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BRINGING MORAL VALUES INTO A FLAWED PLEA-BARGAINING SYSTEM†

Stephanos Bibas††

INTRODUCTION

Albert Alschuler and I agree on more than meets the eye. We agree that *Alford* and *nolo contendere* pleas are shocking injustices, the products of a bureaucratized, utilitarian, assembly-line criminal justice system. We also agree that plea bargains are flawed substitutes for full-fledged jury trials, which both safeguard accuracy and serve as communal morality plays. We live in a fallen and imperfect world, however, one in which plea bargaining is not going to disappear any-time soon. In this real world of plea bargaining, can we make anything good come of guilty pleas? Or is any attempt to do so an immoral deal with the devil? Here is where Alschuler and I part company. The irony is that Alschuler's approach means fewer trials, more pleas, and more dishonesty in a system that cries out for honest, straightforward moral messages.

I

THE MEANING AND MESSAGE OF PLEAS

The criminal justice system uses large sentence discounts to induce guilty pleas. Of course these discounts exert pressure on defendants to plead guilty. As I acknowledged in my original article “most guilty pleas are not the fruit of genuine repentance. Instead, defendants feign repentance to earn sentence reductions.”¹

Alschuler makes a huge logical leap from this point. He concludes that because inducements influence pleas, “a guilty plea *cannot* be a guilty plea” but is necessarily a sham with no truth value and no

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1 Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1399 & n.194 (2003) (footnote omitted) (citing Alschuler, *The Changing Plea Bargaining Debate*, *infra* note 18, at 662-63).

message.² He overstates his case, however, by equating guilty pleas with confessions at gunpoint or under torture.³ No person of reasonable firmness resists such physical duress, but a number of defendants choose to reject plea bargains, protest their innocence, and go to trial. A defendant's plea thus means something to the defendant and to others. This is why many "obviously guilty defendants" have to struggle to admit guilt.⁴ This is why admissions of guilt, even if made initially to reap rewards, break down denial mechanisms and open the way to healing and reform.⁵ Alschuler's claim that all pleas are meaningless shams does not square with his earlier interviews, which found that defendants enter *Alford* pleas to protect their egos and save face.⁶ In other words, defendants want these pleas because they attach meaning to them and to straight guilty pleas. If all pleas were truly meaningless, there would be no demand for *Alford* and nolo pleas.

Likewise, if all pleas were truly meaningless, victims and the public would not object to *Alford* and nolo pleas. They do object, however. They understand that pleas carry meaning and that denials send the wrong message. A rapist's denial means that the victim was making up her accusation, or that she consented to sex, or that she enjoyed being raped. The justice system must not put its stamp of approval on these denials, because they victimize victims all over again. Instead, victims need vindication and catharsis to begin the healing process.⁷ It is telling that Alschuler says barely a word about victims' reactions; evidently he considers them irrelevant.

Alschuler describes *Alford* pleas as "nonsense pleas,"⁸ but usually they are just plain dishonest. He admits that most defendants who use them are guilty and so are lying about their innocence. He rationalizes this dishonesty as a response to a coercive system and says that our plea-bargaining system is already deceptive.⁹ Regrettably, a small minority of plea bargains do misstate charges and facts.¹⁰ But Al-

² Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Amnesia of Professor Bibas*, 88 CORNELL L. REV. 1412, 1416 (2003).

³ See *id.* at 1417.

⁴ See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1304 (1975) (noting that "[o]nce the [*Alford*] plea is allowed, the compulsion upon a defendant to admit his guilt disappears").

⁵ Bibas, *supra* note 1, Part IV.B.

⁶ See Alschuler, *supra* note 4, at 1280, 1287, 1304.

⁷ See Bibas, *supra* note 1, at 1389.

⁸ Alschuler, *supra* note 2, at 1412.

⁹ See *id.* at 1414-15.

¹⁰ Empirical studies of federal sentencing suggest that only 20-35% of federal plea bargains involve manipulation of the U.S. Sentencing Guidelines. Stephen J. Schulhofer & Rene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1284-86 (1997). The amount of outright dishonesty is probably much smaller; the only estimate of dishonest statements of fact in federal plea bargains is about 5%. Frank O. Bowman, III, *To Tell*

schuler's point does not follow from this sad fact. The remedy for dishonesty is not more dishonest pleas, but rather candor wherever possible. *Alford* and nolo pleas are as good a place as any to start introducing candor.

