GNOSTIC CRIMINAL JUSTICE

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I.

In 1963, Henry Alford was indicted for first-degree murder.[1] In North Carolina, that was a capital offense.[2] Alford maintained his innocence, and, in preparation of his defense, gave his attorney a list of witnesses who could testify in his favor. Alford's attorney interviewed all but one of the potential witnesses but found that none of the testimony was very good for Alford's case.[3]

Indeed, the case did not look good for Alford, with the evidence weighing heavily against him. Record testimony indicated that after Alford had taken a gun from his house, he announced that he intended to kill his victim.[4] When he returned home, he declared that he had carried out the killing.[5] With the evidence against Alford being so strong, Alford's attorney was at an impasse. What could he do to best represent his client? Eventually, he gave Alford his recommendation: take a plea. This was, however, only a recommendation, and the final decision to plea was Alford's choice to make.[6] Alford took the plea, pleading guilty to the lesser charge of second-degree murder, which was not a capital offense.[7]

Alford's plea was taken in the midst of trial, and before the plea was fully accepted by the trial court, Alford took the stand.[8] Despite the concurrent plea negotiations, he still maintained his innocence.[9] As the record indicated: Alford testified that "he had not committed the murder but that he was pleading guilty because he faced the threat of the death penalty if he did not do so."[10] Nevertheless, a trial judge always has the discretion to accept or reject a plea, and despite Alford's trial testimony, the trial court accepted his plea.[11] Alford testified that he would continue to plead guilty under the circumstances.[12] He knew the consequences and based his decision on them. To the trial court, this

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1. North Carolina v. Alford, 400 U.S. 25, 26 (1970).
2. *Id.*
3. *Id.* at 27.
4. *Id.* at 28.
5. *Id.*
6. *Id.* at 27.
7. *Alford*, 400 U.S. at 27.
8. *Id.* at 28.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 28–29.

meant that Alford knew what he was doing. While the inconsistency was troubling, it was merely a secondary concern.

Later, Alford sought post-conviction relief, arguing, among other things, that his guilty plea was invalid because it was the result of "fear and coercion."[13] He applied for relief to various courts. But like the trial judge, most judges reviewing the plea sustained the trial judge's decision to accept it.[14] Alford knew what he was doing. He made it "willingly, knowingly, and understandingly."[15] What mattered, it seemed, was not whether Alford's plea voiced a belief of his actual guilt. What mattered was whether the choice to make the plea was made freely, the truth of the substance notwithstanding.

The United States Court of Appeals for the Fourth Circuit reversed, finding that Alford made his plea "involuntarily."[16] But the United States Supreme Court reversed right back, upholding the principle that what mattered to making pleas was not the truth of the substance of the plea, but whether the choice to take the plea was made "willingly, knowingly, and understandingly." As Justice Byron White, writing for the majority, stated:

> That [Alford] would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage.[17]

The United States Supreme Court's decision in *North Carolina v. Alford* (1970) upheld the constitutionality of what we today call the *Alford* plea—a plea in which the accused pleads guilty while simultaneously denying guilt. *Alford* pleas are certainly peculiar. It is a legal "doublespeak" which allows the accused to maintain two contradictory positions at once. It also says something important about pleas: what is central to pleas is that they are valid only if they are made willingly, based on the consequences. Is the rationally made choice to admit guilt in order to avoid the risks of trial worth it? For many it is. Why even risk the chance of being found guilty of a capital crime when one could plead to a lesser offense?

To Judge Frank Easterbrook, there was no mystery to pleas. The decision to plea is made by considering certain costs.[18] These costs do not only include financial costs, but also include abstract opportunity costs. Pleading out not only helps avoid the financial costs of trial, but it also avoids the other costs of trial, such as the cost of time, the cost of a mistake at trial, or the cost of the consequences of a jury verdict. The right to plea, then, would permit the

13. *Alford*, 400 U.S. at 29.

14. *Id.* at 29–30.

15. *Id.* at 29.

16. *Id.* at 30.

17. *Id.* at 31.

18. Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 308–322 (1983).

accused some autonomy in the process—the autonomy necessary to make a rational, perhaps economic, decision. To Easterbrook, the right to plea was a source of autonomy—the "right to waive one's rights as one method of exercising them."[19] In this way, criminal justice is best understood as an economic system—one that could be optimized to minimize losses from all parties.

II.

