

# Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas

Albert W. Alschuler

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

## Recommended Citation

Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 Cornell L. Rev. 1412 (2003)  
Available at: <http://scholarship.law.cornell.edu/clr/vol88/iss5/4>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# STRAINING AT GNATS AND SWALLOWING CAMELS: THE SELECTIVE MORALITY OF PROFESSOR BIBAS

*Albert W. Alschuler*†

## INTRODUCTION

*Alford* pleas are awful. There could hardly be a clearer violation of due process than sending someone to prison who has neither been found guilty nor admitted his guilt. If anything short of torture can shock your conscience, *Alford* pleas should. A criminal justice system that could make accepting these pleas a lesser evil than rejecting them would have to be atrocious, and ours is. Stephanos Bibas's analysis of *Alford* pleas does not look our criminal justice system squarely in the face. His denunciation of *Alford* and *nolo contendere* pleas sounds only one horn of a dilemma.

## I

### AN UNHAPPY CHOICE: NONSENSE PLEAS OR COERCED CONFESSIONS

Although Bibas notes that ninety-four percent of the felony convictions in both state and federal courts result from guilty pleas rather than trials,<sup>1</sup> he barely acknowledges the pressures behind this figure. Prosecutors have many reasons for offering concessions to defendants who plead guilty,<sup>2</sup> but the two they most commonly avow are conserving public resources and eliminating the risk of defeat at trial. Prosecutors routinely engage in both "costs bargaining" and "odds bargaining."<sup>3</sup>

A prosecutor who engages in odds bargaining may estimate a defendant's chance of acquittal at fifty percent and the probable sen-

---

† Julius Kreeger Professor of Law and Criminology, University of Chicago Law School. I am grateful to Stephanos Bibas for inviting me to write this commentary. He knew from our correspondence how vigorous my disagreement would be.

<sup>1</sup> Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1408 n.240 (2003) (reporting that guilty or *nolo contendere* pleas account for 93.8% of adjudicated federal cases, with acquittals as well as convictions included in the category of adjudicated cases, and for 94% of state felony convictions).

<sup>2</sup> Including maintaining comfortable relationships with defense attorneys and going home early. See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

<sup>3</sup> I owe the terminology to Paul Schectman.

tence if he is convicted at trial at ten years. She then may discount the expected sentence by the chance of acquittal and offer a five-year sentence in exchange for a plea of guilty.

The prosecutor's "odds-based" offer, however, would leave the defendant indifferent between pleading guilty or standing trial, and the prosecutor does not want a trial. She engages in costs bargaining as well as odds bargaining. When pressed, she therefore is likely to offer a sentence of less than five years. The prosecutor calculates her offer, not to balance, but to overbalance the defendant's chance of acquittal. The more likely the defendant is to be innocent (or found not guilty—presumably there is some correlation even in the American criminal justice system<sup>4</sup>), the greater the pressure the prosecutor exerts for a guilty plea. Unless the defendant's acquittal at trial is certain, a rational prosecutor ordinarily will make it to his advantage to plead guilty. The defendant, if rational and self-interested himself, ordinarily will accept the prosecutor's offer whether he is guilty or innocent and whatever the strength of the evidence against him.<sup>5</sup> The plea bargaining system effectively substitutes a concept of partial

---

<sup>4</sup> Some prosecutors (but not all) decline to prosecute defendants whose guilt they doubt. See Alschuler, *supra* note 2, at 62–63. If a prosecutor's judgment of guilt adequately protected against conviction of the innocent, however, even the small number of trials the American criminal justice system still provides could be eliminated.

In *United States v. Ruiz*, 536 U.S. 622 (2002), the Supreme Court considered a standard "fast track" plea agreement that federal prosecutors employ in the Southern District of California. This agreement requires defendants to waive their constitutional right to receive some exculpatory evidence but provides that prosecutors will supply "any [known] information establishing the factual innocence of the defendant." *Id.* at 625. The Court declared that this promise and other safeguards would diminish the likelihood that innocent defendants would plead guilty. *See id.* at 631. The Court was apparently unconcerned that prosecutors with information "establishing the factual innocence of the defendant" would merely disclose this information rather than dismiss the case.

