere nearby. An arrest of this type should not be an indicator of recidivism."); Bowers, *supra* note 22, at 1126 ("[P]olice are prone to arrest recidivists on less concrete evidence, because police often *start* with the recidivists—for instance, by directing crime victims to mug-shot books composed exclusively of prior arrestees."); Mark Kielsgard, *Myth-Driven State Policy: An International Perspective of Recidivism and Incurability of Pedophile Offenders*, 47 CREIGHTON L. REV. 247, 257 (2014) ("[S]ex offenders are frequently targeted if any crime is committed nearby. This is supported by the data . . . showing a nearly fifty-percent acquittal rate for new offenses."); Soothill, *supra* note 127, at 160 ("I need to highlight a matter of increasing concern in discussing reoffending and recidivism. There is a tendency, particularly in the United States, to accept, for example, arrest figures as a valid measure of sexual offending. Rearrest is a hazard for known sex offenders and is likely to happen on much less evidence than for other members of the population. Without the scrutiny of the court, there is the danger of recidivism rates being inflated by police simply acting on the stereotype of the repeat sex offender.").

146. Indeed, there are many other uses. *See* Klingele, *supra* note 98 (manuscript at 22) (mentioning their use in "correctional decisionmaking"); Jon Schuppe, *Post Bail*, NBC NEWS, https://www.nbcnews.com/specials/bail-reform (Aug. 22, 2017) ("There are dozens of risk assessment tools in use today, developed by universities, governments, private companies and nonprofit agencies. They are used at various points of the criminal justice system, from pretrial to sentencing to parole.").

147. *See* Mayson, *supra* note 3, at 510 (adding that the number "is growing fast").

148. *See* Schuppe, *supra* note 146.

ing "rely on arrest as the measure of recidivism."[149] Similarly, in the preadjudication context, Sandra Mayson notes that what is described as an assessment of the risk of "new criminal activity" usually equates to an assessment of the risk of arrest.[150] Treating arrest as synonymous with criminal activity is one example of a fusion of arrest and guilt, and Mayson lays out some of its weaknesses:

> [R]isk assessment tools should stop measuring crime risk in terms of the likelihood of arrest for anything. "Any arrest" is an overbroad proxy for harm. Some eleven million people are arrested each year; their charges range from unpaid traffic fines to murder. One-third of arrests lead to dismissal or acquittal. And members of poor communities of color are disproportionately arrested for low-level crimes.[151]

Hannah Jane Sassaman echoes some of these concerns, emphasizing the key point that to predict risk in the form of arrest is actually to predict law enforcement activity: "Almost all risk-assessment tools use criminal justice data as proxies for crime. Most forecast future arrest, which is actually predicting law enforcement behavior."[152]

The fusion of arrest and guilt appears with respect to *past* arrests, in addition to future (anticipated) arrests.[153] In the sentencing context, past arrests are sometimes factored into the risk calculation.[154] In the bail context, risk-assessment tools may also consider past arrests as indicative of future risk.[155] In addition, in the bail context, the existence of a charge in the *current* case is

149. Eaglin, *supra* note 16, at 76 (noting, however, that "some variation exists within this principle across tools").

150. *See* Mayson, *supra* note 3, at 509 ("Existing pretrial tools assess the risk of two outcomes: failure to appear (FTA) and rearrest.").

151. *Id.* at 562 (footnotes omitted). Rather than repudiating altogether the use of arrest in this context, Mayson reaches the conclusion that "arrest for a serious violent crime" is currently "the best measure available," and thus proposes its use: "Pretrial risk assessment tools should instead measure crime risk in terms of the likelihood of rearrest for a serious violent crime in the pretrial phase. This measure does not avoid all difficulties. The harm is the actual commission of violent crime. Many people are wrongfully arrested, and many people who commit violent crimes escape arrest. So, arrest for a serious violent crime is still both over- and under-inclusive as a proxy for the commission of violent crime itself." *Id.*

152. Hannah Jane Sassaman, *Debating Risk-Assessment Tools*, MARSHALL PROJ. (Oct. 25, 2017), https://www.themarshallproject.org/2017/10/25/debating-risk-assessment-tools (adding that "[w]e know that certain communities, especially communities of color, are disproportionately over-policed, more likely to be over-charged by prosecutors, and forced into pleas that result in convictions").

153. *See* Eaglin, *supra* note 16, at 97 ("[R]isk tool developers often choose to estimate recidivism risk as chance of arrest based upon factors like prior arrest."); *id.* at 98 (arrest data is, thus, used "as both a predictor and an outcome").

154. *See id.* at 82–83 (describing a number of tools that use past arrests).

155. *See* Mayson, *supra* note 3, at 509 ("Having been arrested before age eighteen might be three points, for example . . . ."). Some, however, have rejected this as a predictor. *See, e.g.*, Schuppe, *supra* note 146 ("[T]he [Public Safety Assessment's] developers excluded factors that were predictive but also likely served as proxies for race, such as a person's arrest history and number of misdemeanor convictions.").

frequently taken as indicative of guilt.[156] As Mayson puts it, judges assess the risk of "new criminal activity," thus assuming that there has already been "criminal activity"[157] and thus provoking due process concerns.[158]

D. Linguistic "Slips"

In at least some instances, "recidivism" is consciously chosen to denote the rearrest of someone with a criminal record; other terms that are sometimes consciously deployed in a way that fuses arrest and guilt include "criminogenic" (when referring to factors that appear to lead to *arrest*)[159] and "sex offender" (when describing someone *arrested* for a "sex offense").[160] But there are also an array of terms that fuse arrest and guilt in a way that appears unintended. Thus, for example, one frequently finds the terms "offender,"[161] "offense,"[162] "reoffending,"[163] and "crime,"[164] where the legally correct terminol-

156. Here, the fusion seems to be between charge and guilt rather than arrest and guilt. The relationship between these two fusions will be addressed further below. *See infra* Subpart II.E.

157. *See* Mayson, *supra* note 3, at 537.

158. *See id.* ("[T]o invoke a defendant's guilt as justification for pretrial restraint threatens fundamental due process values, which tend to run under the heading of the 'presumption of innocence.' Defendants, after all, have only been accused. Many are not guilty. Fewer than seventy percent of felony arrests nationwide lead to conviction. And the protection of accused people against false condemnation and punishment is a core commitment of the criminal justice system." (footnote omitted)).

159. *See generally, e.g.*, Avinash Singh Bhati & Alex R. Piquero, *Estimating the Impact of Incarceration on Subsequent Offending Trajectories: Deterrent, Criminogenic, or Null Effect?*, 98 J. CRIM. L. & CRIMINOLOGY 207 (2007) (using arrest histories of released prisoners to investigate whether prison has a "criminogenic" effect).

160. William Encinosa & Michael Roussis, *An Empirical Analysis of California Assembly Bill 488: Access to Information on Registered Sex Offenders over the Internet Reduces Recidivism*, 12 FLA. COASTAL L. REV. 429, 446 (2011) ("We identify a sex offender in the California Department of Justice arrest data as any person who has been arrested for a registrable sexual offense."). The fact that "sex offender"—one of the most inflammatory and stigmatizing terms within the criminal lexicon—is used in this way helps to illustrate the strength of this fusion.

161. See Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 330 (2012) ("*Atwater* did not address whether the Constitution imposes special restrictions on the searches of offenders suspected of committing minor offenses once they are taken to jail."); SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 3 (8th ed. 2007) ("Because officers cannot possibly arrest all the offenders they encounter, they must decide which scuffles warrant an arrest for assault."); Michael F. Caldwell, *Quantifying the Decline in Juvenile Sexual Recidivism Rates*, 22 PSYCHOL. PUB. POL'Y & L. 414, 414 (2016) (referring to juvenile sexual offense arrestees as "juvenile sexual offenders"); Brian D. Shannon, *Prescribing a Balance: The Texas Legislative Responses to* Sell v. United States, 41 ST. MARY'S L.J. 309, 339 n.117 (2009) ("Bexar County and the Center for Health Care Services have been leaders in efforts to create meaningful diversion programs for offenders with mental illness caught up in the criminal justice system.").

162. Henry Gass, *Meet a New Breed of Prosecutor*, CHRISTIAN SCI. MONITOR (July 17, 2017), https://www.csmonitor.com/USA/Justice/2017/0717/Meet-a-new-breed-of-prosecutor ("From Texas to Florida to Illinois, many of these young prosecutors are eschewing the death penalty, talking rehabilitation as much as punishment, and often refusing to charge people for minor offenses.").

163. *See, e.g.*, Donna M. Bishop et al., *Juvenile Justice Under Attack: An Analysis of the Causes and Impact of Recent Reforms*, 10 U. FLA. J.L. & PUB. POL'Y 129, 146 (1998) ("[W]e examined differences in the severity of rearrest offenses across the two groups. Ninety-three percent of the transferred youths who reoffended were arrested on felony charges."); Enrique A. Monagas & Carlos E. Monagas, *Prosecuting Threats in the Age of*

ogy would be "alleged" offender/offense/reoffending/crime. Here, as often, language seems to serve as a "window to the unconscious"[165] and, specifically, into an unconscious fusion of arrest and guilt.

