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## RESPONSE

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### THE UNUSUAL MAN IN THE USUAL PLACE

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JOSH BOWERS<sup>†</sup>

In response to Stephanos Bibas, Response, *Exacerbating Injustice*, 157 U. PA. L. REV. PENNUMBRA 53 (2008); George C. Thomas III, Response, *Helping Innocent Defendants in High-Stakes Cases*, 157 U. PA. L. REV. PENNUMBRA 58 (2008); Ronald F. Wright, Response, *Guilty Pleas and Submarkets*, 157 U. PA. L. REV. PENNUMBRA 68 (2008).

I wish to express my warm thanks to Professors Stephanos Bibas, George Thomas, and Ron Wright for their thoughtful responses. I am pleased that my article generated such a stimulating exchange with scholars who have done such fine work in the field and from whom I have learned much, not only about substantive and procedural criminal law, but also about the importance of academic generosity and accessibility.

In *Punishing the Innocent*,<sup>1</sup> I challenge the conventional perception that there is an innocence problem in plea bargaining. For the typical innocent defendant in the typical case (a recidivist facing petty charges), the best resolution is generally a quick plea in exchange for a light bargained-for sentence—an offer that is frequently available because prosecutors do not maximize sentence length in low-stakes

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<sup>†</sup> Associate Professor of Law, University of Virginia School of Law. Many thanks to the fine editors of the *University of Pennsylvania Law Review*, particularly to Stephen Carey and Jonathan Ellis. Thanks to Brandon Garrett and Darryl Brown for helpful comments. The title is a play on a famous early-twentieth-century quote by G.K. Chesterton: “And the horrible thing about all legal officials . . . is simply that they have got used to it. Strictly they do not see the prisoner in the dock; all they see is *the usual man in the usual place*.” G.K. CHESTERTON, *The Twelve Men*, in TREMENDOUS TRIFLES, 80, 85-86 (1909) (emphasis added).

<sup>1</sup> Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008).

cases. Accordingly, once an innocent defendant is arrested and charged wrongfully, the costs of proceeding to an imperfect trial often swamp the costs of pleading to lenient bargains. If there are innocence problems in our criminal justice system, they are problems traceable not to plea bargaining, but to biases that infect arrest, charge, and trial decisions. Because plea bargaining may be in the innocent defendant's manifest best interests, the justice system should ensure that the innocent accused has equal access to bargaining and guilty pleas. Accordingly, I propose systemic reconception of false pleas as ethically accepted legal fictions.

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Of the three responders to my argument and proposal, Professor Bibas takes strongest exception. And there is only so much I can say in reply. Professor Bibas's deontic complaint about the "moral horror[s]" of guilty pleas for innocent defendants<sup>2</sup> resonates only so loudly with me compared to the utilitarian first choices of the inculpable accused. To some degree, that is a matter of personal morality and worldview. I can no more convince Bibas that he is unduly sacrificing actual liberty interests to abstract normative principles than he can convince me that allowing innocent defendants to plead guilty falsely is "just plain wrong, and making it easier is simply abetting the wrong."<sup>3</sup> I keep coming back to the question, "just plain wrong" as compared to what? No doubt, it would be a moral horror to permit innocent defendants to plead guilty in a well-functioning and transparent criminal justice system. But Bibas knows as well as anyone else that ours is not such a system.<sup>4</sup>

Bibas recoils from a regime in which innocent defendants plead guilty with our tacit permission. But to where does he retreat? To a not-too-different regime in which innocent defendants still plead guilty with a systemic wink and nod. In a world without *Alford* pleas<sup>5</sup> (a world that both Bibas and I prefer, albeit for different reasons), most equivocating defendants would continue to take pleas. They would simply admit guilt before doing so. And this is a result that Bibas wel-

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<sup>2</sup> Stephanos Bibas, Response, *Exacerbating Injustice*, 157 U. PA. L. REV. PENNUMBRA 53, 56 (2008), <http://www.pennumbra.com/responses/11-2008/Bibas.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> See Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006) (discussing the role of the criminal justice system's lack of transparency in the creation of a "great gulf" dividing insiders and outsiders within it).

