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## ARTICLES

### PUNISHING THE INNOCENT

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*Scholars highlight an “innocence problem” as one of plea bargaining’s chief failures. Their concerns, however, are misguided. In fact, many innocent defendants are better off in a world with plea bargaining than one without it. Plea bargaining is not the cause of wrongful punishment. Rather, inaccurate guilty pleas are merely symptomatic of errors at the points of arrest, charge, or trial. Much of the worry over an innocence problem proceeds from misperceptions over (1) the characteristics of typical innocent defendants; (2) the types of cases they generally face; and (3) the level of due process they ordinarily desire. In reality, most innocent defendants are recidivists, because institutional biases*

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*select for the arrest and charge of these repeat players. And most cases are petty. In these low-stakes cases, recidivist innocent defendants face high pretrial process costs (particularly if the defendants are detained). But innocent defendants also enjoy low plea prices because prosecutors do not try to maximize sentence length in low-stakes cases. Moreover, defendants possess certain underappreciated bargaining advantages in these cases. In the end, the costs of proceeding to trial often swamp the costs of pleading to lenient bargains. Put differently, many recidivist innocent defendants are punished by process and released by pleas. Thus, plea bargaining is no source of wrongful punishment; rather, it may be a normative good that cuts erroneous punishment short. Accordingly, the system must provide innocent defendants access to plea bargaining. Current vehicles for rational choice pleas—like no-contest pleas and equivocal pleas—are not up to the task. Instead, the system should reconceive of false pleas as legal fictions and require defense lawyers to advise and assist innocent defendants who wish to enter into plea bargains and mouth dishonest on-the-record words of guilt.*

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## INTRODUCTION

Much has been made of an “innocence problem” in plea bargaining.<sup>1</sup> Even scholars who view plea bargaining as systemically positive nevertheless propose reforms to limit access only to the factually guilty.<sup>2</sup> But the conventional view is largely wrong. On balance, plea bargaining is a categorical good for many innocent defendants, particularly in low-stakes cases.

No doubt, punishment of the innocent is a tragedy and a failure. Yet, inaccurate guilty pleas are merely symptomatic of errors at the points of arrest, charge, or trial—not at the point of plea bargaining. The relevant plea-bargaining question is only how bad the failure will be—how great the tragedy. From that understanding, the inescapable, if seemingly unsavory, ultimate conclusion is that many innocent defendants are better off in a world with plea bargaining than one without it.

For the typical innocent defendant in the typical case—which I will demonstrate is a recidivist facing petty charges—the best resolu-

<sup>1</sup> See, e.g., Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 932-34 (1983); John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88, 88-90 (1977); Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1382-86 (2003); John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 444-52 (2001); Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1364-71, 1384 (2000); Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93, 97-100 (1976); Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 42 (2001); David Lynch, *The Impropriety of Plea Agreements: A Tale of Two Counties*, 19 LAW & SOC. INQUIRY 115, 132 (1994); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 986-90 (1989); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 52 (1988) [hereinafter Schulhofer, *Regulatory System*]; Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1992 (1992) [hereinafter Schulhofer, *Disaster*]; Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 494 (2000); Katherine J. Strandburg, *Deterrence and the Conviction of Innocents*, 35 CONN. L. REV. 1321, 1336 (2003); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1151-55 (1998).

<sup>2</sup> See Oren Bar-Gill & Oren Gazal Ayal, *Plea Bargains Only for the Guilty*, 49 J.L. & ECON. 353 (2006) (proposing a screening model to limit plea bargaining to the guilty); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295 (2006) (same); Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 925-26 (1980) (“[P]lea bargaining is constitutionally defensible . . . [but] demands the development of guidelines expressly designed to ensure that the incremental inaccuracy of plea bargaining does not exceed the limits tolerated by procedural due process.”).

tion is generally a quick plea in exchange for a light, bargained-for sentence. And such a plea is frequently available because prosecutors do not try to maximize sentence length in low-stakes cases. Moreover, defendants possess certain underappreciated bargaining advantages in these cases. Finally, even for innocent defendants facing more serious charges, plea bargaining may be, at a minimum, the manifestly least-bad option.

In making these claims, I do not wish to enter the larger debate over plea bargaining.<sup>3</sup> Specifically, I do not address many of the numerous and weighty objections to the practice.<sup>4</sup> My position is far more modest: I seek only to demonstrate that the conventional criticism—that there is an innocence problem in plea bargaining—is off the mark. Whatever other negative commentary may justifiably be offered against plea bargaining, it makes little sense to lament bargained-for discounts that permit the innocent to end cases on defendant-optimal terms. Rather, these great discounts for innocent defendants are facets of plea bargaining that may *recommend* the practice—at least in low-stakes cases. As such, viable bargaining outlets should exist for the innocent.

It is hardly a new observation that guilty pleas may prove attractive to the innocent.<sup>5</sup> But I intend to do more. I intend to pinpoint which innocent defendants draw the most benefit from plea bargaining and in what types of cases. In doing so, I rely on well-developed literature concerning process costs and prosecutors' bargaining incentives, but I also bring a fresh perspective to the scholarship by focusing on two underappreciated aspects of plea bargaining for the innocent: (1) that innocent defendants are probably recidivists facing petty charges; and (2) that, even in the face of agency failure, defendants possess certain bargaining advantages over prosecutors in low-stakes cases. I then

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<sup>3</sup> For a pithy, yet comprehensive, summary of plea bargaining's perceived ills, see Alschuler, *supra* note 1, at 932-34. For some of the strongest critiques of the practice, see *id.* at 931-1050; John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978); and Schulhofer, *Disaster*, *supra* note 1, at 1980-91. For some of the strongest (at least partial) support, see Thomas W. Church, Jr., *In Defense of "Bargain Justice,"* 13 LAW & SOC'Y REV. 509 (1979); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983); and Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1910-11 (1992).

<sup>4</sup> Indeed, I credit a number of these objections but stress that they have nothing to do with innocence. See, e.g., *infra* notes 77, 196-208, and accompanying text.

<sup>5</sup> See, e.g., H. RICHARD UVILLER, *VIRTUAL JUSTICE* 192 (1996); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1278-1306 (1975); Alschuler, *supra* note 1, at 951; Douglass, *supra* note 1, at 448 n.43; Easterbrook, *supra* note 3, at 320; McMunigal, *supra* note 1, at 989-90; Scott & Stuntz, *supra* note 3, at 1934.

raise a novel challenge to the much-maligned quasi-available current channels for rational-choice pleas—specifically, equivocal and no-contest pleas. I fault these pleas not because—as the typical complaint goes—they facilitate guilty pleas for the innocent, but rather because they do not make these false pleas easy or equitable enough. Finally, I offer a practical proposal to reconceive of false pleas as legal fictions and to require defense lawyers to advise and assist innocent defendants who wish to mouth dishonest on-the-record words of guilt. These are my principal contributions.<sup>6</sup>

Much of the worry over an innocence problem in plea bargaining proceeds from misperceptions over (1) the characteristics of typical innocent defendants, (2) the types of cases they generally face, and (3) the level of due process they typically desire. First, most innocent defendants are probably recidivists. These repeat players are the principal target population of police activities and investigations. And, as such, they are more likely to be caught erroneously in miscast or overwide police nets.<sup>7</sup> As recidivists, they face unique burdens when challenging false charges but—perhaps counterintuitively—enjoy concurrent unique plea-bargaining benefits. On the burden side, they are more likely to be charged or indicted postarrest and less

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<sup>6</sup> Professors Alschuler, Scott, and Stuntz have devoted the most rigorous and considered attention to bargaining benefits for the innocent. Alschuler, in particular, made a number of similar points to the points I make, but he used them as ammunition against plea bargaining generally. See Alschuler, *supra* note 5, at 1278-1306. Conversely, I take these points—and others that Alschuler did not make—as positive attributes of the practice. For instance, I reach different conclusions concerning the value of equivocal versus false pleas and the consequences of imperfect agency in low-stakes cases. Compare *id.* at 1182-94, 1201-03 (worrying that agency failure may lead innocent defendants to strike ill-advised bargains), and Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1420-24 (2003) (favoring equivocal pleas as a means of allowing the innocent to plead guilty honestly), with *infra* Part IV (arguing that agency failure has little impact and may even lower plea prices in low-stakes cases), and *infra* Part VII (raising several deficiencies of equivocal pleas and instead proposing systemic acceptance of false pleas). Moreover, Alschuler never explored my central point concerning the interplay between recidivism and innocence. See *infra* Part I.

Professors Scott and Stuntz, for their part, discuss plea bargaining for the innocent in a limited context only: they offer a persuasive defense of bargaining generally and posit that the innocent also may benefit from the practice. But they worry that inculpable defendants are more likely to seize bad pleas because they are risk averse. See Scott & Stuntz, *supra* note 3, at 1943, 1967-68. I disagree with their underlying premise that the innocent are apt to plead on bad terms. See *infra* note 175. In any event, they do not explore when and why it makes sense for the innocent to plead guilty, and they make no proposal for a means of access to such pleas.

<sup>7</sup> See *infra* notes 26-31 and accompanying text.

likely to have pending charges dismissed, even when evidence is weak.<sup>8</sup> Additionally, they are more likely to face pretrial detention and are less able to adequately fight their cases at trial.<sup>9</sup> On the benefits side, recidivists suffer less—if at all—from the corollary consequences of convictions.<sup>10</sup>

Second, most plea bargains terminate petty cases in exchange for trivial sentences, notwithstanding academic and popular overattention to uncommon instances of high-stakes bartering over years in prison in high-profile cases.<sup>11</sup>

Third, the pretrial process is painful. Punishment does not begin with sentence. Many defendants—even the innocent—do not welcome a process that frequently constitutes most, if not all, of the punishment they will face. For the typical innocent recidivist defendant facing the typical petty charge, the more abbreviated the process, the less the punishment.<sup>12</sup>

In low-stakes cases there is only half-truth to the conventional perception of prosecutors as rational wealth maximizers whose chief plea-bargaining aims are to achieve the greatest possible conviction rates and sentence lengths. Specifically, prosecutors may try to maximize conviction rates.<sup>13</sup> But they do not aim principally—or even at all—to maximize sentence lengths where the charges are minor. Instead, prosecutors often provide bargain concessions that far exceed what is necessary to motivate pleas.<sup>14</sup>

Prosecutors make such lenient offers because they can. They enjoy little public or official scrutiny in low-stakes cases. In these cases, prosecutors are much more interested in reducing their own administrative costs while earning some type (*any* type) of undelayed conviction. The adversarial model breaks down, or at least becomes a secondary consideration to workgroup cooperative principles. For all involved, the best pleas are quick pleas. And quick pleas are most ef-

<sup>8</sup> See *infra* Part I.B-C.

<sup>9</sup> See *infra* Part I.D.

<sup>10</sup> See *infra* notes 86-87 and accompanying text.

<sup>11</sup> See *infra* note 29 and accompanying text; see also MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 5 (1979) (noting that the criminal justice system is discussed typically in terms of the “big” cases that in fact “are exceptional—indeed almost unique” (internal quotation marks omitted)); MILTON HEUMANN, *PLEA BARGAINING* 11 (1978) (“Most studies of plea bargaining have been limited to the disposition of felonies . . .”).

<sup>12</sup> See *infra* Part II, and particularly note 75 and accompanying text.

<sup>13</sup> See *infra* notes 38-45, 158-160, and accompanying text.

<sup>14</sup> See *infra* Part III.

ficiently reached at low market prices, because—although prosecutors may abandon sentence maximization—defendants always remain sentence minimizers.<sup>15</sup> The threat that defendants might demur leads even self-interested defense attorneys and prosecutors to set prices low *ex ante* as the most efficient way to ensure that the largest number of defendants plead guilty with the least amount of hesitation.<sup>16</sup>

As stakes rise, however, plea bargaining comes to resemble more closely the orthodox ideal of adversarial gamesmanship: prosecutors more often yield only enough to purchase pleas and use overcharging to compel defendants' acceptance of high prices. In these serious cases, bargaining provides an escape only from the prohibitive risk of substantial trial penalties, not from trial processes that defendants might otherwise welcome. Bargaining may be rational here, but it creates no normative good. Yet, significantly, this overcharging criticism is an objection to bargaining and charging discretion generally. The problem affects all defendants; it is not exclusive to the innocent.<sup>17</sup>

If it is normatively appropriate for the innocent to plead guilty in low-stakes cases, and rational—albeit normatively problematic for reasons unrelated to guilt and innocence—for the innocent to plead guilty in high-stakes cases, then the system must provide effective avenues for innocent defendants to plead guilty.<sup>18</sup> Two possible avenues are *nolo contendere* (or no-contest) pleas and so-called *Alford* (or equivocal) pleas.<sup>19</sup> However, both plea types present problems. First, they are inconsistently available, leaving haphazard disparities both within and across jurisdictions between those innocent defendants permitted to plead guilty and those forced to trial. Second, both types of pleas lead to unanticipated postconviction consequences. Third, *Alford* pleas raise the possibility that courts are erroneously accepting constitutionally impermissible involuntary pleas.<sup>20</sup>

Ultimately, the best avenue to guarantee equal access to plea bargaining and guilty pleas is regularization and systemic acceptance of a common—though neither uniform nor conventionally welcome—underground practice: permitting innocent defendants to offer false on-the-record admissions of guilt. This recommendation is wholly

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<sup>15</sup> See *infra* Part IV.A-B.

<sup>16</sup> See *infra* Part IV.A-B.

<sup>17</sup> See *infra* Part V.

<sup>18</sup> See *infra* notes 212-238 and accompanying text.

<sup>19</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970).

<sup>20</sup> See *infra* Part VII.A.

ethical if the system reconceives of false admissions as utilitarian legal fictions.<sup>21</sup>

This article has seven Parts. In Part I, I discuss selection biases that lead to the disproportionate arrest, prosecution, and trial conviction of recidivist innocent defendants. In Part II, I assess defendants' process costs and explain when these costs most influence defendants' decision making. In Part III, I explore prosecutors' incentives to offer lenient bargains in low-stakes cases. In Part IV, I detail defendants' bargaining advantages in low-stakes cases. In Part V, I consider the particularly serious cases where process costs are of no significant consequence and where, conversely, overcharging and trial penalties become genuine concerns. In Part VI, I address objections to permitting innocent defendants to plead guilty. In Part VII, I explain why *Alford* and *nolo contendere* pleas are inadequate to ensure access to rational-choice guilty pleas. Instead, I propose ethical and systemic acceptance of false pleas as a means of guaranteeing innocent defendants' equal access to the benefits of bargaining.

## I. THE USUAL SUSPECTS

There is no longer any serious question that innocent people are charged with and convicted of crimes.<sup>22</sup> These instances of wrongful conviction may be uncommon, but even so, they likely affect thousands of people per year nationwide.<sup>23</sup> Still, public perceptions of the characteristics of the innocent accused remain fuzzy, if not inaccurate. Commonly, the media portrays the innocent accused as the railroaded "good person"—the law-abiding citizen robbed of liberty and tossed in a dank cell by incompetent or even crooked prosecutors and police.<sup>24</sup>

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<sup>21</sup> See *infra* Part VII.B.

<sup>22</sup> See, e.g., Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1342-58 (1997); Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125, 129-33 (1998); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1158-63 (2005).

<sup>23</sup> See Givelber, *supra* note 22, at 1343 (citing studies estimating the rate of conviction of innocent defendants to be between 0.5% and 7.9% of all cases, and noting that even the lowest estimate entails conviction of several thousand per year).

<sup>24</sup> Any number of films reinforce this misperception. See, e.g., CATCH A FIRE (Focus Features 2006); THE FUGITIVE (Warner Bros. Pictures 1993); THE HURRICANE (Universal Pictures 1999); MY COUSIN VINNY (Twentieth Century Fox 1992); THE SHAWSHANK REDEMPTION (Columbia Pictures 1994). *But cf.* JOHNNY CASH, *Joe Bean*, on AT FOLSOM PRISON (CBS 2006) ("Yes, they're hanging Joe Bean this morning, for a



Undoubtedly, such cases exist. But they are the rarest type of a rare category. In fact, recidivists are the most likely innocent defendants. First, recidivists comprise the majority of criminal defendants overall. Specifically, in 2002, in the nation's seventy-five largest counties, seventy-six percent of state-court felony defendants had at least one prior arrest, fifty percent had five arrests or more, fifty-nine percent had at least one prior conviction, and twenty-four percent had five or more convictions.<sup>25</sup> Second, this recidivist majority is overrepresented among the population of wrongfully accused, because institutional biases select for erroneous arrest, prosecution, and trial conviction of recidivist defendants.<sup>26</sup>

### A. Arrest Biases

Recidivists are common first targets when crime happens, or even when they are simply on public sidewalks or in building lobbies in high-crime areas.<sup>27</sup> They are stopped because they are known to police or just because they are more likely to look the criminal part.<sup>28</sup> This on-the-beat selection bias for repeat players is most pronounced when police enforce minor crime—particularly the petty public-order

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shooting that he never did. He killed twenty men, by the time he was ten, he was an unruly kid.”).

<sup>25</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002, at 12-13 tbls.10-11 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc02.pdf> [hereinafter DOJ, FELONY DEFENDANTS]. National misdemeanor data are unavailable. In fact, I could find detailed data for New York City only. Accordingly, throughout the article, I draw on this source. In 1998, 46% of misdemeanor defendants in New York City had some kind of criminal record. N.Y. CITY CRIMINAL JUSTICE AGENCY, SUMMARY AND ANALYSIS: TRENDS IN CASE AND DEFENDANT CHARACTERISTICS, AND CRIMINAL COURT PROCESSING AND OUTCOMES, IN NON-FELONY ARRESTS PROSECUTED IN NEW YORK CITY'S CRIMINAL COURTS, at fig.3a (2002), available at <http://www.cjareports.org/reports/fnrep02.pdf> [hereinafter CJA, NON-FELONY TRENDS].

<sup>26</sup> For informative examples of these selection biases in action, see RONALD J. ALLEN, RICHARD B. KUHN & ELEANOR SWIFT, EVIDENCE: TEXT, CASES, AND PROBLEMS 303 (2d ed. 1997); RICHARD O. LEMPert, SAMUEL R. GROSS & JAMES S. LIEBMAN, A MODERN APPROACH TO EVIDENCE 326-27 n.10 (3d ed. 2000).

<sup>27</sup> See RICHARD O. LEMPert & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 217 (2d ed. 1983) (“[P]olice work is organized so that persons mistakenly charged are likely to have criminal records.”); accord David A. Dana, *Rethinking the Puzzle of Escalating Penalties for Repeat Offenders*, 110 YALE L.J. 733, 753 (2001); Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1271-72 (2001).

<sup>28</sup> See LEMPert & SALTZBURG, *supra* note 27, at 217 & n.47; cf. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 986-87 (1999).

offenses that have increasingly become the grist of criminal court mills.<sup>29</sup> But even in more serious cases, police are prone to arrest recidivists on less concrete evidence, because police often *start* with the recidivists—for instance, by directing crime victims to mug-shot books composed exclusively of prior arrestees.<sup>30</sup> In short, when police lack solid leads—or even when they just need higher arrest numbers—the time has come to “round up the usual suspects,” as Captain Renault announced in *Casablanca*.<sup>31</sup>

### B. Charging Biases

At the screening phase, prosecutors err on the side of charging—a predisposition that affects *all* arrestees, not just recidivists.<sup>32</sup> There are two principal reasons. First, in the interest of comity, prosecutors must level charges against a significant portion of the arrestees that police process.<sup>33</sup> Second, prosecutors carry a general “presumption of

<sup>29</sup> See, e.g., STATE OF N.Y. UNIFIED COURT SYS., CRIMINAL COURT OF THE CITY OF N.Y., ANNUAL REPORT 2005, at 30, 32-33 (2005), available at <http://www.nycourts.gov/courts/nyc/criminal/annual-report05.pdf> [hereinafter N.Y., ANNUAL REPORT]; CJA, NON-FELONY TRENDS, *supra* note 25, at 20 fig.2; see also *supra* text accompanying note 11. See generally Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998). For example, in New York City, arrests for theft of services (turnstile hops) rose from 1693 in 1989 to 22,686 in 1998. CJA, NON-FELONY TRENDS, *supra* note 25, at tbl.6. Arrests for all categories of trespass rose from 2596 in 1989 to 8796 in 1998. See *id.* at tbl.9. Most strikingly, arrests for nonfelony possession of marijuana rose from 1214 in 1989 to 32,032 in 1998. See *id.* at tbl.4; see also Bernard E. Harcourt & Jens Ludwig, *Reefer Madness: Broken Windows Policing and Misdemeanor Marijuana Arrests in New York City, 1989–2000*, 6 CRIMINOLOGY & PUB. POL'Y 165 (2007).

<sup>30</sup> See LEMPERT & SALTZBURG, *supra* note 27, at 217; Dana, *supra* note 27, at 752-53; Sanchirico, *supra* note 27, at 1271-72.

<sup>31</sup> CASABLANCA (Warner Bros. Pictures 1942). I wish I could claim this illustrative reference as my own. See LEMPERT & SALTZBURG, *supra* note 27, at 217 n.47.

<sup>32</sup> Many scholars have highlighted a systemic prosecutorial screening failure. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002); see also Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquired*, 42 AM. CRIM. L. REV. 1167, 1180 (2005); Schulhofer, *Regulatory System*, *supra* note 1, at 52. A noteworthy recent example of this failure is the so-called Duke Lacrosse case, where a North Carolina prosecutor zealously pursued very questionable rape charges against three Duke lacrosse players. See Peter Whoriskey & Sylvia Adcock, *All Charges Dropped Against 3 at Duke*, WASH. POST, Apr. 12, 2007, at A1.