<sup>5</sup> The model of plea bargaining suggested in text is oversimplified in some respects—but not in ways that bear significantly on the pressure facing defendants:

1. The model neglects the fact that the first year of a ten year sentence is likely to have greater disutility for the defendant than the last.
2. It also ignores the disutility that flows simply from the fact of conviction.
3. It assumes that the defendant is risk neutral.
4. It assumes that the defendant and the prosecutor have equal knowledge of the evidence and evaluate it identically. In fact, the prosecutor is likely to have greater knowledge of the strength of her case, and this knowledge may enable her to create the perception that her concessions overbalance the defendant's chance of acquittal when they do not. The defendant typically has greater knowledge of whether he is guilty. Despite its psychological significance, this knowledge probably should not affect him as a "rational" odds bargainer.
5. The model treats the prosecutor as the sole source of sentence concessions when a defendant pleads guilty. In fact, a judge or sentencing commission may be as important (or more important).
6. The model disregards the personal reasons prosecutors have for seeking guilty pleas—reasons that can lead them to offer greater concessions than rational odds and costs bargaining would justify.

guilt for the requirement of proof of guilt beyond a reasonable doubt. It is marvelously designed to secure conviction of the innocent.<sup>6</sup>

In a minor criminal case, a defendant who denies his guilt may plead guilty simply to avoid the "process costs" of trial.<sup>7</sup> Bibas apparently has no objection to the entry of a nolo plea by an innocent defendant who decides that a traffic ticket is not worth fighting.<sup>8</sup> The common-law plea of nolo contendere, which initially was unavailable in serious cases,<sup>9</sup> apparently was designed for this situation.

Serious criminal cases present the problem of *Alford* and nolo pleas, however, only because our legal system presses defendants hard to plead guilty. Defendants in a noncoercive system—one that did not threaten increased penalties for exercising the right to trial—would have no reason to submit strange pleas of guilty but not guilty.<sup>10</sup> The message of an *Alford* plea is, "I didn't do it, but I want to

7. The model also disregards the circumstances that can discourage bargaining in particular cases (for example, media attention to a case or a prosecutor's desire to gain trial experience or to try a case against a noted defense attorney).
8. The model ignores the fact that defense attorneys, even more than prosecutors, have personal and economic reasons to encourage guilty pleas. See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975) [hereinafter Alschuler, *The Defense Attorney's Role*]. When a prosecutor senses that a defense attorney will do some of her work for her, she need not offer the concessions that, as a rational costs and odds bargainer, she otherwise would make available.
9. The model ignores the fact that prosecutors and defense attorneys sometimes do not engage in adversarial bargaining at all. They may instead assume a quasi-judicial role and try to determine an appropriate outcome without regard to the likelihood of either lawyer's success at trial or the expected cost of trial. See Alschuler, *supra* note 2, at 54.

Of course the purpose of the model is not to provide precise numerical predictions but only to underline what plea bargaining is about.

<sup>6</sup> See Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 713-16 (1981).

<sup>7</sup> See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 949-56 (1983) (defining "process costs" as costs that defendants incur simply by contesting the charges against them).

<sup>8</sup> See Bibas, *supra* note 1, at 1408 n.239.

<sup>9</sup> See *id.* at 1371 n.41.