<sup>5</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970).

comes. Bibas has no compunction against the actually guilty pleading guilty. Nor is he terrifically concerned that—in the absence of *Alford* pleas—equivocating defendants would stop equivocating and would own up to crimes, because he concludes (probably correctly) that most of these equivocating defendants are guilty anyway.<sup>6</sup> Indeed, Bibas hopes to enlist defense counsel in breaking down the psychic or strategic denial mechanisms of equivocating guilty defendants.<sup>7</sup> But, of course, Bibas can only be right in the main: not all equivocating defendants are guilty defendants.<sup>8</sup> As Professor Alschuler previously noted in his response to Bibas’s excellent critique of the *Alford* doctrine, Bibas ends up “play[ing] the average.”<sup>9</sup> That is no small problem. Rather, it is what helped us into this mess in the first instance: we have innocent defendants in our criminal justice system (however few) due largely to too many institutional actors playing averages too often. Police and prosecutors play averages by arresting and charging the usual recidivist suspects, and judges and juries play averages by softening burdens of proof to convict people who probably did “something wrong.”<sup>10</sup>

Bibas would insist that he wants actually innocent defendants to go to trial and win acquittal. Ideally, who doesn’t? But he offers no effective way (nor could he) to separate the actually innocent defendant from the stubborn or strategic guilty defendant who is merely unable or unwilling to fess up. Ultimately, Bibas cannot escape the background information asymmetry that led to the erroneous arrest

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<sup>6</sup> See Bibas, *supra* note 2, at 55 (“[M]ost defendants who balk at admitting guilt are not innocent, but guilty criminals in denial.”); see also Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1393-1406 (2003) [hereinafter Bibas, *Harmonizing*] (discussing the complicity of *Alford* pleas in allowing guilty defendants to plead guilty without fully accepting their guilt).

<sup>7</sup> See Bibas, *supra* note 2, at 55 (indicating that defense lawyers should not “let denying defendants remain in denial” but instead should “get[] to the bottom of guilt or innocence”); Bibas, *Harmonizing*, *supra* note 6, at 1405 (calling on defense attorneys to “penetrat[e] clients’ denials” and to “provide moral as well as legal counsel, advising clients that it is right to admit their crime, apologize to victims, and move forward”).

<sup>8</sup> See Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1422 (2003) (“Not every defendant who declares his innocence . . . is delusional or deceptive.”).

<sup>9</sup> See *id.* at 1417 (“Despite his Kantian talk about justice in the individual case, Bibas sometimes seems to play for the average and to consider only ‘typical’ defendants.”).

<sup>10</sup> Bowers, *supra* note 1, at 1171.

and charge in the first instance. Often (though not always<sup>11</sup>), the defense attorney cannot know any better than a police officer, prosecutor, or judge whether a particular equivocating defendant is one type or the other—factually innocent or guilty but conflicted.<sup>12</sup> In the end, the actually innocent defendant who still wishes to plead can, and still will, plead, provided that he has the intellect to determine what must be done and the stomach to go it alone. Thus, when Bibas talks of the “moral horrors” of plea bargains for the innocent, what he means is only the moral horror of institutional complicity in the exercise.<sup>13</sup> Bibas is content to have defense attorneys lean hard on equivocating defendants who, in the main, are probably guilty but every once in a while are sure to be innocent.

This does not mean, however, that Bibas and I land ultimately in the same place. Under my proposal, the actually innocent defendant would remain able to have a forthright conversation with defense counsel without feeling either that her lawyer presumes guilt or that continued protestations of innocence to the lawyer might foreclose the possibility of plea. And the lawyer could offer clear-eyed advice to her client without running afoul of misguided aspirational ethical standards. These would be real benefits. At least, it would be no virtue to incentivize innocent defendants to lie to their attorneys, thereby undermining historically strained relationships.<sup>14</sup>

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<sup>11</sup> *Id.* at 1174 n.288 (explaining that in some circumstances—like trespass—defense counsel may know “to a substantial certainty” that a client is innocent).

<sup>12</sup> See Alschuler, *supra* note 8, at 1422 (“To carry out her responsibilities in the world of Bibas, a [defense] lawyer would need to determine whether her client’s denials were true. She could assume the role of a therapist only after taking the role of a judge.”); Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 *YALE L.J.* 2011, 2012 (“[D]efense lawyers . . . must assume innocence claims by their clients are false unless proved, because such claims usually are false—criminal defendants . . . have essentially nothing to lose by making false claims.”).

<sup>13</sup> See Bibas, *supra* note 2, at 57 (“[T]here is . . . deontological moral difference between accidentally or even negligently convicting an innocent defendant versus intentionally or knowingly making it easier to convict him.”). Bibas makes a similar point in his *Alford* article: “[S]ociety cannot knowingly facilitate the punishment of those who do not deserve it, even if they agree to it.” Bibas, *Harmonizing*, *supra* note 6, at 1384. But, of course, society already is facilitating undeserved punishment by arresting and charging the innocent defendant in the first instance.

<sup>14</sup> See Alschuler, *supra* note 8, at 1423 (“Contrary to Bibas’s suggestion, many defense attorneys do not ‘exacerbate the problem by failing to challenge their clients’ denials’ enough. They commonly exert pressure that strains the attorney-client relationship and jeopardizes their clients’ trust.” (quoting Bibas, *Harmonizing*, *supra* note 6, at 1405)).