E. "Everyone Pleads Guilty"[166]

A final example involves a statistical error. Legal scholars, as well as others,[167] commonly assert that 90 or 95% of criminal cases end in a guilty plea.[168] It is unclear whether those making this assertion are thinking that a "criminal case" begins with an arrest or with a prosecution.[169] Either way, these statements are inaccurate. They mistakenly characterize the percentage of *convictions*

Social Media, 36 N. ILL. U. L. REV., Summer 2016, at 57, 75 ("[S]uspects likely to reoffend should be charged and prosecuted more aggressively, because those individuals pose the greatest risk to the community.").

164. *See, e.g.*, Dana Houle (@DanaHoule), TWITTER (Mar. 21, 2017, 6:51 AM), https://twitter.com/DanaHoule/status/844184770049392642 (attaching image of headline describing crimes followed by first paragraph describing arrests, and stating that the "[m]ost broke thing in US journalism is headlines, example infinity: headline says crimes, lede says alleged. BIG DIFFERENCE").

165. *See* Peggy Cooper Davis, *The Proverbial Woman*, 48 REC. ASS'N B. CITY N.Y. 7, 16 (1993) ("When we are made to realize that, to take a simple example, we use the verb 'to father' to refer to impregnation but use the verb 'to mother' to refer to nurturing, we learn a great deal about the unconscious assumptions we unwittingly continue to make with respect to parenting."); Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807, 1814 (1994) ("Thought and language are inextricably connected. A speaker who is asked to reconsider his or her use of language may begin to reflect on the way he or she thinks about a subject. Words, external manifestations of thought, supply a window into the unconscious. Our choice of word, metaphor, or image gives signs of the attitudes we have about a person or subject." (footnote omitted)).

166. David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 487 (2016) (quoting, and disagreeing with, Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004)).

167. *See* Adam Gopnik, *How We Misunderstand Mass Incarceration*, NEW YORKER (Apr. 10, 2017), https://www.newyorker.com/magazine/2017/04/10/how-we-misunderstand-mass-incarceration ("Some ninety-five per cent of criminal cases in the U.S. are decided by plea bargains . . . ."); Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal-Justice Reform*, NATION (Oct. 18, 2017), https://www.thenation.com/article/prosecutors-are-banding-together-to-prevent-criminal-justice-reform/ ("Today, around 95 percent of federal and state criminal cases end in a plea bargain."); Jeffrey D. Stein, Opinion, *How to Make an Innocent Client Plead Guilty*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/opinions/why-innocent-people-plead-guilty/2018/01/12/e05d262c-b805-11e7-a908-a3470754bbb9_story.html?utm_term=.d28072535321 ("It's no wonder 95 percent of all defendants accept plea offers.").

168. *See* Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the* Brady *Safety-Valve*, 2012 UTAH L. REV. 51, 84 ("Today, over 95 percent of defendants in the criminal justice system plead guilty . . . ."); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 502 (1985) ("Over 90% of all cases (both civil and criminal) are currently settled and taken out of the system . . . ."); Ellen Yankiver Suni, *Who Stole the Cookie from the Cookie Jar?: The Law and Ethics of Shifting Blame in Criminal Cases*, 68 FORDHAM L. REV. 1643, 1653 n.38 (2000) ("Statistics indicate that over 90% of defendants charged with violent felonies plead guilty."). As Sklanksy points out, some just go ahead and say that "[e]veryone pleads guilty." Sklansky, *supra* note 166, at 487.

169. *See* John Pfaff (@JohnFPfaff), TWITTER (Oct. 18, 2017, 7:34 AM), https://twitter.com/JohnFPfaff/status/920659342201892866 (pointing out that when people assert that "95 percent of federal and state criminal cases end in a plea bargain," it is unclear whether they are using "case" to mean "prosecution" or "arrest"); Adam Gershowitz (@AdamGershowitz), TWITTER (Oct. 18, 2017, 7:36 AM), https://twitter.com/AdamGershowitz/status/920659898622513152 (tweeting in response to Pfaff that "I think the average arrested defendant processed in a jail would think case means arrested").

that are pleas as the percentage of *cases* that are pleas, and thus they erase something important. The erroneous statistics erase those cases that end in dismissal or acquittal.[170] That is a significant erasure. For example, Gershowitz points out that prosecutors "dismiss a huge number of cases with no conviction being entered."[171]

Figures representing the percentage of cases ending in guilty pleas vary according to jurisdiction, but however one defines "cases," they are less than 90%. So, for example, according to one recent study, a little under two-thirds of felony defendants arraigned in state courts in the seventy-five largest counties pled guilty.[172] In D.C. Superior Court, 42% of all defendants pled guilty; 53% had their cases dismissed post-filing.[173] In federal court, where there is a smaller drop-off between prosecution and conviction, the figures diverge less dramatically from the erroneous version, but they still diverge. In 2015, 88% of federal defendants ended their cases with a plea of either guilty or *nolo contendere*; the percentage of convictions that involved a guilty or *nolo contendere* plea was 97.5%.[174]

Again, some have noticed this error.[175] Some are annoyed by it.[176] No one

170. David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 696 n.37 (2006) ("[T]his [95% figure] disregards all dispositions that were unilaterally terminated or that were otherwise dismissed.").

171. Gershowitz, *supra* note 21, at 1527 & n.6 (citing Bureau of Justice Statistics figures indicating that "prosecutors dismiss twenty-five percent of felony charges" and citing sources in support of the proposition that the rate "is much higher in some jurisdictions"). Cases may also be judicially dismissed. *See* Sklansky & Yeazell, *supra* note 170, at 696 n.37.

172. In a 2009 study of large urban counties by the Department of Justice's State Court Processing Statistics project, "[a]mong cases that were adjudicated within the 1-year study period, 66% resulted in a conviction," and "[n]early all convictions were the result of a guilty plea rather than a trial." BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 22 (2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf.

173. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT 65 tbl.17 (2016), https://www.justice.gov/usao/page/file/988896/download.

174. *See* U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, Table D-4, at 1, https://www.uscourts.gov/sites/default/files/data_tables/D04Sep15.pdf.

175. *See* Sklansky & Yeazell, *supra* note 170, at 696 n.37 ("It is remarkably difficult to get robust statistics on the rate of civil or criminal consensual settlement. The most common mistake is to subtract the percentage of trials from the percentage of filings and thereby arrive at a figure of over 95% of settlements or plea bargains. That is an error because it disregards the circumstance that many civil cases end with dispositive adjudication before trial. Those cases end because of a judicial decision that concludes the case, not because the parties decide to control the risks of adjudication with an agreement. An analogous calculation on the criminal side would put consensual agreements at approximately 95%, but, again, this disregards all dispositions that were unilaterally terminated or that were otherwise dismissed. Our own estimates, for which we claim no great statistical sophistication, put both the rate of plea bargain and the rate of civil settlement at about 60–70% of filed cases—very high but not overwhelming." (citations omitted)); Adam Gershowitz (@AdamGershowitz), TWITTER (Oct. 18, 2017, 7:30 AM), https://twitter.com/AdamGershowitz/status/920658466959699968 (stating, in response to Jessica Pishko article, that "95% of criminal *cases* do not end in a plea bargain. 95% of convictions do. There is a difference between those two things!!!"); Carissa Byrne Hessick (@CBHessick), TWITTER (Oct. 18, 2017, 7:56 AM), https://twitter.com/

appears to have posited a suggestion as to its cause. The frequency of this mistake—by people who understand the need for accuracy, precision, and appropriate sourcing and who are committed to exposing and deconstructing harmful assumptions about the criminal legal system—suggests that the error is allowed to slip through because it aligns with an assumption that is pervasive, albeit implicit[177]: that a governmental act that requires only probable cause (whether an arrest or a prosecutorial charge) is in fact equivalent to guilt. If one is conditioned to think of a finding of legal guilt as following on from a finding of probable cause,[178] then one may be less likely to double-check figures that suggest the same.

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As to several of these phenomena, one might proffer explanations such as inattention, sloppiness, or shorthand. Perhaps it could be said, for example, that it's a little sloppy to refer to "recidivism" data without acknowledging that the metric is rearrest, or to make the plea rate error, or to use "offender" to mean "arrestee." But sloppiness is more likely to occur when there is no resistance to it. This Article suggests that these many slips, mistakes, and elisions meet with little resistance because of the strength of an underlying assumption (namely, that arrest equals guilt) that facilitates them all. But how to explain that assumption? The next Part turns to that question.

III. POSSIBLE EXPLANATIONS

To be sure, there may be some explanations for the fusion that are unique to a particular context mentioned above. For example, a partial explanation for widespread acceptance of "recidivism" rates that include arrests (and thus that lie on the expansive end of the spectrum) may be a widespread, if implic-

CBHessick/status/920664882026110976 (reproducing Gershowitz's tweet and adding that "Adam makes an important point here. We should all be careful to use the 95% statistic carefully (and correctly)").

