

## GUILTY PLEAS AND SUBMARKETS

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

When we consider human economic behavior, sometimes it helps to speak in broad strokes about “the market,” with all of its buyers and sellers. But at other times, we learn more from thinking about the differences among submarkets. What distinguishes the buyer of a used car from the buyer of a new Lexus? What makes the sellers of cotton different from the sellers of diamonds?<sup>1</sup>

As we try to understand behavior in the world of criminal justice, the same distinction applies.<sup>2</sup> Many scholars explore plea negotiations and the administrative nature of our modern criminal justice system, writ large. Only a few look more specifically at submarkets of criminal justice. The enormous range of penalties at stake in criminal cases, along with the huge organizational differences among the investigators and the attorneys who work in different corners of this system, suggest that the submarkets of criminal justice deserve separate attention. Large city criminal justice operates differently from small city or rural criminal justice; felony courts produce different outcomes from misdemeanor courts; drug trials look different from fraud trials. When thinking about appropriate ways to regulate plea-bargain practices, it would be wise to account for these submarkets.

One valuable and encouraging aspect of Josh Bowers’s article<sup>3</sup> is that he recognizes differences among defendants and among prosecutors. He shows that defendants in some settings face very different

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<sup>1</sup> See Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

<sup>2</sup> Cf. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 193-205 (2001) (discussing the contributions of scholarly study at different levels of detail in the social control of crime).

<sup>3</sup> Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008).

punishments than defendants in other settings.<sup>4</sup> He also notes that prosecutors in some cases value the fact of a conviction over the severity of the punishment to be imposed.<sup>5</sup> For this reason, Bowers adds important detail to our map of administrative criminal justice.

I worry, however, that Bowers draws the wrong implications from his persuasive portrait of recidivists who face low-level charges. He treats such defendants as the quintessential actors in plea negotiations, and urges us to regulate plea negotiations generally in light of the problems and priorities of this group. For recidivists in low-stakes cases, he argues, the ability to negotiate lesser sentences is the key virtue.<sup>6</sup> Access to these discounts means more for these defendants than the risk that plea negotiations will induce some innocent defendants to plead guilty. This is an essentialist argument: for the typical defendant, punishment of the innocent is not the essential problem. A better response for this defendant, Bowers suggests, is “to reconceive of false pleas as legal fictions and to require defense lawyers to advise and assist innocent defendants who wish to mouth dishonest on-the-record words of guilt.”<sup>7</sup>

Why must we treat the recidivist in a low-stakes case as “the” defendant? And why should we build a single legal structure to respond to “the” highest priority of this defendant? We would do better, I believe, to evaluate and regulate the submarkets of criminal justice separately. In some of those submarkets, the public could legitimately restrict the bargains that the parties might reach, based on concerns that defendants might not place enough value on accurate outcomes—that is, some defendants may not appreciate the public value of innocence.

## I. DEFENDANT SUBMARKETS

Bowers has good reason to direct our attention towards recidivists who face misdemeanors or low-level felony charges. This is a common scenario in the criminal system: as Bowers points out, about three-fourths of felony defendants in large urban courts and about half of

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<sup>4</sup> *See id.* at 1124-32 (focusing on the various biases facing recidivists as compared to first-time defendants in the criminal system).

<sup>5</sup> *See id.* at 1141 (emphasizing that, while prosecutors “still care deeply about convictions,” “[t]hey care little, if at all, about maximizing plea prices and ultimate sentence length”).

<sup>6</sup> *See id.* at 1119 (“On balance, plea bargaining is a categorical good for many innocent defendants, particularly in low-stakes cases.”).

<sup>7</sup> *Id.* at 1121.

the misdemeanor defendants in New York City carry a previous conviction on their records.<sup>8</sup> These two statistical snapshots may not accurately reflect the makeup of criminal defendants in both urban and nonurban courts.<sup>9</sup> Nevertheless, allowing for some unavoidable imprecision,<sup>10</sup> the available numbers confirm Bowers's two essential points: a large portion of the traffic moving through state criminal courts involves defendants with some prior criminal record and criminal charges that do not carry especially heavy penalties.