II

THE JUSTIFICATION AND USE OF SENTENCE DIFFERENTIALS

Though Alschuler repeatedly calls the pressures of plea bargaining "coercion," his attempts to assimilate sentencing differentials to torture or duress go too far. For example, he compares plea bargaining to ordering a person to sign a contract at gunpoint.¹¹ But unlike the contract at gunpoint, the prosecutor's threat to go to trial is a lawful effort to seek a legislatively authorized sentence. As Robert Scott and William Stuntz have explained, plea bargaining does not rely on duress because prosecutors are not responsible for creating defendants' predicament:

[C]oercion in the sense of few and unpalatable choices does not necessarily negate voluntary choice. So long as the post-trial sentences have not been manipulated by the prosecutor, the coercive elements of the plea bargaining environment do not corrupt the voluntariness of the plea agreement. A large sentencing differential does not imply coercion a priori.¹²

Alschuler further writes: "Bibas does not maintain that the court should force the defendant to risk [the post-trial] penalty because imposing it might be necessary to vindicate the public interest."¹³ I do maintain exactly that. The public interest requires heavier punishment for those defendants who are most deeply in denial and are found guilty at trial. As my article explains, these defendants are most likely to recidivate, have done the least to assuage their victims' sufferings, are the least contrite, and most need to learn lessons.¹⁴ Thus, the various justifications for punishment (deterrence, incapacitation, retribution, education, victim vindication, and reform) justify heavier punishment for these defendants.

Suppose, however, that one joins Alschuler in wishing that defendants could not benefit from sentence discounts. Perhaps an ideal

the Truth: The Problem of Pseudo-factual "Manipulation" of Sentencing Facts, 8 FED. SENTENCING REP. 324, 325 (1996) (citing Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 844 (1992)). Fact bargaining has become even less common in recent years, as probation officers have become adept at calling the true facts to the court's attention. Schulhofer & Nagel, *supra*, at 1292.

¹¹ Alschuler, *supra* note 2, at 1417.

¹² Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1920-21 (1992) (footnote omitted).

¹³ Alschuler, *supra* note 2, at 1415.

¹⁴ See Bibas, *supra* note 1, Part IV.B-C.

world would abolish or at least restrict and regulate these discounts. But we do not live in an ideal world. Sentencing discounts will exist for the foreseeable future, so we might as well make our lemons into lemonade. Good can come even of a flawed system, just as roses may grow well in manure.

There is a particular perversity in Alschuler's objection to my proposal. After all, abolishing *Alford* and *nolo contendere* pleas should mean moderately fewer plea bargains and more trials. Many if not most defendants will switch to guilty pleas, but some will go to trial. Alschuler, who has devoted his career to lamenting the cancerous spread of plea bargaining, should welcome this restriction. More trials means more safeguards, more scrutiny of those cases most in dispute, and therefore more accuracy.

III

INNOCENCE, ACCURACY, AND CONFIDENCE IN JUSTICE

Alschuler next attacks my concern with accuracy and perceived accuracy as hypocritical. He admits that most defendants who enter *Alford* and *nolo* pleas are probably guilty, so abolishing these pleas would be more accurate and honest for them. But he thinks that the few innocent defendants need *Alford* and *nolo* pleas so that they can plead guilty and reap plea bargains. Plea bargaining pressures them to take pleas and, he says, they are morally entitled to do whatever best serves their interests. Thus, he argues, the law ought to allow *Alford* and *nolo contendere* pleas to make it easier for innocent defendants to plead guilty.¹⁵ His colleague Frank Easterbrook would go even further. In Easterbrook's view, it is good for innocent defendants to plead guilty whenever the expected sentence at trial, discounted by the probability of acquittal, exceeds the plea bargain offer.¹⁶

Innocent defendants who are tempted to plead guilty often overestimate their chance of conviction at trial. Poor pretrial discovery and pressure from defense attorneys may lead them to overestimate their chances of conviction.¹⁷ Thus, the system should encourage these defendants to persevere to acquittal at trial. Moreover, even if it is sometimes rational for an innocent defendant to plead guilty, the criminal justice system is wrong to encourage it. Easterbrook treats guilty pleas by innocent defendants as a great utilitarian boon, but they are morally offensive. Any criminal justice system, especially one

¹⁵ See Alschuler, *supra* note 2, at 1415; Alschuler, *supra* note 3, at 1296-98.

¹⁶ See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 320 (1983) (justifying *Alford* pleas on this rationale).

¹⁷ See Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 53-56, 78-79 (1988).

as underfunded as ours, will regrettably convict some innocent defendants. But there is a big difference between a criminal justice system that purposely facilitates wrongful convictions via *Alford* pleas and one that takes a stance against them. The former embraces injustice; the latter recognizes with sorrow that injustice may occur but tries to stop it. The former signals its callousness; the latter, its care and concern.