176. *See* Jeffrey Bellin (@BellinJ), TWITTER (Apr. 11, 2018, 5:13 AM), https://twitter.com/BellinJ/status/984041645267210241 ("'[P]lea deals, which is how more than 90 percent of criminal cases end[.]' Why can no one get this stat right? Don't fancy news sites have fact checkers – or is this said wrong so often it checks out each time?") (attaching a National Public Radio story that makes the quoted error); Ron Wright (@wrightrf), TWITTER (July 25, 2017, 11:17 AM), https://twitter.com/wrightrf/status/889912552876126209 (retweeting Jeffrey Bellin, @BellinJ, TWITTER (July 19, 2017, 4:42 PM), https://twitter.com/BellinJ/status/887819941721669632 ("Keep reading '95% of crim cases are resolved by guilty pleas' when authors mean to say 95% of _convictions_ are guilty pleas.[ ]Big difference.")) ("Agreed. This is annoying.").

177. For the notion that hoaxes thrive and skepticism sleeps when the hoaxes square with our assumptions and biases, see R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 824–25 (2004).

178. Probable cause is the standard to which prosecutorial charges, like arrest charges, are held. *See* Brandon Buskey, *If the Convictions Don't Fit, You Must Acquit: Examining the Constitutional Limitations on the State's Pursuit of Inconsistent Criminal Prosecutions*, 36 N.Y.U. REV. L. & SOC. CHANGE 311, 320–21 (2012).

it, belief that certain people (or groups) have a propensity to commit criminal acts.[179] There are also some potential explanations that have been thoroughly explored in the literature, including "tunnel vision" affecting law enforcement and others.[180] This Part will focus on explanations that are more broadly applicable and less well explored.

A. "A System of Pleas"[181]

It may be unsurprising that an arrest, whose core evidentiary requirement is an assertion of probable cause by law enforcement, has come to seem equivalent to guilt, given that our predominant means for declaring guilt—the guilty plea—has as its core evidentiary requirement an assertion of probable cause by law enforcement.[182]

While of course there is a key distinction between an arrest and (the majority of) guilty pleas, namely that for the latter a defendant is required to make some sort of admission of guilt,[183] various scholars have pointed out that in light of the coercive pressure to enter a guilty plea,[184] the "admission" should be seen as little more than a formality,[185] and indeed a formality that

179. *See* Roberts, *supra* note 110, at 2015 (suggesting that part of what sustains the practice of impeaching criminal defendants with their prior convictions is a societal belief in propensity); Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1032–33 (2004).

180. *See, e.g.*, Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292 (defining "tunnel vision" as "that 'compendium of common heuristics and logical fallacies,' to which we are all susceptible, that lead actors in the criminal justice system to 'focus on a suspect, select and filter the evidence that will "build a case" for conviction, while ignoring or suppressing evidence that points away from guilt'" (quoting Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002)); *id.* ("This process leads investigators, prosecutors, judges, and defense lawyers alike to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion.").

181. *See* Murray, *supra* note 80, at 372 ("The presumption of innocence may be the foundational principle of the American criminal justice system, but the presumption of guilt is its operational force. The US Supreme Court acknowledged this reality in two notable criminal law decisions in 2012, *Lafler v. Cooper* and *Missouri v. Frye*, when it described the criminal process as 'a system of pleas, not a system of trials.'").

182. *See* Shapiro, *supra* note 9, at 43–44 (stating that a summary by law enforcement of evidence providing a "factual basis" for a plea is probably sufficient where it establishes probable cause).

183. *See* Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (per curiam) ("[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." (emphasis omitted)); North Carolina v. Alford, 400 U.S. 25, 32 (1970) (stating that pleas are typically accompanied by admission of guilt).

184. *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.").

185. *See* Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1059 (2016) (describing the required allocution as "barebones").

may make a mockery of a system that is often said to be interested in truth.[186]

So perhaps it is not that strange, for example, to use "offender" to refer to someone (an arrestee) who might be guilty,[187] given that in our system of pleas "offender" (used in the "proper" sense, i.e., to refer to someone who is legally guilty) itself only means that the person convicted might be (factually) guilty.[188] This may be particularly true given the centrality of pleas within our legal system: ours is not just a "system of pleas" in the sense that defendants are permitted to (and in large numbers do) take pleas,[189] but also a system that, given the current rate of charging and resourcing, *relies* on pleas in order to continue to operate.[190] If this standard and mode of "proof" establishes guilt in the plea bargaining context, it does not seem surprising that it has the same effect earlier in the process. If our system of plea bargaining "short-circuits" the process of determining guilt,[191] then perhaps it is unsurprising if we in our assumptions do the same.

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186. *See* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 705 (1981) ("It . . . may seem strange suddenly to seek the virtues of consent at one stage of a stigmatizing, misery-producing, and involuntary proceeding. Indeed, in most nations of the world, although civil disputes are compromised as freely as here, American plea bargaining apparently is regarded as a *reductio ad absurdum* of our nation's commercial mentality."); Bowers, *supra* note 22, at 1153 (mentioning critics who find that the propensity of defendants facing weak charges to "plead guilty to cheap pleas" has the effect of "undermin[ing] the system's central truth-seeking function"); *id.* at 1171 ("[The criminal justice system] finds something sacrosanct and inviolable—even magical—in the bottom-line accuracy of the defendant's admission that she behaved (in some fashion) illegally. Institutional actors (who should know better) hold on to this last vestige of an antiquated truth-seeking ideal." (footnote omitted)); Arthur Rosett, *The Negotiated Guilty Plea*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 70, 75 (1967) ("In many courts, the guilty-plea process looks more like the purchase of a rug in a Lebanese bazaar than like the confrontation between a man and his soul.").

187. John Pfaff (@JohnFPfaff), TWITTER (Mar. 22, 2017, 6:19 AM), https://twitter.com/JohnFPfaff/status/844538941311201281 (characterizing an arrest as "[a] cop's suspicion. Maybe a crime, maybe not").

188. *See* Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 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."); Alschuler, *supra* note 186, at 703 ("Adjudication is designed to answer the question of which side is correct on a case-by-case basis. Settlement is not designed to answer this question but to produce an acceptable middle ground."); Talia Fisher, *Conviction Without Conviction*, 96 MINN. L. REV. 833, 851 (2012) (noting the probabilistic nature of pleas, and stating that "plea bargains, by and large, adjust sentencing to the level of proof regarding culpability"); Michael Tonry, *From Policing to Parole: Reconfiguring American Criminal Justice*, *in* REINVENTING AMERICAN CRIMINAL JUSTICE 3 (Michael Tonry & Daniel S. Nagin eds., 2017) (conducting a comparative review and concluding that "[n]owhere else is a guilty plea enough by itself for a conviction; a judge must determine the facts, decide whether the defendant is guilty and of what, and impose a sentence").

189. Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

190. *See* Ortman, *supra* note 5, at 554.

191. *See* Alschuler, *supra* note 186, at 692 ("A prosecutor or defense attorney whose primary concern is to cut corners probably would find a regime of plea bargaining ideally suited to his goals."); Packer, *supra* note 42, at 38 ("[A] decision that the defendant will remain in custody once he has been charged may itself induce him to plead guilty, thereby short-circuiting the part of the process concerned with guilt determination and moving directly to the question of ultimate disposition.").

B. The Costs of Diversion

The hardships caused by the criminal process, including convictions, are so grave that numerous innovators have created mechanisms that aim to avoid some of those hardships. A variety of such innovations, such as diversionary programs, "alternative" courts, and "problem-solving" courts, have been developed,[192] and a significant component of many of them is that participation can ward off the imposition of a criminal conviction and its manifold consequences.[193]

For all the relative advantages that participation in such programs may offer, one trade-off for this escape from some aspects of the criminal process appears to be that certain hardships can be inflicted without what the criminal legal system would (at least in theory) first require—some sort of finding or acknowledgment of guilt. Thus, to be in such a program—even if one has not pled guilty as a condition of participation[194]—is often to be classed as an "offender"[195] and a possible "recidivism" risk,[196] and to be seen as in need of "accountability,"[197] rehabilitation,[198] and penance.[199] Thus, by leaping over any

192. *See, e.g.*, Bruce A. Green, *The Right to Plea Bargain with Competent Counsel After* Cooper *and* Frye*: Is the Supreme Court Making the Ordinary Criminal Process "Too Long, Too Expensive, and Unpredictable . . . in Pursuit of Perfect Justice"?*, 51 DUQ. L. REV. 735, 745–46 (2013).

193. *See* Whitney C. Wootton, *Diversion Not Deportation: Mitigating the Harsh Immigration Consequences of Minor Crimes*, 16 SEATTLE J. SOC. JUST. 217, 236 (2017) ("[Pretrial diversion programs] lead to lower recidivism and allow individuals to avoid the long-term negative consequences of a criminal conviction, such as difficulty in finding housing and employment.").

194. *See id.* at 242 ("[P]re-file diversion programs do not require participants to stipulate to the charges against them to qualify for diversion.").

