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Fundamental Fairness and the Path from *Santobello* to *Padilla*: A Response to Professor Bibas

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INTRODUCTION

Almost no one in the legal academy has written more (or better) about guilty pleas and plea bargains than Stephanos Bibas.¹ It is, therefore, fitting that he should author one of the first articles on *Padilla v. Kentucky*²—a guilty-plea decision that may be the most important opinion on the topic in a generation.³

In *Padilla*, the Court held that an effective defense attorney must advise her noncitizen client of the immigration risks and consequences associated with a guilty plea.⁴ For the first time, the Court recognized that (at least some) so-called collateral civil consequences are meaningful—that is to say, that jail and prison are not the *sina qua non* of defendant decision making.⁵

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1. On the subject of plea bargaining, I would put Bibas in the company of Albert Alschuler, George Fisher, John Langbein, Steven Schulhofer, and Bill Stuntz—all giants in the field.

2. 130 S. Ct. 1473 (2010).

3. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1131 (2011).

⁴ See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

5. *Cf. id.* at 1131 (“Defendants might care much more about the [civil consequences], and the lawyers might well trade off criminal against civil consequences via plea bargaining to make the overall penalties fit the crime.”). *But cf.* *Argersinger v. Hamlin*, 407 U.S. 25, 48 (Powell, J., concurring) (“Losing one’s driver’s license is more serious for some individuals than a brief stay in

No doubt, this realization came as nothing new to some lawyers in the defense bar who have long understood that they have a professional obligation to attend to *all* significant consequences of conviction, not just traditional criminal consequences. For my part, I internalized this message early in my career, as a young lawyer working at The Bronx Defenders, a public defender's office dedicated to comprehensive representation.⁶

The significance and surprise of *Padilla*, then, is not that this professional obligation exists as a matter of best practices, but that it also may be a matter of constitutional imperative. However, this is the only aspect of the decision that I find surprising. Precisely, I cannot agree with Bibas that, methodologically, the ruling is a “watershed”⁷—at least to the extent he takes the term to mean a change of course.⁸ Concretely, *Padilla* is not, as Bibas claims, “the Court’s first case to treat plea bargaining as a subject worthy of constitutional regulation in its own right and on its own terms.”⁹ In fact, the Court has regulated plea bargaining on its own terms for decades. Specifically, *Padilla*’s roots can be traced to the Court’s earliest plea-bargaining decisions—cases in which the Court applied a constitutional interpretive method *distinct* from the method it has applied typically to constitutional questions of trial procedure.¹⁰

What do I mean by *distinct* constitutional methodologies as applied to trial and plea cases? Over the past century, the Court has invoked (at different times and to different degrees) two separate conceptions of constitutional criminal procedure—*fundamental fairness* and *accuracy*. In the domain of trials, the Court has come to rely less on fundamental fairness as a guiding principle and more on procedures that promote accurate resolution of the question of guilt or innocence.¹¹ In other words, the Court is likelier to deem a *trial* practice or

jail.”).

6. See *Holistic Defense*, THE BRONX DEFENDERS, <http://www.bronxdefenders.org/our-work/holistic-defense> (last visited July 9, 2011).

7. Bibas, *supra* note 3, at 1118.

8. *Watershed Definition*, MERRIAM WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/watershed> (last visited Aug. 14, 2011) (defining “watershed” as “a crucial dividing point, line, or factor: turning point”).

9. Bibas, *supra* note 3, at 1120.

10. See *infra* Part III; see, e.g., *Brady v. United States*, 397 U.S. 742 (1970); *Santobello v. New York*, 404 U.S. 257 (1971); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

11. See *infra* Part I. The accuracy conception is grounded in the belief that the first priority of the Constitution is to “ensure accurate procedures, procedures that would prevent conviction of innocent defendants.” RONALD J. ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 90 (2d ed. 2005). Michael Klarman has traced the origins of the accuracy conception to the Court’s invalidation of race-based criminal prosecutions in the Jim Crow south. See Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 50 (2000) (citing *Moore v. Dempsey*, 261 U.S. 86 (1923); *Powell v. Alabama*, 287 U.S. 45 (1932); *Norris v. Alabama*, 294 U.S. 587 (1935); *Brown v. Mississippi*, 297 U.S. 278 (1936)). A number of commentators have noted that the Court’s emphasis on accuracy has only increased since 1960. See ALLEN, ET AL., *supra* note 11, at 90–91; see also *infra* Part I. Emblematic examples of this growing trend toward accuracy as a touchstone include the Court’s decisions in *Brady v. Maryland*, 373 U.S. 83 (1963) (finding that the state must disclose certain exculpatory evidence to the defense); *Drope v. Missouri*, 420 U.S. 162 (1975) (holding that defendants must be competent to assist their counsel at trial); and *Ake v. Oklahoma*, 470 U.S. 168

procedure constitutional where the practice or procedure tends to correctly decide the substantive question of guilt or innocence. In the domain of guilty pleas, however, fundamental fairness remains the principal approach.¹² That is, the Court is likelier to deem a guilty-plea or plea-bargaining practice or procedure constitutional where the practice or procedure is perceived to be fair.

More to the point, in many of the seminal pre-*Padilla* cases, the Court invoked a particular fairness principle—the notion of unfair surprise—to determine the constitutionality of a guilty-plea conviction. And, in *Padilla*, the Court stayed true to this constitutional approach. Specifically, the implicit holding of *Padilla* is that it is fundamentally unfair to leave a pleading defendant in the dark about deportation consequences.