While recidivists do account for a large number of the bodies in the criminal court system, it would be a mistake to ignore the large group of defendants who have no prior convictions. For instance, in North Carolina courts in 2006-2007, slightly less than half of the defendants *convicted* of a misdemeanor had no prior convictions.<sup>11</sup>

A distinctive set of rules and concerns might apply to these defendants. Because the fact of conviction should concern these defendants more than the amount of punishment, they are more likely to hold out for a dismissal or an acquittal in a weak case. The conviction of completely innocent defendants may not worry us so much here. Instead, a central concern for this submarket might be adequate counsel and complete information about the consequences of minor convictions. A surprisingly large number of defendants waive counsel even when they face misdemeanors that are serious enough to trigger a right to counsel.<sup>12</sup> Defendants in this submarket also need to appre-

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<sup>8</sup> *Id.* at 1125 & n.25.

<sup>9</sup> In seventy-five urban jurisdictions in 2004, 78% of felony defendants had a prior arrest and 62% had a prior conviction (46% had a prior felony conviction). BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004—STATISTICAL TABLES, tbls.6, 7 & 8, available at <http://www.ojp.usdoj.gov/bjs/pub/html/fdluc/2004/fdluc04st.htm>.

<sup>10</sup> Statistics that compile state criminal system figures across the nation are terribly limited. This statistical gap is a scandal, but a topic for another day. See Marc L. Miller & Ronald F. Wright, "The Wisdom We Have Lost": *Sentencing Information and Its Uses*, 58 STAN. L. REV. 361, 374-79 (2005) (arguing for a national system of data collection and comparison with regard to sentencing regulation in the states to correct deficiencies in reporting).

<sup>11</sup> For a quick estimate of nonurban systems and misdemeanor courts, I consulted statistics from North Carolina. See VICKY ETHERIDGE, TAMARA FLINCHUM, & GINNY HEVENER, N.C. SENTENCING AND POLICY COMM'N, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES AND MISDEMEANORS: FISCAL YEAR 2006/07, available at <http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/06-07statisticalreport.pdf>.

<sup>12</sup> See Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2078-81 (2006).

ciate fully the long-term consequences of felony versus misdemeanor convictions.<sup>13</sup>

Fewer defendants face more serious felony charges, yet they form a submarket that also deserves separate consideration. Conviction of the innocent—conceived broadly to include convictions that are more serious than a defendant typically receives for a given course of conduct—is a stronger possibility here. Accurate outcomes in the criminal courts face their greatest test when defendants confront large discounts. When the gap between the high potential sentence after a conviction at trial and the low potential sentence after a plea of guilty grows too large, the public might become concerned that defendants will make poor choices. Those who are risk averse might take the offer of a lesser conviction, even if the lesser crime does not accurately reflect what the defendant did. This is a concern for us all. As I have put the point elsewhere,

Because the criminal system emphasizes *public* responses to alleged violations of *public* values, the need to demonstrate the legitimacy of the criminal justice system must trump the preferences of defendants. At some point, the purchase of too many uncertain convictions undermines our confidence that the system is leading to the accurate results necessary for legitimacy.<sup>14</sup>

Bowers explains nicely why accuracy of outcomes is not a major worry for the most typical defendants.<sup>15</sup> He also notes, correctly, that inaccurate convictions might reflect poor investigation, failed pretrial discovery, or various other system failures; the availability of a plea bargain does not alone explain the unhappy outcome.<sup>16</sup> None of this means, however, that “plea bargaining” is a generally positive practice for criminal defendants.

The viable question we face is not whether to abolish plea bargaining, but how best to avoid its most coercive and distorting effects.<sup>17</sup>

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<sup>13</sup> See Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9, 18 (2007) (maintaining that a reduction from a felony charge to a misdemeanor charge not only reduces punishment, but also impacts one’s criminal history and thus dramatically affects future punishment).