195. *See generally, e.g.*, Hiday et al., *supra* note 129 (using the term "offenders" to describe participants in a mental health court, into which participants are diverted preadjudication).

196. *See, e.g.*, Cory R. Lepage & Jeff D. May, *The Anchorage, Alaska Municipal Pretrial Diversion Program: An Initial Assessment*, 34 ALASKA L. REV. 1, 8–9 (2017) ("Impact on future criminality (also known as recidivism) is important. Approximately one-third of the participants were rearrested for any offense between two years and four and one-half years after they were admitted into the program, mirroring the recidivism rates in other states' pretrial diversion programs.").

197. *See* Jillian M. Cavanaugh, *Helping Those Who Serve: Veterans Treatment Courts Foster Rehabilitation and Reduce Recidivism for Offending Combat Veterans*, 45 NEW ENG. L. REV. 463, 471 (2011) ("Drug courts operate on the principles of treatment and accountability. Eligible offenders are taken before the drug court immediately upon arrest or apprehension . . . ." (footnotes omitted)).

198. *See* Jerome Hall, *Objectives of Federal Criminal Procedural Revision*, 51 YALE L.J. 723, 728 (1942) ("The presumption that to be charged means to be guilty has been tenaciously, if unconsciously, entertained by well-intentioned reformers lulled into complacency by humanitarian motives to substitute 'treatment' for punishment, and enlightened by negligible insight into the functions of criminal procedure.").

199. See King County, Washington's "Theft 3 and Mall Safety Pilot Project," in which young people, suspected of shoplifting, but formally accused of nothing, write letters of "apology." KING CTY., WASH., REG'L LAW SAFETY & JUSTICE COMM., JULY 27, 2017 MEETING SUMMARY (2017), http://www.kingcounty.gov/~/media/depts/executive/performance-strategy-budget/documents/pdf/RLSJC/2017/July27/RLSJC-072717.ashx?la=en ("[A] young person gets picked up by a loss prevention specialist, calls [Tukwila Police Department], who walks them down to a community resource area staffed by [Glover Empowerment Mentoring (GEM)], GEM calls the parents and explains that the child has an opportunity to participate in a program. The youth is referred to a geographically and culturally specific group for case manage-

requirements that guilt be established by means of evidence, these programs may help to support a notion that guilt is established at the time of arrest.

The Law Enforcement Assisted Diversion (LEAD) program in Seattle, for example, holds iconic and influential status,[200] in part because it diverts so early—postarrest but pre-booking—in an effort to whisk one away as quickly as possible from certain harms that the criminal process imposes. And yet, this innovation may bring a cost: reinforcement of the fusion of arrest and guilt.[201] LEAD's website, for example, describes the program like this: "LEAD is a pre-booking diversion program that allows officers to redirect low-level *offenders* engaged in drugs or prostitution activity to community-based services instead of jail and prosecution."[202]

C. *Fusion of Act with Crime*

As mentioned above,[203] proving the commission of an act is typically not enough to prove the commission of a crime. Our criminal codes have been set up to include additional elements, such as *mens rea* elements,[204] and to provide for numerous defenses.[205] Yet in the assumptions of the police and the pub-

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ment. The youth writes an apology letter to the business, the theft charge doesn't get filed, and the youth participates in voluntary programming and services.").

200. For an explanation of the Obama White House's July 2015 national convening on the LEAD program and praise of the program in a White House blog post, see Roy L. Austin, *LEAD-ing the Way to a More Efficient Criminal Justice System*, OBAMA WHITE HOUSE: BLOG (July 2, 2015), https://obamawhitehouse.archives.gov/blog/2015/07/02/lead-ing-way-more-efficient-criminal-justice-system. For a 2018 map detailing where in the United States LEAD is being explored, where it is being developed, where it is launching, and where it is currently operating, see LEAD NAT'L SUPPORT BUREAU, https://www.leadbureau.org/ (last visited Feb. 15, 2019).

201. *See* Anna Roberts, *LEAD Us Not into Temptation: A Response to Barbara Fedders' "Opioid Policing,"* 94 IND. L.J. SUPP. 1, 10 (forthcoming 2019).

202. *About LEAD*, LEAD: LAW ENFORCEMENT ASSISTED DIVERSION (emphasis added), http://leadkingcounty.org/about (last visited Feb. 15, 2019).

203. *See supra* Subpart I.A.

204. *See* Natapoff, *supra* note 20, at 1052 (defining the "mens rea requirement" as "the demand that in all but a handful of cases, criminal guilt requires inquiry into what the defendant subjectively, actually intended at the time of the offense").

205. *See* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 203 n.7 (1982) ("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, 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.").

lic[206] and sometimes of legal scholars, establishment of an act (or even an assertion thereof) frequently seems to be taken as establishment of a crime. This phenomenon may contribute to the tendency to equate an arrest with guilt, since the assertion most easily made in support of an arrest is that the defendant committed a particular act.

One commonly sees the act–crime fusion in public discourse. Thus, for example, only some homicides are crimes, and only some criminal homicides are murders. It is not unusual, however, for reporting of homicide rates to betray the assumption that they are crime rates and indeed to refer to them as "murder rates."[207]

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."[208] It is noteworthy that this definition has gained so much currency, given that, in and of itself, commission of the act is typically not enough to establish guilt. It is as if there is a concept of crime, for which an act suffices, that is in a constant tussle with our societal decision, via statutory law, to say that more is needed.[209]

If one looks for explanations of this explanation, one can perhaps speculate about the influence of the "innocence movement." In its first cases, this movement focused on situations in which DNA could establish that law enforcement had the wrong person.[210] The person seeking exoneration was able to say, "That wasn't me," "I wasn't there," or "I didn't do it." This became the emblematic form of a "wrongful conviction"[211] and may have created a corollary risk that the conviction of someone who *was* there and *did* appear to

206. *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.").

207. 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 (discussing, in contrast to the headline, the rising *homicide* rate).

208. *See, e.g.*, Genego, *supra* note 40, at 845 (an individual is "factually guilty" when she "performed a given act"); Craig Haney, *Exoneration and Wrongful Condemnations: Expanding the Zone of Perceived Injustice in Death Penalty Cases*, 37 GOLDEN GATE U. L. REV. 131, 135 (2006) ("[Factual guilt] is the *actus reus*, the physical or behavioral component of the criminal act."); *id.* at 136 ("[F]actual 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 . . . ."); Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law, The Supreme Court, 1964 Term*, 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.").

209. See, for example, the common usage of phrases like "unsolved crimes," or "unsolved murders." 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."

210. *See* Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH. L. REV. 133, 141 n.62 (2008).

211. *See* Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1571.

have done something would be assumed to be rightful.[212] Thus, the variety and potential robustness of all the many ways of saying that I may have done the act alleged, but I did not commit a crime, are easily obscured. Larry L. Archie, a defense attorney from North Carolina, provoked some chuckles when his billboard advertisement—"Just Because You Did It Doesn't Mean You're Guilty"[213]—hit social media, with one commentator stating, "That can't be real!"[214] But it is real, and his work of reminding us of this reality is valuable.

D. Media Influence

Media can, of course, both reflect and shape public perceptions.[215] When media outlets equate an arrest to guilt, they risk reinforcing this fusion. In one recent example, a Univision headline stated that "Trump publishes list of crimes committed by immigrants: the majority are Latinos who haven't been convicted."[216] This headline provoked at least some pushback, on the basis that the list reflected not crimes but arrests.[217]

Two recurring media practices seem likely to fuel the fusion of arrest and guilt. The first involves the "perp walk," which is a coordinated effort between media and police[218] in which images of a legally innocent suspect being marched from place to place are published, broadcast, or both. Other nations find this practice abhorrent,[219] as they do our other methods of identifying and stigmatizing arrestees.[220]

A second example involves the common media practice of reporting the

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212. *See, e.g.*, Rudolf Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097, 1127 (2003) (appearing to treat being "the right guy" as equivalent to "being criminally guilty").

213. Kevin Underhill, *Just Because You Did It . . .*, LOWERING THE BAR (Feb. 3, 2015), http://loweringthebar.net/2015/02/just-because-you-did-it.html.

214. Naomi Seu (@NaomiSeu), TWITTER (Nov. 18, 2017, 3:51 PM), https://twitter.com/NaomiSeu/status/932033575804862464 (exclaiming, "That can't be real!" in response to a photograph of the billboard).

215. *See* Anna King & Shadd Maruna, *The Function of Fiction for a Punitive Public*, *in* CAPTURED BY THE MEDIA: PRISON DISCOURSE IN POPULAR CULTURE 16 (Paul Mason ed., 2006) (explaining ways in which media constructs punitive public attitudes, which, in turn, encourage punitive constructions of "offenders" and increasingly punitive policy approaches).

216. *See* Damià S. Bonmatí & Jorge Cancino, UNIVISION (Mar. 20, 2017, 4:44 PM), https://www.univision.com/univision-news/immigration/trump-publishes-list-of-alleged-crimes-by-immigrants-the-majority-are-latinos-who-havent-been-convicted.