<sup>33</sup> See George F. Cole, *The Decision To Prosecute, in ROUGH JUSTICE: PERSPECTIVES ON LOWER CRIMINAL COURTS* 123, 127 (John A. Robertson ed., 1974) (“[T]he police . . . are dependent upon the prosecutor to accept the output of their system; rejection of too many cases can have serious repercussions affecting the morale, discipline, and workload of the force.”); Givelber, *supra* note 22, at 1362 (“Unless the police re-

guilt” that leads them to resolve inconsistencies in favor of guilt.<sup>34</sup> This charging presumption is strongest when police arrest recidivists. Prosecutors assume—perhaps with good reason—that recidivists are guilty of some crime.<sup>35</sup> As such, prosecutors are unlikely to exercise discretion to decline prosecution.<sup>36</sup> Even in the weakest cases, prosecutors can go forward with charges and anticipate pleas because they know that recidivists cannot easily fight charges at trial under existing evidence rules.<sup>37</sup>

### C. Dismissal Aversion

Once charged, innocent defendants—particularly recidivists—are unlikely to convince prosecutors that the charges are erroneous. Prosecutors have every incentive to spin away stories of innocence. First, prosecutors retain the same presumption of guilt that led them to charge erroneously in the first instance.<sup>38</sup> Second, even if prosecutors were receptive to protests of innocence, innocent defendants cannot effectively signal genuine innocence because prosecutors are aware that guilty defendants will attempt to copy any halfway persua-

port on its face reveals an inconsistency or barrier to conviction, the prosecutor accepts the general conclusion of the police without making an independent investigation or evaluation of the evidence.” (quoting LLOYD L. WEINREB, *DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES* 58 (1977)); see also CJA, *NON-FELONY TRENDS*, *supra* note 25, at 12 & tbl.1; Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1328 (2000).

<sup>34</sup> HEUMANN, *supra* note 11, at 103; accord George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 110-13 (1975); Givelber, *supra* note 32, at 1180-82; Leipold, *supra* note 33, at 1328; Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOL. 52, 57-58 (1967).

<sup>35</sup> ALLEN, KUHN & SWIFT, *supra* note 26, at 303; accord Samuel Dash, *Cracks in the Foundation of Criminal Justice*, in *ROUGH JUSTICE: PERSPECTIVES ON LOWER CRIMINAL COURTS*, *supra* note 33, at 247, 256 (“That the man might be innocent appears not to worry [the prosecutor] . . . because [if the defendant has a] record, he must have committed some undetected crime and deserves any sentence he gets.”).

<sup>36</sup> See *infra* notes 46-53 and accompanying text.

<sup>37</sup> See LEMPERT & SALTZBURG, *supra* note 27, at 217 (“[T]he advantage which past crimes evidence gives the prosecutor at trial means that a weak case is less likely to be dropped . . .”); see also *infra* notes 54-63 and accompanying text (discussing several conviction biases against recidivists).

<sup>38</sup> See Givelber, *supra* note 22, at 1363 (“Having made this decision [to charge], the prosecutor will not retreat easily from it without securing something in return, such as a plea . . .”); see also *supra* note 34 and accompanying text. One vivid example of this rigid thinking is prosecutorial unwillingness to concede error even in the face of exculpatory postconviction DNA evidence. Instead, prosecutors fall back on dubious alternative theories to justify ill-won convictions. See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004).

sive signal.<sup>39</sup> In any event, in many low-stakes cases there is no time for thorough signaling.<sup>40</sup> Third, prosecutors can justify incuriosity as appropriately leaving proof questions to the judge or jury.<sup>41</sup> Fourth, line prosecutors often must obtain supervisory approval before dismissing cases,<sup>42</sup> even though they enjoy no similar official oversight over their bargaining, charging, and trial decisions generally.<sup>43</sup> At bottom, prosecutors carry mindsets of “nondefeat”—aversions to dismissal that they keep in all cases, but that are most pronounced in cases against recidivists.<sup>44</sup> In this sense, prosecutors consistently function as *conviction* maximizers even if they only rarely operate as sentence maximizers.<sup>45</sup>

<sup>39</sup> See Scott & Stuntz, *supra* note 3, at 1967; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 40 (1997).

<sup>40</sup> See FEELEY, *supra* note 11, at 11 (“[T]he overwhelming majority of cases took just a few seconds.”); Lynch, *supra* note 1, at 126 (describing how prosecutors plea bargain cases in “machine-gun fashion”).

<sup>41</sup> See Givelber, *supra* note 32, at 1181 (“[P]rosecutors may decide that the defendant should, quite literally, ‘tell it to the judge.’”); see also UVILLER, *supra* note 5, at 192-93; Skolnick, *supra* note 34, at 57-58.

<sup>42</sup> See Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 64 n.42 (1968) (“[I]t [i]s easier to lose the case than to go through the bureaucratic obstacles preliminary to dismissal.”); see also Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1041 (1972) (noting that the Justice Department requires U.S. Attorneys to seek approval before dismissing an indictment).

<sup>43</sup> See *infra* notes 158-160 and accompanying text.

<sup>44</sup> See Skolnick, *supra* note 34, at 57 (“In the county studied, the prosecutor’s office cared less about winning than about *not losing*. The norm is so intrinsic . . . [that it] cannot be attributed to such a simple and obvious fact as the periodic requirement of reelection. Indeed, reelection seemed to be taken for granted . . . .”); accord Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2472 (2004) (“[Prosecutors’] psychology of risk aversion and loss aversion reinforces the structural incentives to ensure good statistics and avoid risking losses.”); Felkenes, *supra* note 34, at 117 (analyzing prosecutors’ “conviction psychology”). Notably, the conviction rate in cases against recidivist and detained defendants (who are more likely to be recidivists) is substantially higher, which indicates a lower dismissal rate. DOJ, FELONY DEFENDANTS, *supra* note 25, at 24 tbl.24; CJA, NON-FELONY TRENDS, *supra* note 25, at tbl.16.

<sup>45</sup> See Bibas, *supra* note 44, at 2471 (“The statistic of conviction . . . matters much more than the sentence.”); Felkenes, *supra* note 34, at 114 (“[A]n individual’s success as a prosecutor may be measured by the number of criminal convictions which he has been able to secure.”); Rabin, *supra* note 42, at 1045 (“[C]onvictions are the central performance standard, and departures from the average rate raise questions and create anxieties.”); *id.* at 1071 (“[N]egotiation of a plea, any guilty plea, is a victory; the conviction rate is a quantitative, not a qualitative, measure of effectiveness.”); Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335, 337 (1990) (“Conviction rates constitute simplistic but easily advertised indicators of success since they appear to measure prosecutors’ ability to win cases.”).

What, then, accounts for fairly common instances of prosecutorial dismissals? For example, in New York City, prosecutors dismiss about a third of felonies and about a tenth of misdemeanors.<sup>46</sup> Closer analysis of the numbers, however, reveals two trends: first, dismissals often may have little to do with prosecutorial belief in innocence; and, second, dismissals are least likely in the low-stakes public-order cases that innocent recidivist defendants are most likely to face.<sup>47</sup> Specifically, the data reveal that felonies are dismissed more frequently than non-felonies, and violent offenses are dismissed *far* more frequently than victimless offenses.<sup>48</sup> In fact, in New York City, nonfelony harm-to-persons cases are dismissed at a rate almost *ten times* higher than the rate for nonfelony drug cases.<sup>49</sup> At first blush, it seems odd that prosecutors would more readily dismiss more serious cases with concrete victims. But that is just the point: crimes with victims generally require lay-witness cooperation and must be dismissed when cooperation is not forthcoming. Indeed, studies have found that noncooperation is the leading cause of case dismissals and decisions to not charge.<sup>50</sup> Notably, in the 1990s in New York City, nonfelony charging rates rose and pre- and postcharge dismissal rates fell even as prosecutors were called upon to process more than twice as many arrests—most of them for public-order “victimless” offenses.<sup>51</sup> Prosecutors charged more and dismissed less—even as they tackled far more cases—because they *could*; they did not need lay witnesses to push these victimless public-order cases forward (no matter how weak or strong the cases might have been).

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<sup>46</sup> CJA, NON-FELONY TRENDS, *supra* note 25, at tbl.14; N.Y. CITY CRIMINAL JUSTICE AGENCY, TRENDS IN FELONY CASE PROCESSING IN THE 1990S, 28 tbl.E.2-1 (2000), available at <http://www.cjareports.org/reports/trends.pdf> [hereinafter CJA, FELONY TRENDS]. As noted, *supra* in note 25 and *infra* in note 126, national misdemeanor data are nonexistent. Therefore, I rely on New York City misdemeanor data for examples. These data do not segregate prosecutorial dismissals from judicial dismissals (or even rare trial acquittals). I think it is a safe assumption, however, that prosecutors are the source of almost all dismissals. If my assumption does not hold, the rate of prosecutorial dismissals is in fact somewhat lower, which only serves to underscore my point further.

<sup>47</sup> See *supra* note 29 and accompanying text.

<sup>48</sup> CJA, NON-FELONY TRENDS, *supra* note 25, at tbl.15; see also DOJ, FELONY DEFENDANTS, *supra* note 25, at 24 tbls.23 & 24 (indicating that nationwide violent felonies are dismissed approximately fifty percent more often than other felonies).

<sup>49</sup> CJA, NON-FELONY TRENDS, *supra* note 25, at tbl.15.

<sup>50</sup> See, e.g., HANS ZEISEL, THE LIMITS OF LAW ENFORCEMENT 26-28 (1982); Donald A. Dripps, *Miscarriages of Justice and the Constitution*, 2 BUFF. CRIM. L. REV. 635, 644-46 & nn.31-35 (1999).

<sup>51</sup> CJA, NON-FELONY TRENDS, *supra* note 25, at 12 & tbls.1 & 14.

Ultimately, it seems that prosecutors do not typically dismiss because they *desire* dismissal or doubt the strength of charges. There is, therefore, no good reason to believe that innocent defendants will be the beneficiaries of dismissals.<sup>52</sup> They may receive such unlikely dismissals by blind luck, but in the main they can *expect* only a binary choice: plea or trial.<sup>53</sup>

#### D. Trial Biases

Innocent recidivist defendants who choose to go to trial face a number of hurdles that raise the prospect of wrongful conviction.<sup>54</sup> First, innocent defendants are less likely to rely solely on putting the prosecution to its burden. They have stories of innocence to tell—typically of alibi.<sup>55</sup> But they cannot testify without potentially opening the door to past-crimes evidence that may be used against them for impeachment purposes.<sup>56</sup> In any event, juries may not credit even true stories.<sup>57</sup> Second, recidivist innocent defendants are more likely

<sup>52</sup> Cf. *infra* notes 227-228 and accompanying text.

<sup>53</sup> Cf. Leipold, *supra* note 22, at 1160 (“[O]nce the process against an innocent suspect begins, there is little chance that a case will be derailed against the prosecutor’s wishes before trial . . .”). See generally Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85 (2007).

<sup>54</sup> See Gross, *supra* note 22, at 145-46 (“An innocent defendant who goes to trial faces a high risk of conviction. . . . [I]t is unrealistic to expect juries to systematically correct errors in the earlier decisions to investigate, arrest, and prosecute.”); see also Givelber, *supra* note 32; Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011, 2013 (1992).

<sup>55</sup> Leipold, *supra* note 22, at 1130 (“It might be precisely when the wrong person has been charged that factual development, alibis, and hard-to-find evidence are the most vital to the case.”). Innocent defendants may also include individuals who actually played some part in the alleged incident but whose behavior was noncriminal or met an affirmative defense as a matter of law. Just like alibi defendants, these defendants have stories to tell, and they would seem even less likely to be able to tell them persuasively. I am reminded of Clyde Griffiths, the protagonist in Theodore Dreiser *AN AMERICAN TRAGEDY* (1925), who loses the will to murder his pregnant girlfriend, but is convicted all the same after she accidentally drowns in his company.

<sup>56</sup> See LEMPERT & SALTZBURG, *supra* note 27, at 217-18.

<sup>57</sup> See UVILLER, *supra* note 5, at 192 (“The stark, simple, and ugly fact is that true stories can be as incredible as false ones. Maybe more so since the false story is fabricated to seem true. And jurors cannot be trusted any more than the rest of us to sort the true from the false with a high degree of accuracy.”); see also Givelber, *supra* note 32, at 1171; Smith, *supra* note 1, at 513. In this respect, the plea-bargaining recidivist defendant may feel that she played a greater role in her fate than the recidivist trial defendant who had to sit silently by. See JONATHAN D. CASPER, *CRIMINAL COURTS: THE DEFENDANT’S PERSPECTIVE* 51 (1978) (“One of the peculiar differences between trial and plea defendants is the greater propensity of those who have had trials to complain

to be held pretrial, and this confinement impacts their ability to communicate with their attorneys, contact witnesses, and plan defenses.<sup>58</sup> Third, “usual-suspects” policing creates early opportunities for false identification. False identification is the leading cause of wrongful arrest and conviction because police, prosecutors, and juries give undue credence to its probative strength.<sup>59</sup> Fourth, juries and judges are more likely to be predisposed toward conviction of recidivist defendants<sup>60</sup>—all the more so if they can intuit, as is often manifest, that a particular defendant is currently confined.<sup>61</sup> For these reasons, it is no surprise that the great majority of DNA exonerations involve recidivist defendants wrongfully convicted after trial, and that over three-quarters of these erroneous convictions were based at least partly on inaccurate eyewitness identification evidence.<sup>62</sup>

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that they have not had the chance to present their side of the case. . . . [P]leas may foster a greater sense of participation . . . .”)

<sup>58</sup> See Skolnick, *supra* note 34, at 65 (“Several studies have demonstrated that, for the same charges, defendants who make bail generally are more successful in countering accusations of criminality than those who do not.”); see also Bibas, *supra* note 44, at 2493; Leipold, *supra* note 22, at 1130.

<sup>59</sup> On this point, see LEMPert & SALTzBURG, *supra* note 27, at 217; Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1970 (1992); Givelber, *supra* note 22, at 1347-48; Gross, *supra* note 22, at 136; and Elizabeth F. Loftus, *Eyewitness Testimony: Psychological Research and Legal Thought*, 3 CRIME & JUST. 105, 108 (1981). Courts have long held that cases may be proven beyond a reasonable doubt based solely on the uncorroborated testimony of a single lay eyewitness. See, e.g., *United States v. Telfaire*, 469 F.2d 552, 554 (D.C. Cir. 1972).

<sup>60</sup> See, e.g., LEMPert & SALTzBURG, *supra* note 27, at 218 (“[T]he jurors will not feel great regret if they make the mistake of convicting a [recidivist] defendant innocent of the crime charged, because they will be sure that the defendant is guilty of some crime.”); Patricia J. Williams, *Reasons for Doubt*, THE NATION, Dec. 30, 2002, at 10, 10 (recounting a judge’s remark that “[t]he police don’t have time to arrest innocent people,” and, therefore, “[i]f the defendant didn’t commit this particular crime, he did something somewhere, sometime”).

<sup>61</sup> See Skolnick, *supra* note 34, at 65 (“The man in jail enters the courtroom under guard, from the jail entrance. His hair has been cut by a jail barber, and he often wears the clothes he was arrested in. By contrast, the ‘civilian’ defendant usually makes a neat appearance, and enters the court from the spectator’s [sic] seats, emerging from the ranks of the public.”).

<sup>62</sup> See Givelber, *supra* note 32, at 1189; Gross, *supra* note 22, at 142-43. See generally Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. (forthcoming June 2008) [hereinafter Garrett, *Claiming Innocence*], available at <http://ssrn.com/abstract=1032408>; Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008). Of the first two hundred defendants exonerated by DNA evidence only nine were initially convicted after pleas. *Id.* at 60. There may be several reasons for this small proportion. First, prosecutors may give fewer acceptable offers in the very high-stakes cases that ultimately lead to DNA challenges. *Id.* at 74. Second, some defendants who are convicted after plea may be barred from pursuing DNA relief, or, at a minimum, may find lawyers or courts

These several biases present dangers of wrongful punishment—dangers traceable not to plea bargaining, but to the moments of arrest, charge, or trial.<sup>63</sup> Instead, as I will explain, plea bargaining may be the best way for an innocent defendant to minimize wrongful punishment.<sup>64</sup>

## II. DEFENDANTS' PROCESS COSTS

In low-stakes cases plea bargaining is of near-categorical benefit to innocent defendants, because the process costs of proceeding to trial often dwarf plea prices. Defendants' process costs generally fall into three overlapping categories: pecuniary loss, inconvenience, and uncertainty.<sup>65</sup> Postarrest, a defendant often waits twenty-four or more hours to see a judge. If this first appearance results in no disposition, the judge may either set bail, remand the defendant, or release her on her own recognizance. If the defendant is released or pays bail, she must return to court multiple times. She faces public embarrassment, anxiety, possible legal fees and lost wages; she is also forced to deal with the opportunity costs of meeting with attorneys, helping prepare defenses, and attending mandatory court appearances where little often happens.<sup>66</sup> For each appearance, she leaves home in the early morning, waits in long lines to pass through courthouse security, waits for her lawyer's arrival, waits for the prosecution to procure its file, waits for the case to be called, waits for court personnel to serve her with postappearance papers, and finally returns home—often in the

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less receptive to challenges. See Garrett, *Claiming Innocence*, *supra* (manuscript at 39 & n.199) (citing statutes and case law that bar postconviction relief following guilty pleas). Third, physical evidence may be preserved less frequently following plea convictions. Fourth, the types of innocent defendants who are disposed to forego trial process may be similarly disposed to forego postconviction process.

<sup>63</sup> See Easterbrook, *supra* note 3, at 320 ("If there is injustice here, the source is not the plea bargain. It is, rather, that innocent people may be found guilty at trial."); Easterbrook, *supra* note 59, at 1970 ("What disrupts this separation of the guilty from the innocent is not a flaw in the bargaining process but a flaw at trial."); Givelber, *supra* note 32, at 1175 ("The initial screening will determine significantly the kinds of errors that are committed at the adjudicatory phase.")

<sup>64</sup> See McCoy & Mirra, *supra* note 2, at 922 ("An innocent defendant who is induced to plead guilty because he would not have been acquitted at trial could not have been saved by the American criminal justice system."); see also Easterbrook, *supra* note 3, at 320.

<sup>65</sup> See generally FEELEY, *supra* note 11, at 18; Martin A. Levin, *Delay in Five Criminal Courts*, 4 J. LEGAL STUD. 83, 111, 121 (1975); Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1171-72 (2004).

<sup>66</sup> See FEELEY, *supra* note 11, at 15, 32; Alschuler, *supra* note 5, at 1192-94.



late afternoon.<sup>67</sup> Conversely, if she is remanded or held on bail that she cannot pay, she remains in jail at least until disposition. Once every few days or weeks, she is herded from jail cell to caged bus to crowded-courthouse cell where she waits to go in shackles before a judge for a minutes-long appearance.

For all defendants, the pretrial appearances are several; the lead-up to even a misdemeanor trial may take weeks or months.<sup>68</sup> In contrast, pleas typically may be had immediately.<sup>69</sup> Significantly, these many process costs lie independent of case strength or acquittal chance.<sup>70</sup> In fact, innocent defendants may have higher process costs on balance than those who are guilty, because they are more likely to

<sup>67</sup> See HEUMANN, *supra* note 11, at 70; ARTHUR ROSETT & DONALD R. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE 150-51 (1976); Weinstein, *supra* note 65, at 1172. Clearly, there is a difference between appropriate and inappropriate process. Process scholars correctly condemn inapt delays and non-sensical adjournments. See, e.g., FEELEY, *supra* note 11, at 10, 222-24; Alschuler, *supra* note 1, at 951, 955; Lynch, *supra* note 1, at 119. But even the most efficient trial process takes time, and process can be trimmed only so far. See FEELEY, *supra* note 11, at 291 ("Processing costs are part and parcel of the externalized operating costs in any organization."); Alschuler, *supra* note 1, at 951 ("[S]ignificant process costs are inherent in any form of adjudication.").

<sup>68</sup> See HEUMANN, *supra* note 11, at 70-71 (quoting a defense attorney saying, "To the person who wants to fight his case . . . they've got to come back[,] . . . [b]ack and back and back . . ."); Leipold, *supra* note 22, at 1140 ("[A]s every practitioner knows, there are so many exceptions to [the speedy trial] limit that [the statutorily prescribed period] is typically just an opening bid."); Weinstein, *supra* note 65, at 1172 ("[W]ithout any delay by the defense, it is very rare for a case to get to trial before the fifth court date.").

<sup>69</sup> See HEUMANN, *supra* note 11, at 69-71. In New York City, cases commence with an arraignment appearance that occurs on average less than twenty-four hours after arrest. N.Y., ANNUAL REPORT, *supra* note 29, at 29. Approximately half of all cases are disposed of at this initial arraignment appearance. *Id.* at 34; see also N.Y. CITY CRIMINAL JUSTICE AGENCY, INC., ANNUAL REPORT 2006, at 16 (2006) [hereinafter CJA, ANNUAL REPORT], available at <http://www.cjareports.org/reports/annual06.pdf>. Even the cases that "survive arraignments" typically do not last long—unless they proceed to trial. One study found that 84% of convicted misdemeanor defendants were convicted within two months of arraignments and 95% within six months. N.Y. CITY CRIMINAL JUSTICE AGENCY, QUICKVIEWS NO. 3: LENGTH OF TIME TO CRIMINAL COURT DISPOSITION 2003 [hereinafter CJA, QUICKVIEWS], available at <http://www.nycja.org/research/quick3.htm>. In contrast to this speed, misdemeanor cases take an average of seven to nine months to proceed to trial. See N.Y., ANNUAL REPORT, *supra* note 29, at 55. Likewise, 53% of felony defendants who pled guilty did so within three months of arraignments and 89% within a year. CJA, QUICKVIEWS, *supra*. Yet, most felony cases that went to trial took over one year to proceed to trial, only 10% proceeded to trial within three months, and almost 25% went to trial only after the case was more than eighteen months old. *Id.*

<sup>70</sup> See FEELEY, *supra* note 11, at 31 ("[P]retrial costs do not distinguish between innocent and guilty; they are borne by all . . .").

put forward positive defenses; these substantive defenses generally require more preparation time than procedural claims.<sup>71</sup>

### A. Process Pleas

In low-stakes cases, process costs dominate, and plea bargaining is a potential way out. The innocent accused who proceeds to trial over a plea to a pittance may advance laudable societal principles, but she does herself few favors.<sup>72</sup> The costs of pleading guilty may prove so comparatively low in minor cases that pleading becomes a reasonable option *even before* assessing the real danger of trial conviction and subsequent sentence.<sup>73</sup> Like the driver who summarily pays the undeserved traffic ticket, defendants may conclude that the fight is not worth it, especially when they may plead guilty at arraignments, just hours after their arrests.<sup>74</sup> It is small wonder, then, that so many defendants—innocent and guilty—have little interest in engaging in process in these cases and simply wish to “get [them] over with.”<sup>75</sup>

Professor Alschuler, one of bargaining’s foremost critics, made this point, noting that bargains in most misdemeanor cases are unnecessary because the process itself is sufficient to prompt process-cost guilty pleas.<sup>76</sup> Alschuler’s disapproval of seemingly superfluous dis-

<sup>71</sup> See Stuntz, *supra* note 39, at 40 (“Factual arguments are not merely harder to prepare and pursue than legal claims; they are harder to evaluate. . . . In such a world, factual arguments—claims [inter alia] that the defendant did not do the crime . . . —tend to require nontrivial investigation simply to establish whether there is any argument to make.”).

