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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, in which plea bargaining is not going to disappear anytime 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.”

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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message. He overstates his case, however, by equating guilty pleas with confessions at gunpoint or under torture. 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. 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. 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. 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. It is telling that Alschuler says barely a word about victims’ reactions; evidently he considers them irrelevant.

Alschuler describes Alford pleas as “nonsense pleas,” 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. Regrettably, a small minority of plea bargains do misstate charges and facts. But Al-
A large sentencing differential does not imply coercion a priori.\(^1\)

Aschuler 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.\(^1\) 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.\(^1\) 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 Aschuler in wishing that defendants could not benefit from sentence discounts. Perhaps an ideal
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 4, at 1296–98.
as underfunded as ours, will regretfully 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.

Aschauer can see this difference. To him, moral 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. 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 allocation. He later changes his mind, contradicts his earlier story, and unilaterally asks

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18 Aschauer’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 do the right thing 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. Aschauer, 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 guilty pleas and trumpeting those pleas as an advantage.

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.16-36; see also John M. Broder, In a Quiet End to a Case, a Ex-Syndicose 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 Gliman, The Biological Abortion Cases, 36 WM. & MARY L. REV. 1265, 1229-39 (1995) (describing the horrors and dehumanization of biologically invasive methods of alteration, such as lobotomies and forcible administration of antipsychotic 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.\footnote{See Blass. supra note 1, Part IV.B–C.}

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.\footnote{Alschuler. supra note 2, at 1422–23.} I agree that defense counsel often will not be certain of guilt and thus seriously press possible innocence claims. Sometimes, however, defendants who want \textit{Alford} pleas are “obviously guilty,” as Alschuler himself recognizes.\footnote{See Alschuler. supra note 4, at 1904.} Some defense counsel will press these clients to break through their denials, while others may be more hands-off.\footnote{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 \textit{Alford} plea instead of repeated, time-consuming discussions that psychotherapists routinely engage in. In other words, \textit{Alford} pleas may be too easy a way out.} 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.”\footnote{\textit{Id}. at 1423.} Here, both Alschuler and I oppose Alan Dershowitz’s uncritical endorsement of no-holds-barred advocacy.\footnote{\textit{Id}. at 1423 & n.35.} 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.\footnote{See David B. Wesley, \textit{Some Reflections on Therapeutic Jurisprudence and the Practice of Criminal Law}, 33\textit{ Caro. L. Rev.} 295, 296–98 (2002).} 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
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. 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.

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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.