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SACRIFICING FUNDAMENTAL PRINCIPLES OF JUSTICE FOR EFFICIENCY: THE CASE AGAINST *ALFORD* PLEAS

Brandi L. Joffrion*

I. INTRODUCTION

Of all federal convictions sentenced under the U.S. Sentencing Reform Act in 2010, 96.8% were obtained through a guilty plea.[1] According to the most recent data, 95% of state convictions obtained in the nation's 75 largest counties were also obtained through a guilty plea.[2] Despite its controversial nature,[3] it was plea bargaining[4] that led to the majority of these aforementioned guilty pleas.[5]

Out of all the pleas currently available to criminal defendants, the *Alford* plea is perhaps the most controversial. This paper seeks to demonstrate why this is the case. Part II first looks at the general history of plea bargaining, the types of pleas currently accepted, and the constitutional parameters surrounding plea bargaining. Part III discusses the history of the *Alford* plea, how it differs from the nolo contendere plea, jurisdictional acceptance of *Alford* pleas, and the frequency with which *Alford* pleas are used. Part IV analyzes the positive and negative consequences a defendant may experience after entering an *Alford* plea. Part V examines arguments posed both for and against the use of *Alford* pleas. Part VI concludes that if the general accuracy and the public's perception of the criminal justice system are to be improved, defendants should not be allowed to enter guilty pleas without also admitting actual guilt, so long as nolo contendere pleas are available.

II. PLEA BARGAINING

A. A BRIEF HISTORY OF PLEA BARGAINING

Plea bargaining first emerged during the second half of the nineteenth century.[6] The practice was initially met with such overwhelming disapproval that some scholars have gone as far as to speculate that the United States Supreme Court likely would have invalidated plea

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[1] U.S. Sentencing Commission, *2010 Sourcebook of Federal Sentencing Statistics,* Table 11 (May 26, 2011), http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table11.pdf.

[2] Bureau of Justice Statistics, State Court Processing Statistics, *2006: Felony Defendants in Large Urban Counties, 2006* (2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf.

[3] *See, e.g.*, WILLIAM F. MCDONALD, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 1 (1985); JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS 7 (2009); MARY E. VOGEL, COERCION TO COMPROMISE: PLEA BARGAINING, THE COURTS AND THE MAKING OF POLITICAL AUTHORITY 8 (2007).

[4] Andrew D. Leipold and Peter J. Henning, *Rule 11. Pleas,* 1A Fed. Prac. & Proc. Crim., § 180, (4th ed. Updated 2011). For the purposes of this article, plea bargaining is defined as the process by which a prosecutor offers an inducement to a defendant in exchange for a guilty plea.

[5] TURNER, *supra* note 3, at 7.

[6] Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5 (1979).

bargaining at this time, if given the chance.[7] Despite this widespread disapproval, however, by the end of the nineteenth century, plea bargaining had become the dominant method of resolving criminal cases.[8]

It was not until 1970 that the Supreme Court first acknowledged and expressly approved the use of plea bargaining.[9] In that year, the Supreme Court decided three cases that made it clear plea bargaining was not per se unconstitutional.[10] The next year the Court went on to state that plea bargaining "is not only an essential part of the [criminal justice] process but a highly desirable part for many reasons."[11] In 1975, plea bargaining in the federal system was standardized by amendments to Rule 11.[12]

Various reasons have been given for the use and growth of plea bargaining, including crowded court dockets;[13] the oppressiveness of pretrial detention;[14] an increase in pretrial activities accompanied by a specialization of criminal codes;[15] the rise of professional police and professional prosecutors;[16] the change from relatively simple and rapid jury trial proceedings to a "fact-finding mechanism [that] has become so cumbersome and expensive that our society refuses to provide [and fund] it";[17] the "due process revolution";[18] changes in sentencing

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[7] *Id.* at 6.

[8] *Id.*

[9] Brady v. United States, 397 U.S. 742, 748 (1970).

[10] *Id.*; McMann v. Richardson, 397 U.S. 759, 760 (1970); Parker v. North Carolina, 397 U.S. 790, 790 (1970).

[11] Santobello v. New York, 404 U.S. 257, 261 (1971).

[12] FED. R. CRIM. P. 11; H.R. REP. NO. 94-414 (1975) (Conf. Rep.).

[13] Alschuler, *Plea Bargaining and Its History*, *supra* note 6, at 42 ("The growing complexity of the trial process was not the only factor that contributed to the development of today's regime of plea bargaining. Urbanization, increased crime rates, expansion of the substantive criminal law, and the professionalization and increasing bureaucratization of the police, prosecution, and defense functions may have also played their parts.").

[14] Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice,* 154 U. PA. L. REV. 79, 124 (2005). Discussing how the Bail Reform Act passed by Congress in 1966 could have contributed to the decrease in guilty please and the increase in acquittals during the late 1960s, Wright states "Because defendants who remain in detention before trial are more anxious to resolve their cases, they plead guilty more often than defendants who are released pending trial; additionally, because detained defendants cannot assist their attorneys in locating witnesses and evidence, their chances of acquittal are lower." *Id.*

[15] Malcolm M. Feeley, *Perspectives on Plea Bargaining*, 13 LAW & SOC'Y REV. 199, 201 (1979). Where trials once served as the forum in which the basic elements of a case were explored and the jury served a major role, pretrial activities now allow the prosecution to weed out weak cases and adjust charges accordingly. *Id.* In addition, the transformation of simple criminal codes to that of lengthy catalogs describing crimes in minute detail invite challenge and negotiation by defense attorneys. *Id.*

[16] Lynn M. Mather, *Comments on the History of Plea Bargaining*, 13 LAW & SOC'Y REV. 281, 284 (1979) ("When cases undergo extensive pretrial screening before they reach court, there are relatively few genuine disputes over guilt or innocence left to be resolved by juries. In felony cases, at least, the theme has emerged clearly from recent research: the vast majority of defendants in court are guilty of something, and the prosecution has the evidence to prove it."). *But see* Wright, *supra* note 14, at 123 ("[T]he right to defense counsel in particular probably helped decrease the guilty plea rates for a time. The drop in guilty plea rates between 1951 and 1971 coincided with the emergence of the right to defense counsel in routine federal criminal cases.").

[17] John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 262 (1979). Until well into the eighteenth century, between twelve and twenty felony cases were tried per day. *Id. See also* Alschuler, *Plea Bargaining and Its History*, *supra* note 6, at 41 ("[O]ne American felony court could conduct a half-dozen jury trials in a single day in the 1890's. This figure was only half as great as the number of cases that an Old Bailey jury had been able to resolve in a single day in the eighteenth century, but it contrasts dramatically with the 7.2 days that an average felony jury trial required in Los Angeles in 1968.").