<sup>10</sup> Some proponents of plea bargaining would object to the statement that bargaining threatens defendants with increased penalties for exercising the right to trial. They would prefer to say that this practice promises defendants reduced penalties when they plead guilty. See, e.g., Thomas W. Church, Jr., *In Defense of "Bargain Justice"*, 13 LAW & SOC'Y REV. 509, 519-20 (1979); Steven S. Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 698-99 (1980). Perhaps the concepts of harshness and leniency can be judged against the baseline of a "just" or "appropriate" sentence rather than in relation to one another, but in a system pervaded by plea bargaining, this baseline is invisible. No one knows what sentences would be imposed in the absence of plea bargaining. Whether current bargaining patterns reward guilty pleas or penalize exercise of the right to trial is therefore anyone's guess. Recall, however, that 94% of all convicted felony defendants plead guilty. See *supra* note 1 and accompanying text. My own guess is that legislators, judges, sentencing commissioners, prosecutors, and the public do not approve sentences for most of these defendants that they regard as unduly lenient and inadequate to accomplish the purposes

take the deal.” What makes this plea the least awful option for some defendants is the deal and nothing but the deal.

When a defendant who protests his innocence wants to take the deal, a court must accept his *Alford* plea or reject it. Bibas reveals why accepting the plea is terrible, but rejecting it is worse.

When the court rejects an *Alford* plea, the defendant may persist in his denial. If he does, the court will require him to stand trial. The defendant then will risk the penalty that he sought to avoid and that the prosecutor was willing to let him avoid. In the *Alford* case itself, this penalty was death.<sup>11</sup> Bibas does not maintain that the court should force the defendant to risk this penalty because imposing it might be necessary to vindicate the public interest; the prosecutor’s offer has revealed that, in her judgment, it is not. Rather, the court should force the defendant to risk additional years of imprisonment (or even execution) because trial is likely to be therapeutic for him and others, is likely to promote the appearance of justice, and is likely to yield a more accurate verdict than his guilty plea.

Bibas believes that, when a court rejects *Alford* pleas, most defendants will yield to the pressure and retract their denials.<sup>12</sup> They will tell the judge (probably without using these exact words), “OK, you sonofabitch, if I have to say I did it to get the deal, I’ll say it.” Bibas, who has much to say about the horrors of *Alford* pleas, has nothing to say about the horrors of coerced confessions. Indeed, he seems to applaud them.

Bibas analyzes guilty pleas, confessions, and trials under two headings: “Accuracy and Perceived Accuracy” and “Values of the Substantive Criminal Law.”<sup>13</sup> He does not provide a comprehensive list of substantive criminal law virtues but does mention honesty, responsibility, breaking through denial mechanisms, admitting wrongdoing, repentance, contrition, atonement, humiliation, denunciation, victim vindication, community condemnation, therapy, reformation, reconciliation, closure, catharsis, and sending moral messages.<sup>14</sup>

## II

### BIBAS ON BARGAINING

Bibas’s initial stance toward plea bargaining is agnostic. He writes, “This Article does not wade into the broader debate over the

---

of punishment. Public officials and the public seem more likely to approve (albeit unknowingly) “exemplary” sentences for defendants convicted at trial.

<sup>11</sup> See *North Carolina v. Alford*, 400 U.S. 25 (1970).

<sup>12</sup> Bibas, *supra* note 1, at 1379 (observing that “a majority of defendants who deny guilt at plea hearings eventually admit guilt when the only other option is to go to trial”).

<sup>13</sup> See *id.* Parts III–IV.

<sup>14</sup> See *id.* Part IV.

desirability of plea bargaining. Instead, it assumes that plea bargaining will persist for the foreseeable future."<sup>15</sup> That plea bargaining is unlikely to disappear, however, is no reason to pretend it isn't there.

Bibas averts his eyes from the dilemmas this practice poses. De-crying *Alford* pleas while ignoring the pressure that produces them puts him more or less in the position of a police captain who declares, "I take no position on whether our department coerces confessions. I scrupulously insist, however, that any confessions we coerce must be abject and complete. We never permit suspects to equivocate or contradict themselves. With us, a coerced confession must be a whole-hog *confession*."<sup>16</sup>

When nearly every defendant receives an offer calculated to over-balance his chance of acquittal, the virtues Bibas seeks in the criminal justice system are simply unattainable. In this regime, a guilty plea *cannot* be a guilty plea. Forcing a defendant to declare "OK, I'll say I did it" merely packages his pseudo-plea to look genuine. Bibas performs the astonishing task of preaching virtue to the rest of us with his head buried in the sand.

