Punishing the Innocent

Josh Bowers

Follow this and additional works at: https://chicagounbound.uchicago.edu/public_law_and_legal_theory

Part of the Law Commons

Chicago Unbound includes both works in progress and final versions of articles. Please be aware that a more recent version of this article may be available on Chicago Unbound, SSRN or elsewhere.

Recommended Citation
PUNISHING THE INNOCENT

Josh Bowers

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

April 2007, revised August 2007

Scholars highlight an “innocence problem” as one of plea bargaining’s chief failures. Their concerns, however, are misguided. In fact, many innocent defendants are far better off in a world with plea bargaining than without. Plea bargaining is not the cause of wrongful punishment. Rather, inaccurate guilty pleas are merely symptomatic of errors at the points of arrest, charge, and/or trial. Much of the worry over an innocence problem proceeds from misperceptions over (i) the characteristics of typical innocent defendants, (ii) the types of cases they generally face, and (iii) the level of due process they ordinarily desire. In reality, most innocent defendants are recidivists, because institutional biases 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 they are detained). But innocent defendants also enjoy low plea prices, because prosecutors ultimately prioritize work avoidance over sentence maximization. Moreover, defendants possess certain underappreciated bargaining advantages in these low-stakes 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 plea. Thus, plea bargaining is no source of wrongful punishment; rather, it is a normative good that may cut punishment short, and (for the innocent at least) less punishment is a net positive. 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.
Punishing the Innocent
Josh Bowers

INTRODUCTION

Much has been made of an “innocence problem” in plea bargaining. Even scholars who view plea bargaining as systemically positive nevertheless propose reforms to limit access to the factually guilty only. But the conventional view is 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. But inaccurate guilty pleas are merely symptomatic of errors at the points of arrest, charge, and/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 far better off in a world with plea bargaining than without.

For the typical innocent defendant in the typical case—which I demonstrate is a recidivist facing petty charges—the best resolution 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 sentences in low-stakes cases, and, in any event, defendants possess certain underappreciated bargaining advantages in those 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. Specifically, I do not address many of the numerous and weighty objections to the practice. 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 else might be said of plea bargaining, discounts that permit the innocent to end cases on defendant-optimal terms are no source of lament and no persuasive weapon in the arsenal of the anti-bargaining camp. 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.

There is little new to the observation that guilty pleas may prove attractive to the innocent. But I intend to do more. I intend to mount a coordinated normative defense of the practice for the innocent, pinpointing 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 fresh perspective to the scholarship by focusing on two underappreciated aspects of plea bargaining for the innocent: (i) that innocent defendants are probably recidivists facing petty charges, and (ii) that even in the face of agency failure defendants possess certain bargaining advantages over prosecutors in low-stakes cases. I then raise a novel challenge to the much-maligned quasi-available current channels for rational-choice pleas—i.e., equivocal and no-contest pleas. Specifically, I challenge 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 re-conceive of false pleas as legal fictions and to require defense lawyers to advise and assist innocent defen-

---

3 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, e.g., Id.; Schuhlhofer, Disaster, supra note 1; John H. Langbein, Torture and Plea Bargaining, 46 U. CHI. L. REV. 3 (1978). For some of the strongest (at least partial) support, see, e.g., See Scott & Stuntz, supra note 5; Frank H. Easterbrook, supra note 5; Thomas W. Church, Jr., In Defense of “Bargain Justice”, 13 L. & Soc. Rev. 509 (1979).

4 Indeed, I credit a number of these objections but stress that they have nothing to do with innocence. See, e.g., infra notes 77, 203-215, 241-242 and accompanying text.

dants who wish to mouth dishonest on-the-record words of guilt. These are my principal contributions.6

Much of the worry over an innocence problem in plea bargaining proceeds from misperceptions over (i) the characteristics of typical innocent defendants, (ii) the types of cases they generally face, and (iii) 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 too-wide police nets.7 As recidivists, they face unique burdens when challenging false charges, but—perhaps counter-intuitively—enjoy concurrent unique plea-bargaining benefits. On the burden side, they are more likely to be charged and/or indicted post-arrest and less likely to have pending charges dismissed, even where evidence is weak.8 Additionally, they are more likely to face pretrial detention and are less able to adequately fight their cases at trial.9 On the benefits side, recidivists suffer less—if at all—from the corollary consequences of convictions.10

---

6 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 but used them as ammunition against plea bargaining generally. See, e.g., Alschuler, Defense Role, 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 Alschuler, supra note 5, at 1182-94, 1201-03 (worrying that agency failure leads innocent defendants to strike ill-advised bargains); Albert W. Alschuler, Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas, 88 CORNELL L. REV. 1412, 1412-1424 (2003) (favoring equivocal pleas as means to allow innocent to plead guilty honestly) [hereinafter, Swallowing Camels]; with infra Parts IV (arguing that agency failure has little impact and may even lower plea prices in low-stakes cases); 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 5, at 1943, 1967-68. I disagree with their underlying premise that the innocent are apt to plead on bad terms. See infra notes 42, 181. In any event, they do not explore when and why it makes the most sense for the innocent to plead guilty, and they make no proposal for a means of access to such pleas.

7 See infra notes 26-31 and accompanying text.
8 See infra notes 32-54 and accompanying text.
9 See infra notes 55-63 and accompanying text.
10 See infra notes 86-87 and accompanying text.
Second, most plea bargains terminate petty cases in exchange for trivial sentences—notwithstanding academic and popular over-attention to uncommon instances of high-stakes bartering over years in prison in high-profile cases.\(^{11}\)

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, the punishment they will face. For the typical recidivist innocent defendant facing the typical petty charge, the more abbreviated the process, the less the punishment.\(^{12}\)

Of course, necessary first-order questions are whether defendants really receive such substantial bargains, and what accounts for these discounts. Conventionally, prosecutors are viewed as rational wealth maximizers whose chief plea-bargaining ends are to promote efficiency while garnering the highest frequency of convictions with the highest possible sentence per conviction.\(^{13}\) If this conception were uniformly true, prosecutors could leverage defendants’ process costs to extract increased bargained sanctions. For instance, the confined defendant facing a misdemeanor charge might rationally accept any plea offer that promises a sentence a bit less than pretrial delay. However, this conventional view of prosecutorial motivation proves only part right. Prosecutors are conviction maximizers: they operate under a presumption of guilt and carry an aversion to wholesale dismissal of cases once charged, especially in cases against recidivist defendants.\(^{14}\) However, they do not aim principally—or even at all—to maximize sentences where the charges are minor. Indeed for clean-record defendants, prosecutors may not maximize sentences even where the charges are moderately serious. Instead, prosecutors often provide bargain concessions that far exceed what is necessary to motivate pleas.\(^{15}\)

Prosecutors make such lenient offers because they can. They enjoy little public or official scrutiny in all but the most serious and high-profile cases. In low-stakes cases, prosecutors are much more interested in reducing their own administrative costs while earning some type (any type) of un-delayed 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 efficiently reached at low market prices, because (although prosecutors may abandon sentence maximization) defendants remain always sentence minimizers.\(^{16}\) The threat that defendants might demur

\(^{11}\) See infra note 29 and accompanying text; see also Malcolm Feeley, The Process Is The Punishment 5 (1979) (noting that criminal justice system is discussed typically in terms of the “big” cases that in fact “are exceptional—indeed almost unique.”); Milton Heumann, Plea Bargaining 11 (1978) (“Most studies of plea bargaining have been limited to the disposition of felonies.”).

\(^{12}\) See infra Part II, and note 75 and accompanying text.

\(^{13}\) See infra notes 103-107 and accompanying text.

\(^{14}\) See infra notes 38-45, 164-166 and accompanying text.

\(^{15}\) See infra Part III.

\(^{16}\) See infra notes 113-161 and accompanying text.
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.17

The advantages of plea-bargaining for defendants are not uniform across cases, however. As stakes raise, plea bargaining comes to resemble more closely the orthodox ideal of adversarial gamesmanship: prosecutors yield only enough to win pleas and use overcharging to compel high prices. In these serious cases, bargaining is escape only from the prohibitive risk of substantial trial penalties, not from trial processes that defendants would otherwise welcome. Bargaining, here, may be rational, but it is no normative good. But, significantly, this overcharging critique, is an objection to bargaining and charging discretion generally. The problem affects all defendants; it is not exclusive to the innocent.18

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.19 Two possible avenues are nolo contendere (or no-contest) pleas and so-called Alford (or equivocal) pleas.20 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 plea lead to unanticipated post-conviction consequences. Third, Alford pleas raise the possibility that courts might erroneously accept constitutionally impermissible involuntary pleas.21

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 ethical if the system re-conceives of false admissions as utilitarian legal fictions.22

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 con-

17 See infra notes 162-185 and accompanying text.
18 See infra notes 192-216 and accompanying text.
19 See infra notes 220-249 and accompanying text.
21 See infra notes 254-279 and accompanying text.
22 See infra notes 280-314 and accompanying text.
sequence 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 means to guarantee 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 and convicted of crime.23 These instances of wrongful conviction may be uncommon, but, even so, they likely affect thousands per year nationwide.24 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.25 Undoubtedly, some such cases exist. But the safe assumption is that they are the rarest type of a rare category. In fact, recidivists are overrepresented among innocent defendants and probably comprise the majority of the population because institutional biases select for their arrest, prosecution, and trial conviction.26


24 Givelber, supra note 23, at 1343 (citing studies estimating rate of conviction of innocent defendants between 0.5% and 8% of all cases, and noting that even lowest estimate entails conviction of several thousand per year).

25 Any number of films reinforce this misperception. See, e.g., CATCH A FIRE (Focus Features 2006), THE HURRICANE (Universal Pictures 1999); THE SHAWSHANK REDEMPTION (Columbia Pictures 1994); THE FUGITIVE (Warner Bros. 1993); MY COUSIN VINNY (20th Century Fox 1992). But c.f. JOHNNY CASH, Joe Bean, on AT FOLSOM PRISON (CBS 2006) (“Yes, they’re hanging Joe Bean this morning, for a shooting that he never did. He killed twenty men, by the time he was ten, he was an unruly kid.”).

26 See RICHARD O. LEMPERT, SAMUEL R. GROSS & JAMES S. LIEBMAN, A MODERN APPROACH TO EVIDENCE 326 n.10 (3d ed. 2000) (providing informative example of selection biases in action); RONALD J. ALLEN, RICHARD B. KUHNS & ELEANOR SWIFT, EVIDENCE: TEXT, CASES, AND PROBLEMS 303 (2d ed. 1997); see generally Samuel Dash, Cracks in the Foundation of Criminal Justice, in ROUGH JUSTICE: PERSPECTIVES ON LOWER CRIMINAL COURTS 254 (John A. Robertson ed. 1974) (noting that few of convicted innocents “would be considered desirable citizens since most have long records of prior convictions for crimes of which they were actually guilty”).

Even without accounting for these biases, a safe assumption is that most innocent defendants are recidivists, because recidivists comprise the majority of overall criminal defendants. In 2002, in the nation’s 75 largest counties, 76% of state-court felony defendants had at least one prior arrest, 50% had five arrests or more, 59% had at least one prior conviction, and 24% had five or more convictions. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002, at 12-13 tbls. 10-11 (2006), available at http://www.ojp.usdoj.gov/bjs/abstract [hereinafter DOJ, FELONY DEFENDANTS]. National misde-
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.\textsuperscript{27} They are stopped because they are known to police or just because they are more likely to look the criminal part.\textsuperscript{28} This on-the-beat selection bias for repeat players is most pronounced when police enforce minor crime—particularly the petty public-order offenses that have increasingly become the grist of criminal court mills.\textsuperscript{29} But even in more serious cases, police are prone to arrest recidivists erroneously, because, when no concrete leads exist, police direct crime victims to mug-shot books composed exclusively of prior arrestees.\textsuperscript{30} In short, when police lack concrete 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.\textsuperscript{31}

\textsuperscript{27} See id. at 217 (“[P]olice work is organized so that persons mistakenly charged are likely to have criminal records.”); Chris William Sanchirico, Character Evidence and the Object of Trial, COLUM. L. REV. 1227, 1271-72 (2001); David A. Dana, Rethinking the Puzzle of Escalating Penalties for Repeat Offenders, 110 YALE L.J. 733, 753 (2001); Levenson, supra note 1, at 40-41.


\textsuperscript{30} See LEMPERT & SALTZBURG, supra note 28, at 217; Sanchirico, supra note 27, at 1271-72 (“The police are more likely to ask around about an individual, interrogate him in person, search his person, his house and his car, call him in for a lineup and show his picture to victims, if he already has a criminal record.”); Dana, supra note 27, at 753.

\textsuperscript{31} CASABLANCA (Warner Bros. 1942). I wish I could claim this illustrative reference as my own. See LEMPERT & SALTZBURG, supra note 28, at 217.
B. Charging Biases

At the screening phase, prosecutors err on the side of charging—a predisposition that affects all arrestees, not just recidivists. There are two principal reasons. First, in the interest of comity, prosecutors must level charges against a great portion of those that police process. Second, prosecutors carry a general “presumption of guilt” that leads them to resolve inconsistencies in favor of guilt. This charging presumption is strongest when police arrest recidivists. Prosecutors assume—perhaps with good reason—that recidivists are “guilty of some crime.” As such, prosecutors are unlikely to exercise discretion to decline prosecution. Even in the weakest cases, prosecutors can charge and anticipate pleas because they know that recidivists cannot easily fight charges at trial under existing evidence rules.