[18] Alschuler, *Plea Bargaining and Its History*, *supra* note 6, at 38 ("A major effect of the "due process

practices that "increased the certainty and size of the penalty for going to trial";[19] and the need to facilitate individualized punishment.[20]

B. TYPES OF PLEA BARGAINING

Plea bargaining can take more than one form. "Charge bargaining" – a practice more commonly used at the state level because state criminal codes typically include lesser offenses allowing for the possibility of charge reduction[21] – is the practice whereby the prosecutor allows the defendant to plead guilty to a charge less serious than the one supported by the evidence.[22] Charge bargaining can be advantageous to the defendant for various reasons: the less serious charge likely will carry a lower maximum statutory penalty than the charge supported by the evidence; the defendant may avoid a high statutory minimum sentence or a statutory bar to probation; and the defendant can avoid a record of conviction on the offense actually committed.[23] This last reason, avoiding a record of conviction for a particular crime, is most desirable in situations that allow the defendant either to avoid a felony conviction along with its collateral consequences or to avoid a repugnant conviction label, e.g., pleading guilty to the nondescript charge of disorderly conduct when the evidence supports a sex offense charge.[24]

"Sentence bargaining" involves an agreement whereby the defendant pleads guilty to the original charge in exchange for the prosecutor's promise to either seek leniency or ask for a specific disposition, such as probation.[25] Sentence bargaining can be riskier than charge bargaining because the trial judge has the discretion to refuse to follow the prosecutor's recommendations.[26] A prosecutor's recommendation does carry some weight, however,[27] and a great number of defendants enter into this type of plea based on advice from counsel.[28]

A third type of plea negotiation involves the defendant pleading guilty to one charge in exchange for the prosecutor's promise to drop filed charges or not to file other charges.[29]

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revolution" was to augment the pressures for plea negotiation. For one thing, the Supreme Court's decisions contributed to the growing backlog of criminal cases. Prosecutors' offices were required to devote a greater share of their resources to appellate litigation, and both prosecutors and trial judges spent a greater portion of their time on pretrial motions and post-conviction proceedings. In addition, the Court's decisions probably contributed to the increased length of the criminal trial. In the District of Columbia, the length of the average felony trial grew from 1.9 days in 1950 to 2.8 days in 1965, and in Los Angeles the length of the average felony jury trial increased from 3.5 days in 1964 to 7.2 days in 1968. The 'due process revolution' also led directly to more intense plea negotiation.").

[19] Wright, *supra* note 14, at 129. The Sentencing Reform Act of 1984 wrought massive changes on federal criminal sentencing such as abolishing parole, instituting the U.S. Sentencing Commission, and instructing the Commission to create federal sentencing guidelines that would direct the sentencing decisions of federal judges. *Id.*

[20] Mather, *supra* note 16, at 282 (Plea bargaining is "a way for judges and prosecutors to reach a sentence that, in their view, would be more appropriate for the needs of the individual offender.").

[21] WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.1(a) (5th ed. 2007).

[22] Anne D. Gooch, *Admitting Guilt by Professing Innocence: When Sentence Enhancements Based on Alford Pleas Are Unconstitutional*, 63 VAND. L. REV. 1755, 1761-62 (2010).

[23] LAFAVE ET AL., *supra* note 21, at § 21.1(a).

[24] *Id.*

[25] Gooch, *supra* note 22, at 1762.

[26] LAFAVE ET AL., *supra* note 21, at § 21.1(a).

[27] Gooch, *supra* note 22, at 1762.

[28] LAFAVE ET AL., *supra* note 21, at § 21.1(a).

[29] Mason v. State, 488 A.2d 955, 958 (Md. 1982) ("Once the court accepts the defendant's guilty plea and the defendant complies with the terms of that agreement, the State is barred from any further prosecution

However, this type of bargain is often more illusory than actual.[30] Although a single criminal episode can involve the violation of several separate provisions of the applicable criminal code, multiple charges are seldom brought against a defendant who does not plead guilty.[31] Even if multiple charges are brought against a defendant and he or she is found guilty, the defendant is likely to serve concurrent sentences.[32]

C. TYPES OF PLEAS CURRENTLY ACCEPTED

Five types of pleas currently exist in federal court: (1) guilty or not guilty plea; (2) conditional plea; (3) nolo contendere plea;[33] (4) *Alford* plea;[34] and (5) hybrid plea.[35] Rule 11 of the Federal Rules of Criminal Procedure governs the pleading process and gives the requirements for guilty pleas, not guilty pleas, conditional pleas, and nolo contendere pleas.[36]

A guilty plea must be entered in open court to be valid.[37] It involves a formal decision by the defendant to dispense of his right to a trial, thereby allowing the government to obtain a conviction without proving the defendant's guilt beyond a reasonable doubt.[38] A guilty plea may be invoked as such in separate civil or criminal litigation because it is a judicial admission of guilt.[39] In contrast, by entering a not guilty plea, a defendant preserves all of his or her rights and places the burden on the government to prove the defendant's guilt beyond a reasonable doubt.[40] Alternatively, a defendant may enter a conditional plea in which he or she reserves the right to have an appellate court review an adverse determination of a pretrial motion,[41] or may enter a nolo contendere plea, in which a defendant refuses to admit guilt but waives a trial and accepts punishment as if he or she were guilty of the charged offense.[42] The *Alford* plea is an additional plea the United States Supreme Court recognized in *Alford v. North Carolina* in 1970, whereby a defendant can affirmatively protest his or her innocence and simultaneously enter a

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on the charges so nol-prossed. In these circumstances the State cannot recharge the defendant under a new charging document or new count with any offense it previously nol-prossed.").

30 LAFAVE ET AL., *supra* note 21, at § 21.1(a).

31 *Id.*

32 *Id.*

33 FED. R. CRIM. P. 11(a).

34 North Carolina v. Alford, 400 U.S. 25 (1970).

35 FED. R. CRIM. P. 11(a)(2) ("With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.").

36 FED. R. CRIM. P. 11.

37 FED. R. CRIM. P. 11(b)(1).

38 *Id.*

39 United States v. Berndt, 127 F.3d 251, 258 (2d Cir. 1997) ("A guilty plea is an unconditional admission of guilt, and constitutes an admission of all the elements of a formal criminal charge. As to those elements the plea is as conclusive as a jury verdict.").

