HELPING INNOCENT DEFENDANTS IN HIGH-STAKES CASES

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

Professor Josh Bowers's article[1] is a breath of fresh air. He exposes the tired, stale arguments of those who are opposed to false guilty pleas—i.e., guilty pleas of factually innocent defendants. He persuades that, to the extent that innocent defendants are harmed by the criminal justice process, it is not the fault of plea bargaining but, rather, failures in other parts of our justice systems, specifically failures at the points of arrest, charge, and the trial itself. In his words, "[t]he inevitable conclusion is that there may well be systemic innocence problems, but they are not problems with plea bargaining."[2]

I was surprised when I read Bowers's article to learn that quite a few commentators,[3] and even courts (on state law grounds),[4] have rejected the analysis of the Supreme Court in *North Carolina v. Alford*.[5] Not a single Justice in 1969 took the position that Alford should be forbidden to plead guilty on the ground that he claimed to be innocent. Justice Brennan's short dissent did not reach the question of whether the Due Process Clause foreclosed an entry of a conviction based on a plea of guilty accompanied by a claim of innocence. The dissent merely read the record to show that Alford was so gripped by fear of the death penalty that his plea was involuntary.[6]

Bowers's clear-eyed analysis demonstrates that a false guilty plea is

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

2 *Id.* at 1179.

3 *Id.* at 1166.

4 *Id.* at 1166 & n.249.

5 400 U.S. 25 (1970).

6 *See id.* at 40 (Brennan, J., dissenting) ("[The defendant's] decision to plead guilty was not voluntary but was 'the product of duress as much so as choice reflecting physical constraint.'" (quoting Haley v. Ohio, 332 U.S. 596, 606 (1948))).

nothing more, and nothing less, than just another legal fiction.[7] He embraces the autonomy logic that underlies the *Alford* opinion. In the Court's words, "[w]hether [Alford] realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading."[8] Bowers recognizes that fairness also compels allowing false guilty pleas.[9] Why would a rational justice system permit guilty defendants to plead guilty and obtain sentence or charge concessions from the prosecutor, while denying innocent defendants those same benefits? As Bowers puts it, "[u]ltimately, a system that respects the autonomy of the guilty to forfeit trial rights should respect the autonomy of the innocent to do the same."[10]

Bowers is right in stating that Anglo-American criminal law is based—too much I have argued[11]—on the principle that it is best to let adversary parties control how the question of guilt or innocence is settled. What would justify abandoning that principle in the *Alford* context? Perhaps courts that refuse to accept false pleas are motivated by paternalism—that they know better than defendants what is good for them. Judges might also be moved by the view that judicial "clean hands" are more important than allowing innocent defendants to have the same benefits as guilty defendants. While those justifications are not without weight, they are, in my view, overwhelmed by the autonomy and fairness principles.

The Bowers defense of false pleas of guilt can be expanded. How do we know that any given plea is false? Judges lack an epistemology that would reveal the truth about the defendant's claim of innocence. To reject *Alford* is to require the trial judge to make, at best, an educated guess about whether the defendant who claims to be innocent is in fact innocent. Indeed, there is every reason to believe that Alford himself was guilty. The Court noted that the trial judge heard evidence that "substantially negated [Alford's] claim of innocence."[12] If the judge were required to refuse Alford's plea, we would have the bizarre spectacle of forcing a probably guilty

[7] *See* Bowers, *supra* note 1, at 1170-76.

[8] *Alford*, 400 U.S. at 37.

[9] *See* Bowers, *supra* note 1, at 1174 (arguing that "false admissions are just another means of bending law to 'promote[] function, form, and sometimes even fairness'" (quoting Aviam Soirfer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 875 (1986))).

[10] *Id.* at 1164.

[11] GEORGE C. THOMAS III, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS 168-80 (2008).

[12] *Alford*, 400 U.S. at 38.

defendant to trial merely because he falsely claimed to be innocent.

One (slight) criticism of Bowers's article is that he sometimes labors to rebut what are lightweight arguments on the behalf of those who oppose false guilty pleas. That said, the great value of the piece is that Bowers adds substantially to our understanding of how the system processes cases. Moreover, his ultimate claim is that *Alford* does not go far enough in holding that judges *may* accept guilty pleas from defendants who profess innocence.[13] Bowers argues that defendants should be permitted as a matter of right to make a false claim of guilty.[14] I applaud this analytical move. Bowers recognizes that the logic of *Alford*'s autonomy and fairness points cannot be limited in the way that the majority opinion attempts.[15]