<sup>72</sup> See Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 82 (1995).

<sup>73</sup> See FEELEY, *supra* note 11, at 30, 277; HEUMANN, *supra* note 11, at 70; Weinstein, *supra* note 65, at 1172. In this respect, defendants in petty street-crime cases are strange bedfellows of defendant corporations, for which the process may also be the punishment: “A conviction carries at most a million-dollar fine, but simple indictment, which lies wholly within the prosecutor’s discretion, imposes multibillion-dollar losses.” Richard A. Epstein, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14.

<sup>74</sup> See *supra* note 69 and accompanying text.

<sup>75</sup> HEUMANN, *supra* note 11, at 69 (internal quotation marks omitted); see also *id.* at 69-70 (“Contrary to what the newcomer expects, defendants are often eager to plead guilty. . . . [T]hey contrast the relative ease with which they can plead guilty with the costs in time and effort required to fight a case.”); Uphoff, *supra* note 72, at 81 (“[A] significant number of defendants just want to plead guilty. Few criminal defendants, even those who are innocent, actually want to go to trial.” (footnote omitted)); *infra* note 124 and accompanying text.

<sup>76</sup> See Alschuler, *supra* note 1, at 952 (“For it is primarily the process costs of misdemeanor justice that currently cause all but a small minority of defendants to yield to conviction; these process costs are, in practice, more influential than plea bargain-

counts may be sound as a critique of bargain justice generally.<sup>77</sup> For innocent defendants specifically, however, overgenerous concessions provide escape from an undesired and expensive process on defendant-optimal terms. These innocent defendants might have pled guilty on the basis of process costs alone, but now they may do so with less sanction. This provides a persuasive response to the complaint that “[f]orcing an accused to choose between immediate freedom in return for a guilty plea and continued incarceration in return for a claim of innocence seems perverse.”<sup>78</sup> Would we rather force the innocent defendant to remain in jail to await completion of a slow, undesired process? For innocent defendants facing a prohibitively burdensome trial course, the choice is not between bargain and potential vindication at trial; the choice is between pleading guilty and pleading guilty with the added discounts that plea bargaining provides. Why should we not favor the latter—at least for the innocent?

### B. *Process Costs and Defendant Categories*

It is worth taking a moment to specify which defendants benefit from plea bargaining to avoid process costs. Taking the most likely innocent defendants first—recidivists charged with minor crimes—their process costs may be tremendous, particularly when the defendants are impecunious. Courts often rely on recidivists’ past records as bases for setting more frequent and higher bail, notwithstanding lower charge severity or even lack of case strength.<sup>79</sup> Furthermore, it is doubtful whether recidivist defendants can make bail, at least in the

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ing.”); see also Bibas, *supra* note 44, at 2492-93 (“The pretrial detention can approach or even exceed the punishment that a court would impose after trial. So even an acquittal at trial can be a hollow victory. . . .”).

<sup>77</sup> The discounts may be superfluous in the sense that most defendants in low-stakes cases would *ultimately* see fit to plead guilty even without them. Nonetheless, such discounts save on opportunity costs. As an institutional matter, low-set bargain prices are the most efficient means to ensure that unimportant cases plead quickly en masse, with minimal defendant hesitation. See *infra* Part IV and notes 140-144 and accompanying text.

<sup>78</sup> Givelber, *supra* note 1, at 1364.

<sup>79</sup> See N.Y. CITY CRIMINAL JUSTICE AGENCY, FACTORS INFLUENCING RELEASE AND BAIL DECISIONS IN NEW YORK CITY, pt. 2, at 26-28, 50 (2004), available at <http://www.cjareports.org/reports/bail2.pdf> (Brooklyn) (discussing the importance of criminal history in bail decisions and concluding that for some judges a defendant’s criminal record is “the strongest factor” in deciding whether to set bail); see also N.Y. CITY CRIMINAL JUSTICE AGENCY, FACTORS INFLUENCING RELEASE AND BAIL DECISIONS IN NEW YORK CITY, pt. 1, at 29-43, 48 (2004), available at <http://www.cjareports.org/reports/bail1.pdf> (Manhattan).

short run. For example, in New York City in 2004, only ten percent of defendants held on bail were able to buy release at arraignment,<sup>80</sup> and only an additional twenty-three percent were released at some later date.<sup>81</sup> Likewise, national studies show that most recidivist defendants are unable to pay bail, and, as a group, they are substantially less likely to pay bail than defendants without criminal records.<sup>82</sup> When courts set bail, recidivist defendants are likely to remain jailed through disposition.<sup>83</sup>

The trial course is long; even if convicted, the defendant often has already served any postconviction sentence, and then some.<sup>84</sup> In this way, conviction may counterintuitively inaugurate freedom.<sup>85</sup> Moreover, the costs of conviction are minimal; an additional misdemeanor conviction does little to further mar an already-soiled record because the recidivist defendant has already suffered most of the corollary consequences that typically stem from convictions.<sup>86</sup> If the defendant can get a plea to a misdemeanor and time served, then the process constitutes the whole punishment.<sup>87</sup> Any plea that frees this defendant may be more than advisable—it may be salvation. No matter how

<sup>80</sup> CJA, ANNUAL REPORT, *supra* note 69, at 22. Remarkably, the figure rose only to seventeen percent even for defendants held only on minimal bail of \$500 or less. *Id.*

<sup>81</sup> *Id.* at 24.

<sup>82</sup> *See, e.g.*, DOJ, FELONY DEFENDANTS, *supra* note 25, at 20 & tbl.18.

<sup>83</sup> *Id.*

<sup>84</sup> *See infra* notes 134-136 and accompanying text (noting a mean misdemeanor jail sentence in New York City of 20.1 days and a median of seven days).

<sup>85</sup> *See infra* notes 125, 132-139 and accompanying text.

<sup>86</sup> *See* LEMPERT & SALTZBURG, *supra* note 27, at 218; McMunigal, *supra* note 1, at 988; Weinstein, *supra* note 65, at 1171. There will, of course, be case-specific exceptions. A new conviction for a different type of crime may raise new immigration, housing, or child-custody complications. *See* McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 481-82 (2005). Additionally, new convictions may put habitual-offender, sex-offender, or persistent-misdemeanant statutes in play. Generally, however, for a defendant with ten prior misdemeanor convictions, the consequences of receiving an eleventh are almost nonexistent. In any event, many corollary consequences are triggered by arrest, not conviction. *Id.* at 481; *see also* Leipold, *supra* note 33, at 1299-1300.

<sup>87</sup> *See* HEUMANN, *supra* note 11, at 70-71 (quoting a defense attorney saying, "They'll take [time served] simply because they don't care about what the criminal record is. They have criminal records."). Additionally, a recidivist is more likely to recidivate or warrant. If she leaves a first case open, is released, and picks up a second case, her ability to dispose of both cases on favorable terms is made more complicated. To the extent that she fights both cases at trial, a judge in a misdemeanor bench trial is prone, upon conviction, to factor (at least unconsciously) the existence of the separate open charges into the sentencing decision.

certain of acquittal, she is better off pleading guilty.<sup>88</sup> She is the defendant who benefits most from plea bargaining, and she is the very defendant who most frequently is innocent in fact.<sup>89</sup>

Even for the rare unjustly accused “good person,” plea bargaining may sometimes prove beneficial. Jail time is generally not a real concern when this clean-record defendant is charged with a minor crime. Pretrial, the court usually releases the defendant on her own recognizance, and even a loss at trial would be likely to result in a nonincarceratory sentence.<sup>90</sup> The decision to plead guilty generally comes down to whether the bargain results in a criminal record. Not all types of pleas are to crimes. In many jurisdictions, a defendant may plead down to a violation (also known as an infraction). A violation is not a crime, and conviction for a violation leaves the defendant’s clean record intact.<sup>91</sup> If a defendant can get a violation offer and get it quickly, harm is minimal. Continuing to trial would require multiple appearances, a misdemeanor trial, and the potential for a misdemeanor conviction and record (and all the debilitating corollary consequences that come with it).<sup>92</sup> Even assuming acquittal, the process costs swamp the costs of a violation plea.

Even for the clean-record, innocent defendant charged with a moderate felony, the influence of process costs may prove determinative. The court sometimes holds such a defendant pretrial.<sup>93</sup> If the

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<sup>88</sup> Prosecutors may meet even demonstrable claims of innocence—for instance, in ironclad alibi cases and in trespass cases where the defendant, in fact, lived at the location in question. This wait may be unconscionable for a detained defendant in a minor case who has the option to plead to a jail sentence shorter than the delay. In my experience as a public defender in Bronx County, New York, the prosecutor often would not be assigned until the case was weeks old. Even then, establishing contact with the right prosecutor was a chore. Additionally, that prosecutor might delay for days more while seeking supervisory approval for dismissal. See *supra* note 42 and accompanying text.

<sup>89</sup> See *supra* Part I.

<sup>90</sup> See *infra* Part III.B; see also HEUMANN, *supra* note 11, at 104; Scott & Stuntz, *supra* note 3, at 1948.

<sup>91</sup> See *infra* notes 128-129 and accompanying text. A violation may carry minor penalties—fines, community service, licensing hurdles, or perhaps even a few days in jail—but such consequences are generally slight and are familiar to anyone who has ever received a speeding ticket (a moving violation) or a parking ticket (a parking violation).

<sup>92</sup> See *supra* note 68 and accompanying text.

<sup>93</sup> One national study found that approximately one-third of felony defendants without criminal records were released without bail, and, overall, three-quarters were released at some point pre-disposition. DOJ, FELONY DEFENDANTS, *supra* note 25, at 20 tbl.18. Notably, bail decisions—especially in borderline cases—can be somewhat ca-

defendant is held pretrial, she faces substantially greater process costs than even the detained recidivist defendant in a low-stakes case, since the pretrial wait is substantially longer for a felony trial.<sup>94</sup> However, pretrial detention is not an actual process cost when the defendant receives a posttrial jail or prison sentence longer than the pretrial delay, because the defendant typically receives credit for pretrial jail time.<sup>95</sup> Put simply, a defendant suffers no harm for serving *ex ante* time that she would otherwise serve postdisposition. So, for the innocent defendant detained pretrial, the process costs of detention are highly relevant if and only if (and to the extent that) an offer exists that promises release in a period shorter than the pretrial interval. If she can receive a nonincarceratory offer, the benefits of dodging detention costs may outweigh even the substantial impact of a felony conviction and subsequent years of probation.

There is, however, a point at which the influence of process costs melts away. The recidivist who is charged with a serious felony draws no clear plea-bargaining advantage in terms of process costs. The court likely will hold her on high bail or even remand. For example, one national study found that courts set bail on or remanded over three-quarters of all recidivist felony defendants.<sup>96</sup> The defendant—particularly if indigent—often remains jailed for the duration of the case.<sup>97</sup> Potential sentences are appreciable, especially if habitual-offender statutes are in play.<sup>98</sup> The threat of long sentences upends process-cost considerations.<sup>99</sup> Significantly, the process costs of pretrial detention are generally nothing because the prosecutor is

precious; studies identify marked variability between judges. *See, e.g.*, sources cited *supra* note 79.

<sup>94</sup> *See* CJA, FELONY TRENDS, *supra* note 46, at 32 tbls.E.2-5, E.2-6; *see also supra* note 69 and accompanying text.

<sup>95</sup> *See, e.g.*, N.Y. PENAL LAW § 70.30(3) (McKinney 1998) (“The term of a definite sentence . . . shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence.”).

<sup>96</sup> DOJ, FELONY DEFENDANTS, *supra* note 25, at 20 tbl.18; *see also supra* note 79 and accompanying text. Overall, courts held recidivist defendants until disposition about twice as frequently as defendants with no criminal records. DOJ, FELONY DEFENDANTS, *supra* note 25, at 20 tbl.18. And defendants on parole were held until disposition almost three times as frequently as defendants with no criminal record. *Id.*

<sup>97</sup> *See supra* notes 79-83 and accompanying text.

<sup>98</sup> *See* HEUMANN, *supra* note 11, at 41 (“Unlike the [misdemeanor] court, in which ‘time’ . . . is a rarity, ‘time’ is what it is all about in the [felony] court.”).

<sup>99</sup> *See id.* at 186 n.15 (“For more serious cases, the defendant’s interest is less likely to be summed up in terms of simply ‘getting it over with.’ He faces substantial prison time, and quick disposition becomes less important . . .”).

unlikely to offer a sentence less than the time the defendant would be detained pretrial. Some length of postconviction detention is probably inevitable. Detention, therefore, translates into a process cost only upon acquittal at trial. For this type of defendant, process costs are nondeterminative and trivial. Process is not an unwelcome cost to bear—in fact, sometimes it is all the defendant has left.<sup>100</sup>

### III. PROCESS COSTS AND LENIENCY

Process costs are not exclusive to defendants. All players—prosecutors, judges, defense attorneys—bear their own version of these costs. Prosecutors must investigate cases, assess evidence, interview witnesses, file charges, present matters to grand juries, staff courts, prepare motions and responses, and conduct hearings and trials. Defense attorneys investigate cases, interview witnesses and defendants, analyze defenses, make appearances, write motions, and conduct hearings and trials. Judges and staffed courts orchestrate these proceedings.

The traditional conception of prosecutors as sentence-maximizers takes into account these administrative costs. Indeed, it recognizes that efficiency (in the interest of deterrence) is the chief justification for plea bargaining.<sup>101</sup> Prosecutors craft pleas to ensure the greatest number of convictions, with each conviction garnering the highest possible sentence.<sup>102</sup> According to this model, most cases would naturally result in adversarial “heavy combat” but for the unfortunate reality of resource shortages.<sup>103</sup> Plea bargaining operates in the “shadow of trial”: protracted and individualized adversarial haggling produces results that reflect trial hazards and potential posttrial sentences.<sup>104</sup>

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<sup>100</sup> See ROSETT & CRESSEY, *supra* note 67, at 155 (“If the police are able to jail a man before conviction for a period equal to or greater than any sentence that is likely to be imposed, the accused might just as well plead guilty; it costs no more.”); *infra* notes 207-208 and accompanying text.

<sup>101</sup> See Easterbrook, *supra* note 3, at 297.

<sup>102</sup> See *id.* at 297; William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 63-64 (1971); Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713, 713-14 (1988).

<sup>103</sup> FEELEY, *supra* note 11, at 267.

<sup>104</sup> See *Scott v. United States*, 419 F.2d 264, 276 (D.C. Cir. 1969) (“To the extent that the bargain struck reflects only the uncertainty of conviction before trial, the ‘expected sentence before trial’—length of sentence discounted by probability of conviction—is the same for those who decide to plead guilty and those who hope for acquittal but risk conviction by going to trial.”); accord Easterbrook, *supra* note 59, at 1972 (“Settlements are better (or worse) as the outcomes of trials are better (or worse).”).

This account depends on the engrained claim that plea bargaining necessarily exists only to prompt efficient guilty pleas so courts can stay afloat.<sup>105</sup> While it is true that courts in many urban jurisdictions would be hard pressed to manage their dockets in a world without plea bargaining—at least not without radically restructuring process or a substantial infusion of resources—much recent scholarship has called into question the “myth” that wide-scale bargaining is a *product* of heavy caseloads.<sup>106</sup> In fact, studies have found comparable rates of plea bargaining in some low-caseload jurisdictions.<sup>107</sup> Ultimately, then, plea bargaining occurs for reasons other than caseload or deterrence—at least in the low-stakes cases.<sup>108</sup>

### A. Workgroup Principles

What are these other reasons? Prosecutors may claim a desire to “do the right thing” by minimizing punishment for specific defendants or by broadly relegislating what they perceive as harsh or over-inclusive statutes.<sup>109</sup> But prosecutors also harbor the normatively

<sup>105</sup> See *Santobello v. New York*, 404 U.S. 257, 260 (1971) (“If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”); see also UVILLER, *supra* note 5, at 180-81; Givelber, *supra* note 1, at 1382; Skolnick, *supra* note 34, at 55; Wright & Miller, *supra* note 32, at 30, 31 n.5.

<sup>106</sup> See FEELEY, *supra* note 11, at 244-77 (refuting the claim that “case pressure” drives plea bargaining); see also HEUMANN, *supra* note 11, at 32; ROSETT & CRESSEY, *supra* note 67, at 104-10; Peter F. Nardulli, *The Caseload Controversy and the Study of Criminal Courts*, 70 J. CRIM. L. & CRIMINOLOGY 89, 91-93 (1979) (analyzing the work of Feeley and Heumann).

<sup>107</sup> See, e.g., FEELEY, *supra* note 11, at 244-77; Lynch, *supra* note 1, at 117-22.

<sup>108</sup> See Bibas, *supra* note 44, at 2464 (calling the traditional model “oversimplified”); Worden, *supra* note 45, at 335 (“[R]esearch on prosecutors has been handicapped by overly simplified conceptions of prosecutorial motivations, such as the assumption that all prosecutors strive to maximize convictions or to impose maximally harsh sentences . . .”); see also HEUMANN, *supra* note 11, at 104-05; Alschuler, *supra* note 42, at 52-54; Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 966 (1997).

<sup>109</sup> Alschuler, *supra* note 42, at 52-54 (explaining that prosecutors act in multiple capacities, including that of a judge or legislator); see also HEUMANN, *supra* note 11, at 109 (describing how a prosecutor “redefines his professional goals” in the face of statutes that “sweep too broadly” (internal quotation marks omitted)); UVILLER, *supra* note 5, at 180 (“What I thought I was doing, mainly, in the run-of-the-docket case, was . . . rewriting the law, modifying the judgment of the legislature to fit the circumstances of the crime, in accord with what I perceived to be the prevailing ethic in the courts of my time and place.”); Dash, *supra* note 35, at 256 (discussing common-law prosecutors who similarly circumvented death-penalty statutes); Richman, *supra* note 108, at 958 (“Criminal sanctions are blunt instruments . . . Prosecutors thus emerge as



more dubious motivation to avoid process and work, where possible.<sup>110</sup> This is a potential factor in almost all cases, but proves most influential in minor cases in lower criminal courts where caseloads are higher but stakes are lower. Prosecutors are loath to devote time, resources, and full process to such “Mickey Mouse” cases.<sup>111</sup> Instead, prosecutors may come to see arrests as valuable in and of themselves—particularly for crimes like marijuana possession or turnstile hopping, but even for crimes with concrete victims where the problematic confrontation has resolved itself through arrest.<sup>112</sup>

In a narrow sense only, caseload may drive plea bargaining: “[T]here will always be *too many cases* for many of the participants in the system, since most of them have a strong interest in being some place other than in court.”<sup>113</sup> Plea bargaining allows the workgroup to minimize its collective workload and provides “solutions” to a common problem: the immutable burden that is the process itself.<sup>114</sup> Prosecutors may still care deeply about convictions,<sup>115</sup> but they want to reach convictions by immediate disposition.<sup>116</sup> They care little, if at all, about maximizing plea prices and ultimate sentence length.<sup>117</sup>

mediators between phenomenally broad legislative pronouncements and the equities of individual cases . . .” (footnote omitted).

<sup>110</sup> See generally FEELEY, *supra* note 11, at 272; HEUMANN, *supra* note 11, at 103, 156-57; UVILLER, *supra* note 5, at 180; Alschuler, *supra* note 42, at 52-53, 106-07; Bibas, *supra* note 44, at 2470; Dash, *supra* note 35, at 256; Lynch, *supra* note 1, at 121; Rabin, *supra* note 42, at 1071; Zacharias, *supra* note 1, at 1136, 1142, 1161-63, 1181.

<sup>111</sup> See HEUMANN, *supra* note 11, at 38 (quoting a prosecutor).

<sup>112</sup> See CJA, NON-FELONY TRENDS, *supra* note 25, at 1; Lynch, *supra* note 1, at 121; Weinstein, *supra* note 65, at 1170-71.

<sup>113</sup> See FEELEY, *supra* note 11, at 272; see also Levin, *supra* note 65, at 125.

<sup>114</sup> FEELEY, *supra* note 11, at 28-33, 159, 244 (describing the development of “informal dispositional practices, lenient sentences, and a general spirit of cooperation among supposedly adversarial agents”); see also HEUMANN, *supra* note 11, at 62-63, 82-84; ROSETT & CRESSEY, *supra* note 67, at 105; Lynch, *supra* note 1, at 122-25; Skolnick, *supra* note 34, at 53, 58-59.

<sup>115</sup> See *supra* notes 44-45, *infra* notes 160-161, and accompanying text (discussing prosecutors’ motivation to maximize convictions).

<sup>116</sup> See HEUMANN, *supra* note 11, at 103 (“The central concern with these nonserious cases is to dispose of them quickly. If the defense attorney requests some sort of no-time disposition . . . the prosecutor . . . [is] likely to agree. [There is] no incentive to refuse . . . The case is simply not worth the effort to press for greater penalty.”); Bibas, *supra* note 44, at 2471-72 (“The statistic of conviction . . . matters much more than the sentence. . . . Thus, prosecutors may prefer the certainty of plea bargains even if the resulting sentence is much lighter than it would have been after trial.”); Dash, *supra* note 35, at 256 (describing the “fervent desire of the prosecutors to establish a record of numerous convictions the quickest and easiest way”).