Put differently, both before and after *Padilla*, the Court has approached guilty pleas on their own terms. Thus, *Bibas* is wrong to conclude that the Court has traditionally treated the constitutional law of guilty-plea procedure as an adjunct to the constitutional law of criminal trial procedure. This is where *Bibas* and I part ways. *Bibas* fails to understand that the fairness principles that animate the Court’s decision in *Padilla* are the same principles that have animated its guilty-plea and plea-bargaining jurisprudence all along. *Bibas* confuses the Court’s unwillingness to seriously consider the accuracy question in the guilty-plea context with an unwillingness to regulate plea bargains and guilty pleas altogether. *Bibas* therefore takes *Padilla* to represent a course correction when, in fact, it represents only an unfamiliar result reached through familiar means.¹³ This is not to say that *Padilla* is inconsequential—just that it is a consequential byproduct of a conventional approach. It is a potentially substantial step down a well-worn path.

I.

TWO CONCEPTIONS OF CONSTITUTIONAL CRIMINAL PROCEDURE

There are two dominant measures of constitutional criminal procedure: accuracy and fairness. These two concepts are not mutually exclusive, but an emphasis on one or the other may produce markedly different results.¹⁴

(1985) (ruling that courts sometimes must appoint a mental health expert to assist defendants’ insanity claims). More recently, a plurality of the Court observed that a new constitutional law should be retroactive only when there is “a procedure which creates an impermissibly large risk that the innocent will be convicted.” *Teague v. Lane*, 489 U.S. 288, 312 (1989).

12. See *infra* Part II (discussing *Brady v. United States*, 397 U.S. 742 (1970); *Santobello v. New York*, 404 U.S. 257 (1971); and *Bordenkircher v. Hayes*, 434 U.S. 357 (1978)).

13. My differences with *Bibas* are fairly modest. For instance, I do not disagree with his ultimate policy proposal to look to consumer protection law as a model for further regulating the guilty-plea regime. See *Bibas*, *supra* note 3, at 1151–60. To me, this move makes a good deal of sense. Consumer protection law is, after all, all about fairness. Indeed, the very term “unfair surprise” can be found in the commentary to the Uniform Commercial Code. U.C.C. § 2-302 cmt. 1 (2004) (regulating the unconscionability of contracts by “prevent[ing] . . . oppression and unfair surprise”). In short, *Bibas* is right that consumer protection law is the proper analogy, but, significantly, he did not need *Padilla* to draw the connection. It was there all along.

14. Scholars have tended to explore the two approaches (and the potential tension between

Specifically, a court that prioritizes pure procedural fairness may rule unconstitutional even a practice that does not produce an inaccurate result on the question of guilt or innocence, and a court that prioritizes substantive accuracy may tolerate an unfair procedure that nevertheless produces the right outcome.¹⁵ For example, in *Rochin v. California*, the Court held that police violated a suspect's due-process rights by forcibly pumping his stomach to recover drugs.¹⁶ Significantly, the suspect was almost certainly *factually guilty* of drug possession, but the Court's concern was not with the guilt-accuracy of the procedure, but with the fact that the procedure was fundamentally unfair—that it was “too close to the rack and the screw.”¹⁷

Over the middle part of the last century, the Court did not clearly value one concept over the other but rather oscillated between the two, depending on the context. However, over the past forty years, the unmistakable trend in constitutional *trial* procedure has been in the direction of accuracy as paramount conception.¹⁸

Consider, for example, the Court's shifting methodological approach to the rule that a prosecutor may not comment on a defendant's exercise of his right to remain silent at trial. In a case that Bibas discusses, *Griffin v. California*, the Court relied on the principle of fundamental fairness to establish this constitutional rule.¹⁹ Precisely, it observed that the prosecutor's argument was inimical to the fair administration of the adversarial system.²⁰ It noted that even if the jury might naturally draw an inference of guilt from silence, it is *unfair* for a court to “magnify that inference into a penalty for asserting a constitutional privilege.”²¹ Nevertheless, by the turn of the century, the Court in *Portuondo v. Agard* had recast *Griffin* as a case principally about *accuracy*, particularly the invalidity of the empirical claim that a jury may draw a sound inference of guilt from silence.²² Specifically, Justice Scalia indicated that the

them) as competing conceptions of *due process*. See, e.g., ALLEN ET AL., *supra* note 11, at 77–100. But fundamental fairness and accuracy animate a far broader class of constitutional criminal procedure cases. Compare, e.g., *Teague v. Lane*, 489 U.S. 288 (1989) (adopting an accuracy focus to evaluate retroactivity of Sixth Amendment jury-selection claim), with *id.* at 321 (Stevens, J., dissenting) (endorsing a fundamental-fairness approach).

15. Tom Stacy has observed that certain constitutional rights that promote fairness are “truth furthering,” while others are “truth impairing.” Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1370–71 (1991). According to Stacy, double jeopardy, *Miranda v. Arizona*, 384 U.S. 436 (1966), and the exclusionary rule may be “truth-impairing” but nevertheless defensible for reasons of fairness. *Id.* at 1374.

16. 342 U.S. 165, 172 (1952).

17. *Id.*

18. See *infra* notes 22–27 and accompanying text.

19. 380 U.S. 609 (1965).

20. See *id.* at 614.

21. See *id.*

22. See *Portuondo v. Agard*, 529 U.S. 61 (2000); cf. ALLEN ET AL., *supra* note 11, at 1390–91 (“[D]oes *Agard* manage to undermine *Griffin* in the course of reaffirming it? . . . Is *Griffin* based on the idea that the inference of guilt from the defendant's silence is [possibly inaccurate] . . . ? Or is the inference improper *even if it accurately reflects the most likely reason* for the defendant to remain

result in *Griffin* would have been different were silence, in fact, an accurate guilt signal.²³

More generally, Scalia believes that if a procedure at issue does not generate an erroneous result, it ought to be affirmed. For Scalia, then, inaccurate inferences may be unconstitutional inferences, but accurate inferences are good enough inferences.²⁴ Thus, Scalia's jurisprudence is defined not only by its well-explored originalism and (as Bibas helpfully examines) its formalism,²⁵ but also by its emphasis on accuracy as a guiding principle. More importantly, this emphasis on accuracy is one that a majority of the Court now shares.²⁶ When it comes to contemporary constitutional *trial* procedure, accuracy is the prevailing coin of the realm; fundamental fairness is an afterthought.²⁷

II.