Perhaps Bowers's single best insight is to expand Malcolm Feeley's point that the process *is* the punishment[16] for most recidivist defendants who are charged with misdemeanors—Bowers calls these "low-stakes cases."[17] Bowers argues forcefully that the process is the punishment in "low-stakes cases" for the innocent defendant as well as for the guilty one.[18] Waiting in jail for a bail hearing, perhaps not being released on bail, having to consult with counsel, having to marshal evidence of innocence—all of these life-disrupting events can often dwarf the ultimate penalty, sometimes a conviction of a noncriminal violation or a conviction with time served as the sentence. In those cases, as Bowers demonstrates, a guilty plea of an innocent defendant is a supremely rational decision.[19]

A more serious criticism of Bowers's article is that it devotes a relatively small amount of attention to, and has little to say about, what he admits is the "pricklier" question of innocent defendants facing serious charges.[20] Here, as he admits, process costs diminish, and a conviction threatens devastating harm to innocent defendants.[21] All Bowers has to say about these defendants is that, in many cases, it

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[13] Bowers, *supra* note 1, at 1166-67.

[14] *See id.* at 1177-78 (detailing the weak and strong versions of Bowers's proposal).

[15] *See Alford*, 400 U.S. at 38 n.11 ("Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead.").

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

[17] Bowers, *supra* note 1, at 1119.

[18] *Id.* at 1132-34.

[19] *Id.* at 1134-35.

[20] *Id.* at 1178-79.

[21] *Id.* at 1153-58.

still might make sense to plea bargain.[22] He seems to feel that he is free to ignore the high-stakes defendants because low-stakes cases, involving defendants who are typically recidivists, are by far the most frequent case where false pleas occur.[23] But just because these defendants are numerically more common does not mean that we should care more about them than defendants in high-stakes cases. My recent book, *The Supreme Court on Trial: How the American Justice System Sacrifices Innocent Defendants*, begins with the story of Ray Krone, who was sentenced to die and eventually served over ten years for a murder that DNA ultimately proved he did not commit.[24] I think the Ray Krones of the world are the defendants we should worry about.

And what does Bowers provide as a solution to the Ray Krone type of case? Not much. The "stronger version" of his solution would include "sanctioning plea bargaining for the innocent, declaring false pleas to be a legal fiction, and affirmatively requiring counsel to advise clients about outstanding offers and to facilitate knowing and voluntary client decisions to plead guilty."[25] But in the very next sentence he admits that this proposal "is no more than an admonition to defense counsel to take seriously" the canons of ethics that require them to communicate with clients and help them make a sound decision.[26] And he also admits that "even without my proposal, plea bargaining for many innocent defendants will proceed apace" because of the obvious benefits to judges, defense counsel, and defendants.[27]

I think we can do more. Bowers is onto something big when he writes that "the criminal justice system no longer has much to do with transparent adversarial truth-seeking; it has far more to do with the opaque processing of (rightful or wrongful) recent arrests."[28] He uses this insight to justify explicit recognition of false pleas of guilty. I agree with him that, given the current system, his solution is the best we can do. But why accept the current system? The point of my book is that we do not have to keep employing policies that harm innocent defendants. We could, as Lloyd Weinreb argued persuasively thirty

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[22] *Id.* at 1158.

[23] *Id.* at 1119-20, 1125-26.

[24] THOMAS, *supra* note 11, at 6-8; *see also* State v. Krone, 897 P.2d 621, 622-23 (Ariz. 1995) (en banc) (describing the events that led to Krone's conviction and death sentence); Innocence Project, Know the Cases: Browse Profiles: Ray Krone, http://www.innocenceproject.org/Content/196.php (last visited Oct. 7, 2008) (recounting Krone's eventual exoneration).

[25] Bowers, *supra* note 1, at 1177.

[26] *Id.*

[27] *Id.* at 1174.

[28] *Id.* at 1173.

years ago, adopt a French-style system in which magistrates and trial judges actively engage in a search for the truth rather than being merely referees for adversaries.[29]

"Truth" is a victim in our current system, as Bowers recognizes.[30] William Pizzi has written that the current American criminal rules resemble "a card game in which the prosecutor and the defense attorney lay individual pieces of evidence on the table but keep the rest of their hands close to their chests."[31] Almost sixty years ago, Jerome Frank observed that advocates do not want the objective truth, but, rather, *their version of the truth*, to come out in most cases.[32] Thus, the adversary system is "the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation."[33]

Moreover, every conviction of an innocent defendant imposes a legitimacy cost on the system as a whole. While innocent defendants should be permitted to plead guilty if they have no other good choice, consider how much better it would be to screen innocent defendants out of the system prior to that choice. In my book, I recommend changes in the way cases are screened prior to trial. I propose that a special class of judges be created—call them "screening magistrates"—whose job it is to screen out defendants who are probably not guilty.[34] This could be done with a deposition process much like that used in civil cases. Defendants could not, of course, be compelled to provide a deposition, but innocent defendants would in most cases want to waive their Fifth Amendment rights and put their innocence on the record. Florida has, for over forty years, used a similar approach to felony cases[35] and has reported no structural impediments and no

[29] *See* LLOYD L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES 117-46 (1977) (proposing that the current problems of the criminal justice system could be remedied by the creation of a new judicial office charged with truth seeking in criminal matters).