Bibas, however, does not share my concern about upsetting these already fragile attorney-client interactions. Instead, Bibas sees an agency advantage to preserving “moral . . . strictures on convicting the innocent.”<sup>15</sup> Specifically, such prohibitions “stiffen [defense lawyers’] spines and steel them to do combat.”<sup>16</sup> I will grant Bibas that this may be true in a given case, but in most cases it comes down to what is meant by “combat.” And, on this score, I am certain that Bibas and I do not share a common definition. To me, combat means more than trial battle. My horror at seeing an innocent defendant unjustly punished by a costly process might steel me, instead, to push harder for a better deal to minimize the pain of “deplorable” pretrial confinement<sup>17</sup> and to eliminate the risk of “disastrous” Type I trial error.<sup>18</sup>

Bibas worries that my proposal would permit the guilty defendant to view her guilty plea as no more than an empty legal fiction.<sup>19</sup> I worry about the contrary: that, under current rules, the innocent defendant, who finds herself in a tight spot, is made to think that, by taking the plea, she has sinned—that she has lied or, worse still, commit-

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<sup>15</sup> Bibas, *supra* note 2, at 56.

<sup>16</sup> *Id.*

<sup>17</sup> See *Barker v. Wingo*, 407 U.S. 514, 520 (1972) (noting the “overcrowding and generally deplorable state” of jails and the “destructive effect on human character” of pretrial confinement).

<sup>18</sup> See ANTHONY G. AMSTERDAM, 1 TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 201, at 339 (5th ed. 1988) (“[O]ften counsel can protect the client from disaster only by using a considerable amount of persuasion to convince the client that a plea . . . is, in fact, in his or her best interest.”); Scott & Stuntz, *supra* note 12, at 2013 (“[Innocent defendants are better off at trial] only if going to trial means *winning* at trial. For some it does. For others it means not just loss but disaster, given the substantially longer sentence that awaits a defendant who gambles on the trial process and loses.”); *cf.* *Tremblay v. Overholser*, 199 F. Supp. 569, 570 (D.D.C. 1961) (holding that courts cannot “force any defense on a defendant in a criminal case,” especially where that defense, even if successful, might “end in disaster,” as in the case of a forced insanity defense). For these reasons, I do not cede the moral high ground to Bibas. I may take a consequentialist approach, but there is ethical value in considering unjust ends. See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 320 (1983) (“[G]iven the regrettable fact that courts make mistakes, no principle of justice calls for executing that unlucky [innocent defendant who is forced to an unsuccessful trial] rather than allowing [all innocent defendants] to plead and receive low sentences.”); Scott & Stuntz, *supra* note 12, at 2013 (“[A]ny system that pushes innocent defendants to trial will thereby minimize the number of innocents who are convicted. But it will do so only at the cost of *maximizing* the amount of punishment each of those unfortunates receives. This result stands every known theory of distributional justice on its head. . . . [U]njust losses[] are better spread than concentrated . . .”).

<sup>19</sup> Bibas, *supra* note 2, at 55-56.

ted perjury.<sup>20</sup> It would be much better if the lawyer could counsel her probably innocent client that she is merely availing herself of an accepted (though unfortunate) legal procedure—a fiction deemed necessary to minimize the injustices of an imperfect system. In this way, my proposal actually would promote an odd, but very real, kind of honesty in lies—an honesty that innocent defendants do, and often should, falsely admit guilt in order to secure the benefits of defendant-favorable pleas, as many of us would readily do if put in their shoes.

Finally, I question Bibas's complaint that my proposal perpetuates guilty defendants' denial and hinders rehabilitation.<sup>21</sup> I will concede that on this point Bibas has the support of the Supreme Court, which has similarly bought into the belief that the defendant who pleads guilty "enter[s] the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary."<sup>22</sup> But I remain unconvinced, and I know of no data that support such speculation. When it comes to the obdurate guilty defendant, the guilty plea is no cleansing moment of "catharsis."<sup>23</sup> The equivocating guilty defendant does not plead because he has come to see the light. He pleads because he does not like the alternatives. I have had innumerable clients, many of whom were almost certainly guilty, who saw their pleas not as first steps toward reform, but as bitter, but necessary, pills.<sup>24</sup>

There is one point on which Bibas and I agree. Bibas worries about perceptions of systemic legitimacy,<sup>25</sup> and I share his concern. Bibas is right that protecting even an illusion of a procedurally rigor-

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<sup>20</sup> Cf. Alschuler, *supra* note 8, at 1422 ("Pressing innocent defendants to confess would generate only a sense of victimization and of the cruelty and hypocrisy of our legal system.")