32 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 Acquitted, 42 AM. CRIM. L. REV. 1167, 1180 (2005); Schulhofer, Regulatory System, supra note 1, at 52.

33 See George F. Cole, The Decision to Prosecute, ROUGH JUSTICE: PERSPECTIVES ON LOWER CRIMINAL COURTS 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.”); see also Andrew D. Leipold, The Problem of the Innocent, Acquitted Defendant, 94 NW. U. L. REV. 1297, 1328 (2000); Givelber, supra note 23, at 1362 (“Unless the police report 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.”); CJA, NON-FELONY TRENDS, supra note 26, at 12 & tbl. 1.

34 HEUMANN, supra note 11, at 103; accord Givelber, supra note 32, at 1180-88; Leipold, supra note 33, at 1328 (“[E]ven in the absence of bad faith prosecutors have incentives to resolve nagging doubts about a suspect’s guilt in favor of prosecution.”); George T. Felkenes, The Prosecutor: A Look at Reality, 7 SW. U. L. REV. 98, 110-13 (1975); Jerome H. Skolnick, Social Control in the Adversary System, 11 J. CONFLICT RESOL. 52, 57-58 62 (1967); see also 1 AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE, at § 3-3.9(b) (2d ed. 1980) (providing that prosecutors may not ethically bring charges unless they believe defendants to be factually guilty); U.S. DEPARTMENT OF JUSTICE, U.S. ATTORNEYS’ MANUAL, at § 9-27.220(A) (2005), available at http://www.usdoj.gov.usao/eousa/foia_reading_room/usam/index.html (same) [hereinafter, DOJ, ATTORNEYS’ MANUAL].

35 ALLEN ET AL., supra note 26, at 303; accord Dash, supra note 26, at 256 (“That the man might be innocent appears not to worry [the prosecutor] . . . because of his record, [the defendant] must have committed some undetected crime and deserves any sentence he gets.”); LEMPERT & SALTZBURG, supra note 28, at 217-18.

36 See infra notes 46-50 and accompanying text.

37 See LEMPERT & SALTZBURG, supra note 28, 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 55-63 and accompanying text (discussing several conviction biases against recidivists).
C. Dismissal Aversion

Once charged, innocent defendants—particularly recidivists—are unlikely to convince prosecutors that the charges are wrongful. Prosecutors have every incentive to spin away a story of innocence. First, prosecutors retain the same presumption of guilt that led them to charge erroneously.38 Second, even if prosecutors were receptive to protestations of innocence, innocent defendants cannot effectively signal genuine innocence because prosecutors know that guilty defendants will attempt to copy any halfway persuasive signal.39 In any event, in many low-stakes cases there is no time for thorough signaling.40 Third, prosecutors can justify incuriosity as appropriately leaving jury questions to the jury.41 Fourth, line prosecutors often must obtain supervisory approval before dismissing cases,42 even though they enjoy no similar official oversight over their bargaining, charging, and trial decisions generally.43 At bottom, prosecutors carry a mindset of “non-defeat”—an aversion to dismissal present in all cases, but most pronounced in cases against recidivists.44 In this sense, prosecutors consistently

38 See Givelber, supra note 23, 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 sources, supra, at note 34. A vivid example of this tracked thinking is prosecutorial unwillingness to concede error even in the face of exculpatory post-conviction 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).


40 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”).

41 See UVILLER, supra note 2, at 192-93; Givelber, supra note 32, at 1181 (“[P]rosecutors may decide that the defendant should, quite literally, ‘tell it to the judge.’”); Skolnick, supra note 34, at 57-58.


43 See infra notes 164-166 and accompanying text.

44 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. . . . 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.”) (emphasis in original); 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”); Alschuler, supra note 42, at 64. 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
function as conviction maximizers even if they only rarely operate as sentence maximizers.\textsuperscript{45}

What then accounts for prosecutorial dismissals? After all, prosecutors consistently dismiss about a quarter of felonies nationally, a third of New York City felonies, and a tenth of New York City misdemeanors.\textsuperscript{46} Closer analysis of the numbers, however, reveals two trends: first, dismissals 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.\textsuperscript{47} Specifically, the data reveal that felonies are dismissed more frequently than non-felonies, and violent offenses are dismissed far more frequently than victimless offenses.\textsuperscript{48} In fact, in New York City, non-felony harm-to-persons cases are dismissed at a rate almost ten times higher than the rate for non-felony drug cases.\textsuperscript{49} At first blush, it seems odd that prosecutors would more readily dismiss serious cases with concrete victims. But that’s 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 non-cooperation is the leading cause of case dismissal and decisions to not charge.\textsuperscript{50} Notably, in

\textsuperscript{45} See Dash, supra note 26, at 256; Bibas, supra note 44, at 2471-72; 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.”); 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, 1071 (1972) (“[C]onvictions are the central performance standard, and departures from the average rate raise questions and create anxieties. . . . [N]egotiation of a plea, any guilty plea, is a victory; the conviction rate is a quantitative, not a qualitative, measure of effectiveness.”); see also Daniel C. Richman, Old Chief v. United States: Stipulating Away Prosecutorial Accountability? 83 Va. L. Rev. 939, 966-67 (1997); Wright & Miller, supra note 32, at 35.

\textsuperscript{46} DOJ, Felony Defendants, supra note 26, at tbl.23; New York City Criminal Justice Agency, Trends in Felony Case Processing in the 1990s, tbl.E.2-1 (2000), available at www.nycja.org/research/research.htm [hereinafter CJA, Felony Trends]; CJA, Non-Felony Trends, supra note 26, at tbl.14. As noted, supra note 26 and infra note 131, national misdemeanor data is non-existent. Therefore, I rely on New York City misdemeanor data by way of example. Neither the New York City misdemeanor data nor the national felony data 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.

\textsuperscript{47} See supra note 29 and accompanying text.

\textsuperscript{48} DOJ, Felony Defendants, supra note 26, at tbl.23-24 (indicating that violent felonies are dismissed approximately 50% more often than other felonies); CJA, Non-Felony Trends, supra note 26, at tbl.15.

\textsuperscript{49} CJA, Non-Felony Trends, supra note 26, at tbl.15.

\textsuperscript{50} See e.g., Hans Zeisel, The Limits Of Law Enforcement 26-28 (1982); see also Donald A. Dripps, Miscarriages of Justice and the Constitution, 2 Buff. Crim. L. Rev. 635, 644-46 & nn.33,35 (1999) (noting witness non-cooperation as leading cause of decisions to dismiss or not charge).
the 1990s in New York City, non-felony charging rates rose and pre- and post-charge 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. Prosecutors charged more and dismissed less—even as they tackled far more cases—because they could; they did not need lay-witnesses in order to push these victimless public-order cases forward (no matter how weak or strong the cases might have been).

Ultimately, then, it seems that prosecutors do not typically dismiss because they desire dismissal or doubt charges (or even believe charges weak). And there is therefore no good reason to believe that innocent defendants will be the beneficiaries of dismissals. They may receive such unlikely dismissals by blind luck, but in the main they can expect a binary choice only: plea or trial.

D. Trial Biases

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

---

51 CJA, NON-FELONY TRENDS, supra note 26, at 12 & tbls.1,14.
52 Cf. Leipold, supra note 23, 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.”).
53 Cf. infra notes 236-238 and accompanying text.
56 Leipold, supra note 23, 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 non-criminal 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 think of Clyde Griffiths, the protagonist of Theodore Dreiser’s 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.
58 See UVILLER, supra note 2, 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.”); Smith, supra note 1, at 513; Givelber, supra note 32, at 1171. In this respect, the plea-bargaining recidivist defendant may feel that she played a greater role in her fate
held pretrial which impacts their ability to communicate with their attorneys, contact witnesses, and plan defenses.\textsuperscript{59} Third, “usual-suspects” policing creates early opportunities for false identification. And false identification is the leading cause of wrongful arrest and conviction, because police, prosecutors, and juries give undue credence to its probative strength.\textsuperscript{60} Fourth, juries and judges are more likely to be predisposed against recidivist defendants\textsuperscript{61}—all the more so if they can intuit, as is often manifest, that the defendant is confined.\textsuperscript{62} For these reasons, it is no surprise that the great majority of DNA exonerations involve recidivist defendants wrongfully convicted after trial.\textsuperscript{63}

These several biases present dangers of wrongful punishment—dangers traceable, not to plea bargaining, but to the moments of arrest, charge, and/or

\textsuperscript{59} See Bibas, supra note 44, at 2493; Leipold, supra note 23, at 1130; Skolnick, supra note 34, at 65 (“Several studies have demonstrated that, for the same charges, defendants who make bail are generally more successful in countering accusations of criminality than those who do not.”).


\textsuperscript{61} See Lempert & Saltzburg, supra note 28, 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 the defendant is guilty of some crime.”); Givelber, supra note 23, at 1336; Skolnick, supra note 34, at 65; Patricia J. Williams, Reasons for Doubt, The Nation, Dec. 30, 2002 (recounting judge’s remark that “[t]he police don’t have time to arrest innocent people. If the defendant didn’t commit this particular crime, he did something, somewhere, sometime”); supra note 35 and accompanying text.

\textsuperscript{62} See id. 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 spectators’ seats, emerging from the ranks of the public.”).

\textsuperscript{63} See Givelber, supra note 32, at 1189; Gross, supra note 23, at 142-43.
trial. Rather, plea bargaining may be the best way for the innocent defendant to minimize her erroneous punishment.

II. DEFENDANTS’ PROCESS COSTS

But does plea bargaining in fact minimize erroneous punishment? Put simply, when, if ever, is it in innocent defendants' interests to plea bargain? The clearest answer is that plea bargaining is of near-categorical benefit to innocent defendants in low-stakes cases, because the process costs of proceeding to trial in these cases often dwarf plea prices.

Defendants' process costs generally fall into four overlapping categories: waiting, pecuniary loss, inconvenience, and uncertainty. Post-arrest, 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; and the opportunity costs of meeting with attorneys, helping prepare defenses, and attending mandatory court appearances where little often happens. For each appearance, she leaves home in the early morning, waits in a long line 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 post-appearance papers, and finally returns home in the late afternoon. Conversely, if she is remanded or held on bail, she remains in jail until disposition at earliest. Once

---

64 See Richman, supra note 45, at 957; Givelber, supra note 32, at 1175 (“The initial screening will determine significantly the kinds of errors that are committed at the adjudicatory phase.”); Easterbrook, supra note 60, at 1970 (1992) (“What disrupts this separation of the guilty from the innocent is not a flaw in the bargaining process but a flaw at trial.”); Easterbrook, supra note 5, at 320 (“If there is an injustice here, the source is not the plea bargain. It is, rather, that innocent people may be found guilty at trial.”).

65 See Easterbrook, supra note 5, at 320; 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.”).


67 FEELEY, supra note 11, at 15, 32; Alschuler, supra note 5, at 1192-94.

68 HEUMANN, supra note 11, at 70; ARTHUR ROSETT, JUSTICE BY CONSENT 150-51 (1976); Weinstein, supra note 66, at 1172. Clearly, there is a difference between appropriate and inappropriate process. Process scholars correctly condemn inapt delays and nonsensical adjournments. See e.g., FEELEY, supra note 11, at 10, 222-23; Lynch, supra note 1, at 119; Alschuler, supra note 1, at 951, 955. 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, 955 (“[S]ignificant process costs are inherent in any form of adjudication.”).
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.\textsuperscript{69} By contrast, pleas typically
may be had immediately.\textsuperscript{70} Significantly, these many process costs lie independ-
et of case strength or acquittal chance.\textsuperscript{71} In fact, innocent defendants may have
higher process costs on balance than the guilty, because they are more likely to
put forward positive defenses, and these substantive defenses generally require
more preparation time and work than procedural claims.\textsuperscript{72}

A. Process Pleas

In low-stakes cases, process costs dominate, and plea bargaining is a poten-
tial 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. The
costs of pleading guilty may prove so comparatively low in minor cases that

\textsuperscript{69} See HEUMANN, supra note 11, at 70-71 (quoting defense attorney: “To the person who
wants to fight his case . . . . [T]hey’ve got to come back . . . . Back and back and back.”);
Weinstein, supra note 66, 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.”); see also Leipold, supra note 23, at 1140 (“[A]s every prac-
titioner knows, there are so many exceptions to [the speedy-trial] limit that [the statutorily pre-
scribed period] is typically just an opening bid.”).

\textsuperscript{70} See HEUMANN, supra note 11, at 69-71; Weinstein, supra note 66, at 1172; see also William
York City, cases commence with an arraignment appearance that occurs on average less than
twenty-four hours after arrest. NEW YORK, ANNUAL REPORT, supra note 29, at 29. Approximately
half of all cases are disposed of at this initial arraignment appearance, usually by bargained
guilty plea. Id. at 34 (2005); see also NEW YORK CITY CRIMINAL JUSTICE AGENCY, ANNUAL REPORT
16 (2006), available at
www.nycja.org/research/research.htm [hereinafter CJA, ANNUAL REPORT];
Weinstein, supra note 66, at 1172. Even the cases that “survive arraignments” typically do not last along—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. NEW YORK CITY CRIMINAL JUS-
TICE AGENCY, QUICK VIEWS, at http://www.nycja.org [hereinafter, CJA, QUICK VIEWS]. Yet, mis-
demeanor cases take an average of seven to nine months to proceed to trial. NEW YORK, ANNUAL
REPORT, supra note 29, at 55. Likewise, 53% of felony defendants pled guilty within three months
of arraignments and 89% within a year. Id.; CJA, QUICK VIEWS, supra. Yet, most felony cases
took over one year to proceed to trial, only 10% proceeded to trial within three months, and al-
most one quarter went to trial only after the case was more than eighteen months old. CJA,
QUICK VIEWS, supra.