Judge Easterbrook's conception of autonomy in the decision to plea borrows from economic assumptions. Specifically, the assumption that human beings are rational, utility-maximizing, economic actors. This assumption is sometimes called the *homo economicus* (economic man). But this assumption of a human being is quite limited, and when considering a person's decision to plea, it assumes too much by assuming too little. For one, this economic assumption may not even be fundamental. Deirdre McCloskey argued that our modern idea of the *homo economicus* may be a malformation of economic theory.[20] Adam Smith's project, McCloskey notes, recognized the traditional virtues, while our contemporary *homo economicus* only recognizes one virtue—prudence—usually in the form of Jeremy Bentham's favored term—utility.[21] McCloskey suggests that the 1980s law and economics movement, and the assumptions about economic theory it disseminated, was closer to Bentham than Smith.[22]

The law is a teacher, and while it may not be an alternative to morality, law communicates some semblance of a moral vocabulary in order for persons to understand the social obligations that come from living in a society.[23] What the law communicates is important in understanding how individuals within a political community conceive of themselves.[24] A legal system that communicates to persons that they ought to understand themselves as utility-maximizing *homo economicus* presents a dangerous drawback—will persons begin to habituate this understanding of themselves as a *homo economicus*? Will a person be more likely to act as *homo economicus* when dealing with other persons?

Yes and no. Certainly, we may see certain relations with others as merely economic (i.e. contracts and employment), but we can also understand other relations as more than economic. For example, a family might be said to

19. *Id.* at 317.

20. *See generally* Deirdre McCloskey, *The Demoralization of Economics: Can We Recover from Bentham?*, Nov. 1997, manuscript available at: https://www.deirdremccloskey.com/docs/pdf/Article_153.pdf.

21. *Id.* at 17.

22. *Id.* at 16–17.

23. *See* Aaron J. Walayat, *Legal Worlds and Legal Narratives*, 13 BALKAN J. OF PHIL. 45, 49 (2021); *see also* Aaron J. Walayat, *The Project of Law as a Rectification of Names*, 56 UIC L. REV. 233, 240, 243 (2023).

24. *See* Walayat, *Legal Worlds*, *supra* note 23, at 48.

conceive of itself through intra-family relations. However, the assumption that the bonds that form families go beyond the contractual might be challenged by our contemporary experiences. Certainly, we see some intra-family relations as taking on a merely contractual and economic character while other relations are more holistic. This is a shift, but I do not think that we should understand it as a progression (or even a regression). Notwithstanding the proposition that intra-family relations are moving toward mere economics, it is more likely that different forms of relations (economic, holistic, or otherwise), are forced to co-exist in our understanding of our relationships with each other. Individual laws, it seems, come with different assumptions about these relationships, and while some laws communicate economic relations, other laws communicate holistic relations.

But what does this all mean? To some extent, much of our law does communicate an economic vision of humankind, sometimes in correspondence with our actual relations, but often in contradiction to them. This clash, I think, is best understood as creating something close to what W.E.B. DuBois described as a "double consciousness."[25] While DuBois's observations focused on the experience of black Americans living in a majority white context, this notion can be expanded to include all persons living in the modern context. By splitting ourselves between the economic assumptions of the legal world while maintaining a holistic understanding in the actual world, we are forced to split ourselves between our legal self and our actual self.

III.

This split is reminiscent of a 2016 article by Robert P. George in *First Things* entitled "Gnostic Liberalism."[26] In that article, George compared the excesses of contemporary, liberal thought as a sort of Gnosticism—the ancient heresy which conceived of human beings as purely spiritual persons "trapped" in the evil material world.[27] Everything spiritual was good, and everything material was bad. Early orthodox Christians and Jews rejected Gnosticism, for how could this thought system by reconciled with the Judeo-Christian belief in the God of Genesis who created the material world and declared it "good"?[28]

If Gnosticism has infiltrated liberalism, as George describes, then Gnostic liberalism has likewise infiltrated criminal justice, particularly in the criminal justice system's economic assumptions of human beings. The human person within the law is dualistic—a phenomenon that I think is most illustrated in the *Alford* plea. On the one hand, the accused may plead guilty. Nevertheless, the accused is also bestowed with "secret, spiritual knowledge" (another aspect of Gnostic thought) in which they maintain their innocence. The "spiritual" self, then, is trapped in the material/legal body, with the pleading being a

25. *See generally* W.E.B. DUBOIS, THE SOULS OF BLACK FOLK (1903).

26. Robert P. George, *Gnostic Liberalism*, FIRST THINGS, Dec. 2016, https://www.firstthings.com/article/2016/12/gnostic-liberalism.

27. *Id.*

28. *See generally id.*

compromise within the "evil" material world. In this sense, the decision to plead is, to use a term George borrows from sociologist Robert Bellah, a form of "expressive individualism."[29] The "legal" self is a tool for the actual self. The legal self is the "physical" apparatus used at the pleasure (in this case, making the rather unpleasurable choice to plead) of the "spiritual," actual self.

Perhaps the federal judge and Catholic legal philosopher John T. Noonan, Jr. would describe the accused as being "masked" by the law.[30] The full humanity of the accused is hidden by the law, and the decision to plead is made behind the legal mask. In pleas, the effect of the mask of the law is not only to limit the person's humanity within the legal process, but to bifurcate them—creating a separate legal personality (an autonomous rights maximizer rationally deciding to plead guilty), distinct from the full human being, who maintains their innocence.

