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Abstract: In the American criminal justice system, accusations have eternal life. Prosecutors, judges, and prison officials regularly consider dismissed charges and even prior acquittals in the defendant's criminal history when making decisions ranging from the filing of charges to the imposition of punishment. This Article argues that the criminal justice system's reliance on "accusation evidence" should be understood as furthering that system's larger allegiance to attaining and preserving findings of guilt.

Once the government obtains a guilty plea or verdict, appellate courts rarely overturn convictions based on concerns about the accuracy of the conviction; indeed, post-conviction review procedures often are structured to prevent meaningful consideration of innocence claims. Appellate courts will eventually cease reconsideration of the conviction altogether, even, in many cases, where legitimate questions about the defendant's guilt remain. But while convictions are eventually laid to rest, accusations that do not result in convictions can be reconsidered forever, in a variety of contexts, by a variety of government actors, applying low or non-existent standards of proof. Once guilt is obtained, the system aims to preserve it; if guilt is eluded, the system will pursue it.

This Article begins by reviewing the ways in which the criminal justice system seeks to obtain and maintain convictions. It then discusses the criminal justice system's reliance on accusation evidence, identifying how uncertainty about the defendant's culpability in the absence of a conviction drives decision makers to reconsider that outcome and replace it with their own determinations of guilt. It goes on to contrast the systemic reconsideration of convictions with the reconsideration of charges for which no conviction was obtained, using the doctrine of finality as a comparison point. Based on this analysis, it argues that the criminal justice system is structured to obtain and preserve findings of guilt, even if doing so does not advance the pursuit of truth or the conviction of the culpable. This Article then examines the implications of the systemic dedication to the pursuit and preservation of guilt, and suggests ways in which it might, and should, be dismantled.

INTRODUCTION

The criminal justice system frequently relies on what this Article will call "accusation evidence," that is, evidence of criminal conduct for which a person was once formally accused and subjected to criminal prosecution, but for which the defendant was not convicted. Prosecutors, judges, and prison officials regularly consider dismissed charges and even prior acquittals in the defendant's criminal history when making decisions ranging from what new charges should be filed against him[1] to

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1. The number of women convicted of crimes has risen dramatically in the last thirty years. *See, e.g.*, WOMEN'S PRISON ASS'N, QUICK FACTS: WOMEN & CRIMINAL JUSTICE – 2009 (2009), http://www.wpaonline.org/wpaassets/Quick_Facts_Women_and_CJ_2009_rebrand.pdf ("The female prison population grew by 832% from 1977 to 2007."). Nevertheless, the vast majority of persons arrested in the United States are male. "Over 74 percent (74.1) of the persons arrested in the nation during 2011 were males." *Crime in the United States 2011: Persons Arrested*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-

what punishment is merited if a conviction is obtained. The reliance on unproven accusations is generally justified by reference to lingering questions regarding the defendant's actual culpability when a case results in a dismissal or acquittal, and thus by the search for truth. This Article argues that the reliance on accusation evidence is more accurately understood as part of the criminal justice system's larger allegiance to obtaining and preserving findings of guilt.

The criminal justice system's widespread reliance on accusation evidence highlights the sharp contrast between the ways in which the system handles the reconsideration of cases that resulted in a conviction and those that did not. Once the state obtains a guilty plea or verdict, appellate courts rarely overturn convictions based on concerns about the accuracy of the conviction; indeed, post-conviction review procedures often are structured to prevent meaningful consideration of innocence claims. Appellate courts will eventually cease reconsideration of the conviction altogether, even, in many cases, where legitimate questions about the defendant's guilt remain. When a criminal accusation does not result in a conviction, however, it can be reconsidered forever, in a variety of contexts, by a variety of government actors, applying low or no standards of proof, in search of the guilt for which the accused person may have escaped justice in the past.

Further, there are few procedural bars to the use of accusation evidence. While the prohibition against double jeopardy prevents the government from prosecuting a person for a crime for which he was previously acquitted, it does not prevent reconsideration of prior charges that did not result in a conviction for other purposes, particularly if the defendant is charged with new crimes. Appellate courts have widely condoned the reconsideration of unproven accusations in a criminal defendant's past, generally by reasoning that the prosecution's failure to convict a defendant of a crime beyond a reasonable doubt does not preclude a conclusion that the defendant is factually guilty of that crime. Thus, parole officers may revoke a person's parole and send him back to prison based on crimes for which he was acquitted, prison officials may classify inmates as sexual offenders based on charges that the government dismissed, and judges may impose a more severe sentence on a defendant based on charges for which the jury found him not guilty.

If an accused person admits his guilt or the government proves him guilty beyond a reasonable doubt, it is easy to understand why decision

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2011/persons-arrested (last visited Nov. 11, 2015). For this reason, I will generally use male pronouns when referring to persons accused and convicted of crimes, although the circumstances described in this Article apply to women as well as men.

makers in the system might have greater confidence in the accuracy of that outcome than in the notion that the State's failure to prove a case means that the defendant was factually innocent of the crime for which he was charged. There are certainly differences between an appellate review of a criminal conviction and the multiple ways that judges, prosecutors, and other state actors reconsider prior accusations for which no conviction was obtained. This Article will not argue otherwise. Instead, it will juxtapose the criminal justice system's reliance on accusation evidence with its intense focus on obtaining and preserving convictions. It will note that doubt about the accuracy of the outcome of a criminal case plays a much larger and more dispositive role when decision makers review cases for which a conviction was not obtained than it does in the appellate review of criminal convictions. It will then conclude that this concern shifts in relation to an overarching systemic goal: Not the search for truth, but rather obtaining and preserving findings of guilt.

Part I of this Article reviews the ways in which the criminal justice system seeks to obtain and maintain convictions. This Part will address the enormous pressures placed on defendants to plead guilty, the very small numbers of cases that actually make it to trial, an appellate process structured to discourage investigating claims of innocence and disturbing the verdict of guilt, and the adoption of the principle of finality, which holds that once a person has been convicted of a crime there should come a time when the appeals process is exhausted and the conviction can no longer be challenged in court. This Part will argue that the system tolerates uncertainty about the defendant's culpability—up to and including claims of innocence in death penalty cases—when courts uphold convictions on appeal and when judges apply the principles of finality in the context of habeas corpus review.

Part II will identify the ways in which the criminal justice system uses accusation evidence, noting how uncertainty about the defendant's culpability in the absence of a conviction drives decision makers to reconsider that outcome and replace it with their own determinations of guilt.

Part III will examine the system's discordant treatment of the reconsideration of convictions and the reconsideration of charges for which no conviction was obtained, using the doctrine of finality as a comparison point. The finality doctrine imposes limits on the reconsideration of criminal convictions on habeas review, even when questions regarding the defendant's innocence or the constitutionality of his arrest and prosecution remain. This Part argues that the justifications underlying the call for finality of convictions also support the limitation

or elimination of accusation evidence, while noting that courts do not invoke these principles to limit the reconsideration of criminal charges for which the government did not obtain a finding of guilt.

Part IV argues that the different approaches to the reconsideration of prior outcomes in the criminal justice system are best understood as part of a larger systemic dedication to the preservation of guilt. This Part will then examine the implications of this dedication and suggest ways in which it might be dismantled. The Article then concludes.

I. THE AMBIGUITY OF CONVICTIONS

The search for truth is one of the paramount values of the criminal justice system in the United States.[2] The presumption of innocence and the requirement that criminal charges be proven beyond a reasonable doubt at trial bolster a view of the American justice system as one that seeks only to convict those defendants who are factually guilty. Prosecutors, agents of the government's search for truth, are ethically bound to seek justice rather than a conviction;[3] the system is thus understood as one in which the undisputedly guilty are convicted[4] and the innocent are absolved.[5] Yet consistently high conviction rates in our federal and state systems demonstrate that, once a person is charged with a crime, the resulting guilty plea or verdict is almost a foregone conclusion.[6]

In 2013, ninety-two percent of federal criminal cases resulted in

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2. *See* United States v. Nobles, 422 U.S. 225, 230 (1975) ("[W]e have placed our confidence in the adversary system, entrusting to it the primary responsibility for developing relevant facts on which a determination of guilt or innocence can be made.").

3. *See, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935) (stating that the government's duty "in a criminal prosecution is not that it shall win a case, but that justice shall be done").

4. Even if this were true—and this Article will address the legitimacy of this viewpoint—it is worth noting that a system that successfully identifies and punishes the factually guilty is not necessarily a just one. One must also consider what actions that system defines as "criminal" and what punishments it considers to be proportionate to those purported crimes. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2011) (discussing the War on Drugs and its consequences as a means of social control over black men). This Article notes, but does not engage in, this important discussion.

5. *See, e.g.*, *Berger*, 295 U.S. at 88 (describing the "twofold aim" of the law as "that guilt shall not escape or innocence suffer"); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *358 (1765) (containing his famous and influential formulation: "It is better that ten guilty persons escape than that one innocent suffer").

6. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 84 (2005) ("Acquittals are steadily disappearing from the federal system. Indeed, acquittals are disappearing more quickly than any other outcome, including trial convictions and dismissals, as guilty pleas expand to displace all other outcomes in federal court.").

conviction.[7] Of those convictions, ninety-seven percent were the result of a guilty plea and the remaining three percent were the result of trial verdicts,[8] with similar statistics at the state level.[9] Fewer and fewer cases go to trial; since 2010, approximately three percent of federal criminal cases were resolved by a trial, down from nineteen percent in 1980.[10]

Some argue that the high rate of conviction accurately reflects the high rate of culpability of the criminally accused;[11] others contend that it masks significant numbers of wrongful convictions.[12] Regardless of which position is more accurate, there is no question that in some instances defendants who are not guilty are convicted.[13] We might imagine that the appellate process is designed to investigate the

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7. *See* U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR U.S. ATT'YS, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT FISCAL YEAR 2013, at 9 (2013), *available at* http://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf (reporting that of the 82,092 defendants with cases that closed during fiscal year 2013, 75,718 were convicted either through a plea or at trial, constituting a ninety-two percent conviction rate). Of course, not every arrest leads to a conviction; prosecutors decline to pursue charges in criminal cases for a variety of reasons, and those cases do not enter the criminal justice system. *Id.* at 7 (noting that, of the 172,024 criminal cases that U.S. Attorneys' offices received in fiscal year 2013, prosecutors declined 25,629, for reasons including "weak or insufficient evidence" and "lack of criminal intent").

8. *Id.* at 9.

9. Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) ("[The] criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 717 (2006) ("In the criminal justice systems of the 50 states, over 95 percent of all criminal cases are disposed of without a trial, through the entry of a guilty plea.").

10. *See* Judge Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014) http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/ (noting the "virtual extinction of jury trials in federal criminal cases").

11. *See, e.g.*, Morris Hoffman, *The Myth of Factual Innocence*, 82 CHI.-KENT. L. REV. 663, 674 (2007) (arguing that wrongful conviction is a rare event and the public perception that it happens frequently is due to a "myth of innocence . . . driven more by legal academics, wrongful conviction advocates, and journalists than by the available data"); *see also* Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES, Jan. 26, 2006, at A23 (estimating the wrongful conviction rate as 0.027%).

12. *See How Many Innocent People Are There in Prison?*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/How_many_innocent_people_are_there_in_prison.php (last visited Jan. 18, 2015) [hereinafter *Innocent People in Prison*] (citing studies that estimate that between 2.3 percent and 5 percent of all prisoners in the U.S. are innocent); NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Nov. 3, 2015) (listing 1700 cases since 1989 in which people convicted of crimes were subsequently "cleared of all the charges based on new evidence of innocence").

13. *See* NAT'L REGISTRY OF EXONERATIONS, REPORT: EXONERATIONS IN 2014, at 1 (2015) (reporting that 2014, with 125 exonerations, was "a record-breaking year for exonerations in the United States, by a large margin," and citing the work of Conviction Integrity Units in prosecutors' offices as a substantial reason for the upward trend in exonerations).

possibility of this error and reverse cases where meaningful doubt about the defendant's guilt remains.[14] But, in fact, the appellate process is not well designed to identify cases in which innocent people have been wrongfully convicted; it is procedurally difficult to make such claims, and even more difficult to win them.[15]

A study by Professor Brandon L. Garrett brings the structural barriers to raising claims of factual innocence on appeal into stark relief. Professor Garrett investigated the appellate review of 200 cases of convicted persons who were later exonerated through the use of DNA evidence.[16] This study demonstrated that, in the subgroup of 133 convicted but factually innocent persons for whom courts issued written appellate or post-conviction opinions, appellate courts reversed the innocent person's conviction only fourteen percent of the time—nine percent when the study group was narrowed to defendants convicted only of noncapital crimes.[17]

False evidence (such as mistaken identifications—which played a role in seventy-nine percent of the wrongful convictions[18]—false confessions, or perjured testimony given by informant witnesses) played a significant role in these wrongful convictions.[19] In many cases, however, the innocent appellant did not raise constitutional challenges to

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14. *See* Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1275 (2013) (stating that "the value of accuracy is at the heart of appellate review, and underlies both the error-correction function of review and the public-trust function").

15. *See, e.g.*, Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 592, 601 (arguing that, if appellate courts have a duty to identify and prevent wrongful convictions, that goal is "largely a failure"—a situation he describes as "truly alarming").

16. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 58–59 (2008) (describing the study as examining "how our criminal system handled, from start to finish, the cases of the first 200 persons exonerated by post-conviction DNA testing in the United States," by considering "the reasons why these people were wrongfully convicted, the claims they asserted and rulings they received during their appeals and post-conviction proceedings, how DNA testing eventually proved their innocence, and how they were exonerated").

17. These reversal rates were identical to a "matched comparison group" that consisted of persons convicted of the same charges, in the same state, and at the same time, as each of the exonerated people, but for whom no post-conviction DNA testing occurred. *Id.* at 61 (finding that appellate courts reversed nine percent of the noncapital convictions of the exonerees and ten percent of the matched comparison group of persons convicted of noncapital rape or murder, a "statistically insignificant" difference); *see also* Findley, *supra* note 15, at 594. (discussing the results of Professor Garrett's study and noting that "of the 133 cases in which known innocents appealed their convictions, reviewing courts failed to recognize innocence or grant any relief in 86% of the cases, or 91% if only non-capital cases are counted").