<sup>14</sup> Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 111 (2005).

<sup>15</sup> See Bowers, *supra* note 3, at 1157-58 (emphasizing that, in low-stakes cases, it is the process costs that matter to defendants, rather than the outcomes).

<sup>16</sup> See *id.* at 1119 (“[I]naccurate guilty pleas are merely symptomatic of errors at the points of arrest, charge, or trial—not at the point of plea bargaining.”).

<sup>17</sup> See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2468, 2531-45 (2004) (proposing reforms to make plea-bargaining practices “conform more to the shadows of trials and to iron out inequalities”); Michael M.

What forms of regulation might appeal to us? The answer is contextual, and depends upon more than finding the leading concern of the largest group of defendants. Closer attention to submarkets of defendants would lead us to diagnose the most meaningful risks that apply to plea negotiations within various groups.<sup>18</sup> Our challenge is to match the appropriate regulatory technique to the most important failures in each submarket.<sup>19</sup>

## II. PROSECUTOR SUBMARKETS

Just as there are differences among defendants that matter when we evaluate plea negotiation practices, there are differences among prosecutors. Bowers sometimes treats prosecutors as a collection of interchangeable parts, to be analyzed as rational wealth maximizers.<sup>20</sup> He subjects their practices and priorities to a general analysis, cutting across different offices, different courts, and different types of charges. Take this passage, for example:

Plea bargaining allows the workgroup to minimize its collective workload and provides “solutions” to a common problem: the immutable burden that is the process itself. Prosecutors may still care deeply about convictions, but they want to reach convictions by immediate disposition. They care little, if at all, about maximizing plea prices and ultimate sentence length.<sup>21</sup>

Prosecutors, however, behave differently when the environment changes. Some offices are tightly organized, managed from the top; in other offices, the chief prosecutor delegates most important deci-

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O’Hear, *What’s Good About Trials?*, 156 U. PA. L. REV. PENNUMBRA 209, 215-18 (2007), <http://pennumbra.com/responses/11-2007/OHear.pdf> (recommending a process-based approach to plea-bargain reform); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1126-27 (1998) (recommending the creation of “internal guidelines or procedures” within prosecution offices as a “simple step” towards plea-bargain reform).

<sup>18</sup> For the submarket of recidivist defendants facing minor charges, one of the most important risks might be a lack of procedural justice. See Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407 (2007).

<sup>19</sup> Cf. STEPHEN BREYER, REGULATION AND ITS REFORM 191-96 (1982) (arguing that regulatory failure “sometimes means a failure to correctly match the tool to the problem at hand”).

<sup>20</sup> See Bowers, *supra* note 3, at 1122 (“[P]rosecutors may try to maximize conviction rates. But they do not aim principally—or even at all—to maximize sentence lengths where the charges are minor. Instead, prosecutors often provide bargain concessions that far exceed what is necessary to motivate pleas. Prosecutors make such lenient offers because they can.”).

<sup>21</sup> *Id.* at 1141 (footnotes omitted).

sions to the line prosecutors. Prosecutors are monitored closely while doing some jobs, and receive little scrutiny while doing others.<sup>22</sup> The interaction between prosecutors and police departments looks quite different in some places than in others, a relationship that might say much about the prospect of convicting innocent defendants. Moreover, prosecutors' offices set different priorities. They might emphasize some crime categories over others, or favor some sentence recommendations or charge selections. The criminal code in the jurisdiction might offer richer bargaining options for some groups of crimes than for others.<sup>23</sup>

It is possible to carry this insight about local conditions too far. There are 2344 distinct prosecutors' offices in state criminal justice systems in the United States, each with its own culture.<sup>24</sup> An academic must be able to generalize across different units and offices to make any useful observations at all. Nevertheless, we can learn more about prosecutors if we account for the most important and recurring features of their organizational settings. These submarkets of prosecutors tell us much about the plea negotiation practices that most deserve our attention. For some prosecutorial settings (but not for others), the risk of inaccurate convictions might lead to extra scrutiny and limits on bargaining practices.