Bibas does not, however, remain agnostic or buried for long. He writes: "Whatever their other flaws, plea bargains induce guilty defendants to confess and start repenting."<sup>17</sup> His praise for (mildly) coerced confessions then accelerates:

Confessions in open court, even if induced by external pressure, may begin to breach offenders' denial.<sup>18</sup>

[T]he ordeal of feigning repentance, even if initially done for the wrong reasons, can sometimes lead to genuine repentance.<sup>19</sup>

By admitting guilt, however insincerely, defendants let down their denial mechanisms, begin the process of reform, and bring closure to the community.<sup>20</sup>

[T]hose who want *Alford* and *nolo* pleas . . . are in the deepest denial . . . . The bigger the struggle, the bigger the defendant's breakthrough when he finally confesses. Indeed, it is a catharsis . . . .<sup>21</sup>

[O]ffenders whose psychological barriers impede confession, to others or even to themselves, are the primary users of *Alford* and *nolo* pleas. They are also . . . those who most need to come clean.<sup>22</sup>

<sup>15</sup> *Id.* at 1362-63.

<sup>16</sup> The captain might add, "Allowing equivocal confessions would undercut the values of the substantive criminal law and lead the public to doubt the guilt of the people whose confessions we possibly coerce."

<sup>17</sup> Bibas, *supra* note 1, at 1400.

<sup>18</sup> *Id.* at 1397.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1400.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1399.

One suspects that, like Dr. Strangelove, Bibas has learned to stop worrying and love the bomb.<sup>23</sup>

### III

#### ACCURACY AND PERCEIVED ACCURACY

When a court's rejection of *Alford* pleas leads to an increase in the number of trials, I agree with Bibas that this practice is likely to yield more accurate judgments of guilt and innocence. Trial verdicts are more reliable than bargained guilty pleas—especially pleas coupled with protestations of innocence. Bibas concludes, however, that prohibiting *Alford* pleas would not greatly increase the number of trials.<sup>24</sup> In his view, it would lead more often to admissions of guilt.

One could not have much confidence in the truth of these admissions—especially when they were preceded by protestations of innocence and induced by threats of punishment. In 1783, the Court of King's Bench declared, “[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it.”<sup>25</sup> America's reversal of this position reflects neither psychological insight nor moral progress.

Bibas and the lawyers he interviewed believe that a substantial majority of the defendants who submit *Alford* pleas are guilty.<sup>26</sup> They probably are. When plea bargaining and the rejection of *Alford* pleas prompt defendants to admit their guilt, most of their confessions are probably accurate, just as most of their earlier denials were false. Forcing all defendants who submit *Alford* pleas to confess at gunpoint or entering automatic guilty pleas on their behalf would similarly improve the accuracy of the “typical” defendant's statement. Aggregate accuracy of this sort belongs in *Alice in Wonderland*. The argument that coerced confessions can make a criminal justice system more accurate belongs in wonderland too. Despite his Kantian talk about justice in the individual case, Bibas sometimes seems to play for the average and to consider only “typical” defendants.

Bibas focuses less on accuracy than on “public perceptions of the justice system.” He declares:

Public confidence and faith in the justice system are essential to the law's democratic legitimacy, moral force, and popular obedience. When citizens learn that defendants are pleading and being punished while refusing to admit guilt and even protesting their inno-

---

<sup>23</sup> DR. STRANGELOVE, OR, HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB (Hawk Films Ltd. 1963).

<sup>24</sup> *Id.* at 1382–83 n.105.

<sup>25</sup> The King v. Warickshall, 1 Leach 263, 263–64, 168 Eng. Rep. 234, 235 (K.B. 1783).

<sup>26</sup> See Bibas, *supra* note 1, at 1380.

cence, they may well suspect coercion and injustice. They also may conclude that our system does not care enough about separating guilty from innocent defendants.<sup>27</sup>

*Alford* pleas should do more than cause citizens to suspect coercion and injustice. For a citizen whose eyes are open, they should make the coercion and injustice too obvious to deny. Moreover, when a legal system does not care much about separating the guilty from the innocent, the public ought to know it.