THE PATH TO *PADILLA*

Significantly, however, what is true of constitutional trial procedure is not true of constitutional guilty-plea procedure. In the plea-bargaining and guilty-plea contexts, the accuracy principle has played a smaller role as compared to fundamental fairness. For example, consider the Court's early plea-bargaining

silent? Under the first interpretation, only empirically unsupportable burdens on constitutional rights would be invalid.") (emphases in original).

23. *Portuondo*, 529 U.S. at 67–68.

24. More recently, Scalia made this point plain, albeit in a different context. See *Schiriro v. Summerlin*, 542 U.S. 348, 355–56 (2004) (“[T]he question is whether judicial fact-finding so *seriously* diminishes accuracy that there is an impermissibly large risk of punishing conduct the law does not reach.”) (internal quotation marks and alterations omitted).

25. See Bibas, *supra* note 3, at 1120 (noting that “*Padilla* represents the eclipse of Justice Scalia’s eighteenth-century formalism in criminal procedure”).

26. For example, consider the recent string of cases narrowing the circumstances in which the *Miranda* doctrine or the exclusionary rule applies. See, e.g., *Kentucky v. King*, 131 S. Ct. 1849 (2011) (holding that in certain circumstances police may provoke exigent circumstances to justify a warrantless search); *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010) (requiring a suspect to affirmatively invoke his right to remain silent); *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010) (permitting police to reinitiate questioning in certain circumstances after a suspect invokes his right to counsel under *Miranda*); *Davis v. United States*, 512 U.S. 452 (1994) (requiring a defendant to unequivocally invoke his right to counsel under *Miranda*); *Murray v. United States*, 487 U.S. 533 (1988) (holding constitutional warrantless search of warehouse where police sought and received a warrant after the fact). These cases may be read as an effort to promote the accuracy of verdicts, notwithstanding extant procedural unfairness. See Stacy, *supra* note 15, at 1370.

27. In the words of Tracey Meares, the latter decades of the twentieth century witnessed “the gradual weakening of fundamental fairness analysis in due process as a mechanism for the creation of constitutional criminal procedure.” Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 123 (2005); see also ALLEN ET AL., *supra* note 11, at 92 (describing fundamental fairness as “surviv[ing]” in only “a few outposts” today). Notably, it may be that accuracy also trumps fundamental fairness in the popular conscience as reflected by the popularity of the innocence movement as compared to progressive efforts to improve prison conditions or reform draconian drug sentencing laws—efforts that would assist almost exclusively the factually guilty. See Josh Bowers, *The Unusual Man in the Usual Place*, 157 U. PA. L. REV. PENNUMBRA 260 (2009).

ruling in *Santobello v. New York*.²⁸ In that case, the Court held that prosecutors violated a defendant's constitutional rights by promising to make no sentencing recommendation, but by thereafter asking the sentencing judge to impose the maximum sentence on a reduced charge. The Court reasoned that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."²⁹

The significance of the decision is often misunderstood. Bibas cites the case only to underscore the point that the Court encourages disposition by plea.³⁰ And, no doubt, *Santobello* stands for that proposition. However, the decision signifies much more. First, it is noteworthy that the Court vacated the sentence *even though* it found no prejudice. Specifically, the Court took the government at its word that the prosecutor's breach of the plea agreement was inadvertent, and accepted the trial judge's assertion that he would have imposed the maximum sentence in any event:

We need not reach the question whether the sentencing judge would or would not have been influenced had he known all the details of the negotiations for the plea. He stated that the prosecutor's recommendation did not influence him *and we have no reason to doubt that*.³¹

In short, the Court accepted that the sentence was *accurate*—that is, that the defendant would have received the same sentence even in the absence of a constitutional violation. Nevertheless, the Court provided a constitutional remedy, because the Court concluded that it would have been fundamentally unfair to do otherwise. Thus, accuracy played no part in the Court's calculation.

Second, the opinion is remarkably uninformative. Indeed, the Court never even signaled what constitutional right the prosecutor violated. Perhaps the opinion's obscurity was tactical. In any event, it is telling. A frank discussion of due-process jurisprudence would have forced the Court to acknowledge that it was applying a more expansive version of fundamental fairness to guilty-plea procedures than to trial procedures. Specifically, the prevailing fundamental-fairness test at the time was whether the procedure in question "shock[ed] the conscience"—whether it "more than offend[ed] some fastidious squeamishness or private sentimentalism."³² But, significantly, had the Court applied such a rigorous fundamental-fairness standard to the facts of *Santobello*, it would have had no choice but to reject the defendant's constitutional claim, because a prosecutor's inadvertent breach surely does not shock the conscience,

28. 404 U.S. 257 (1971).

29. *Id.* at 262; see also Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1953 (1992) ("When defendants promise to plead guilty in return for government concessions and then do so, they are legally entitled to the concessions.").

30. See Bibas, *supra* note 3, at 1121.

31. *Santobello*, 404 U.S. at 262 (emphasis added).

32. *Rochin v. California*, 342 U.S. 165, 172 (1952).

especially where—as the *Santobello* Court assumed—the breach had no influence on the sentencing judge.