40 FED. R. CRIM. P. 11(b)(1). These rights include the right to plead guilty, the right to be tried by jury, and at that trial the right to assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled incrimination. *Id.*

41 FED. R. CRIM. P. 11(a)(2) ("With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may withdraw the plea.").

42 Hudson v. United States, 272 U.S. 451, 455 (1926) ("[T]his plea does not create an estoppel; but, like the plea of guilty, it is an admission of guilt for the purposes of the case.").

guilty plea.[43] Finally, the hybrid plea can be a combination of a conditional plea accompanied by a nolo contendere plea or an *Alford* plea.[44]

D. CONSTITUTIONAL REQUIREMENTS FOR ACCEPTING PLEAS

The Supreme Court mandates that "waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[45] Thus, before any pleas may be accepted, a court must ensure that these initial requirements are met.[46] In addition, before a court may accept a guilty plea, it must ensure that the plea has a factual basis[47] by having the accused describe the conduct that gave rise to the charge on the record.[48] There is no absolute right to have a guilty plea accepted,[49] and a court may reject a plea when exercising sound judicial discretion.[50] A defendant also needs the court's consent to enter either a nolo contendere[51] or *Alford* plea.[52] Rule 11 of the Federal Rules of Criminal Procedure requires a court to consider both parties' views and the public interest at large when determining whether to accept a nolo contendere plea.[53] A court is not bound by the prosecution's wishes, however, and may permit a nolo contendere plea over the government's objection.[54] Similarly, in *North Carolina v. Alford*, the Supreme Court, noting Rule 11, stressed that its holding did not mean that the trial judge had to accept a plea merely because the defendant wished to plead that way.[55]

Rule 11(b)(1) of the Federal Rules of Criminal Procedure ensures that the "knowing" aspect of the constitutional requirements for entering guilty pleas is met,[56] i.e., the defendant

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[43] North Carlolina v. Alford, 400 U.S. 25, 37-38 (1970).

[44] *See* Edwards v. Carpenter, 529 U.S. 446, 448 (2000) (defendant entered a guilty plea while maintaining his innocence in exchange for the prosecution's agreement that the guilty plea could be withdrawn if the three-judge panel that accepted the plea elected to impose the death penalty after a mitigation hearing).

[45] Brady v. United States, 397 U.S. 742, 748 (1970).

[46] FED. R. CRIM. P. 11(b).

[47] FED. R. CRIM. P. 11(b)(3).

[48] Santobello v. New York, 404 U.S. 257, 261 (1971).

[49] Lynch v. Overholser, 369 U.S. 705, 719 (1962).

[50] *Santobello*, 404 U.S. at 262.

[51] FED. R. CRIM. P. 11(a)(1)-(2).

[52] North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970) (citing Lynch v. Overholser, 369 U.S. 705, 719 (1962).

[53] FED. R. CRIM. P. 11(a)(3).

[54] *See* United States v. Balt. & Ohio R.R., 543 F. Supp. 821, 823 n.4 (D.C. 1982) (finding that between 1955 and 1980, federal trial courts in antitrust cases accepted 2,845 nolo contendere pleas, and 1,299 of those were accepted over the objections of the government).

[55] *Alford*, 400 U.S. at 38 n.11 (citing Lynch v. Overholser, 369 U.S. 705, 719 (1962).

[56] FED. R. CRIM. P. 11(b)(1) ("Before the court accepts a plea of guilty or nolo contendere plea, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following: (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath; (B) the right to plead not guilty, or having already so pleaded, to persist in that plea; (C) the right to a jury trial; (D) the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding; (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere; (G) the nature of each charge to which the defendant is pleading; (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release; (I) any mandatory minimum penalty;

understands the nature of the charges against him, the rights he is waiving, and consequences of the plea.[57] Rule 11(b)(2) ensures the voluntariness of the plea,[58] i.e., the defendant's choice to enter a plea is not the result of improper coercion, threats, or promises.[59]

II. *ALFORD* PLEAS

A. *NORTH CAROLINA V. ALFORD*

When Henry C. Alford was indicted for first degree murder, it was a capital crime in North Carolina.[60] However, if a defendant pleaded guilty, the maximum punishment he or she could receive was life imprisonment.[61] It is with this sort of dilemma Alford found himself confronted: maintain his innocence, assert his right to a jury trial, and risk the death penalty; or plead guilty and ensure his life would be spared.[62]

Alford's appointed counsel recommended that Alford plead guilty after various witness interviews strongly indicated Alford's guilt and no substantial evidence could be found to support his claim of innocence.[63] Before the trial court accepted Alford's guilty plea to second-degree murder, the court heard testimony indicating that Alford had stated his intention to kill the victim prior to the killing, taken his gun from his house, and returned home declaring that he had indeed killed the victim.[64] It should be noted, however, that there were no eyewitnesses to the crime.[65] After Alford gave his version of the events of the night of the murder, he stated, "I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all."[66] After highlighting Alford's substantial prior criminal record, the trial court bestowed the maximum penalty for second-degree murder upon Alford: thirty years' imprisonment.[67]

Subsequently, Alford sought post-conviction relief claiming, among other things, that his guilty plea was invalid because it was based on fear and coercion.[68] The Supreme Court

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(J) any applicable forfeiture; (K) the court's authority to order restitution; (L) the court's obligation to impose a special assessment; (M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.").

[57] *Id.*

[58] FED. R. CRIM. P. 11(b)(2) (The court must "[d]etermine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).").

[59] *Id.*

[60] *Alford*, 405 F.2d at 344.

[61] *Id.*

[62] *See id.*

[63] North Carolina v. Alford, 400 U.S. 25, 27 (1970).

[64] *Id.* at 28.

[65] *Id.*

[66] *Id.* at 28 n.2.

[67] *Id.* at 29.

[68] *Id.* at 29-30. ("The state court in 1965 after a hearing, found that Alford's plea was 'willingly, knowingly, and understandingly' made. In that same year, both the United States District Court for the Middle District of North Carolina and the Court of Appeals for the Fourth Circuit denied the writ on the basis of the state court's finding that Alford voluntarily and knowingly agreed to plead guilty. Again in 1967 without an evidentiary hearing, the District Court for the Middle District of North Carolina denied relief 'on the grounds that the guilty plea was voluntary and waived all defenses and nonjurisdictional defects in any prior stage

concluded, however, that simple fear of the death penalty was not enough, without additional evidence, to render a plea involuntary and therefore invalid.[69] In order to get around its own ruling in the previous term in *Brady v. United States*, in which the Supreme Court held that admission of guilt is normally "[c]entral to the plea and the foundation for entering judgment against the defendant,"[70] the Court analogized Alford's plea to a nolo contendere plea, stating that the difference between the two pleas "[i]s of no constitutional significance with respect to the issue now before us, for the Constitution is concerned with the practical consequences, not the formal categorizations, of state law."[71] The Court went on to state that admitting guilt is not a constitutional requirement for entering a guilty plea and that "an individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."[72]

B. DIFFERENCES BETWEEN *ALFORD* PLEAS AND NOLO CONTENDERE PLEAS

Alford pleas differ from nolo contendere pleas in two respects: (1) avoiding estoppel in civil litigation;[73] and (2) admission of guilt.[74] In contrast to the nolo contendere plea, when a defendant enters an *Alford* plea he is generally foreclosed from relitigating the issue of his guilt in subsequent civil cases arising from the same facts.[75] Therefore, a nolo contendere plea is better than an *Alford* plea for a defendant in this context because it protects the defendant in subsequent civil or criminal litigation.[76] Additionally, the defendant's admission of guilt differs between an *Alford* plea and a nolo contendere plea. When entering an *Alford* plea, the defendant affirmatively protests his innocence despite entering a guilty plea,[77] while a nolo contendere plea is simply a refusal to admit guilt.[78]

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of the proceedings, and that the findings of the state court in 1965 clearly required rejection of Alford's claim that he was denied effective assistance of counsel prior to pleading guilty.'") (citing United States v. Jackson, 390 U.S. 570 (1968)).