\textsuperscript{71} See FEELEY, supra note 11, at 31 (“[P]retrial costs do not distinguish between the innocent
and guilty; they are borne by all.”).

\textsuperscript{72} 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 investi-
gation simply to establish whether there is any argument to make.”).
pleading becomes a reasonable option even before assessing the real danger of trial conviction and consequent sentence. 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 post-arrest. It is small wonder, then, that so many defendants—in innocent and guilty—have little interest in process in these cases and simply wish to “get it over with.”

Professor Alschuler, one of bargaining’s foremost critics, made this point, noting that bargains in the “overwhelming majority” of misdemeanor cases become “gratuitous overkill” because process itself is sufficient to prompt “process cost guilty pleas.” Alschuler’s disapproval of seemingly superfluous discounts may be sound as a critique of bargain justice generally. But for innocent defendants specifically, overgenerous concessions provide escape from undesired and expensive process on defendant-optimal terms. These innocent defendants might have pled guilty on the bases 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.”

Would we rather force the innocent defendant to remain in jail to await

---

73 See HEUMANN, supra note 11, at 70; FEELEY, supra note 11, at 30, 277; Weinstein, supra note 66, at 1172; Rodney J. Uphoff, The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach, 2 Clinical L. Rev. 73, 82 (1995). 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., November 28, 2006, at A14.

74 See supra note 70 and accompanying text.

75 HEUMANN, supra note 11, 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.”); accord FEELEY, supra note 11, at 276; Uphoff, supra note 73, 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.”); Scott & Stuntz, supra note 5, at 1916; infra note 127 and accompanying text.

76 Alschuler, supra note 1, at 952, 955 (“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 bargaining.”); see also HEUMANN, supra note 11, at 69-71; FEELEY, supra note 11, at xix, 33; Bibas, supra note 44, at 2492-93 (“The pre-trial 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.”); Weinstein, supra note 66, at 1173; Jerold H. Israel, Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom, 48 FLA. L. REV. 761, 774 & n.43 (1996); Landes, supra note 70, at 68 n. 10.

77 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. But such discounts save on opportunity costs nonetheless. 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 145-152 and accompanying text.

78 Givelber, supra note 1, at 1364.
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 if the defendants are impecunious. Courts often rely on recidivists’ past records as a basis for setting more frequent and higher bail, notwithstanding lack of charge severity or even case strength. And it is doubtful that recidivist defendants will make bail, at least in the short run. For example, in New York City in 2004, only nine percent of defendants held on bail were able to buy release at arraignment. And only an additional twenty-seven percent were released at some later date. 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. When courts set bail, recidivist defendants are likely to remain jailed through disposition.

The trial course is long; even if convicted, the defendant often has already served any post-conviction sentence—and then some. In this way, conviction may counter-intuitively inaugurate freedom. 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 come with convictions. If this de-
fendant can get a plea to a misdemeanor and time served, then the process constitutes the whole punishment. Any plea that frees this defendant may be more than advisable—it may be salvation. No matter how certain of acquittal, she is better off pleading guilty. She is the defendant that benefits most from plea bargaining, and she is the very defendant that most frequently is innocent in fact.

Even for the rare unjustly accused “good person,” plea bargaining sometimes may prove beneficial. Jail time is generally not a real consideration when this clean-record defendant is charged with a minor crime. Pretrial, the court usually releases her on her own recognizance, and even trial loss likely results in a non-incarceratory sentence. The decision whether to plead guilty generally falls to whether the bargain confers 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 criminal record intact. If a defendant can get a violation offer and get that offer 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).

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. TOLEDO L. REV. 479, 481-82 (2005). New felony convictions may put habitual-offender 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; Leipold, supra note 33, at 1299-1300.

See HEUMANN, supra note 11, at 70-71 (quoting defense attorney: “They’ll take [time served] simply because they don’t care about what the criminal record is. They have criminal records.”); Weinstein, supra note 66, at 1171. 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 complicated. To the extent that she fights both cases at trial, a judge in a misdemeanor bench trial is prone upon conviction to at least unconsciously factor the existence of the separate open charge into the sentencing decision.

Prosecutors may meet even demonstrable claims of innocence—for instance, in trespass or ironclad alibi cases—with a period of bureaucratic hedging, and this wait may be unconscionable for a detained defendant in a minor case who has available a plea 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. And that prosecutor might delay for days more while seeking supervisory approval for dismissal. See supra note 42 and accompanying text.

See infra notes 132-144 and accompanying text; see also HEUMANN, supra note 11, at 104; Scott & Stuntz, supra note 5, at 1948.

See infra notes 134-135 and accompanying text (discussing prevalence of violation offers for misdemeanor defendants). A violation may carry minor penalties—fines, community service, licensing hurdles, or perhaps even a few days jail—but the consequences of violations 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).
quences that come with it).\textsuperscript{92} Even assuming acquittal, the process costs swamp the costs of a violation plea.

Even for the clean-record innocent defendant charged with moderate felonies, the influence of process costs may prove determinative. The court sometimes holds such a defendant pretrial.\textsuperscript{93} If the defendant is held pretrial, she faces substantially greater process costs than even the detained recidivist defendant in a low-stakes case, because the pretrial wait is substantially longer for a felony trial.\textsuperscript{94} However, pretrial detention is not a real process cost where the defendant receives a post-trial jail or prison sentence longer than the pretrial delay, because the defendant typically receives credit for pretrial jail time.\textsuperscript{95} Put simply, a defendant suffers no harm for serving \textit{ex ante} time that she would otherwise necessarily serve post-disposition. 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 non-incarceratory offer, the benefits of dodging detention costs may outweigh even the substantial impact of a felony conviction and years of probation.\textsuperscript{96}

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 or remanded over three quarters of all recidivist felony defendants.\textsuperscript{97} The defendant—particularly if indigent—is likely to remain jailed for the life of the case.\textsuperscript{98} Potential sentences are appreciable, especially if habitual-offender stat-

\textsuperscript{92} See \textit{supra} note 69 and accompanying text.

\textsuperscript{93} One national study found that approximately one-third of felony defendants without criminal records were released without bail, and, overall, over three-quarters were released at some point pre-disposition. DOJ, FELONY DEFENDANTS, \textit{supra} note 26, at 20 & tbl.18. Notably, bail decisions—especially in these borderline cases—are somewhat capricious; studies identify marked variability between judges. See, \textit{e.g.}, sources \textit{supra} note 79.

\textsuperscript{94} See \textit{id.} at 32 tbls.E.2-5,E.2-6; see also \textit{supra} note 70 and accompanying text.

\textsuperscript{95} See, \textit{e.g.}, N.Y. PENAL LAW § 70.30(3).

\textsuperscript{96} See McMunigal, \textit{supra} note 1, at 986; Uphoff, \textit{supra} note 73, at 85-86 (“Many defendants, especially first offenders, will agree to almost anything to get out of jail.”); Thomas W. Church, \textit{Examining Local Legal Culture}, AM. B. FOUND. RES. J. 449, 489 (1985) (quoting defendant: “Hell, I’d plead guilty to raping my grandmother if the sentence was probation.”); cf. Criminal Courts: The Defendant’s Perspective at 47 (noting that the “break point” in defendants’ evaluations of fairness is confinement).

\textsuperscript{97} DOJ, FELONY DEFENDANTS, \textit{supra} note 26, at 20 & tbl.18; see also \textit{supra} note 79 and accompanying text. Overall, courts held recidivist defendants until disposition about 50\% more frequently than defendants with no criminal records. \textit{Id.} And defendants on parole were held until disposition well over twice as frequently as defendants with no criminal record. \textit{Id.}

\textsuperscript{98} See \textit{supra} notes 79-83 and accompanying text.
utes are in play.99 The threat of high sentences upends process-cost considerations.100 Significantly, the process costs of pretrial detention are generally nil because the prosecutor is unlikely to offer a sentence less than the time the defendant would be detained pretrial.101 Some length of detention is probably inevitable. Detention converts into a process cost only upon trial acquittal. For this defendant, process costs are non-determinative and trivial. Process is not an unwelcome cost to bear, it is all the defendant has left.102

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 court parts, 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 host all of 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.103 Prosecutors craft pleas to ensure the greatest number of convictions with each conviction garnering the highest possible sentence.104 According to this model, most cases would naturally result in adversarial “heavy combat” but for the unfortunate reality of resource shortages.105 Due process and plea bargaining operate as two halves of a coherent whole. Both envision “a zero-sum game; the accused and the state either win or lose, and what one gains the other loses.”106 Here, plea bargaining operates in the “shadow of trial”: protracted and individualized adversarial haggling produces results that reflect trial hazards and potential post-trial sentences.107

99 See HEUMANN, supra note 11, at 40 ("Unlike [misdemeanor] court, in which ‘time’ . . . is a rarity, ‘time’ is what it’s all about in the [felony] court.").
100 See HEUMANN, supra note 11, 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.").
101 See supra notes 95-96 and accompanying text.
102 See ROSETT, supra note 68, at 155; infra notes 200, 214-215 and accompanying text.
103 See Easterbrook, supra note 5, at 297.
104 See Landes, supra note 70, at 63-64; Easterbrook, supra note 5, at 292, 297; Jennifer F. Reinganum, Plea Bargaining and Prosecutorial Discretion, 78 AM. ECON. REV. 713 (1988).
105 Feeley, supra note 11, at 268.
106 Feeley, supra note 11, at 26.
107 See Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969) (Bazelon, J.) (“To the extent that the bargain struck reflects only the uncertainty of conviction before trial, the ‘expected sentence
This account depends on the engrained claim that plea bargaining necessarily exists only to prompt efficient guilty pleas so courts can stay afloat. 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 and/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. In fact, studies have found comparable rates of plea bargaining in some low-caseload jurisdictions. Ultimately, then, plea bargaining occurs for reasons other than caseload or deterrence—at least in the low-stakes cases.

A. Workgroup Principles

What are these other reasons? Prosecutors may claim a desire to “do the right thing” by minimizing punishment for a specific defendant or by broadly re-legislating perceived harsh or over-inclusive statutes. But prosecutors also

108 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.”); Uviller, supra note 2, at 180-81; Givelber, supra note 1, at 1382; Wright & Miller, supra note 32, at 30-31 & n.5; Skolnick, supra note 34, at 55.

109 Feeley, supra note 11, at 244-77 (“[C]ase pressure appears to have almost no effect on plea bargaining policies.”); Heumann, supra note 11, at 32; Rosett, supra note 68, at 110; see generally Peter Nardulli, The Caseload Controversy and the Study of Criminal Courts, 70 J. Crim. L. & Criminology 89 (1979).

110 See Feeley, supra note 11, at 244-77; Israel, supra note 76, at 767 (“Studies . . . indicate that the high guilty plea rates in many jurisdictions are spurred primarily by other concerns that make resolution by guilty plea appealing to the courtroom participants irrespective of the weight of their caseloads.”); Lynch, supra note 1, at 117-20 (discussing plea bargaining in suburban county and noting that even “during criminal trial weeks, judges spent most of their time in chambers while their courtrooms sat empty”).

111 See Bibas, supra note 44, at 2464 (calling the traditional model “oversimplified”); Worden, supra note 45, at 335 (“Research 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; Richman, supra note 45, at 966; Alscher, supra note 42, at 52-54; Skolnick, supra note 34, at 65.

112 Alscher, supra note 42, at 52-54; see also Dash, supra note 26, at 256 (discussing common law prosecutors who circumvented death-penalty statutes for property crimes); Uviller, supra note 2, at 180, 197 (“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.”); Feeley, supra note 11, at 274; Heumann, supra note 11, at 109 (describing how prosecu-
harbor the normatively more dubious motivation to avoid process and work where possible.\textsuperscript{113} This separate variable exists in almost all cases but is most acute in minor cases where caseloads are higher but stakes are lower. Prosecutors are loath to devote time, resources, and full process to “Mickey Mouse” cases.\textsuperscript{114} Prosecutors may come to see arrests as “ends in themselves,” particularly for crimes like marijuana possession or turnstile hopping, but even for crimes with concrete victims where the problematic confrontation resolved itself with arrest.\textsuperscript{115} In this narrow sense only, caseload may drive plea bargaining: “There 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 the court.”\textsuperscript{116} Plea bargaining allows the workgroup to minimize collective workload and provides “solutions” to a common problem: the immutable burden that is the process.\textsuperscript{117} Prosecutors may still care deeply about convictions.\textsuperscript{118} But they want conviction by immediate disposition—period.\textsuperscript{119} They care little, if at all, for maximizing plea prices.\textsuperscript{120}