Essentially, the *Santobello* Court held unconstitutional a plea-bargaining breach that was more slip-up than “rack and screw.”³³ Thus, the import of *Santobello* is not just that the Court appealed to fundamental fairness as opposed to accuracy, but that it did so *generously*. The question is why the Court deemed it appropriate to adopt what might be called a kind of *fundamental fairness with bite* for pleas but not for trials. On this score, I think Bibas has hit upon the answer: when it comes to guilty pleas, the Court assumes that the pleading defendant is factually guilty.³⁴ Thus, fundamental fairness is the focus because there is little else on which to concentrate once the Court has deemed the accuracy question beside the point. Put differently, if fundamental fairness lacks bite, then the Constitution has almost no bite at all in the guilty-plea context.³⁵

And, significantly, *Santobello* is no outlier. Rather, the case is consistent with the Court’s conventional methodological approach to plea-bargaining and guilty-plea cases. For example, in *Brady v. United States*, the Court held that a conviction by plea must be intelligent and voluntary—that is, that the conviction must be the product of fair procedures designed to promote fully informed and free choice.³⁶ First, as to the voluntariness requirement, the *Brady* Court forbade “actual or threatened physical harm . . . [,] mental coercion overbearing the will of the defendant,”³⁷ and “misrepresentation[s] . . . , or . . . promises that . . . hav[e] no proper relationship to the prosecutor’s business.”³⁸ In other words, it prohibited prosecutors from engaging in manifestly unfair conduct of the kind that might invalidate a civil contract. Second, as to the intelligence requirement, the *Brady* Court demanded that a defendant be made aware of the nature of the charges, the rights waived, and the consequences of pleading guilty.³⁹ Taken together, then, these constitutional requirements protect against unfair threats or promises and the unfair surprise of unforeseen

33. *Id.*

34. See Bibas, *supra* note 3, at 1133 (“[I]nnocent defendants are very unlikely to plead guilty, the Court assumed.”). Consider, for instance, this statement from *Brady v. United States*:

We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary. . . .

397 U.S. 742, 758 (1970).

35. Moreover, fundamental fairness is a particularly useful approach, because a guilty-plea market regulated for fairness begets efficiency, as the *Santobello* Court, itself, recognized: “Disposition of charges after plea discussions is not only an essential part of the process[,] but a highly desirable part for many reasons. . . . However, all of these considerations presuppose fairness” *Santobello*, 404 U.S. at 261 (emphasis added). Thus, *Santobello* can be re-read as an effort to cement a set of national (and constitutional) contract standards to promote fair and efficient bargaining between the *guilty* defendant and his prosecutor. See generally, Scott & Stuntz, *supra* note 29.

36. See 397 U.S. 742, 747–48, 756–58 (1970).

37. *Id.* at 750.

38. *Id.* at 755.

39. See *id.* at 755–57.

consequences, misrepresentations, or other shady dealings.

Even the Court's somewhat infamous decision in *Bordenkircher v. Hayes* was not inattentive to principles of fundamental fairness.⁴⁰ In that decision, the Court found no due-process violation where the defendant declined a plea to a five-year prison term, whereupon the prosecutor made good on a threat to file a habitual-offender charge that carried a mandatory life sentence.⁴¹ Unquestionably, the *Bordenkircher* Court authorized hard bargaining.⁴² However, hard bargaining and unconstrained bargaining are not one and the same. Significantly, the Court found dispositive the fact that the defendant saw the habitual-offender charge coming. It held, therefore, that the prosecutor's threat was merely part of the transparent "give-and-take" of plea-bargaining.⁴³ In short, the defendant was not *surprised* by the added charge, and, thus, he could make no constitutional claim.

Notice, then, that this same notion of unfair surprise runs through all three cases—*Brady*, *Santobello*, and *Bordenkircher*. The only difference is that in *Santobello*, the Court found unfair surprise, whereas in *Brady* and *Bordenkircher*, it did not. This is not to say that the Court sufficiently regulated the guilty-plea regime pre-*Padilla*, but only that its approach was consistent, coherent, and decidedly not *caveat emptor*. And this is the point that I think Bibas misses. He confuses an indifference toward accuracy with an indifference toward constitutional regulation altogether. He mistakes an under-regulated market for an unregulated market. Put simply, he sees too little in the path to *Padilla*. And, beyond that, he sees too much in the *Padilla* decision itself. Precisely, he considers *Padilla* to be an opinion principally about substance, not procedure—an effort by the Court to substantively “evaluate whether [a plea] punishment is fitting.”⁴⁴ But *Padilla* is no more a case about *substantive* fairness than *Brady* or *Santobello*, and it is therefore no obvious harbinger of substantive things to come. In all three cases, substantive results are regulated practically only to the extent that they are products of unfair *procedures*: *Brady* instituted minimum (and, as indicated, almost certainly insufficient) procedural safeguards; *Santobello* ensured that prosecutors act according to their promises; and *Padilla* obliged counsel to advise noncitizen clients about certain sufficiently serious noncriminal consequences of conviction. Thus, a clean line runs from *Brady* to *Padilla*, and it is a principally procedural line—to wit, *Brady* made certain that the defendant is “fully aware of the direct consequences” of pleading guilt,⁴⁵ and *Padilla* extended that

40. 434 U.S. 357 (1978); see, e.g., William J. Stuntz, *Bordenkircher v. Hayes: Plea Bargaining and the Decline of the Rule of Law*, in *CRIMINAL PROCEDURE STORIES* 351 (Carol S. Steiker ed., 2006) (criticizing *Bordenkircher*).

41. *Bordenkircher*, 434 U.S. at 357.

42. To my thinking, too hard.

43. *Bordenkircher*, 434 U.S. at 363.

44. Bibas, *supra* note 3, at 1139.

45. *Brady v. United States*, 397 U.S. 742, 755 (1970).

guarantee to immigration consequences (and possibly much more).⁴⁶

Moreover, the Court achieved this procedural extension without abandoning its former interpretive commitments. As before, unfair surprise remains the focus, and accuracy remains a practical irrelevancy.⁴⁷ The difference is that now, for the first time, the Court has announced that it may constitute unfair surprise for a defendant to plead guilty when he is blind to certain meaningful consequences that were formerly considered collateral. On this reading, the Court did not “drag the law into the twenty-first century.”⁴⁸ It gave the old law new teeth.⁴⁹

The consistency of the Court’s interpretive approach raises a more general point about fundamental fairness. Some have faulted the concept as too mutable to provide the basis for principled constitutional regulation.⁵⁰ But it is this very same capacious quality that permits fundamental fairness to occasionally admit appropriate change over time. I concede that there are dangers to the enterprise of constitutional regulation premised on soft principle, but, sometimes, fundamental fairness may provide the Court with a useful and constructive foothold. And, to my thinking, this is just such a setting. More than ever, the severity and scope of so-called collateral consequences are genuine, expansive, and significant.⁵¹ In *Padilla*, the Court justifiably recognized and responded to this reality. It determined that counsel can, and constitutionally *must*, advise clients about all sufficiently meaningful consequences of conviction—that is, all consequences that are “intimately related to the criminal process” or that are “integral part[s] of the penalty.”⁵²

Nevertheless, because *Padilla*—like *Santobello*, *Brady*, and *Bordenkircher* before it—principally regulates the fairness of constitutional criminal *procedure*, it can do only so much to promote what Bibas and I both

46. See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

47. See Bibas, *supra* note 3, at 1139 (observing that the *Padilla* Court’s focus “reaches beyond a defendant’s factual guilt”).