18. Garrett, *supra* note 16, at 60.

19. *Id.* at 60, 76 (stating that fifty-seven percent of the innocent persons were convicted "based on forensic evidence, chiefly serological analysis and microscopic hair comparison," eighteen percent based on "informant testimony" and sixteen percent based on the defendant's own false confession).

these factual errors on appeal.[20] This was so, in large part, because courts had already severely restricted the availability of legal claims related to such factual issues,[21] and stand-alone claims of actual innocence were likewise largely unavailable.[22] Even when the appellants did raise legal claims regarding factual error or actual innocence, in most cases those efforts were unsuccessful.[23] For example, while more than half of the wrongfully convicted persons who had falsely confessed to the crime challenged that confession on appeal, none had their convictions reversed on that basis.[24]

Our system, Garrett concluded, is one "structurally averse to the correction of factual errors."[25] Our criminal appellate process generally fails to provide a means by which convicted persons might raise claims of factual error and actual innocence, and appellate courts do not treat the possibility of factual error as the primary justification to reconsider and reverse the outcome of a criminal case. A closer look at the process by which convictions are obtained and reviewed helps clarify this point.

A. Barriers to Raising Claims of Factual Innocence in Appellate Review of Guilty Pleas

Whether or not the high rate of convictions generally reflects the aggregate guilt of criminal defendants, there are reasons to question a blanket confidence in the notion that a criminal conviction is always an accurate reflection of the defendant's guilt. There is significant support for the argument that plea bargaining in particular, by which the government obtains the overwhelming percentage of all convictions, is structured primarily as an efficient method to resolve criminal cases rather than one designed to identify and punish the factually guilty.[26]

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20. *Id.* at 76–77.

21. *Id.* at 76–77, 94 ("[W]ith the exception of defendants in cases relying on confessions, fewer than half of the defendants brought constitutional claims challenging the types of evidence supporting their wrongful convictions. In part this is because few such constitutional claims exist.").

22. *Id.* at 112, 113 (explaining that "no petitioner has ever received relief under a constitutional theory that they were actually innocent," and noting that other "legal avenues for claiming innocence remain extremely narrow").

23. *Id.* at 61, 108 ("Exonerees rarely received new trials based on factual claims challenging the evidence supporting their wrongful convictions," and later noting that that when courts ruled on the merits of their appellate claims, they often concluded that any error was harmless, such that "[o]f exonerees with written decisions, 32% had a court rely on harmless error, and 16% had a court agree that a claim had merit, but nevertheless deny relief due to harmless error.").

24. *Id.* at 61.

25. *Id.* at 131.

26. *See* Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea*

This is not to say that guilty pleas are always—or even often—disconnected from factual guilt. But, while the majority of guilty pleas may accurately reflect the defendant's culpability, some estimates indicate that innocent people plead guilty in between two to eight percent of felony cases.[27]

Reliance on a guilty plea as trustworthy evidence of the defendant's guilt is muddied by a closer look at the structure of the plea bargaining system, particularly the range of penalties that defendants face when they do not accept a plea. These consequences include the threat of added charges and longer sentences if the defendant does not plead guilty,[28] often including additional sentencing penalties for requiring the prosecutor to prepare for trial.[29] The defendant thus faces strong, even terrifying, inducements to take a plea, whether or not the charges are an accurate reflection of his conduct.[30] And while courts require a "factual

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Bargaining, 91 MARQ. L. REV. 213, 246–47 (2007) (describing the criminal justice system as an "integrated plea bargaining machine that functionally works to overcome the cognitive resistance of criminal defendants to plead guilty"); John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?*, 126 U. PA. L. REV. 88, 96–97 (1977) (citing a variety of reasons that an innocent defendant might plead guilty, including "the disparity in punishment between conviction by plea and conviction by trial," "the conditions of pretrial incarceration," and "a desire to expedite the proceedings because of feelings of hopelessness, powerlessness, or despair when faced with the power of the state").

27. Rakoff, *supra* note 10 (citing criminologists' estimates of the percentage of innocent people who plead guilty, and noting that, even if it is "no more than 1 percent" of felons, that would amount to 20,000 of the two million prisoners who are incarcerated as the result of guilty pleas); *see When the Innocent Plead Guilty*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php (last visited Jan. 18, 2015) (describing thirty-one cases in which people pled guilty to crimes for which they were later exonerated through DNA testing).

28. *See* HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 4–6 (2013), *available at* https://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf. This document describes the variety of methods used by prosecutors to induce defendants to plead guilty, including filing charges carrying long sentences and then offering to reduce the severity of the consequences in a range of ways if the defendant takes a deal, or threatening to increase the severity of the punishment if the defendant does not plead guilty. For example, prosecutors often formally notify the court of the defendant's prior convictions, which can in some circumstances double the sentence for a drug offense or increase the sentence to life in prison.

29. These are not empty threats; according to the Human Rights Watch report on federal plea bargaining practices, "[i]n 2012, the average sentence for federal drug offenders convicted after trial was three times higher (16 years) than that received after a guilty plea (5 years and 4 months)." *Id.* at 2.

30. *See, e.g.*, *The Best Defense Is a Good Defense*, SERIAL (Dec. 4, 2014), http://serialpodcast.org/season-one/10/the-best-defense-is-a-good-defense. In this popular podcast, focused on the conviction of Adnan Syed for the murder of his high school girlfriend, Mr. Syed states, in part, that "[o]nce you come into this whole system, one thing that you really learn is that no one really beats cases" and advises others accused of crimes to "take the deal. Regardless of

basis" for a plea,[31] that requirement does not prevent defendants from pleading guilty to crimes they did not commit; defendants in some jurisdictions may, for example, enter a nolo contendere[32] or *Alford* plea[33] instead. The fact that a person pleads guilty to a crime may or may not mean that he is guilty of committing it; a guilty plea does not therefore preclude uncertainty about the defendant's factual culpability.[34]

Once a defendant pleads guilty, however, the system is designed to preserve that plea. Defendants face obstacles to withdrawing their guilty pleas, particularly after sentencing has occurred or judgment has been imposed; in those circumstances, a defendant generally must establish that a withdrawal is required to cure a "manifest injustice,"[35] a standard which primarily focuses on procedural defects such as whether the plea was knowingly and voluntarily made.[36] Plea bargains offered by the government frequently require defendants to waive their constitutional and statutory rights, including the right to appeal, thus limiting the

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whether you did it, take the deal."

31. *See, e.g.*, FED. R. CRIM. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.").

32. 21 AM. JUR. 2D *Criminal Law* § 675 (2015) (describing a nolo contendere, or "no contest" plea as one in which the defendant admits the elements of the charge against him while not "admit[ting] the allegations of the charge").

33. North Carolina v. Alford, 400 U.S. 25, 37 (1970) (holding that "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime").

34. *See, e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2007) (writing that "plea bargaining pressures even innocent defendants to plead guilty to avoid the risk of high statutory sentences . . . . This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial"); *see also* Sydney Schneider, *When Innocent Defendants Falsely Confess: Analyzing the Ramifications of Entering Alford Pleas in the Context of the Burgeoning Innocence Movement*, 103 J. CRIM. L. & CRIMINOLOGY 279 (2013) (analyzing whether and in what circumstances defense attorneys should encourage their clients to enter into Alford pleas in cases of actual innocence).

35. Broadly speaking, the difficulty of withdrawing a plea depends on when the petition is made; "[g]enerally, the earlier the withdrawal is undertaken, the easier it will be." Robert L. Segar, *Plea Bargaining Techniques*, *in* 25 AM. JUR. 2D *Trials* § 54 (2015). Some states only permit defendants to withdraw pleas before sentencing, others only before judgment is entered, and still others, like the federal courts, permit withdrawal after sentencing and judgment in order "to avoid manifest injustice" or a similar standard. Wayne R. LaFave et al., *Criminal Procedure: Withdrawal of Plea*, *in* 5 CRIMINAL PROCEDURE § 21.5(a) (3d ed. 2014).

36. *See, e.g.*, United States v. Farley, 72 F.3d 158, 162–63 (D.C. Cir. 1995) (holding that defendants seeking to withdraw a guilty plea after sentencing must show that "the withdrawal of his plea is necessary to correct a 'manifest injustice,'" and the defendant's claim of innocence did not meet this standard).

opportunity for review of the plea bargain beyond the trial level.[37] The criminal justice system is thus structured to obtain guilty pleas through pressures that induce such pleas whether or not the defendant is actually guilty, and is further structured to preserve such pleas even when there is lingering uncertainty—or even substantial doubt—about their accuracy.[38]

B. Barriers to Raising Claims of Factual Innocence in Appellate Review of Jury Verdicts

For the small percentage of criminal defendants who are convicted at trial, it seems harder to argue that those convictions are clouded with uncertainty about the defendant's factual culpability. After all, the jury or judge has found the defendant, cloaked with the presumption of innocence, guilty beyond a reasonable doubt.[39] He has been afforded the right to counsel,[40] who must provide him with effective representation,[41] and has been given other protections including the right to compulsory process,[42] a jury trial,[43] and confrontation of the government's witnesses.[44] But even if the majority of criminal convictions obtained at trial are reflections of the defendant's factual guilt, the growing numbers of people identified as wrongly convicted demonstrate that error does occur.[45]

Regardless of whether criminal convictions are generally accurate reflections of the culpability of defendants as a whole, it is evident that

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37. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005) (finding that, in a study of federal plea agreements, two-thirds required defendants to agree to waive all or some of their appellate rights, including, in many cases, the right to raise claims on collateral review, including allegations of ineffective assistance of counsel).

38. Wright, *supra* note 6, at 154 (reviewing the history and scope of plea bargaining, and arguing that plea bargaining has "displace[d] acquittals and distort[ed] the truth-finding function of trials").

39. *See, e.g.*, *In re* Winship, 397 U.S. 358 (1970).

40. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

41. *See, e.g.*, Strickland v. Washington, 466 U.S. 668 (1984).

42. *See, e.g.*, Taylor v. Illinois, 484 U.S. 400 (1988).

43. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968).

44. *See, e.g.*, Coy v. Iowa, 487 U.S. 1012 (1988).

45. *See, e.g.*, Marvin Zalman, *Qualitatively Estimating the Rate of Wrongful Convictions*, 48 CRIM. LAW BULL. 221, 230 (2012) (suggesting "a general felony wrongful conviction rate of between 1/2 of 1% and 1%"); Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 832 (2010) (citing studies regarding the rate of wrongful convictions that "cap estimates at around 3% to 5% of convictions").

once convictions are obtained the criminal appellate process is structured to preserve that outcome even when doubts as to the factual guilt of the defendant remain.[46] While there is no constitutional right to appeal a criminal conviction,[47] the federal government and most state governments[48] provide people convicted of crimes the opportunity to do so.[49] On the state level, convicted people can pursue their claims through a process of direct appeal, state post-conviction procedures, and federal habeas review; people convicted of federal crimes can pursue direct review in federal courts of appeal, followed by habeas review.[50] In all these contexts, the convicted person faces significant procedural hurdles to raising innocence claims and a very small chance of success when such claims are raised.[51]

A person who is charged with a crime, subjected to the processes of the criminal justice system, and convicted, is presumed by appellate courts to be guilty; the presumption of innocence is entirely gone.[52]

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46. *See* Giovanna Shay, *What We Can Learn About Appeals from Mr. Tillman's Case: More Lessons from Another DNA Exoneration*, 77 U. CIN. L. REV. 1499, 1536 (2009) ("It is a commonplace observation that appeals are not really about guilt and innocence.").

47. *See* Abney v. United States, 431 U.S. 651, 656 (1977) ("[I]t is well settled that there is no constitutional right to an appeal."); Robertson, *supra* note 14 (arguing that the Supreme Court should, for due process and policy reasons, recognize a constitutional right to appeal in both criminal and civil cases).

48. *See* Robertson, *supra* note 14, at 1222 n.8 (noting that "appellate remedies are nearly universal: the federal court system and forty-seven states provide—as a matter of state law—either a constitutional or statutory requirement for appeals as of right in both civil and criminal cases"—the state-level exceptions being New Hampshire, West Virginia, and Virginia).

49. Even when the right to appeal exists, that right, in some circumstances, is not vigorously exercised. Juveniles convicted of crimes and people convicted of misdemeanor offenses generally have a right to appeal those outcomes, but the rate of appeal for juvenile and misdemeanor convictions is extremely low. *See, e.g.*, Megan Annitto, *Juvenile Justice on Appeal*, 66 U. MIAMI L. REV. 671, 672 (2012); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 320 (2011).

50. *See* Christopher M. Johnson, *Post-Trial Judicial Review of Criminal Convictions: A Comparative Study of the United States and Finland*, 66 ME. L. REV. 425, 428 (2012) (describing three levels of review for state prisoners: (1) direct appeal, (2) state post-conviction proceedings, and (3) federal habeas; and two levels for federal prisoners: (1) direct appeal and (2) habeas corpus).

51. *See, e.g.*, Garrett, *supra* note 16, at 61 (reporting that appellate courts reversed nine percent of the convictions of a group of appellants who were later determined to be actually innocent); *see also* Michael Heise, *Federal Criminal Appeals: A Brief Empirical Perspective*, 93 MARQ. L. REV. 825, 829, 833 (2009) (assessing data on federal criminal appeals collected by the United States Sentencing Commission in 2006, and noting that "most criminal appeals, regardless of type, are affirmed," although suggesting that perhaps the high rate of affirmance is due to a large number of "meritless" or "frivolous" appeals; further noting that "the overall average nationwide affirmance rate for 2006 criminal appeals was 68.5%," though that rate varied from 49.3% to 85.1% depending on the circuit undertaking the appeal).

52. *See* Ross v. Moffitt, 417 U.S. 600, 610 (1974) ("The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one

Appellate review exists to determine whether legal error occurred,[53] not to revisit factual determinations made at the trial level. Appellate courts are thus deferential to the facts established at trial, and will not consider new facts on direct appeal, even if those facts point to the defendant's innocence.[54] Although the appellant may argue that the evidence was insufficient to support his conviction,[55] it is usually impossible to raise factual innocence as a stand-alone legal claim.[56]

Since innocence claims are frequently based on issues related to factual determinations at the trial level, such as mistaken eyewitness identification, dubious forensic evidence, and untrustworthy informants,[57] it can be procedurally difficult to raise such claims on appeal. The convicted person must either attempt to couch his innocence claim in a limited number of direct constitutional arguments,[58] or through arguments that challenge the introduction of the evidence rather than the evidence itself, such as claims that the evidence improperly came before the fact-finder due to prosecutorial misconduct.[59] As

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found guilt beyond a reasonable doubt.").