\begin{itemize}
\item \textsuperscript{113} See Dash, supra note 26, at 256; Uviller, supra note 2, at 180; Heumann, supra note 11, at 103, 156-57; Feeley, supra note 11, at 272; Bibas, supra note 44, at 2470; Lynch, supra note 1, at 122-25; Fred C. Zacharias, Justice in Plea Bargaining, 39 WM. & MARY L. REV. 1121, 1136, 1142, 1161-63, 1181 (1998); Alschuler, supra note 42, at 52-53, 106-07; Rabin, supra note 42, at 1071.
\item \textsuperscript{114} Heumann, supra note 11, at 38 (quoting prosecutor).
\item \textsuperscript{115} Feeley, supra note 11, at 274, 294; accord CJA, NON-FELONY TRENDS, infra note 26, at 1; Lynch, supra note 1, at 121; Weinstein, supra note 66, at 1170-71.
\item \textsuperscript{116} Feeley, supra note 11, at 272 (emphasis in original); see also Levin, infra note 66, at 125.
\item \textsuperscript{117} Feeley, supra note 11, at 28-33, 159, 244 (describing 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; Rossett, supra note 68, at 105; Lynch, supra note 1, at 122-25; Skolnick, supra note 34, at 53, 58-59.
\item \textsuperscript{118} See supra notes 44-45, infra notes 166-167, and accompanying text (discussing prosecutors’ motivation to maximize convictions).
\item \textsuperscript{119} 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. They have no incentive to refuse. . . . The case is simply not worth the effort to press for greater penalty.”); Dash, supra note 26, at 256 (describing “fervent desire of the prosecutors to establish a record of numerous convictions the quickest and easiest way”); 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.”); Alschuler, supra note 42, at 55.
\item \textsuperscript{120} See Feeley, supra note 11, at 205; Heumann, supra note 11, at 71-72, 103-105 (“The newcomer is struck by the prosecutor’s eagerness to enter into a deal that seems beneficial to the defendant.”); Rossett, supra note 68, 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.”); Lynch, supra note 1, at 123; William J. Stuntz, Plea Bargaining and Criminal Law’s Dis-
Many plea bargaining opponents complain of the coercion of pleas that are too good to turn down. But few inquire why so many pleas are far too good to turn down. Prosecutors could take advantage of defendant’s comparatively weighty process costs in low-stakes cases. Yet, these are the very cases where prosecutors can most easily act for reasons other than sentence maximization. First, prosecutors are subject to little public or official oversight in these cases. Second, as noted, prosecutors can rationalize leniency as normatively just in many low-stakes cases. If society might be served by less significant penalties, prosecutors can entertain work avoidance while credibly claiming to “render substantive justice”—a convenient excuse for leniency and speedy case processing. 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. The anomaly is that defendants enjoy great discounts in cases where process costs alone might have led them to plead guilty without any discount at all. Where process hurts most, bargain justice helps all parties most. Consequently,

appearing Shadow, 117 Harv. L. Rev. 2548, 2553-54 (2004); see infra notes 121, 132-144 and accompanying text (providing data demonstrating leniency).

121 See, e.g., Lynch, supra note 1, at 123; Schulhofer, Disaster, supra note 1, at 2004-05; Alschuler, supra note 42, at 60; Langbein, supra note 3; see also infra notes 190, 222-253 and accompanying text.

122 See infra notes 164-167 and accompanying text.

123 See supra note 112 and accompanying text.

124 Feeley, supra note 11, at 11, 25 (emphasis in original); accord Dash, supra note 26, at 256 (noting other prosecutorial motivations for leniency, but concluding that “major” reason is “the desire of the prosecutor for a record of numerous convictions by the quickest and easiest method”); Heumann, supra note 11, at 62-63, 81-85, 101-04 (describing bargains as “reasonable at worst, and extremely favorable at best”); Alschuler, supra note 42, at 106-07 (noting that prosecutorial “misgovernment” leads to lenient sentences); see generally Schulhofer, Disaster, supra note 1, at 1986 (discussing agency concerns that lead prosecutors to make “unduly lenient sentence offers” that do not maximize deterrence or public interest generally); Schulhofer, Regulatory System, supra note 1, at 50-52, 63-66 (same).

125 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 were they to force trials by not offering generous deals.”); see also Scott & Stuntz, supra note 5, at 1948 n.131; supra note 78, infra notes 137-144, and accompanying text. For example, sentence-maximizing prosecutors might refuse to offer time served to defendants detained pretrial. Prosecutors could exploit detention and other process costs to exact sentences just less than pretrial delay. Yet, prosecutors take no great advantage of jailed defendants. Indeed, observers have noted the frequent paradox that defendants held pretrial 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 Magazine Mar. 12, 1971, at 61-62; supra notes 85, 134-144 and accompanying text.

126 See supra notes 73-77 and accompanying text.

127 This partially explains studies that find defendant satisfaction with plea bargaining. See, e.g., Casper, supra note 58, at 48-49 tbl.VIII-5; see also supra note 75 and accompanying text (discussing defendant preference to "get it over with"). Casper’s well-known study of defendant attitudes found that 64% of defendants who pled guilty believed they were treated fairly com-
prosecutors make frequent plea offers to non-criminal violations and to timeserved dispositions.128

B. Lenient Pricing

Of course, it is no easy task to demonstrate leniency as a general principle in low-stakes cases. The claim is probably most true for state-level prosecutions of trivial public-order offenses.129 By contrast, federal prosecutors can be more selective at the screening phase; the cases they choose to prosecute are the cases they think should be prosecuted.130 Additionally, my analyses are necessarily limited principally to New York City, because I could uncover no comprehensive misdemeanor data for other jurisdictions.131 These caveats aside, I believe my leniency claim is somewhat universal. Indeed, various scholars have observed widespread leniency in other jurisdictions.132 In any event, even if leniency exists only for trivial public-order offenses in northern urban jurisdictions that still

pared to only 41% of defendants who were tried. CASPER, supra note 58, at 48-49 tbl.VIII-5. Remarkably, this 64% satisfaction rate was just shy of the 69% rate for defendants who had their cases dismissed outright. Id. To borrow Hobbes’ expression, 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.”).

128 See infra notes 132-144 and accompanying text.
129 See Bowers, supra note 54.
130 UVILLER, supra note 2, at 178.
132 See Donald I. Warren, Justice in Recorder’s Court: An Analysis of Misdemeanor Cases in Detroit, in ROUGH JUSTICE: PERSPECTIVES ON LOWER CRIMINAL COURTS 334 (John A. Robertson ed. 1974) (finding that only 13.3% of black defendants and 5.9% of white defendants were sentenced to jail in Detroit); Dash, supra note 26, at 253-54 (noting leniency in Chicago felony court); HEUMANN, supra note 11, at 81-85 (studying urban Connecticut counties and concluding that observed dynamics probably “will hold across states but that some small—but nonetheless significant—variation exists”); FEELEY, supra note 11, at 28-32 (studying urban and rural Connecticut counties); ROSETT, supra note 68, at 45-46 (studying Los Angeles county and noting that “[a]lmost all of the cases flow easily through the discretionary system to dismissal, probation, a fine or a short jail term.”); Lynch, supra note 1, at 117-23 (discussing leniency in rural and suburban New York counties); Uphoff, supra note 73, at 89 n.63 (noting high frequency of pleas to deferred sentences for first-time defendants in Oklahoma). Significantly, New York City criminal justice may actually be more punitive than other jurisdictions. One cross-state study of case disposition in four urban courts found that sentences in Bronx County were generally higher for all defendants, particularly those with no records. Church, supra note 93, at 491-92.
would affect a sizable defendant population—the majority of criminal defendants in many of the nation’s largest cities.\footnote{Cf. supra note 29 (providing data on New York City public-order prosecutions).}

Looking at New York City specifically, the data show clear leniency. In 1998, fifty-two percent of all misdemeanor charges that ended in conviction were reduced for plea to non-criminal violations.\footnote{CJA, NON-FELONY TRENDS, supra note 26, at tbl.17A (calculating average rate for A- and B-level misdemeanors).} For clean-record defendants, the rate of reduction was eighty-six percent.\footnote{CJA, NON-FELONY TRENDS, supra note 26, at tbl.18 (calculating average rate for A- and B-level misdemeanors).} Even for the worst recidivists—defendants with both prior felony and misdemeanor convictions—the rate of reduction remained over twenty-five percent.\footnote{Id. at tbl.18.}

Likewise, over fifty percent of all misdemeanor charges that ended in conviction resulted in non-jail dispositions. And of the so-called jail sentences, fifty-seven percent were for time served.\footnote{Id. at 29 & tbl.19. For clean-record defendants this 57\% rate rose to 76.3\%. Even for defendants with combined felony and misdemeanor records, the rate only dropped to 48.5\%. Id.} Even, for defendants with combined felony and misdemeanor records, the rate of time-served sentences dropped only to near fifty percent.\footnote{Id. (noting that 51.5\% received post-conviction jail sentence); see also HEUMANN, supra note 11, at 81 (quoting defense attorney: “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.”).} Further, the percentage of express time-served sentences significantly underestimates the number of sentences that were in fact \textit{equivalent to} time served, because most defendants with designated time sentences actually had completed those sentences by disposition. Specifically, for misdemeanor defendants sentenced to designated jail terms, the mean sentence was only 20.1 days and the median was seven days—notwithstanding potential statutory sentences of up to one year for A-level misdemeanors and ninety days for B-level misdemeanors.\footnote{Id. at tbl.20.} Moreover, under New York law, defendants serve only two-thirds of their sentenced jail time, calculated from the moment of arrest.\footnote{N.Y. PENAL LAW § 70.30(3).} So, a defendant with a median seven-day sentence must serve only four days (rounding, as the system does, in the defendant’s favor).\footnote{Id.} As such, many—if not most—of these supposed time sentences were in fact fully satisfied by the time of plea.\footnote{CJA, NON-FELONY TRENDS, supra note 26, at 29 & tbls.19-20; see also Freda F. Solomon, CJA Research Brief: The Impact of Quality of Life Policing, at 7 (2003), available at www.nycja.org/research/research.htm (analyzing this data set and noting that it “includes jail sentences satisfied by pre-trial detention time”). For those who had not yet completed the median sentence, even the shortest adjournment would likely be days longer (and there a trial requires many adjournments). See supra notes 69 and accompanying text.} Only the tiniest fraction of a fraction of misdemeanor defendants had to
serve any post-plea jail time at all.\textsuperscript{143} Put differently, many of these defendants were jailed as part of the process and released as part of the bargain.\textsuperscript{144}

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.\textsuperscript{145} These prices may vary overtime 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.\textsuperscript{146} As such, the analogy of the plea-bargain regime to

\begin{itemize}
\item \textsuperscript{143} CJA, NON-FELONY TRENDS, supra note 26, at 29 & tbl.19; see also HEUMANN, supra note 11, at 187 n.17.
\item \textsuperscript{144} 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 released from jail only after and because they pleaded guilty.” (emphasis in original)); Bibas, supra note 44, at 2492-93 (“[T]he shadow of pretrial detention looms much larger over these small cases than does the shadow of trial.”); Weinstein, supra note 66, at 1171 (“If a defendant is denied bail [at arraignments], she will likely spend more time waiting for the case to be resolved than would have been imposed on a jail term.”); Givelber, supra note 1, at 1364 (“The road to freedom is a guilty plea, whereas insisting upon innocence means that incarceration continues.”). 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, 34 & tbl.F.1; see also HEUMANN, supra note 11, 188 n.17 (noting that only 48.8\% of defendants in 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 prison, and over 70\% were sentenced to city jail time of one year or less. CJA, FELONY TRENDS, supra note 46, 35-38 & tbl.F.3. Perhaps more significantly, almost two-thirds of all felony cases were reduced and disposed of in lower criminal court as misdemeanors, violations, or dismissals; and an additional number of felony cases were disposed of as misdemeanors and violations in the upper felony courts. Id. at 27-31 & tbls.E.1,E.2-4; see also Dash, supra note 26, at 253-54 (noting similar findings in Chicago felony court).
\item \textsuperscript{145} See Gerard E. Lynch, Our Administrative System of 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 like those of the flea market: there is a fixed price tag on the case.”); see also HEUMANN, supra note 11, at 98, 104, 118 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.”); FEELEY, supra note 11, at 158-59, 275-76 (describing how repeat players know the worth of a case “intuitively”); DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 79 (1966); Bibas, supra note 44, at 2481 (noting that “repeat players . . . develop a feel for cases and can guage the going rate for particular types of crimes or defendants”); Scott & Stuntz, supra note 5, at 1923, 1933 (“[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.”); Douglass, supra note 1, at 447.
\item \textsuperscript{146} See UVILLER, supra note 2, at 179 (noting that the “worth” of a crime in the “ordinary commerce of the courts” is less than the punishments prescribed by statute); Scott & Stuntz, supra note 5, at 1923, 1933; see infra notes 206-209.
\end{itemize}
trading bazaar is misplaced.\textsuperscript{147} The regime is more supermarket or department store. Repeat players routinely process similar cases according to intuitively known set bargain prices that are discernible upon quick reference to the defendants’ past records and the present charges.\textsuperscript{148} Significantly, recidivist defendants also come to know these prices and may balk if prosecutors push atypical pleas.\textsuperscript{149}

This concept of fixed pricing cuts against the notion of individualized bargaining, but only to a degree. In the lower criminal courts, bargaining happens too rapidly to be wholly individualized.\textsuperscript{150} Instead, discrete tags act as proxies for defendants’ individual circumstances and traits. From a set starting point, a prosecutor may adjust prices by largely set increments based on information either that is manifest from the record or that can be conveyed to that prosecutor succinctly.\textsuperscript{151} 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.\textsuperscript{152} This is true whether prosecutors were motivated in past cases by substantive justice principles, workgroup principles, or something else altogether.\textsuperscript{153}