217. *See* Pfaff, *supra* note 187 ("Stop. Calling it. A list. Of crimes. It's arrests. A cop's suspicion. Maybe a crime, maybe not.").

218. *See supra* notes 78–81 and accompanying text.

219. *See* Murray, *supra* note 80, at 378.

220. *See* JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 194 (2015) ("From an international perspective, publicly accessible arrest records are even more exceptional than publicly available conviction records." (emphasis omitted)).

content of police accounts as if it were the truth.[221] This includes presenting police accounts of what suspects are alleged to have said as if those accounts were fact,[222] despite documented examples of false police claims about what suspects are alleged to have said[223] and of police mendacity more generally.[224] This media choice echoes, and may fuel, common assumptions about the truthfulness and accuracy of police accounts[225] and of law enforcement more generally.[226] If a police account is seen as the truth, and if acts are commonly assumed to equal crimes,[227] then the police account of an alleged act, which can suffice for the purposes of an arrest,[228] may also be taken as sufficient to establish guilt.[229]

E. Self-Comforting

Assertions and assumptions that serve a self-comforting purpose are

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221. *See, e.g.*, Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 LAW & CONTEMP. PROBS. 93, 95–96 (2008) ("In covering crime stories, journalists typically rely on law-enforcement officials' views, downplaying the defense perspective while minimally acknowledging the innocence presumption. Thus, news of crime generally exhibits a pro-prosecution bias, rooted most importantly in this dependence of reporters on official and, therefore, purportedly credible sources." (footnote omitted)); Adam H. Johnson (@adamjohnsonNYC), TWITTER (Apr. 5, 2018, 8:33 AM), https://twitter.com/adamjohnsonNYC/status/981917661515960322 (appending comment "i see the New York Times has mind-readers on staff" to New York Times story headlined "Police Fatally Shoot a Brooklyn Man After Falsely Believing He Had a Gun"); Benjamin Mueller & Nate Schweber, *Police Fatally Shoot a Brooklyn Man, Saying They Thought He Had a Gun*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/nyregion/police-shooting-brooklyn-crown-heights.html (subsequent version of headline).

222. *See, e.g.*, Jacobs et al., *supra* note 77 ("A hate-fueled white supremacist told cops his killing of a random black man was merely a practice run for a racist mass murder spree."); James C. McKinley, Jr., *A Question Hangs Over a Trial: Why Did a Nanny Kill 2 Children in Her Care?*, N.Y. TIMES (Feb. 11, 2018), https://www.nytimes.com/2018/02/11/nyregion/nanny-murder-trial-insanity-defense.html; N.Y. Times (@nytimes), TWITTER (Mar. 22, 2017, 3:48 PM), https://twitter.com/nytimes/status/844682114901721088 ("A white veteran with a hatred of black men told the police that he killed a homeless man to make a statement[.]").

223. *See, e.g.*, Mitchell P. Schwartz, *Compensating Victims of Police-Fabricated Confessions*, 70 U. CHI. L. REV. 1119, 1127–30 (2003).

224. *See supra* notes 32–35 and accompanying text.

225. *See* Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788, 811 (2000) ("[M]ost White Americans believe that police officers are the most trustworthy witnesses."); Nancy Gertner, *Is the Jury Worth Saving?*, 75 B.U. L. REV. 923, 931 (1995) (reviewing STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM (1994)); Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH. L. REV. 315, 371 (2012) ("[T]he public . . . too readily accepts . . . police judgment without adequate criticism.").

226. *See* Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 628 (2013) (mentioning empirical indications that jurors put "unjustified stock in the credibility of governmental employees").

227. *See supra* Subpart III.C.

228. *See* Gershowitz, *supra* note 21, at 1526–27.

229. *See* Packer, *supra* note 42, at 12 ("If there is confidence in the reliability of informal administrative factfinding activities that take place in the early stages of the criminal process, the remaining stages of the process can be relatively perfunctory without any loss in operating efficiency. The presumption of guilt, as it operates in the Crime Control Model, is the expression of that confidence.").

more likely to prosper than those that do the opposite,[230] and they may prosper even in the absence of empirical support. Thus, for example, law professors commonly assert that "law professors have the best job in the world."[231]

In a system in which arrests are disproportionately visited upon poor people of color,[232] and in which arrests lead to stringent and permanent consequences,[233] some of which appear even to judges to resemble "punishment,"[234] it might be self-comforting to assume that those arrested are guilty.[235] (Otherwise, one might have to conclude that we are stymying the life

230. Daniel Givelber uses the term "ego-syntonic" to capture a similar idea. *See Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1404 (2000). Also relevant is the concept of "motivated reasoning," which "refers to 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." Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law, The Supreme Court, 2010 Term*, 125 HARV. L. REV. 1, 7 (2011). *See generally* Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990).

231. *See* Erwin Chemerinsky, *Keynote Speech: Reimagining Law Schools?*, 96 IOWA L. REV. 1461, 1462 (2011) ("Being a law professor is probably the best job on the planet."); Brad Areheart, *Advice on Becoming a Law Professor*, THE UNIV. OF TEX. AT AUSTIN SCH. OF LAW, https://law.utexas.edu/career/paths/academic/advice-on-becoming-a-law-professor/ ("[T]his is the best job in the world (seriously) . . . ."); LawProfBlawg, *The 10 Truths of Academia for New Tenure-Track Law Professors*, ABOVE THE LAW (Feb. 14, 2017), https://abovethelaw.com/2017/02/the-10-truths-of-academia-for-new-tenure-track-law-professors ("I have the best job in the world, and so will you."); *Why Law Teaching*, NYU SCH. OF LAW, http://www.law.nyu.edu/acp/why-law-teaching ("I find law teaching and legal academia to be the best job in the world . . . ." (quoting NYU Law Professor Florencia Marotta-Wurgler)); Heather Celeste Mitchell, *Law by Design: Interview with Professor Sarah Burstein*, MS. JD (Feb. 21, 2013), https://ms-jd.org/blog/article/law-design-interview-professor-sarah-burstein ("Seriously, I have the best job in the world."); *Q&A with Outgoing Interim Dean James Gardner*, UNIV. AT BUFFALO SCH. OF LAW (June 2017), http://www.law.buffalo.edu/links/2017-June/news-gardner.html ("In the long term, I plan simply to resume my former life as a UB law professor – just about the best job in the world."); Richard Westlund, *Professor Osamudia James: Examining Identity and the Law*, UNIV. OF MIAMI SCH. OF LAW (Nov. 2, 2016), https://www.law.miami.edu/news/2016/november/professor-osamudia-james-examining-identity-and-law ("I have the best job in the world.").

232. *See* Mayson, *supra* note 3, at 553.

233. *See* Gershowitz, *supra* note 21, at 1528 ("[W]e should not want arrestees to suffer needless incarceration, expensive bail bonds, embarrassing mug shots, possible job loss, and other consequences of arrest if their cases will ultimately be dismissed outright without conviction."); Harmon, *supra* note 25, at 312 ("Unlike many other encounters with the police, a suspect who is arrested and booked faces practical, reputational, and privacy consequences that persist whether or not he is subject to further legal proceedings.").

234. *See supra* Subpart II.A.

235. JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY 241 (1966) ("The negation of the presumption of innocence permeates the entire system of justice . . . . All involved in the system, the defense attorneys and judges, as well as the prosecutors and policemen, operate according to a working presumption of the guilt of persons accused of crime."); Roberts, *supra* note 110, at 2017 ("[E]ven at the trial stage, to raise the specter of innocence is to make uncomfortable suggestions: not only that law enforcement (both police and prosecution) has made costly mistakes, and that out beyond the courthouse a factually guilty person may be enjoying freedom, but also that an innocent person's life has been harmed or ruined in all the ways that pre-adjudication process can achieve." (footnote omitted)). The point suggested in the text is particularly the case if one is less concerned about hardships when they fall on those believed to be guilty. *Cf.* Radley Balko, Opinion, *The Case for Releasing Violent Offenders*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/08/14/the

chances of, stigmatizing, and stripping away the liberty of people on the basis of their race and poverty.)[236] If a desire to self-comfort is indeed operative, then perhaps those people who are erased from the common plea-bargaining statistical error—people whose cases ended without a finding of guilt—are erased because dwelling on their existence and numerosity is troubling. Similarly, a view of the police that associates them with truthfulness and accuracy may be more comforting than the opposite.[237] A view of arrests as acts of the suspect,[238] and thus within the suspect's control, may be more comforting than the view of arrest as a threat that may be incentivized by factors other than evidence,[239] and that may be visited upon you no matter how you behave.