To Noonan, the masks of the law were categorically a bad thing, as they prevent human beings from recognizing the full humanity of others.[31] What was needed, for Noonan, was for the participants to be unmasked, for only then could heart properly speak to heart. But what about criminal justice? Is criminal justice really a way for heart to speak to heart?

No system is perfect, but, as Judge Stephanos Bibas argued, criminal justice in colonial America once attempted to find a way to recognize full human persons.[32] As he wrote:

> Jury trials should serve not only to acquit innocent defendants, but also to teach guilty defendants and vindicate their victims and the community's moral norms. They are mortality plays. Because criminal law's norms include honesty and responsibility for one's actions, criminal procedure should not let guilty defendants dishonestly dodge responsibility and the truth.[33]

This view of the jury trial is not meant to merely be a longing for an idealized past, one in which trials were laymen-led and focused more on a cathartic airing of grievances rather than efficiently processing the accused.[34] Instead, an exploration of the criminal justice system of the past helps to identify the values of that process: the process of recognizing one's guilt and one's wrongs, admitting them, showing remorse, seeking forgiveness, and maintaining the integrity of the system as a whole.[35] In this model, admitting guilt recognizes one's wrong, aligning the legal and actual selves.

No one will doubt that guilt is a difficult thing to admit. It is both a recognition of one's wrong as well as a recognition that the accused is at odds with his or her community. Admitting guilt is the first step, as it aligns the full

29. *Id.*

30. *See generally* JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW (2002).

31. *See generally id.*

32. *See generally* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012).

33. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1364 (2003).

34. *See generally* BIBAS, *supra* note 32.

35. *See generally id.*

human person with his legal self. It realizes the full self, the "body-soul composite," as George described.[36] Law, like other forms of moral education, is concerned with realigning people—realigning the correct feelings (shame, guilt, remorse, etc.) with the correct situations. Law and the criminal justice system should not be concerned merely with "processing" legal persons but transforming full human beings by habituating them to feel the right emotions in the right circumstances.

But *Alford* pleas allow the accused to bypass this alignment, stunting the criminal justice system's pedagogical role through habituation. Instead, the law permits the Gnosticism of the accused, splitting their legal, economic self from the full human person. The admission of guilt is not an expression of guilt, but a rational decision given the circumstances. This is a problem. Can the process of punishment be realized without feeling the right emotion in the right situation? If anything, it begs the questions of *what* emotions offenders feel in circumstances of punishment and *what* is being habituated when those offenders feel those emotions in circumstances of punishment.

IV.

While *Alford* pleas were held to be constitutional and are accepted in most states, some government departments discourage *Alford* pleas. Indiana, New Jersey, Michigan, and the U.S. Armed Forces courts, for example, reject *Alford* pleas outright, while Arizona disfavors them.[37] According to Judge Stephanos Bibas, Alford pleas are rejected for the risk that they are made unintelligently, involuntarily, and inaccurately.[38] There is also a fear that they undercut public respect for the justice system.[39]

Admitting guilt is a difficult thing to do, and admittedly, allowing an accused to admit guilt while also not admitting guilt allows the criminal justice system to function efficiently. Efficiency is important and necessary for the functioning of an overburdened criminal justice system. However, despite the efficiency of these pleas, *Alford* pleas also pose a problem. This type of plea assumes that "processing" criminals through the system is a good-in-itself. But the process is not a *prima facie* good. Rather, the process is meant to realize the numerous goods that come out of the criminal justice system through the morality play model. While the goods that might come from incapacitation of criminals might be exercised through the efficient processing of criminals, the goods that come from rehabilitation, and even retribution, such as the acknowledgement of one's wrong and the possibility of change, are cut out of the criminal justice system.

Mere efficiency is not what criminal justice is about. Trials mean something. Punishments mean something. Jails mean something. And, following this logic, plea bargaining also means something. Pleas are a

36. *See* George, supra note 26.

37. *See* Bibas, *supra* note 33, at 1381.

38. *Id.*

39. *Id.*

necessary part of the process and they have alleviated much of the burden placed on the participants of the criminal justice system. But plea bargaining also means that there are processes other than trials in which defendants are processed. Are participants merely *processed* within the machine, or is the process allowed to run their course? Is the process allowed to realize the other goods meant to be realized by the process.

Criminal justice was created for human beings, full human beings. Crimes are committed by humans against humans. The effect of crime goes beyond the actual harm done, scarring victims, the public, and even offenders themselves. Criminal justice should recognize both that these scars run deep and that these scars cannot simply be healed by processing offenders efficiently. What matters is recognizing that laws deal with full human persons and that criminal justice and punishment is meant to change people. It is meant to change full human beings, not the shadows that they cast into the legal world.