<sup>117</sup> See HEUMANN, *supra* note 11, at 71-72 (“The newcomer is struck by the prosecutor’s eagerness to enter into a deal that seems beneficial to the defendant.”); ROSETT &

Many opponents of plea bargaining complain of the coercion implicit in pleas that are supposedly too good to turn down.<sup>118</sup> But few critics inquire as to why so many pleas are *far* too good to turn down. Prosecutors are well positioned to take advantage of defendants. Specifically, prosecutors could readily try to extract high-price pleas from confined defendants by leveraging the costs of pretrial detention. (For example, a jailed defendant facing misdemeanor charges might rationally accept any plea offer that promises a sentence even marginally shorter than pretrial delay.) However, these are the very cases where prosecutors most strongly wish to act for reasons other than sentence maximization, in addition to being the cases where prosecutors can most easily act on these other motivations. First, prosecutors are subject to little public or official oversight in such cases.<sup>119</sup> Second, as previously noted, prosecutors can rationalize leniency as ethically appropriate in many low-stakes cases.<sup>120</sup> If society might be served by less significant penalties, prosecutors can entertain their desires for work avoidance while credibly claiming to “render *substantive* justice,” which may just be a convenient excuse for leniency and speedy case processing.<sup>121</sup> In short, the very cases where prosecutors can make the most of defendants’ high process costs are the cases where prosecutors are least likely to do so.<sup>122</sup> The anomaly is that de-

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CRESSEY, *supra* note 67, at 107 (“[Prosecutors] routinely grant so-called concessions to many . . . knowing full well that the attorney will not take up their time with a trial if they do not.”); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2553-54 (2004) (“[P]rosecutors do not try to maximize total prison time. . . . [T]he legally authorized sentence is harsher than the sentence prosecutors want to impose.”); *see also infra* notes 127-139 and accompanying text (providing data demonstrating leniency).

<sup>118</sup> *See, e.g.*, Alschuler, *supra* note 42, at 60; Langbein, *supra* note 3, at 12; Lynch, *supra* note 1, at 123; Schulhofer, *Disaster*, *supra* note 1, at 2004-05; *see also infra* note 184 and accompanying text, and Part VI.

<sup>119</sup> *See infra* notes 158-161 and accompanying text.

<sup>120</sup> *See supra* note 109 and accompanying text.

<sup>121</sup> FEELEY, *supra* note 11, at 25; *accord* HEUMANN, *supra* note 11, at 84-85 (describing bargains as “reasonable at worst, and extremely favorable at best”); Alschuler, *supra* note 42, at 106-07 (noting that political considerations can lead to lenient sentences); Dash, *supra* note 35, at 256 (noting other prosecutorial motivations for leniency, but concluding that the “major” reason is “the desire of the prosecutor for a record of numerous convictions by the quickest and easiest method”). *See generally* Schulhofer, *Disaster*, *supra* note 1, at 1988 (discussing agency concerns driving prosecutors to make “unduly lenient sentence offers” that maximize neither deterrence nor the public interest); Schulhofer, *Regulatory System*, *supra* note 1, at 50-52, 63-66 (same).

<sup>122</sup> *See* Lynch, *supra* note 1, at 123 (“As loyal members of the workgroup team, prosecutors did not take advantage of the [defendants’] predicament . . . but instead consistently offered a carrot . . . . They knew that they, too, would lose professional face

defendants enjoy great discounts in cases where process costs alone might have led them to plead guilty without any discounts at all.<sup>123</sup> Where process hurts most, bargain justice helps *all* parties most.<sup>124</sup> Consequently, prosecutors make frequent offers of pleas to noncriminal violations and time-served dispositions.<sup>125</sup>

### B. *Lenient Pricing*

Admittedly, it is difficult to demonstrate conclusively that prosecutors make lenient plea offers in low-stakes cases. Indeed, I necessarily limit my analysis to data from New York City's enforcement of nonfelony criminal cases, because I could uncover no comprehensive misdemeanor data from other jurisdictions.<sup>126</sup> That caveat aside, I believe my leniency claim is somewhat generalizable. Indeed, various scholars

were they to force trials by not offering generous deals."); *see also* Scott & Stuntz, *supra* note 3, at 148 n.131 ("[T]he prosecutor's incentive to 'push' such cases is slight since the post-trial punishment will be so low."); *infra* notes 132-139 and accompanying text (describing the short sentences given for misdemeanors when statutory sentences are longer); *cf.* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 171 (2005) ("[T]he mere fact that a [bargaining] party has the potential to use . . . [a] source[] of power does not require that the party actually use that power.").

<sup>123</sup> *See supra* notes 73-77 and accompanying text.

<sup>124</sup> This partially explains studies that find defendant satisfaction with plea bargaining. *See, e.g.*, CASPER, *supra* note 57, at 48-49 tbl.VIII-5; *see also supra* note 75 and accompanying text (discussing defendants' preference to "get it over with" (quoting HEUMANN, *supra* note 11, at 69 (internal quotation marks omitted))). Casper's well-known study of defendant attitudes found that 64% of defendants who pled guilty believed they were treated fairly, compared to only 41% of defendants who were tried. CASPER, *supra* note 57, at 48 tbl.VIII-5. Remarkably, this 64% satisfaction rate was just shy of the 69% rate for defendants who had their cases *dismissed* outright. *Id.* The plea-bargaining mill may seem nasty and brutish, but defendants favor it because the attendant sentences are short. *Cf.* FEELEY, *supra* note 11, at 29-30 ("If we looked only at jails, with their ubiquitous overcrowding, the criminal justice system might appear to be unduly harsh and severe. But if we sat in the gallery in a lower criminal court, the process might appear chaotic and arbitrary, but essentially tolerant and lenient.").

<sup>125</sup> Indeed, observers have noted the frequent paradox that defendants held pre-trial are released only upon conviction by plea. *See* FEELEY, *supra* note 11, at 3, 30, 139; Givelber, *supra* note 1, at 1364-65; McMunigal, *supra* note 1, at 990; James Mills, "I Have Nothing To Do with Justice," LIFE MAG., Mar. 12, 1971, at 61-62.

<sup>126</sup> *Cf.* Michael J. Leiber & Anita N. Blowers, *Race and Misdemeanor Sentencing*, 14 CRIM. JUST. POL'Y REV. 464, 469 (2003) ("Only a few comprehensive studies of misdemeanor sentence outcomes exist."); Ed A. Muñoz & Stephen J. Sapp, *Racial/Ethnic Misdemeanor Sentencing Disparities: Additional Evidence for Contextual Discrimination*, 1 J. ETHNICITY CRIM. JUST. 27, 29 (2003) ("The deficiency in knowledge surrounding the adjudication of misdemeanor crimes is somewhat surprising considering they are the most common types of offenses for which people are detained, interrogated, arrested and convicted . . .").

have observed widespread leniency in other jurisdictions.<sup>127</sup> In any event, even if leniency exists only for trivial public-order offenses in northern urban jurisdictions, then that leniency would still affect a sizable defendant population—the majority of criminal defendants in many of the nation’s largest cities.

Looking at New York City specifically, the data show somewhat clear leniency. In 1998, fifty-two percent of *all* misdemeanor charges that ended in conviction were reduced to pleas to noncriminal violations.<sup>128</sup> For clean-record defendants, the rate of reduction was eighty-six percent.<sup>129</sup> Even for the worst recidivists—defendants with both prior felony and misdemeanor convictions—the rate of reduction remained over twenty-five percent.<sup>130</sup>

Likewise, over fifty percent of all misdemeanor charges that ended in conviction resulted in nonjail dispositions.<sup>131</sup> Of the so-called jail sentences, fifty-seven percent were sentences of time served.<sup>132</sup> Even for defendants with combined felony and misdemeanor records, the rate of time-served sentences dropped only to near fifty percent.<sup>133</sup> Further, the percentage of *express* time-served sentences significantly underestimates the number of sentences that were in fact *equivalent* to time served, because most defendants with designated time sentences actually had completed those sentences at disposition. The mean sentence was only twenty days and the median was seven days for misdemeanor defendants sentenced to designated jail terms—notwithstanding potential statutory sentences of up to one year for A-level misde-

<sup>127</sup> See, e.g., FEELEY, *supra* note 11, at 28-32 (urban Connecticut); HEUMANN, *supra* note 11, at 10-11, 81-85 (urban and rural Connecticut); ROSETT & CRESSEY, *supra* note 67, at 45-46 (Los Angeles county); Dash, *supra* note 35, at 253-54 (Chicago); Lynch, *supra* note 1, at 117-22 (rural and suburban New York counties); Uphoff, *supra* note 72, at 89 n.63 (Oklahoma); Donald I. Warren, *Justice in Recorder’s Court: An Analysis of Misdemeanor Cases in Detroit*, in ROUGH JUSTICE: PERSPECTIVES ON LOWER CRIMINAL COURTS, *supra* note 33, at 326, 334 (Detroit).

<sup>128</sup> See CJA, NON-FELONY TRENDS, *supra* note 25, at tbl.17A (calculating the average rates for A- and B-level misdemeanors).

<sup>129</sup> *Id.* at tbl.18.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 29.

<sup>132</sup> *Id.* at 29 & tbl.19. For clean-record defendants this 57% rate rose to 76.3%. *Id.* at tbl.19.

<sup>133</sup> See *id.* (noting that 51.5% received postconviction jail sentences); see also HEUMANN, *supra* note 11, at 81 (quoting a defense attorney saying, “I am . . . I tell you, amazed . . . by how few people go to jail. I mean, we get some pretty bad clients, and they don’t go to jail.” (first ellipsis in original)).

meanors and ninety days for B-level misdemeanors.<sup>134</sup> Moreover, under New York law, defendants serve only two-thirds of their sentenced jail time, calculated from the moment of arrest.<sup>135</sup> For example, the defendant with a median seven-day sentence must serve only four days (rounding, as the system does, in the defendant's favor).<sup>136</sup> As such, many—if not most—of these supposed jail time sentences were in fact fully satisfied at the time of plea.<sup>137</sup> Only a fraction of misdemeanor defendants had to serve any postplea jail time at all.<sup>138</sup> Put differently, many of these defendants were jailed as part of the process and released as part of the bargain.<sup>139</sup>

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<sup>134</sup> CJA, NON-FELONY TRENDS, *supra* note 25, at tbl.20.

<sup>135</sup> N.Y. PENAL LAW § 70.30(3) (McKinney 1998).

<sup>136</sup> *Id.*

<sup>137</sup> See CJA, NON-FELONY TRENDS, *supra* note 25, at 29 & tbls.19-20; see also Freda F. Solomon, N.Y. Criminal Justice Agency, *The Impact of Quality-of-Life Policing*, CJA RES. BRIEF, Aug. 2003, at 1, 6, available at <http://www.cjareports.org/reports/brief3.pdf> (noting that this data set “includes jail sentences satisfied by pre-trial detention time”). Even for the defendant who had not yet completed the median sentence, the shortest adjournment would likely be days longer than the median sentence (and, of course, a trial would require many adjournments). See *supra* note 68 and accompanying text.

<sup>138</sup> CJA, NON-FELONY TRENDS, *supra* note 25, at 29 & tbl.19; cf. HEUMANN, *supra* note 11, at 187 n.17.

<sup>139</sup> See FEELEY, *supra* note 11, at 30 (“For every defendant sentenced to a jail term of any length, there are likely to be several others who were released from jail only *after* and *because* they pleaded guilty.”); Bibas, *supra* note 44, at 2493 (“[T]he shadow of pre-trial detention looms much larger over these small cases than does the shadow of trial.”); Givelber, *supra* note 1, at 1364 (“The road to freedom is a guilty plea, whereas insisting upon innocence means that incarceration continues.”); Weinstein, *supra* note 65, at 1171 (“If a defendant is denied bail [at arraignment], she will likely spend more time waiting for the case to be resolved than would have been imposed in a jail term.”). Even in more serious cases, prosecutors may offer lenient sentences. Notably, in New York City in the 1990s, only 57% of *felony* defendants received any kind of jail or prison sentence. CJA, FELONY TRENDS, *supra* note 46, at 34 tbl.F.1; cf. HEUMANN, *supra* note 11, 187-88 n.17 (noting that only 48.8% of defendants in a study of upper criminal court received jail or prison time). Of the defendants sentenced to jail or prison, almost one-third received sentences that amounted to time served, only 2.4% were sentenced to over five years in prison, and over 70% were sentenced to city jail time of one year or less. CJA, FELONY TRENDS, *supra* note 46, at 35-38 & tbl.F.3. Perhaps more significantly, almost *two-thirds* of all felony cases were reduced and disposed of in lower criminal courts as misdemeanors, violations, or dismissals; an additional number of felony cases were disposed of as misdemeanors and violations in the upper felony courts. *Id.* at 27 tbl.E.1, 31 tbl.E.2-4; cf. Dash, *supra* note 35, at 253-54 (noting similar findings in a Chicago felony court).

C. *Fixed Pricing*

Lenient sentencing in a collection of cases begets lenient prices more broadly. Bargains are struck according to “going rates”—known and somewhat fixed starting-point prices.<sup>140</sup> These prices may vary over time as customary practices change, but, at a given moment, the going price for a certain charge against a defendant with a certain type of record is largely market set and unreflective of statutory prescription.<sup>141</sup> As such, the analogy of the plea-bargain regime to a trading bazaar is misplaced.<sup>142</sup> The regime is more akin to a supermarket or department store. Repeat players routinely process similar cases according to intuitively known, market-set prices that are discernible upon quick reference to defendants’ past records and the present charges. From a set starting point, a prosecutor may adjust prices by largely set increments based on information that is either manifest from the record or can be succinctly conveyed to that prosecutor.<sup>143</sup> Moreover, because pricing at the outset is not static or individualized, when a collection of prosecutors make lenient offers for a given type of charge, this leniency serves as “precedent” for future pricing for that charge.<sup>144</sup> This is true whether prosecutors were motivated in

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<sup>140</sup> See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2130 (1998) (“Many, perhaps most, cases are processed pursuant to fairly standard rules . . . . The rules are more like those of the supermarket than those of the flea market: there is a fixed price tag on the case . . . .”); see also FEELEY, *supra* note 11, at 158-59 (describing how repeat players know the worth of a case “intuitively”); HEUMANN, *supra* note 11, at 188 n.19 (“[A] ‘feel for a case’ develops with greater experience in the system. . . . [T]he defense attorney’s ‘feel’ is often not very different from that of the experienced prosecutor.”); DONALD J. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 79 (1966) (“Common patterns of charge reduction or sentence promise emerge wherever the practice is frequent.”); Bibas, *supra* note 44, at 2481 (“[R]epeat players . . . develop a feel for cases and can gauge the going rate for particular types of crimes and defendants.”); Scott & Stuntz, *supra* note 3, at 1923 (“[T]he bargaining range is likely to be both small and familiar to the parties, as both prosecutors and defense attorneys have a great deal of information about customary practices . . . [and] the ‘market price’ for any particular case.”).

<sup>141</sup> See UVILLER, *supra* note 5, at 179 (noting that the “worth” of a crime in the “ordinary commerce of the courts” is less than the punishments prescribed by statute (internal quotation marks omitted)); see also Scott & Stuntz, *supra* note 3, at 1923, 1933; *infra* notes 199-202.

<sup>142</sup> See UVILLER, *supra* note 5, at 177-78 (introducing that and other similar analogies).

<sup>143</sup> See Scott & Stuntz, *supra* note 3, at 1922-23.

<sup>144</sup> See HEUMANN, *supra* note 11, at 120-21 (“After obtaining a specific plea bargain . . . , [defense attorneys] treat this disposition as a ‘precedent’ . . . . Prosecutors, in turn, admit that they are subject to these ‘habits of disposition’ . . . . Thus, a good defense deal in one case can have a trickle-down effect . . . .”).

past cases by substantive justice principles, workgroup principles, or something else altogether.<sup>145</sup>

The pervasiveness of fixed pricing is a counterpoint to the common objection that defense attorneys who consistently avoid trials cannot credibly threaten litigation.<sup>146</sup> Prosecutors may extend marginally worse offers to defense lawyers who are recognized as frequent pleaders. But, in the main, a particular lawyer's shortcomings are corrected by market prices that derive from aggregate defender work.<sup>147</sup>

#### D. *Judicial Input*

Judges play a secondary role in the plea-bargaining process,<sup>148</sup> but their presence is nevertheless felt, especially as a check on bargains that are set outside the prevailing market.<sup>149</sup> Like prosecutors and defense attorneys, judges wish to avoid the administrative costs of entertaining litigation—particularly in low-stakes cases.<sup>150</sup> Generally, their first priority is to oversee expeditious case processing—usually by plea.<sup>151</sup> Judges typically have few objections to lenient dispositions on “garbage[,] . . . cheap cases.”<sup>152</sup> They are more likely to object when prices are too high rather than too low, because high prices more readily engender defendant resistance and serve as obstacles to efficient guilty pleas.<sup>153</sup> Consequently, in low-stakes cases, judges rarely inter-

<sup>145</sup> Cf. *id.* at 161 (quoting a prosecutor saying, “[W]e try to avoid stupid recommendations, but we do make mistakes sometimes, and they have these aftereffects.”).

<sup>146</sup> See, e.g., Alschuler, *supra* note 5, at 1186-87 (describing how a defense attorney's reputation for avoiding trial can lead prosecutors to withhold leniency); Bibas, *supra* note 44, at 2478.

<sup>147</sup> See, e.g., Scott & Stuntz, *supra* note 3, at 1933-34.

<sup>148</sup> See HEUMANN, *supra* note 11, at 102 (noting that while judges have much formal power over sentencing, they actually exercise little of it); UVILLER, *supra* note 5, at 179, 186; Wright & Miller, *supra* note 32, at 39.

<sup>149</sup> See Scott & Stuntz, *supra* note 3, at 1959 (“The judge is in a poor position to supervise the bargaining process, but he is in a very good position to recognize unusually high sentences.”); see also HEUMANN, *supra* note 11, at 127-52 (describing the judge's role in plea bargaining).

<sup>150</sup> See FEELEY, *supra* note 11, at 271; HEUMANN, *supra* note 11, at 127-52; Levin, *supra* note 65, at 90-91; Skolnick, *supra* note 34, at 55; Stuntz, *supra* note 117, at 2560-61.

<sup>151</sup> I practiced in front of one judge who used the same question to open every case he deemed disposable by plea bargain: “What's the disposition?”

<sup>152</sup> Levin, *supra* note 65, at 95, 122 (internal quotation marks omitted).

<sup>153</sup> See Alschuler, *supra* note 42, at 105 (discussing judges' preferences for reasonable recommendations from prosecutors); Lynch, *supra* note 1, at 120 (describing the often harsh practices of particular judges, aimed at forcing defendants to plead guilty rather than go to trial); Scott & Stuntz, *supra* note 3, at 1959 (“The judge . . . is in a very good position to recognize unusually high sentences.”); Skolnick, *supra* note 34, at

cede to derail even seemingly overlenient time-served pleas.<sup>154</sup> This top-down judicial pressure further fosters ex ante low “going rates.”<sup>155</sup>

#### IV. BARGAINING IN LOW-STAKES CASES

Agency failure is a prominent plea-bargaining concern.<sup>156</sup> Undoubtedly, some level of bilateral agency failure does exist. As Judge Easterbrook correctly noted, “Of what agents is this not true?”<sup>157</sup> But even beyond this truism, there are strong reasons to believe that the critics’ great concern for defendant-principals is misplaced—at least when it comes to bargaining in low-stakes cases. Contrary to prevailing wisdom, imperfect agency in low-stakes cases does little to interfere with defendant-optimal plea pricing and may in fact encourage it, because defense attorneys and prosecutors can best prioritize their own work avoidance by setting and keeping plea prices low.

##### A. Oversight

Prosecutors are supposedly subject to public and official oversight, but these restraints are highly attenuated—if they exist at all—in low-

55 (explaining that judges are often unhappy with prosecutors who overcharge and dissuade plea bargains); Stuntz, *supra* note 117, at 2561 (“[J]udges, like prosecutors and defense attorneys, are invested in plea bargaining and try to facilitate it.”).

<sup>154</sup> See FEELEY, *supra* note 11, at 130; HEUMANN, *supra* note 11, at 188 n.17 (offering quantitative support for the proposition that judges almost always concur with a prosecutor’s sentence recommendation in low-stakes cases); Skolnick, *supra* note 34, at 62 (“Since the judge is also under administrative pressure, he rarely rejects a plea of guilty, and also rarely fails to cooperate with the defense attorney and prosecutor who have worked out a ‘deal.’”); Wright & Miller, *supra* note 32, at 39-40 (“The judge . . . has little incentive to inquire behind the parties’ agreement.”).

<sup>155</sup> See *supra* Part III.C.

<sup>156</sup> See Alschuler, *supra* note 5, at 1181-1210; Bibas, *supra* note 44, at 2477; Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC’Y REV. 15, 28 (1967) (describing the defense attorney as a “[d]ouble [a]gent”); F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 207-11 (2002); Lynch, *supra* note 1, at 122-25; John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 319-21 (1980).

<sup>157</sup> See Easterbrook, *supra* note 59, at 1975 (“Agency costs are endemic and do not justify abandoning consensual transactions.”); see also ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 206, at 346 (5th ed. 1988) (“[T]he negotiated disposition of criminal charges is no more to be scorned [because of various corruptions in some cases] than are all contracts because some of them are fraudulent.”).



stakes cases.<sup>158</sup> Prosecutors can shirk their duties with relative impunity. Even when publicly elected district attorneys adopt tough-on-crime postures, their assistants can covertly circumvent restrictive policies.<sup>159</sup> And it is rational for district attorneys seeking reelection to permit—or even privately encourage—bargaining for suboptimal sentences, because opposing candidates gain little foothold by spotlighting minor sanctions in minor cases but could make more headway drawing attention to suboptimal conviction rates. The conviction rate, after all, is the most visible rubric of quality job performance.<sup>160</sup> And that measure is achieved most readily by lenient, quick bargains.<sup>161</sup>

Defense attorneys enjoy no similar freedom from oversight. Instead, defendants check defense attorneys—however imperfectly. Defense attorneys must sell offers to their clients, and defendants always operate as sentence minimizers.<sup>162</sup> Critics point to the pressures on defendants to plead guilty, and these pressures are no doubt real.<sup>163</sup> But defendants remain the most immediate check on whether pleas will be consummated—certainly more immediate than public and supervisory oversight of line prosecutors. Consequently, defense attorneys may find it difficult to convince defendants to accept harsh deals.<sup>164</sup> Time-served pleas or the equivalent are so prevalent because bargains that require jail time are more likely to prompt defendants to balk.<sup>165</sup> And this is all the more true for recidivist defendants, who are better positioned to identify atypically high plea prices and to use earlier dispositions as benchmarks for what constitute suitable pleas in pending cases.

<sup>158</sup> See HEUMANN, *supra* note 11, at 169 (noting that in all but high-stakes cases “a ‘zone of indifference’ surrounds court practices” such that “the community is indifferent to how and why cases are plea bargained or tried”); Bibas, *supra* note 44, at 2476; Levin, *supra* note 65, at 93; Lynch, *supra* note 1, at 125.