48. *Id.* at 1120.

49. And who better than Justice Stevens to re-imagine with a new twist the old fundamental-fairness style? Among current and recent justices, he has been the most ardent voice in favor of fundamental fairness over accuracy. See, e.g., *Sawyer v. Whitley*, 505 U.S. 333, 361 (1992) (Stevens, J., concurring) (“[F]undamental fairness is more than accuracy at trial; justice is more than guilt or innocence.”); *Smith v. Murray*, 477 U.S. 527, 540–45 (1986) (Stevens, J., dissenting) (“[T]he Court’s exaltation of accuracy as the only characteristic of ‘fundamental fairness’ is deeply flawed.”) (internal quotation marks omitted); *Teague v. Lane*, 489 U.S. 288, 321 (1989) (Stevens, J., dissenting) (observing that the Constitution is concerned with more than just errors that “undermine ‘an accurate determination of innocence or guilt’”).

50. See, e.g., ALLEN ET AL., *supra* note 11, at 92–93 (raising the concern).

51. See McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney’s Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 481 (2005) (describing licensing, housing, immigration, and employment consequences of conviction, among others); see also *Adult Criminal Consequences Statute Demonstration Site*, ABA CRIMINAL JUSTICE SECTION, <http://isrweb.isr.temple.edu/projects/accproject/> (last visited July 9, 2011) (database of civil consequences of conviction).

52. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1476 (2010).

believe ought to be a paramount objective: *substantively* fair guilty-plea sentencing.⁵³ The decision fails to constrain constitutionally the breadth and depth of criminal codes, and, thus, it cannot address adequately what Bibas appropriately identifies as some of plea-bargaining's most significant dangers. Specifically, a prosecutor still may stack criminal charges "to hide [her] . . . weak hand" or to "induce [the] defendant[] to surrender [his] Cadillac trial[] in exchange for [a] scooter plea bargain[]".⁵⁴ And a legislature still may "multiply overlapping criminal statutes and inflate sentences to give prosecutors extra plea-bargaining chips."⁵⁵ Bibas recognizes that an increasing proportion of convictions "trigger automatic collateral consequences, such as deportation or sex-offender residency restrictions,"⁵⁶ but he does not appreciate sufficiently that *Padilla* has left those triggers firmly in place. The decision has merely changed what a defense attorney must say *ex ante* to her client about the potential application of those triggers.

Thus, even after *Padilla*, the defendant has no constitutional claim as long as he pleads guilty with his eyes open. *Padilla* has merely made bargaining processes fairer. Any unduly harsh penalty that may follow such fair processes is taken to be, in *Bordenkircher's* words, just part of the "give-and-take" of plea-bargaining.⁵⁷ Put differently, the substantive law may be unfair, but the well-informed defendant is never *unfairly surprised*. Once again, the *Padilla* decision has kept true to its roots. In *Bordenkircher*, the Court affirmed the ability of a prosecutor to threaten a substantively draconian life sentence for a relatively nominal offense like forgery, and, in *Padilla*, the Court affirmed the ability of the prosecutor to threaten automatic deportation for even a marijuana conviction.⁵⁸

III.

HILL, PADILLA, AND PREJUDICE

Notably, *Padilla* is not the Court's first foray into effective assistance of counsel at plea. To the contrary, for the past quarter century, the Court has guaranteed pleading defendants a right to effective assistance under the standard announced in *Hill v. Lockhart*.⁵⁹ The *Hill* standard, in turn, is modeled

53. As Bibas puts it: "Plea-bargaining doctrine should try to guard against . . . charge and sentencing inequities, not just convictions of the innocent." Bibas, *supra* note 3, at 1141.

54. Bibas, *supra* note 3, at 1131.

55. *Id.* at 1128.

56. *Id.* at 1129.

57. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

58. More generally, the Court has proven largely unwilling to constitutionally regulate substantive criminal law. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5–6 (1997) (comparing the Court's hands-off constitutional approach to substantive criminal law to its hands-on approach to criminal procedure); see, e.g., William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 843 (2001) ("Fourth Amendment law mostly ignores substantive criminal law.").

59. 474 U.S. 52 (1985).

after the two-part test for trial ineffectiveness that the Court formulated a year earlier in *Strickland v. Washington*.⁶⁰ Specifically, to satisfy the so-called *Strickland* test, a defendant must demonstrate, first, that his attorney was deficient and, second, that but for her errors, there was “a reasonable probability that . . . the result of the proceeding would have been different.”⁶¹

Significantly, the *Hill* Court modified this two-part test in the guilty-plea context. The Court left the performance prong unchanged, but it customized the prejudice prong in a subtle but meaningful way. That is, the pleading defendant had to show “a reasonable probability that, but for counsel’s errors, *he would not have pleaded guilty* and would have insisted on going to trial.”⁶² Thus, the *Hill* standard is designed to recognize only a *certain kind* of prejudice—that is, prejudice sufficient to impact the “binary” decision to plead guilty or go to trial.⁶³

Simply put, it is not enough for the pleading defendant to show that he probably would have pushed for and received a better plea had he had a better lawyer. He must show a reasonable probability that he *would not have pled guilty at all*. In the typical guilty-plea case, this is close to impossible. After all, as a matter of sheer numbers, the overwhelming majority of criminal defendants do, in fact, plead guilty.⁶⁴ Thus, a defendant who challenges his plea for ineffective assistance of counsel must overcome a quasi-presumption that, like most defendants, he was bound to plead guilty in any event.