53. *See* Shay, *supra* note 46, at 1536 (noting the "conventional wisdom" that appellate courts are charged with evaluating the trial court's compliance with legal principles rather than with revisiting factual decisions made by judges and juries).

54. *See* Findley, *supra* note 15, at 602, 605 (arguing that appellate courts fail to protect against wrongful conviction for a variety of reasons, including their "extreme deference to trial-level fact finders on factual determinations and related questions like credibility," and the fact that "there is no mechanism that ensures litigants a right to introduce new evidence of innocence during the direct appeal process").

55. *Id.* at 602 (noting that *Jackson v. Virginia*, 443 U.S. 307 (1979), requires courts reviewing sufficiency of the evidence claims to determine whether "if, taking the evidence in the light most favorable to the prosecution, there is insufficient evidence upon which a rational jury could find guilt," but noting that most appellate courts have "applied this standard so deferentially that in practice they uphold convictions unless there is essentially no evidence supporting an element of the crime").

56. *See* John M. Leventhal, *A Survey of Federal and State Courts' Approaches to a Constitutional Right of Actual Innocence: Is There a Need for a State Constitutional Right in New York in the Aftermath of CPL 440.10(G-1)?*, 76 ALB. L. REV. 1453, 1472 (2013) ("Currently, very few states recognize freestanding state constitutional claims of actual innocence.").

57. *See The Causes of Wrongful Conviction*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/ (last visited Oct. 20, 2015) (identifying the most common causes of wrongful convictions as eyewitness misidentification, false confessions, government wrongdoing, untrustworthy informants, defense counsel error, and unsound forensic evidence).

58. *See* Garrett, *supra* note 16, at 76, 77 n.80 (noting that, in a review of the appellate record of 133 wrongfully convicted people, "fewer than half of the defendants brought constitutional claims challenging the types of evidence supporting their wrongful convictions," among other reasons, because "few . . . constitutional claims exist" to challenge the type of evidence responsible for wrongful convictions).

59. *Id.* at 77 (reporting that some of the exonerees in the study group raised evidentiary

Professor Garrett's study of the appellate records of exonerated persons revealed, convicted people—even those who know they are innocent—may abandon fact-based arguments on their direct appeals altogether because there are no legal avenues by which their innocence claims may be raised.[60] If such arguments are made, appellate courts may side-step review because the defense lawyer at trial did not adequately "preserve" the issue, either by creating a record to support it or objecting in a timely manner.[61] Even if courts do engage in a substantive analysis of the claim and further find that error occurred, the appellant may nevertheless lose because the court determines that the error, in one commentator's words, "didn't matter anyway"[62]—that the mistake was harmless beyond a reasonable doubt.[63] Courts undertaking direct appellate review of convictions are therefore not engaged in resolving uncertainty about the defendant's culpability; instead, the appellate process is designed both to preclude convicted persons from raising claims based on factual innocence and to prevent courts from granting relief for such claims when they are raised.

Convicted persons have greater latitude to introduce new facts in post-conviction motions or state and federal habeas corpus appeals, but all of these layers of review have been criticized for the barriers they have erected to limit or prevent the meaningful consideration of innocence claims. The appellant is impeded by the lack of resources available to assist him in preparing these collateral appeals—for

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challenges through claims that were "less direct" than a constitutional argument directed at the evidence itself; "[f]or example, rather than bring a claim that a confession was involuntary, one might indirectly assert a claim that the attorney was ineffective for failing to challenge the confession").

60. Findley, *supra* note 15, at 595–97 (discussing the lack of legal arguments available for many claims of factual error, and noting that exonerated persons in the Garrett study who were convicted based on mistaken eyewitness identification "did not even raise challenges to the eyewitness identification evidence, even though these innocent defendants obviously knew it was mistaken . . . . Most defendants simply could not even find a viable claim to make to challenge the actually mistaken, false identification evidence in their cases").

61. Shay, *supra* note 46, at 1539 (discussing the frequency with which state appellate courts "dispose of claims for lack of preservation or failure to make an adequate record," including counsel's "failure to object or make a legal argument, failure to ensure sufficient memorialization of what transpired at trial, and failure to make an adequate 'offer of proof' or request an evidentiary hearing").

62. *Id.* at 1542.

63. Findley, *supra* note 15, at 603–04 (explaining that the doctrine of harmless error "encourage[s] courts to overlook error, even when they find that it exists," and further noting that "other legal standards, such as the standard for ineffective assistance of counsel and for establishing a Brady violation, encourage courts to ignore possible impediments to accuracy by imposing on the defendant a burden of proving prejudice from the errors of defense counsel or the prosecutor").

example, appellants seeking post-conviction relief do not have a right to counsel except in capital cases.[64] In state post-conviction motions, such as a motion for a new trial, defendants are hampered in raising wrongful convictions claims by short statutes of limitations,[65] as well as the fact that the motion is considered by the original trial judge, who may be inclined, for a variety of reasons, to preserve the original verdict obtained on his or her watch.[66] In state habeas corpus review, complex procedures, high burdens of proof, and demonstrably poor records in remedying trial-level constitutional error combine to create a process inhospitable to identifying and rectifying wrongful convictions.[67]

A petitioner seeking relief for a wrongful conviction through federal habeas review is also highly unlikely to meet with success.[68] The Supreme Court has held that the "Great Writ" does not exist to remedy free-standing claims of actual innocence, as "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the

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64. *Id.* at 615 (discussing the limitations on raising claims based on new evidence in post-conviction or habeas motions, including the fact that the convicted person has no right to a court-appointed lawyer or experts, nor to transcripts; that the passage of time hinders the appellant's ability to find the evidence in the first place; and that "the burden for obtaining relief in such collateral proceedings is often higher than on direct appeal"); *see also* Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61, 88–89 (2011) (discussing the statutes governing the appointment of counsel in federal habeas proceedings, and noting that, while ninety-five percent of capital prisoners were represented by counsel in their habeas appeals, "only about two percent of criminally confined, noncapital prisoners had lawyers").

65. *See* Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 676 (2005).

66. *See* Stephanie Roberts Hartung, *Missing the Forest for the Trees: Federal Habeas Corpus and the Piecemeal Problem in Actual Innocence Cases*, 10 STAN. J. C.R. & C.L. 55, 62 (2014) (discussing the concern that judges considering motions for a new trial may display a "cognitive bias [that] operates to subconsciously prejudice judges toward upholding their prior decisions," a bias that might be exacerbated by the need for elected judges to appear "tough on crime" and the desire to defer to the jury's determination of guilt; noting also that "in some states, there is no right to appeal a motion for new trial, but even where there is, the standard of review requiring abuse of discretion is often regarded as so high that it effectively precludes relief to a defendant claiming actual innocence").

67. *See id.* at 63–64 (describing the barriers to claims of actual innocence in state-level post-conviction proceedings, and concluding that "[w]hile the innocent prisoner is presented with a façade of protection in the form of direct appeal and collateral attack of the conviction via motion for a new trial and state habeas review, nothing lies beneath the surface").

68. *See id.* at 64 (noting that federal habeas petitions are "virtually never granted"); NANCY J. KING & JOSEPH L. HOFFMAN, HABEAS FOR THE 21ST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT 79, 87–100 (2011) (stating that approximately 0.35% of habeas petitions brought by state prisoners in noncapital cases result in a remand to state court); Ronald Quy Tran, *State Trial Courts as the New Champions of the Great Writ: An Argument for a Statement of Decision in the Criminal Context*, 47 U.S.F. L. REV. 163, 169 (2012) ("Statistically speaking, there is virtually no likelihood of obtaining relief from unconstitutional trial error on federal collateral review.").

Constitution—not to correct errors of fact."[69] The federal Antiterrorism and Effective Death Penalty Act (AEDPA),[70] enacted in 1996, is particularly responsible for a host of procedural and substantive limitations on habeas review.[71] The AEDPA, among other changes, established a one-year statute of limitations for filing habeas petitions,[72] required that federal courts display greater deference to state court rulings,[73] barred successive claims except in limited circumstances,[74] and required prisoners arguing innocence to prove such innocence by clear and convincing evidence.[75] Many have argued that these and other changes have acted to severely restrict habeas corpus relief "even when newly discovered evidence suggests the prisoner might be innocent."[76] Indeed, as Justice Scalia noted in his dissent in *In re Davis*,[77] "This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent."[78]

Many of the restrictions placed on habeas corpus petitions arose, at least in part, from allegiance to the core, though much criticized, principle of finality.[79] Proponents of finality argue that, once a conviction has been obtained, there is value in requiring the system to

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69. Herrera v. Collins, 506 U.S. 390, 400 (1993) (noting, however, that "a truly persuasive demonstration of actual innocence" in a death case might, in theory, constitute a permissible freestanding claim to habeas relief); *see also The Supreme Court 2012 Term: Leading Cases*, 127 HARV. L. REV. 318, 323 (2013) (describing habeas review as serving "to ensure procedural justice in criminal proceedings. It is not directly concerned with substantive justice").

70. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

71. *But see* Kimberly A. Thomas, *Substantive Habeas*, 63 AM. U. L. REV. 1749, 1767 (2014) (acknowledging that "at least some scholars believed that the Court had already done the most significant procedural 'reforms' prior to the passage of AEDPA. Other scholars echoed the limited impact of AEDPA on the substantive side").

72. 28 U.S.C. § 2244(d)(1) (2012).

73. *Id.* § 2254(d), (e).

74. *Id.* § 2244(b).

75. *Id.* § 2254(e)(1); *see also* Hartung, *supra* note 66, at 75–82 (describing the provisions of the AEDPA as "barriers to factually innocent prisoners seeking post-conviction relief" and arguing that the act "rendered federal habeas corpus procedure a façade that appears to facilitate review of actual innocence claims without actually doing so").

76. Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2361 (2007); *see also* Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After* Martinez, 55 WM. & MARY L. REV. 2071, 2088 (2014) (describing the focus of habeas review as "denying relief to the guilty, not on providing relief to the innocent").

77. 577 U.S. 901 (2009).

78. *Id.* at 955.

79. Duncan v. Walker, 533 U.S. 167, 168, 178 (2001) (describing the AEDPA as advancing the "principles of comity, finality, and federalism").

reach a point where it stops reconsidering what it has done before. The judicial adherence to strict appellate deadlines is an example of the value of finality trumping questions of the accuracy of the criminal conviction.[80] Finality has played its most significant role, however, in the context of habeas corpus review. Legions of courts have cited the principles underlying the call for finality in support of significant restrictions on habeas corpus relief, and the AEDPA in particular ushered in an era in which courts considering habeas petitions have valued the finality of a conviction above almost all else.[81]

Our criminal justice system is thus one that pushes hard to obtain a conviction, and, once that conviction is obtained, is one designed to preserve it, even when ambiguity about the defendant's guilt remains. Indeed, as we have seen, post-conviction review procedures are often structured to avoid questions regarding the accuracy of the conviction altogether. It is true that DNA exonerations in recent years have challenged the perception of the criminal justice system as nearly flawless; gone are the days when Learned Hand famously described the concept of a wrongful conviction as an "unreal dream."[82] Courts and legislatures have taken some action to address the injustice of wrongful convictions, such as through the enactment of laws allowing convicted persons to seek post-conviction DNA testing in some circumstances[83] or through the creation of so-called "Innocence Commissions" with the power to investigate claims of actual innocence after a conviction has occurred.[84] (Even these types of efforts have limitations, however, such

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80. *See* Robertson, *supra* note 14, at 1275 ("In almost every case, however the value of accuracy will eventually give way to a need for finality, as evidenced by the universal existence of appellate deadlines."). For another example of finality's influence on the justice system, see Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79 (2012) (describing the refusal of federal courts to correct sentencing errors on collateral review—even when the error is acknowledged by the prosecutor and sentencing court—based on allegiance to the principles of finality).

81. Marceau, *supra* note 76, at 2086 ("First, federal habeas review, particularly after the enactment of the AEDPA, is considerably less hospitable to any federal judgments that would disturb the federalism concerns and finality of a state conviction.").

82. United States v. Garrison, 291 F. 646, 649 (S.D.N.Y. 1923) ("Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream."); *see also* Findley, *supra* note 15, at 593 ("Until recently, we have taken it on faith that the appellate system does what it purports to do—ensures largely error-free trials that accurately sort the guilty from the innocent," but "[p]ostconviction DNA testing has changed that.").

83. Garrett, *supra* note 16, at 117–18 (describing the recent enactment of laws allowing post-conviction DNA testing in many jurisdictions, but noting that such laws often impose "difficult preliminary showings" and require the asset of law enforcement).

84. *See* David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1032 (2010) (arguing that Innocence Commissions can provide a more robust

as restricting review to cases involving DNA evidence,[85] or excluding review of guilty pleas.)[86] And, of course, there are cases where appellate courts overturn convictions because of factual error or proof of innocence. Despite these efforts, however, our system of appellate review is not well designed to address or resolve uncertainty regarding the accuracy of a criminal conviction.

While the criminal justice system is willing to tolerate uncertainty about whether a conviction was reflective of factual guilt, this tolerance does not extend to uncertainty about the accuracy of cases that did *not* result in a conviction. As Part II reveals, if a person is charged with a crime and not convicted, the lingering concern that the defendant might nevertheless be guilty is precisely what drives the continual reconsideration of the prior charge, as prosecutors, judges, probation officers, and others are free to substitute the outcome of acquittal or dismissal with their own determination of culpability.

II. THE IMMORTALITY OF ACCUSATIONS

Just as a person convicted of a crime might be innocent, a person acquitted of a crime may be guilty. The fact that the government chose to dismiss a criminal charge or a factfinder determined that the government failed to prove a case beyond a reasonable doubt is a far cry from a conclusion that the accused person was factually innocent of the crime. Prosecutors routinely dismiss charges as part of plea bargains, not because of a belief that the initial accusation was false. Jurors or judges may enter acquittals not because they believe the defendant was truly innocent, but rather because of their legal obligation to find a defendant not guilty if any reasonable doubt as to his guilt remains. Since there is often no way to know why the jury was motivated to acquit or the prosecutor to dismiss, those outcomes leave room for uncertainty about the defendant's true culpability of the crime for which he was not convicted.[87]

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review of actual innocence claims than the appellate review and post-conviction review process).

85. This, despite the fact that "DNA cases represent a very small percentage of criminal cases overall." Hartung, *supra* note 66, at 71.