<sup>21</sup> Bibas, *supra* note 2, at 55.

<sup>22</sup> *Brady v. United States*, 397 U.S. 742, 753 (1970); *see also Santobello v. New York*, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It [among other things] . . . enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.")

<sup>23</sup> Bibas, *Harmonizing*, *supra* note 6, at 1400.

<sup>24</sup> In any event, my proposal does not exacerbate the danger that guilty defendants will "back away from their pleas" and deny victims "closure." Bibas, *supra* note 2, at 56. Even without reconceptualizing guilty pleas as legal fictions, defendants can privately renounce their guilty pleas as they see fit at any point postsentence. *See* Alschuler, *supra* note 8, at 1419 ("[D]efendants [can] leave the courtroom to announce their innocence to the world.")

<sup>25</sup> Bibas, *supra* note 2, at 54-55.

ous and truth-seeking justice system is worthwhile.<sup>26</sup> Society relies on saving lies of high principle to sustain sufficient respect for its institutions.<sup>27</sup> But, on this score, my proposal is a significant improvement over the status quo, and I would think that Bibas would agree. Specifically, current quasi-available avenues for rational-choice pleas—like equivocal and no-contest pleas—leave no space for acoustic separation: they announce in unmistakable terms the problematic message that the criminal justice system is not always (or even principally) concerned with parsing the innocent from the guilty.<sup>28</sup> Recasting guilty

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<sup>26</sup> See Bibas, *Harmonizing*, *supra* note 6, at 1386-88 (“[S]ociety has a strong interest in ensuring that criminal convictions are both just and *perceived* as just.” (emphasis added)); see also *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.”); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1334 (1997) (“Even if innocents are convicted, the criminal justice system cannot formally acknowledge this because it will undermine society’s faith in the system.”); *id.* at 1342-58 (examining the frequency of false convictions and presenting false-conviction case studies).

<sup>27</sup> See, e.g., Bibas, *Harmonizing*, *supra* note 6, at 1364 n.15 (“I recognize that many guilty-plea confessions are insincere or induced by extrinsic inducements or pressures, such as plea bargains. . . . [H]owever, even a true but insincere confession is better than no confession at all. It . . . teaches, heals, and vindicates the victim and society’s moral norms.”). Psychologists, musicians, and writers have long touted self-deception and denial as necessary coping mechanisms to avoid paralytic collapse, both at individual and systematic levels. See, e.g., EUGENE O’NEILL, *THE ICEMAN COMETH* 9-10 (1st ed. 1946) (“To hell with the truth! As the history of the world proves, the truth has no bearing on anything. It’s irrelevant and immaterial, as the lawyers say. The lie of a pipe dream is what gives life to the whole misbegotten mad lot of us . . . .”); Richard S. Lazarus, *The Costs and Benefits of Denial*, in *THE DENIAL OF STRESS* 1, 2, 9 (Shlomo Breznitz ed., 1983) (arguing that, because “[w]e have collective illusions, for example, that our society is free, moral, just; that successful people work harder, are smarter . . . and so on,” it follows that “mental health *requires* some self-deception.”); THE ROLLING STONES, *Just My Imagination (Running Away with Me)*, on *SOME GIRLS* (Virgin Records 1994) (1978) (“Her love is ecstasy . . . , but in reality, she doesn’t even know me.”).

<sup>28</sup> See Bibas, *Harmonizing*, *supra* note 6, at 1403 n.215 (“Though many plea bargains are less than honest in describing charges and less than complete in vindicating justice, at least they do not proclaim this dishonesty or inconsistency openly. *Alford* and *nolo contendere* pleas, in contrast, are internally and facially contradictory.”); see also *United States v. Bednarski*, 445 F.2d 364, 366 (1st Cir. 1971) (noting the negative societal message of *Alford* pleas); Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 SMU L. REV. 567, 573 (1996) (“An equivocal plea of guilty invites suspicion about the processes of justice. And that suspicion, inevitably, does serious damage to the symbolic, deterrent, and correctional functions of criminal law.”). Indeed, Alschuler favored *Alford* pleas precisely because they called public attention to all that is wrong with our system of criminal justice: “For a citizen whose eyes are open, [*Alford* pleas] should make the coercion and injustice [of the criminal justice system] too obvious to deny.” Alschuler, *supra* note 8, at 1418.

pleas as legal fictions might, therefore, go some of the way toward reinforcing public confidence in criminal justice.