Moreover, on appeal, the defendant has only the cold record on which to make the necessary counterfactual argument to overcome this quasi-presumption.⁶⁵ In practice, this means that a pleading defendant will typically fail to demonstrate prejudice, because he typically cannot demonstrate what *Hill* requires—that he would have had a great chance of winning an acquittal had he had a competent lawyer.⁶⁶ Put differently, the defendant must come close to showing that he was otherwise unconvictable (and, for that reason, that

60. 466 U.S. 668, 687 (1984) (formulating a two-part test for ineffective assistance of counsel at trial); see also *Hill*, 474 U.S. at 57 (describing *Strickland*’s two-part standard for evaluating claims of ineffective assistance of counsel).

61. *Strickland*, 466 U.S. at 694.

62. *Hill*, 474 U.S. at 59 (emphasis added).

63. Bibas, *supra* note 3, at 1140 n.116. (“Though the [*Hill*] Court did not consider the possibility of two alternative possible plea bargains, its binary framing of plea versus trial appeared to foreclose such prejudice claims.”) (citation omitted); see also Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 HOW. L.J. 693, 696 (2011) (criticizing *Hill* because it “assumes that rejection of a guilty plea has only one outcome—trial”).

64. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2497 (2004); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1156 (2008).

65. As the *Hill* Court itself recognized, the existence of prejudice “depend[s] in large part on a prediction whether the evidence likely would have changed the outcome of a trial.” *Hill*, 474 U.S. at 59.

66. See ALLEN ET AL., *supra* note 11, at 1184 (“Notice what sort of errors tend to satisfy th[e] *Hill* prejudice standard: attorney errors that suggest not only that the defendant would have gone to trial, but that he would have *won* at trial.”).

he was legally—though perhaps not factually—innocent).⁶⁷ In *Hill*, then, the Court announced a prejudice standard that is unconcerned with the *fairness* of the deal, and is instead concerned only with the *accuracy* of the guilt determination. If the Court had formulated the standard to be sensitive to fundamental fairness, it would have permitted consideration of more than the plea's legal accuracy. It would have permitted consideration of the plea's equitable terms.⁶⁸ On this score, I agree with Bibas that the Court adopted a too narrow vision of prejudice in *Hill*. For many defendants, it is the substance of the plea deal that matters much more than the accuracy of the underlying conviction. According to Bibas:

While convictions may be foregone conclusions in many cases, . . . the punishments need not be. As noted, defendants face a spectrum of possible outcomes even after conviction. Thus, they need to weigh “the advantages and disadvantages of a plea agreement,” compared with other possible pleas as well as compared with trial.⁶⁹

Recognize, then, the difference between *Hill* and the previously discussed guilty-plea cases. All of the cases—*Hill* included—start from the same presumption of guilt, but the similarities end thereafter. In the rest of the cases—*Brady*, *Santobello*, *Bordenkircher*, and *Padilla*—the Court used the presumption of guilt as a basis to put aside the question of accuracy and move on to the consequential question of fairness. In *Hill*, the Court began and ended its analysis with accuracy (and not just any type of accuracy but the accuracy of

67. To understand the meaningful difference between prejudice under *Hill* and *Strickland*, consider the following comparison. In *Hill*, the defendant failed to meet that case's own prejudice prong where the defendant's attorney misadvised him about parole eligibility. In *Boria v. Keane*, the defendant was able to establish *Strickland* prejudice where his attorney failed to push him to take a manifestly favorable plea to avoid a “suicidal” trial. 99 F.3d 492, 497 (2d Cir. 1996). Critically, the defendant in *Boria* only had to show a reasonable probability of a different result—*any result*—because he took his case to trial. And, in *Boria*, the probable difference was manifest. The defendant received a twenty-year-to-life post-trial sentence instead of the one-to-three-year plea offer that he had rejected earlier. Comparatively, the defendant in *Hill* could not show prejudice, but only the probability that he would have pushed for a better (and, in his eyes, fairer) deal.

68. As Bob Scott and Bill Stuntz explained in their brilliant article, *Plea Bargaining as Contract*: “The potential unfairness in the typical plea bargain is not that the defendant gives up some legal entitlements, *but that he may not get enough from the government in return.*” Scott & Stuntz, *supra* note 29, at 1931 (emphasis added); *see also* Roberts, *supra* note 63, at 698 (recognizing that impact on “trial-outcome is only one part of a more nuanced and realistic approach” to prejudice).

69. Bibas, *supra* note 3, at 1140 (quoting *Padilla v. Kentucky*, 130 S. Ct. 1473, 1484 (2010)). Significantly, some lower courts have endorsed a more expansive vision of prejudice—*Hill*'s language to the contrary notwithstanding. *See Missouri v. Frye*, 311 S.W.3d 350, 357 (Mo. Ct. App. 2010), *cert. granted*, 131 S. Ct. 856 (U.S. Jan. 7, 2011) (No. 10-444) (“Reliance on *Hill*'s ‘template’ . . . completely ignores *Strickland*'s looser emphasis on whether a defendant can establish ‘an adverse effect on the defense.’”); *Mask v. McGinnis*, 233 F.3d 132, 141 (2d Cir. 2000) (considering as potential prejudice the reasonable likelihood that the defendant might have secured a better bargain); *cf. United States v. Kwan*, 407 F.3d 1005, 1017 (9th Cir. 2005), *abrogated by Padilla v. Kentucky*, 130 S. Ct. 1473 (U.S. 2010) (“Had counsel and the court been aware that a nominally shorter sentence would enable [the defendant] to avoid deportation, there is a reasonable probability that the court would have imposed a sentence of less than one year.”).

what probably would have happened *at trial*).⁷⁰ Put differently, the Court was unconcerned with the fairness of the defendant's sentence as long as the underlying determination of guilt was right. In this way, the *Hill* Court evaluated the guilty plea not on its own terms but against the yardstick of trial accuracy. The takeaway is that if there is an outlier in the plea canon, it is *Hill* (and its accuracy focus) and not *Padilla* (and its fundamental-fairness focus).