<sup>159</sup> See ROSETT & CRESSEY, *supra* note 67, at 106 (noting that prosecutors undercut the projected image that they “are interested only in maximizing punishment”); see also Schulhofer, *Regulatory System*, *supra* note 1, at 50-51, 64; Worden, *supra* note 45, at 338.

<sup>160</sup> See *supra* note 45 and accompanying text.

<sup>161</sup> See *supra* note 116.

<sup>162</sup> See Stuntz, *supra* note 117, at 2554.

<sup>163</sup> See Alschuler, *supra* note 42, at 81; Lynch, *supra* note 1, at 132; Schulhofer, *Regulatory System*, *supra* note 1, at 74; Schulhofer, *Disaster*, *supra* note 1, at 1992.

<sup>164</sup> See HEUMANN, *supra* note 11, at 82 (quoting a defense attorney saying, “[I]f I use the wrong word . . . [it] may get them scared . . . .”); Lynch, *supra* note 1, at 123 (describing difficulties convincing clients to accept plea bargains); Skolnick, *supra* note 34, at 66 (describing a defense attorney’s need to appease his client).

<sup>165</sup> See HEUMANN, *supra* note 11, at 42 (“[I]f you are talking time, negotiations become strained.” (internal quotation marks omitted)).

Significantly, public defenders represent most criminal defendants, and these lawyers are more likely to engender clients' visceral mistrust (however undeserved).<sup>166</sup> Their clients may require substantially greater concessions to overcome engrained worries of self-dealing. To keep defendants from exercising—even temporarily—their option to reject pleas, it makes sense for self-interested prosecutors and defense attorneys to set lenient bargain prices *ex ante*. Institutional prices remain low going forward—lower than is even necessary to make the pleas rational—because these prices are most likely to allow both sides to finish their work quickly and go home early.<sup>167</sup>

Moreover, although defendants provide some check over poor bargaining results, they cannot so readily check poor trial practice.<sup>168</sup> Consequently, defendants with bad lawyers are generally *better off* after plea bargaining. Defense attorneys who favor work avoidance over their clients' best interests are more likely to hurt their clients at trial.<sup>169</sup> Plea bargaining is a skill, but it does not involve the technical expertise or the time outlay required for trial preparation and defense.<sup>170</sup> The point is particularly salient for innocent defendants, because their cases more likely require heavier investigation and presentation of positive trial defenses.<sup>171</sup> The indolent lawyer may perform worst when telling a client's story of innocence. Conversely, that law-

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<sup>166</sup> See Bibas, *supra* note 44, at 2486 (“Indigent defendants may distrust public defenders’ recommendations to cooperate because they already fear that their free lawyers are pushing pleas to get rid of cases.”); Lynch, *supra* note 1, at 121 (describing defendants’ perception of public defenders as “hired cronies of the state”); Skolnick, *supra* note 34, at 67 (noting that indigent defendants “tend to be more critical and hostile toward their attorney from the start of the case”); see also *United States v. Hill*, 252 F.3d 919, 925-26 (7th Cir. 2001) (quoting a defendant saying, “I want him off my case. . . . I don’t trust him. . . . He’s got too many people he’s helping out. So, I prefer he helped them out.”).

<sup>167</sup> See FEELEY, *supra* note 11, at 272; HEUMANN, *supra* note 11, at 72 (quoting a defense attorney saying, “Usually we get very good first-offer-deals from the prosecutors.”).

<sup>168</sup> See Scott & Stuntz, *supra* note 3, at 1922, 1933-34; cf. CASPER, *supra* note 57, at 49-51.

<sup>169</sup> See, e.g., Easterbrook, *supra* note 3, at 309 (arguing that imperfect agency is present at all stages of criminal procedure, not just bargaining).

<sup>170</sup> See HEUMANN, *supra* note 11, at 78 (quoting a defense attorney saying, “[L]ike making love, you do it enough times, you learn to like it, and you’ll get good at it.”); Lynch, *supra* note 1, at 131 (“I am convinced that the average car salesman or real estate agent with a few days of instruction could become an adequate plea bargainer.”); Scott & Stuntz, *supra* note 3, at 1928, 1933 (suggesting that conducting a trial is more difficult than negotiating a plea bargain).

<sup>171</sup> See Scott & Stuntz, *supra* note 3, at 1934 (“[A] world without plea bargaining would disproportionately harm both the innocent and the poor. . . .”); *supra* note 71 and accompanying text.

yer's negotiation failures are constrained to a degree by the defendant herself, by customary market pricing, and by judicial pressure to correct atypically high prices.<sup>172</sup> Finally, the lazy lawyer has an increased incentive to diligently pursue plea negotiations, because the relatively small investment in reaching a defendant-optimal plea price maximizes chances that the lawyer will not have to invest heavily in repeat appearances, or, worse still, trial work.<sup>173</sup>

### B. *Bluffing*

When it comes time for bluffing, the defense attorney has an advantage over the prosecutor: the defendant has a "call" on the prosecutor's time.<sup>174</sup> The defense attorney can make his bluff more credible by insisting that the defendant fully intends to exercise her call, no matter how foolish that exercise may be. This bluffing advantage may carry even more weight when the defendant asserts innocence, because the defense attorney can point to the innocence claim as the reason the defendant refuses to come around.<sup>175</sup> Defendants and their counsel have room to push back, and prosecutors are unlikely to stand firm.<sup>176</sup> In the end, prosecutors must try cases if defendants re-

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<sup>172</sup> See Scott & Stuntz, *supra* note 3, at 1933.

<sup>173</sup> See *id.* at 1928, 1933.

<sup>174</sup> *Id.* at 1924 ("The defendant's [trial] entitlement thus motivates prosecutors to bargain—not simply to make offers and walk away.").

<sup>175</sup> Innocence claims may lead prosecutors to lower prices, but they are unlikely to convince prosecutors to dismiss cases. See *supra* note 39 and accompanying text (noting that prosecutors resist innocence signals). At best, prosecutors may consider a credible innocence pitch as one more summary factor—together with criminal record and severity of charges—in the quick processing of pleas.

Professors Scott and Stuntz worried that innocent defendants were at greatest peril of acquiescing to unfavorable pleas, because the innocent are more risk averse than the criminally inclined. Scott & Stuntz, *supra* note 3, at 1943. But, to my thinking, the risk-aversion point holds true only for clean-record innocent defendants—the less frequent type. Moreover, there is some reason to believe that clean-record innocent defendants may be *less* likely to take pleas, because they may (1) be more reluctant to accept an initial criminal conviction that carries greater corollary consequences than subsequent convictions, (2) overestimate their chances of acquittal, (3) elect to try cases on principle even in the face of lenient pleas, or (4) have greater ability to fight cases at trial. See ALLEN, KUHN & SWIFT, *supra* note 26, at 303; LEMPERT & SALTZBURG, *supra* note 27, at 217 & n.45; Easterbrook, *supra* note 59, at 1970; Landes, *supra* note 102, at 69; McCoy & Mirra, *supra* note 2, at 894, 924; McMunigal, *supra* note 1, at 987.

<sup>176</sup> See HEUMANN, *supra* note 11, at 71-72, 188 n.18; Alschuler, *supra* note 42, at 56-57 (quoting San Francisco's chief ADA saying, "Defense attorneys use the fact that we have to move the unimportant cases as quickly as possible—it's an effective way of doing their job."); McCoy & Mirra, *supra* note 2, at 895 ("The greater the defendant's desire for trial, the greater the sentencing disparity must be in order to induce a guilty

fuse to plead. The best defense tool in the face of an atypically high price then—or even just a price that the defendant does not particularly like—is to create the perception that the defendant is willing to engage her own process costs.<sup>177</sup>

Of course, a defendant and her attorney can only use litigation to better her bargaining position at the price of bearing process costs. For many, the best plea is a quick one. In every courthouse, however, there are “gamblers”—defense attorneys and defendants who buck the general trend toward cooperation and fight on for the love or principle of the fight.<sup>178</sup> When these defense attorneys drive hard bargains, it not only lowers prices in these particular cases but generally pressures prices downward going forward.<sup>179</sup>

### C. Case Weakness

Above all, prosecutors want to obtain some kind of conviction and to avoid wholesale dismissal or acquittal.<sup>180</sup> For weak cases, this “conviction psychology” translates into marked added bargaining discounts.<sup>181</sup> As one prosecutor explained to Professor Alschuler: “When we have a weak case . . . we’ll reduce to almost anything rather than lose.”<sup>182</sup> These discounts supplement typical low-set prices to

plea.”); *see also* UVILLER, *supra* note 5, at 181 (“Prosecutors generally feel they owe some deference to the interests of judicial economy.”); Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 713 (2001) (discussing the impact of prosecutors’ heavy caseloads); Levin, *supra* note 65, at 120-21 (same).

<sup>177</sup> Cf. Barnhizer, *supra* note 122, at 179 (noting that one way to overcome an adversary’s superior bargaining power is “to be indifferent to its threats” (internal quotation marks omitted)).

<sup>178</sup> See Skolnick, *supra* note 34, at 66 (describing defendants who refuse to take a plea); *cf.* Bibas, *supra* note 44, at 2479 (“[I]nexperienced lawyers will be too unyielding in plea bargaining because they want trial experience.”).

<sup>179</sup> See UVILLER *supra* note 5, at 181 (noting that if defenders refuse to plead clients to offered dispositions “they can drive down the market . . . [, and that this] background prospect helps to keep offers at the low end”); *supra* notes 144-145 and accompanying text.

<sup>180</sup> See *supra* notes 44-45 and accompanying text.

<sup>181</sup> Felkenes, *supra* note 34, at 117; *accord* HEUMANN, *supra* note 11, at 106; Alschuler, *supra* note 42, at 59; Bibas, *supra* note 44, at 2472-73; Lynch, *supra* note 1, at 132; McCoy & Mirra, *supra* note 2, at 895-96; McMunigal, *supra* note 1, at 990.

<sup>182</sup> See Alschuler, *supra* note 42, at 59 (internal quotation marks omitted); *see also* Bibas, *supra* note 44, at 2473 (noting the potential for “irresistible offers in weak cases”); Dash, *supra* note 35, at 256; Scott & Stuntz, *supra* note 3, at 1942 (noting that prosecutors will be more generous with defendants they think would be more difficult to convict at trial); Uphoff, *supra* note 72, at 88-89 (“Prosecutors are well aware of the allure of a ‘no jail’ recommendation and use it frequently to entice a defendant into a

make already-lenient market offers even more irresistible—at least in low-stakes cases where process costs loom largest. And these case-weakness discounts are of particular relevance to innocent defendants, because the innocent are more likely to face flimsy charges.<sup>183</sup>

Critics emphasize this last point as the precise problem: normatively, defendants facing weak charges should go to trial because they are likely to be acquitted, but the propensity of this group to plead guilty to cheap pleas undermines the system's central truth-seeking function.<sup>184</sup> This objection carries obvious weight from a systemic standpoint, but for the innocent defendant in the low-stakes case who must endure a process more painful than the proffered plea, the prospect of eventual acquittal is of small consolation. Instead, many innocent defendants are quite happy for the opportunity to give the prosecution a conviction—however undeserved—if they may avoid the daunting process and the potential disaster of full trial loss.<sup>185</sup>

#### V. WHERE PROCESS COSTS MATTER LITTLE: TRIAL PENALTIES VERSUS PLEA REWARDS

In serious cases, prosecutors drive harder bargains and aim for sentence maximization to a greater degree.<sup>186</sup> They are less willing

guilty plea in a marginal case . . ."). One study asked prosecutors which of a number of factors might lead them to plea bargain. Case weakness was the *only* factor to which all prosecutors answered affirmatively. See Dominick R. Vetri, Note, *Guilty Plea Bargaining: Compromises by Prosecutors To Secure Guilty Pleas*, 112 U. PA. L. REV. 865 app. at 901 (1964).

<sup>183</sup> See, e.g., Alschuler, *supra* note 42, at 60; Landes, *supra* note 102, at 69; Scott & Stuntz, *supra* note 3, at 1942. For example, one-witness identification cases are the presumed sources of both the greatest number of false convictions and some of the most pronounced case-weakness discounts. See Alschuler, *supra* note 42, at 63 ("Almost without exception, prosecutors list this case as one in which unusual concessions will be given."); *supra* note 59 and accompanying text.

<sup>184</sup> See Alschuler, *supra* note 42, at 64 ("If trials ever serve a purpose, their utility is presumably greatest when the outcome is in doubt. The practice of responding to a weak case by offering extraordinary concessions therefore represents, at best, a dangerous allocation of institutional responsibility."); Lynch, *supra* note 1, at 132; McMunigal, *supra* note 1, at 990; Vetri, *supra* note 182, at 901.

<sup>185</sup> Cf. CASPER, *supra* note 57, at 49-50 (discussing defendant satisfaction with plea bargaining); Easterbrook, *supra* note 59, at 1975 ("Black markets are better than no markets. . . . Rights that may be sold are more valuable than rights that must be consumed . . ."); Scott & Stuntz, *supra* note 3, at 1933 ("The relative losers in a no-bargaining world have no control over their fate; other forces—prosecutorial charging decisions, trial error rates—determine whether they fare well or poorly.").

<sup>186</sup> See Rabin, *supra* note 42, at 1072 (discussing cases in which U.S. Attorneys are unwilling to bargain); Stuntz, *supra* note 117, at 2563 ("With respect to the most vio-

and able to provide categorically lenient deals. First, there is more public and managerial oversight of these high-profile cases.<sup>187</sup> Second, prosecutors are more likely to try even weak cases because they cannot justify the substantial discounts that make these cases imprudent for defendants to litigate.<sup>188</sup> Third, defense attorneys cannot bluff effectively because prosecutors are more ready to call and try cases.<sup>189</sup> Particularly when the charges are grave and the defendant has a serious record, prosecutors concede only enough to make pleas *just* rational, and in certain cases they offer no discounts at all.<sup>190</sup> In fact, even when bargaining may be justified, prosecutors may favor trial: victory in a high-profile case may polish a reputation.<sup>191</sup>

Concurrently, defendants' process costs diminish in importance. Pretrial detention is no process cost at all where the defendant will receive a sentence after either trial or plea that exceeds and consumes the term of preconviction confinement.<sup>192</sup> And all other process costs pale in comparison to lengthy postconviction sentences. As stakes rise, therefore, defendants become more forward looking; potential future consequences take precedent over any focus on present pain.<sup>193</sup>

Normatively, then, process costs for both sides abate in influence almost precisely where they should. After all, these costs should matter least where due process and trial rights matter most.<sup>194</sup> Moreover,

lent crimes, plea bargaining probably resembles civil litigation; law's shadow looms large in these cases.”).

<sup>187</sup> See, e.g., HEUMANN, *supra* note 11, at 169; Alschuler, *supra* note 42, at 107; Levin, *supra* note 65, at 90; Richman, *supra* note 108, at 963-64; Stuntz, *supra* note 117, at 2563.

<sup>188</sup> See UVILLER, *supra* note 5, at 179-80 (describing a prosecutor's reasoning in such a circumstance); Alschuler, *supra* note 42, at 107 (“[E]ven the weakness of the state's case has little weight as a bargaining factor when [the crime is serious].”).

<sup>189</sup> See UVILLER, *supra* note 5, at 179.

<sup>190</sup> See *id.* (“Some cases—some homicides or other brutal crimes with more aggravating than mitigating circumstances—got no offer of reduction: plead to the indictment or try it.”). Notably, when prosecutors stress sentence maximization it necessarily leads to some sacrifice of conviction maximization. See Stuntz, *supra* note 117, at 2563 (reasoning that there are higher acquittal rates in murder cases because voters will forgive acquittals but not leniency).

<sup>191</sup> See Bibas, *supra* note 44, at 2472-74; Zacharias, *supra* note 1, at 1181-82.

<sup>192</sup> See *supra* note 95 and accompanying text.

<sup>193</sup> See *supra* Part II.B.

<sup>194</sup> See FEELEY, *supra* note 11, at 300 n.12; ROSETT & CRESSEY, *supra* note 67, at 155 (“It is when the punishments are most brutal that people justifiably look to the formal legal system for help in controlling those in power.”); Worden, *supra* note 45, at 340. Our system has long recognized a need for enhanced process as stakes increase. See, e.g., *Baldwin v. New York*, 399 U.S. 66 (1970) (limiting the constitutional jury right in petty criminal cases); see also John H. Langbein, *Land Without Plea Bargaining: How the*

only a small class of defendants faces such high-stakes cases—a mere fraction of the system's accused. The system could probably provide this group full-dress trials without unduly taxing resources.

The results are not so rosy, however. Trials are a bit more frequent in serious cases, but even there, bargaining is still the primary mode of case disposition.<sup>195</sup> The question is why defendants continue to bargain in large numbers even when prosecutors are highly reluctant to provide lenient offers. The answer is overcharging.

Felony criminal and sentencing law is astonishingly broad because legislators have every incentive to statutorily overcriminalize behavior, set unduly harsh potential punishments, and then leave to the executive the job of divining what degree of enforcement best serves deterrence and the public good generally.<sup>196</sup> Overbroad statutes serve the legislature by minimizing the opportunity costs of legislative specification and maximizing legislative appearances of being tough on crime.<sup>197</sup> Prosecutors are thereby given extraordinary weapons. They can charge harsh substantive crimes and then use questionable counts and habitual-offender sentencing statutes as leverage in bargaining, offering substantial so-called concessions that merely lead to convictions and sentences only on the *warranted* charges.<sup>198</sup> Generally, such

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*Germans Do It*, 78 MICH. L. REV. 204, 223 (1979) (“Continental and Anglo-American criminal procedural systems both exhibit as an organizing principle the idea that the full set of procedures and safeguards appropriate for determining charges of serious crime need not be extended to cases of petty crime.”); Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot*, 32 AM. J. CRIM. L. 325, 332 (2005) (describing the tradition at common law of providing “rough natural justice” to petty cases and formal process to more serious matters).

<sup>195</sup> In 2002, the plea rate nationally was 95% for all state court felony convictions, but was only 90% for violent felonies as a whole, 68% for murder, and 84% for rape. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, at tbl.5.46.2002 (2003), <http://www.albany.edu/sourcebook/pdf/t5462002.pdf>.

<sup>196</sup> See ROSETT & CRESSEY, *supra* note 67, at 157; Richman, *supra* note 108, at 959 n.69; Scott & Stuntz, *supra* note 3, at 1965; Stuntz, *supra* note 117, at 2556-58; Weinstein, *supra* note 65, at 1160-64. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (discussing the cycle whereby legislative overcriminalization necessarily leads to increased prosecutorial discretion, which leads to further legislative criminalization).

<sup>197</sup> See Richman, *supra* note 108, at 960 n.69 (“[T]he public might blame legislators for failing to criminalize conduct it condemns, but will blame only prosecutors for bringing charges in a marginal case. Given this dynamic, legislators will always be safer if they err on the side of overinclusion.”); Stuntz, *supra* note 117, at 2556-58 (using the passage of the federal legislation on crack cocaine in the mid-1980s as an example).

<sup>198</sup> See HEUMANN, *supra* note 11, at 42; Alschuler, *supra* note 42, at 85-105; Easterbrook, *supra* note 3, at 311-16; Felkenes, *supra* note 34, at 119; McCoy & Mirra, *supra*

counts are questionable not in the sense that the provable facts would fail to meet statutory definitions (though this more extreme brand of overcharging may occur); rather, such counts are questionable because they fall outside of operating systemic and communal norms.<sup>199</sup>

The result of overcharging is that plea prices typically start high in serious cases, and prosecutors are less likely to permit much, if any, negotiation.<sup>200</sup> Duress and coercion become genuine concerns.<sup>201</sup> Defendants who plead guilty end up receiving proportional sentences—but only upon sacrifice of trial rights. In a system where as many as nineteen out of twenty defendants plead guilty, the inescapable conclusion is that the postplea sentences are, in fact, the communally appropriate ones. After all, society would not tolerate disproportionately lenient sentences for the overwhelming majority of defendants who plead guilty in high-stakes (and highly public) felony cases. Conversely, the unlucky few who venture trial and lose are afforded disproportionate trial penalties.<sup>202</sup> Significantly, however, the problems

note 2, at 927; Schulhofer, *Disaster*, *supra* note 1, at 1992; Scott & Stuntz, *supra* note 3, at 1920-21, 1965; Stuntz, *supra* note 117, at 2563; Wright & Miller, *supra* note 32, at 33; Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005) (providing federal data to demonstrate the presence of prosecutorial overcharging).

<sup>199</sup> See ROSETT & CRESSEY, *supra* note 67, at 156 (discussing courthouse norms that apply “no matter what the statutes might stipulate as a proper punishment”); Stuntz, *supra* note 117, at 2554-58; *see also supra* note 141 and accompanying text. Because legislative prescription is so overbroad and overpunitive, the community may view lower prices as optimal *even* in high-stakes cases where greater public oversight exists. *See* Stuntz, *supra* note 117, at 2558 (“[P]rosecutors, at least those whose political antennae are in good working order, will . . . often prefer lower sentences than the legislature has authorized.”).

<sup>200</sup> *See* Felkenes, *supra* note 34, at 119; Scott & Stuntz, *supra* note 3, at 1964-65.

<sup>201</sup> *See* Scott & Stuntz, *supra* note 3, at 1964 (“[T]he prosecutor . . . put[s] pressure on [the defendant] to take the deal without further dickering. . . . The contract analogy is economic duress . . . .”); *see also* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 869 (1995) (“By charging the defendant with the most serious offenses that the prosecutor believes the defendant’s conduct supports, the prosecutor can push up the trial penalty and limit, as a consequence, the defendant’s ability to waive his right to trial intelligently and voluntarily.”). *See generally* Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 LAW & SOC’Y REV. 527 (1979). Indeed, the Court has noted that the “give-and-take negotiation common in plea bargaining” is a principal facet of its constitutionality. *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) (internal quotation marks omitted).