86. *See* Wolitz, *supra* note 84, at 1040 (reviewing some legislative efforts to expand "innocence-based post-conviction challenges," but noting that "these statutes so restrict the type of claims that can be brought, the classes of prisoners who can bring such claims, and the timeframe within which such challenges can be brought, that they fail to provide the orderly mechanism for post-conviction relief that they promise").

87. There are therefore not readily available statistics about the percentage of guilty people who wrongfully avoid conviction, either through acquittals or because the prosecution dismissed the

Once a person is acquitted of a crime, the Double Jeopardy Clause of the Fifth Amendment bars the government from prosecuting him for that offense a second time.[88] Nevertheless, when the state fails to obtain a conviction against a criminally accused person, courts generally consider that outcome as a process failure, reflecting the challenges of a high standard of proof[89] or the overly burdened system,[90] rather than an accurate determination that the defendant did not commit the crime.[91] Decision makers ranging from judges imposing sentences to parole officers making parole revocation determinations thus may base their decisions, at least in part, on charges for which the defendant was not convicted. This reliance is animated by the suspicion that such charges represent acts for which the defendant is factually guilty, but for which

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charges. *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1325 n.25, 1396 (1997) ("[T]here is no legal literature dealing with acquittals generally . . . . There are no appellate decisions. No defense committees organize to demonstrate the injustice of false acquittals."). In a 2006 paper, *Estimating the Accuracy of Jury Verdicts*, Bruce D. Spencer sought to analyze the accuracy of jury verdicts by comparing the rate at which judges agree with the jury's verdict, ultimately estimating that the conditional probability by which a jury incorrectly acquits is 0.14, as compared to a 0.25 probability of incorrect convictions. *See* Bruce D. Spencer, Estimating Accuracy of Jury Verdicts (Northwestern Univ. Inst. Policy Research, Working Paper No. WP-06-05, 2006), *available at* http://www.ipr.northwestern.edu/publications/doc/workingpapers/2006/IPR-WP-06-05.pdf.

88. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."). This is so, as the United States Supreme Court has explained:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187–88 (1957).

89. *See, e.g.*, United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984) ("[A]cquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt."); *see also* United States v. Watts, 519 U.S. 148, 155 (1997) ("An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences . . . ." (quoting United States v. Putra, 78 F.3d 1386, 1394 (9th Cir. 1996))); Claire M. Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 ST. JOHN'S L. REV. 1415, 1463–64 (2010) (noting that "at present there is no verdict whereby a criminal defendant may definitively prove his innocence and have that innocence be certified by the state").

90. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471, 2479 (2004) (observing that both prosecutors and defense lawyers have incentives to plea bargain that are influenced by excessive caseloads).

91. Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1299 (2000) ("Given our deeply rooted preference for acquitting guilty people to convicting the innocent, we strongly suspect that many defendants who are acquitted were in fact guilty . . . .").

he escaped justice.[92]

These decision makers generally rely on accusation evidence as an indicator of the actor's character and a predictor of his future conduct. Accusation evidence plays other roles as well; for example, a dismissed charge or acquittal may constitute evidence that the accused person violated terms of his parole or possessed specific skills relevant to the commission of a new crime. But the belief that prior criminal acts provide decision makers with salient information about a person's character or his likelihood to commit future crimes informs the use of accusation evidence in most circumstances—from sex crime prosecutions to credibility determinations in trial. Judges, prosecutors, probation officers, parole officials, and others thus seek to understand what kind of person the defendant is and how he or she may behave in the future by looking at his or her prior criminal acts—whether the defendant was convicted of those acts or not.[93] Whether or not these decision makers are correct in their assumption that a person's prior acts have predictive power for his future conduct or provide insight into his

92. A distrust of acquittals and dismissals extends beyond the criminal justice system. For example, people who have been arrested but not convicted of crimes often experience challenges in finding housing and employment, just as if they had been found guilty of those offenses. *See* THE LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY: A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS 10, 16 (2004), *available at* http://www.lac.org/roadblocks-to-reentry/ (noting that "many public housing authorities deny eligibility for federally assisted housing based on an arrest that never led to a conviction" and citing the fact that "37 states have laws permitting all employers and occupational licensing agencies to ask about and consider arrests that never led to conviction in making employment decisions"). Some find themselves on public criminal registries based on allegations for which they have not sustained a criminal conviction. *See* John Sherman, *Procedural Fairness for State Abuse Registries: The Case for the Clear and Convincing Evidence Standard*, 14 J. GENDER RACE & JUST. 867, 872 (2011) (describing state laws that require the inclusion of individuals on public child abuse and adult abuse registries based on a state agency's finding that abuse occurred). Accusations thus retain a perpetual influence outside of the system, in the form of a wide variety of civil consequences, and within the system, in the form of accusation evidence.

93. The use of accusation evidence may increase, as scholars and advocates from both defense and prosecution camps are increasingly calling for courts to engage in "evidence-based decision making," which calls for courts to base judicial decisions on peer-reviewed social science research. *See* NAT'L INST. OF CORR., A FRAMEWORK FOR EVIDENCE-BASED DECISION MAKING IN LOCAL CRIMINAL JUSTICE SYSTEMS 6 (2010) (describing a goal of building "a systemwide framework (arrest through final disposition and discharge) that will result in more collaborative, evidence-based decisionmaking and practices in local criminal justice systems"). This movement asks judges, in sentencing, to look at aspects of the defendant's life that are, according to proponents of this approach, more generally tied to future offending. *See* J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1355–56 (2011). Under the evidence-based approach, "adult criminal history is the staple of risk prediction"—a staple that includes arrest records as well as convictions. *Id.*

character (a much-debated question[94]), the reliance on accusation evidence may be understood as an effort on the part of the criminal justice system to engage in the search for truth.

This Part will review the ways in which decision makers rely on accusation evidence—again, evidence of alleged crimes for which the defendant was previously charged but not convicted—during trial, juvenile transfer hearings, and sentencing. It will also touch on the use of accusation evidence at decision points that are inherent to the charging and punishment phases of the criminal justice system: the filing of charges, parole revocation hearings, and prison classification procedures. At each stop along the way, this Part cites the facts of real cases to illustrate the profound effect that accusation evidence can have on the experience of both defendants and prisoners within the criminal justice system.

A. Accusation Evidence in Trial

In the U.S. justice system, a defendant can only be convicted of a crime at trial if the prosecutor proves each element of the offense beyond a reasonable doubt. During the trial, however, a variety of evidentiary rules allow judges to permit the introduction of other criminal acts for which the person was formerly prosecuted but not convicted, for purposes ranging from establishing a motive for the new offense to attacking the credibility of a witness.

1. Accusation Evidence as "Other Act" Evidence Under Federal Rule of Evidence 404(b)(2)

Charles Smith, Jr., was charged with two counts of armed robbery and one count of bank robbery[95] based on allegations that he robbed two convenience stores and a bank during a journey from Dalton to Atlanta, Georgia.[96] Although he was acquitted of the convenience store robberies in his first trial, the jury was hung on the bank robbery charge. In his eventual retrial on the bank robbery charge, the court allowed the prosecutor to introduce testimony about the convenience store robberies

94. *See, e.g.*, Edward J. Imwinkelried, *Reshaping the 'Grotesque' Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741 (2008); Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717 (1998); Charles Rose, *Should the Tail Wag the Dog?: The Potential Effects of Recidivism Data on Character Evidence Rules*, 36 N.M. L. REV. 341 (2006).

95. Along with related firearms charges.

96. United States v. Smith, 148 F. App'x 867 (11th Cir. 2005).

for which Mr. Smith had been acquitted in order to identify him as the perpetrator of the bank robbery. The appellate court upheld the lower court's ruling, noting that, while Mr. Smith had been acquitted of the convenience store robberies, the jury's verdicts of acquittal did "not represent findings of true innocence."[97]

The Federal Rules of Evidence (FRE), and similar rules in all fifty states, forbid the introduction at trial of evidence of a person's crime, wrong, or other act "to prove a person's character in order to show that on a particular occasion the person acted in accordance with that character."[98] FRE 404(b)(2) and its state-level counterparts do, however, permit parties to introduce so-called "other act" evidence, such as Mr. Smith's acquitted convenience store robberies, to prove such things as motive, identity, intent, preparation, plan, or knowledge—indeed, for any purpose other than proof of a character trait.[99] In practical terms, this means that lawyers may present the fact-finder with evidence that the defendant committed an act other than the one for which he is being prosecuted, so long as they avoid arguing that the other act is emblematic of his flawed character. Other act evidence is not limited solely to criminal acts,[100] but such evidence is generally offered by a prosecutor against a criminal defendant, and is frequently of a criminal nature.[101]

When lawyers introduce allegations that a person has committed other criminal acts under FRE 404(b)(2), they are not limited to acts for which that person has been convicted. In *Huddleston v. United States*,[102] the Supreme Court held that a judge may admit other act evidence if he or

97. *Id.* at 870.

98. FED. R. EVID. 404(b)(1).

99. FED. R. EVID. 404(b)(2) ("This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.").

100. A prosecutor might, for example, attempt to introduce evidence that a defendant charged with murder had an affair with the decedent to demonstrate that the defendant had a motive to kill, such as keeping the affair a secret. The court is likely to admit this evidence under 404(b)(2) (or its state-level equivalent) so long as the prosecutor avoids arguing that the affair is evidence that the defendant is a morally flawed person who is therefore more likely to have committed a homicide—the inference forbidden under 404(b)(1).

101. *See* Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 216 (2005) (arguing that "[u]ncharged misconduct evidence may be admissible under a comforting legal theory, i.e., to prove a non-character intermediate issue. However, its real value to the prosecution is the forbidden innuendo: uncharged misconduct proves that the defendant committed other crimes, thereby making it more likely that the defendant committed the crimes charged in the indictment because the defendant has an evil character").

102. 485 U.S. 681 (1988).

she determines that a reasonable jury could find by a preponderance of the evidence that the other act occurred.[103] In *Dowling v. United States*,[104] the Supreme Court established that the introduction at trial of other act evidence for which the defendant was previously acquitted does not run afoul of the Double Jeopardy or Due Process clauses of the Constitution.[105] Federal circuit courts have further held that the fact that the prosecutor's office dismissed a charge in the past does not prohibit lawyers from introducing evidence of that criminal act in a future trial under FRE 404(b)(2).[106]

Under the low federal standard established by *Huddleston*[107] and the standards of proof applied to this evidence by many state courts—all of which fall below proof beyond a reasonable doubt[108]—lawyers are able to routinely introduce accusations for which the person has never been

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103. *Id.* at 689–90. In *Huddleston*, the Court identified whether "the jury can reasonably conclude that the act occurred and the defendant was the actor" as a question of conditional relevance governed by FRE 104(b). *Id.* at 689. It held that "[i]n determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence." *Id.* at 690.

104. 493 U.S. 342 (1990).

105. *Id.* at 351–53 (holding that the introduction of evidence that defendant committed another crime, despite the fact that he had been acquitted of that crime at trial, was not precluded by the doctrine of collateral estoppel because of the difference between the "beyond a reasonable doubt" standard required in trial and the lower *Huddleston* standard applied to 404(b) evidence and thus did not violate the due process test).

106. United States v. Carney, 387 F.3d 436, 450–52 (6th Cir. 2004) (finding no abuse of discretion in the introduction of "evidence of similar transactions . . . which had been the subjects of dismissed counts or counts of acquittal at the defendants' initial trial" because the government "need not prove probative 'other acts' beyond a reasonable doubt; rather, that proof must merely be sufficiently compelling such that 'the jury can reasonably conclude that the act occurred and that the defendant was the actor'").

107. *See, e.g.*, PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE 181 (4th ed. 2013) (describing the *Huddleston* holding as "a very lax standard").

108. *See, e.g.*, People v. McGraw, 30 P.3d 835 (Colo. App. 2001). Many state courts have held that when the prosecution introduces evidence that the defendant has committed other criminal acts for which he or she has been acquitted, the court should instruct the jury about the acquittal. *See* Kinney v. People, 187 P.3d 548, 555–56 (Colo. 2008) (noting that in cases analyzing the introduction by the prosecution of other act evidence for which the defendant had been acquitted, "[s]tate courts . . . have generally ruled that under the facts of a particular case, a defendant was entitled to an acquittal instruction," but also noting that federal courts do not usually find that lower courts have abused their discretion in failing to provide an acquittal instruction under those circumstances); Christopher Bello, *American Law Reports Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of that Offense*, 25 A.L.R. 4th 934 (2015) (compiling case law from federal and state courts regarding the admissibility of evidence of an act for which the defendant has been acquitted, and the defendant's right, if the act is allowed into evidence, to introduce proof that he or she had been acquitted of that act in a prior trial).

convicted as other act evidence at trial.

2. Accusation Evidence in Sex Assault and Child Molestation Trials

Ralph Hess was charged with sexual assault, but claimed the sex was consensual.[109] At trial, in order to rebut his claim of consent, the prosecution introduced testimony from another woman who claimed that Mr. Hess had sexually assaulted her in the past. The court permitted the introduction of this testimony despite the fact that Mr. Hess had been acquitted of that prior alleged assault. That acquittal, the appellate court later wrote, did not prove that Mr. Hess was innocent, but "only that the state did not prove every element of the crime beyond a reasonable doubt."[110]

It is not unusual for the government, as in Mr. Hess's case, to seek to prove a sexual assault charge by introducing evidence of a prior sexual assault for which the defendant was never convicted. Accusation evidence plays a role in federal (and some state-level) sex assault or child molestation trials. In such prosecutions, FRE 413 and 414 allow prosecutors to admit evidence that the defendant "committed any other sex assault" or "any other child molestation" for any purpose for which such evidence is relevant, including the character evidence generally forbidden under FRE 404(b)(1).[111] The government is not limited to introducing evidence of the defendant's prior sexual assault or child molestation convictions, but may also introduce prior accusations of those crimes that did not result in a finding or plea of guilty. Federal district courts have held that this type of accusation evidence may be admitted under the *Huddleston* standard described above—that is, after the court makes a preliminary determination that a reasonable jury could find by a preponderance of the evidence that the defendant committed the prior crime.[112]

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109. Hess v. Alaska, 20 P.3d 1121 (Alaska 2001).

110. *Id.* at 1125 (holding that the defendant should have been permitted to inform the jury about the fact that he was acquitted of the prior crime, as it could "help the jury weigh the evidence of the prior act").