[69] *See id.* at 31 ("That he 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.").

[70] *See id.* at 32 (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

[71] *Id.* at 37.

[72] *Id.*

[73] *See* FED. R. EVID. 410 (providing a list of pleas inadmissible against the defendant at a later civil or criminal trial, which includes nolo contendere pleas, but does not list Alford pleas).

[74] *See Alford*, 400 U.S. at 35 ("A nolo contendere plea [is] a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty."); United States v. Vonn, 535 U.S. 55, 69 n.8 (2002) ("[T]he *Alford* theory [is] that a defendant may plead guilty while protesting innocence . . . .").

[75] Jenny Elayne Ronis, *The Pragmatic Plea: Expanding Use of the Alford Plea to Promote Traditionally Conflicting Interests of the Criminal Justice System*, 82 TEMP. L. REV. 1389, 1404-05 (2010) ("[C]ollateral estoppel 'bars a party from relitigating an issue that has been actually litigated and necessarily decided in [a] prior proceeding' where four factors have been met: 1) [T]he party against whom the preclusion is employed was a party to or in privity with a party to the first action; 2) [T]he issue precluded from relitigation is identical to the issue decided in the first action; 3) [T]he issue was resolved [i.e. actually litigated] in the first action by a final judgment on the merits; and 4) [T]he determination of the issue was essential to the final judgment. To be 'actually litigated,' an issue must be 'properly raised by the pleadings or otherwise,' 'submitted for determination,' and actually determined.").

[76] *See* FED. R. EVID. 410.

[77] *Vonn*, 535 U.S. at 69 n.8 (citing North Carolina v. Alford, 400 U.S. 25, 27 (1970)).

[78] *Alford*, 400 U.S. at 35.

C. JURISDICTIONAL ACCEPTANCE AND FREQUENCY OF USE OF *ALFORD* PLEAS

Although courts typically accept guilty pleas as a matter of course,[79] this policy does not always apply to *Alford* pleas, as some courts, including state courts in Indiana,[80] Michigan,[81] and New Jersey[82] have refused to accept this type of plea. In addition, federal courts strongly discourage defendants from entering *Alford* pleas.[83] Since Rule 11 of the Federal Rules of Criminal Procedure prohibits federal courts from accepting a guilty plea when there is no factual basis for the plea, a court may refuse to accept an *Alford* plea by reasoning that the defendant's refusal to admit guilt undermines the factual basis finding.[84]

In 1997, 6.3% of state inmates who conferred with court-appointed counsel and 6.7% of those who conferred with private counsel entered an *Alford* plea.[85] These numbers are even lower in federal courts, where 3.0% of federal inmates who conferred with court-appointed counsel and 2.8% of those who conferred with private counsel entered *Alford* pleas.[86] However, *Alford* pleas occur more frequently in certain types of offenses, including sex offenses[87] and drunk driving offenses.[88]

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[79] *See, e.g.*, Robinson v. State, 291 A.2d 279, 281 (Del. 1972) (guilty plea to manslaughter valid despite lack of admission of guilt); Johnson v. State, 478 S.W.2d 954, 955 (Tex. Crim. App. 1972) (guilty plea to possession of heroin not invalidated by assertion of innocence); State v. Brown, 477 P.2d 930, 931 (Wash. Ct. App. 1970) (upholding guilty plea to grand larceny as unequivocal despite assertion of innocence).

[80] Ross v. State, 456 N.E.2d 420, 423 (Ind. 1983) ("We hold, as a matter of law, that a judge may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time. To accept such a plea constitutes reversible error.").

[81] People v. Butler, 204 N.W.2d 325, 330 (Mich. Ct. App. 1972) ("When accepting a guilty plea, the courts of this state, then, are required to probe deeper than the mere expression of willingness by the prosecutor and defendant to strike a bargain. They must look to the ultimate guilt or innocence of the pleaders.").

[82] State v. Korzenowski, 303 A.2d 596, 597 n.1 (N.J. Super. Ct. App. Div.) ("[E]xcept in capital cases, a plea shall not be accepted from a defendant who does not admit commission of the offense.").

[83] *See* United States Attorneys' Manual § 9-16.010 (instructing federal prosecutors not to consent to nolo contendere pleas, except in the most unusual circumstances); Curtis J. Shipley, *The Alford Plea: A Necessary But Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1068 (stating that federal judges commonly refuse to accept Alford pleas even in those jurisdictions that recognize Alford pleas).

[84] FED. R. CRIM. P. 11(b)(3).

[85] CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 8 TBL. 17 (2000) (1997 survey of inmates in state and federal correction facilities), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf.

[86] *Id.*

[87] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (defendants entered pleas of nolo contendere to sodomy, paid fine, challenged Texas sodomy statute and won); Smith v. Doe, 538 U.S. 84 (2003) (John Doe I and John Doe II entered pleas of nolo contendere to sexual abuse of minors).

[88] *See, e.g.*, Nichols v. United States, 511 U.S. 738, 754 (1994) (Blackmun, J., dissenting) (defendant entered plea of nolo contendere to misdemeanor charge of driving under influence of alcohol and received $250 fine; defendant was later convicted of cocaine distribution and prior DUI conviction increased his Criminal History Category and thus his sentence).

III. SHOULD DEFENDANTS BE ALLOWED TO ENTER A GUILTY PLEA WHILE ACTIVELY MAINTAINING THEIR INNOCENCE?

A. WHY WOULD AN INNOCENT PERSON EVER PLEAD GUILTY?

An innocent defendant may choose to plead guilty for various reasons. When faced with strong adverse evidence,[89] a defendant may find a plea deal offered by the government to be more attractive[90] than taking the risk of going to trial[91] where, if found guilty, a harsher penalty would likely be imposed.[92] A defendant may also take a plea deal simply to avoid the monetary expense of going to trial[93] or to spare his family and friends from prosecution.[94] An innocent defendant may also feel powerless or hopeless when confronted with the strength the government's prosecution can seemingly wield and, therefore, may want to expedite the process by pleading guilty.[95] Finally, the conditions of pretrial incarceration and pressures from family, friends, or attorneys may lead an innocent defendant to plead guilty.[96]

B. ADVANTAGES A DEFENDANT CAN REALIZE BY ENTERING AN *ALFORD* PLEA

Alford pleas allegedly allow defense attorneys to provide their clients with better odds, more certainty, and less risk, as defendants are often better off pleading than going to trial, at least when the interests of saving both monetary and emotional expense are considered.[97] Unlike regular guilty pleas, *Alford* pleas also allow defendants to avoid the shame of admitting guilt.[98] This is especially relevant in sex offense cases.[99] Scholars have also contended that *Alford*

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[89] Henderson v. Morgan, 426 U.S. 637, 648 n.1 (1976) (White, J., concurring) ("Alford is based on the fact that the defendant could intelligently have concluded that, whether he believed himself to be innocent and whether he could bring himself to admit guilt or not, the State's case against him was so strong that he would have been convicted anyway.").