Bibas notes that “only one-third of the American public expresses confidence in the criminal justice system and . . . two-thirds think plea bargaining is a problem.”<sup>28</sup> He proposes to resolve this difficulty, not by reducing the pressure on defendants to admit their guilt, but by increasing it. Forced confession, in his view, can be cosmetic, and he evidently sees no need to correct the problems the public perceives in plea bargaining. When Bibas declares, “The justice system should forestall cynicism by forbidding practices that openly promote injustice or public doubts about guilt,”<sup>29</sup> he refers to *Alford* pleas, not the pressures of the plea-bargaining system.

Bibas says that an article of mine “hint[ed] at a revolutionary goal of fomenting the overthrow of plea bargaining by exposing its internal contradictions.”<sup>30</sup> He replies, “Allowing *Alford* and nolo pleas . . . will more likely maintain the status quo and cause growing public cynicism about the entire system.”<sup>31</sup> The implication of this statement seems to be that, as long as fundamental reform is unattainable, the blemishes and internal contradictions of a flawed legal system should be masked. Bibas writes, “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.”<sup>32</sup> He apparently prefers the covert subordination of core values to their open subordination.

Bibas’s remarks have a different tone when he speaks, not of the criminal justice system, but of criminal defendants. He repeatedly proclaims that, for defendants, “honesty and responsibility for one’s actions” are “basic moral norms.”<sup>33</sup> He objects to *Alford* and nolo pleas on the ground that they undermine moral norms by “allow[ing] guilty defendants to avoid accepting responsibility for their wrongs.”<sup>34</sup>

---

<sup>27</sup> *Id.* at 1387 (footnotes omitted).

<sup>28</sup> *Id.*

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

<sup>30</sup> *Id.* at 1386 n.126 (citing Alschuler, *The Defense Attorney’s Role*, *supra* note 5, at 1298).

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

<sup>32</sup> *Id.* at 1403 n.215.

<sup>33</sup> *Id.* at 1390, 1384.

<sup>34</sup> *Id.* at 1363.



In Bibas's moral world, honesty is evidently more important for defendants than for the government. Defendants may not dodge responsibility for their wrongs, but the government may. Defendants may not package their guilty pleas in disingenuous ways to save face. Rather, the government may package their guilty pleas in disingenuous ways to save face. Defendants who plead guilty may not imply that they have been coerced (even when they might have been) or that they are innocent (even when they might be). The government, however, may promote the appearance of justice (even when this appearance may be false).

Bibas would extend the duties of defendants beyond the courtroom. Requiring them to enter unqualified pleas of guilty would be unlikely to accomplish his objectives when these defendants could leave the courtroom to announce their innocence to the world. Bibas applauds the action of Judge Larry Paul Fidler who, in the case of Sara Jane Olson (Kathleen Soliah), responded to a post-plea declaration of innocence by returning the defendant to court and asking whether she wished to withdraw her guilty plea (not her *Alford* plea). The defendant declined the judge's offer and once more acknowledged her guilt.

Later, however, the defendant renewed her claim of innocence and sought to accept the judge's proposal. "I cannot plead guilty when I know I am not," she wrote. "Cowardice prevented me from doing what I knew I should. . . . I am not second-guessing my decision as much as I have found the courage to take what I know is the honest course."<sup>35</sup> Judge Fidler, however, told the defendant that she no longer had the option of pleading not guilty.

The defendant hedged again at the sentencing hearing that Bibas portrays as a moment of cathartic breakthrough. According to the *New York Times*, "Ms. Olson offered a vague apology, saying 'I am truly sorry' for hurting people. But she insisted that she had not actually helped make or plant the bombs, which failed to detonate. 'I thought I was doing good deeds, saving lives,' she said of the assistance she has admitted providing to members of the Symbionese Liberation Army."<sup>36</sup>

One wonders whether Bibas would return a defendant to court and threaten him with increased punishment if he made and refused to recant an out-of-court declaration of his innocence ten years after pleading guilty. Bibas might want a guilty plea to work a lifetime estoppel so that no mixed moral message could reach the public, but at

---

<sup>35</sup> James Sterngold, *Waffling Again: 70's Radical Acts to Change Guilty Plea*, N.Y. TIMES, Nov. 15, 2001, at A20.