An additional self-comforting assumption that might be at play is the assumption that there exists a clean binary of "guilty" and "innocent," "offender" and "not an offender." Under this binary, guilt is revealed by conduct—the arrest—and thus it exists before the lawyering begins and is not subject to the vagaries of resources or skill. It would be—for some, it *is*—highly disturbing that one's chances of being found legally guilty are deeply influenced by the quality (and often the resources) of one's defense counsel.[240] It may also be unsettling to acknowledge that in some cases factual guilt does not exist in a definitive sense,[241] and that the only real answer one can get on that question is what a factfinder concludes (thus again implicating the quality/resources differential). Some may be tempted to substitute this "maybe-maybe not" or "let's see what your lawyer can do with that" world—a world in tension with the Supreme Court's declaration that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has"[242]—for a world of a nice, clean binary, in which it is not money, chance, or legal skill

-case-for-releasing-violent-offenders/?utm_term=.bc9b2f5f97cf ("We want to punish criminals. We want them to suffer. We create hostile prison environments rife with violence, racial resentment and rape.").

236. *See* Packer, *supra* note 42, at 19 ("[In] the system as it operates, the relative financial inability of most persons accused of crime sharply distinguishes their treatment from the small minority of the financially capable.").

237. *See* David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1741 (1993).

238. *See* O'Neill et al., *supra* note 56, at 268 ("[T]he existence of an arrest indicates some familiarity with the criminal justice system on the part of the arrestee[,] . . . [and] familiarity with the criminal justice system may bear a role in assessing culpability."); Myrna S. Raeder et al., *Convicting the Guilty, Acquitting the Innocent: Recently Adopted ABA Policies*, 20 CRIM. JUST. 14, 19 (2006) (referring to Givelber's assertion that there is a "'core belief [shared] by virtually all personnel who work within the criminal justice system' that anyone arrested is guilty," and asserting that it stems in part from a tendency to "believe in a just world" (quoting Givelber, *supra* note 34, at 1329)).

239. *See supra* notes 23–35 and accompanying text.

240. *See, e.g.*, James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 159 (2012) (a lot).

241. *See supra* Subpart I.A.

242. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

that determines your guilt, but rather your misconduct, embodied by your arrest.[243]

IV. WHY THIS MATTERS

There are various reasons why one might be concerned by a fusion of arrest and guilt.[244] This Article highlights just one set of such reasons, selected because of the breadth of its impact. It focuses on a variety of components of our criminal legal system that require urgent reform, and as regards to which the slowness of reform may be a puzzle.[245] It posits that reform in these areas requires a robust understanding of the difference between arrest and guilt, and that the depth and breadth of those concepts' fusion might provide at least a partial explanation of the obstacles to reform.

A. Defense Representation

If guilt is commonly seen as something revealed by an arrest—if, in other words, the relevance of the entire part of the criminal process between arrest and adjudication has fallen out,[246] and if the law is viewed less as a means by which guilt can be constructed and more as a construct that can be used by defense attorneys to "get their clients off"[247]—a variety of failings in the area

243. *See* Erin Murphy, *Indigent Defense*, CHAMPION, Feb. 2002, at 33, 33 ("In the short time that I have been a public defender, I have learned that most people who ask the 'how can you' question have already divided the world into neat categories of 'us' and 'them.' They assume that 'those people' are in fact guilty criminals and therefore undeserving of constitutional protections. Sometimes the 'us' and the 'them' is simply the speaker's distinction between the lawless and the lawful, the good citizen and the bad. Often race or economic privilege bolsters the speaker's confidence that he or she will always be counted among the 'us.' Regardless of how the division is justified, however, the 'them' is always a group to which the speaker cannot relate, or to which the speaker is confident he or she will never belong. It is also always a group comprised only of the guilty — as though our laws and procedures were just impediments to the efficient adjudication of guilt, rather than the engine through which we determine whether guilt exists at all."); U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL SYMPOSIUM ON INDIGENT DEFENSE 2000: REDEFINING LEADERSHIP FOR EQUAL JUSTICE vii (2000) ("In the end, a good lawyer is the best defense against wrongful conviction . . . .").

244. See *supra* Subpart II.B, for example, for the many potential effects of recidivism calculations that are maximized through the choice to use arrest as a metric.

245. *See* Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1230 (2005) ("The rules and structures of which I speak—indigent defense systems, prosecutorial incentive structures, plea bargaining procedures, docket control mechanisms, etc.—are over-determined candidates for reform campaigns in that they both impose unfairness up front in all criminal cases and lead to the incarceration of innocents on the back end.").

246. *See* Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697, 725–26 (2017) (highlighting the thinness of the center of criminal, as compared to civil, procedure).

247. Entman & Gross, *supra* note 221, at 96 n.8 ("The defense attorneys, the contending side, are likely viewed as more biased than prosecutors—their job is to try to get their clients off—and thus their claims are likely to be viewed more skeptically.").

of defense representation may become less surprising. These include government-funded defense resources,[248] the standards and policing of attorney performance,[249] the incentive structures operating on defense attorneys,[250] defender caseloads,[251] and—resulting from these—the inability of defense attorneys to meet their ethical obligations.[252] James Forman Jr. has commented on the apparent tension between the dire state of public defense and the "scant attention" focused on it in some quarters.[253] A fusion of arrest and guilt may make the phenomenon that he notes more understandable because if factual guilt is viewed as something established by arrest, then many or all of the functions of defense counsel may be seen as a waste of money. Who wants to support those who are trying to get people off on a technicality?[254]

248. *See* James Forman Jr., Opinion, *Justice Springs Eternal*, N.Y. TIMES (Mar. 25, 2017), https://www.nytimes.com/2017/03/25/opinion/sunday/justice-springs-eternal.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=1 ("[N]o aspect of our criminal justice system is as overworked and underfunded as public defender services. Of the more than $200 billion that states and local governments spend on criminal justice each year, less than 2 percent goes to public defense. Yet improving indigent defense gets scant attention in the conversation about how to fix our criminal justice system."); *see also* Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 311 (2002) ("Judges are not likely to order the expenditure of funds to hire lawyers and support staff when convinced of guilt and worried that additional support will only slow the process of adjudication not change results.").

249. *See* Bernhard, *supra* note 248, at 311 ("[C]ourts may have been dissuaded from taking action [on Sixth Amendment right to counsel claims] by the unacknowledged but pervasive belief that anyone who has been arrested is guilty—a belief which inevitably minimizes the significance of all else in the criminal justice system besides the swift resolution of cases. The presumption of guilt is a 'core belief shared by virtually all personnel who work within the criminal justice system' and a major hindrance to improving criminal defense services. If judges suspect that everyone arrested is guilty, it is hard to convince them to strike as unconstitutional state-funded criminal defense systems that rush pleas or discourage legal research and creative investigation." (footnotes omitted) (quoting Givelber, *supra* note 34, at 1329)); *id.* at 312 ("The presumption of guilt helps to explain why the Supreme Court formulated an almost insurmountable standard of review for ineffective assistance claims on appeal."); Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 741–42 (describing assistance of counsel as often involving "little more than counsel's help in facilitating a guilty plea").

250. For defense attorney incentives in our system that militate in favor of performing the "minimum amount necessary to convince clients to plead guilty as quickly as possible," see Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 351 (2012).

251. *See* Peter A. Joy, *Rationing Justice by Rationing Lawyers*, 37 WASH. U. J.L. & POL'Y 205, 215–16 (2011) ("The *Strickland* standard and the 'guilty anyway' syndrome combine to produce a criminal justice system that accepts excessive caseloads resulting in poor lawyering.").

252. *See* Eldred, *supra* note 250, at 335 ("[U]nderfunded and overworked public defenders 'are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession's rules. They 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.'" (quoting 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)); Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 396 (2016).

253. Forman, *supra* note 248.

254. *See* Jodi F. Bouer & Elizabeth Ortecho, Book Review, 6 B.U. PUB. INT. L.J. 377, 378 (1996) ("Rothwax does not view the defense attorney's role as any better than the defendant's since she also serves

Who wants to fund smoke and mirrors?[255]

To the extent that problems exist with defense lawyering that are within defense attorneys' power to ameliorate, the fusion may again have some explanatory weight. Thus, Abbe Smith finds that attorneys' assumptions of guilt underlie "the bad lawyering at the root of many wrongful convictions: feckless or beleaguered lawyers feeling that their client is guilty anyway, so what the hell?"[256]

A final example concerns the very provision of defense counsel. To some, the failure to provide defense counsel at stages of the criminal process that include arraignment[257]—and during the guilty plea process that arraignment may encompass[258]—is a disgrace.[259] But those who fuse arrest with guilt may reject the idea that defense counsel needs to be provided at such points.[260] And, where defense counsel is provided, those who fuse arrest and guilt may view the model of "meet 'em and plead 'em" not as a monstrosity but rather

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to prevent, distort, and mislead the court from discovering the truth, i.e., her client's guilt.") (reviewing JUDGE HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF THE CRIMINAL JUSTICE SYSTEM (1996)).