111. "In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant." FED. R. EVID. 413(a). "In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant." FED. R. EVID. 414(a).

112. *See, e.g.*, United States v. Dillon, 532 F.3d 379, 387 (5th Cir. 2008) ("To be admissible under Rule 413, the uncharged 'offense of sexual assault' need not be established by a conviction, but the district court must make a preliminary finding that a jury could reasonably find by a preponderance of the evidence that the defendant committed the other act and that it constituted an

Although the majority of states have not adopted evidence rules equivalent to FRE 413 and 414, a significant number of states have passed legislation that broadens the criteria for admissibility of other sexual crimes in sex assault and child molestation cases.[113] In those states, as under the federal rules, courts may admit evidence of accusations of other sexual crimes for which the defendant was not convicted as well as convictions for such crimes. When a prosecutor seeks to admit accusation evidence in a sexual assault trial in one of these states, state appellate courts have held that the prosecution must prove that the defendant committed the prior sexual crime either by clear and convincing evidence[114] or by a preponderance of the evidence.[115]

3. Accusation Evidence and Credibility

Accusation evidence also plays a role in challenges to a witness's

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'offense of sexual assault' for purposes of Rule 413."); United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (holding that "similar acts must be established by 'sufficient evidence to support a finding by the jury that the defendant committed the similar act'"). Not every court applies the *Huddleston* standard when deciding whether to admit prior accusations of sexual assault or child molestation under FREs 413 and 414. *See, e.g.*, United States v. Redlightning, 624 F.3d 1090, 1120 (9th Cir. 2010) (holding that "[e]vidence that tends to show that Redlightning committed another sexual assault, namely, his 1990 confession to that sexual assault, was admissible under Rule 413 because it tends to show that Redlightning had the propensity to commit another sexual assault"). Some appellate courts have established factors that the trial court must consider when applying FRE 403 to FRE 413 and 414. *See, e.g.*, United States v. LeMay, 260 F.3d 1018, 1027–28 (9th Cir. 2001) (citing several factors that "district judges must evaluate in determining whether to admit evidence of a defendant's prior acts of sexual misconduct," including the similarity between the prior acts to the acts charged in the current trial, how close in time the prior acts were to the new alleged crime, and how often the prior acts occurred).

113. EDWARD J. IMWINKELRIED, 1 UNCHARGED MISCONDUCT EVIDENCE § 4:16 (1998) (noting the passage of legislation "selectively abolishing the character evidence prohibition in sexual assault prosecutions, in a fifth of the states, including Arizona, California, Colorado, Louisiana, and Texas"); *see also* Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 AM. J. CRIM. L. 327, 342 (2012) ("Though no state has adopted them in their entirety, approximately eleven states have codified rules which are similar in substance and application to FRE 413 and FRE 414.").

114. *See, e.g.*, McLean v. State, 934 So. 2d 1248, 1262 (Fla. 2006) ("Of course, before even considering whether to allow evidence of prior acts to be presented to the jury, the trial court must find that the prior acts were proved by clear and convincing evidence.").

115. *See, e.g.*, CALJIC, *Evidence of Other Crimes by the Defendant Proved by a Preponderance of the Evidence* § 2.50.1 (7th ed. 2003). These jury instructions state, in part, that:

> Within the meaning of the preceding instruction[s], the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed [a] [crime[s]] [or] [sexual offense[s]] other than [that] [those] for which [he] [she] is on trial. You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that [a] [the] defendant committed the other [crime[s]] [or] [sexual offense[s]].

Id. (alterations in original).

credibility at trial. FRE 608(b), and similar rules in the majority of the states, allows attorneys to cross-examine witnesses about specific instances of the witness's conduct if those instances are deemed probative of the character of truthfulness[116] or untruthfulness of the witness.[117] These specific instances are not limited to criminal acts—courts may find other types of conduct, such as fabricating information on a resume, to be probative of an untruthful character—but cross-examination under 608(b) frequently involves questions about crimes such as fraud and perjury.[118] While most states forbid attorneys from questioning a witness about crimes that did not result in a conviction, federal courts allow questioning about specific instances of conduct, including evidence of a criminal act for which the witness was charged but not convicted, so long as the questioner has "a good-faith factual basis for the questioning."[119]

B. Accusation Evidence in Juvenile Transfer Hearings

Sixteen-year-old Terry Wilson was arrested for selling cocaine and crack.[120] The government wished to charge him in adult rather than juvenile court, and the trial judge ordered the transfer after a hearing. In determining that Terry Wilson should be treated as an adult rather than a child in the criminal justice system, the court relied, among other information, on arrests for which he was not convicted. The appellate court affirmed, stating that it was within the court's discretion to rely on the entirety of Wilson's juvenile record, convictions and accusations alike.[121]

Terry Wilson's case represents a contested question in our nation's juvenile court system: the role that prior, unproven accusations in the child's record should play in determining whether or not he should be

116. FRE 608(a) mandates, however, that "evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked." FED. R. EVID. 608(a).

117. Or probative of the character of another witness about whose character "the witness being cross-examined has testified about." FED. R. EVID. 608(b)(2).

118. *See, e.g.*, United States v. Tomblin, 46 F.3d 1369, 1389 (5th Cir. 1995) ("Rule 608 authorizes inquiry only into instances of misconduct that are 'clearly probative of truthfulness or untruthfulness,' such as perjury, fraud, swindling, forgery, bribery, and embezzlement." (citations omitted)).

119. *See, e.g.*, United States v. Courtney, 439 F. App'x 383, 385 (5th Cir. 2011) (citing United States v. Nixon, 777 F.2d 958, 970–71 (5th Cir. 1985)) ("For testimony about such an alleged bad act to be admissible under Rule 608(b), the questioning party must have a good-faith factual basis for the questioning.").

120. United States v. Wilson, 149 F.3d 610 (7th Cir. 1998).

121. *Id.*

tried as an adult. Since separate courts for children accused of crimes were first instituted in the 1890s, the federal government and all fifty states have established juvenile courts with a focus on the rehabilitation of the child who has committed a criminal act.[122] These courts retain jurisdiction over children under eighteen charged with criminal offenses. In some circumstances, however, children charged with crimes may instead be tried and sentenced in adult court under a variety of procedures known generally as "transfer" or "waiver" proceedings. The decision to charge a juvenile as an adult carries significant repercussions for the child,[123] and accusation evidence is frequently a factor in this determination.[124]

1. Accusation Evidence and Prosecutorial Discretion in Juvenile Transfer Decisions

When prosecutorial discretion laws control transfer decisions, prosecutors have the authority to decide whether juveniles charged with certain crimes will be charged in adult or juvenile court. Transfer laws that fall into the "prosecutorial discretion" category give power solely to district attorneys to decide whether to file charges against a child in juvenile or adult court, but generally provide no criteria to guide that decision, nor provide for review of the decision once it is made.[125]

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122. Brian Fuller, *Criminal Law—A Small Step Forward in Juvenile Sentencing, But Is It Enough? The United States Supreme Court Ends Mandatory Juvenile Life Without Parole Sentences;* Miller v. Alabama, *132 S. Ct. 2455 (2012)*, 13 WYO. L. REV. 377, 378–79 (2013) ("The dissatisfaction with a criminal court system that detained, tried, and punished children in the same manner as adults led to the creation of a separate juvenile court systems in the 1890s."); Emily A. Polachek, *Juvenile Transfer: From 'Get Better' to 'Get Tough' and Where We Go from Here*, 35 WM. MITCHELL L. REV. 1162, 1166 (writing that the creation of the first juvenile courts in the United States dates back to "the Illinois Juvenile Court Act of 1899" and further explaining that, by "1945, juvenile courts existed in every jurisdiction in the country, including the federal court system").

123. These repercussions include exposure to lengthier prison sentences and incarceration with adults rather than in facilities designed for juveniles, where they are at high risk of victimization by older inmates. *See, e.g.*, Randie P. Ullman, *Federal Juvenile Waiver Practices: A Contextual Approach to the Consideration of Prior Delinquency Records*, 68 FORDHAM L. REV. 1329, 1346 (2000) ("Statistics reveal that juveniles transferred to adult court and housed in adult prisons are five times more likely to become victims of sexual assault and at least 50% more likely to be attacked with a weapon than those juveniles housed in rehabilitation facilities.").

124. A third category of laws known as statutory exclusion laws specify particular types of crimes that must be charged in adult court, and do not award discretion to either courts or prosecutors.

125. *See* U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE & DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: NATIONAL REPORT SERIES—TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 5 (2011), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf. This report notes that:

National Prosecution Standards established by the National District Attorney's Association advise prosecutors to base transfer decisions on, among other factors, the gravity of the alleged offense and the juvenile's "record of previous delinquent behavior," without specifying whether the consideration of the child's record should be limited to those charges for which he or she was found guilty.[126] Because standards are scarce and there is no oversight or review of prosecutorial transfer decisions, prosecutors are free to consider arrests, dismissed charges, or even alleged behavior for which the juvenile was previously acquitted when determining whether a child should be tried in adult court.[127]

2. Accusation Evidence and Judicial Discretion in Juvenile Transfer Decisions

When judicial waiver laws control transfer decisions, judges determine whether a case should be transferred from juvenile to adult court,[128] usually after a formal hearing.[129] In *Kent v. United States*,[130] the

> [P]rosecutorial discretion laws are usually silent regarding standards, protocols, or appropriate considerations for decisionmaking. Even in those few states where statutes provide some general guidance to prosecutors, or at least require them to develop their own decision-making guidelines, there is no hearing, no evidentiary record, and no opportunity for defendants to test (or even to know) the basis for a prosecutor's decision to proceed in criminal court.

Id.

126. NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS § 4-11.5 (2010). The National District Attorney's Association National Prosecution Standards advise prosecutors, when deciding whether a charge against a juvenile should be adjudicated or subjected to diversion, to consider, among other factors, "[t]he nature and number of previous cases presented by law enforcement or others against the juvenile, and the disposition of those cases." *Id.* § 4-11.6, at 65; *see also* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 437 (describing the fact that, "in most states, prosecutors make charging decisions with little guidance about whether and how to charge youth . . . . Moreover, prosecutors have published few internal standards to guide prosecutorial decisions at the juvenile intake and charging stage").

127. Victor L. Streib, *Prosecutorial Discretion in Juvenile Homicide Cases*, 109 PENN ST. L. REV. 1071, 1085 (2005) (noting that while "[p]rosecutors' information about the crime is typically ample," often little is known about the juvenile except for "his or her juvenile or criminal record").

128. U.S. DEP'T OF JUSTICE, *supra* note 125, at 2 (describing the three categories of transfer laws: "once adult/always adult" laws that mandate that once a child has been charged as an adult, he must always be charged as an adult in the future, "reverse waiver laws" that permit juveniles charged in adult court to seek removal to juvenile court, and "blended sentencing laws" that allow juvenile judges to impose adult sentences or criminal court judges to hand down juvenile sentences).

129. Patrick Griffin, *The Current State of Juvenile Transfer Law, with Some Recommendations for Reform*, JUV. & FAM. JUST. TODAY 15, 15–16 (2009) (writing that the laws "designate a class of cases in which juvenile courts may consider waiving jurisdiction, generally on the prosecutor's motion. They prescribe broad standards to be applied, factors to be considered, and procedures to be followed in waiver decision-making, and require that prosecutors bear the burden of proving that waiver is appropriate"). This Article further describes the reduced importance of such laws as states increasingly rely on prosecutorial discretion, exclusion laws, and presumptive and mandatory

Supreme Court established procedural requirements that govern a judge's decision to transfer a child to adult court, suggesting in an appendix to the opinion that courts consider "[t]he record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions."[131] In addition, the Federal Juvenile Delinquency Act (FJDA) included consideration of "the extent and nature of the juvenile's prior delinquency record" among the factors that federal courts should consider when making discretionary transfer determinations.[132]

While there is a circuit split regarding whether the meaning of "prior delinquency record" in the FJDA is limited to prior convictions (referred to as "adjudications" in juvenile court),[133] courts on either side of the split permit lower juvenile courts to rely on accusation evidence.[134] Even courts which reject the use of conduct for which the child was not found guilty under the "prior delinquency record" standard (or decline to address that claim) nevertheless hold that judges may consider prior conduct that did not result in a conviction under one of the FJDA's other six factors.[135] There are thus multiple ways courts can rely on prior

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waiver laws.

130. 383 U.S. 541, 567 (1966).

131. Kent v. United States, 383 U.S. 541, 567 (1966).

132. 18 U.S.C. § 5032 (2012).

133. For example, in *United States v. Juvenile LWO*, the Eighth Circuit held that the "plain language of the term 'the juvenile's prior delinquency record,' would not encompass evidence of incidents or behavior which could be of a delinquent or criminal nature, for which there has been no charge or a charge but no conviction." 160 F.3d 1179, 1183 (8th Cir. 1998). In contrast, in *United States v. Wilson*, the Seventh Circuit held that "the statute allows review of the delinquency record, which includes arrests as well as convictions." 149 F.3d 610, 613 (7th Cir. 1998). For a comprehensive discussion of judicial interpretation of the "prior delinquency record" factor, see, for example, Randie P. Ullman, *Federal Juvenile Waiver Practices: A Contextual Approach to the Consideration of Prior Delinquency Records*, 68 FORDHAM L. REV. 1329, 1353–58 (2000).

134. *See, e.g.*, United States v. Anthony Y., 172 F.3d 1249, 1253 (10th Cir. 1999) (comparing the Seventh Circuit Court of Appeals' broader approach to accusation evidence with the Eighth Circuit Court of Appeals' "narrower definition" of accusation evidence).

135. *See id.* at 1253–54. The court held that:

> Even if we limited Anthony Y.'s prior delinquency to the three adjudicated offenses, the additional conduct considered by the district court was relevant to several of the other statutory factors, like "the age and social background of the juvenile," "the juvenile's present intellectual development and psychological maturity," or "the nature of past treatment efforts and the juvenile's response to such efforts."

Id.; *see also Juvenile LWO*, 160 F.3d at 1183 (holding that while courts cannot consider unadjudicated acts under the "prior delinquency record" factor, the "plain language" of three other factors—"the juvenile's present intellectual and psychological maturity," "the age and social background of the juvenile," and the "nature of past treatment efforts and the juvenile's response to such efforts"—were "broad enough to authorize the admission of evidence regarding almost any action, criminal or otherwise, the juvenile has taken").

accusations for which the child was not convicted when deciding if that child should be prosecuted in juvenile or adult court.