### III. PIECEMEAL REGULATION

After the study of a submarket yields insights, how might we respond? The best answers will be targeted rather than global. Indeed, any effort to control plea negotiation practices will inevitably happen locally.

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<sup>22</sup> Bowers argues that prosecutors are "unlikely to exercise discretion to decline prosecution," *id.* at 1127, but this does not accurately capture reality in many jurisdictions. While the decision to dismiss charges after the initial filing is more highly regulated than plea negotiations or trial decisions, in most jurisdictions a healthy percentage of cases are declined at the point of the initial filing. See BARBARA BOLAND, PAUL MAHANNA & RONALD SONES, U.S. DEP'T OF JUSTICE, *THE PROSECUTION OF FELONY ARRESTS*, 1988, at 3 (1992).

<sup>23</sup> See Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1940 (2006) (concluding that the availability of charging options for prosecutors heavily affects the ultimate determination of whether a defendant receives a sentence based on the original charge or a reduced charge).

<sup>24</sup> STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, *PROSECUTORS IN STATE COURTS*, 2005, at 1 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/psc05.pdf> (providing data on the departmental makeup and practices of prosecution offices nationwide).

Bowers closes his article with a proposal to replace *Alford* pleas<sup>25</sup> and nolo contendere pleas with more explicit authority for “fictional” pleas of guilty, even when defendants do not believe that they are guilty.<sup>26</sup> One of his objections to *Alford* and nolo pleas is that these techniques are “inconsistently available.”<sup>27</sup> Given the multiple institutions that create and apply the relevant rules, however, won’t the same necessarily be true for “fictional” pleas? The same institutions that allow judges the option to disallow *Alford* pleas are likely to give them the same latitude with fictional pleas. And even if a statewide rule were more favorable for fictional pleas, judges would still hold the ultimate power to evaluate—and possibly to reject—guilty pleas.<sup>28</sup> Whatever state law might say about fictional pleas, prosecutors will remain free to reach plea bargains that include such fictional pleas, or to refuse such deals altogether. In light of the radically decentralized nature of prosecution in the United States, these choices are likely to remain at the local level.

Bowers also surmises that judges increase sentences toward the statutory maximum for defendants who enter *Alford* or nolo pleas, based on the defendant’s lack of contrition.<sup>29</sup> There is some data that suggests otherwise about current practices.<sup>30</sup> Again, however, nothing stops judges from doing the same thing after a fictional guilty plea.

I do not mean to dismiss fictional pleas as a potential regulatory tool. In the proper setting, combined with other techniques to structure plea negotiations, they might make a positive impact. My point, instead, is that a device like a fictional guilty plea will pass through many hands as it spreads through American criminal justice systems. Appellate judges, trial judges, local prosecutors, rule-drafting committees, public-defender organizations, legislative-funding committees, and countless others will have their say about the use of any new negotiation technique. This does not mean that we throw up our hands and declare the path of change to be wholly unpredictable. It is worth the effort to find meaningful categories and to explain patterns in the

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<sup>25</sup> North Carolina v. Alford, 400 U.S. 25 (1970).

<sup>26</sup> Bowers, *supra* note 3, at 1165-70.

<sup>27</sup> *Id.* at 1166.

<sup>28</sup> See Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055, 2063-73 (2006) (discussing prospects for more assertive judicial monitoring of guilty pleas).

<sup>29</sup> Bowers, *supra* note 3, at 1168.

<sup>30</sup> The statistics on acceptance of responsibility in the federal system show great overlap between guilty pleas and acceptance of responsibility discounts. See Wright, *supra* note 14, at 130-34.

behavior of these various actors. But in the end, the simple micro-economic model of buyers and sellers in the market for guilty pleas has taken us about as far as it can go. In pointing out the problems with one generic justification for plea bargaining, Bowers directs us beyond a generalized market for guilty pleas toward a more concentrated study of particular defendant groups.

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