<sup>202</sup> *See* ROSETT & CRESSEY, *supra* note 67, at 156 (“[T]here is a . . . tendency of officials to evoke the severe statutory [penalty] and to forget the less severe ‘courthouse law’ when dealing with defendants who have unsuccessfully used . . . legal tactics.”); Lynch, *supra* note 1, at 120, 123. *See generally* David Brereton & Jonathan D. Casper, *Does It Pay To Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*,



of overcharging and consequent trial penalties are not innocence problems. They are problems we should care about whether defendants are guilty or innocent.<sup>203</sup>

Significantly, these problems that affect high-stakes cases are not of serious concern in the low-stakes cases that “few view as seriously criminal.”<sup>204</sup> There, the issue is more likely to be posttrial *proportional* sentences far in excess of *overlenient* bargain rewards. Indeed, prosecutors may even believe that the arguably *merited* misdemeanor charges already prescribe overly harsh penalties.<sup>205</sup> In any event, prosecutors’ abilities to overcharge are minimal, because misdemeanor charges typically carry the threat of exposure to sentences no greater than one year in jail.

Ultimately, the distinction between trial penalties and plea rewards comes down to the difference between trading in trial costs and trial rights. In low-stakes cases, if defendants see fit to join in the communal pursuit of process-cost avoidance, they are rewarded with sentence bargains of light sanctions and charge bargains of violations or misdemeanors.<sup>206</sup> This quasi-happy story of the defendant who escapes costly *undesired* process on favorable terms is replaced in high-stakes cases by the troubling account of the defendant who is forced under threat of trial penalty to forgo *desired* process to escape undue punishment.<sup>207</sup> When *process costs* matter most, bargaining provides a

16 LAW & SOC’Y REV. 45 (1981–1982) (providing data to demonstrate a substantial “trial tax”); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1 U. ILL. L. REV. 37, 46–47 (1983) (discussing trial penalties); Givelber, *supra* note 1, at 1396–1406 (same).

<sup>203</sup> See Schulhofer, *Disaster*, *supra* note 1, at 1992 (calling for the repeal of mandatory minimum sentences in order to reduce bargaining pressure, and noting that this reform would affect all pleading defendants, not just the innocent). See generally Givelber, *supra* note 1, at 1393–99 (discussing trial tax as a burden that affects all defendants and arguing that it should be eliminated).

<sup>204</sup> FEELEY, *supra* note 11, at 280; accord Stuntz, *supra* note 117, at 2563 (“[T]he less serious the crime, the more likely it is that the legislature has authorized punishments no one really wishes to impose.”).

<sup>205</sup> See *supra* notes 109–112 and accompanying text. As Professor Stuntz noted, “[C]riminal law and the law of sentencing define prosecutors’ options, not litigation outcomes. . . . [T]hey are items on a menu from which the prosecutor may order as she wishes. . . . [H]er incentive is to get whatever meal she wants. . . . The menu does not define the meal; the diner does.” Stuntz, *supra* note 117, at 2549. Generally, the prosecutor “has no incentive to order the biggest meal possible.” *Id.*

<sup>206</sup> See HEUMANN, *supra* note 11, at 123; see also *supra* Parts III–IV.

<sup>207</sup> See ROSETT & CRESSEY, *supra* note 67, at 155 (“When the system is severe, the accused is justifiably afraid to plead guilty to the crime charged. . . . [T]he path of acquiescence becomes less tempting. . . . No one casually pleads guilty to robbery. . . .

beneficial exit strategy on defendant-optimal terms. But when *process* matters most, recidivist offenders plead guilty because the prospect of terrific sentences after trial conviction is simply too terrifying. This distinction—between pleading guilty to avoid a trial tax on the exercise of constitutional rights and pleading guilty to avoid process costs—has led some critics to condemn plea bargaining while generally accepting guilty pleas.<sup>208</sup>

Courts have frowned on prosecutorial overcharging and have even reversed *explicit* prosecutorial or judicial threats of trial penalties.<sup>209</sup> Nevertheless, the Supreme Court and several lower courts have repeatedly rejected constitutional challenges to trial penalties in the absence of express evidence of vindictive motivation.<sup>210</sup> In the usual case, a prosecutor or judge may readily intimidate the defendant with the threat of an excessive posttrial sentence on overcharged counts—as long as the prosecutor or judge is careful with her words. Unsurprisingly, defendants choose to plea bargain, not because they necessarily want to do so in high-stakes cases, but because it is the sole sensible course.

## VI. OBJECTIONS

To sum up, plea bargaining works best for innocent defendants for whom the process is the punishment. However, because the system condones overcharging (and consequently substantial *de facto*

Conversely, only a man very confident of his ultimate vindication will chance capital punishment . . . ."); *see also supra* Part II.B.

<sup>208</sup> *See* Alschuler, *supra* note 1, at 954-55 (finding guilty pleas, but not plea bargains, acceptable); Langbein, *supra* note 194, at 213 (describing "that terrible attribute that defines our plea bargaining and makes it coercive and unjust: the sentencing differential by which the accused is threatened with an increased sanction for conviction after trial by comparison with that which is offered for confession and waiver of trial"); Scott & Stuntz, *supra* note 3, at 1914 ("[A]cademic critics are not opposed to *pleas*, but only to *plea bargains*."); Schulhofer, *Disaster, supra* note 1, at 1986 n.26 (same).

<sup>209</sup> *See, e.g., In re Lewallen*, 590 P.2d 383 (Cal. 1979) (vacating the defendant's sentence when the sentencing judge indicated that the defendant should be treated more harshly for exercising his trial right); *State v. Boone*, 235 S.E.2d 74 (N.C. Ct. App. 1977) (same); *People v. Picciotti*, 151 N.E.2d 191, 193-94 (N.Y. 1958) ("A plea of guilty is, of course, frequently the result of a 'bargain,' but there is no bargain if a defendant is told that, if he does not plead guilty, he will suffer [overcharging] consequences that would not otherwise be visited upon him.")

<sup>210</sup> *See Corbitt v. New Jersey*, 439 U.S. 212 (1978); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Brady v. United States*, 397 U.S. 742 (1970); *see also* JAMES E. BOND, *PLEA BARGAINING AND GUILTY PLEAS* 2-20 (2d ed. 1983) (collecting cases). A prosecutor may even threaten to recharge under a habitual-offender statute if a defendant refuses a plea. *Bordenkircher*, 434 U.S. at 358-59, 365.

trial penalties), bargaining may also prove to be the least-bad option for some innocent defendants for whom process would otherwise be welcome.<sup>211</sup> After all, trials are imperfect, particularly for recidivist defendants who cannot so easily challenge wrongful charges.<sup>212</sup> Accordingly, it seems wrongheaded and even unjust to allow a factually guilty defendant to make a rational choice in the face of plea bargaining's benefits and trial's potential penalties and travails, but to force an innocent defendant—who, by her nature as innocent and facing criminal charges, has already been systemically abused once—to risk, against her will, an uncertain trial with significant downside.<sup>213</sup> Yet, that is precisely what some commentators and courts piously demand when they insist that the innocent should never plead guilty.<sup>214</sup>

<sup>211</sup> See *supra* Part V.

<sup>212</sup> See *supra* Part I.D.

<sup>213</sup> See UVILLER, *supra* note 5, at 195-96; Church, *supra* note 3, at 516 (“It is . . . somewhat disingenuous to argue that the innocent defendant suffers from being offered an alternative to the high stakes of a trial.”); Easterbrook, *supra* note 59, at 1975 (“Forcing [the innocent] to use their rights at trial means compelling them to take the risk of conviction or acquittal . . .”); Scott & Stuntz, *supra* note 54, at 2013 (“[T]he choice is between permitting innocents to plead under the most favorable circumstances possible and forcing them to trial, where they risk vastly greater punishment.”).

<sup>214</sup> See, e.g., United States v. Price, 436 F.2d 303, 303 (D.C. Cir. 1970) (noting that an innocent defendant cannot plead guilty); United States v. Rogers, 289 F. Supp. 726 (D. Conn. 1968) (same); People v. Butler, 204 N.W.2d 325, 330 (Mich. Ct. App. 1972) (same); see also AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY, No. 14-1.6 cmt. at 66 (3d ed. 1999) [hereinafter ABA, STANDARDS] (“Our system has concluded, in order to protect the innocent, that persons whose conduct does not fall within the charges brought by a prosecutor should not be permitted to plead guilty.”); JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE § 15:10 (2005) (“Clients who maintain their innocence should go to trial and [generally] should not be permitted to plead guilty.”); Alschuler, *supra* note 5, at 1280-89, 1296-1301 (interviewing several attorneys who refuse ethically to abide by or participate in guilty pleas for defendants who claim innocence); Bibas, *supra* note 1, at 1382 (“It should go without saying that it is wrong to convict innocent defendants. Thus, the law should hinder these convictions instead of facilitating them . . .”); Gerard V. Bradley, *Plea Bargaining and the Criminal Defendant's Obligation To Plead Guilty*, 40 S. TEX. L. REV. 65, 72, 77 (1999) (describing trials for innocent defendants as “morally necessary” and noting that the “common good is always served by the trial of an innocent defendant (at least when a guilty plea is the alternative)”); Douglas A. Copeland, *Missouri's Public Defender System*, 62 J. MO. B. 10, 10 (2006) (“[P]lea bargaining a defendant that may be innocent” “simply doesn't satisfy what the Constitution requires . . .”); Dash, *supra* note 35, at 254 (noting that a justice system that permits the innocent to plead guilty is “a system of injustice”); Hessick & Saujani, *supra* note 156, at 197 (“[A]n innocent person pleading guilty is inexcusable. . . . [T]o convict innocent people without a trial . . . exposes the failure to uphold criminal justice standards upon which society is constructed.”); Mitchell, *supra* note 156, at 320 (stressing the importance of innocent defendants taking cases to trial); Schulhofer, *Disaster*, *supra* note 1, at 1986; Jack B. Zimmermann, *Things Aren't Always as They Seem at First Glance*, 40 S. TEX.

What are these critics' principal concerns? There seem to be four concrete reasons for potential pause: bargained-for convictions of the innocent may (1) engender disaffection with the criminal justice system;<sup>215</sup> (2) permit real perpetrators to escape punishment;<sup>216</sup> (3) incentivize prosecutors to charge marginal cases because they can anticipate pleas;<sup>217</sup> and (4) enable police misconduct by insulating unlawful searches, seizures, and other police procedures from constitutional review.<sup>218</sup> Further, these problems carry greater moral weight if—as one might expect—they disproportionately affect poor or minority communities.<sup>219</sup>

But these objections are unpersuasive. First, plea bargaining for the innocent causes little, if any, surplus disaffection. No doubt, the innocent defendant who must voice false words to get her bargain may feel that the system has abused her twice. But the defendant's enmity on that score is likely less than her aversion to a compelled trial course (with all its attendant process costs and risks); otherwise she would elect to fight on to trial.<sup>220</sup> Conversely, she may even derive a degree of satisfaction from autonomously taking a role in determining her own fate.<sup>221</sup> In any event, even if false admissions feed her dis-

L. REV. 227, 228 (1999) (“[I]n my opinion, it borders on unethical conduct by a lawyer to participate in a *plea of guilty* by a client who in fact is not guilty.”); Eunyung Theresa Oh, Note, *Innocence After “Guilt”: Postconviction DNA Relief for Innocents Who Plead Guilty*, 55 SYRACUSE L. REV. 161, 168 (2004) (“[A] guilty plea should not be an option if [the defendant] is innocent.”); *infra* Part VII.B (discussing the perceived ethical problem of guilty pleas for the innocent).

<sup>215</sup> See, e.g., Bibas, *supra* note 1, at 1382-88 (arguing that *Alford* and nolo contendere pleas undermine public confidence in the accuracy and fairness of the criminal justice system); Hessick & Saujani, *supra* note 156, at 205-06 (noting that the public can lose confidence in the justice system if it learns that innocent defendants plead guilty).

<sup>216</sup> See, e.g., Brandon J. Lester, Note, *System Failure: The Case for Supplanting Negotiation with Mediation in Plea Bargaining*, 20 OHIO ST. J. ON DISP. RESOL. 563, 570-71 & n.29 (2005).

<sup>217</sup> See, e.g., Schulhofer, *Disaster*, *supra* note 1, at 2007 (“[C]onvicting the innocent is unequivocally easier in a world that permits plea bargaining.”). See generally Strandburg, *supra* note 1.

<sup>218</sup> See, e.g., Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 324-32 (2005).

<sup>219</sup> See MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 28-31 (1995) (discussing the disproportionate burden that blacks face in the criminal justice system); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 15-16 (1998) (describing the author's experience of watching white defendants regularly be treated more leniently by prosecutors).

<sup>220</sup> See *supra* note 185, *infra* notes 235-242, and accompanying text.

<sup>221</sup> See CASPER, *supra* note 57, at 49 (“[T]he ‘participation’ hypothesis . . . suggests that a defendant, by participating in the decision about what sentence he is to receive,

illusions, this harm is of little concern because she is someone who presumably has already lost faith in a system that leveled false charges in the first instance.

Second, little concern exists over real perpetrators escaping punishment. Police and prosecutors do not commonly pursue other suspects once a defendant wins acquittal. After all, law enforcement officials generally arrest and prosecute wrongfully because they truly believe that innocent defendants are guilty.<sup>222</sup> When prosecutors lose at trial, they do not conclude that the defendant must have been innocent after all; they conclude that the defendant got away with it. Moreover, many innocent defendants are innocent not because they did not commit the crime, but because *no* crime in fact was committed. This is particularly true of recidivist innocent defendants facing petty charges. Petty charges often stem from police observation of supposed crime, not police investigation of crime reports.<sup>223</sup> If the defendant is innocent, it is frequently because the police saw *something* and wrongly assumed that it was criminal.<sup>224</sup>

The weightiest objections are the third and fourth—that plea bargaining for innocent defendants incentivizes prosecutorial decisions to charge and enables police misconduct. However, both concerns are endemic to plea bargaining more generally. With respect to prosecutors' charging decisions, the argument is that in a world without plea bargaining—and keeping resources constant—prosecutors would be forced to take more cases to trial and therefore would be

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will find the sentence and the whole proceeding more palatable . . ."). *But cf.* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 31-39, 62-69, 161-62 (1990) (finding that defendants' perceptions of legitimacy are linked to fair procedures, not outcomes). The defendant may even recoup some personal vindication from what one lawyer described as the "civil disobedience" of the false plea. Alschuler, *supra* note 5, at 1306. I am reminded of the grandfather's deathbed admonition in Ralph Ellison's *Invisible Man*: "I have been a traitor all my born days . . . [O]vercome 'em with yeses, undermine 'em with grins, agree 'em to death and destruction, let 'em swoller you till they vomit or bust wide open." RALPH ELLISON, *INVISIBLE MAN* 16 (2d ed., Vintage Int'l 1995).

<sup>222</sup> See Easterbrook, *supra* note 59, at 1970 ("Innocent persons are accused not because prosecutors are wicked but because these innocents *appear* to be guilty.").

<sup>223</sup> See William J. Stuntz, Essay, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1819-21 (1998) (describing how police enforcement of vice crimes—and street crime prevention generally—is prospective as police go looking for crime, instead of simply responding to reported crimes).

<sup>224</sup> Trespassing is the clearest example. Usually, if the defendant is innocent, it is because she had permission to be at the location, not because another individual trespassed.

more circumspect in their charging decisions.<sup>225</sup> This may or may not be true. Professors Scott and Stuntz offer a persuasive counter:

[A] cheaper trial process [necessitated by increased trial frequency] would likely make more [mistakes]. The combination of a higher error rate and lower cost per trial would substantially reduce the cost to a prosecutor of getting a case wrong . . . . That adds up to a reduced incentive to separate the innocent from the guilty.<sup>226</sup>

In any event, the problem is not substantially worsened by the addition to the mix of rare innocent defendants. Because most defendants are in fact guilty, and the overwhelming majority pleads guilty, the prosecutorial impulse to charge remains strong even if a few innocent defendants are forced to trial. Moreover, the defendant knows he is innocent, but the prosecutor *ex ante* does not. And the prosecutor resists innocence signals.<sup>227</sup> This information asymmetry calls into question any confidence that a greater exercise of charging discretion would lead prosecutors to weed out cases against the innocent, as opposed to the guilty. Admittedly, prosecutors operating under resource constraints might decide to dismiss weak cases (which innocent defendants are more likely to face). However, these prosecutors would be least likely to exercise discretion in favor of recidivist defendants (who are *most* likely to be innocent).<sup>228</sup> In the end, prosecutors would probably go forward with cases charging recidivist defendants and would end up weeding out principally the cases charging clean-record defendants or cases where witness cooperation was in doubt—both categories that are largely unreflective of (or even cut against) innocence.<sup>229</sup>

With respect to enabling police misconduct, the argument is that the exclusionary rule is the principal tool for combating that particu-

<sup>225</sup> See Schulhofer, *Disaster*, *supra* note 1, at 2007.

<sup>226</sup> Scott & Stuntz, *supra* note 54, at 2014.

<sup>227</sup> See *supra* notes 32-34, 38-45, and accompanying text. Because guilty defendants copy innocent defendants' signals, permitting the innocent to plea bargain may increase deterrence for another reason: on balance, it produces greater increases in conviction of the guilty than the innocent, because most defendants who proclaim innocence are in fact guilty. See Church, *supra* note 3, at 518-19 ("[A] choice for more convictions is, at the very least, not inherently irrational.")

<sup>228</sup> See *supra* notes 35-37 and accompanying text (discussing the tendency of prosecutors to charge recidivists even in weak cases).

<sup>229</sup> See *supra* notes 46-53 and accompanying text (discussing reasons for dismissal). See generally Scott Baker & Claudio Mezzetti, *Prosecutorial Resources, Plea Bargaining, and the Decision To Go to Trial*, 17 J.L. ECON. & ORG. 149 (2001) (same).

lar ill, but guilty pleas forestall the check.<sup>230</sup> But suppression hearings already are ineffective as a safeguard against police misconduct because so few cases ever get to that point.<sup>231</sup> Moreover, for the few cases that ripen to substantive hearings, there are strong reasons to doubt the efficacy of the exclusionary rule in policing the police. Judges are especially loath to discredit even incredible police testimony if it means razing evidence against defendants—especially recidivist defendants—whom judges may already believe are wasting judicial resources by not plea bargaining.<sup>232</sup> In short, the impact of permitting innocent defendants to plea bargain is a mere drop in a very large and full bucket. Instead, the problem is best addressed by instituting innovative alternative safeguards against police misconduct<sup>233</sup> or by limiting plea bargaining for the guilty and the innocent alike.<sup>234</sup>

As to all these concerns, perhaps the best response is that the innocent defendant seems a strange agent of social reform. By obliging her to forego a plea, she is forced to internalize all costs and risks for diffuse and somewhat abstract public benefit.<sup>235</sup> Certainly, evils like

<sup>230</sup> See Zeidman, *supra* note 218, at 324-33.

<sup>231</sup> See *id.* at 332 (“[A] slew of guilty pleas . . . serve to insulate police practice from scrutiny.”); sources cited *supra* note 69 (noting that half of all New York City cases are disposed of at the first appearance and the overwhelming majority are disposed of within months).

<sup>232</sup> See COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, CITY OF N.Y., COMMISSION REPORT 42 (1994), available at [http://www.parc.info/client\\_files/Special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf](http://www.parc.info/client_files/Special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf) (“[T]he tolerance the criminal justice system exhibits takes the form of a lesser level of scrutiny when it comes to police officers’ testimony. Fewer questions are asked; weaker explanations are accepted.”).

<sup>233</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 422 (1971) (Burger, C.J., dissenting) (proposing an “administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated”). See generally Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937 (1983) (discussing alternatives to an exclusionary rule).

<sup>234</sup> See Zeidman, *supra* note 218, at 332 (noting that guilty pleas “insulate police practice from scrutiny”).

<sup>235</sup> Cf. Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v Morales*, 1998 U. CHI. LEGAL F. 197, 209 (discussing “burden sharing”); Scott & Stuntz, *supra* note 54, at 2013 (“[F]orcing [the innocent] to trial . . . stands every known notion of distributional justice on its head. . . . [L]osses, especially unjust losses, are better spread than concentrated . . .”). In a related context, one commentator persuasively offered the following response to those who would compel defense attorneys to exhaust every available appeal on behalf of a death-row “volunteer” (who wishes to give up his defenses): “[A] condemned and resigned in-

police misconduct disproportionately impact poor and minority communities. But the most common innocent defendants—recidivists facing petty charges—often *come* from these very communities. And they are not well served by compulsory trials.<sup>236</sup> Accordingly, any societal benefit can be realized only by discounting the preferences of inculpable defendants (from vulnerable communities) who least deserve the added burdens.<sup>237</sup>

Ultimately, a system that respects the autonomy of the guilty to forfeit trial rights should respect the autonomy of the innocent to do the same.<sup>238</sup> Indeed, autonomy is a persuasive counterweight to constitutional objections to bargaining's trial penalties: "[T]he defendants who pay the heaviest penalties under the current regime—defendants who refuse to bargain, go to trial, and are convicted—at least have the option, *ex ante*, of taking a different course of action."<sup>239</sup> Innocent defendants should have the same option.

mate is a human being, not a cause." Richard W. Garnett, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers*, 77 NOTRE DAME L. REV. 795, 800 (2002) (internal quotation marks omitted).

<sup>236</sup> See Scott & Stuntz, *supra* note 3, at 1928 ("[A]bolishing plea bargaining only worsens this situation. Poor people are indeed disadvantaged in the criminal process relative to rich people, but the relative disadvantage *increases* when trials are required."); *cf. supra* notes 168-173 and accompanying text (arguing that clients of self-dealing attorneys are better off plea bargaining in low-stakes cases).

<sup>237</sup> See Easterbrook, *supra* note 3, at 320 ("It would do defendants no favor to prevent them from striking the best deals they could in such sorry circumstances."); Scott & Stuntz, *supra* note 3, at 1913 ("Parties who are denied either freedom to contract or freedom to exchange entitlements suffer unnecessary constraints on their choices, constraints that undermine the value of the entitlements themselves.").

<sup>238</sup> See Easterbrook, *supra* note 59, at 1976 ("Why is liberty too important to be left to the defendant whose life is at stake? Should we not say instead that liberty is too important to deny effect to the defendant's choice?"); Scott & Stuntz, *supra* note 3, at 1913, 1935; Zacharias, *supra* note 1, at 1143 ("The process must include the defendant in a meaningful way. Defendants must . . . have some meaningful influence over both the nature of the plea offer and whether to accept it." (footnote omitted)); Charles W. Smith, Note, *Equivocal Guilty Pleas—Should They Be Accepted?*, 75 DICK. L. REV. 366, 372 (1970) ("[A]n innocent man who asks for punishment may be foolish, but if he thinks the bargain good, no injustice results from punishing him, for his will is done." (footnote omitted)).