State juvenile transfer statutes often incorporate the *Kent* factors wholesale or in large part,[136] and many allow courts to consider prior accusations of criminal conduct that did not result in a conviction as part of the transfer decision.[137] When the government bears the burden of proving that the child at issue should be tried as an adult, the standard of proof in state transfer hearings ranges from "clear and convincing evidence" to "preponderance of the evidence" to simply "substantial evidence."[138]

C. Accusation Evidence in Sentencing

Shawn Towne was accused of assaulting, kidnapping, and threatening a man he had just met, then stealing the man's car.[139] He faced a multitude of serious charges at trial, including kidnapping and robbery, but was acquitted of all of them except for the lesser offense of joyriding. At sentencing, the judge imposed the maximum sentence for the joyriding conviction, finding that Mr. Towne's behavior related to the kidnapping and robbery had frightened the victim. The appellate court upheld the trial court's decision, reasoning that "the trial court's consideration of conduct underlying counts of which the defendant has been acquitted is not inconsistent with the jury's verdict of acquittal, because a lower standard of proof applies at sentencing."[140]

In *United States v. Watts*,[141] the Supreme Court held that sentencing

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136. *See* SAMUEL M. DAVIS, RIGHTS OF JUVENILES § 4:3, at 250 (2013) ("[A] number of states have codified waiver criteria identical or very similar to those enumerated in Kent . . . . Others have fashioned criteria of their own that reflect the essential concerns of those suggested in Kent.").

137. For example, Florida law allows the court to consider "the record and previous history of the child, including . . . previous contacts with the department, the Department of Corrections, the former Department of Health and Rehabilitative Services, the Department of Children and Family, other law enforcement agencies, and courts." FLA. STAT. ANN. § 985.556(4)(c)(7)(a) (West, Westlaw through 2015 1st Reg. Sess.). Other state transfer statutes also permit judges to consider prior accusations that did not result in juvenile adjudications as part of the transfer determination. For example, in Michigan the court shall consider "the juvenile's prior record of delinquency, including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior." MICH. COMP. LAWS ANN. § 712A.2d (West, Westlaw through 2015 Reg. Sess.).

138. *See* DAVIS, *supra* note 136 (noting that, while "the state bears the burden of proof on the issue on nonamenability to treatment as a juvenile," that standard of proof "differs from jurisdiction to jurisdiction").

139. People v. Towne, 186 P.3d 10 (Cal. 2008).

140. *Id.* at 24.

141. 519 U.S. 148 (1997).

judges may consider criminal conduct for which the defendant was acquitted if the court finds that the conduct has been proven by a preponderance of the evidence, and such use does not violate the defendant's constitutional due process rights.[142] Many federal circuit courts have also held that judges can consider crimes for which the defendant was arrested but not convicted if the court is aware of sufficient underlying facts and the defendant does not contest the arrest during the sentencing hearing.[143] Indeed, one such court stated that, even in the absence of such underlying facts, "there may be situations where the number of prior arrests, and/or the similarity of prior charges to the offense of conviction, becomes so overwhelming and suggestive of actual guilt that they become exceedingly difficult to ignore."[144] While the federal court may not consider a prior arrest record, standing alone, as justification for an upward departure from the sentencing range recommended by the Guidelines,[145] federal sentencing law—as well as the law in many states[146]—provides ample opportunity for courts to consider accusation evidence in sentencing.

142. *Id.* at 154–57 (1997) (holding that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence").

143. *See, e.g.*, United States v. Robertson, 568 F.3d 1203, 1212 (10th Cir. 2009) ("To be clear, all that is precluded from consideration by § 4A1.3(a)(3) is a district court's reliance 'on bare reports of prior arrests.' The facts underlying those arrests are fair game." (citation omitted)); United States. v. Dixon, 318 F.3d 585 (4th Cir. 2003) (holding that the district court did not abuse its discretion when it imposed an enhanced sentence based in part on four arrests for which there were sufficient underlying facts and when the defendant did not contest); United States v. Williams, 989 F.2d 1137, 1141–42 (11th Cir. 1993) (holding that the district court did not rely on the defendant's arrest record alone where the information was more in depth than a mere arrest record and the defendant did not question the reliability of the information).

144. United States v. Berry, 553 F.3d 273, 284 (3d Cir. 2009).

145. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (2014); *see, e.g.*, *Berry*, 553 F.3d at 284 ("[A] bare arrest record—without more—does not justify an assumption that a defendant has committed other crimes and it therefore cannot support increasing his/her sentence in the absence of adequate proof of criminal activity."); United States v. Jones, 489 F.3d 679, 682 (5th Cir. 2007) (holding that the court's consideration of defendant's prior arrests, especially when it did not find that he actually committed the offenses but merely commented that it "seemed unlikely that he would have been arrested wrongfully so many times," was error); United States v. Zapete-Garcia, 447 F.3d 57 (1st Cir. 2006) (holding that it is unreasonable for a court to enhance a sentence based on a single arrest, remote in time).

146. *See* Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235 (2009) (providing an overview of the state courts that permit the use of acquitted conduct at sentencing).

D. Accusation Evidence Outside of the Courtroom

Accusation evidence also plays a role in decisions that take place within the criminal justice system but outside of the criminal courtroom, during the charging and punishment phases of a criminal case. This Section will briefly discuss reliance on accusation evidence by prosecutors when making charging decisions, by parole officials deciding whether to revoke parole and judges determining whether to revoke probation, and by prison officials when making classification decisions.

1. Accusation Evidence in Prosecutorial Charging Decisions

Prosecutors have complete, and largely unreviewable,[147] discretion in deciding whether to charge an accused person with a crime, and what criminal charges to bring if the prosecutor determines that prosecution is merited. In exercising this discretion, prosecutors are guided by standards such as those promulgated by the American Bar Association, the National District Attorney's Association, the United States Attorney's Manual, and state-level statutes. While all these resources require prosecutors to bring charges only when they believe that there is sufficient evidence to support a conviction,[148] they do not impose limits on the consideration of past conduct for which the accused person was not convicted. Rather, these standards encourage the prosecutor to consider a range of factors in exercising his or her discretion.[149] These factors generally include consideration of the accused person's criminal history,[150] including conduct for which the person was not convicted.[151]

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147. *See, e.g.*, Shmueli v. City of New York, 424 F.3d 231, 236–37 (2d Cir. 2005) (noting that prosecutors are accorded immunity from civil damages in a Section 1983 suit so long as they act within the scope of their "duties in initiating and pursuing a criminal prosecution").

148. *See, e.g.*, NAT'L DIST. ATT'YS ASS'N, *supra* note 126 ("A prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonable believes can be substantiated by admissible evidence at trial.").

149 *See, e.g., id.*

150. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS MANUAL § 9-27.230 (1997) ("In determining whether prosecution should be declined because no substantial Federal interest would be served by prosecution, the attorney for the government should weigh all relevant considerations, including: . . . (5) The person's history with respect to criminal activity . . . ."); Leipold, *supra* note 91, at 1330–31 (arguing that a prosecutor's charging decisions may be influenced by the defendant's prior arrests, and explaining that when a prosecutor is considering prior charges for which the defendant was not convicted, he or she "will often have an unbalanced file to consider: a detailed prosecution memo and indictment suggesting the validity of the prior charge, and a general verdict indicating that the suspect was found not guilty. A mistaken prior indictment can look just the same as a wholly justified one").

2. Accusation Evidence in Probation and Parole Revocation Proceedings

Robert Coughlin, while on probation for burglary and receipt of stolen property, was accused of committing another burglary.[152] He went to trial on the new burglary charge and was acquitted. Later, at his probation revocation hearing, the judge considered the facts of the charge for which he was acquitted—including testimony from three of the trial witnesses—and revoked his probation, stating, "[t]he Court believes that he did participate in an attempted burglary . . . even though the evidence might not have been sufficient to convince the Court [in his criminal trial] beyond a reasonable doubt."[153]

A person on probation or parole can, like Mr. Coughlin, have his release revoked based on a criminal accusation for which he is not convicted. When a person is sentenced to probation, or is released from prison onto parole, the conditions of his release are certain to contain a requirement that he refrain from further criminal activity.[154] Failure to adhere to this or any other term of his release can result in the initiation of parole or probation revocation proceedings.[155] Parole and probation violations may be proven by preponderance of the evidence or another standard of proof lower than beyond a reasonable doubt.[156] Because the State's failure to prove a case beyond a reasonable doubt does not preclude a finding of guilt under the lower preponderance of the evidence standard, state and federal courts have long held that courts and parole officials may revoke a person's probation or parole based on accusations of criminal acts for which he was not found guilty in the

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151. *See, e.g.*, OR. ADMIN. R. 137-095-0020 (2015) (instructing prosecutors to coordinate with "local, state and federal regulatory agencies" to obtain additional information about the defendant, including "the violator's past record of compliance or noncompliance with the law").

152. *In re* Coughlin, 545 P.2d 249 (Cal. 1976).

153. *Id.* at 250–51.

154. *See, e.g.*, CAL. CODE. REGS. tit. 15, § 2512 (2015) ("General Conditions of Parole . . . . (4) Criminal Conduct. You shall not engage in criminal conduct. You shall immediately inform your parole agent if you are arrested for a felony or misdemeanor under federal, state, or county law.").

155. People facing the revocation of their parole or probation are entitled to minimal standards of due process in their revocation hearings. *See* Morrissey v. Brewer, 408 U.S. 471 (1972) (establishing minimum due process standards for federal parole revocation hearings); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (establishing minimum due process standards for federal probation revocation hearings).

156. *See* 21A AM. JUR. 2d *Criminal Law* § 856 (2013) ("The burden of proof in a probation-revocation hearing is considerably lower than in a criminal case," and further noting that "[t]he state bears the burden of providing satisfactory proof of a violation of probation, although proof beyond a reasonable doubt is not required. The state may prove a violation of probation by a preponderance of the evidence, reasonably satisfactory evidence, or by the greater weight of the evidence.").

criminal justice system.[157] It is not unusual, therefore, for a person on probation or parole to be charged with a new crime, have that case dismissed or be acquitted altogether, and nevertheless suffer revocation based on the crime for which he was not convicted.[158]

3. Accusation Evidence in Prison Classification Procedures

After a jury trial, Raymond Tinsley was convicted of murder but acquitted of sexual assault.[159] Once he began serving his prison sentence, prison officials informed him that, despite the fact that he was acquitted of the sexual assault, he needed to complete sexual offender treatment based upon the description of his crime in his pre-sentence investigation report.[160]

When a person is convicted of a crime and sentenced to prison, prison officials must determine what level of security he requires, what programs he must complete, what discretionary comforts he may receive, and a host of other conditions of his confinement. These decisions are driven by classification matrixes developed by the prisons, which require officials to evaluate the inmate based on a variety of factors related to his personal characteristics and history, such as his criminal background, age, and need for substance abuse treatment.[161]

Prison officials can, as in Mr. Tinsley's case, determine that an inmate has satisfied one or more of these factors based on a crime for which the inmate was never convicted. For example, prison officials routinely classify inmates as sexual offenders based on prior arrests for sexual offenses, dismissed sex offense charges, or even sexual assault charges

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157. *See, e.g.*, Standlee v. Rhay, 557 F.2d 1303, 1307 (9th Cir. 1977) (holding that "collateral estoppel does not bar a subsequent parole revocation hearing after a criminal acquittal" as "[t]he sanctions imposed and the burden of proof are different"); People v. Brown, 704 N.Y.S.2d 88, 88 (App. Div. 2000) (holding that there is no "inherent contradiction between a determination that the defendant violated his probation and a verdict acquitting him of the criminal offenses which formed the basis of the violation").

158. *See, e.g.*, Leipold, *supra* note 91, at 1333 (stating that, in the context of parole or probation revocation hearings, "courts have found [that] the inability to determine the basis for the acquittal, coupled with the lower standard of proof in the revocation proceedings, mean that the acquittal has no preclusive or even probative value").

159. Tinsley v. Goord, No. 05-civ-3921(NRB), 2006 WL 2707324 (S.D.N.Y. Sept. 20, 2006).

160. *Id.* at *2.

161. *See* NAT'L INST. OF CORR., INTERNAL PRISON CLASSIFICATION SYSTEMS: CASE STUDIES IN THEIR DEVELOPMENT AND IMPLEMENTATION 1 (2002) ("Fueled by litigation and overcrowding, classification systems are viewed as the principal management tool for allocating scarce prison resources efficiently and minimizing the potential for violence or escape.").

that resulted in acquittal.[162] Prisons officials may also base a determination of the "severity" of the inmate's crime of conviction based, not on the crime itself, but on the official's evaluation of the inmate's behavior as represented in police reports or other materials.[163] Prison officials may make such determinations either applying no standard of proof whatsoever, or after hearings in which officials apply standards of proof lower—generally much lower—than proof beyond a reasonable doubt.[164]

As we have seen, decision makers within the criminal justice system reconsider charges for which the defendant was not convicted in a variety of different circumstances. From the perspective of the decision maker considering accusation evidence—a judge deciding the appropriate length of a prison sentence, a prosecutor determining what charges to file against a newly arrested person—the fact that the defendant was not convicted of a prior crime does not preclude the possibility that he is factually guilty of committing it. And, if convinced that the defendant really committed the prior crime, the decision maker may look to that act as evidence that he is a violent person, or a liar, or more likely to be guilty of the new offense for which he is charged. Courts impose few procedural obstacles to the use of this evidence, apart from the requirement (not present in all circumstances) that the defendant's culpability for the prior charge be established under a standard of proof lower than proof beyond a reasonable doubt.

The systemic reliance on accusation evidence is thus animated by the lingering uncertainty regarding the defendant's culpability when he is charged but not convicted of a crime. As Part III explores further, our criminal justice system treats uncertainty about the defendant's culpability very differently depending on whether or not he was convicted of the crime for which he was accused.

III. THE INCONSISTENCY OF UNCERTAINTY

While there may be uncertainty about a defendant's actual innocence when he is acquitted or when charges are dropped, there can be just as

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162. *See, e.g.*, Lindsey Webb, *The Procedural Due Process Rights of the Stigmatized Prisoner*, 15 U. PA. J. CONST. L. 1055, 1062 (2013) (describing ways in which prisons classify inmates as sexual offenders based on crimes for which they were never convicted).