\textbf{D. Judicial Input}

Judges play a secondary role in the plea-bargaining process.\textsuperscript{154} But their presence is nevertheless felt, especially as a check on bargains that are set out-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{147} See Uviller, \textit{supra} note 2, at 177-78.
\item \textsuperscript{148} The pervasiveness of fixed pricing is a counterpoint to the common objection that defense attorneys who consistently avoid trials cannot credibly threaten litigation. See, e.g., Bibas, \textit{supra} note 44, at 2478; Alschuler, \textit{Defense Role, supra} note 5, at 1186-87. Prosecutors may extend marginally worse offers to defense lawyers who are recognized pleaders. But, in the main, a particular lawyer’s shortcomings are corrected by market prices that derive from aggregate defender work. Scott & Stuntz, \textit{supra} note 5, at 1923, 1933. Moreover, the known pleader is in the best position as repeat player to know intuitively the market prices and can object if she is not receiving them, perhaps enlisting the judge’s help to pressure the prosecutor to conform. See \textit{infra} notes 154-161 and accompanying text.
\item \textsuperscript{149} See \textit{infra} notes 168-179 and accompanying text; see also Bowers, \textit{supra} note 54.
\item \textsuperscript{150} See \textit{supra} note 40 and accompanying text.
\item \textsuperscript{151} Scott & Stuntz, \textit{supra} note 5, at 1922-23.
\item \textsuperscript{152} Heumann, \textit{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.”); accord Scott & Stuntz, \textit{supra} note 5, at 1922-23; see also \textit{infra} note 167 and accompanying text.
\item \textsuperscript{153} Cf. Heumann, \textit{supra} note 11, at 161 (quoting prosecutor: “[W]e try to avoid stupid recommendations, but we do make mistakes sometimes, and they have these aftereffects.”).
\item \textsuperscript{154} See Uviller, \textit{supra} note 2, at 179, 186; Heumann, \textit{supra} note 11, at 102; Wright & Miller, \textit{supra} 32, at 33, 39; McCoy & Mirra, \textit{supra} note 2, at 896.
\end{enumerate}
\end{footnotesize}
side the prevailing market heartland. Like prosecutors and defense attorneys, judges wish to avoid the administrative costs of entertaining litigation—particularly in low-stakes cases. Generally, their first priority is to oversee pleas. And they have little objection to the disposition on lenient terms of “garbage . . . cheap cases.” Accordingly, judges are more likely to object when prosecutors make offers that are too high rather than too low if high prices might serve as obstacles to guilty pleas. Conversely, judges will rarely intercede to derail even seemingly over-lenient plea agreements. This top-down judicial pressure further fosters ex ante low-set “going rates.”

IV. BARGAINING IN LOW-STAKES CASES

Agency failure is a prominent plea-bargaining concern. Undoubtedly, some level of bilateral agency failure does exist. As Judge Easterbrook correctly noted: “Of what agents is that not true?” 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.

See Scott & Stuntz, supra note 5, at 1933, 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 Uviller, supra note 2, at 186; see generally Heumann, supra note 11, at 127-52.

See Heumann, supra note 11, at 127-52; Feeley, supra note 11, at 271; Skolnick, supra note 34, at 55; Stuntz, supra note 120, at 2561; Martin A. Levin, Delay in Five Criminal Courts, J. Legal. Stud. 83, 90 (1975).

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?”

Levin, supra note 156, at 95, 122.

See Stuntz, supra note 120, at 2561 (“[J]udges, like prosecutors and defense attorneys, are invested in plea bargaining and try to facilitate it.”); Scott & Stuntz, supra note 5, at 1959; Skolnick, supra note 34, at 55; Lynch at 120; Alschuler, supra note 42, at 105.

See Heumann, supra note 11, at 188 n.17; Feeley, supra note 11, at 130; Wright & Miller, supra 32, at 39 (“The judge . . . has little incentive to inquire behind the parties’ agreement.”); Skolnick, supra note 34, at 62.

See supra note 145-153 and accompanying text.


Easterbrook, supra note 60, at 1975-76 (“Agency costs are endemic and do not justify abandoning consensual transactions.”); see also Anthony Amsterdam, Trial Manual 5 for the Defense of Criminal Cases 346 (1988).
A. Oversight

Prosecutors are supposedly subject to public and official oversight, but these restraints are highly attenuated—if existent at all—in low-stakes cases.164 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.165 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 from minor sanctions in minor cases but could make more headway spotlighting suboptimal conviction rates. Conviction rate, after all, is the most visible rubric of quality job performance.166 And that measure is achieved most readily by lenient quick bargains.167

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.168 Critics point to the pressures on defendants to plead guilty, and these pressures are no doubt real.169 But defendants remain the most immediate check on whether pleas will be consummated—certainly more immediate than public and supervisory oversight of prosecutors. Defense attorneys may find it difficult to convince defendants to accept harsh deals.170 Time-served pleas or the equivalent are so prevalent, because bargains that require jail time are more likely to prompt defendants to reject them.171 And no one wants that.

Moreover, public defenders represent most criminal defendants, and these lawyers engender clients’ visceral mistrust (however undeserved) to a greater de-
agree than retained counsel. The clients of public defenders may require substantially greater concessions to overcome ingrained worries over 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-set going forward—lower even than 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.

Notably, although defendants have some check over poor bargaining results, they cannot so readily check poor trial practice. Consequently, defendants with bad lawyers are generally better off plea bargaining. Defense attorneys who favor work avoidance over their clients’ best interests are more likely to hurt their clients at trial. Plea bargaining is a skill, but it does not involve the technical expertise or the time outlay required for trial preparation and defense. The point is particularly salient for innocent defendants, because their cases more likely require heavier investigation and presentation of positive trial defenses. The indolent lawyer may perform worst when telling a client’s story of innocence. Conversely, that lawyer’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. Finally, the lazy lawyer has increased incentive to diligently pursue plea negotiations, because the relatively smaller investment in reaching a defendant-optimal plea price maximizes chances that the lawyer will not have to invest heavily in repeat appearances, or, worse, trial work.

---

172 See Bibas, supra note 44, at 2478, 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; see also United States v. Hill, 252 F.3d 919, 925-26 (7th Cir. 2001) (quoting defendant: “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.”).

173 See HEUMANN, supra note 11, at 72 (quoting defense attorney: “Usually we get very good first-offer-deals from the prosecutors.”); FEELEY, supra note 11, at 272.

174 See Scott & Stuntz, supra note 5, at 1922, 1933-34; cf. CASPER, supra note 58, at 49-51.

175 See generally Easterbrook, supra note 5, at 309 (arguing that imperfect agency is present at all stages of criminal procedure, not just bargaining).

176 See HEUMANN, supra note 11, at 78 (quoting defense attorney: “[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 5, at 1928, 1933.

177 Scott & Stuntz, supra note 5, at 1934; supra note 72 and accompanying text.

178 See id. at 1933.

179 See id. at 1928, 33.
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.¹⁸⁰ 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 where the defendant asserts innocence, because the defense attorney can point to the innocence claim as the reason the defendant refuses to come around.¹⁸¹ In this way, a bilateral monopoly more accurately describes bargaining in low-stakes cases.¹⁸² Defendants and their counsel have room to push back, and prosecutors are unlikely to stand firm.¹⁸³ In the end, prosecutors must try cases if defendants refuse to plead. The best defense tool then in the face of an atypically high price—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.

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.¹⁸⁴ When these defense attorneys drive

¹⁸⁰ Id. at 1923-24 (“The defendant’s [trial] entitlement thus motivates prosecutors to bargain—not simply to make offers and walk away.” (emphasis in original)).

¹⁸¹ 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.

¹⁸² See Easterbrook, supra note 60, at 1975.

¹⁸³ See HEUMANN, supra note 11, at 71-72, 186 n.18; McCoy & Mirra, supra note 2, at 896 (“The greater the defendant’s desire for trial, the greater the sentencing disparity must be in order to induce a plea.”); Alschuler, supra note 42, at 56-57 (quoting San Francisco’s chief ADA: “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”); see also UVILLER, supra note 2, at 181; Joseph Colquitt, Ad Hoc Plea Bargaining, 75 TULANE L. REV. 695, 714 (2001); Levin, supra note 156, at 120-21.

¹⁸⁴ Skolnick, supra note 34, at 66; cf. Bibas, supra note 44, at 2479 (“[I]nexperienced lawyers will be too unyielding in plea bargaining because they want trial experience.”).
hard bargains it not only lowers price in these particular cases but pressures general prices downward going forward.185

C. Case Weakness

Above all, prosecutors want some kind of conviction and to avoid wholesale dismissal or acquittal.186 For weak cases, this “conviction psychology” translates into marked added bargaining discounts.187 As one prosecutor explained to Professor Alschuler: “When we have a weak case . . . we’ll reduce to almost anything rather than lose.”188 These discounts supplement typical low-set prices to make irresistible already-lenient market offers—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.189

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 undermines the system’s central truth-seeking function.190 This objection carries obvious weight from a systemic standpoint, but for the innocent defendant who must endure a process more painful than the proffered plea, the prospect of eventual acquittal is of

185 See Uviller at 181 (noting that if defenders refuse to plead clients to offered dispositions “they can drive down the market . . . [and this] background prospect helps to keep offers at the low end”); supra notes 152-153 and accompanying text..

186 See supra notes 44-45, 166 and accompanying text.

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

188 Alschuler, supra note 42, at 59; see also Dash, supra note 26, at 256; Bibas, supra note 44, at 2472 (noting potential for “irresistible offers in weak cases”); Uphoff, supra note 73, at 88-89 (“Prosecutors are well aware of the allure of the ‘no-jail’ recommendation and use it frequently to entice a defendant into a guilty plea in a marginal case.”); Scott & Stuntz, supra note 5, at 1942. 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. Note, Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas, 112 U. PA. L. REV. 865, 901 (1964).

189 See Scott & Stuntz, supra note 5, at 1942; Alschuler, supra note 42, at 60; Landes, supra note 70, at 69. For example, one-witness identification cases are the presumed sources both of the greatest number of false convictions and of 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 60 and accompanying text.

190 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; Dominick R. Vetri, Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas, 112 U. PA. L. REV. 865, 910 (1964).
small consolation. Instead, many innocent defendants are quite happy for the opportunity to give the prosecution a conviction—however ill-deserved—if they may avoid daunting process and the potential disaster of full trial loss.  

V. WHERE PROCESS COSTS MATTER LITTLE

In serious cases, prosecutors drive harder bargains and aim for sentence maximization to a greater degree. They are less willing and able to provide categorical lenient deals. First, oversight over these high-profile cases is more pronounced; prosecutors are less free politically or institutionally to lighten workload with over-generous offers. 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. In any event, recidivist defendants—who are the most likely defendants in high-stakes cases—have less ability to adequately fight weak charges. Third, defense attorneys cannot effectively bluff because prosecutors are readier to call and try cases. Particularly where 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. In fact, even when bargaining may be justified, prosecutors may favor trial: victory in a high-profile case may polish a burgeoning reputation.

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 pre-conviction con-

---

191 Cf. Scott & Stuntz, supra note 5, at 1935 (“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.”); Easterbrook, supra note 60, at 1975 (“Black markets are better than no markets . . . . Rights that may be sold are more valuable than rights that must be consumed.”); CASPER, supra note 58, at 49-50 (discussing defendant satisfaction with plea bargaining).

192 See Stuntz, supra note 120, at 2563 (“With respect to the most violent crimes, plea bargaining probably resembles civil litigation; law’s shadow looms large in these cases.”); Rabin, supra note 42, at 1072.

193 See HEUMANN, supra note 11, at 169; Richman, supra note 45, at 964; Stuntz, supra note 120, at 2563; Alschuler, supra note 42, at 107; Levin, supra note 156, at 90.

194 See UVILLER, supra note 2, at 179; Alschuler, supra note 42, at 107.

195 See supra note 37, 55-63 and accompanying text.

196 See UVILLER, supra note 2, at 179.

197 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 leads necessarily to some sacrifice of conviction maximization. See Stuntz, supra note 120, at 2563 (noting higher acquittal rate in murder cases because voters will forgive acquittal but not leniency).

198 See Bibas, supra note 44, at 2472-74; Zacharias, supra note 113, at 1181-82; Rabin, supra note 42, at 1072 n.92.
And all other process costs pale in comparison to lengthy post-conviction sentences. As stakes raise, therefore, defendants become more forward looking; potential future consequences take precedent over any focus on present pain.

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. Moreover, this is a small class of defendants—a mere fraction of the system’s accused—so the system could probably provide this group full-dress trials without unduly taxing resources.

A. Trial Penalties versus Plea Rewards

The results are not so rosy, however. Trials are a bit more frequent in serious cases, but bargaining is still the primary mode of case disposition. The question is why defendants continue to bargain in large numbers even when prosecutors are highly reluctant to provide lenient offers. The reason is overcharging, and if there is a substantial problem related to plea bargaining, this is it.

Felony criminal and sentencing law is astonishingly broad because legislators have every incentive to statutorily over-criminalize behavior, set over-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.

---

199 See supra notes 95-96, 101 and accompanying text
200 See supra notes 97-102, infra notes 214-215, and accompanying text
201 See Feeley, supra note 11, at 297 n.12; Rosett, supra note 68, 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.”); John H. Langbein, Land Without Plea Bargaining: How the Germans Do It, 78 Mich. L. Rev. 204, 223-24 (1979); 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 Andrew M. Siegel, When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land That Time Forgot, 32 AM. J. CRIM. L. 325, 332 (2005) (noting tradition at common law to provide “rough natural justice” to petty cases and formal process to more serious matters); Langbein, supra, at 223 (“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 in serious crime need not be extended to cases of petty crime.”).
202 In 2002, the plea rate nationally was 95% for all state-court felony convictions, but was only 90% for violent felonies and 68% and 84% for murder and rape respectively. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl. 5.46.2002 (2003), available at http://www.albany.edu/sourcebook (hereinafter, SOURCEBOOK, ONLINE).
203 See Rosett, supra note 68, at 157; Richman, supra note 45, at 959 & n.69; Weinstein, supra note 66, a6 1160-64; Stuntz, supra note 120, at 2556-58; Scott & Stuntz, supra note 5, at 1965; see generally William J. Stuntz, The Pathological Politics of Criminal Law, 100 MICH. L. REV. 505 (2001) (discussing cycle whereby legislative over-criminalization leads necessarily to increased prosecutorial discretion that leads to further legislative criminalization).
Overbroad statutes serve the legislature in terms of minimizing the opportunity costs of legislative specification and maximizing tough-on-crime appearances. Prosecutors are thereby given extraordinary weapons. They can charge harsh substantive crimes and habitual-offender sentencing statutes and then use questionable counts as bargaining leverage, offering substantial so-called concessions that just lead to conviction and sentence on the only warranted charges. Generally, the 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, the counts are questionable because they fall outside the operating systemic (and possibly communal) norms of what constitutes appropriate sanction for given conduct.