<sup>239</sup> Scott & Stuntz, *supra* note 3, at 1933; see also CASPER, *supra* note 57, at 50 ("The defendant, if he does not like the bargain, may reject it and stand trial. If he accepts the bargain, he cannot help but feel that his sentence is something that he consented to and participated in bringing about, even if at the same time he resents the process . . . ." (misquoting Arnold Enker, *Perspectives on Plea Bargaining*, in TASK FORCE REPORT: THE COURTS 115 (U.S. Admin. of Criminal Justice ed., 1967))); *supra* notes 57, 221, and accompanying text (discussing participation as a reason that defendants prefer guilty pleas to trials).



When an innocent defendant rationally chooses to plead guilty, the system should want to protect access. It should recognize that at least for the innocent defendant it is not bad that some deals are more than just sensible—they would be improvident to reject. Particularly where process costs are high and the consequences of conviction low, a bargained-for conviction of an innocent accused is no evil; it is the constructive minimization thereof—an unpleasant medicine softening the symptoms of separate affliction.<sup>240</sup> This is the best response to Professor Schulhofer, a leading critic, who highlighted a “strong social policy against *punishing* the innocent” and noted that “there is no comparable social policy against inconveniencing an innocent (for example, by requiring him to stand trial), if reducing his welfare in this way would benefit others.”<sup>241</sup> From this reasoning, Schulhofer concluded that the system is normatively required to “protect innocents from the pressure (or temptation) of extremely lenient plea offers.”<sup>242</sup> But he drew too fine a line: the typical recidivist innocent defendant—facing petty charges and perhaps detained pretrial—would find no practical distinction between punishment and trial inconvenience and no solace in systemic protections *against* leniency.

## VII. FOR FALSE PLEAS

Finally, I turn to the means of guaranteeing innocent defendants’ access to guilty pleas and plea bargaining’s full benefits. I first address why current options are insufficient and then propose a new solution: reconstructing false words of guilt as accepted legal fictions.

### A. *Nolo Contendere* and Alford Pleas: *Nonsolutions*

At common law, defendants could enter pleas of *nolo contendere* to misdemeanor charges and thereby accept conviction without making express admissions.<sup>243</sup> Presently, some jurisdictions have extended *nolo contendere* pleas to certain felony charges, but, in the main, the

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<sup>240</sup> Cf. Leipold, *supra* note 33, at 1301 (“For an innocent suspect charged with a crime, there are only two possible outcomes: bad and really bad.”).

<sup>241</sup> Schulhofer, *Disaster*, *supra* note 1, at 1986; accord Hessick & Saujani, *supra* note 156, at 241 (noting that an innocent defendant’s choice to plead guilty may be “rational from his private perspective,” but that such private choice is of no consequence where it “imposes costs on society by undermining public confidence”); see also Bibas, *supra* note 1, at 1386-88.

<sup>242</sup> Schulhofer, *Disaster*, *supra* note 1, at 2004-05.

<sup>243</sup> See Bibas, *supra* note 1, at 1370-71.

practice is reserved for minor offenses.<sup>244</sup> Separately, the Supreme Court in *North Carolina v. Alford* formulated an additional vehicle for rational-choice pleas—available theoretically in cases of all degrees of seriousness.<sup>245</sup> In *Alford*, the Court held that an equivocal plea—where the defendant pleads guilty while concurrently maintaining innocence—is constitutional as long as the plea constitutes “a voluntary and intelligent choice among the alternative courses of action.”<sup>246</sup>

Many scholars oppose both types of pleas—particularly *Alford* pleas—as cynical instruments that sacrifice accuracy and communal values for the questionable goods of efficient punishment and purported voluntary choice.<sup>247</sup> Others favor the pleas as evils necessary to allow the innocent the option to plead guilty with a measure of honesty.<sup>248</sup> In truth, *Alford* and nolo contendere pleas are faulty not because they promote inaccurate convictions, but rather because they do not make voluntary pleas for the innocent available or useful enough.

First, both types of pleas are inconsistently available. Many jurisdictions adopt blanket bans against the pleas.<sup>249</sup> Others permit the pleas for only some types of defendants and crimes.<sup>250</sup> Indeed, in formulating the *Alford* doctrine, the Supreme Court expressly gave the lower courts broad discretion over whether to accept the pleas.<sup>251</sup>

<sup>244</sup> See *id.*; see also *Hudson v. United States*, 272 U.S. 451, 457 (1926) (holding valid nolo contendere pleas for federal charges that carry potential prison sentences). Of the 1683 federal defendants who pled nolo contendere between 1997 and 2001, 90% were charged with misdemeanor or petty offenses and more than half were charged with traffic offenses. Leipold, *supra* note 22, at 1156 n.172.

<sup>245</sup> 400 U.S. 25 (1970).

<sup>246</sup> *Id.* at 31, 37.

<sup>247</sup> See Bibas, *supra* note 1, at 1382; Hessick & Saujani, *supra* note 156, at 197.

<sup>248</sup> See Alschuler, *supra* note 5, at 1292, 1296-98; Easterbrook, *supra* note 3, at 320; Curtis J. Shipley, Note, *The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1073 (1987). See generally Alschuler, *supra* note 6.

<sup>249</sup> See, e.g., *Ross v. State*, 456 N.E.2d 420, 423 (Ind. 1983) (holding that Indiana does not recognize *Alford* pleas); *State v. Korzenowski*, 303 A.2d 596, 597 n.1 (N.J. Super. Ct. App. Div. 1973) (affirming a state court directive to reject such pleas), *cert. denied*, 307 A.2d 100 (N.J. 1973); *Eisenberg v. Pa. Dep't of Pub. Welfare*, 485 A.2d 511, 514 (Pa. Commw. Ct. 1984) (noting that Pennsylvania does not recognize *Alford* pleas). Presently, thirty-eight states and the District of Columbia allow nolo contendere pleas in at least some types of cases, and forty-seven states and the District of Columbia theoretically allow *Alford* pleas. Bibas, *supra* note 1, at 1371 n.44, 1372 n.52. However, far fewer states have actually applied the *Alford* doctrine. See Hessick & Saujani, *supra* note 156, at 198 (finding only thirteen states to have “applied” *Alford*).

<sup>250</sup> See Bibas, *supra* note 1, at 1370-71, 1379-80; *supra* notes 243-244 and accompanying text.

<sup>251</sup> See 400 U.S. at 38 n.11 (“Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to

Consequently, even in jurisdictions where the pleas are theoretically available, final say over availability is left not to defendants, but to the vagaries of individual lawyers and judges.<sup>252</sup> For example, notwithstanding the ostensible availability of the pleas in federal courts, the Department of Justice has expressly discouraged its assistants from offering *Alford* pleas and requires supervisory approval before assistants may make exceptions.<sup>253</sup> Even defense attorneys—out of professional discomfort—may opt not to pursue or participate in *Alford* pleas.<sup>254</sup> Consequently, *Alford* has developed into a doctrine applied by “whim” that is “subject to no restrictions and no standards,” where in essence “defendants have no rights and trial courts can do no wrong.”<sup>255</sup> And *nolo contendere* pleas are relegated by history and practice to only limited classes of cases in limited jurisdictions.<sup>256</sup> The result is arbitrary availability; some innocent defendants may plead, but many may not.<sup>257</sup>

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plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court . . . States may bar their courts from accepting guilty pleas from any defendants who assert their innocence.”)

<sup>252</sup> See Alschuler, *supra* note 5, at 1304 (“The refusal of most trial judges to accept *Alford* pleas is probably attributable in part to their personal conviction that these pleas are improper . . .”); Barkai, *supra* note 1, at 123-24 (“[T]he rejection of an equivocal plea falls in the vast area of district court discretion that is virtually unreviewable.”); Bibas, *supra* note 1, at 1379-81, 1386 (noting differing levels of acceptance among defense lawyers, prosecutors, and the public). For cases, see, for example, *United States v. Melendrez-Salas*, 466 F.2d 861, 862 (9th Cir. 1972) (quoting *Alford* to find no abuse of discretion in a judge’s refusal of the defendant’s plea); *State v. Brumfield*, 511 P.2d 1256, 1257-58 (Or. Ct. App. 1973) (same); and *State v. Knutson*, 523 P.2d 967, 968-69 (Wash. Ct. App. 1974) (same). See also Shipley, *supra* note 248, at 1069 n.58 (“[M]ost judges remain leery of *Alford* pleas and accept the Supreme Court’s invitation to . . . reject them.”). *Contra* *United States v. Gaskins*, 485 F.2d 1046, 1049 (D.C. Cir. 1973) (reversing the trial court’s denial of the defendant’s plea “merely because the defendant refuse[d]” to admit guilt).

<sup>253</sup> See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-16.015 (2006), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/16mcrm.htm#9-16.015](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/16mcrm.htm#9-16.015) (requiring approval and “the most unusual of circumstances”); Bibas, *supra* note 1, at 1379-80, 1386.

<sup>254</sup> See, e.g., HALL, *supra* note 214, § 15:10 (noting that defense attorneys have professional discretion to pursue or forgo *Alford* pleas); see also *United States ex rel. Tillman v. Alldredge*, 350 F. Supp. 189, 195 (E.D. Pa. 1972) (holding that counsel’s failure to pursue plea bargaining where defendant maintained his innocence was not ineffective); *infra* notes 279-281 and accompanying text (discussing the perceived ethical problem of guilty pleas for the innocent, and citing sources that would prohibit or make discretionary defense attorneys’ involvement in such pleas).

<sup>255</sup> Alschuler, *supra* note 5, at 1301.

<sup>256</sup> See *supra* notes 243-244, 249-250, and accompanying text.

<sup>257</sup> See Barkai, *supra* note 1, at 125 (describing the use and impact of *Alford* in the federal system to be “very limited”); Shipley, *supra* note 248, at 1064, 1068 (describing *Alford*’s application as “haphazard,” “unpredictable,” and “rarely accept[ed]”). *But see*

Second, both types of plea fail to provide defendants with the full benefits of their bargains. Instead, defendants may suffer multiple detrimental sentencing and corollary consequences for entering pleas without admitting guilt. For example, if defendants have entered into charge bargains with open sentences, judges may increase sentences toward the statutory maximum for lack of contrition.<sup>258</sup> Additionally, defendants often are required to make factual admissions to the crimes of conviction in order to secure release on parole, to minimize grading under the Sex Offender Registration Act, and to successfully complete probation or mandatory treatment programs.<sup>259</sup> Finally, prosecutors that choose to accept the pleas may demand a higher sanction as the quid pro quo price of acquiescence.<sup>260</sup>

Third, with respect only to *Alford* pleas, these pleas raise genuine concern over the conviction not of the innocent but of defendants who do not, in fact, wish to plead at all. At bottom, equivocation is an imprecise check for the possibility that an innocent defendant is falsely pleading guilty. It is a far more accurate check for the possibility that a defendant is pleading *involuntarily*—a separate (and constitutional) concern.<sup>261</sup> Defendants who equivocate generally do so because they are unsure that the guilty plea is the right course of action.<sup>262</sup> Their hesitation signals that something is amiss—that they

Bibas, *supra* note 1, at 1375 (noting more frequent usage of *Alford* pleas, particularly in state courts).

<sup>258</sup> See Leipold, *supra* note 22, at 1158 (“[C]ourts are unlikely to find contrition or remorse buried in a claim that a defendant is really a victim.”); Bryan H. Ward, *A Plea Best Not Taken: Why Criminal Defendants Should Avoid the Alford Plea*, 68 MO. L. REV. 913, 921-26 (2003) (citing cases where courts took the defendant’s lack of remorse into account in order to increase sentences after *Alford* pleas).

<sup>259</sup> See Ward, *supra* note 258, at 926-35 (citing cases where *Alford* pleas produced defendant-negative parole, probation, and sex-offender consequences).

<sup>260</sup> See Bibas, *supra* note 1, at 1378 n.81; E-mail from Alafair S. Burke, Professor of Law, Hofstra Univ. Sch. of Law, former Deputy Dist. Att’y, Portland, Or., to author (May 6, 2007, 15:37 CST) (on file with author). This is especially true for nolo contendere pleas that (at least in theory) cannot be used as evidence in future civil suits. See also CHARLES ALAN WRIGHT, 1 FEDERAL PRACTICE AND PROCEDURE § 177, at 666 (2d ed. 1982) (“The principal difference between a plea of guilty and a plea of nolo contendere is that the latter may not be used against the defendant in a civil action based upon the same acts.”). Prosecutors justifiably may view this benefit as requiring a corresponding defense concession.

<sup>261</sup> See *Brady v. United States*, 397 U.S. 742, 748 (1970) (holding that pleas are constitutionally required to be knowing and voluntary).

<sup>262</sup> See Smith, *supra* note 238, at 375 (“By his equivocation, the pleader has signalled [sic] his dissatisfaction with the bargain, or at the very least, his latent unwillingness to make it.”).

do not view pleading as the best option, even if it is.<sup>263</sup> A particular defendant might demur precisely because she is innocent (or believes herself to be) or for wholly different reasons. Regardless, a court should not deem such a plea voluntary.<sup>264</sup> Moreover, to the extent concerns exist over imperfect agency—that domineering defense lawyers might force unwilling defendants to plead guilty against their wills—then permitting equivocal pleas seems a particularly poor idea. The equivocating defendant is of two minds; a necessary question is which mind is hers and which is her lawyer’s.<sup>265</sup> Conversely, a defendant who very much wants a bargain would seem most ready to voice words of guilt—true or not—that consummate the bargain. When defense counsel explains that asking for an *Alford* plea might complicate matters, a willing defendant generally protests no further.<sup>266</sup> Those

<sup>263</sup> Accordingly, the pleas are prime fodder for appellate challenge. See Bibas, *supra* note 1, at 1379 (noting fear among prosecutors that *Alford* pleas are “vulnerable” on appeal, “thus undercutting finality”).

<sup>264</sup> See Smith, *supra* note 238, at 374-75; cf. *State v. Bouie*, 817 So. 2d 48 (La. 2002) (holding that the defendant had not pled guilty voluntarily where the defendant equivocated but ultimately relented to the trial court’s pressure to take a plea that the trial court believed was in the defendant’s best interest). The facts of *Alford* are instructive on this point. The defendant tried to withdraw his plea as involuntary, because, among other reasons, he had contested his guilt and the court had disregarded his protestations. The plea transcript hints at involuntariness: “[Y]ou all got me to plead guilty. . . . You told me to plead guilty, right. I don’t—I’m not guilty but I plead guilty.” *North Carolina v. Alford*, 400 U.S. 25, 28 n.2 (1970). It seems at least plausible that the defendant was about to say, “I don’t—*want to plead*.” Cf. Ward, *supra* note 258, at 917 (“Defense attorneys should keep in mind that the *Alford* plea was not a fundamental right wrested from an unwilling prosecution, but rather was a means by which the prosecution was able to retain a questionable plea of guilty.”).

<sup>265</sup> Cf. *Bouie*, 817 So. 2d at 55-56 (“[T]he defendant’s continuing reservations about his culpability . . . , which he never entirely put aside during the colloquy, did not prevent him from entering a voluntary guilty plea. However, *Alford* presupposes that the defendant ‘must be permitted to judge for himself in this respect.’” (quoting *Alford*, 400 U.S. at 33)).

<sup>266</sup> See Smith, *supra* note 238, at 374-75 (“[A] truly innocent, rational man who, for his own reasons, chooses to ‘take the rap’ is least likely of all to tergiversate when pleading. . . . Indeed, it may well be that chief among the equivocators are the merely reluctant guilty and the dissemblers.” (footnote omitted)); see also UVILLER, *supra* note 5, at 195 (“[I]nnocent defendants . . . say[] what [i]s required to get the bargain plea they want[.]”); Alschuler, *supra* note 5, at 1305 (noting that defense attorneys sometimes counsel clients to get their “lines right” (internal quotation marks omitted)); Richard H. Kuh, Book Review, 82 HARV. L. REV. 497, at 500-01 (1968) (reviewing DONALD J. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* (1966)) (noting that defendants just “mouth[]” the prearranged words, “whether or not they are truthful”); cf. Bibas *supra* note 1, at 1378 n.81, 1370 n.87 (relating the experience of one defense lawyer that innocent defendants are more apt to use “classic guilty pleas” and that defendants whose *nolo contendere* pleas were rejected by one judge all went ahead with guilty pleas).

innocent defendants who are voluntarily pleading guilty rationally recognize—out of concerns over process costs or trial penalties—that swallowing pride and stating guilt on the record are the smoothest roads forward.

### B. *False Pleas: The Solution*

Criminal law—like most other law—consists in part of a collection of accepted fictions.<sup>267</sup> For example, defendants are considered to have constructive knowledge of statutory text and meaning.<sup>268</sup> Defendants are presumed innocent, notwithstanding the mathematical certainty that they are more likely culprits than any other person present in the courtroom.<sup>269</sup> Fictions permeate even the bargaining process: in many jurisdictions, defendants must concur on the record that no promises were made in exchange for their pleas even though bargains clearly were struck.<sup>270</sup> And courts premise guilty-plea discounts on a dubious contrition, claimed inherent in the acceptance of bargained-for deals.<sup>271</sup> Even certain discrete breeds of false defendant testimony are acceptable. Defendants must verbally enter a plea of “not guilty” at arraignments—even when they most certainly are—in order to push a case on to trial.<sup>272</sup> Courts have allowed defendants to plead guilty to daytime burglaries to satisfy lesser charges, even when the crimes indisputably occurred in dark of night.<sup>273</sup> Courts have upheld

<sup>267</sup> See H. VAHINGER, *THE PHILOSOPHY OF ‘AS IF’* 34 (1924) (“In the *factio juris*, . . . something that has not happened is regarded as having happened, or *vice versa* . . . Roman law is permeated throughout by such fictions, and in modern countries . . . juristic fictions have undergone additional development.”).

<sup>268</sup> See Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORDHAM L. REV.* 885, 886 (2004) (arguing that the rule of lenity’s notice rationale is undermined by the fact that “criminals do not read statutes”).

<sup>269</sup> See Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 *HARV. L. REV.* 1329, 1370-71 (1971).

<sup>270</sup> See Kuh, *supra* note 266, at 500.

<sup>271</sup> See UVILLER, *supra* note 5, at 183 (noting that judges accept the premise of contrition “with a straight face”); Kuh, *supra* note 266, at 501 (noting the guilty plea’s “fiction of ‘remorse’”).

<sup>272</sup> See Robert F. Cochran, Jr., “How Do You Plead, Guilty or Not Guilty?": Does the Plea Inquiry Violate the Defendant’s Right to Silence?, 26 *CARDOZO L. REV.* 1409, 1411 (2005) (“What is for lawyers and judges a casually used term-of-art is viewed by ordinary people as a serious moral claim by the defendant that he did not commit the crime. In order to make the state prove its case, the defendant must make a false statement.”).

<sup>273</sup> The frequency of such factual reinvention led one police officer to complain, “You’d think all burglaries were committed in Detroit at high noon.” BOND, *supra* note 210, at 3-112 (internal quotation marks omitted); see also Stuntz, *supra* note 117, at 2557 (noting the prevalence in federal cases of “fact bargaining” over the quantity of

pleas to “hypothetical crimes” that exist in no penal code and require impossible mens rea.<sup>274</sup> All of these falsehoods generally muster little objection, because they are “recognized as having utility”—Professor Lon Fuller’s paradigmatic definition of legal fictions.<sup>275</sup>

The puzzle is why the system draws the line on the ultimate question of culpability.<sup>276</sup> False pleas are only less truthful than these other fictions by degree. A defendant who pleads to a factually impossible crime could not have committed it—just like an innocent defendant who pleads to a genuine crime. The answer to the puzzle lies elsewhere then: the system accepts pleas to hypothetical or incoherent charges because the defendant still admits truthfully that she did “something wrong.” The system authorizes all kinds of expedient falsehood, but stops short at lies that cut against blameworthiness. Rather, it finds something sacrosanct and inviolable—even magical—in the bottom-line accuracy of the defendant’s admission that she behaved (in some fashion) illegally.<sup>277</sup> Institutional actors (who should know better) hold on to this last vestige of an antiquated truth-seeking ideal.<sup>278</sup> Accordingly, professional responsibility materials on the topic of false pleas for the innocent almost uniformly condemn—or at least frown upon—the defense practice of allowing or assisting an innocent

possessed drugs (internal quotation marks omitted)); Colquitt, *supra* note 176, at 740-41 (collecting similar cases).

<sup>274</sup> See, e.g., *People ex rel. Bassin v. Isreal*, 335 N.E.2d 53 (Ill. App. Ct. 1975) (upholding a plea to the nonexistent lesser charge of attempted voluntary manslaughter); *People v. Castro*, 44 A.D.2d 808, 808 (N.Y. App. Div. 1974) (“[A] defendant may plead to a crime which does not even exist and the plea is valid. Such a hypothetical crime has no elements, yet their absence does not affect the plea.” (citation omitted)), *aff’d*, 339 N.E.2d 620 (N.Y. 1975); Colquitt, *supra* note 176, at 712, 740-41 (collecting cases).

<sup>275</sup> LON L. FULLER, *LEGAL FICTIONS* (1967).

<sup>276</sup> See *supra* note 214 and accompanying text; *infra* notes 279-281, 290-294, and accompanying text.

<sup>277</sup> Cf. Loftus E. Becker, Jr., *Plea Bargaining and the Supreme Court*, 21 LOY. L.A. L. REV. 757, 832 (1988) (“[A] . . . theme runs consistently through the cases. Pleas of guilty are ‘grave and solemn’ acts that are valid because they represent ‘the defendant’s admission in open court that he committed the acts charged . . .’” (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970))); David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 35 (1984) (“[T]he argument runs . . . that acceptance of a guilty plea is a far more solemn and significant event . . . [S]ociety has an interest in insuring that only the guilty are convicted and punished. Thus, a guilty plea, once accepted, comes closer to an adjudication of fact . . .”).