[90] McKune v. Lile, 536 U.S. 24, 42 (2002) (plurality opinion) ("The Court . . . has held that plea bargaining does not violate the Fifth Amendment, even though criminal defendants may feel considerable pressure to admit guilt in order to obtain more lenient treatment.").

[91] United States v. Vonn, 535 U.S. 55, 69 n.8 (2002) (A defendant may choose to enter an Alford plea "simply to avoid the . . . vicissitudes of trial.").

[92] North Carolina v. Alford, 400 U.S. 25, 28 n.2 (1970) (Alford chose to plead guilty to second-degree murder because it carried a maximum sentence of 30 years imprisonment rather than risk the death penalty being imposed if found guilty at trial.).

[93] Vonn, 535 U.S. at 69 n.8 (2002) (A defendant may choose to enter an Alford plea "simply to avoid the expenses . . . of trial"); Nichols, 511 U.S. at 752 (1994) (Souter, J., concurring) (noting that defendant may choose to plead guilty based on "frugal preference").

[94] Bryan H. Ward, A Plea Best Not Taken: Why Criminal Defendants Should Avoid the Alford Plea, 68 Mo. L. Rev. 913, n.25 (2003) (citing John L. Barkai, Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?, 126 U. Pa. L. Rev. 88, 96-97 (1977)).

[95] *Id.*

[96] *Id.*

[97] Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1278-306 (1975).

[98] Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1377-78 (2003) (In an interview of thirty-four veteran prosecutors, judges, and public and private defense attorneys, Bibas found that the most common reasons a defendant chooses to enter a guilty plea while refusing to admit guilt include: "fear of embarrassment and shame before family and friends," "psychological denial," avoidance of estoppel in collateral civil litigation, and inability to remember the facts due to intoxication.).

[99] *Id.* at 1393-94.

pleas reduce defendants' incentives to lie to both their attorneys and the court.[100] The *Alford* plea allows those risk-averse, innocent defendants, "for whom the value of ensuring a lesser sentence or removing the possibility of the death penalty is greater than the value of possibly being found not guilty at trial," to accept the plea they believe is best for them without having to admit factual guilt.[101]

C. DISADVANTAGES A DEFENDANT CAN REALIZE BY ENTERING AN *ALFORD* PLEA

Despite assertions that *Alford* pleas minimize risks and provide definite, assured outcomes for those defendants facing sentencing, probation revocation, or parole review, *Alford* pleas can actually provide anything but these purported advantages.[102] Additionally, lying may become necessary in order to reap the benefits the *Alford* plea was originally intended to provide.[103]

During the sentencing phase, a defendant's refusal to admit guilt can become a problem if the jurisdiction in which he or she is being sentenced takes into account his or her degree of remorse.[104] Remorse not only reflects the defendant's contrition,[105] but also indicates a defendant's willingness to accept responsibility for his actions.[106] For sentencing purposes, remorse is thought to measure the likelihood that the defendant will discontinue engaging in criminal activity in the future.[107] Some jurisdictions view remorse as a mitigating factor,[108] while others view "lack of remorse" as an aggravating factor.[109] Where remorse is viewed as a mitigating factor, a defendant may receive a lighter sentence if he exhibits "a feeling of compunction or deep regret and repentance for a sin or wrong committed,"[110] either to the court or to the proper authorities during presentence investigations.[111] Courts that view "lack of remorse" as an aggravating factor may, and in some circumstances must, enhance a defendant's sentence if a "lack of remorse" is demonstrated by the defendant.[112]

The issue of remorse is problematic for *Alford* defendants because, by definition, all *Alford* defendants lack remorse as all *Alford* defendants refuse, at least at the time of

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[100] *E.g.*, Ward, *supra* note 94, at 920 (Before the existence of Alford pleas when an admission of guilt was required in order to enter a guilty plea, a defendant was forced to admit all the underlying facts of the crime to his or her defense attorney. Until he did so, the attorney would be restrained "from seeking a plea agreement if an admission of guilt [was] a prerequisite." Similarly, an innocent defendant would have to lie in court and admit the alleged facts if he or she wished to plead guilty.) (citing Shipley, *supra* note 82, at 1074).

[101] Gooch, *supra* note 22, at 1765 (citing Shipley, *supra* note 82, at 1073).

[102] Ward, *supra* note 94, at 920-21.

[103] Id.

[104] *Id.* at 921-22.

[105] *Id.* at 921.

[106] *Id.* at n. 41.

[107] *See, e.g.*, Fair v. State, 268 S.E.2d 316 (Ga. 1980); Thomas v. Commonwealth, 419 S.E.2d 606, 619 (Va. 1992), abrogated on other grounds by Haugen v. Shenandoah Valley Dept. of Social Services, 274 Va. 27 (Va. 2007); State v. Jones, 444 N.W.2d 760, 763 (Wis. Ct. App. 1989).

[108] *See, e.g.*, State v. McKinney, 946 P.2d 456, 458 (Alaska Ct. App. 1997); Commonwealth v. Mills, 764 N.E.2d 854, 866 n.9 (Mass. 2002); State v. Buttrey, 756 S.W.2d 718, 722 (Tenn. Crim. App. 1988).

[109] *See, e.g.*, State v. Landrigan, 859 P.2d 111 (Ariz. 1993), *abrogated on other grounds*, Turner v. Crosby, 339 F.3d 1247, (11th Cir. 2003); People v. Gonzales, 926 P.2d 153, 156 (Colo. App. 1996); Issaks v. State, 386 S.E.2d 316, 323 (Ga. 1989); People v. Mulero, 680 N.E.2d 1329, 1337 (Ill. 1997).

[110] Ward, *supra* note 94, at 922 (citing Oxford English Dictionary Vol. XIII, at 598 (2d ed. 1989)).

[111] *Id.* at 921-22.