163. FED. BUREAU OF PRISONS, PROGRAM STATEMENT: INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION, ch. 4, 6–7 (2006).

164. *See, e.g.*, Gwinn v. Awmiller, 354 F.3d 1211, 1218–19 (10th Cir. 2004) (holding that before a prison can classify an inmate as a sex offender, he should be afforded a hearing in which the determination that he should be so classified is supported by "some evidence").

much uncertainty about that defendant's actual guilt if he is convicted. Once a person is convicted of a crime, however, a claim that the convicted person is factually innocent will not, by itself, serve as the basis for appellate or habeas review, and courts have upheld legal and policy approaches that hinder reconsideration of convictions based on innocence claims. If a person is charged with a crime and not convicted, on the other hand, ambiguity about whether he was actually guilty provides justification for decision makers throughout the system to review that prior outcome for a variety of purposes, seeking to establish the guilt for which he previously eluded justice.

A. Examining the Role of Uncertainty Through the Lens of Finality

Although it may be complicated to draw direct parallels between appellate and habeas review of convictions and the ways that decision makers review accusation evidence, the doctrine of finality provides a useful point of comparison. Proponents of finality cite the importance of respecting the process by which a criminal conviction is obtained and invoke a host of policy considerations for denying a convicted person habeas relief even when questions regarding the petitioner's innocence or the constitutionality of his arrest and prosecution remain. This argument, while originating in academic articles, is no theoretical exercise; courts have, for example, denied DNA tests to convicted persons with innocence claims based on the principles of finality.[165]

This Article does not seek to champion finality, which has been sharply criticized by a multitude of critics for the ways in which its application has resulted in the disregard of claims of innocence and of claims of constitutional error on habeas review.[166] Rather, it uses finality as a lens to examine and contrast the criminal justice system's eagerness to cease reconsideration of the outcome of criminal convictions with its willingness to eternally reconsider cases that resulted in dismissal or acquittal. To this end, it seeks to highlight the significant role that policy considerations play in the systemic limitation of the review of convictions and to note the absence of such considerations when courts

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165. Dist. Attorney's Office v. Osborne, 557 U.S. 52, 102 (2009) (holding that state defendant has no constitutional right to access to the government's evidence so that it can be subjected to DNA testing); *see also* Kristen McIntyre, *A Prisoner's Right to Access DNA Evidence to Prove His Innocence: Post*-Osborne *Options*, 17 TEX. WESLEYAN L. REV. 565, 571–73 (2011) (discussing the facts of *Osborne*).

166. *See, e.g.*, Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 356 (2010) (discussing the arguments for finality and the impacts of those arguments on habeas review).

review challenges to the use of accusation evidence.

Allegiance to finality began its ascent five decades ago, when Professor Paul Bator[167] and Judge Henry J. Friendly[168]—the fathers of finality—advanced arguments for that principle which, despite a lack of empirical support,[169] triggered significant judicial and legislative changes to habeas corpus procedures. Both Bator and Friendly emphasized the importance of respecting the process by which a conviction is obtained, and argued that if a lower court has provided the defendant with process that is meaningful and just, our society should decline to endlessly repeat that process in search of possible errors.[170] If the convicted person had what Bator described as "a fair chance"[171] and Friendly as a "fair opportunity"[172] to litigate his claims at the trial and appellate level, the system must be willing to tolerate some measure of uncertainty about the accuracy of its own processes.[173] In Bator's words, at some point it is essential for a judicial system to conclude that, despite the possibility of error, "we have tried hard enough and thus may take it that justice has been done."[174] Courts applying the doctrine of finality are willing to live with some level of uncertainty—even a substantial level of uncertainty—about whether constitutional or factual error occurred in a particular case in the greater interest of ending consideration of the case altogether.

Further, the doctrine of finality rests on the reasoning that, while uncertainty is inherent to a human system of justice, there are values that

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167. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

168. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

169. Andrew C. Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interest of Finality,"* 2013 UTAH L. REV. 561, 575 (critiquing advocates of finality who, while arguing for restrictions on review, fail to identify what specific benefits the restriction would advance or how such benefits would be obtained).

170. Bator did not seek to eradicate all appellate review; he felt that such review had value in checking the possibility of "error, oversight, arbitrariness and even venality in any human institution," in addition to providing an opportunity for higher courts to articulate precedent that could help assure that the law was uniformly applied. Bator, *supra* note 167, at 453. His focus instead was on what limits might be imposed on state prisoners seeking review under the federal writ of habeas corpus. *Id.* at 443.

171. *Id.* at 456; *see also* BRIAN R. MEANS, POSTCONVICTION REMEDIES §§ 4.1–4.9 (2014).

172. Friendly, *supra* note 168, at 149–50.

173. Even state and federal appellate courts, Bator pointed out, do not generally re-litigate the underlying facts of a case, although factual error may have occurred, instead focusing on the lower court's application of the law. Bator, *supra* note 167, at 454.

174. *Id.* at 452.

trump the judicial system's continued pursuit of that uncertainty. Bator, followed by Friendly, argued that a variety of policy considerations, including conserving resources, preserving the high quality of decision-making at the trial court level, aiding in the rehabilitation of the defendant, deterring criminal activity, preserving public confidence in the criminal justice system, reducing decision-making based on aging or lost evidence, and satisfying the human need for "repose," provide justifications for ending reconsideration of a criminal conviction.[175] Scholars and courts frequently cite these considerations in support of the finality of convictions.[176] Yet courts have not invoked them as reasons to limit the reconsideration of prior accusations, although many of these policy concerns have applicability to the reconsideration of criminal charges for which no conviction was obtained.

For example, courts frequently cite the economic expense of collateral attacks on convictions as a justification for limiting access to habeas corpus review.[177] But the use of accusation evidence can require the same "resources of the community—judges, prosecutors, and attorneys appointed to aid the accused, and . . . courtrooms" that Judge Friendly argued merited against collateral review of convictions.[178] A parole revocation hearing based on a crime for which the parolee was acquitted may involve a complete reconsideration of the very same evidence—including live testimony from the trial witnesses—that was introduced at the trial level. A judge considering whether to allow the government to introduce evidence at trial of a prior crime for which the defendant was not convicted may review the police reports, trial testimony, or other documents from the alleged offense, listen to arguments from the prosecution and defense, or even require a hearing with live testimony before making her ruling. If the court decides to allow the prosecution to admit this evidence, the government will then present witnesses and physical evidence at trial regarding the prior alleged offense. All these efforts are costly, both in terms of resources and time.

Another justification for finality in the context of habeas review is the argument that when collateral attacks on a criminal conviction take place

175. *See* Friendly, *supra* note 168, and Bator, *supra* note 167.

176. *See* Kim, *supra* note 169, at 572 (noting that the Bator and Friendly articles have "been cited in hundreds of law review articles and court opinions," and "the interests of finality have been treated as 'paramountly important' in the dozens of Supreme Court opinions that cite these articles by name").

177. *See id.* at 578 (describing "finality" as "a shorthand used to refer to a collection of societal interests—primarily conservation of resources, efficient defense counsel behavior, and deterrence—that scholars assume are furthered by any restrictions on review").

178. Friendly, *supra* note 168, at 148.

long after the crime and investigation occurred, the evidence upon which the conviction was based will necessarily have eroded, jeopardizing the accuracy of the review process.[179] Similarly, decision makers relying on accusation evidence, such as judges making juvenile transfer decisions or prosecutors seeking to cast doubt on the credibility of a witness, may also base these efforts on arrest reports, witness testimony, and other evidence from many years in the past. Some decisions based on accusation evidence, such as prosecutorial charging decisions or some prison classification determinations, occur in completely unreviewable and private settings, raising even greater concerns about reliance on evidence that has been damaged or lost due to the passage of time. The use of accusation evidence thus raises the same concerns about the accuracy of decision-making raised by proponents of finality of convictions in the habeas context.[180]

Proponents of finality also argue that because appellate courts are no better equipped than the trial court to evaluate the facts and law of the case, review by such courts does little to advance the search for truth and much to damage the system of justice. Again, whether or not that position is accurate, there is no reason to believe that the parties evaluating accusation evidence are in any way better positioned to evaluate that case than were the parties to its original prosecution. Indeed, in many ways these secondary evaluators are in a far weaker position than the original parties. They may base their decisions on police or probation reports rather than live testimony, and, as noted above, significant time may have passed since the original prosecution, possibly resulting in lost or weakened evidence. Further, the procedures by which the decision makers conduct these re-evaluations are not governed by rigorous procedural due process protections.

Moreover, the apprehension, advanced by proponents of finality, that reconsideration of criminal convictions may damage the public trust in the criminal justice system also applies to the system's reliance on accusation evidence. As Judge Friendly wrote, "it is difficult to urge public respect for the judgments of criminal courts in one breath and to countenance free reopening of them in the next."[181] When decision

179. *Id.* at 147 ("The longer the delay, the less the reliability of the determination of any factual issue giving rise to the attack.").

180. Wayne R. LaFave et al., *Balancing Within the Statutory Framework*, *in* 7 CRIMINAL PROCEDURE § 28.2(c) (3d ed. 2014) (noting the concern that "expansive federal review of state court decisions" may undermine accuracy "because habeas review often does not take place for several years, relief may mean the state no longer has access to the evidence it may need to retry the case").

181. Friendly, *supra* note 168, at 149; *see also* John N. Mitchell, Attorney Gen. of the United

makers in the criminal justice system rely on accusation evidence, they are revisiting the conclusion of a case just as surely as does an appellate court that reviews a criminal conviction. The use of accusation evidence, which calls into question the accuracy and fairness of the outcomes of criminal cases, may, like ongoing appeals of convictions, lead the public to doubt the criminal justice system.

Finally, advocates of finality cite the human need for "repose," arguing for the need to address the psychological[182] effect that continual collateral attacks on convictions have on both participants in the criminal justice system and society as a whole. Bator argued that a continual reexamination of criminal convictions "no longer reflects humane concern but merely anxiety and a desire for immobility,"[183] and Friendly described repose as the "human desire that things must sometime come to an end."[184] When actors in the criminal justice reconsider accusation evidence, that reconsideration also subverts the value of repose by allowing continual reconsideration of criminal charges for which a conviction was not obtained. When judges base juvenile transfer decisions on charges for which the child was not adjudicated, for example, they are reconsidering a prior outcome and replacing it with their own determination of culpability. This reconsideration is informed by the same anxiety that troubled Bator: the fear that the criminal justice system may have erred in the past and anxiety that such error will go uncorrected if it is not continually reexamined.[185] This continual revisiting of the conclusions of the criminal justice system, be they convictions, acquittals, or dismissals, are surely equally troubling to our social need for repose.

The criminal justice system's allegiance to the values of finality over the nagging concern that the outcome of the criminal case was erroneous applies only to the appeal of convictions. Yet the analysis above

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States, Address Before the Alabama State Bar Association: "Restoring the Finality of Justice" (June 25, 1971), *available at* http://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/06-25-1971.pdf (agreeing with Friendly's concern that repetitive habeas appeals undermine "the respect for law," commenting, "[d]o we not demonstrate a certain lack of confidence in our legal processes if we must keep avenues open for endless redetermination of questions long ago passed upon by competent judicial tribunals?").

182. Bator, *supra* note 167, at 452 ("Repose is a psychological necessity in a secure and active society . . . .").

183. *Id.* at 452–53.

184. Friendly, *supra* note 168, at 149.

185. *See* Bator, *supra* note 167, at 443 (describing this anxiety as "the impulse . . . to make doubly, triply, even ultimately sure that the particular judgment is just, that the facts as found are 'true' and the law applied 'correct'").

demonstrates that many of the arguments for finality—for a time when the system must stop reconsidering the decisions it has made before, for the purported good of society, the defendant, and the justice system itself—apply equally as powerfully to the reconsideration of charges for which the defendant was prosecuted but for which a conviction was not obtained. The fact that the principles of finality have been invoked to impose limits on the habeas review of convictions and not to the reconsideration of charges for which the State failed to achieve a conviction at first seems puzzling. It becomes less so when the inconsistency is understood as furthering the same underlying goal: the preservation of guilt.

IV. THE PRESERVATION OF GUILT

Our system of criminal justice seeks guilt; once guilt is obtained, it aims to preserve it; and if guilt is eluded, it will pursue it. The system tolerates a risk of wrongful conviction in the process by which guilty pleas and even guilty verdicts are obtained, and yet imposes significant hurdles to raising post-conviction questions of innocence. When the State fails to obtain a conviction, on the other hand, the possibility that the defendant might be guilty drives decision makers within the system to reconsider the unproven accusation for a wide variety of purposes. The justice system's level of comfort with certainty and uncertainty about a defendant's culpability shifts depending on whether or not the defendant was convicted of the crime.

This difference cannot be explained by, for example, asserting that the system simply honors proof beyond a reasonable doubt above all else, because the system seeks to preserve convictions even when (as in most cases) they were obtained through a guilty plea instead of through a trial. Similarly, it cannot be satisfactorily explained as a manifestation of the search for truth, as courts of appeal seem unwilling or unable to engage in the truth-seeking process when questions of culpability arise post-conviction. And, as we have seen, even assuming that the arguments for finality have inherent merit, they do not provide a meaningful justification for the outcome-specific differences in our system's reaction to uncertainty.

Uncertainty about the defendant's culpability after a conviction does not trigger meaningful appellate review. But uncertainty about the defendant's culpability after an acquittal or dismissal of charges is the basis for endless reconsideration of the unproven charges. This discrepancy reveals a deep bias in our system of justice towards the preservation of guilt. The pursuit of guilt as a value unto itself distorts our system of justice.

A. The Ramifications of a Systemic Allegiance to Guilt

There are both individual and systemic consequences to our system's focus on guilt. Individual lives are damaged or destroyed when innocent people are convicted and punished for crimes they did not commit.[186] A system of criminal justice that tolerates the risk of wrongful conviction (and, indeed, sets up barriers to appellate review that might serve to lessen that risk) risks erosion of its moral authority.[187] Society may grow increasingly skeptical of the justice system's ability to make meaningful determinations of guilt and innocence, particularly as cases of wrongful conviction become increasingly well-documented.[188] While proponents of finality fear that review of criminal convictions will reduce the public's confidence in the criminal justice system, the system's failure to identify and rectify cases where innocent people have been convicted risks even greater damage to that trust.