[30] *See* Bowers, *supra* note 1, at 1153 (explaining that while the frequency of plea bargains in low-stakes cases may undermine the truth-seeking function of the criminal justice system, this function is also likely to be relatively unimportant to an individual defendant who, in going to trial, "must endure a process more painful than the proffered plea").

[31] WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT 114 (1999).

[32] *See* JEROME FRANK, COURTS ON TRIAL 80-102 (1949) (describing a "fight" theory of advocacy, as opposed to a "truth" theory).

[33] *Id.* at 85.

[34] *See* THOMAS, *supra* note 11, at 198-202.

[35] *See* FLA. R. CRIM. P. 3.220 (providing the defendant with the opportunity to bind

additional strain on resources.[36]

In 2001, reacting to the same concerns that would later move Governor George Ryan to commute 156 death sentences, the Illinois Supreme Court revised its rules to permit defendants in capital cases to take depositions of witnesses "upon a showing of good cause."[37] Both the Florida and Illinois rules are careful to minimize the risk of witness intimidation. Florida provides for protective orders[38] and forbids the presence of defendants at the deposition of other witnesses unless both parties agree or the court allows the defendant's presence.[39] Illinois denies defendants the right to appear at the depositions but gives judges discretion to permit attendance.[40]

Under my proposal, when the State is ready for trial, the screening magistrate would examine the depositions, call for a hearing if necessary, and then decide whether the prosecution has proven that the defendant is more likely than not guilty. This is the standard used in civil trials. Judges and lawyers are familiar with it. If the prosecutor cannot persuade the magistrate on the eve of trial that the defendant is more likely than not guilty, two propositions follow. It will be difficult to prove those defendants guilty beyond a reasonable doubt, and there is an unacceptable risk that some of them are innocent. The screening stage would be no more of a jeopardy bar than a grand jury's failure to indict. The prosecutor who loses at the screening stage, but still believes the defendant to be guilty, can refile charges, collect more evidence, and try again.

There are obvious advantages to having a judge screen the State's case. Judges are better able than juries to ignore distracting or irrelevant testimony. Perhaps most importantly, judges are more likely to give proper weight to prior convictions used to attack the credibility of defendants. My strong hunch is that juries give weight to

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both the prosecution and defense to a discovery process that includes depositions).

[36] I examined the law review literature listed under the Florida rule on Westlaw and found no evidence of any concern on the part of prosecutors or judges. I also ran searches designed to find evidence of protective orders in the Florida case law. Multiple searches for the rule number and "protective order!", "good cause," "harassment," etc. produced only one case, and it was not relevant to any concern about burdens on the State or its witnesses. *See* Media Gen. Operations, Inc. v. State, 933 So. 2d 1199, 1201 (Fla. Dist. Ct. App. 2006) (holding that Florida Rule of Civil Procedure 3.220 did not permit the trial judge to receive discovery-related motions under seal).

[37] *See* ILL. SUP. CT. R. 416(e).

[38] *See* FLA. R. CRIM. P. 3.220(*l*).

[39] *See Id.* at 3.220(h)(7).

[40] *See* ILL. SUP. CT. R. 416(e)(iii); *id.* committee comments (confirming that a trial court judge retains discretion to allow the defendant's presence at a deposition).

prior convictions on the issue of guilt or innocence and not just credibility. To encourage innocent defendants to give a deposition, one could make inadmissible at trial any testimony about prior convictions elicited during the deposition.

And what of the cases that stay in the pipeline? My book proposes that the screening magistrates act as plea regulators.[41] Because they would know much more about the case than any judge in the current system, the magistrate would have enough knowledge to propose a fair plea. There would be no bargaining. The magistrate would propose a charge and sentence, and the defendant could take it or leave it. I think this would be a vast improvement over the current system, where the State usually has a vastly superior bargaining position (though Bowers is right to point out that defendants in low-stakes cases have leverage in the bargaining process that scholars often fail to understand[42]).

The combination of active participation of the magistrate in evaluating the State's evidence and the requirement that the prosecution prove guilt by a preponderance of evidence on the eve of trial will reduce, dramatically I think, the number of innocent defendants who remain in the pool. But no system is perfect, and some innocent defendants will undoubtedly face the choice of accepting the magistrate's plea offer or going to trial. In writing this Response, I wondered if there was something else that could be done to help these defendants.

Michael Risinger has made a particularly intriguing proposal that would allow defendants to choose to be tried by "factual innocence rules."[43] Defendants would identify the one or two ultimate facts that prove their claims of innocence.[44] Everything else could be

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[41] *See* THOMAS, *supra* note 11, at 204-07.