[112] Id.

sentencing or entering the plea, to admit to committing the elements of the crime of which they have been accused.[113] Of course, this would not be a problem if those defendants who chose to enter an *Alford* plea were exempt from this remorse assessment at sentencing, but courts often refuse to allow such an exemption, reasoning that the rights of *Alford* plea defendants should not differ from those of defendants who plead, or are found, guilty.[114]

Further complications may ensue after the sentencing phase.[115] While a court may allow a defendant to deny any wrongdoing at the time the plea is entered, this often is not the case going forward.[116] As part of probation, defendants are routinely required to participate in counseling to learn how to avoid the conduct that resulted in the criminal conviction and the resulting probation.[117] This routine counseling can result in revocation of the *Alford* plea defendant's probation and imposition of the underlying sentence, if and when he refuses to acknowledge his involvement with the crime for which he has pled guilty.[118] It should be noted that these programs do not offer immunity to the defendant if any statements of involvement are made,[119] nor do these programs violate the Fifth Amendment's self-incrimination privilege.[120] Furthermore, many states have adopted a procedure by which an inmate seeking early release from prison must appear before a parole board to state why early release is appropriate for him or her.[121] These hearings often consider an inmate's remorse or lack thereof.[122] Similar to the situation *Alford* plea defendants face when seeking probation, a defendant's parole may be denied if he or she refuses to admit any involvement in the offense for which an *Alford* plea was entered.[123] Refusing to "accept responsibility" for the crime for which a defendant is currently serving a sentence may also result in a harsher prison assignment or loss of prison privileges,[124] such as visitation rights, earnings, work opportunities, the ability to send money to family,

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113 *See, e.g.*, State v. Weaver, No. 91-2568-CR-FT, 1992 WL 126807, at *2 (Wis. App. Mar. 24, 1992) ("First of all, it's always difficult when there has been an Alford Plea entered because, on the one hand, by virtue of an *Alford* Plea there is no acceptance of responsibility; in fact, there is a denial that the offense was committed; and I accepted that plea knowing that that was the problem in this case.")

114 *See, e.g.*, State v. Howry, 896 P.2d 1002 (Idaho Ct. App. 1995) (reasoning that the Supreme Court's decision in *Alford* "does not require . . . that a court accept a guilty plea from a defendant while simultaneously treating the defendant as innocent for purposes of sentencing" because, "[a]lthough an *Alford* plea allows a defendant to plead guilty amid assertions of innocence, it does not require a court to accept those assertions"); State ex rel. Warren v. Schwarz, 579 N.W.2d 698, 707 (Wis. 1998) ("Put simply, an *Alford* plea is not the saving grace for defendants who wish to maintain their complete innocence. Rather, it is a device that defendants may call upon to avoid the expense, stress and embarrassment of a trial and to limit one's exposure to punishment.").

115 Ward, *supra* note 94, at 926.

116 Id.

117 Id.

118 *Id.*; Jonathan Kaden, *Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination*, 89 J. CRIM. L. & CRIMINOLOGY 347, 365 (1998) (probation counseling, especially in the case of sex offenders, routinely requires offenders to "admit responsibility" for the underlying offenses).

119 *See, e.g.*, McKune v. Lile, 536 U.S. 24, 35 (2002) (noting that Federal Bureau of Prisons, Kansas, and New Hampshire do not offer immunity to sex offenders who must accept responsibility in order to participate in prison rehabilitation programs).

120 *Id.* at 35.

121 *See, e.g.*, COLO. REV. STAT. ANN. § 17-22.5-404 (2011).

122 Ward, *supra* note 94, at 932.

123 Id.

124 McKune v. Lile, 536 U.S. 24, 29 (2002) (plurality opinion) (upholding against Fifth Amendment challenge Kansas program which conditioned favorable prison assignment and certain prison privileges on acceptance of responsibility by incarcerated sex offender).

canteen expenditures, and access to a personal television.[125] Considerably worse than loss of prison privileges, an inmate further risks the possibility of transfer to a maximum security unit,[126] a potentially more dangerous environment where movement is limited,[127] if he or she refuses to accept responsibility.

"[T]he Sexual Offender Registration Act, otherwise known as Megan's law," has recently caused *Alford* plea defendants additional problems.[128] These laws, enacted in some form in most states, release information to the public about individuals depending on the "level of risk" that individual poses.[129] This level of risk is determined in part based on post-offense behavior.[130] Refusing to "accept responsibility" for the sexual conduct in question can lead to a more serious level of risk being calculated.[131] In addition, some states use this form of risk calculation to evaluate potential criminal sentences.[132]

D. ARGUMENTS POSITED IN FAVOR OF KEEPING *ALFORD* PLEAS

It has been argued that *Alford* pleas promote efficiency throughout the criminal justice system. *Alford* pleas may persuade a defendant to agree more readily to the plea bargaining process because the defendant is not required to lie openly in court but can still take advantage of the plea bargaining process when he or she believes the costs of going to trial are greater than the consequences of accepting a plea deal.[133] This same rationale applies to innocent defendants with prior convictions, for whom a criminal record is of less consequence, and to those innocent defendants who believe their odds of acquittal at trial are too slim.[134] The consensus among courts and scholars is that if a defendant is to be allowed the option of plea

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125 *Id.* at 30-31 (Kansas prison "officials informed respondent that if he refused to participate in the SATP [Sexual Abuse Treatment Program] his privilege status would be reduced[.] As part of this reduction, respondent's visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, access to a personal television and other privileges would be automatically curtailed."). *But see id.* at 45 (Federal sex offender rehabilitation program differs from Kansas one in that "it does not require inmates to sacrifice privileges besides housing as a consequence of nonparticipation.").

126 *Id.* at 30-31 (Kansas prison "officials informed respondent that if he refused to participate in the SATP [Sexual Abuse Treatment Program] . . . respondent would be transferred to a maximum security unit where his movement would be more limited, he would be moved from a two-person to a four-person cell, and he would be in a potentially more dangerous environment."); *id.* at 45 (Federal sex offender rehabilitation program "is conducted at a single, 112-bed facility that is more desirable than other federal prisons," so federal program "conditions a desirable housing assignment on inmates' willingness to accept responsibility for past behavior.).

127 Id.

128 Ward, *supra* note 94, at 934 (citing Alan R. Kabat, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 AM. CRIM. L. REV. 333, 359-61 (1998) (listing existing state versions of Registration, Disclosure and Notification statutes, otherwise known as "Megan's Law")).

129 *Id.*

130 *See, e.g.*, People v. J.G., 655 N.Y.S.2d 783, 785-86 (App. Div. 1996).

131 Ward, *supra* note 94, at 934.

132 *E.g.*, TENN. CODE ANN. § 39-13-705 (2012).

133 Mark Gurevich, *Justice Department's Policy of Opposing Nolo Contendere Pleas: A Justification*, 6 CAL. CRIM. L. REV. 2, 27 (2004).