But did *Padilla* change *Hill*? The answer is maybe, but not completely and not directly. Significantly, the *Padilla* Court did not even squarely reach the second prong of the ineffectiveness test and instead remanded to the trial court for a determination of prejudice.⁷¹ Nevertheless, a colorable argument could be made that the *Padilla* Court moved modestly away from the *Hill* standard. First, throughout the *Padilla* decision, the Court emphasized the ability of competent counsel to bargain “creatively.”⁷² By endorsing creative bargaining, the Court possibly signaled that it understands that there is more to prejudice than what might otherwise have happened at trial. There is also the question of what might otherwise have happened at plea.⁷³

Second, from one perspective, *Padilla* came close to rejecting *Hill* expressly. Specifically, in an illuminating article, Jenny Roberts took the position that the Court affirmatively abandoned the *Hill* test when it observed (in passing) that “to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been *rational under the circumstances*.”⁷⁴ If this passage were taken as gospel (that is to say, if the passage had been part of the Court's holding), then Roberts's conclusion might well be right, because a defendant could now successfully demonstrate that his plea was irrational as compared to any favorable alternative plea and not just as compared to a potentially favorable trial

70. Roberts, *supra* note 63, at 696–97 (observing that the *Hill* prejudice prong fails to “recognize[] the realities of a non-trial based criminal justice system”).

71. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1487 (2010).

72. *Id.* at 1486 (“Counsel . . . may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.”); see also *id.* (“[T]he threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.”).

73. This practice of bargaining around legislatively prescribed penalties—whether they be mandatory minimum prison sentences or so-called collateral civil consequences—has been viewed pejoratively as “ad hoc bargaining.” Joseph A. Colquitt, *Ad-Hoc Bargaining*, 75 TUL. L. REV. 695, 698 (2001). Others view the practice more favorably as a way to achieve individualized substantive justice in the discrete case. See Malcolm M. Feeley, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 283–88 (discussing “the tension between formal and substantive justice” and exploring the overlooked advantages of pursuing the latter). I consider myself to fall squarely in the latter camp. See, e.g., Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010). I am pleased—and somewhat startled—to find the Supreme Court there, too. Indeed, I find the Court's frank endorsement of adjudicative efforts to circumvent draconian code law to be one of the most surprising (and wonderfully mischievous) aspects of the opinion. I had no idea the Court shared my misgivings about mandatory legislative directives.

74. Roberts, *supra* note 63, at 697 (citing *Padilla*, 130 S. Ct. at 1485 (emphasis added)).

outcome. But this passage was not part of the *Padilla* Court's holding, and, therefore, it would not seem to amount to much more than a few incautious words of offhand dicta. At best, the passage constitutes a clever effort by Justice Stevens to plant a seed of change. In either event, I am unsatisfied that the Supreme Court has definitively discarded the *Hill* prejudice test, and I will not be satisfied that it has done so until it takes that step in a case that squarely raises the question.⁷⁵

Significantly, even if Roberts were right—even if *Padilla* did successfully reject the *Hill* prejudice prong⁷⁶—this would be no more than a modest reform. At most, *Padilla*'s dictum would serve to trade the *Hill* test for a (still-stringent) *Strickland*-type test.⁷⁷ Comparatively, under a pure fundamental-fairness approach, the Court might aggressively restructure the prejudice requirement (or do away with it altogether) in *both* the *trial* and the *plea* contexts. Notably, a few lower courts have experimented with such radical reform.⁷⁸ For instance, the Oregon Supreme Court rejected the *Strickland* test for ineffective assistance-of-counsel claims at parental termination proceedings, reasoning that “fundamental fairness” demands that meritorious claims be granted except where the result would “inevitably have been the same”—put simply, a much looser prejudice standard than *Strickland*.⁷⁹ Likewise, the Hawaii Supreme Court declined to follow the *Strickland* test, reasoning that the standard is “unduly difficult for a defendant to meet,” and instead holding, on state law grounds, that a defendant may demonstrate prejudice whenever

75. One notable decision illustrates the problems lower courts may face when they attempt to divine a fresh prejudice test from *Padilla*'s dicta. See *Commonwealth v. Clarke*, No. SJC-10888 (Mass. App. Ct. June 17, 2011), available at <http://www.socialaw.com/slip.htm?cid=20734&sid=120>. In this case, the Massachusetts Supreme Judicial Court described the *Hill* standard as a mere first step. *Id.* Thereafter, the court concluded that the defendant would bear the “additional” burden—as prescribed by *Padilla*—of “convinc[ing] the court that a decision to reject the plea bargain would have been rational under the circumstances.” *Id.* (quoting *Padilla*). Finally, the court indicated that a defendant might satisfy this latter burden by showing “a reasonable probability that a different plea bargain . . . could have been negotiated.” *Id.* To put it mildly, the *Clarke* decision is a contradictory hodgepodge. According to the court, the availability of a better plea might satisfy the *Padilla* part of the test, but then, of course, it would fail the *Hill* part of the test, thereby inviting the question why the *Clarke* court felt it relevant to discuss a potential alternative deal that could not support a prejudice finding in any event.

76. See Roberts, *supra* note 63.

77. The question of whether a plea is “rational under the circumstances,” *Padilla*, 130 S. Ct. at 1485, sounds substantively similar to the question of whether there was “a reasonable probability that . . . the result of the proceeding would have been different,” *Strickland*, 466 U.S. at 694.

