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Professor outlines legal and moral problems with *Alford* pleas

When is a plea of guilty not really a plea of guilty? Pedro Cabrera was charged in a six-count felony indictment arising out of an incident with a married couple and their two children. *People v. Cabrera.* 402 Ill.App.3d 440 (2010).

The state offered to drop five counts in exchange for a guilty plea to one count of armed robbery with six years of imprisonment. Cabrera accepted the offer.

At the plea hearing, the state informed the court that Cabrera had four prior felony convictions. The trial judge then told Cabrera that, considering his criminal history, he was lucky that the state was willing to agree to the minimum sentence of six years.

Cabrera, however, responded that he was actually innocent of the charge and that he was pleading guilty only because he could not "show my innocence because of my background." The judge responded, "You don't have a right to cause me to disgrace myself and the criminal justice system by accepting a plea of guilty from you when you are, in fact, not guilty." The judge then vacated the plea and set the case for trial.

At the subsequent bench trial, the state's case showed that Cabrera, while armed with a knife, robbed the couple and took items from their car. Soon after the incident, he was arrested in the vicinity in possession of some of the stolen items. Cabrera did not testify. The trial judge found him guilty and sentenced him to 20 years in prison. The trial court's actions were affirmed on appeal.

The bottom line: Cabrera's protestations of innocence at his plea hearing cost him an additional 14 years in prison.

Was it wrong for the trial judge to refuse to allow Cabrera to take advantage of the generous plea bargain while nonetheless asserting his innocence? Stephanos Bibas, a professor of law at the University of Pennsylvania Law School, deals with the legal and moral implications of this and other procedural issues in his provocative new book "The Machinery of Criminal Justice" (Oxford, 2012).

Criminal practitioners will recognize the "guilty-but-not-guilty" plea as a device known as an "*Alford* plea." Henry Alford was charged with first-degree murder in North Carolina in the late 1960s. Although he insisted he was innocent, Alford sought to plead guilty to second-degree murder in order to avoid a possible sentence of death.

The U.S. Supreme Court found no constitutional bar to such a plea as long as the judge finds there is strong evidence of his actual guilt. *North Carolina v. Alford.* 400 U.S. 25 (1970). The court stressed the value of the defendant's autonomy and characterized this as a reasonable tactical decision. Importantly, the court held that while the Constitution permits *Alford* pleas, it does not require them. Therefore, states and judges are entitled to restrict, or even forbid, them.

The last four decades have seen 48 states, the District of Columbia and the federal courts permit *Alford* pleas under some circumstances. (Bibas, 201-202) In fact, one empirical study found that 6.5 percent — about one out of every 16 — pleas in state courts are *Alford* pleas. In the federal courts, it is about 3 percent. And when you consider that guilty pleas make up 97 percent of federal convictions and 94 percent of state convictions, the ubiquity of *Alford* pleas becomes even clearer. *Missouri v. Frye.* USSC No. 10-444, decided March 21, 2012, slip op. 7.

Illinois provides that "a circuit court has discretion to accept or reject a guilty plea where the defendant proclaims his innocence." *Cabrera,* at 451 citing *People v. Hancasky.* 410 Ill. 148 (1951).

Bibas reports that "[E]very defense lawyer I interviewed approved of guilty-but-not-guilty pleas. They say they use them as a last resort, a tool for difficult defendants who simply will not admit guilt." (62)

CRIMINAL PROCEDURE

TIMOTHY P. O'NEILL

Timothy P. O'Neill is a professor at The John Marshall Law School. He was a finalist for the 2010 "Peter Lisagor Award" for Exemplary Journalism in the area of Commentary. Readers are invited to visit his Web log and archives at jmls.edu/oneill.

There are obviously two problems with *Alford* pleas. The first is the danger of innocent defendants using the plea out of fear of receiving a more severe sentence. Certainly, this must have been part of the trial judge's decision to force Cabrera to trial once he proclaimed his innocence.

Yet the lawyers and judges Bibas interviewed agreed that innocent defendants rarely used the *Alford* plea. (62) Most are tendered by guilty defendants. But Bibas contends that even allowing the guilty to tender *Alford* pleas undercuts important values in criminal law. He said he believes that these pleas "interfere with the defendants' contrition, education and reform, which hinders catharsis and vindication and obscures responsibility for one's actions." (65).

> ***"For Stephanos Bibas, the problem with allowing Alford pleas is that it allows the guilty to evade responsibility and thus denies the community the healing it needs."***

This relates to a major theme of the book. Bibas laments the fact that the criminal justice system has evolved from a community morality play into an impersonal piece of machinery. In the morality play era, jurors came from the community that was actually affected by the crime. Their job was not only to separate the liars from the truth-tellers, but in a broader sense to determine criminal responsibility. Punishment of a community member was actually meant to reintegrate the guilty party back into the community. Victims, defendants and the public literally had their "day in court."

Bibas contrasts this with today's "machinery of criminal justice" run by professionals — prosecutors, defense lawyers, police and judges. Bibas calls these participants "insiders" and stresses their alienation from the community as a whole. Their goal is to operate the machinery in order to move the criminal docket as quickly and efficiently as possible. This is often done with little thought given to the "outsiders" — victims, members of the public, even defendants themselves. The insiders' push for efficiency often clashes with the outsiders' interest in broader issues of community justice.

For Bibas, the problem with allowing *Alford* pleas is that it allows the guilty to evade responsibility and thus denies the community the healing it needs. A guilty plea should be cathartic not only for the defendant, but for the victim and the community as well.

This is only one of many issues Bibas tackles in this challenging book. It should be required reading for all lawyers and judges.