134 *See* Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 718-19 (2006); *See also* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1913 (1992).

bargaining at all, he or she should be provided with the full range of plea bargaining options, including the *Alford* plea, in order to promote his or her agency.[135]

Additionally, in contrast to the nolo contendere plea, which does not collaterally estop relitigation of the issue of guilt in a civil trial, the *Alford* plea makes it easier for victims to prevail in a civil suit.[136] Since an *Alford* plea will not be accepted without the court's satisfaction that there is a factual basis to support the defendant's guilt,[137] this same factual basis can be used to satisfy the preponderance of the evidence standard that is necessary in order to prevail in subsequent civil litigation.[138] By collaterally estopping subsequent litigation, the *Alford* plea also adds to the long-term costs of entering such a plea, thereby creating a disincentive that purportedly limits the number of defendants who will ultimately choose to enter an *Alford* plea after weighing the costs and benefits.[139]

Advocates of the *Alford* plea further contend that such a plea minimizes the punishment a defendant receives, increases the certainty a defendant has regarding the imposition of his sentence, and decreases the incentive defendants have to lie "both to their attorneys and in court."[140] However, as discussed in the sections both above and below, these arguments lack significant merit when analyzed more closely.[141]

E. ARGUMENTS FOR PROHIBITING *ALFORD* PLEAS

Perhaps "the most troubling aspect of an *Alford* plea is the potential to undermine . . . the most fundamental underpinning of our criminal justice system: that only the truly guilty are convicted and punished."[142] Arguably, the nolo contendere plea "has permitted [innocent people to plead guilty] for hundreds of years."[143] However, when a defendant enters a nolo contendere plea, he or she is refusing to contest his guilt, whereas when entering an *Alford* plea a defendant is actively asserting his or her innocence.[144]

Realizing that trials are imperfect and innocent defendants can be convicted, Albert W. Alschuler contends that "both courts and defense attorneys should recognize a 'right' of the

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[135] Shipley, *supra* note 83, at 1073 (arguing that if general plea-bargaining system is permitted, defendants should be free to choose which plea they enter); *see* Roland Acevedo, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 1013 (1995).

[136] Gurevich, *supra* note 133, at 2.

[137] FED. R. CRIM. P. 11(b)(3); *see* United States v. Feekes, 582 F. Supp. 1272, 1275 (E.D. Wis. 1984) (applying standards of voluntariness and factual basis).

[138] Krahner v. Kronenberg, No. 47549-5-I, 2001 WL 1463798, at *2 (Wash. Ct. App. Nov. 19, 2001) (citing Falkner v. Foshaug, 29 P.3d 771, 776 (Wash. Ct. App. 2001) (requiring preponderance of proof of innocence)).

[139] Shipley, *supra* note 83, at 1084-85, 1088 ("[C]ourts state that issues are judicially determined by the establishment of a factual basis for a plea, and that a defendant who enters an *Alford* plea is no less guilty than one who enters a standard guilty plea . . . . If *Alford* pleas were not preclusive in subsequent actions, all criminal defendants, regardless of actual guilt, would attempt to use the pleas if there were the slightest possibility of civil liability resulting from their conduct. This would encourage guilty defendants to abuse the system by falsely proclaiming innocence in court, thereby defeating the honesty goals of the *Alford* principle.").

[140] Ward, *supra* note 94, at 918-20.

[141] *See supra* Part IV.C. and *infra* Part IV.E.

[142] Steven E. Walburn, *Should the Military Adopt an Aford-Type Guilty Plea?*, 44 A.F. L. REV. 119, 145 (1998). Walburn presents such safeguards as "the presumption of innocence, the burden of proof, the right against self-incrimination, the right to a jury trial, and the rules of evidence," *id.* at 145 n.163, as evidence of the "great pains" the United States takes "to reduce the risk of convicting an innocent defendant," *id.* at 145.

[143] *Id.*

[144] *Id.*

innocent to plead guilty. So long as a defendant has something to gain by entering a plea agreement, it is unfair to deny him the choice."[145] According to Judge Easterbrook, innocent defendants will plead guilty only when the plea terms offered are less than the expected sentence at trial, discounted by the probability of acquittal.[146] Judge Easterbrook's argument assumes, somewhat mistakenly, that all innocent defendants are "fully informed, autonomous, rational actors."[147] This, however, is not always the case, as "[m]any defendants . . . receive poor advice from overburdened appointed counsel of varying quality whose caseloads and incentives lead them to press clients to plead guilty."[148] Furthermore, those innocent defendants of low intelligence who are "poor enough to qualify for overburdened counsel" are more likely to make the mistake of pleading guilty, despite their innocence, as a result of pressure or misinformation.[149] In order to prevent the "troubling disparities based on wealth, mental capacity, and education" that are likely to result from allowing innocent defendants to enter *Alford* pleas, "[t]he law should instead encourage these innocent defendants to go to trial."[150]

In addition to considering the desires of the parties directly involved with a criminal suit, "public perceptions of accuracy and fairness" with regards to the criminal justice system as a whole must be considered.[151] "[S]ociety has a strong interest in ensuring that criminal convictions are both just and perceived as just."[152] This perception is crucial "to the law's democratic legitimacy, moral force, and popular obedience"[153] as society may well suspect coercion and injustice upon hearing of tales of defendants pleading guilty and being punished while simultaneously professing their innocence.[154] Justice Brennan illustrated the significance of this perception in discussing the importance of the reasonable doubt standard in criminal law:

> [T]he reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.[155]

Allowing a defendant to enter an *Alford* plea also undermines a historical foundation of punishment: retribution.[156] It has been argued that when a defendant is allowed to escape the step of recognizing his or her own guilt, the defendant will never "atone for his crime," and therefore the goal of retribution is never satisfied and the defendant is not reconciled to

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[145] Alschuler, *The Defense Attorney's Role in Plea Bargaining*, *supra* note 96, at 1296.

[146] Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 311-12 (1983).

[147] Bibas, *supra* note 98, at 1383.

[148] *Id.*, citing Alschuler, *The Defense Attorney's Role in Plea Bargaining*, *supra* note 96, at 1248-70.

[149] *Id.* at 1384.

[150] *Id.*

[151] *Id.* at 1386.

[152] *Id.*

[153] Bibas, *supra* note 98, at 1387.

[154] United States v. Bednarski, 445 F.2d 364, 366 (1st Cir. 1971) ("[T]he public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail.").

[155] *In re* Winship, 397 U.S. 358, 364 (1970).

[156] David Starkweather, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 866 (1992).

society.[157] Rather than promoting honesty, *Alford* pleas in particular allow guilty defendants to "cloak their pleas in innocence."[158] While it is possible to attain retribution by means other than exacting a confession, i.e., via the actual punishment of the perpetrator,[159] for some victims, such as sexual offense victims, the healing process cannot begin and retribution may only be obtained once the defendant actively admits his guilt.[160]

Alford pleas also violate the basic moral norms that define our criminal justice system: honesty and responsibility for one's actions.[161] As long as offenders deny, justify, or minimize their actions, they cannot accept responsibility and repent.[162] In the case of especially heinous or shameful crimes, such as sex offenses, the inability to admit to the crime is even more common.[163] Therefore, it is no surprise that *Alford* and nolo contendere pleas are used most frequently when pleading to sex offenses.[164] Such cognitive denials and distortions impede treatment[165] and can lead to the commission of more sexual offenses in the future.[166] Confessions in open court, even when induced by external pressure, may begin to breach an offender's denial.[167] Allowing a defendant to enter an *Alford* plea, on the other hand, can exacerbate the offender's denial reflex, making subsequent treatment less effective, and thus making it more likely for an *Alford* defendant to reoffend.[168] Exemplifying this point, one study conducted in Minnesota found that seven out of eight sex offenders who entered *Alford* pleas reoffended within five years of his or her release,[169] a rate two to five times higher than the general recidivism rate of sex offenders.[170]

Allowing defendants to enter *Alford* pleas also harms a victim's ability to recover, especially in sexual assault and molestation cases where a victim's recovery often depends directly upon the defendant's own acknowledgment of the crime committed.[171] When a

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[157] *Id.* at 865-67.