<sup>36</sup> James Sterngold, *70's Radical Is Sentenced, Then Arraigned in New Case*, N.Y. TIMES, Jan. 19, 2002, at A10.

some point, suppressing out-of-court declarations of innocence probably would violate the constitutional guarantee of free speech.<sup>37</sup>

Judges once asked defendants who submitted guilty pleas, "Are you pleading guilty because you are guilty and for no other reason?" These judges understood that the defendants' pleas were the product of bargains, but they refused to allow defendants to plead guilty unless the defendants answered yes. The judges might have believed that their courtroom ceremonies promoted the appearance of justice. In fact, they promoted cynicism. Bibas comes close to restoring the first part of the judges' traditional question.

#### IV

#### THE VALUES OF THE SUBSTANTIVE CRIMINAL LAW

When Bibas says that the use of "external pressure" to induce defendants to confess can place them on the road to repentance,<sup>38</sup> that "[a]dmitting one's wrongdoing is the first step toward moving beyond it,"<sup>39</sup> that "even feigned or induced repentance may teach lessons to some offenders,"<sup>40</sup> that pretended repentance also can "bring closure to a community,"<sup>41</sup> and that defendants who are in "the deepest denial" are "those who most need to come clean,"<sup>42</sup> I shudder. The inauspicious history of the use of external pressure to correct erroneous thinking runs from the Inquisition and before through the Chinese Cultural Revolution and beyond.<sup>43</sup> Like O'Brien, the dictator of George Orwell's *1984*, Bibas apparently has few qualms about "tearing human minds to pieces and putting them together again in new shapes."<sup>44</sup>

One wonders how much "external pressure" Bibas would approve. He certainly would not favor setting a defendant on the road to repentance by shooting him in the foot and twisting the wound. I am confident that he would oppose even the use of light whipping to

---

<sup>37</sup> If a defendant in the world of Professor Bibas wanted to take the deal and still protest his innocence, he might wait until the judge had imposed a sentence and then say what he wanted to say. When the defendant had left the courtroom for the last time, the judge would be very unlikely to threaten rescission of the bargain because the defendant had refused to follow the assigned script.

<sup>38</sup> Bibas, *supra* note 1, at 1397.

<sup>39</sup> *Id.* at 1395.

<sup>40</sup> *Id.* at 1399.

<sup>41</sup> *Id.* at 1400.

<sup>42</sup> *Id.* at 1399.

<sup>43</sup> For discussion of the unhappy history of therapeutic jurisprudence in our own criminal justice system, see Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1 (2003); Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063 (2002).

<sup>44</sup> GEORGE ORWELL, 1984, at 220 (1949).

break down a defendant's denial mechanisms. Recognizing the need for limits, however, would require Bibas to explain how (and how much) a threat of additional imprisonment differs from a threat of brutality.<sup>45</sup> He also should consider what limits, if any, he would place on his subordination of procedural to substantive values.

Bibas disregards basic procedural distinctions—most notably, the distinction between people who have been found guilty of a crime and people who have not. If the time for shattering pride ever comes, it comes only after a determination of guilt. Before employing tough-love confrontation of the sort Bibas approves, a legal system ought to figure out whether the defendant did it.

Bibas sees no need to await a verdict before advancing the values of atonement, humiliation, denunciation, victim vindication, community condemnation, therapy, reformation, reconciliation, closure, catharsis, and sending a moral message. Even if coercion to virtue were as appropriate as he contends, compulsion to incriminate oneself would not be. Bibas merges the two things together. His quarrel with the framers of the Fifth Amendment privilege against self-incrimination runs deep.<sup>46</sup>

Some defendants are guilty and know it; others are guilty and do not know it; and still others are not guilty at all. Pressing even the defendants who recognize their guilt to confess might generate resentment more often than it would prompt catharsis and repentance.