78. See generally Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. APP. PRAC. & PROCESS 179, 184–99 (2004) (exploring state court alternatives to *Strickland*).

79. State *ex rel.* Juvenile Department of Multnomah County v. Geist (*In re Geist*), 796 P.2d 1193, 1203 (Or. 1990) (observing that “fundamental fairness requires that appointed counsel exercise professional skill and judgment”); see also Calkins, *supra* note 78, at 218 (indicating that the operative prejudice standard in *Geist* is looser than the *Strickland* test); cf. Mark C. Brown, Note, *Establishing Rights Without Remedies? Achieving an Effective Civil Gideon by Avoiding a Civil Strickland*, 159 U. PA. L. REV. 893, 920 (2011) (arguing that the *Strickland* Court put too much emphasis on accuracy, while devaluing the need for fundamentally fair procedures).

counsel's errors "resulted in either the withdrawal or substantial impairment of a potentially meritorious defense."⁸⁰ Finally, a number of commentators have advocated a return to the harmless-error test that typically applied before *Strickland* and that put the burden on the state to demonstrate that counsel's error did not "impair[] the defense in a material way."⁸¹

Consider what such radical reform might signify. In his article, Bibas calls *Padilla* a triumph of Justice Stevens' "incrementalis[t]" vision,⁸² and that label may well be accurate. But Stevens had another jurisprudential commitment—fundamental fairness.⁸³ And that commitment is best served by liberalizing prejudice or, better yet, by dismantling it altogether. Indeed, this was Justice Marshall's principal point in his *Strickland* dissent. Marshall argued that the right to counsel is an end in itself, not a consequentialist means to produce an accurate determination of guilt:

[T]he assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is *to reduce the chance that innocent persons will be convicted*. In my view, the guarantee also functions *to ensure that convictions are obtained only through fundamentally fair procedures*. . . . Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer.⁸⁴

Marshall believed that the Sixth Amendment guaranteed more than accurate acquittals for innocent defendants; it guaranteed fundamentally fair procedures for *all* defendants.⁸⁵ For Marshall, then, a fundamentally fair procedure could not—under any circumstances—include, say, a sleeping or an intoxicated lawyer, even if the defendant were manifestly guilty.⁸⁶

In *Strickland*, the Court rejected Marshall's vision of prejudice-less

80. *State v. Smith*, 712 P.2d 496, 497 (Haw. 1986).

81. David Cole, Gideon v. Wainwright and *Strickland v. Washington: Broken Promises*, in CRIMINAL PROCEDURE STORIES 101, 112 (Carol S. Steiker ed., 2006); *see also* Brown, *supra* note 79, at 923.

82. Bibas, *supra* note 3, at 1161.

83. *See supra* note 49 and accompanying text (citing cases that illustrate Stevens' preference for fundamental fairness over accuracy).

84. *Strickland v. Washington*, 466 U.S. 668, 711 (1984) (Marshall, J., dissenting) (emphasis added).

85. For more of Justice Marshall's fundamental-fairness approach, *see* *Peters v. Kiff*, 407 U.S. 493 (1972); Meares, *supra* note 27, at 117–18.

86. *Cf. Ivory v. Jackson*, 509 F.3d 284 (6th Cir. 2007) (rejecting ineffective-assistance-of-counsel claim even though counsel allegedly was addicted to drugs and alcohol because defendant failed to show that counsel's deficient performance prejudiced him under *Strickland*); *Jackson v. State*, 290 S.W.3d 574, 585–87 (Ark. 2009) (rejecting ineffective-assistance-of-counsel claim even though one of four defense attorneys fell asleep during voir dire because defendant was never without counsel); *Ex parte McFarland*, 163 S.W.3d 743 (Tex. Crim. App. 2005) (rejecting ineffective-assistance-of-counsel claim even though one of two attorneys fell asleep during critical stages of trial because defendant was never without counsel); *Moore v. State*, 227 S.W.3d 421 (Tex. App. 2007) (rejecting ineffective-assistance-of-counsel claim even though counsel allegedly fell asleep briefly during prosecutor's cross-examination).

fundamental fairness, but, critically, it implicitly endorsed that same vision in *Santobello*. Specifically, the *Santobello* Court vacated the defendant's sentence *even though* it assumed that the constitutional violation had had no effect on the outcome.⁸⁷ Thus, the Court effectively took the position that fundamental fairness was its own end and that, accordingly, an unfair breach demanded a constitutional remedy. Significantly, then, Bibas may be wrong to conclude that the best path forward is to build on *Padilla* and its conception of fair bargaining and pleading; the best path forward may be to build on *Santobello* instead.

That said, Bibas is undoubtedly correct that *Padilla* is a step in the right direction. At a minimum, the decision has opened the door to a new set of cases that potentially may satisfy the onerous and misguided *Hill* prejudice standard. Specifically, post-*Padilla*, even a demonstrably factually guilty defendant may be able to show that, had he properly understood the prohibitively high (formerly) collateral consequences of his guilty plea, he reasonably might have rolled the dice and proceeded to trial. In this way, even if *Padilla* continues to operate within the *Hill* paradigm, it may serve to soften its sharpest edges and refocus the inquiry (however slightly) away from the accuracy of the guilt determination and toward the fairness of the plea price.

CONCLUSION

Stephanos Bibas is no fan of the Court's pre-*Padilla* decisions, and—with the exception of *Santobello*—neither am I. The difference between us is that I fault the Court only for the inadequacy of its constitutional rules and standards, but not also for its dominant methodological approach. I agree with Bibas that, all too often, the Court's regulation of plea bargaining and guilty pleas has amounted to a kind of window dressing that may do little more than prop up the prevailing guilty-plea regime. Thus, I am firmly of the belief that the Court has significant work to do. Critically, however, the Court's best method to achieve these much-needed reforms is not to abandon its interpretive commitments, but to *expand* them—to constitutionally police not only the fairness of plea *procedures* but also the *substance* of pleas.

87. See *supra* notes 28–30 and accompanying text.