[158] Bibas, *supra* note 98, at 1386-87.

[159] Walburn, *supra* note 142, at 148.

[160] Claire L. Molesworth, *Knowledge Versus Acknowledgment: Rethinking the Alford Plea in Sexual Assault Cases*, 6 Seattle J. for Soc. Just. 907, 908-09 (2008)..

[161] Bibas, *supra* note 97, at 1386-87.

[162] *Id.* at 1393.

[163] *Id.*

[164] *Id.* at 1393-94.

[165] Stefan J. Padfield, *Self-Incrimination and Acceptance of Responsibility in Prison Sex Offender Treatment Programs*, 49 U. Kan. L. Rev. 487, 498-99 (2001) ("Acceptance of responsibility on the part of the offender is considered an indispensable part of treatment. Without acceptance of responsibility, the key goals of treatment are stymied. Denial precludes addressing cognitive distortions, developing empathy for victims, identifying risk factors that may serve as warning signals, developing much needed social skills, and examining deviant sexual arousal. It is, therefore, no wonder that the United States Department of Justice has identified admission of responsibility as a basic requirement for treatment and that the American Bar Association has concluded that individuals who deny responsibility are not amenable to treatment . . . . In addition, the disincentives for refusing treatment keep offenders active in treatment long enough to break through their psychological defenses that would otherwise result in their choice to terminate treatment before any positive change occurred.").

[166] Bibas, *supra* note 97, at 1394.

[167] Elizabeth Mertz & Kimberly A. Lonsway, *The Power of Denial: Individual and Cultural Constructions of Child Sexual Abuse*, 92 Nw. U. L. Rev. 1415, 1418 (1998) (noting that the legal system, by challenging denials in the adversary system, "can help to puncture false denials and reveal unpleasant truths").

[168] Bibas *supra* note 97, at 1397.

[169] Id.

[170] Id.

[171] Molesworth, *supra* note 160, at 908.

defendant is allowed to enter an *Alford* plea, the victim is robbed of the public acknowledgment that a crime has been committed.[172] This lack of public acknowledgment can also increase "a victim's sense of alienation."[173]

As discussed above, defendants entering an *Alford* plea frequently experience negative, unanticipated consequences, including revocation of probation, denial of parole, and sentence enhancements.[174] Despite the fact that some courts have taken the view that it is the defense attorney's responsibility to advise the defendant of the possibility of these negative consequences before entering an *Alford* plea,[175] defendants do not prevail when attempting to withdraw their previous guilty plea by arguing ineffective assistance of counsel because courts view this lack of advice as a "collateral" rather than a "direct" consequence.[176] Similarly, defendants have not prevailed upon Fifth Amendment right against self-incrimination grounds when attempting to preclude themselves from having to admit guilt either during post-conviction treatment programs or when entering the initial plea.[177]

VI. IS IT PRACTICALLY POSSIBLE TO ELIMINATE *ALFORD* PLEAS?

Currently, over 95% of trials are disposed of through plea bargaining.[178] Clearly, it is not feasible to do away with the practice altogether. *Alford* pleas, however, constitute a small percentage of all pleas, between 6.3% and 6.7% among state inmates[179] and between 2.8% and 3.0% among federal inmates.[180] Removing *Alford* pleas as an option for defendants while retaining nolo contendere pleas will not even marginally disrupt the plea bargaining system as a whole. Furthermore, while efficiency is an important value in criminal procedure, accuracy and legitimacy are far more important.

In response to those *Alford* plea proponents who believe the entire range of pleas should be available to defendants[181] and who applaud *Alford* pleas because this type of plea does not force a defendant to lie in court,[182] it is not the position of this paper that nolo contendere pleas should be removed as an option. A defendant can still reap the benefits of plea bargaining (receiving a lesser punishment, increasing the certainty of the sentence received) while refusing

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[172] *See* Terence S. Coonan, *Rescuing History: Legal and Theological Reflections on the Task of Making Former Torturers Accountable*, 20 FORDHAM INT'L L. J. 512, 548 n.229 (citing STATE CRIMES: PUNISHMENT OR PARDON 93 (The Aspen Inst. ed., 1989)).

[173] Walburn, *supra* note 142, at 147.

[174] *See supra* Part IV.C.

[175] People v. Birdsong, 958 P.2d 1124, 1128 (Colo. 1998).

[176] Ward, *supra* note 94, at 936 (citing Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequence of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002)) (When seeking to withdraw a guilty plea, the test used is "whether, but for defense counsel's advice, the defendant would have refused to plead guilty and would have proceeded to trial." In the *Alford* plea context, this test has yet to be satisfied in any reported opinions. Courts have concluded that ineffective assistance of counsel can only arise when a defendant has not been advised of the "direct" rather than "collateral" consequences of his or her plea.)

[177] *Id.* at 937-38.

[178] U.S. Sentencing Commission, *2010 Sourcebook of Federal Sentencing Statistics,* Table 11, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table11.pdf; Bureau of Justice Statistics, State Court Processing Statistics, 2006: Felony Defendants in Large Urban Counties, 2006, 1, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf.

[179] HARLOW, *supra* note 85.

[180] *Id.*

[181] Alschuler, *The Defense Attorney's Role in Plea Bargaining*, *supra* note 96, at 1296.

[182] Ward, *supra* note 94, at 920-21.

to admit guilt by entering a nolo contendere plea. As with an *Alford* plea, a nolo contendere plea does not require the defendant to lie in court or to his attorney.

Today, only one-third of the American public expresses confidence in the criminal justice system,[183] and two-thirds think plea bargaining is a problem.[184] In order to begin to rectify the public's perception of the American criminal justice system and to better implement the goals that system is meant to serve, we should not allow defendants to enter a guilty plea without also admitting guilt. As long as nolo contendere pleas are available, the defendant is not forced to lie in court if he or she is truly innocent. Additionally, removing *Alford* pleas from the plea bargaining toolbox likely will encourage truly innocent defendants to persevere through trial proceedings, allowing the public to participate in the pursuit of justice and in turn improving public perception of the criminal justice system – all while allowing that system to serve its intended function.

[183] Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, NAT'L INST. JUST. J., Mar. 2002, at 23-24.

[184] AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY 54-55 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996).