---

<sup>45</sup> One could say that threatening increased punishment differs from threatening physical brutality simply because the Supreme Court has said that it does for more than 30 years. See *Brady v. United States*, 397 U.S. 742, 755 (1970) (holding that “a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty”). Bibas, however, is not the sort of scholar to press a juridical fiction as far as it will go. The issue he considers could be described as whether defendants who have been pressed to declare their “legal” guilt (by submitting pleas of guilty) should also be pressed to declare their “factual” guilt. This issue is not *res judicata*. To be sure, threatening lawful punishment does differ from threatening unlawful violence, but in constitutional law, contract law, and the law of extortion, courts have abandoned the distinction between “lawful” and “unlawful” threats and have recognized the coerciveness of threats of lawful action. See Albert W. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 58–70 (1975). Indeed, the historical standard for judging the voluntariness of confessions did not distinguish between threats of unlawful action and promises to mitigate lawful punishment. Compare *Bram v. United States*, 168 U.S. 532, 542–43 (1897) (declaring that an admissible confession must be “free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight”) (citation omitted), with *Arizona v. Fulminate*, 499 U.S. 279, 285 (1991) (declaring that *Bram* “does not state the standard for determining the voluntariness of a confession”).

Bibas probably would not endorse the view of some champions of plea bargaining that the settlement of criminal cases is comparable to the settlement of civil cases. Civil settlements without admissions of wrongdoing are common, but Bibas could appropriately argue that substantive criminal law values make *Alford* pleas more troubling than civil settlements accompanied by denials of liability. See Alschuler, *supra* note 6, at 704–07.

<sup>46</sup> See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2651 & n.96 (1996).

When guilty defendants are in denial and truly believe themselves innocent, moreover, pressing them to offer confessions that they regard as untrue would be even less likely to lead to their salvation. Pressing innocent defendants to confess would generate only a sense of victimization and of the cruelty and hypocrisy of our legal system.

Bibas does not deny that plea bargaining can make it advantageous for innocent defendants to plead guilty. No knowledgeable observer could. Defense attorneys have reported advising defendants to plead guilty although the attorneys themselves had no doubt of their innocence.<sup>47</sup> Imagine a defendant who concludes: "The jury is unlikely to believe me; I have a record. In fact, when that sweet, middle-class victim identified me at the preliminary hearing, I would have believed her myself if I hadn't known better. My lawyer tells me that I am facing ten years if convicted at trial and six months or possibly even probation if I take the deal." Demanding a confession from this innocent defendant before he could take the deal would confront him with an excruciating choice. It would not teach him an uplifting lesson.

Bibas proposes to enlist the defendant's lawyer as well as the prosecutor and judge in his therapeutic army. Although lawyers today "exacerbate the problem by failing to challenge their clients' denials,"<sup>48</sup> they could play a "constructive role . . . in educating and transforming clients' misperceptions and short-term desires."<sup>49</sup> Lawyers should "provide moral as well as legal counsel, advising clients that it is right to admit their crime, apologize to victims, and move forward."<sup>50</sup>

Not every defendant who declares his innocence, however, is delusional or deceptive. When defendants are innocent, Bibas apparently expects their lawyers to encourage them to persevere and win acquittals.<sup>51</sup> Deciding whether to challenge a client's denials and transform his misperceptions or to encourage him to assert his innocence might be difficult. To carry out her responsibilities in the world of Bibas, a 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.

A lawyer's duty in a plea bargaining system is often to confront her client forcefully with the strength of the evidence against him. Some lawyers report that they go "almost to the point of coercion" to obtain their clients' confessions, and some describe conferences with

---

<sup>47</sup> See Alschuler, *The Defense Attorney's Role*, *supra* note 5, at 1280–81, 1296, 1311.