255. *See* Michael J. Minerva, Letter, *Court Funding, in* THE FLA. BAR, SEPTEMBER 1, 2008 LETTERS (2008), https://www.floridabar.org/the-florida-bar-news/letters-28/ ("Sen. Victor Crist, R-Tampa, decries the proposed moratorium [by public defenders on taking new cases, as a response to a funding crisis] as grandstanding, saying along the way that most defendants are guilty anyway. No wonder public defenders lack adequate funds when that highly placed legislator has such an outlandish view of the defense function."); Raeder et al., *supra* note 238, at 19 ("Governments thus view defense services as perhaps necessary evils, but evils nevertheless, leading to cost control as the bureaucracy's overriding concern. After all, [the logic appears to go,] why pay high fees to protect the guilty?"); John P. Gross & Jerry J. Cox, *The Cost of Representation Compared to the Cost of Incarceration*, CHAMPION, Mar. 2013, at 22, 22 ("The reluctance to adequately fund indigent defense is undoubtedly based on an unwillingness to spend money on attorneys to represent defendants who are perceived as most likely guilty. Providing defendants with representation is therefore seen as a waste of money; attorneys will only delay the inevitable and will make the criminal justice system less efficient."). *See generally* Murphy, *supra* note 243.

256. 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); *see also* Rapping, *supra* note 111, at 1020 ("[T]hrough their subconscious assumptions about their clients, what the evidence against them means, and what consequences are appropriate, defenders can be pushed to accept a lower standard of justice, and to fight a little less aggressively, for their clients of color.").

257. *See* Packer, *supra* note 42, at 51 ("The assistance of counsel, to the extent that it is available at arraignment, is perfunctory in the majority of cases. Waiver is easily accomplished and widespread.").

258. *See id.* at 48; *cf.* Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 387–88 (2011).

259. *See, e.g.*, ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 17 (2009).

260. *See* Packer, *supra* note 42, at 48 ("[According to the Crime Control Model,] [t]he general run of criminal defendants are capable of making up their own minds as to whether they want to plead guilty. If a defendant has a lawyer and wants to consult him about the guilty plea, that is proper. But the state should be under no obligation to provide counsel for a defendant at arraignment. All that is required for a plea of guilty is that the defendant understand its nature and consequences in a general kind of way, and that he enter it of his own free will. The judge's duty is to ensure that these conditions are met. It would involve a needless duplication of resources to insist that a defense lawyer as well as a judge must participate in the entry of a guilty plea."); *id.* at 61 ("The criminal process as it actually operates in the large majority of cases probably approximates fairly closely the dictates of the Crime Control Model.").

as an efficient way of proceeding.[261] The phrase nicely encapsulates a system in which the period between arrest and adjudication is largely seen as pointless filler,[262] and thus one in which a lack of funding and support for vigorous defense becomes understandable.

B. Preadjudication Suffering

Preadjudication practices, such as bail, seem finally to be getting broad recognition as practices that not only resemble the "punishment" that is forbidden in advance of conviction but specifically punishment for the crime of poverty.[263] But it took a long time.[264]

If one is searching for explanations of how preadjudication practices of this nature have gone on so long and to such adverse effect,[265] it may again be worth considering the assumptions of guilt attaching to those arrested. Jeffrey Manns, for example, notes that the "conventional wisdom of the culpability of anyone that the government has probable cause to arrest goes far towards explaining popular apathy to pretrial detentions and the dearth of remedies for detainees who are not convicted."[266] This apathy makes sense if, as R.A. Duff suggests, "the defendant is seen as being in fact an offender, who awaits only the formal verdict of the court before receiving the punishment he deserves."[267] And indeed, if punishment is deserved, one might as well get started as soon as possible,[268] something that our system permits by folding "time

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261. For the notion that the criminal justice system in America is "plagued by a . . . 'meet 'em and plead 'em' methodology," see Lahny R. Silva, *Right to Counsel and Plea Bargaining:* Gideon*'s Legacy Continues*, 99 IOWA L. REV. 2219, 2230 (2014) (footnote omitted).

262. *See* Meyn, *supra* note 246, at 725–26.

263. *See, e.g.*, Shaun Ossei-Owusu, *Poverty's Punishment: America's Oppressive Bail Regime*, AM. PROSPECT (Nov. 18, 2016), https://prospect.org/article/poverty%E2%80%99s-punishment-america%E2%80%99s-oppressive-bail-regime.

264. *See* Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 839–40.

265. *See* Simonson, *supra* note 89, at 608 ("Even a few days in jail are profoundly destabilizing: defendants experience declines in physical and mental health, and potentially lose wages, jobs, stable housing, and custody of their children.").

266. Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1956 (2005).

267. Duff, *supra* note 128, at 120 (adding that "that is why it is so easy (and so revealing) to slide into talking about the danger that the defendant will commit, not ['offenses,'] but 'further offen[s]es' while on bail").

268. *See id.* at 119 ("Now pre-trial detention is not (formally) punishment; it does not presuppose that the defendant is guilty of the crime for which he is to be tried (although if the defendant is convicted and sentenced to imprisonment, time spent on pre-trial remand can be counted towards that sentence as 'time served')."); Packer, *supra* note 42, at 39 ("[Under the Crime Control Model,] [t]he vast majority of persons charged with crime are factually guilty[,] . . . [and] [f]or all practical purposes, the defendant is a criminal. Just because the assembly line cannot move fast enough for him to be immediately disposed of is no reason for him to go free. If he does go free, he may not appear for trial, a risk that is heightened when he has a strong consciousness of guilt and a lively expectation of probable punishment.").

served" into the formal sentence.[269] As Human Rights Watch puts it, "[t]he time in pretrial detention (as well as in police lockup pre-arraignment)" can serve as "punishment paid in advance."[270]

A lack of concern about pretrial custody has ripple effects. Part of what justifies speedy trial guarantees is that a limit on the time spent to bring a case to trial necessarily means a temporal limit on pretrial custody.[271] If those held in custody are assumed to be guilty, then we can see an explanation for the widespread failure to make speedy trial guarantees meaningful.[272] Similarly, while one might be concerned that pretrial custody helps to bring about pleas,[273] if one assumes that those in custody are guilty, then that may appear to be not coercion but welcome efficiency.[274]

C. Police Reform

If the kinds of assumptions mentioned in this Article—that arrests are tantamount to guilt, that police are truthful, and that police are essential as the primary mechanism for bringing the guilty to light—are indeed widespread, then it may be unsurprising how halting reform has been of policing problems, including racially disparate policing and arrests,[275] widespread use of arrest,[276] inappropriate incentives to arrest,[277] police untruth,[278] and the incen-

269. *See* Duff, *supra* note 128, at 119.

270. HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 30 (2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf.

271. *See* Barker v. Wingo, 407 U.S. 514, 532 (1972).

272. *See, e.g.*, Benjamin Weiser & James C. McKinley Jr., *Chronic Bronx Court Delays Deny Defendants Due Process, Suit Says*, N.Y. TIMES (May 10, 2016), https://www.nytimes.com/2016/05/11/nyregion/chronic-bronx-court-delays-deny-defendants-due-process-suit-says.html.

273. *See* Packer, *supra* note 42, at 39–40.

274. *See id.* at 38 ("[A] decision that the defendant will remain in custody once he has been charged may itself induce him to plead guilty, thereby short-circuiting the part of the process concerned with guilt determination and moving directly to the question of ultimate disposition."); *id.* at 39–40 (explaining the antipathy of the "Crime Control Model" to reducing the rate of pretrial confinement: "The main risk is that the increased consumption of time required to litigate cases that do not really need to be litigated would put an intolerable strain on what is already an overburdened process. That consideration alone argues against a policy that makes pretrial liberty the norm.").

275. *See* Tammy Rinehart Kochel et al., *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 498 (2011) (using a meta-analysis to reach the conclusion that, "[o]n average, the chances of a minority suspect being arrested were found to be 30 percent greater than a White suspect"); Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT'G REP. 167, 173 (2014) ("Black men are arrested at younger ages and more often than white men for reasons that have as much to do with racially differentiated exercises of police discretion as with racial differences in offending behavior. Racial profiling by the police targets blacks and Hispanics and exposes them proportionately more often than whites to arrest. Police drug enforcement policies target substances that black drug dealers sell and places where they sell them, resulting in rates of arrests for drug offenses that have been four to six times higher for blacks than for whites since the mid-1980s.").

276. *See supra* note 1 and accompanying text.

277. *See supra* notes 23–31 and accompanying text.

tives and culture that may encourage that untruth.[279] If arrests are seen as tantamount to guilt, then those who bear the burden of making arrests—and thus of taking control of criminal wrongdoers—are likely to garner esteem and protection. The fusion of arrest and guilt thus may act as an obstacle to reform. Judges, for example, play a role in overseeing police conduct and testimony. But Rodney Uphoff and others have suggested that judicial assumptions of guilt may dilute that power.[280]

This Article also suggests that traveling along with an assumption that an arrest equals guilt is an assumption that a lack of arrest equals a lack of guilt.[281] (It can be hard to make much sense of "recidivism rates" that rely on arrests, or "crime rates" that rely on arrest rates,[282] unless this second assumption is in

278. *See supra* notes 32–35 and accompanying text.

279. *See, e.g.*, Alexander, *supra* note 27.