Here, plea offers correct back to institutionally appropriate penalties, but only upon sacrifice of trial rights. Plea prices start high, and prosecutors permit little if any negotiation. Duress and coercion become real worries, not just for innocent defendants but for all defendants. The unlucky few who venture trial and lose are afforded sizeable trial penalties of sentences far in excess of what systemic actors would typically deem proportional. Significantly, however, this

---

204 See Stuntz, supra note 120, at 2556-58; Richman, supra note 45, at 959 & 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.”).

205 See Heumann, supra note 11, at 42; Scott & Stuntz, supra note 5, at 1920-21, 1965; Stuntz, supra note 120, at 2563; Wright & Miller, supra 32, at 33; Easterbrook, supra note 5, at 311-16; Schulhofer, Disaster, supra note 1, at 1992; McCoy & Mirra, supra note 2, at 927; Alschuler, supra note 42, at 85-105; Felkenes, supra note 34, at 119.

206 See Rosett, supra note 68, at 156 (discussing courthouse “norms” that hold “no matter what the statutes might stipulate as a proper punishment”); Stuntz, supra note 120, at 2554-58; supra note 146 and accompanying text. Because legislative prescription is so overbroad and over-punitive, the community may view lower prices as optimal even in high-stakes cases where greater public oversight exists. See Stuntz supra note 120, 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.”).

207 See Scott & Stuntz, supra note 5, at 1964-65; McCoy & Mirra, supra note 2, at 927; Felkenes, supra note 34, at 119.

208 See Scott & Stuntz, supra note 5, 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 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 quotations omitted).

209 See Rosett, supra note 68, 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 Givelber, supra note 1, at 1396-1406 (discussing trial penalties); Donald G. Gifford, Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion, 1983 U. ILL. L. REV. 37, 46-47 (1983) (same); David Brereton & Jonathan Casper, Does It Pay to Plead Guilty? 16 LAW & SOC’Y REV. 45 (1981-82) (providing data to demonstrate substantial “trial tax”).
prospect of trial penalties is not exclusive to innocent defendants; the penalties threaten all defendants charged in high-stakes cases.\textsuperscript{210}

By contrast, in low-stakes cases, the issue is more likely to be post-trial proportional sentences far in excess of over-lenient bargain rewards. Substantial trial penalties are no great issue in these minor cases that “few view as seriously criminal,” because overcharging is no real concern.\textsuperscript{211} Indeed, prosecutors may even believe that the arguably merited charges already prescribe over-harsh penalties.\textsuperscript{212} In any event, prosecutors’ ability to overcharge is minimal for misdemeanor charges, because they can threaten no worse exposure than one-year jail.

Ultimately, the distinction between trial penalties and plea rewards comes down to the difference between trading in trial costs versus trial rights. In low-stakes cases, if defendants choose 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.\textsuperscript{213} 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 innocent defendant who is forced under threat of trial penalty to forgo desired process to escape undue punishment.\textsuperscript{214} When process costs matter most, bargaining provides a savory exit strategy on defendant-optimal terms. But when process matters most, recidivist offenders plead guilty because the prospect of terrific sentence after trial conviction is just too terrifying. It is this distinction—between pleading guilty to avoid a trial tax on the exercise of constitutional rights and pleading guilty to avoid process costs (or for any other reason unrelated to trial penalties)—that has led some critics to condemn plea bargaining while abiding guilty pleas generally.\textsuperscript{215}

\textsuperscript{210} See Schulhofer, Disaster, supra note 1, at 1992 (calling for repeal of mandatory minimums in order to reduce bargaining pressure, and noting that this reform would affect all pleading defendants, not just innocent); see generally Givelber, supra note 1, at 1393-99 (discussing trial tax as burden that affects all defendants and that should be eliminated).

\textsuperscript{211} Feeley, supra note 11, at 280; accord Stuntz, supra note 120, 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.”).

\textsuperscript{212} See supra notes 112-115 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 120, at 2549, 2553-54. Generally, the prosecutor “has no incentive to order the biggest meal possible.” Id.

\textsuperscript{213} See Heumann, supra note 11, at 123; supra Parts III-IV.

\textsuperscript{214} See Rosett, supra note 68, 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. . . . Conversely, only a man very confident of his ultimate vindication will chance capital punishment.”); supra notes 97-102, 200 and accompanying text.

\textsuperscript{215} Scott & Stuntz, supra note 5, at 1914 (“[A]cademic critics are not opposed to pleas, but only to plea bargains.” (emphasis in original)); Langbein, supra note 201, at 213 (“[T]hat terrible attribute that defines our plea bargaining and makes it coercive and unjust: the sentencing dif-
Courts have frowned on prosecutorial overcharging and have even reversed explicit prosecutorial or judicial threats of trial penalties. Nevertheless, the Supreme Court and several lower courts have repeatedly rejected constitutional complaints of trial penalties in the absence of express evidence of vindictive motivation. In the usual case, a prosecutor or judge may readily intimidate the defendant with the threat of an excessive post-trial sentence on overcharged counts—so 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. But, because the system condones overcharging and consequent substantial de facto trial penalties, bargaining also may prove to be the least-bad option for some innocent defendants for whom process would otherwise be welcome. Trials are imperfect after all, particularly for recidivist defendants who cannot so easily challenge wrongful charges. 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 once systemically abused—to risk against her will an uncertain trial with significant downside.
Yet, that is precisely what some commentators and courts piously demand when they insist that the innocent should never plead guilty.222

What are these critics’ principal concerns? There seem to be four concrete reasons for potential pause: bargained-for convictions of the innocent may (i) engender disaffection with the criminal justice system and its norms;223 (ii) permit real perpetrators to escape punishment;224 (iii) incentivize prosecutors to charge marginal cases because they can anticipate pleas;225 and (iv) enable police misconduct by insulating unlawful searches, seizures, and other police procedures from constitutional review.226 Further, these problems carry greater deontologi-
The first two objections are largely nonstarters. 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 ill-used her twice. But the defendant’s enmity on that score is necessarily less than her antipathy toward a compelled trial course (with all its attendant process costs and risks), otherwise she would elect to fight on to trial. Conversely, she may even derive a degree of satisfaction from autonomously taking a role in determining her own fate. In any event, even if false admissions feed her disillusionment, this harm is of weak concern, because presumably she already has lost much faith in a system that in the first instance leveled false charges (and perhaps even jailed her pre-plea). Again, if there are real problems that cause disenchantment, they exist principally at the points of arrest and charge. Separately, there is no deep concern over declining societal faith in the system, because false pleas remain largely invisible to public scrutiny.

Second, little concern exists over real perpetrators escaping punishment. Police and prosecutors do not commonly pursue other suspects once a defendant wins acquittal. Remember, law enforcement officials arrest and prosecute wrongfully because they truly believe that innocent defendants are guilty. Accordingly, when prosecutors lose at trial, they do not then come to think that the defendant must have been innocent after all; they think 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

---


228 See supra note 191, infra notes 246-253, and accompanying text.

229 See CASPER, supra note 58, at 49 (“[T]he participation hypothesis . . . suggests that a defendant, by participating in the decision about what sentence he is to receive, will find the sentence and the whole proceeding more palatable.”). But cf. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 31-37, 64-69, 161-62 (1990) (finding that defendants’ perceptions of legitimacy are linked to fair procedures, not outcomes). She 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 32 (2d. vintage ed. 1995).

230 Of course, the innocent defendant’s immediate community of family and friends may know of (or believe in) the defendant’s innocence. But they are as likely to be in favor of the guilty plea as the innocent defendant. They, too, may see it as the least evil. And, like the innocent defendant, if they harbor any systemic disillusionments, these disillusionments flow most directly from the policing and screening processes that led to the initial wrongful arrest and charge. See Bowers, supra note 54.

231 See Easterbrook, supra note 60, at 1970 (“Innocent persons are accused not because prosecutors are wicked but because these innocents appear to be guilty.”).
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. If the defendant is innocent, it is frequently because the police saw something and wrongly assumed that it was criminal.

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 stable—prosecutors would be forced to take more cases to trial and therefore would be more circumspect in their charging decisions. This may or may not be true. Professors Scott and Stuntz offered this equally persuasive counter: “[A] cheaper trial process [necessitated by increased trial frequency] would make more [mistakes]. The combination of 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.”

In any event, the problem is not substantially worsened by the addition to the mix of rare innocent defendants. Because most defendants are guilty in fact, 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. This information asymmetry calls into question any confidence that greater attention to charging discretion would lead prosecutors to weed out cases against the innocent, as opposed to the guilty. Admittedly, it could be the case that prosecutors would dismiss weak cases (which innocent defendants are more likely to face). However, it is even more likely that prosecutors would choose to charge recidivists (who are more likely to be innocent). In the end, prosecutors would probably weed out cases against clean-record defendants or cases in which witness cooperation was question-

---


233 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 trespassed.


236 See infra notes 32-34, 38-51, 179 and accompanying text. Because guilty defendants copy innocent defendant’s 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 5, at 518-519.

237 Schulhofer, Disaster, supra note 1, at 2007.

238 See infra notes 35-37 and accompanying text.
able—both of which are categories that are largely unreflective of (or even cut against) innocence.\footnote{239 See supra notes 46-54 and accompanying text; see generally Scott Baker, Prosecutorial Resources, Plea Bargaining, and the Decision to Go to Trial, 17 J.L. ECON. & ORG. 149 (2001).}

With respect to enabling police misconduct, the argument is that the exclusionary rule is the principal tool for combating that particular ill, but guilty pleas forestall the check.\footnote{240 See Zeidman, supra note 226, at 324-33} But suppression hearings already are ineffective as a safeguard against police misconduct because so few cases ever get to that point.\footnote{241 See id. at 332 ("[A] slew of guilty pleas . . . serve to insulate police practice from scrutiny."); infra sources at note 70 (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).}

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—who judges may already believe are wasting judicial resources by not plea bargaining.\footnote{242 See COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, CITY OF NEW YORK, COMMISSION REPORT 1994, at 42 ("[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."). available at http://www.parc.info/reports/pdf/mollenreport.pdf [hereinafter MOLLEN REPORT].}

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\footnote{243 See Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 422 (1971) (Burger, J., dissenting) (proposing “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).} or by limiting plea bargaining for the guilty and the innocent alike.\footnote{244 See Zeidman, supra note 226, at 332-33.}

As to all these concerns, perhaps the best response is that the innocent defendant seems a strange agent of social reform.\footnote{245 Cf. Tracey L. Meares & Dan M. Kahan, The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales, 1998 U. CHI. L. F. 197, 208 (1998) (discussing “burden sharing”).} By obliging her to forego a plea, she is forced to internalize all costs and risks for diffuse and somewhat abstract public benefit.\footnote{246 Cf. Scott & Stuntz, supra note 55, at 2013 (“[Forcing the innocent to trial] stands every known notion of distributional justice on its head. . . . [L]osses, especially, unjust losses, are better spread than concentrated.”).} Certainly, evils like 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. Accordingly, any societal benefit can be realized only by discounting the preferences of inculpable defendants (from vulnerable communities) who least deserve the added burdens.

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. 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.” Innocent defendants should have the same option.

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 not 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. 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.” From this reasoning, Schulhofer concluded that the system is normatively required to “protect inno-

247 See Scott & Stuntz, supra note 5, 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 174-179 and accompanying text (arguing that clients of self-dealing attorneys are better off plea bargaining).


249 See Scott & Stuntz, supra note 5, at 1913, 1935; Easterbrook, supra note 60, 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.”); Zacharias, supra note 113, at 1136, 1143; Charles Smith, Equivocal Guilty Pleas—Should They Be Accepted, 75 DICK L. REV. 366, 371 (1975) (“[A]n innocent man who asks for punishment may be foolish, but if he thinks the bargain is good, no injustice results from punishing him for his will is done”).

250 See Scott & Stuntz, supra note 5, at 1935; see also CASPER, supra note 58, 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.”); supra notes 58, 229 and accompanying text (discussing participation as reason that defendants prefer guilty pleas to trials).

251 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.”).

252 Schulhofer, Disaster, supra note 1, at 1986 (emphasis in original); accord Hessick & Sajani, supra note 162 at 241 (noting that innocent defendant’s choice to plead guilty may be “rational from his private perspective,” but 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.
cents from the pressure (or temptation) of extremely lenient plea offers.”  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 fiction.

A. Nolo Contendere and Alford Pleas: Non-Solutions

At common law, defendants could enter pleas of *nolo contendere* to misdemeanor charges and thereby accept conviction of guilt without making express admissions.  Presently, some jurisdictions have extended *nolo contendere* pleas to certain felony charges, but, in the main, the practice is reserved for minor offenses.  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.  In *Alford*, the Court held constitutional equivocal pleas where defendants plead guilty while concurrently maintaining innocence—so long as the plea constitutes “a voluntary and intelligent choice among the alternative courses of action.”