<sup>278</sup> See Givelber, *supra* note 32, at 1172 (“Believing that those charged are guilty also operates as a balm upon the conscience of those who administer criminal justice in our society. No one wants to participate in a practice that they believe routinely imprisons the innocent . . .”); see also *infra* notes 282-283 and accompanying text.

defendant to plead guilty falsely.<sup>279</sup> And the limited case law on this ethical question has held likewise.<sup>280</sup> Indeed, no less respected an authority than Chief Justice Warren Burger has declared the practice unethical: "When an accused tells the court he committed the act

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<sup>279</sup> See ABA, STANDARDS, *supra* note 214, at No. 14-1.6 cmt. at 66 (outlining three important purposes of requiring a factual basis for a plea, including assuring that the defendant is guilty, eliminating the fact-finding necessity if a plea is challenged, and aiding the sentencing phase); AM. BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 5.3, at 241 (1970) ("If the accused discloses to the lawyer facts which negate guilt and the lawyer's investigation does not reveal a conflict with the facts disclosed but the accused persists in entering a plea of guilty, the lawyer may not properly participate in presenting a guilty plea, without disclosure to the court."); see also AMSTERDAM, *supra* note 157, § 215, at 363 (noting that section 215 leaves the decision to a lawyer's "individual conscience" and that even when a plea bargain is "distinctly to the client's best advantage," a "hard decision follows"); HALL, *supra* note 214, § 15:10 ("There is . . . no ethical or constitutional duty on counsel to negotiate a plea for the defendant who insists on his or her innocence."); Alschuler, *supra* note 5, at 1280-89, 1296-1306 (discussing a potential ethical problem and defense attorneys' ethical concerns); Bradley, *supra* note 214, at 77 ("The common good is always served by the trial of an innocent defendant (at least when a guilty plea is the alternative)."); Warren E. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 15 (1966) (arguing that a lawyer "must . . . consult his private conscience," as well as remember that "he is an officer of the court"); Copeland, *supra* note 214, at 10 (stating that plea bargaining potentially innocent defendants is not a constitutional method of addressing overwhelmed public defender offices); Bradley J. Huestis, *New Developments in Pretrial Procedures: Evolution or Revolution?*, 2002 ARMY LAW. 20, 30 ("The military accused may not plead guilty unless he honestly and reasonably believes he is guilty . . ."); Zimmermann, *supra* note 214, at 228 ("[I]t borders on unethical conduct by a lawyer to participate in a *plea of guilty* by a client who in fact is not guilty. . . . [F]or a lawyer to stand silent while the innocent defendant lies to the judge (falsely confessing guilt) is to perpetrate a fraud on the court."); *supra* note 214 and accompanying text (citing sources insisting that the innocent should not plead guilty).

<sup>280</sup> See, e.g., *Bruce v. United States*, 379 F.2d 113, 119 n.17 (D.C. Cir. 1967) (stating that "[w]e have no hesitation in saying that an attorney, an officer of the court, may not counsel or practice such a deliberate deception," such as permitting the defendant to "state[] facts that show he is guilty," thereby "departing from truth if need be"); *United States v. Rogers*, 289 F. Supp. 726, 729 (D. Conn. 1968) (noting that it is "utterly unreasonable for counsel to recommend a guilty plea to a defendant without first cautioning him that, no matter what, he should not plead guilty unless he believed himself guilty"); *People v. Butler*, 204 N.W.2d 325, 330 (Mich. Ct. App. 1972) (noting that Michigan state courts are required to "probe deeper" into "guilt or innocence"); *supra* note 214 and accompanying text. The Supreme Court has also expressed a will to limit pleas to the factually guilty only. See *Corbitt v. New Jersey*, 439 U.S. 212, 224 n.14 (1978) (noting that New Jersey statutes allow for a judge to reject a plea absent a factual basis); *North Carolina v. Alford*, 400 U.S. 25, 38 (1970) (requiring a factual basis before a court can take an equivocal plea); *Brady v. United States*, 397 U.S. 742, 758 (1970) ("We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants . . . would falsely condemn themselves.").



charged to induce acceptance of the guilty plea, the lawyer to whom contrary statements have been made owes a duty to the court to disclose such contrary statements so that the court can explore and resolve the conflict."<sup>281</sup>

I have shown, I hope, that blameworthiness does not deserve the import ascribed to it. Righteous judicial pronouncements to the contrary only "demonstrate[] how easily judges—even wise and sophisticated judges—come to believe in the forms and trappings of their own rituals."<sup>282</sup> Ultimately, there exists a marked disconnect between systemic fact and hollow ideals when it comes to guilt and innocence. The *fact* is that the criminal justice system no longer has much to do with transparent adversarial truth-seeking; it has far more to do with the opaque processing of (rightful or wrongful) recent arrests.<sup>283</sup> Guilty pleas are thus no more than sterile administrative procedures, and plea bargaining is merely the mechanism that ensures that these procedures are carried out efficiently.<sup>284</sup> Administrative procedures, of course, possess no magic or endogenous moral value; they are at most pragmatic. Accordingly, there is nothing left that is sacrosanct about defendant admissions. And there is no good reason to act in deference to empty principles that ignore the realities of punishment and serve no practical purposes other than compelling the undeserved innocent accused to bear unwelcome process or trial-penalty risk. All that recommends prohibition of false pleas is visceral distaste—and that is not enough.

Conversely, there are many reasons to recommend false pleas: they allow innocent defendants to receive the same bargaining and pleading benefits as the guilty; they ensure that pleas are limited to the voluntary innocent (only to those so eager to plead guilty that they

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<sup>281</sup> Burger, *supra* note 279, at 15.

<sup>282</sup> UVILLER, *supra* note 5, at 196; *cf. supra* note 278 and accompanying text.

<sup>283</sup> See *supra* Parts I-V. Trials are not so obviously the "communal morality plays" they are sometimes taken to be, because trial biases diminish confidence that trials accurately separate the recidivist innocent defendants from the guilty defendants. See Stephanos Bibas, *Bringing Moral Values into a Flawed Plea-Bargaining System*, 88 CORNELL L. REV. 1425, 1425 (2003); *supra* Part I.D.

<sup>284</sup> See Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 916-18, 920-22 (2006) (arguing that, contrary to its history, American criminal justice has become the exclusive province of professional insiders who depend on "[s]wift dispositions" and "low-visibility procedures" at the points of arrest, charge, and plea); *cf.* EUGENE O'NEILL, *THE ICEMAN COMETH* 12 (2006) ("To hell with the truth! As the history of the world proves, the truth has no bearing on anything. It's irrelevant and immaterial, as the lawyers say. The lie of a pipe dream is what gives life to the whole misbegotten mad lot of us . . .").

are willing to swallow principle and utter false words); and presumably they promote judicial efficiency.<sup>285</sup> Like all good legal fictions, false admissions are just another means of bending law to “promote[] function, form, and sometimes even fairness.”<sup>286</sup>

Admittedly, even without my proposal, plea bargaining for many innocent defendants will proceed apace. Many judges and lawyers eagerly resist righteous interdictions that might interfere with the welcome processing of pleas.<sup>287</sup> Accordingly, a great many defense attorneys currently counsel their innocent clients to plead guilty even when no judicially sanctioned devices (like equivocal or no-contest pleas) are available.<sup>288</sup> A few of these attorneys may even accept the practice as a quasi-legal fiction already.<sup>289</sup> But most will not admit that senti-

<sup>285</sup> See *supra* notes 250-266 and accompanying text.

<sup>286</sup> Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 875 (1986). By contrast, false testimony of innocence—of the kind condemned in *Nix v. Whiteside*, 475 U.S. 157 (1986)—serves no recognizable systemic value.

<sup>287</sup> See *supra* Part III.

<sup>288</sup> See Alschuler, *supra* note 5, at 1284-87, 1296, 1305-06 (interviewing defense attorneys). Many defense attorneys make use of the convenient dodge that they cannot conclusively *know* that clients are factually innocent. See William H. Simon, Essay, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1705-06 (1993) (describing how defense attorneys rely on judges and juries to discern the truth); cf. Monroe H. Freedman, *But Only If You “Know,”* in ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS 135, 138 (Rodney J. Uphoff ed. 1995) (discussing the degree of knowledge of guilt necessary to trigger a defense attorney’s ethical obligation not to suborn perjury). There are some circumstances, however, where knowledge of innocence is clear. For example, I represented several defendants charged with trespass in buildings where they in fact lived or were lawfully visiting relatives. Occasionally, I would verify this defense to a substantial certainty, but the defendant would still plead guilty because compelling dismissal would require weeks of waiting. Similarly, I represented some defendants with ironclad alibi defenses. A few of these defendants, facing petty cases, preferred immediate disposition. See HEUMANN, *supra* note 11, at 73 (noting a lawyer who hired a psychiatrist to question a felony defendant under truth serum, during which the defendant passed the truth test, but pled to a fifty-dollar fine); Alschuler, *supra* note 5, at 1296 (quoting a defense attorney saying, “I have entered guilty pleas for defendants whom I *knew* to be innocent. . . . Year after year, these [repeat] clients would . . . ‘level’ without hesitation. Then they would come . . . and say, ‘It’s a bum rap this time.’ There would be no reason . . . to lie; the case would be like all the others.”); cf. Simon, *supra*, at 1706 (“To conclude that [defense counsel] ‘knows’ these things, we do not have to attribute any cosmic, pre-Heisenbergian certainty to her . . .”).

<sup>289</sup> See Alschuler, *supra* note 5, at 1306 (quoting a defense attorney’s claim that an admission of guilt is “a fiction, like Nevada domicile in a divorce action” (internal quotation marks omitted)); cf. *United States v. Rogers*, 289 F. Supp. 726, 729 (D. Conn. 1968) (finding “utterly unreasonable” defense counsel’s advice that his client should only plead guilty if he believes himself to be guilty); *State v. Kaufman*, 2 N.W. 275, 276 (Iowa 1879) (“Reasons other than the fact that he is guilty may induce a defendant to so plead . . . and the right of the defendant to so plead has never been doubted.”). It

ment in polite company. And some other defense attorneys take seriously their perceived responsibilities to ship innocent clients off to uncertain trials via costly process. For example, in *United States v. Price*, the defense attorney indicated on the record that he would not allow his client to plead guilty: "He tells me he didn't do it. I told him that under those circumstances, I can't proffer the plea to the Court."<sup>290</sup> Likewise, Professor Alschuler interviewed several prosecutors and defense attorneys who categorically refused to permit or participate in plea bargains or guilty pleas for the innocent.<sup>291</sup> Indeed, some of these defense attorneys indicated that their offices had express policies proscribing the practice.<sup>292</sup> One senior public defender noted that in his office, lawyers would typically withdraw from cases if they believed innocent clients wished to falsely plead guilty.<sup>293</sup>

In such a climate, even those defense attorneys who would otherwise see fit to counsel false pleas may do so only with great profes-

would seem that Professor Alschuler and Judge Easterbrook fall squarely in this camp. See Alschuler, *supra* note 5, at 1300 n.328 ("Why the problem of the 'innocent' defendant . . . [is] viewed primarily as an ethical problem . . . is somewhat mystifying. Apparently guilty pleas were once viewed unquestioningly as factual confessions to the court . . . [but presently] it might be proper to employ the 'guilty-plea strategy' . . . [and the] 'ethical problem' largely disappears."); Easterbrook, *supra* note 3, at 320.

<sup>290</sup> 436 F.2d 303, 303 (D.C. Cir. 1970).

<sup>291</sup> Alschuler, *supra* note 5, at 1280-89, 1296-1301; see also *Glatt v. Johnson*, No. 00-CV-506-A, 2001 WL 432355, at \*4 (N.D. Tex. Apr. 20, 2001) (noting favorably defense lawyer's practice of advising clients "not to plead guilty unless they are guilty"); Mitchell, *supra* note 156, at 320-21 (lauding a public defender office where "almost no defendants who protested their innocence (and there were many), whether out on bail or not, pled guilty"); Steven Zeidman, *To Plead or Not To Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 905 (1998) ("There are defense attorneys who believe that once a client asserts innocence, professional ethics or individual morality render plea discussions inappropriate."); Mills, *supra* note 125, at 61-62 (quoting a discussion between a defense lawyer and a detained client in which the defense lawyer refused to let his client plead unless he stopped privately insisting on innocence); *supra* note 214 and accompanying text (citing several attorneys who insist that the innocent should not plead guilty).

<sup>292</sup> Alschuler, *supra* note 5, at 1280-89.

<sup>293</sup> *Id.* at 1285-86. Likewise, judges often warn clients not to plead guilty unless they are guilty. See, e.g., *Frederick v. Warden*, 308 F.3d 192, 194 n.3 (2d Cir. 2002) (quoting a judge telling the defendant, "I want to warn you not to plead guilty unless you are, in fact, guilty . . ."); *Pursley v. United States*, 391 F.2d 224, 224-25 (5th Cir. 1968) ("You cannot plead guilty unless you are actually guilty . . ."); *Stone v. United States*, No. 99-CV-0461, 1999 WL 325406, at \*2 (N.D.N.Y. May 17, 1999); *Mosley v. United States*, No. 95-CV-0069, 92-CR-0051, 1995 WL 118180, at \*6 (N.D.N.Y. Mar. 8, 1995); *United States v. Messimer*, 598 F. Supp. 992, 998 (C.D. Cal. 1984); *United States v. Chaney*, No. ACM 36138, 2006 WL 2843492, at \*4 (A.F. Ct. Crim. App. Sept. 29, 2006) ("If you don't believe that you're guilty, you should not plead guilty for any reason."); *Cobb v. State*, 895 So. 2d 1044, 1046 (Ala. Crim. App. 2004).

sional discomfort—speaking in hushed tones for fear of disapproval, interference, or, worse, discipline.<sup>294</sup> Consequently, my proposal would have value even if most innocent defendants who wish to plead guilty do so already as part of underground practice. My proposal would strengthen the argument for scrapping the ineffective and problematic *nolo contendere* and *Alford* doctrines. More than that, my proposal would provide much-needed guidance to systemic actors. By embracing dishonest pleas, the proposal might even (perhaps counterintuitively) promote a healthy kind of institutional honesty, visible only to criminal justice functionaries (who trade in legal fictions and should be allowed to know what does and does not qualify), and necessarily invisible to a citizenry that benefits from the permanency of its truth-seeking illusions.<sup>295</sup>

The false plea would become just another sound legal tactic over which defense attorneys may entertain no professional qualms. Rather, they would be obliged to assist in such strategy— notwithstanding conflicting personal principles over appropriate systemic function. A lawyer who would refuse to advance an accepted legal fiction would do no less than place her own self-interest above her client's. Zealous advocacy clearly requires more.

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<sup>294</sup> I practiced in front of certain judges—admittedly a minority—who would foreclose plea bargaining that too closely followed prior on- or even off-the-record innocence claims. One judge in particular bore especial hostility toward the prospect of rational-choice pleas. He loudly denounced the unprofessionalism of any lawyer whom he felt was advancing a guilty plea for a defendant with a strong claim of innocence. He would even sometimes offer the unhelpful and possibly untrue on-the-record promise to pleading defendants, in sum and substance: “If you are innocent, go to trial; you will be acquitted.” Cf. Givelber, *supra* note 1, at 1396 (“[A] defendant against whom the Government is prepared to proceed to trial is convictable, even if innocent.”). Likewise, I encountered a few prosecutors and defense attorneys—particularly the new and unassimilated—who would draw similar fine lines against pleas for those who proclaimed innocence. Cf. HEUMANN, *supra* note 11, at 47-152 (describing adaptation process whereby new judges, prosecutors, and defense attorneys gradually abandon traditional adversarial roles). I observed the same at the federal level. As an associate at a boutique white-collar defense firm, I sat in on a ludicrous hours-long lawyer-client face-off where the partner refused to permit the client to plead guilty unless the client would stop privately protesting innocence and admit to having done “something wrong.”

<sup>295</sup> See Bibas, *supra* note 1, at 1363-64, 1386-88, 1403 n.215 (“[S]ociety has a strong interest in ensuring that criminal convictions are both just and perceived as just. . . . Though many plea bargains are less than honest . . . at least they do not proclaim this dishonesty or inconsistency openly.”); cf. *In re Winship*, 397 U.S. 358, 364 (1970) (“It is critical that the moral force of the criminal law not be diluted by . . . [fears that] innocent men are being condemned.”). See generally Bibas, *supra* note 284, at 912-22 (discussing how professional criminal-justice insiders operate out of view of lay outsiders).

What then are the nuts and bolts of my proposal? A weak version might just involve abrogation of case law and official ethical instruction hindering innocent defendants from plea bargaining or pleading guilty.<sup>296</sup> Such ethical prescription by silence runs the risk of doing very little to change the status quo. Many institutional actors would facilitate (at least quietly) plea bargains and guilty pleas for the innocent, a few others would not, and all would lack clear guidance. A stronger version would speak positively, sanctioning plea bargaining for the innocent, declaring false pleas to be a legal fiction, and affirmatively requiring counsel to advise clients about outstanding offers and to facilitate knowing and voluntary client decisions to plead guilty. In essence, this would be no more than an admonition to defense counsel to take seriously—even when clients profess innocence—the established rules that a lawyer (i) “should promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney,” (ii) “should advise the defendant of the alternatives available,” (iii) “should use reasonable persuasion to guide the client to a sound decision,” and (iv) “should ensure that the decision whether to enter a plea of guilty or *nolo contendere* is ultimately made by the defendant.”<sup>297</sup> Open questions remain, of course, such as the appropriate degree of “reasonable persuasion.”<sup>298</sup> But it is proba-

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<sup>296</sup> See, e.g., sources cited *supra* notes 279-280.

<sup>297</sup> ABA, STANDARDS, *supra* note 214, at No. 14-3.2(a)-(c) cmt. at 124; see also AM. BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, *supra* note 279, § 5.1 cmt. at 235; AMSTERDAM, *supra* note 157, § 201, at 339. At present, courts do not always give these obligations their due weight, especially when clients protest innocence. See, e.g., *Guerrero v. United States*, 383 F.3d 409, 418-19 (6th Cir. 2004) (holding that there was no prejudice due to an undisclosed offer because the defendant protested innocence and therefore would not have accepted the offer in any event); *Purdy v. United States*, 208 F.3d 41, 46 (2d Cir. 2000) (noting that no *per se* rule exists that counsel must advise a client whether to plead guilty); *United States ex rel. Tillman v. Alldredge*, 350 F. Supp. 189, 195-96 (E.D. Pa. 1972) (“I am not prepared to hold that an attorney who fails to explore the possibility of a plea bargain on behalf of a client who insists that he is innocent, has represented his client ineffectively.”); *State v. Powell*, 578 N.W.2d 727, 732 (Minn. 1998) (“Because of respondent’s insistence of his innocence . . . and rejection of the first plea offer, counsel could have reasonable [sic] concluded that additional discussion [with his client about a second plea offer] would have served no purpose.”); *Commonwealth v. Boyd*, 688 A.2d 1172, 1177 (Pa. 1997) (Castille, J., concurring in part and dissenting in part) (“My research reveals only one case in which a federal court granted a writ of habeas corpus based solely on a claim that trial counsel’s *advice* to reject a plea offer and to proceed to trial was ineffective.”).

<sup>298</sup> The answer is no doubt case-specific. Admittedly, even light pressure on a client who proclaims innocence may strain attorney-client relations, but a good lawyer can provide effective counsel tactfully. Especially where a plea is particularly favorable,

bly enough to leave such questions to the constraints of generalized ethical directives against self-dealing.<sup>299</sup>

### CONCLUSION

Innocent defendants fall into two very loose categories for the purposes of plea bargaining and guilty pleas: those for whom *process costs* should matter (i.e., defendants in low-stakes cases, particularly recidivists), and those for whom *process* should matter (i.e., defendants in high-stakes cases, particularly recidivists).

In the former category, innocent defendants are plainly better off in a world with plea bargaining. Bargains provide these innocent defendants a means to escape their own process costs and receive light unmaximized sentences, rather than endure full process and risk considerable posttrial sanctions. It is wholly secondary whether the lenient offers are normatively and systematically good or bad. For the innocent accused, it is enough that they exist. Lenient offers create opportunities. A top-most normative demand should be to ensure that the innocent have the same access to those opportunities. Of course, even an abbreviated sentence and any brand of conviction of the innocent is a systemic failure. The plea bargain, however, does not create this failure; the false arrest and the prosecutorial decision to make and carry out charges do. And, although the offer may seem foolhardy to decline, the defendant—innocent or guilty—always retains the right to fight on for acquittal.

The question is pricklier in high-stakes cases. In these cases, *all* defendants—innocent and guilty—are better off in a world without plea bargaining, or, at least, in a world with fewer plea-bargaining pressures. If prosecutors were unable to exploit overinclusive criminal statutes to overcharge defendants, then there would be far less concern over *de facto* trial penalties. Nevertheless, it does not follow from this objection that innocent defendants should have no right to plead guilty in serious felony cases. The innocent would be at a great

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defense counsel should not abandon persuasion unless and until the defendant understands the jeopardy of soldiering on. See AMSTERDAM, *supra* note 157, at 339 (“[O]ften counsel can protect the client from disaster only by using a considerable amount of persuasion to convince the client that a plea which the client instinctively disfavors is, in fact, in his or her best interest.”); Zeidman, *supra* note 291, at 905.

<sup>299</sup> See, e.g., ABA, STANDARDS, *supra* note 214, at No. 14-3.2(c) cmt. at 124 (“It is, of course, unprofessional conduct for the lawyer intentionally to understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused’s decision as to his or her plea.” (internal quotation marks omitted)).

disadvantage if the culpable could plead guilty to avoid large sentence disparities and rampant overcharging but the innocent could not. Innocent defendants—particularly recidivists facing habitual-offender statutes—would be obliged to bear all the risks but have no access to the benefits. Innocent defendants who wanted to plead (but could not) would be forced to face the potential double injustice of, first, wrongful arrest and charge, and, second, a posttrial sentence far lengthier than the unavailable plea-bargain sentence. Worse still, because recidivists are the most frequent innocent defendants and because trial biases make it particularly difficult for them to fight charges, a guilty-plea bar would typically mandate trial for the very type of innocent defendant least equipped to prevail.

The question of how to provide plea-bargaining access to the innocent is not adequately answered by the faulty and inconsistently available *Alford* and *nolo contendere* doctrines. The question should be answered instead by systemic recognition of false admissions as legal fictions. And defense attorneys should indulge no personal hesitation over such fictions where the guilty plea is the innocent defendant's voluntary choice and the manifest best option. When an innocent defendant wishes to minimize exposure, either to a horrific posttrial sentence or a burdensome pretrial process, that choice commands institutional respect.

The inevitable conclusion is that there may well be systemic innocence problems, but they are not problems with plea bargaining.