<sup>48</sup> Bibas, *supra* note 1, at 1405 (footnote omitted).

<sup>49</sup> *Id.* at 1404.

<sup>50</sup> *Id.* at 1405.

<sup>51</sup> See *id.* at 1382.

clients that have the flavor of backroom stationhouse interrogations.<sup>52</sup> These lawyers regard themselves, not as saving their clients' souls, but as encouraging them to make sound tactical decisions. They may be influenced by the fact that a guilty plea can save the lawyers themselves days of work. From a defense attorney's perspective, a guilty plea can be a quick buck.

Contrary to Bibas's suggestion, many defense attorneys do not "exacerbate the problem by failing to challenge their clients' denials" enough.<sup>53</sup> They commonly exert pressure that strains the attorney-client relationship and jeopardizes their clients' trust. The pressure for confession exerted by defense attorneys only increases when courts refuse to allow *Alford* pleas.

Like Bibas, I have criticized lawyers who "assume that clients wish only to advance their personal, selfish interests,"<sup>54</sup> and I have opposed the claim that "[w]hat a defense attorney 'may' do, he *must* do, if it is necessary to defend his client."<sup>55</sup> When a client is receptive, his lawyer should encourage him to consider the moral implications of his choices.<sup>56</sup> In the end, however, the lawyer should not judge a client who insists that he is innocent, and she should not presume that this client requires treatment. Within the bounds of honesty, lawfulness, and decency to others, the lawyer's duty is to be on her client's side.

#### CONCLUSION

Plea bargaining, although a dreadful practice, is thoroughly entrenched, and any reform that would make this practice better (or less awful) is to be cheered.<sup>57</sup> Bibas, however, would make the practice more awful by increasing the pressure on defendants to confess and by forcing them to risk added punishment when they do not.

As I have emphasized, plea bargaining makes it advantageous for innocent defendants to plead guilty. It systematically confronts them

---

<sup>52</sup> See Alschuler, *The Defense Attorney's Role*, *supra* note 5, at 1287-88.

<sup>53</sup> *Bibas*, *supra* note 1, at 1405.

<sup>54</sup> Albert W. Alschuler, *The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel*, 54 U. COLO. L. REV. 67, 74 n.37 (1982).

<sup>55</sup> Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 MCGEORGE L. REV. 291, 293 (1998) (quoting without approval ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 145 (1996)).

<sup>56</sup> The caveat is important. A lawyer need not offer moral counsel when her client is uninterested and clearly has retained the lawyer only for the purpose of minimizing the adverse consequences of the client's encounter with the law. Lawyers err, however, when they assume that every client fits this description and when they discourage moral actions simply because these actions may be costly to the client.

<sup>57</sup> I do not see minor reform as the enemy of major reform and have offered suggestions to improve the bargaining process. See Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1122-49 (1976).

with offers calculated to overbalance their chances of acquittal. Blocking defendants from declaring in public, "I didn't do it, but I want to take the deal," does not send a moral message. It only increases the system's hypocrisy.

Although Bibas and I part company on *Alford* pleas, I applaud the underlying theme of his article. In the American criminal justice system, we have met the utility monster, and he is us. The instrumentalist turn that began in the final third of the nineteenth century and then accelerated<sup>58</sup> has produced a stream of criminal justice horrors—among them, massive plea bargaining, *Alford* pleas, sentencing by bureaucrats who know nothing about the people they sentence, and more than two million Americans behind bars. Bibas's central message—back to basics—is right on the mark.

For someone who respects the core values of the criminal law, *Alford* pleas are an obvious target. They are offensive for many of the reasons Bibas says they are. But sometimes the most available target is just a messenger. A defendant who says, "I didn't do it, but I want to take the deal," delivers the message of a legal system that has deprived guilty pleas of their meaning. This messenger has made visible something that Bibas would rather not see. Shooting the messenger cannot accomplish much, and it can be very unfair to the messenger.

---

<sup>58</sup> See generally ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES (2000).