Many scholars oppose both types of pleas—singling out *Alford* pleas for especially pointed derision—as cynical instruments that sacrifice accuracy, process, and substantive communal values for the questionable good of efficient punishment and purported voluntary choice.  Others favor the pleas as evils neces-

---

253 Schulhofer, *Disaster*, supra note 1, at 2004-05.
255 See Bibas, *supra* note 1, at 1370-71; Alschuler, *supra* note 5, at 1291; see also Hudson v. United States, 272 U.S. 451 (1926) (holding valid *nolo contendere* pleas for federal charges that carry potential prison sentences). Of the 1,683 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 23, at 1156 & n.172.
257 *Id.* at 31, 37.
258 See Bibas, *supra* note 1, at 1382; Hessick & Saujani, *supra* note 162, at 197.
nary to allow the innocent the option to plead guilty with a measure of honesty.\footnote{Alschuler, \textit{Swallowing Camels}, supra note 6, at 412-424; Alschuler, \textit{supra} note 5, at 1292, 1296-98; Easterbrook, \textit{supra} note 5, at 320, Curtis J. Shipley, \textit{Note, The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant}, 72 Iowa L. Rev. 1063, 1073 (1987).} Both sides miss the mark. \textit{Alford} and \textit{nolo contendere} pleas are faulty not because they promote inaccurate conviction, but rather because they do not make voluntary pleas for the innocent available or useful enough.

First, both types of plea are inconsistently available. The \textit{nolo contendere} plea is available by statute only in certain jurisdictions and for certain types of crimes.\footnote{See Bibas, \textit{supra} note 1, at 1370-71, 79-80; \textit{supra} notes 254-255 and accompanying text.} The \textit{Alford} plea is even less frequently available. In formulating the \textit{Alford} doctrine, the Supreme Court gave lower courts broad discretion whether to accept the plea at all.\footnote{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 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.").} Ultimately, for both plea types, final say over availability is left not to defendants, but to state legislatures, court systems, or the individual vagaries of lawyers and judges. For example, some states adopt blanket bans against \textit{nolo contendere} and/or \textit{Alford} pleas.\footnote{Presently, thirty-eight states and the federal system allow \textit{nolo contendere} pleas in at least some types of cases, and forty-seven states and the federal system theoretically allow \textit{Alford} pleas. See \textit{supra} note 1, at 1370-71. However, far fewer states have actually applied the \textit{Alford} doctrine. See Hessick & Saujani, \textit{supra} note 162, at 198.} Others leave the decision to the individual judge, who exercises almost absolute discretion.\footnote{See Bibas, \textit{supra} note 1, at 1379-80; Barkai, \textit{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."); see, e.g., United States v. Melendez-Salas, 466 U.S. 861 (9th Cir. 1972) (finding no abuse of discretion for judge’s refusal of plea); State v. Knutson, 523 P.2d 967 (Wash. 1974) (same); State v. Brumfield, 14 Or. App. 273 274-76, 511 P.2d 1256, 1257-58 (1973) (same); \textit{see also} Shipley, \textit{supra} note 259, at 1068 n. 58 ("[M]ost judges remain leery of Alford pleas and accept the Supreme Court’s invitation to reject them."). \textit{Contra} United States v. Gaskins, 485 F.2d 1046, 1049 (D.C. Cir. 1973) (finding abuse where court based refusal of plea solely on defendant’s denial of guilt).} Even where a particular judge permits the pleas, prosecutors still may resist.\footnote{See \textit{id}.} Indeed, the Department of Justice has expressly discouraged its assistants from offering \textit{Alford} pleas.\footnote{See \textit{DOJ, Attorneys’ Manual}, \textit{supra} note 34, at § 9-16.015; \textit{see also} Hessick & Saujani, \textit{supra} note 162, at 198.} And many offices require supervisory approval before assistants may acquiesce.\footnote{See \textit{id}.} Finally, even defense attorneys—out of professional discom-
fort—may opt not to pursue or participate in Alford pleas.267 This broad opposition to both pleas—the Alford plea especially—is most likely a product of queasiness for practices that offend core values that institutional actors like to believe the system prizes.268 The result is arbitrary availability; some equivocating defendants may plead, but most may not.269 Consequently, Alford has developed into a doctrine applied by “judicial whim” that is “subject to no restrictions and no standards,” where in essence “defendants have no rights and trial courts can do no wrong.”270 And nolo contendere pleas are relegated by history and practice to only limited classes of cases in limited jurisdictions.271

Second, both types of plea fail to provide defendants 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.272 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 complete successfully probation and/or treatment programs.273 Finally, prosecutors that choose to accept the pleas may demand a higher sanction as the quid pro quo price of acquiescence.274

267 See HALL, supra note 222, at § 15:10 (noting that defense attorney has professional discretion to pursue or forgo Alford pleas); see, e.g., U.S. ex rel. Tillman v. Alldredge, 350 F. Supp. 189 (E.D. Pa. 1972) (holding not ineffective counsel’s failure to pursue plea bargaining where defendant maintained innocence); see also infra notes 293-294 (discussing perceived ethical problem of guilty pleas for innocent, and citing sources that would prohibit or make discretionary defense attorneys’ involvement in such pleas).

268 See UVILLER, supra note 2, at 196; 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.”); Bibas, supra note 1, at 1379-81; 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.”).

269 See Shipley, supra note 259, at 1064, 1068 (describing Alford’s application as “haphazard . . . unpredictable” and as “a rarity”); Barkai, supra note 1, at 125 (describing use and impact of Alford in federal system to be “very limited”). But see Bibas, supra note 1, at 1375 (noting more frequent usage).

270 Alschuler, supra note 5, at 1301.

271 See supra notes 254-255, 260 and accompanying text.

272 See 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 lack of remorse into account to increase sentences after Alford pleas); Leipold, supra note 23, at 1157-58.

273 See Ward, supra note 272, at 926-35 (citing cases where Alford pleas produced defendant-negative parole, probation, and sex-offender consequences).

274 See Bibas, supra note 1, at 1378 n.81. This is especially true for nolo contendere pleas that (at least in theory) cannot be used as evidence in future civil suits. See RONALD WRIGHT & MARC MILLER, 1 FEDERAL PRACTICE AND PROCEDURE § 177 (1973). Prosecutors justifiably may view this benefit as requiring a corresponding defense concession.
Third, with respect only to Alford pleas, these pleas raise genuine concern over 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 pleading guilty falsely. It is a far more accurate check for the possibility that a defendant is pleading involuntarily—a separate (and constitutional) concern.275 Defendants who equivocate generally do so because they are unsure that the guilty plea is the right course of action.276 Their hesitation signals that something is amiss—that they do not view pleading as the best option, even if it is.277 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.278 Moreover, to the extent concerns exist of imperfect agency—that domineering defense lawyers might force unwilling defendants to plead—then permitting equivocal pleas seems a particularly poor idea. The equivocating defendant is of two minds; a necessary question is which is hers and which is her lawyer’s. Conversely, a defendant who very much wants a bargain would seem most ready to voice words of guilt—true or not—that makes the bargain happen fluidly. When defense counsel explains that asking for an Alford plea might complicate matters, a willing defendant generally protests no further.279 Those innocent defendants that are voluntarily pleading guilty rationally recognize—for reasons of process-cost avoidance or concern over trial penalties—that swallowing pride and stating guilt on the record are the smoothest roads forward.

275 See Brady v. United States, 397 U.S. 742 (1970) (holding that pleas are constitutionally required to be knowing and voluntary).

276 See Smith, supra note 249, at 374 (“By his equivocation, the pleader has signaled his dissatisfaction with the bargain, or at the very least, his latent unwillingness to make it.”).

277 Accordingly, the pleas are prime fodder for appellate challenge. See Bibas, supra note 1, at 1379.

278 See Smith, supra note 249, at 374-75. 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.” 400 U.S. at 28 n.2. It seems at least plausible that the defendant was about to say: “I don’t—want to plead.” Cf. Ward, supra note 272, at 917 (2003) (“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 guilt.”).

279 See Smith, supra note 249, at 374 (“[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.”); see also Uviller, supra note 2, at 195 (“[I]nvisible 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 “lines right”); Kuh, supra note 194, at 500 (noting that defendants just “mouth” the prearranged words “whether or not they are truthful”); cf. Bibas supra note 1, at 1378 nn.81,87.
B. False Pleas: The Solution

Criminal law—like most all law—consists of a collection of accepted fictions. For example, defendants are considered to have constructive knowledge of statutory text and meaning. Defendants are presumed innocent, notwithstanding the mathematical certainty that they are more likely culprits than any other person present in the courtroom. 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. And courts premise guilty-plea discounts on a dubious contrition, claimed inherent in the acceptance of even bargained-for deals. Even certain discrete breeds of false defendant-testimony are acceptable. Defendants must verbally state “not guilty” at arraignments—even when they most certainly are—in order to push a case on to trial. Courts have allowed defendants to plead guilty to daytime burglaries to satisfy lesser charges, even when the crimes indisputably occurred in dark of night. Courts have upheld pleas to “hypothetical crimes” that exist in no penal code and require impossible mens rea. All of these falsehoods generally muster little objection, because they are “recognized as having utility”—Professor Lon Fuller’s paradigmatic definition of legal fictions.

---

280 See H. VAIHINGER, THE PHILOSOPHY OF ‘AS IF’ 34 (1935) (“In the fictio 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.”).


283 See Kuh, supra note 194, at 500.

284 UVILLER, supra note 2, at 183 (noting that judges accept the premise of contrition “with a straight face”); Kuh, supra note 194, at 500 (noting guilty plea’s “fiction of remorse”).

285 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.”).

286 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 217, at 3-112; see also Stuntz, supra note 120, at 2557 (noting the prevalence in federal cases of ‘fact bargaining’ over quantity of possessed drugs); Colquitt, supra note 183, at 740-41 (collecting similar cases).

287 See e.g., People v. Castro, 44 A.D.2d 808 (1974), aff’d, 37 N.Y.2d 818 (1975) (“[A] defendant may plead to a crime which does not exist and the plea is valid. Such a hypothetical crime has no elements, yet their absence does not affect the plea.”); People v. Israel, 335 N.E.2d 53 (Ill. 1975) (upholding plea to nonexistent lesser charge of attempted voluntary manslaughter); see also BOND, supra note 217, at 3-112 (“Occasionally a defendant will plead guilty to an offense that doesn’t exist . . . . Such pleas are always bargained, and courts generally sustain their validity.”); Colquitt, supra note 183, at 712, 740-41 (collecting cases).

288 LON FULLER, LEGAL FICTIONS (1967).
The puzzle is why the system draws the line on the ultimate question of culpability. 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 as when an innocent defendant 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 he behaved (in some fashion) illegally. Institutional actors (who should know better) hold on to this last vestige of an antiquated truth-seeking ideal. Accordingly, ethics 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 defendant to plead guilty. And the

289 See supra note 222, infra notes 292-294, 303-308, and accompanying text.
290 Cf. Loftus E. Becker, Jr., Plea Bargaining and the Supreme Court, 21 LOY. L.A. L. REV. 757 (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, 758 (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 really 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.”).
291 See infra notes 295-296 and accompanying text.
292 ABA STANDARDS, supra note 222, at Standard 14-1.6 Cmt. (noting that innocent defendants should not plead guilty); AMERICAN BAR ASSOCIATION, PROJECT ON CRIMINAL JUSTICE STANDARDS RELATING TO THE DEFENSE FUNCTION, Section 5.3 (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.”); AMSTERDAM, supra note 163, at 363 (leaving the decision to lawyer’s “individual conscience” and noting that even when a plea bargain is “distinctly to the client’s best advantage,” a “hard decision follows”); HALL, supra note 222, at § 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.”); Warren E. Burger, Standards of Conduct for Prosecution and Defense Personnel, 5 AM. CRIM. L.Q. 11, 15 (1966); see also Douglas A. Cope land, Missouri’s Public Defender System, 62 J. MO. B. 10 (2006); Major Bradley J. Huestis, New Developments in Pretrial Procedures: Evolution or Revolution, 2002 ARMY LAW. 20, 30 (2002) (“The military accused may not plead guilty unless he honestly and reasonably believes he is guilty.”); Jack B. Zimmermann, The Lawyer’s Duty to Promote the Common Good, 40 S. TEX. L. REV. 227, 228 (1999) (“[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 perpetuate a fraud on the court. . . . I have learned [this] through service as a prosecutor, defense lawyer, and criminal trial judge.”); Bradley, supra note 222, at 77; supra note 222 and accompanying text (citing sources that insist that innocent should not plead guilty); see generally Alschuler, supra note 5, at 1280-89, 96-1306 (discussing potential ethical problem and defense attorneys’ ethical concerns).
limited case law on the question has held likewise.\textsuperscript{293} Indeed, no less respected an authority than Warren Burger has declared the practice unethical: “When an accused tells the court he committed the act 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 the court can explore and resolve the conflict.”\textsuperscript{294}

I have demonstrated, I hope, that blameworthiness does not deserve the import ascribed to it. And 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.”\textsuperscript{295} 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.\textsuperscript{296} Guilty pleas are thus no more than sterile administrative procedures, and plea bargaining is the mere mechanism that ensures that these procedures are carried out efficiently.\textsuperscript{297} 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 admissions, and there is no good reason to act in deference to empty principles that ignore the realities of punishment and serve no practical purpose other than shuttling the undeserving innocent into compelled unwelcome process or risk of trial penalties. At bottom, all that recommends prohibition of false pleas is visceral distaste. And that is not enough.