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An overarching purpose of this project (and of much of my scholarship to date) has been to spotlight categories of crimes and defendants that we do not commonly consider when crafting procedural rules, public policy, or academic debate. Specifically, I have sought to draw attention to recidivist offenders in the kind of petty cases that comprise the bulk of criminal court dockets but that have attracted too little outside scrutiny.<sup>29</sup> In this vein, I found the thrust of Professor Thomas's principal criticism to be a bit puzzling. Specifically, Thomas introduces the story of Ray Krone, a man who was exonerated after ten years on death row for a murder he did not commit.<sup>30</sup> Thomas argues that "the Ray Krones of the world are the defendants we should worry about."<sup>31</sup>

But, of course, the Ray Krones of the world are precisely the defendants who (at least of late) have attracted the whole of our collective concern over wrongful convictions. A veritable cottage industry has grown up around the innocence movement, producing commissions, articles, books, documentaries, websites, law-school clinics, and public interest organizations—all devoted to the exoneration of innocent convicts in high-stakes felony cases.<sup>32</sup> In my article, I did not want to retread that well-worn path. I wanted to explore a somewhat separate and largely ignored innocence phenomenon.

The bulk of the rest of Thomas's critique focuses on the road not taken. Specifically, Thomas remarks, "I agree with [Bowers] that,

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<sup>29</sup> Bowers, *supra* note 1, at 1124-32; see also Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 99-109 (2007) (analyzing prosecutorial charging and dismissal data in the New York City criminal justice system).

<sup>30</sup> George C. Thomas III, Response, *Helping Innocent Defendants in High-Stakes Cases*, 157 U. PA. L. REV. PENNUMBRA 58, 61 (2008), <http://www.pennumbra.com/responses/11-2008/Thomas.pdf>.

<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (examining cases of exoneration through postconviction DNA evidence and finding that the criminal justice system did not provide for adequate appellate review of factual evidence); The Innocence Project, <http://www.innocenceproject.org/Content/520.php> (last visited Apr. 15, 2009) (collecting documentaries and news reports about exonerations); Innocent Projects in the US, <http://www.truthinjustice.org/ips.htm> (last visited Apr. 15, 2009) (providing information about innocence projects, clinics, and commissions).

given the current system, his solution is the best we can do. But why accept the current system?”<sup>33</sup> Thereafter, Thomas proceeds to map out a bold proposal to insert a pretrial screening procedure that would rely on a “special class of judges . . .—call them ‘screening magistrates’—whose job it is to screen out defendants who are probably not guilty.”<sup>34</sup>

Inevitably, whenever an observer offers prescriptions for legal change, she must make a judgment call. Modest proposals run risks of doing little more than moving proverbial deck chairs, but seismic top-down solutions engender possible political and institutional resistance; consequent adaptation to the preexisting practice norms; and, worse still, fresh, unanticipated, and bigger (even constitutional) problems.<sup>35</sup> I am glad that there are scholars, like Thomas, who are willing to propose bold moves. My own preference—at least in this context—is for incremental reform. Radical change to our plea bargaining regime is undoubtedly needed, but it is not forthcoming. In the meantime, practical first steps can be taken within the existing paradigm, and that is what I propose.

In any event, with respect to Thomas’s bold proposal, I worry not just about the known unknowns and the unknown unknowns—I also foresee concrete problems. In the first instance, I am not certain how these “screening magistrates” differ significantly from judges and magistrates at preliminary hearings, who already ostensibly screen charges to determine whether there is probable cause to believe that the de-

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<sup>33</sup> Thomas, *supra* note 30, at 61.

<sup>34</sup> *Id.* at 62.

<sup>35</sup> See MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL, at xiii, 191-92, 196 (1983) (noting the resistance to change among legal system “insiders” and the lack of institutional knowledge required for effective change among system “outsiders” such as legislators); see also Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839 (1997) (explaining the difficulty of combining civil law and common law factfinding approaches because of other differences between the two systems); John Pfaff, *Reform School: Five Myths About Prison Growth Dispelled.*, SLATE, Feb. 19, 2009, <http://www.slate.com/id/2211585/pagenum/all> (“Any reform agenda that does not acknowledge the ingrained nature of our punitive impulses will surely fail.”). For example, Thomas posits that his “screening magistrates” might have the power to reach charge bargains with defendants, see Thomas, *supra* note 30, at 64—a move that, to my thinking, would interfere with prosecutorial charging discretion and thereby create constitutional separation-of-powers problems. Cf. *United States v. Ammidown*, 497 F.2d 615, 620, 622 (D.C. Cir. 1972) (holding that “the court does not have primary responsibility” over decisions to dismiss charges for purpose of plea, and therefore that “trial judges are not free to withhold approval of guilty pleas . . . merely because their conception of the public interest differs from that of the prosecuting attorney”).