[42] The principal leverage is the threat to insist on a trial. *See* Bowers, *supra* note 1, at 1151-52. Prosecutors do not have the resources to take very many low-stakes cases to trial, and if the defense lawyer makes a good bluff, the prosecutor will sweeten the pot. I know this from experience—though my case was a high-stakes one. The prosecutor, nearing retirement, did not want to try a second-degree murder case where the victim was a passenger who died in a one-car accident. The victim was as intoxicated as the driver and had, after all, assumed the risk of riding in the car driven by my intoxicated client. My client, who had a serious drug and alcohol problem, did not want to spend even one day in jail. Thus, we kept rejecting more and more favorable plea deals until finally the prosecutor offered two months in jail in exchange for a guilty plea to involuntary manslaughter. I persuaded my client to take that deal.

[43] D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1311-13 (2004).

[44] *Id.* at 1311.

stipulated.[45] The court under factual innocence rules would screen the prosecutor's expert testimony more closely and would permit more freedom to the defense to challenge confessions, jailhouse informants, and eyewitness identifications.[46] The issue would not be whether the State can put together circumstantial or false evidence of guilt (if the defendant is factually innocent, all of the evidence by definition must either be circumstantial or false). The focus under Risinger's rules would be whether the defendant is innocent. The beauty of Risinger's idea is that it actually lessens the burden of trial. Trials under factual innocence rules would be shorter and more focused.

To assist innocent defendants during the pretrial screening process, I propose adopting a version of the factual innocence rules. Defendants should be permitted to choose to go first in the deposition process so that they can take advantage of any testimony of innocence. Consider an innocent defendant who has an alibi. She presumably would choose to present her alibi testimony before the State has presented its evidence. If her alibi witnesses—including herself—hold up well during the deposition stage, the prosecutor might dismiss the case. Even if the case is not dismissed, the defendant has the advantage of having the alibi testimony to use to cross-examine the State's witnesses.

Almost every documented wrongful conviction featured some combination of a mistaken eyewitness identification, false testimony from jailhouse informants, or a false confession.[47] Innocent defendants would, of course, like to use expert witnesses to explain how a false confession is possible or to discredit the testimony of jailhouse informants or eyewitnesses who make false identifications. The law here is complex and varies from state to state. The principal reason for the legal maze is the age-old nostrum that experts should not invade the province of the jury. But a pretrial screening process would determine only whether the case goes forward and not guilt or innocence. Thus, there is no reason to limit the testimony of experts at the screening stage beyond the obvious requirement that it must be relevant. To make this testimony routinely admissible would substantially benefit innocent defendants.

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[45] *Id.*

[46] *Id.* at 1311-12.

[47] *See* Innocence Project, Understand the Causes, http://www.innocenceproject.org/understand/ (last visited Oct. 7, 2008) (noting that 101 of the first 130 exonerations based on DNA evidence involved eyewitness misidentification, 35 involved false confessions, and 21 involved informants or jailhouse snitches).

Will making this testimony admissible confer an untoward benefit on the guilty? I doubt it. At the screening stage, defendants must show by a preponderance of the evidence that they are innocent. If all the State has is an eyewitness identification, a confession that the defendant now denies, or informant testimony, perhaps expert testimony challenging that evidence will move the meter enough to merit a dismissal. If the State has other substantial evidence of guilt, the magistrate will likely refer the case to trial. If the State does not have other substantial evidence of guilt, there is (for me) sufficient doubt about innocence that would justify a magistrate's decision not to refer the case for trial. The case can still go forward if the prosecutor later finds more evidence.

Michael Risinger reminded me that powerful hydraulic forces operate in a system that produces well over a million felony convictions a year.[48] Even if my recommendations were adopted, these forces might co-opt the screening magistrates and cause them to defer to police and prosecutors. We would then have a world in which the protection of innocent defendants is merely given lip service. The possibility of failure is, of course, no reason not to try. More fundamentally, I would rather have a criminal process that at least pays lip service to the value of protecting the innocent. Our current process fails to achieve even that modest accomplishment.

Josh Bowers has made a powerful, smart presentation that plea bargaining is not part of the innocence problem that American criminal justice faces. But, for me, that is just the beginning of the inquiry. I have sought in my recent book and in this essay to put forward some ideas that move us away from the adversary model, where truth is sacrificed on the altar of zealous advocacy, and move us toward a model where protecting innocence is more important than advocacy.

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[48] *See* Bureau of Justice Statistics, Criminal Sentencing Statistics, http://www.ojp.usdoj.gov/bjs/sent.htm (last visited Oct. 7, 2008) (reporting a total of nearly 1,145,000 state and federal felony convictions in 2004).

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