280. *See* Rodney J. Uphoff, *On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L.J. 521, 543–44 (2007) ("In my view, the attitudinal blinders that many judges possess contribute significantly to the inadequacies of the criminal justice system. Most judges, especially those with prosecutorial experience, presume that most defendants are, in fact, guilty, even though some are, in fact, innocent. This presumption of guilt, pro-prosecution perspective not only affects the manner in which many judges rule on motions, evaluate witnesses, and exercise their discretion, but it also adversely affects the willingness of many judges to police law enforcement agents and prosecutors. Judges tolerate sloppy police work because they do not want to be viewed as micro-managing the police. Judicial reluctance to let the guilty go free has meant a decreased use of the exclusionary rule. Similarly, courts are hesitant to dismiss cases because of *Brady* violations or take other steps to reign in [sic] prosecutorial misconduct. Finally, even when courts find error, too many errors are deemed harmless. The expanded use of harmless error not only allows questionable verdicts to stand, it does little to discourage misconduct and sloppy practices in the administration of justice." (footnotes omitted)); Bowers, *supra* note 22, at 1163 ("[T]here are strong reasons to doubt the efficacy of the exclusionary rule in policing the police. Judges are especially loath to discredit even incredible police testimony if it means razing evidence against defendants—especially recidivist defendants—whom judges may already believe are wasting judicial resources by not plea bargaining."); Andrew E. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709, 764 (1999) (suggesting that the fact that "many judges believe that most defendants are guilty" provides one of five reasons why judges are "all too willing to ignore police perjury").

281. *Cf., e.g.*, Petersilia, *supra* note 91, at 382 ("[C]riminal activity in the general population is assumed to be relatively rare.").

282. *See* Linda S. Beres & Thomas D. Griffith, *Habitual Offender Statutes and Criminal Deterrence*, 34 CONN. L. REV. 55, 60 (2001) ("[W]e have no direct measure of the crime rate, but must rely on either the Federal Bureau of Investigation Uniform Crime Reports ("UCR") or the National Crime Victimization Surveys ("NCVS"). The UCR only shows reported crimes and the NCVS is dependent upon the memory of the individuals surveyed and the method of questioning."); Jerome G. Miller, *From Social Safety Net to Dragnet: African American Males in the Criminal Justice System*, 51 WASH. & LEE L. REV. 479, 481 (1994) ("Meanwhile, the FBI *Uniform Crime Reports (UCR)*, upon which the media routinely base their official estimates of crime, inflated both the numbers and the seriousness of the types of incidents reported. Whereas most European nations report their crime statistics on the basis of convictions, the *UCR* reports are based on complaints or arrests. However, about thirty-eight of every one hundred individuals arrested for a felony either were not prosecuted or had their cases dismissed outright at their first court appearances. This had nothing to do with plea bargains; usually there was not sufficient reason to proceed with the cases." (footnote omitted)). For spillover effects of these choices, see, for example, Tess Owen & Isabella McKinley Corbo, *When Cops Commit Crimes: Inside the First Database that Tracks America's Criminal Cops*, VICE NEWS (Sept. 12, 2017), https://news.vice.com/story/police-crime-database, for a discussion of the use of police arrests to populate a database of police "crime": "We should also bear in mind that an arrest is not equivalent to a conviction. Just as with the general population, officers are presumed innocent until proven guilty.

play.[283]) This second assumption may serve to insulate the police from concerns about disparate enforcement, since it may mean that potential concern about *failure to* arrest is diluted,[284] just as is potential concern about decisions *to* arrest.

D. Prosecutorial Reform

Commentators frequently lament a widespread failure by prosecutors to put much meaning into their constitutional and ethical mandate to "do justice."[285] This mandate all too often seems to be interpreted as a mandate to score convictions—in direct contravention of the Supreme Court's indication in *Berger v. United States* that the interest of the prosecution "is not that it shall win a case, but that justice shall be done."[286] Paul Butler describes this statement, in the current system, as "just words on paper";[287] others despair of the idea that the "do justice" mandate can ever be made meaningful.[288] One would need, for example, to set up an appropriate incentive system for prosecutors, and that has not yet been done.[289]

An assumption regarding the guilt of those arrested may help elucidate some of these failures.[290] If those arrested are assumed to be guilty, then (for

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But Stinson [the creator of a 'police crime database'] thinks looking at arrests is a fair way to examine cop crime, because that's how law enforcement (including the FBI's Uniform Crime Report) collects information on crime in general." *Id.*

283. *See* Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563 (2014) (discussing the question of whether a criminal record is not just a reliable indicator of culpability but also a reliable indicator of *relative* culpability).

284. *See* I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1252–54 (2017) (discussing "underenforcement"); *see also* I. Bennett Capers, *The Under-Policed*, 51 WAKE FOREST L. REV. 589 (2016).

285. *See* AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (4th ed. 2015), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.").

286. Berger v. United States, 295 U.S. 78, 88 (1935).

287. Paul Butler, Opinion, Gideon's *Muted Trumpet*, N.Y. TIMES (Mar. 17, 2013), https://www.nytimes.com/2013/03/18/opinion/gideons-muted-trumpet.html.

288. *See, e.g.*, State v. Starrish, 544 P.2d 1, 9 (Wash. 1975) (Utter, J., dissenting).

289. *See* Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2091 (2010) ("[C]onvictions are the lodestar by which prosecutors tend to be judged."); Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1328 (2000) ("[E]ven in the absence of bad faith prosecutors have incentives to resolve nagging doubts about a suspect's guilt in favor of prosecution."); Siegel, *supra* note 245, at 1225 (noting "the failure of our system to develop an incentive structure for prosecutors that rewards the pursuit of justice rather than the pursuit of competitive advantage").

290. *See* HUMAN RIGHTS WATCH, *supra* note 270, at 31 (quoting Timothy Murray, then-Executive Director of the Pretrial Justice Institute, as saying that woven into the mindset of prosecutors across this country is "the idea [that] you should somehow 'pay' from the moment of arrest, that you owe the system something just by virtue of being accused . . . because they implicitly believe—and must believe—that people who are arrested are guilty").

those who believe that guilt should be met with a conviction) justice might well be seen as identical to the pursuit of convictions, and incentives that further that pursuit might be seen as beneficial. In addition, if those arrested are assumed to be guilty, then concerns about prosecutorial misconduct are likely to lessen, given the tendency to worry less about misconduct when its victim is thought to be guilty.[291]

Judges have a potential role in overseeing aspects of the prosecutorial role and curbing its worst excesses.[292] But if they too are liable to fuse arrest with guilt, their relative inaction may make more sense.[293] Prosecutors, in turn, have a potential role in overseeing aspects of police conduct, screening its output,[294] and curbing its worst excesses.[295] If they are liable to fuse arrest with guilt,[296] their relative failure to play this role may make more sense.[297]

CONCLUSION

Criminal justice reform is hard. However strong one's commitment, one faces obvious barriers, whether fear, financing, or resistance to change. This Article has brought to light a less obvious barrier: a widespread fusion of arrest and guilt. If even those committed to criminal justice reform are vulnerable to this fusion, the slowness of reform in areas that rely on a robust understanding of the distinction between arrest and guilt may make more sense.

Yet criminal justice reform is crucial. If, as this Article suggests, the fusion of arrest and guilt is indeed a potent force, we must investigate its many pos-

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291. *See* Balko, *supra* note 235 ("We want to punish criminals. We want them to suffer. We create hostile prison environments rife with violence, racial resentment and rape.").

292. *See, e.g.*, Roberts, *supra* note 67, at 331 (suggesting that judicial power to monitor and regulate prosecutorial conduct is greater than commonly suggested).

293. *See* Uphoff, *supra* note 280, at 543–44, 544 n.129 ("Many commentators have highlighted the serious systemic problem of prosecutorial misconduct and criticized judicial inattention to the problem . . . .").

294. *See* NYU Sch. of Law, *New Frontiers in Race and Criminal Justice – Panel 2: Race and Prosecution*, YOUTUBE 29:58–31:07 (Apr. 24, 2012), http://www.youtube.com/watch?v=qUtgqDaJN_g#t=29m58s (showing Whitney Tymas saying: "[P]rosecutors need to understand the real leadership that they can exercise when it comes to not endorsing all police action. . . . [I]t's really okay to tell a police officer, 'I'm not . . . prosecuting this case.' . . . [P]rosecutors can say no and . . . not just be case processors—really be leaders . . . .").

295. *See id.*

296. *See* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 140 (2004) ("The perception, even among prosecutors, that the police only arrest guilty people in the first place reinforces the belief that the right person was charged and later convicted.").

297. *See* Natapoff, *supra* note 20, at 1068 ("With respect to minor offenses, . . . prosecutors in some jurisdictions forgo the screening inquiry and convert arrests into charges more or less automatically. This fact is reflected in low rates at which prosecutors decline cases. In New York and Iowa, for example, Josh Bowers found declination rates for certain minor offenses as low as 2% or less, meaning that 98% of those police arrest decisions converted to criminal charges. A Vera Institute study found similarly low prosecutorial declination rates in misdemeanor drug cases in North Carolina." (footnote omitted)).

sible explanations. Identifying the fusion, and attempting to understand it, is a necessary precursor to efforts to combat it.