defendant has committed the crime. If Thomas's answer is that the screening magistrate tests proof of guilt immediately before trial and therefore at a later stage in the process—a stage when the evidence is better developed—then I wonder how frequently the proposal will be put into practice. The overwhelming majority of even felony cases culminate in guilty pleas, typically after some kind of plea bargain.<sup>36</sup> Guilty pleas tend to happen early,<sup>37</sup> and hence late-stage procedural protections are woefully underused. To the extent that such procedural protections do much at all, they often function principally to provide a substantive transfer of wealth in the form of cheaper plea offers to defendants who threaten to make prosecutors engage in these new, resource-intensive procedures.<sup>38</sup> Put concretely, although Thomas surely does not want to engender *more* false guilty pleas, his proposal may have that principal effect: “[D]efense rights that raise the expense of criminal prosecution[] may significantly improve the criminal trial process, but [they] may also lead to a system in which fewer defendants actually use that process.”<sup>39</sup>

Finally, I lack confidence that “screening magistrates” would reliably acquit the few questionable cases that make it to this screening phase. Ultimately, magistrates would not know whether defendants were actually innocent—magistrates would simply harbor doubts about defendants' guilt.<sup>40</sup> Even doubtful magistrates might resist granting potential windfalls to possibly guilty defendants. Instead,

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<sup>36</sup> See Bowers, *supra* note 1, at 1155 & n.195 (citing the DOJ's finding of a plea rate of 95% for state court felony convictions in 2002).

<sup>37</sup> See *id.* at 1133 & n.69 (noting that, in New York, “53% of felony defendants who pled guilty did so within three months of arrangements and 89% within a year,” whereas only 10% of felony cases began trial within three months of arraignments).

<sup>38</sup> See RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 125 (2d ed. 2005) (“[T]he more costly trials are to the state, the more the state may be willing to pay, in the form of reduced charges or sentences, in order to get the defendant to plead guilty.”).

<sup>39</sup> *Id.* Plea bargaining has something of a hydraulic quality; it exhibits a remarkable resistance to change. Indeed, a California study showed that a statutory ban on plea bargaining in serious felony cases had little effect on bargaining and guilty plea rates; instead, the parties circumvented the proscription by striking pleas earlier in the process—during stages to which the ban did not apply. MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION 361 (3d ed. 2007) (citing CANDACE MCCOY, POLITICS AND PLEA BARGAINING: VICTIMS' RIGHTS IN CALIFORNIA (1993)). Anecdotally, I observed the same phenomenon in my practice as a public defender in Bronx County, New York: parties would evade statutory limitations on the size of postindictment pleas, see N.Y. CRIM. PROC. LAW § 220.10 (McKinney Supp. 2009), by consummating plea agreements pre-indictment.

<sup>40</sup> Cf. Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1970 (1992) (“Innocent persons are accused not because prosecutors are wicked but because these innocents *appear* to be guilty.”).

they would typically only press prosecutors to offer more favorable pleas.<sup>41</sup> Hence, Thomas's proposed screen might succeed in providing a downward pressure on plea prices, but it would not so readily serve as a mechanism for outright dismissals.

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Professor Wright applauds my efforts to examine the underanalyzed defendant submarket of recidivists facing petty charges, but he faults me for not slicing finely enough.<sup>42</sup> Or put differently, Wright's claim is that I have gone too far: I have shifted from the conventional, almost-exclusive felony focus to an almost-exclusive petty-crime focus. On Wright's reading, I have taken the recidivist-misdemeanant defendant-type to comprise practically the whole innocent-defendant market.<sup>43</sup> I did not intend to go so far. Indeed, at points I expand my focus beyond this defendant type. For example, I also examine when and whether it might be advisable for a clean-record defendant or a defendant facing serious charges to plead guilty falsely.<sup>44</sup> And I conclude that even defendants from these other submarkets may rationally elect to plead guilty in the face of high process costs<sup>45</sup> or potential trial penalties.<sup>46</sup>

Nevertheless, I take Wright's larger point: he appropriately cautions against blurring lines between separate submarkets and concludes that where possible we should favor "targeted" to "global" solu-

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<sup>41</sup> Indeed, magistrates would not even need to pressure prosecutors to lower plea prices because Thomas would make the screening magistrates "plea regulators" with the power to bargain directly with defendants. See Thomas, *supra* note 30, at 64. Such judicial involvement in plea bargaining—especially in the immediate run-up to trial—might raise a further problem: the specter of coercive and therefore constitutionally involuntary pleas. See, e.g., State v. Bouie, 817 So. 2d 48, 55-56 (La. 2002) (holding that the judge's warning to defendant on the date of trial that conviction was "all but a foregone conclusion" constituted sufficient coercion to render the plea involuntary).

