11-1-2008

Exacerbating Injustice

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In response to Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008).

Josh Bowers's article *Punishing the Innocent*[1] is a terrific contribution to the plea-bargaining literature. Bowers, a former public defender, cuts through many of the misguided assumptions that cloud thinking about plea bargaining. For one, he is absolutely right to refocus attention away from the few violent felonies to the overwhelming number of low-level misdemeanors and violations.[2] The market and shadow-of-trial metaphors have some validity for the highest-stakes cases.[3] For murders, rapes, and terrorism prosecutions, public monitoring and retributive outrage discipline prosecutors, and the desire to minimize sentences drives defendants.[4] But the market or shadow-of-trial model has little relevance for low-level crimes, for which the desire to get it over with overwhelms the nominal sentences. As Malcolm Feeley famously argued, the process is the punishment.[5]

Another valuable contribution of Bowers's article is to focus attention on recidivists.[6] The spectre that an innocent person like you or me might face mistaken conviction haunts many discussions of the innocence problem. As Bowers notes, this fear is greatly exaggerated.[7] Police are unlikely to target and assume the guilt of citizens with clean records, and the absence of prior convictions makes it easier for law-

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[1] Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008).

[2] *See id.* at 1129.

[3] I have made this point elsewhere. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2491-93 (2004) (noting the pressure that pretrial detention places on low-level misdemeanants to plead guilty in exchange for a sentence of time served).

[4] *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2563 (2004).

[5] MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

[6] Bowers, *supra* note 1, at 1124-32.

[7] *Id.* at 1124-25 (stating that a wrongful conviction of a "good person" is "the rarest type of a rare category").

abiding citizens to speak in their own defense at trial. Moreover, those with clean records have greater incentives to clear their names to avoid criminal records in the first place. But recidivists, as unsavory as they are, are much more likely to be swept up in a dragnet of guilt by association. And because they already have criminal records, they may be much less reluctant to rack up one more conviction even if it is unjustified. This phenomenon may exacerbate existing race and class disparities, as those who are punished once are more likely to be the usual suspects.

Finally, Bowers has a unique take on the puzzling phenomena of *Alford*[8] and nolo contendere pleas.[9] I have complained that those pleas make it too easy for innocent defendants to plead guilty.[10] Bowers turns that argument on its head, noting that innocent defendants may rationally prefer to plead guilty than stand trial.[11] While these decisions are not always fully informed and rational,[12] Bowers is right that, even with full information, many innocent recidivists would still want to plead guilty.

Nonetheless, Bowers's argument rests on a misguided premise. He assumes that the job of plea rules and defense lawyers is simply to maximize the satisfaction of innocent defendants' preferences. That is one plausible model of criminal justice, but hardly the only one. Lay intuitions recoil at Bowers's argument, I think, because we think the job of the criminal justice system is to do justice. Of course, as Bowers notes, our justice system is tragically flawed, presenting innocent defendants with hard choices. Bowers and Albert Alschuler would say that, for as long as we have a flawed system, the remedy is to make it easier for innocent defendants to plead as they wish.[13]

This narrow utilitarian calculus leaves out several important considerations. For one, Bowers gives too little weight to public faith and

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[8] North Carolina v. Alford, 400 U.S. 25 (1970).

[9] Bowers, *supra* note 1, at 1165-70.

[10] Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1382-86 (2003).

[11] Bowers, *supra* note 1, at 1174 n.288.

[12] Bibas, *supra* note 10, at 1384 ("[I]nnocent defendants who want to enter *Alford* or nolo pleas are likely overestimating their risk of conviction at trial.").

[13] *See* Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1424 (2003) (arguing that efforts to block *Alford* pleas would only "increase[] the system's hypocrisy"); Bowers, *supra* note 1, at 1163 ("[T]he impact of permitting innocent defendants to plea bargain is a mere drop in a very large and full bucket.").

confidence in the justice system. True, low-level crimes are not often on the public's radar screen. And true, some innocent defendants are unjustly facing conviction, a cloaked injustice that Bowers would bring out into the open. But formally endorsing and embracing false guilty pleas as a legal fiction can only further erode public confidence in and the legitimacy of the justice system. Public legitimacy and trust are tied to the public's perception of the justice system's substantive accuracy and procedural fairness. Blatantly unjust pleas can only sap public faith in and compliance with the law.[14] A Marxist might perversely embrace Bowers's proposal as a way to foment the revolutionary overthrow of the capitalist system by exposing and exacerbating its internal contradictions. But that is not Bowers's agenda. Allowing—indeed, encouraging—the innocent to lie and plead guilty can only further erode public confidence.