When a decision maker relies on accusation evidence, the consequences to the accused person can be severe, including increased prison sentences, revoked parole and a return to incarceration, the transfer of children to adult court, and classification of an inmate as a sex offender in prison. There are also larger social ramifications to the system's willingness to allow decision makers to salvage findings of guilt from cases where guilt was not proven beyond a reasonable doubt. The use of accusation evidence arguably runs counter to our systemic allegiance to the presumption of innocence and the government's burden to prove a defendant's guilt beyond a reasonable doubt. When decision makers rely on accusation evidence, they rely on proof that falls far below that required for a criminal conviction; indeed, in some contexts mere suspicion of the defendant's guilt is enough to establish culpability of the prior crime.[189] While the fact that a person was not convicted of a

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186. *See* Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES, Nov. 25, 2007, at 138 (describing a *New York Times* study of 137 former prisoners who had been exonerated through DNA evidence; the study revealed that many of the exonerees suffered from mental health issues related to their wrongful incarceration and faced significant challenges in securing employment, medical care, and creating or maintaining family relationships and other social ties following their release from prison).

187. *See* Charles I. Lugosi, *Punishing the Factually Innocent: DNA, Habeas Corpus and Justice*, 12 GEO. MASON U. C.R. L.J. 233, 234 (2002) (asking "if the criminal justice system is divorced from morality on something as basic as punishing the guilty and exonerating the innocent, has it lost its moral authority and legitimacy?").

188. *See Innocent People in Prison*, *supra* note 12 (compiling media coverage of wrongful convictions).

189. As discussed in Part II, *supra*, prosecutors may rely on accusation evidence in making charging decisions and prison officials often may rely on accusation evidence in making prison

crime does not necessarily mean that he is innocent of wrongdoing, reliance on accusation evidence demonstrates that, even if a person accused of a crime is acquitted or the charges against him are dismissed, the system harbors suspicions or even presumptions that his true guilt will be revealed if decision makers are simply given enough opportunities and a low enough standard of proof.[190]

Further, our criminal justice system provides no avenue by which a person, once charged with a crime, can obtain definitive proof that he was not culpable of the crime of which he is accused.[191] This fact, combined with the low (or nonexistent) standards of proof applied to the review of accusation evidence, supports a view of a justice system that fails to provide defendants with a means by which their culpability can be disproven, and then penalizes the accused person for this fact by eternally reconsidering accusations for which he was not convicted so long as it has jurisdiction over him. The use of accusation evidence thus illuminates a troubling pattern: The system distrusts its own processes when they fail to result in a conviction, is unwilling to live with the uncertainty associated with an acquittal or dismissal (such that such outcomes may be eternally reconsidered), and simultaneously fails to provide procedures by which that uncertainty could be reduced or eliminated. Although the use of such evidence may be justified as furthering the search for truth, it also illuminates a systemic belief that guilt should be preserved so long as any suspicion of culpability remains. Again, such a perspective arguably undermines the principles of the presumption of innocence and the government's burden to prove the defendant guilty beyond a reasonable doubt, thus sending a message to juries and the community that such principles are derided by the very system that purports to exalt them.

Public concern for such outcomes may be muted by a variety of factors, including the fact that they can occur in settings with little to no review (as in the case of prosecutorial decision-making, parole revocation hearings, and prison classification determinations), the fact that the use of accusation evidence is not always obvious to an observer

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classification decisions without applying any particular burden of proof to that evidence.

190. It is worth noting that decision makers reviewing accusation evidence are generally looking solely at the question of whether the accused person was factually guilty of the crime or crimes of which he was accused and not convicted, and thus ignore questions about whether the evidence against him was unconstitutionally obtained.

191. *See* Leipold, *supra* note 91, at 1299 ("[A] factually innocent defendant confronts the problem of being publicly accused by the government of criminal behavior with no real prospect of ever being officially vindicated.").

(as in a trial setting where facts about a prior crime are elicited without revealing that the defendant had been acquitted of that crime), and there is no movement akin to the "innocence movement" seeking to rectify the use of accusation evidence. Indeed, many might take the view, espoused by so many courts, that just because a person escaped conviction for a crime does not mean that he is not culpable of committing it, and thus revisiting that offense in different circumstances evokes no particular alarm. Systemic reliance on accusation evidence is thus not easily detected; it take place in a variety of complex circumstances, some of which are not public, with consequences that may not be as easily understood as unjust as is a wrongful conviction.

B. Dismantling the Allegiance to Guilt

Our criminal justice system is based on high ideals—the search for truth, the punishment of the guilty, the exoneration of the falsely accused—but its focus on the pursuit and preservation of guilt has distorted those principles. Determining how to dismantle the allegiance to guilt is an enormous undertaking, however, as that allegiance is interwoven throughout the system in a range of complicated ways. Efforts to shift the system's primary focus from attaining and preserving findings of guilt to the pursuit of truth fall into two broad categories: (a) reforms that seek to increase the accuracy of the process by which convictions, acquittals, and dismissals are obtained, and (b) reforms that seek to improve the ability of review bodies to determine whether the outcome of a criminal case accurately reflected the defendant's culpability.

The legal and academic community has paid significant attention to the question of improving the accuracy of the process by which convictions, acquittals, and dismissals are obtained. Many have suggested changes to the investigative process that would reduce the risk of wrongful convictions, such as taping law enforcement interrogations or adopting better practices for eyewitness identifications.[192] Commentators have called for courts to apply stricter restrictions on the use of the types of evidence that is primarily responsible for wrongful convictions, eyewitness identification chief among them.[193] Observers

192. *See, e.g.*, Garrett, *supra* note 16, at 122 (describing research that suggests that reforms such as "videotaping interrogations, conducting double-blind and sequential eyewitness identifications, and implementing oversight of forensic crime laboratories" could better ensure the accuracy of criminal convictions, and noting that many jurisdictions have adopted these reforms in whole or in part).

193. Shay, *supra* note 46, at 1506 (arguing that trial courts should be particularly mindful of cases

have argued for jury instructions that would provide greater guidance for factfinders as they evaluate such evidence.[194] Scholars and others have suggested increased funding to both defense counsel and law enforcement to conduct a more robust factual investigation prior to trial.[195]

Some have also suggested reforms designed to reduce the uncertainty about the defendant's guilt associated with acquittals or dismissals, such as new verdict structures[196] or creating procedures that would allow wrongfully convicted persons an opportunity to seek a civil or other judgment declaring their innocence.[197] Others have suggested specialized procedures for convicted defendants who assert their innocence,[198] such as allowing people accused of crimes to choose between having their case tried in traditional courts or in an alternative "innocence track."[199]

Another approach is to improve the accuracy of the process by which convictions are reviewed. One idea, already in practice in some states, is the creation of "Innocence Commissions" that serve to review convictions where actual innocence is at issue.[200] Some have called for

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based on the testimony of a single eye-witness, and in such cases should carefully ensure that the investigation, representation, jury instructions and other procedural protections are scrupulously observed); *see, e.g.*, Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615; Robert Norris et al., *"Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301 (2011) (reviewing state-level criminal justice reforms designed to prevent or remedy wrongful convictions).

194. *See, e.g.*, David. E. Aaronson, *Cross-Racial Identification of Defendants in Criminal Cases: A Proposed Model Jury Instruction*, 23 CRIM. JUST. 4 (2008).

195. *See, e.g.*, Garrett, *supra* note 16, at 126 (noting that courts may face difficulties in identifying and rectifying claims of actual innocence when the factual record was not fully developed at trial, in part because of resource restraints).

196. Samuel Bray, Comment, *Not Proven: Introducing a Third Verdict*, 72 U. CHI. L. REV. 1299, 1305–06 (2005) (proposing a third verdict of "not proven").

197. Frederick Lawrence, *Declaring Innocence: Use of Declaratory Judgments to Vindicate the Wrongly Convicted*, 18 B.U. PUB. INT. L.J. 391, 397 (2009) (proposing "that persons wrongfully accused of criminal acts have a right to sue for a declaration of innocence"); *see also* Leipold, *supra* note 91, at 1300 ("If a defendant is acquitted in a bench trial, or if the charges are dismissed prior to trial, the defendant should be permitted to ask the judge for a finding that, not only has the government failed to prove guilt, but also that the evidence shows his innocence.").

198. *See* Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547 (2008); Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for Truth*, 56 N.Y.L. SCH. L. REV. 911, 913 (2011) (suggesting a system in which lawyers act as defense lawyers and prosecutors in turn, and "share in guiding the inquisitorial process of investigating the case and developing the evidence").

199. *See, e.g.*, D. Michael Risinger & Lesley C. Risinger, *Innocence Is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV. 869, 893 (2011).

200. Garrett, *supra* note 16, at 127.

appellate courts to actively reconsider the factual determinations made at the trial level,[201] to allow appellants to introduce new facts on direct appeal,[202] or to reconsider their reliance on the doctrine of harmless error.[203] Many have called for reforms of the procedural hurdles that limit the ability of convicted people, including those raising claims of actual innocence, to seek meaningful habeas review.[204] These include suggestions for creating an exception to statutes of limitation when the prisoner's claim is based on newly discovered evidence[205] or asserts innocence,[206] as well as arguments that habeas courts should recognize a freestanding constitutional claim of actual innocence.[207] Some scholars have suggested solutions that would allow post-conviction courts to consider appellate claims as a whole rather than in a "piecemeal" fashion over a series of courts and a long period of time.[208] Others have argued that inmates should receive the assistance of attorneys on post-conviction review.[209]

There has been little direct attention paid, however, to reforming the ways in which decision makers review accusation evidence.[210] There

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201. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 308–22.

202. Findley, *supra* note 15, at 609 (arguing for a procedure by which a convicted person can introduce new facts on appeal).

203. *See, e.g.*, Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1170 (1995) (arguing that "each time we employ the imaginary tonic of harmless error, we erode an important legal principle. When we hold errors harmless, the rights of individuals, both constitutional and otherwise, go unenforced").

204. Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629 (2008).

205. *See* Medwed, *supra* note 65, at 691–92 (arguing that "[a]t its core, the enforcement of statutes of limitations that begin to run as of the date of conviction fundamentally impedes the presentation of innocence claims given that the new evidence may not even be discoverable prior to the expiration of the limitations period").

206. *See, e.g.*, Limin Zheng, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CALIF. L. REV. 2101, 2129 (2002); *see also* Case Comment, *Antiterrorism and Effective Death Penalty Act of 1996—Actual Innocence Gateway*—McQuiggin v. Perkins, 127 HARV. L. REV. 318, 327 (2013) (arguing that the Supreme Court's 2012 ruling in *McQuiggin v. Perkins* "removed a procedural barrier to habeas relief for those petitioners who can demonstrate their actual innocence").

207. *See* Leventhal, *supra* note 56 (reviewing federal and state court considerations of claims of actual innocence raised on habeas review).

208. *See* Hartung, *supra* note 66, at 107 (suggesting that "when faced with a colorable claim of actual innocence, supported by a series of piecemeal claims raised individually, a court should expand the record in order to view the 'evidence as a whole'"); *see also* Phillip G. Cormier et al., *Federal Habeas Corpus and Actual Innocence*, NAT'L L.J., May 2011, at 34, 34.

209. *See* Kim, *supra* note 169, at 606 (arguing that prisoners would have greater success in their habeas petitions if they were represented by counsel).

210. Some of these suggestions discussed above, if adopted, might transform the justice system's

have been suggestions for change focused on specific uses of such evidence; for example, lawyers have raised legal challenges to the reliance on accusation evidence in a wide variety of contexts, and legal academics have strongly criticized the many forms in which this reliance is manifested. But there has been no argument critiquing the systemic use of accusation evidence—the ways in which the consideration of allegations of criminal wrongdoing for which the defendant was not convicted are interwoven into the routine functioning of the criminal justice system—or suggesting a broad approach to addressing this broad reliance on unproven accusations.

Suggestions for dismantling the systemic reliance on accusation evidence could take a variety of forms. If courts were seeking ways to permit the use of accusation evidence, they might revisit their rejection of due process claims and propose increased procedural protections aimed at prioritizing the search for truth over the pursuit of guilt. Solutions might include a blanket prohibition on the use of acquittals with the imposition of a balancing test applied to use of dismissed charges, on the theory that dismissals have a wider range of motivations than acquittals and jury verdicts should be given greater deference than individual prosecutorial decision-making. Courts might also require the application of a uniform standard of proof of beyond a reasonable doubt to all uses of accusation evidence—again, eliminating reliance on jury acquittals, which already reflect the State's failure to meet this standard. Courts could impose a presumption against the use of accusation evidence that could only be overcome by meeting particular criteria. Courts could simply disapprove of reliance on accusation evidence across the board, perhaps by relying on principles of finality, and perhaps also accompanied by reforms to the processes of sealing or expunging criminal accusations for which the State failed to obtain a conviction.

There are strengths and weaknesses to these theoretical approaches to reform, and obvious doubts about the likelihood of these or any other changes to the use of accusation evidence taking place at all. Exploring the ramifications of these various approaches is a project for another time. This Article seeks instead to identify the reason why reform is needed. Reform will have its greatest impact if it is motivated, not just by a piecemeal approach to individual injustices, but by a holistic

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approach to the use of accusation evidence. Courts might, for example, be less sympathetic to the reconsideration of a charge that resulted in an acquittal if that acquittal was viewed as a reflection of actual innocence instead of merely the government's failure to establish guilt beyond a reasonable doubt.

attempt to dismantle our criminal justice system's allegiance to guilt. By juxtaposing the system's reliance on accusation evidence with its focus on obtaining and preserving convictions, we have the opportunity, and the responsibility, to take a hard look at the primary allegiance to guilt that currently shapes our criminal justice system. We have an opportunity, and a responsibility, to ask who this allegiance to guilt benefits, and who it harms, and why. And we have the opportunity, and the responsibility, to define the principles that should animate our criminal justice system and ensure that those principles are reflected in the practice and policy of our criminal courts.

CONCLUSION

Our system of criminal justice is a system dedicated to attaining and preserving guilt. This dedication warps the principles for which the justice system is generally understood to stand, such as the punishment of the guilty and the exoneration of the innocent. Instead, our justice system is structured to ignore uncertainty about the factual culpability of a person who has been convicted, but to presume uncertainty about the factual innocence of a person who has been acquitted. It is structured so that a convicted person with a viable claim of innocence may be put to death, while unproven accusations of criminal conduct have eternal life. By dismantling the criminal justice system's dedication to guilt, we may instead create a system focused not on enduring accusations, but on lasting justice.