<sup>42</sup> See Ronald F. Wright, Response, *Guilty Pleas and Submarkets*, 157 U. PA. L. REV. PENNUMBRA 68, 69 (2008), <http://www.pennumbra.com/responses/11-2008/Wright.pdf> ("We would do better, I believe, to evaluate and regulate the submarkets of criminal justice separately.").

<sup>43</sup> See *id.* ("Why must we treat the recidivist in a low-stakes case as 'the' defendant? And why should we build a single legal structure to respond to 'the' highest priority of this defendant?")

<sup>44</sup> Bowers, *supra* note 1, at 1137-39, 1153-58.

<sup>45</sup> *Id.* at 1137-38.

<sup>46</sup> *Id.* at 1155-58.

tions.<sup>47</sup> In fact, the admonition reminds me of a separate proposal that I failed to pursue: adoption of something akin to the European system of penal orders. Penal orders permit police to issue citations to misdemeanor arrestees, who are thereafter released directly.<sup>48</sup> Defendants can summarily accept penal orders and accept nonjail (and perhaps noncriminal) sanctions, without having to make even a single court appearance.<sup>49</sup> Or they can object to the penal order, receive court appearance dates, and engage in full process.<sup>50</sup> In essence, penal orders are no different than American traffic citations, except that they apply to petty criminal charges.<sup>51</sup> Several scholars have persuasively argued that penal orders or similar systems may be an appropriate partial solution to the problem of prohibitively high process costs for certain defendant submarkets.<sup>52</sup>

If nothing else, I hope this rough-and-ready endorsement of penal orders underscores an important point: no part of my proposal to reconceptualize false guilty pleas as permissible legal fictions forecloses supplemental reforms intended to address the distinct concerns of other defendant submarkets. For example, Wright correctly highlights that a “central concern” for the large group of defendants who have no prior convictions “might be adequate counsel and complete information about the consequences of minor convictions.”<sup>53</sup> I agree wholeheartedly, and I support proposals to address these specific concerns. For example, a defendant challenging her guilty plea for ineffective assistance of counsel “must show that there is a reasonable probability that, but for counsel’s errors, *he would not have pleaded guilty*

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<sup>47</sup> Wright, *supra* note 42, at 73.

<sup>48</sup> See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 296-97 (1979) (describing the penal-order process).

<sup>49</sup> See John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 213-18 (1979) (describing German penal orders—permitted for all nonjail misdemeanor cases—which take the form of a draft judgment of the lowest criminal court).

<sup>50</sup> See *id.* at 213-14.

<sup>51</sup> See *id.* at 218.

<sup>52</sup> See, e.g., FEELEY, *supra* note 48, at 296-97 (advocating the adoption of a penal-order system coupled with a recategorization of certain misdemeanors as “violations”); Warren Davis, *Should Georgia Change Its Misdemeanor Arrest Laws to Authorize Issuing More Field Citations? Can an Alternative Arrest Process Help Alleviate Georgia’s Jail Overcrowding and Reduce the Time Arresting Officers Spend Processing Nontraffic Misdemeanor Offenses?*, 22 GA. ST. U. L. REV. 313, 358 (2005) (recommending that the Georgia legislature “authorize the discretionary use of field citations for more types of misdemeanors”); cf. MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCE OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 167 (1978) (suggesting the use of arbitration, rather than formal trials, for certain minor crimes).

<sup>53</sup> Wright, *supra* note 42, at 70.

and would have insisted on going to trial.”<sup>54</sup> This prejudice standard is almost impossible to satisfy in a criminal justice system where almost all cases result in guilty pleas. Typically, in the absence of counsel’s incompetent mistakes, defendants would not go to trial; they would merely strike *better* pleas—a particular type of prejudice that the Supreme Court does not recognize, but should. Likewise, defense counsel and courts are not constitutionally required to make defendants aware of collateral consequences of pleas.<sup>55</sup> This rule is, to my thinking, misguided. I welcome a more robust vision of what constitutes an intelligent plea.