Conversely, there is much 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 (to only those so eager to

\textsuperscript{293} Bruce v. United States, 379 F.2d 113, 119 n.17 (D.C. Cir. 1967) (“We have no hesitation in saying that an attorney, an officer of the court, may not counsel or practice such a deliberate deception [as permitting the defendant] . . . state[] facts that show he is guilty . . . departing from truth if need be.”); United States v. Rogers, 289 F. Supp. 726 (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, 43 Mich. App. 270, 280-81, 204 N.W.2d 325, 330 (1972); supra note 222 and accompanying text. Even the Supreme Court has expressed a will to limit pleas to the factually guilty only. North Carolina v. Alford, 400 U.S. 25 (1970) (requiring factual basis before court can take 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.”); Corbitt v. New Jersey, 439 U.S. 212, 225 (1978).

\textsuperscript{294} Burger, supra note 292, at 15.

\textsuperscript{295} UVILLER, supra note 2, at 196; cf. supra sources at note 268.

\textsuperscript{296} See supra Parts I-V.

\textsuperscript{297} See Stephanos Bibas, Transparency and Participation in Criminal Procedure, 81 N.Y.U. L. REV. 911, 912-22 (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)
plead guilty that they are willing to swallow principle and utter false words); and presumably they promote judicial efficiency. Like all good legal fictions, false admissions are just another means of bending law to promote “function, form, and sometimes even fairness.”

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. Accordingly, some defense attorneys currently counsel their innocent clients to plead guilty—even when equivocal and no-contest pleas are unavailable. A few might even already accept the practice as a quasi-legal fiction. But most will not admit that sentiment in polite company. And some 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 de-

---

298 See supra notes 260-279 and accompanying text.


300 See supra Part III.

301 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. William H. Simon, The Ethics of Criminal Defense, 91 Mich. L. Rev. 1703, 1705 (1993); cf. Monroe H. Freedman, But Only if You Know, ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS 138 (Rodney J. Uphoff ed. 1995) (discussing degree of knowledge of guilt necessary to trigger defense attorney’s ethical obligation to not suborn perjury). But there are some circumstances 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 because compelling dismissal would require weeks of waiting. Similarly, I represented some defendants with alibi defenses that were ironclad. A few of these defendants, facing petty cases, preferred immediate disposition. See HEUMANN, supra note 11, at 73 (noting lawyer who hired psychiatrist to question felony defendant under truth serum; defendant passed but took plea to fifty-dollar fine); Alschuler, supra note 5, at 1296 (quoting defense attorney: “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.”).

302 See Alschuler, supra note 5, at 1306 (quoting defense attorney’s claim that admission of guilt is “a fiction, like Nevada domicile in a divorce action”); c.f. United States v. Rogers, 289 F. Supp. 726, 729 (D. Conn. 1968) (finding “utterly unreasonable” defense counsel’s advice that client should only plead guilty if he believes himself to be guilty); State v. Kaufman, 51 Ia. 578, 580 (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 would seem that Professor Alschuler and Judge Easterbrook fall squarely in this camp. 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 unquestionably 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 5, at 320.
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.”303 Likewise, Professor Alschuler interviewed several prosecutors and defense attorneys who categorically refused to permit or participate in plea bargaining or guilty pleas for the innocent.304 Some of these defense attorneys indicated that their offices had policies expressly proscribing the practice.305 And one senior public defender noted that in his office, lawyers would withdraw typically from cases if they believed innocent clients wished to plead guilty falsely.306 Additionally, judges often warn clients not to plead guilty unless they are guilty in fact.307

In such a climate, even those defense attorneys who would otherwise see fit to counsel false pleas may do so only with great professional discomfort—speaking in hushed tones for fear of disapproval, interference, or worse, discipline.308 Consequently, my proposal would have value even if most innocent de-

303 436 F.2d 303, 303 (D.C. Cir. 1971).
304 Alschuler, supra note 5, at 1280-89, 1296-1301; see also Glatt v. Johnson, 2001 WL 432355 (N.D. Tex. 2001) (noting favorably defense lawyer's practice of advising clients “not to plead guilty unless they are guilty”); Mitchell, supra note 162, at 320-21 (lauding public defender office where “almost no defendants who protested their innocence (and there were many), whether out on bail or not, pled guilty”); Mills, supra note 126, at 61-62 (quoting discussion between defense lawyer and detained client in which defense lawyer refused to let client plead unless he stopped privately insisting on innocence); 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.”); supra note 222 and accompanying text (citing several attorneys that insist that innocent should not plead guilty).
305 Alschuler, supra note 5, at 1280-89.
306 Id. at 1285-86.
308 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 to the prospect of rational-choice pleas. He loudly denounced the un-professionalism of any lawyer who 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. See generally Heumann 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
fendants 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 counter-intuitively) 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.309

The false plea would become just another sound legal tactic over which defense attorneys may entertain no professional qualm. 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.310

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.311 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 bargaining 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. 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.”312 Open questions remain, of course, such as the 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.”

309 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 297, at 912-22 (discussing how professional criminal-justice insiders operate out of view of lay outsiders).

310 See *infra* notes 311-314 and accompanying text.

311 See, e.g., sources at notes 292-293, 312.

312 *See ABA Standards, supra* note 222, at Standard 14-3.2 & cmt. (3d ed. 1999); *see also* *Amsterdam, supra* note 292, at 339. At present, courts do not always give these obligations their
appropriate degree of “reasonable persuasion.”\footnote{313}{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, defense counsel should not abandon persuasion unless and until the defendant understands the jeopardy of soldiering on. See &textit{Amsterdam}, supra note 292, 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 304, at 905.}

But it is probably enough to leave such questions to the constraints of generalized ethical directives against self-dealing.\footnote{314}{See, e.g., &textit{ABA Standards}, supra note 222, at Standard 14-3.2 cmt. (“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)).}

\section*{Conclusion}

Innocent defendants fall into two very loose categories for plea bargaining and guilty plea purposes: those for whom \textit{process costs} should matter (read, defendants in low-stakes cases, particularly recidivists), and those for whom \textit{process} should matter (read, 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 un-maximized sentences, rather than endure full process and risk considerable post-trial sanction. It is wholly secondary whether the lenient offers are normatively good or bad systematically. For the innocent accused, it is enough that they exist. Lenient offers create opportunities. A topmost 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. But the plea bargain is not the cause of this failure; the false arrest and the prosecutorial decision to make and carry out charges are. And, although the offer may seem

\footnote{313}{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, defense counsel should not abandon persuasion unless and until the defendant understands the jeopardy of soldiering on. See &textit{Amsterdam}, supra note 292, 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 304, at 905.}

\footnote{314}{See, e.g., &textit{ABA Standards}, supra note 222, at Standard 14-3.2 cmt. (“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)).}
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 less plea-bargaining pressures. If prosecutors were unable to exploit over-inclusive criminal statutes to overcharge defendants, then there would be far less concern over de facto trial penalties. Nevertheless, it does not translate from this objection that innocent defendants should have no right to plead guilty in serious felony cases. The innocent would be at great 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 risk, but have no access to the benefits. The innocent defendant 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 post-trial 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 plea is the innocent defendant’s voluntary choice and the manifest best option. When an innocent defendant wishes to minimize exposure either to horrific post-trial sentence or burdensome pretrial process that choice commands institutional respect.

There is no innocence problem—at least not with plea bargaining.

The University of Chicago Law School  
Public Law and Legal Theory Working Paper Series

20. Julie Roin, Taxation without Coordination (March 2002).
24. David A. Strauss, Must Like Cases Be Treated Alike? (May 2002).
28. Cass R. Sunstein and Adrian Vermeule, Interpretation and Institutions (July 2002).
34. Cass R. Sunstein, Conformity and Dissent (November 2002).
37. Adrian Vermeule, Mead in the Trenches (January 2003).
42. Emily Buss, The Speech Enhancing Effect of Internet Regulation (March 2003)
44. Elizabeth Garrett, Legislating Chevron (April 2003)
46. Mary Ann Case, Developing a Taste for Not Being Discriminated Against (May 2003)
47. Saul Levmore and Kyle Logue, Insuring against Terrorism—and Crime (June 2003)
49. Adrian Vermeule, The Judiciary Is a They, Not an It: Two Fallacies of Interpretive Theory (September 2003)
57. Cass R. Sunstein, Black on Brown (February 2004)
59. Bernard E. Harcourt, You Are Entering a Gay- and Lesbian-Free Zone: On the Radical Dissents of Justice Scalia and Other (Post-) Queers (February 2004)
60. Adrian Vermeule, Selection Effects in Constitutional Law (March 2004)
61. Derek Jinks and David Sloss, Is the President Bound by the Geneva Conventions? (July 2004)
64. Derek Jinks, Protective Parity and the Law of War (April 2004)
65. Derek Jinks, The Declining Significance of POW Status (April 2004)

67. Bernard E. Harcourt, On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars {A Call to Historians} (June 2004)
68. Jide Nzelibe, The Uniqueness of Foreign Affairs (July 2004)
69. Derek Jinks, Disaggregating “War” (July 2004)
70. Jill Elaine Hasday, Mitigation and the Americans with Disabilities Act (August 2004)
73. Adrian Vermeule, Constitutional Amendments and the Constitutional Common Law (September 2004)
74. Elizabeth Emens, The Sympathetic Discriminator: Mental Illness and the ADA (September 2004)
75. Adrian Vermeule, Three Strategies of Interpretation (October 2004)
78. Adam M. Samaha, Litigant Sensitivity in First Amendment Law (November 2004)
79. Lior Jacob Strahilevitz, A Social Networks Theory of Privacy (December 2004)
80. Cass R. Sunstein, Minimalism at War (December 2004)
83. Adrian Vermeule, Libertarian Panics (February 2005)
84. Eric A. Posner and Adrian Vermeule, Should Coercive Interrogation Be Legal? (March 2005)
85. Cass R. Sunstein and Adrian Vermeule, Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs (March 2005)
86. Adam B. Cox, Partisan Gerrymandering and Disaggregated Redistricting (April 2005)
89. Adam B. Cox, Partisan Fairness and Redistricting Politics (April 2005, *NYU L. Rev.* 70, #3)
93. Bernard E. Harcourt and Jens Ludwig, Broken Windows: New Evidence from New York City and a Five-City Social Experiment (May 2005)
96. Eugene Kontorovich, Disrespecting the “Opinions of Mankind” (June 2005)
97. Tim Wu, Intellectual Property, Innovation, and Decision Architectures (June 2005)
98. Lior Jacob Strahilevitz, Exclusionary Amenities in Residential Commons (July 2005)
100. Mary Anne Case, Pets or Meat (August 2005)
103. Adrian Vermeule, Absolute Voting Rules (August 2005)
104. Eric A. Posner and Adrian Vermeule, Emergencies and Democratic Failure (August 2005)
105. Adrian Vermeule, Reparations as Rough Justice (September 2005)
107. Tracey Meares and Kelsi Brown Corkran, When 2 or 3 Come Together (October 2005)
108. Adrian Vermeule, Political Constraints on Supreme Court Reform (October 2005)
109. Lior Jacob Strahilevitz, Information Asymmetries and the Rights to Exclude (November 2005)
110. Cass R. Sunstein, Fast, Frugal and (Sometimes) Wrong (November 2005)
111. Cass R. Sunstein, Justice Breyer’s Democratic Pragmatism (November 2005)
115. Elizabeth Garrett and Adrian Vermeule, Transparency in the Budget Process (January 2006)
117. Stephanos Bibas, Transparency and Participation in Criminal Procedure (February 2006)
118. Douglas G. Lichtman, Captive Audiences and the First Amendment (February 2006)
120. Jeff Leslie and Cass R. Sunstein, Animal Rights without Controversy (March 2006)
121. Adrian Vermeule, The Delegation Lottery (March 2006)
122. Adrian Vermeule, Self-Defeating Proposals: Ackerman on Emergency Powers (March 2006)
129. Jacob E. Gersen and Adrian Vermeule, Chevron as a Voting Rule (June 2006)
130. Jacob E. Gersen, Temporary Legislation (June 2006)
131. Adam B. Cox, Designing Redistricting Institutions (June 2006)
137. Douglas Lichtman, Irreparable Benefits (September 2006)
139. Eric A. Posner and Adrian Vermeule, The Credible Executive (September 2006)
144. Cass R. Sunstein, Second-Order Perfectionism (December 2006)
145. Wayne Hsiung and Cass R. Sunstein, Climate Change and Animals (January 2007)
146. Cass R. Sunstein, Deliberating Groups versus Prediction Markets (or Hayek’s Challenge to Habermas) (January 2007)
151. Cass R. Sunstein, If People Would Be Outraged by Their Rulings, Should Judges Care? (February 2007)
154. Eugene Kontorovich, Inefficient Customs in International Law (March 2007)
155. Bernard E. Harcourt, From the Asylum to the Prison: Rethinking the Incarceration Revolution. Part II: State Level Analysis (March 2007)
157. Cass R. Sunstein, Backlash’s Travels (March 2007)
158. Cass R. Sunstein, Due Process Traditionalism (March 2007)
159. Adam B. Cox and Thomas J. Miles, Judging the Voting Rights Act (March 2007)
161. Jacob E. Gersen, Overlapping and Underlapping Jurisdiction in Administrative Law (April 2007)
165. Josh Bowers, Punishing the Innocent (April 2007)