Alschuler cannot see this difference.¹⁸ To be sure, any system that involves plea bargaining must be indifferent to innocence and coercion. Thus, he claims, reforms are little more than cosmetic window dressing for public consumption. But even a flawed system can take good-faith steps in the right direction. The public realizes that the system's intention matters. As Justice Holmes famously put it, even a dog knows the difference between being stumbled over and being kicked.¹⁹ The public will lose confidence in a system that purposely uses *Alford* pleas to facilitate convicting the innocent. Conversely, abolishing these pleas is a good first step towards honestly protecting the innocent. The point is not to hide injustice, but to embrace a consistent message: innocent defendants should persevere to trial to win acquittals.

There is only so much the system can do to ensure consistent moral messages. Of course some defendants who admit guilt will later change their stories and protest their innocence. Prison inmates do it all the time in their habeas corpus petitions. But there is an enormous difference between a collateral attack or other subsequent denial and an *Alford* plea. In the former case, the convicted defendant first admits guilt unequivocally in a guilty plea allocution. He later changes his mind, contradicts his earlier story, and unilaterally asks

¹⁸ Alschuler's blindness to this point is particularly ironic because he has made the same argument elsewhere. In responding to some authors who saw no difference between giving light plea bargains to many innocent defendants and giving heavy sentences to a few innocent defendants wrongly convicted at trial, he noted an important difference, namely the difference between a criminal justice system that tries to find the truth and sometimes fails and one that apparently does not care. Indeed, although those who measure justice only by a statistical "bottom line" might scoff at this suggestion, even the one defendant wrongly convicted at trial might sense this difference: despite his longer sentence, he might be less embittered by a mistaken assessment of the evidence in his case than all of the innocent defendants would be by a system in which no one truly wished to listen to the evidence at all.

Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 714 (1981). The same point applies here. The justice system should try to obstruct guilty pleas by innocent defendants, even if a few innocent defendants will instead be mistakenly convicted at trial and wind up with longer sentences. This effort to thwart mistaken convictions is morally far preferable to consciously facilitating unjust convictions via *Alford* and no-pleas and trumpeting those pleas as an advantage.

¹⁹ OLIVER WENDELL HOLMES, *THE COMMON LAW* 7 (Mark DeWolfe Howe ed., Little, Brown & Co., 1963) (1881).

the court to reopen a final conviction. With an *Alford* plea, the defendant never admits guilt in the first place. Rather, the justice system accepts and puts its seal of approval on his simultaneous equivocation or denial. In the Sara Jane Olson case, the judge did all he could to ensure a consistent guilty plea instead of allowing an *Alford* plea. The result, Olson's apology for conspiring with and assisting bombers, was a big change from her earlier defiant denials. And it meant a lot to the family of another of Olson's victims, as they too insisted on a public admission of guilt as a condition of a later Olson plea bargain.²⁰ This message was clearer and more satisfying to victims and the public than a facially ambiguous *Alford* plea would have been.

IV

THERAPEUTIC PRESSURE AND DEFENSE COUNSEL

Alschuler objects to using pleas to influence a defendant's conscience. He equates my proposal with the Spanish Inquisition, the Chinese Cultural Revolution, and George Orwell's *1984*.²¹ Once again, Alschuler is carried away by the force of his own rhetoric. Rehabilitation certainly can be abused, and past uses of torture, psychosurgery, and psychotropic drugs on offenders make one cringe.²² Such invasive rehabilitation wrongly treats defendants not as moral agents who must learn lessons, but as animals or robots to be fixed. This scientific nightmare is a far cry from my proposal. A system without *Alford* and *nolo* pleas does not treat the defendant as an automaton, nor does it invade his brain or body. Instead, it operates by appealing to the defendant's moral sense, his conscience. (This is the fundamental difference between rehabilitation and moral reform.) It uses jury trials as morality plays to teach moral lessons to those in deepest denial. The trial itself, a classic procedural safeguard, is therapeutic. Far from undermining the defendant's autonomy, presumption of innocence, or privilege against self-incrimination, the trial option respects his ultimate freedom of choice.²³ Some defendants

²⁰ See Bibas, *supra* note 1, at 1364-65 & nn.16-30; see also John M. Broder, *In a Quiet End to a Case, 4 Ex-Symbionese Liberation Army Members Plead Guilty to Murder*, N.Y. TIMES, Nov. 8, 2002, at A18 (noting Olson's later guilty plea to a related murder, in which she said "I am truly sorry, and I will be sorry until the day I die"; the victims' families had insisted that the defendants publicly admit their part in the death as a condition of this plea bargain).