Moreover, as I have argued elsewhere, most defendants who balk at admitting guilt are not innocent, but guilty criminals in denial. For them, *Alford* and nolo contendere pleas represent cheap ways out, accepting punishment while continuing to deny guilt. When the legal system offers these pleas, it facilitates and hardens defendants' denials. But admissions of guilt are first steps on the road to reform. This is why Alcoholics Anonymous and similar twelve-step programs require admitting one's wrongdoing as a prerequisite for turning over a new leaf and moving on. Pleas that let defendants continue to proclaim their innocence may prevent them from entering prison treatment programs, greatly increasing the likelihood of recidivism. They also make it easier for defense lawyers to let denying defendants remain in denial, instead of getting to the bottom of guilt or innocence.[15] Now, it is possible that Bowers's proposal would break down the dam of denial, leading some defendants to mouth their own guilt and later come to confess it freely. But it is at least as likely that many guilty defendants would express buyer's remorse later on, telling

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[14] *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 94-109, 125-34, 146-47, 161-69, 178 (1990) (stressing the importance of procedural justice for law's legitimacy); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 101-38 (2002) (same); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 483-85, 488 (1997) (emphasizing the importance of substantive just deserts for the criminal law's credibility, respect, and compliance); *see also* Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1410-26 (2005) (finding that stories of unjust laws increased survey subjects' willingness to flout unrelated laws and to nullify as jurors in unrelated criminal cases).

[15] *See generally* Bibas, *supra* note 10, at 1393-1406 (arguing that confessions and trials are valuable for guilty defendants).

friends and family that their pleas were legal fictions with no truth content.

These continued denials harm not only offenders' rehabilitation, but also victims' healing. If defendants who plead guilty can plausibly back away from their pleas at any time, victims may never enjoy closure. The defendant's family may more readily accept the defendant's self-serving proclamations of factual innocence in the face of his legal plea of guilt. (I am more skeptical than Bowers that the legal system can maintain acoustic separation, proclaiming a defendant's guilt publicly while privately whispering that guilty pleas are mere legal fictions.) Thus, victims may feel they have to continue to defend themselves and their actions from the jeers and criticisms of defendants' friends and family. Victims want authoritative, final pronouncements of guilt or innocence, and only trial verdicts or unequivocal guilty pleas can deliver that.

Another dynamic effect could involve salving the consciences of defense lawyers. Defense lawyers have self-interests in quick pleas, but these are balanced by moral and ethical strictures on convicting the innocent. Moral horror at convicting the innocent, reinforced by legal and ethical barriers to doing so, stiffen their spines and steel them to do combat. This adversarial combat may be a public good, as it may expose unjust arrests, crooked police informants, testilying, racial profiling, and the like.[16] If we remove the legal and ethical barriers, defense lawyers may feel more comfortable allowing and encouraging guilty pleas by the innocent. This may undercut their zeal to vindicate them. The result could be to stifle the exposure of police misconduct and similar injustices.

Most fundamentally, though, Bowers is mistaken to view all of criminal justice as a utilitarian calculus. Convicting the innocent is just plain wrong, and making it easier is simply abetting the wrong. Bowers would respond that the flaw lies in a justice system that threatens innocents with huge process costs and substantial chances of mistaken punishment. To his mind, fictional guilty pleas are simply the

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[16] Indeed, one fake-drug scandal involving the Dallas Police Department snared many false guilty pleas until pretrial discovery revealed the fake drugs, causing the house of cards to collapse. *See* Holly Becka & Tim Wyatt, *DA Tossing Dozens of Drug Cases; Prosecutors Acting Amid Concerns over Fake Evidence*, DALLAS MORNING NEWS, Jan. 18, 2002, at 1A; Robert Tharp, *D.A. Hill Admits Action Too Slow on Fake-Drugs Scandal*, DALLAS MORNING NEWS, Feb. 27, 2005, at 6H; Robert Tharp, *Drug Cases Marred: Several Arrests Jeopardized by Fake Cocaine*, DALLAS MORNING NEWS, Jan. 1, 2002, at 23A. While these false pleas already happen, Bowers's proposal could make the problem worse, covering up even more police misconduct.

least bad way out of a system that will inevitably convict some innocent defendants anyway. But there is a big moral difference between imposing process costs on a presumedly innocent defendant and imposing criminal punishment, with all its attendant moral stigma and opprobrium. And there is an even bigger deontological moral difference between accidentally or even negligently convicting an innocent defendant versus intentionally or knowingly making it easier to convict him. Of course, that is the point of criminal law's fine mens rea gradations. Intent matters. And the manifest intent of Bowers's proposal, or at least the way the public would see it, is that we simply don't care.

The massive flaws in our criminal justice system are indeed frustrating. It is awfully tempting to give in to the punishment assembly line, to make it speedier and more efficient and surrender any pretense of doing justice. But our conscience cannot brook that. We must fight; we must continue to proclaim our commitment to exonerating the innocent, however inconsistent we are in pursuing that in practice. We remain prey to charges of pious hypocrisy, but at least we keep the ideal as our lodestar. Otherwise, we might as well surrender the powerful symbolism of criminal *Justice*, wearing her blindfold, scales, and all. To do so would be not only a social disaster, but a moral one as well.

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