Notably, however, these potential reforms stand separate and apart from the sole (but nonexclusive) proposal that I offer and explore. In short, I have no objection to adopting additional sensible reforms—targeted or otherwise. However, there is a limit. In some circumstances, targeted solutions may create unworkable rules or arbitrary results across cases. As Wright concedes, “It is possible to carry this insight about local conditions too far.”<sup>56</sup> And I think Wright does go too far when he advocates only piecemeal adoption of my proposal to reconceptualize false pleas as legal fictions. As Wright puts it, “In some . . . submarkets, the public could legitimately restrict the bargains that the parties might reach . . . .”<sup>57</sup> But my proposal builds off of a single animating premise: that innocent defendants should have the same access to advantageous pleas as those who are actually guilty. I cannot discern how to craft a *targeted* pleading standard that adequately advances this principle. Wright suggests the possibility of some kind of case-by-case counterbalancing of society’s interest in accurate outcomes against an innocent defendant’s interest in equal access to pleas.<sup>58</sup> But how and where does Wright draw this line? Imagine, say, that we were to adopt a bright-line rule barring only clean-record, recidivist defendants from pleading guilty falsely (on the

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<sup>54</sup> Hill v. Lockhart, 474 U.S. 52, 59 (1985) (emphasis added).

<sup>55</sup> See, e.g., Hill v. Lockhart, 731 F.2d 568, 570 (8th Cir. 1984) (“The details of parole eligibility are considered collateral rather than direct consequences of a plea, of which a defendant need not be informed before pleading guilty.”), *aff’d*, 474 U.S. 52 (1985); People v. Ford, 657 N.E.2d 265, 269 (N.Y. 1995) (holding that the defendant need not be informed of the possibility of deportation as a result of his plea). *But cf.* State v. Ross, 916 P.2d 405 (Wash. 1996) (en banc) (holding that a defendant need be informed only of direct consequences of a plea, but finding “community placement” in a halfway house to be one such direct consequence).

<sup>56</sup> Wright, *supra* note 42, at 73.

<sup>57</sup> *Id.* at 69.

<sup>58</sup> *Id.* at 71.

premise that these defendants may not adequately appreciate the corollary consequences of their newly sullied records). The rule would lead to unjustifiable absurdities in individual cases. For example, consider two innocent defendants who were both offered pleas to time served in practically identical cases where the process costs were similarly high and the potential postconviction sentences were similarly long. Defense counsel could assist the guilty plea of *only* the recidivist defendant. It would be better for the innocent defendant, in such a world, to have a prior misdemeanor conviction and more options. The least culpable defendant would be left in the tightest bind.

When it comes to voluntary and intelligent rational-choice pleas, we must opt for rules that either permit such pleas or forbid them—categorically. Unreservedly, I favor leaving the decision to the innocent defendant (assisted, of course, by competent counsel). The interests of society in accurate adjudication of guilt—which may or may not happen at trial<sup>59</sup>—is no match for an innocent defendant’s interest in unconstrained choices concerning matters affecting her own liberty.

#### CONCLUSION

Particularly in the lower criminal courts, criminal justice is an overly professional and insider-dominated affair—much closer to Herbert Packer’s crime-control model than to our due process ideals.<sup>60</sup> Cases are commenced and adjudicated in routinized fashion. Executive determinations of guilt at the points of arrest and charge initiate a chain reaction of highly stylized and hollow rituals—a kind of kabuki theater—that serve principally to reify decisions made earlier in the process while pretending to pay deference to higher principles that hold no genuine sway.<sup>61</sup> Defendants are shuffled through the process. They listen as attorneys talk to judges using incomprehensible jargon peppered with inscrutable acronyms and code-section citations. If defendants are lucky, they are left at liberty and given slips of paper with dates to appear and reappear. At adjournments,

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<sup>59</sup> See Easterbrook, *supra* note 40, at 1970-72 (arguing that “[w]hat disrupts . . . separation of the guilty from the innocent is not a flaw in the bargaining process but a flaw at trial,” and positing that negotiation may be superior to trial in distinguishing guilt from innocence).

<sup>60</sup> See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* ch. 8 (1968) (defining and elaborating the crime-control and due process models of the criminal justice system).

<sup>61</sup> See FEELEY, *supra* note 48, at 293 (describing criminal court appearances as “ritualistic terminations”).

they sometimes wait all day for minutes-long appearances where substantive litigation may or may not occur. If defendants are unlucky, they remain incarcerated until disposition. In the interim, they are led to and from jail and court in shackles.

The plea bargain is the typical last act of the courthouse drama. Judges engage defendants in monotone and sometimes mumbled plea colloquies. Defendants bark “yes” and “no,” as required, and are instructed to consult with their lawyers should they forget what line goes where. If the defendant does not carry out her assigned role in the performance, she is deemed uncooperative. Thereafter, she is guaranteed to suffer substantial process costs in the long lead-up to an imperfect trial that likely culminates in an atypically high conviction sentence.

Let there be no mistake: our process is flawed. Plenty of space exists for much-needed reforms to criminal justice, generally, and plea bargaining, specifically. Within the walls of a typical urban criminal court, an observer is certain to find no shortage of moral horrors. But the early and cheap exit of innocent defendants from such a system is not one of them.

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