²¹ Alschuler, *supra* note 2, at 1420.

²² See generally Sheldon Gelman, *The Biological Alteration Cases*, 36 WM. & MARY L. REV. 1293, 1229-39 (1995) (describing the horrors and dehumanization of biologically invasive methods of alteration, such as lobotomies and forcible administration of antipsychotropic drugs).

²³ One can also question how good the status quo is for autonomy. Defendants who suffer from massive denial, delusion, and distorted thinking are far from ideal, fully informed, autonomous, rational actors. Destroying their warped denial mechanisms may in fact increase their autonomy and clarity of thought.

will resent the confrontation at trial, as Alschuler supposes. But my psychological and anecdotal evidence suggests that more often, confronting denial can do some good.²⁴

Alschuler's final criticism is not really at odds with my argument. He points out that defense counsel must represent their clients' interests, instead of simply sitting in judgment of them or acting as therapists.²⁵ I agree that defense counsel often will not be certain of guilt and thus will only press possible innocence claims. Sometimes, however, defendants who want *Alford* pleas are "obviously guilty," as Alschuler himself recognizes.²⁶ Some defense counsel will press these clients to break through their denials, while others may be more hands-off.²⁷ Alschuler and I agree that a defense lawyer's role is not simply to promote the client's expressed selfish, short-term interests. Defense counsel should also "encourage [clients] to consider the moral implications of [their] choices."²⁸ Here, both Alschuler and I oppose Alan Dershowitz's uncritical endorsement of no-holds-barred advocacy.²⁹ One might loosely analogize the lawyer-client relationship to that of law clerks and judges. The law clerk does the judge a service—up to a point—by challenging the judge and expressing an independent viewpoint. Once the judge hears this advice and settles firmly on a course of action, the clerk's job is to implement the judge's directions.

Alschuler does not mention a further nuance of my argument, which is that a client's long-term interests may be at odds with his expressed short-term desires. A lawyer representing a recidivist drunk driver may be doing the client no favors by ignoring the client's drinking problem and seeking acquittal. The client may be better off if the lawyer persuades him to plead guilty and accept alcohol-abuse treatment.³⁰ The same may be true of crimes that result from drug addiction, pedophilia, kleptomania, or similar illnesses. These clients are far from fully informed, clear-eyed, autonomous rational actors; they may be blind to their own sicknesses. Defense lawyers can help their

²⁴ See Bibas, *supra* note 1, Part IV.B–C.

²⁵ Alschuler, *supra* note 2, at 1422–23.

²⁶ See Alschuler, *supra* note 4, at 1304.

²⁷ Alschuler notes that some defense counsel may press their clients hard to confront guilt. He then turns around and recognizes that some defense counsel will take the path of least resistance to earn "a quick buck." Alschuler, *supra* note 2, at 1423. In our system, the path of least resistance to a quick buck may be an *Alford* plea instead of repeated, time-consuming discussions that psychotherapists routinely engage in. In other words, *Alford* pleas may be too easy a way out.

²⁸ *Id.* at 1423.

²⁹ *Id.* at 1423 & n.55.

³⁰ See David B. Wexler, *Some Reflections on Therapeutic Jurisprudence and the Practice of Criminal Law*, 38 *Crim. L. Bull.* 205, 206–08 (2002).

clients confront and correct these pathologies if they see it as part of their job.

CONCLUSION

At root, Alschuler's loathing of plea bargaining obstructs realistic, incremental reform. To him, reforming the system from within smacks of dealing with the devil or of mere window dressing. In his mind, the best is the enemy of the good, because incremental reform might prop up a system that deserves only to be demolished.³¹ In the real world, however, plea bargaining is here to stay. Though there is some truth to his critique, his insistence on an ideologically pure hatred of plea bargaining blinds him to any good that can come of it. As long as plea bargaining exists, we can and should try to make it send more clear, honest, and straightforward moral messages. In this case, the solution is to abolish *Alford* and *nolo* pleas, so that defendants will either admit guilt or learn from jury trials. Criminal justice is not just about processing defendants efficiently but is about teaching and vindicating morality as well. I am pleased that Alschuler applauds my underlying moral theme and hope that he and others will keep broadening criminal procedure's focus beyond the blinders of utilitarian efficiency.

³¹ Alschuler protests that he is open to minor reform, see Alschuler, *supra* note 2, at 1423 & n.57, but his rejection of my position as mere window-dressing that might add an air of legitimacy to the system belies this claim.