THE PRAGMATIC PLEA: EXPANDING USE OF THE *ALFORD* PLEA TO PROMOTE TRADITIONALLY CONFLICTING INTERESTS OF THE CRIMINAL JUSTICE SYSTEM

"The dual aim of our criminal justice system is 'that guilt shall not escape or innocence suffer.'"[1]

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1. United States v. Nobles, 422 U.S. 225, 230 (1975) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

I. INTRODUCTION

The *Alford* plea is a criminal defendant's explicit assertion of innocence while pleading guilty.[2] Despite concerns that the *Alford* plea robs victims of a sense of closure or vindication,[3] it remains a useful and valid plea-bargaining tool.[4] The *Alford* plea is especially appropriate for criminal defendants who are unwilling or unable to admit their guilt,[5] but perceive the risks of pursuing a full criminal trial to be greater than the costs of the terms offered in a plea bargain.[6] Conversely, the *Alford* plea serves victim interests as well, by collaterally estopping the defendant in subsequent civil suits.[7]

Currently, the *Alford* plea is frequently used in Louisiana, Missouri, Ohio, and Pennsylvania, but is forbidden in Indiana and New Jersey.[8] The federal criminal system, which requires permission of the court to enter any plea, discourages its application.[9] Most states, however, leave acceptance of an *Alford* plea to the trial court's discretion.[10]

If courts embrace their discretion to accept the *Alford* plea, it will positively serve defendants, while aiding in the just and efficient resolution of criminal cases.[11] This Comment proposes that, for a narrow class of defendants, the *Alford* plea is capable of balancing elements of the criminal justice system that are traditionally considered mutually exclusive.[12] The *Alford* plea can simultaneously promote both the victim's and defendant's interests, while contributing to systemic goals of efficiency and justice.[13]

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2. See *infra* Part II.B for an introduction to the scope and use of the *Alford* plea.

3. See *infra* Part III.B.1 for criticisms of the *Alford* plea's lack of closure for victims.

4. See *infra* Part II.B.2 for a discussion of the current scope of acceptance of the *Alford* plea.

5. See *infra* notes 21–22 and accompanying text for a discussion of criminal defendants drawn to the *Alford* plea.

6. See *infra* notes 42–45 and accompanying text for a discussion of interest-balancing in plea bargaining.

7. See *infra* Part II.B.4.b for a discussion of how the *Alford* plea collaterally estops relitigation of crimes in subsequent civil proceedings on the same facts.

8. See *infra* Part II.B.2 for a discussion of the scope of the *Alford* plea's current use.

9. See *infra* note 100 and accompanying text for an explanation of the court's discretion in accepting *Alford* pleas.

10. See *infra* Part II.B.2 for a discussion of the extent to which the *Alford* plea is applied.

11. See *infra* Part III for a discussion of the practical application of the *Alford* plea.

12. See *infra* Parts III.B.1–2 for a discussion of criticisms of the *Alford* plea from both victims' and defendants' perspectives.

13. See *infra* Part III.A for a discussion of public interest policies supporting application of the *Alford* plea.

Part II of this Comment offers an overview of the process of plea bargaining in general, the origins of the *Alford* plea, and subsequent developments in the plea-bargaining system as a result of the *Alford* plea's effect on post-conviction relief. Part III.A discusses the public policy and efficiency interests served by the *Alford* plea, and explains how the plea promotes both defendant and victim concerns. Part III.B addresses typical concerns raised by the use of the *Alford* plea, and rejects these concerns as criticisms aimed at the entire plea-bargaining system which could not be resolved by eliminating the *Alford* plea in particular.

II. OVERVIEW

Despite a defendant's constitutional right to a full trial,[14] an overwhelming majority of criminal cases are resolved by plea bargaining.[15] Some statistics indicate that only one in fifty criminal cases goes to trial.[16] More than ninety-five percent of state criminal cases end with the entry of a guilty plea, and even more guilty pleas are entered in the federal criminal justice system.[17] As a result, a variety of plea-bargaining tools have evolved to achieve just and efficient results for criminal defendants outside the courtroom.[18]

Courts have recognized that defendants are not necessarily sophisticated enough to navigate the criminal justice system without guidance.[19] Defendants nonetheless have several plea-bargaining options to simultaneously advance their cases while accommodating a variety of fact patterns and individual defendants' resolutions.[20] A defendant may claim innocence while seeking to plea bargain for strategic reasons, such as aiming to influence sentencing or mitigation factors,[21] or he may have emotional or moral reasons that are not necessarily apparent to the court.[22] Even if a defendant's assertions are not corroborated by the facts of the case, plea bargaining

14. U.S. CONST. amend. VII.

15. *See* Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 717 (Supp. 2006) (noting statistics on frequency of plea bargaining). Chin and Holmes state that "[m]ore than ninety percent of dispositions on the merits of criminal prosecutions are convictions, and more than ninety percent of convictions result from guilty pleas." Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 698 (2002).

16. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1911 (1992).

17. *See* Ross, *supra* note 15, at 717 (discussing frequency of plea bargains in criminal justice system).

18. See *infra* notes 64–67 and accompanying text for a discussion of the types of available pleas.

19. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (holding that all criminal defendants charged with felonies have Sixth Amendment right to counsel).

20. See *infra* notes 64–67 and accompanying text for a discussion of guilty, nolo contendere, and *Alford* pleas. Concurrent with the concept of protecting defendants' rights, the Constitution privileges defendants from confessing at all. U.S. CONST. amend. V; *see generally* Katharine B. Hazlett, *The Nineteenth Century Origins of the Fifth Amendment Privilege Against Self-Incrimination*, 42 AM. J. LEGAL HIST. 235 (1998). Indeed, neither the defendant nor victims are required to testify in court in order for the criminal justice system to resolve criminal cases. *See generally* Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced To Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383 (2001).

21. See *infra* note 111 and accompanying text for a discussion of a defendant's use of an assertion of innocence at sentencing.

22. *See* Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1422 (2003) (discussing mental states of defendants).

permits defense counsel to make intelligent tactical moves when a defendant's individual motives may seem illogical to those trained to understand the subtleties of the criminal justice system.[23]

The plea-bargaining process is relatively informal when compared to the "solemnity of the trial process."[24] The decision to pursue a plea bargain begins with the defendant; in *Henderson v. Morgan*,[25] Justice White discussed the plea option as follows: "the choice to plead guilty must be the defendant's: it is *he* who must be informed of the consequences of his plea and what it is that he waives when he pleads; and it is on his admission that he is in fact guilty that his conviction will rest."[26]

A. Plea Bargaining

1. The Process of Plea Bargaining

In *Criminal Procedure as a Market System*, now Chief Judge Frank Easterbrook describes the process by which the prosecution and defense come to a plea bargain acceptable to both parties.[27] The seriousness of the crime and the evidence obtained by the government determine the prosecutor's proposed conviction and sentencing, formulated "against the backdrop of trial."[28] The prosecution's minimum acceptable settlement rises with the probability of conviction and sentencing at trial.[29] The defendant, on the other hand, is most interested in minimizing his punishment, and his perception of a maximum settlement offer is determined by the sentence he expects to receive if convicted.[30] As Chief Judge Easterbrook summarizes, "[a] deal is possible if the defendant's maximum offer equals or exceeds the prosecutor's minimum demand."[31]

Like a contract, the plea bargain reflects a balancing of the interests of both parties, and there are remedies in place if either party breaches.[32] Both parties wish to minimize their costs and maximize the resources at their disposal.[33] The best interest of

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23. See *infra* notes 45–47 and accompanying text for a discussion of plea-bargaining tactics.

24. Note, *A Prosecutor's Duty to Disclose Promises of Favorable Treatment Made to Witnesses for the Prosecution*, 94 HARV. L. REV. 887, 889 (1981).

25. 426 U.S. 637 (1976).

26. *Henderson*, 426 U.S. at 650 (White J., concurring) (citation omitted) (citing Boykin v. Alabama, 395 U.S. 238 (1969)). In addition, the Rules of Professional Conduct remind us:

> A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (1983).

27. Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 292–98 (1983).

28. Scott & Stuntz, *supra* note 16, at 1933.

29. Easterbrook, *supra* note 27, at 297.

30. *Id.*

31. *Id.*

32. *See, e.g.*, *Guilty Pleas*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 392, 412–16 (2008) (describing process of plea bargaining and breach remedies).

33. *See* Scott & Stuntz, *supra* note 16, at 1913–17 (describing plea bargain in terms of contract negotiation).

the defendant is to minimize his punishment and maximize his attorney's resources, whether retained or appointed.[34] The prosecutor's best interest is to see the defendant convicted and punished to the full extent of the law consistent with principles of justice, while clearing his docket as efficiently as possible.[35] Scott and Stuntz describe the balanced interests between the parties as follows:

> [t]he defendant has the right to plead not guilty and force the prosecutor to prove the case at trial. The prosecutor has the right to seek the maximum sentence for the maximum offense that can be proven. . . . If so, the conditions exist for an exchange that benefits both parties and harms neither.[36]

Furthermore, the plea-bargaining system incorporates remedies in case either party breaches. If the prosecution fails to enter a plea according to the terms of its bargain, the defendant can withdraw his plea and invoke his right to trial.[37] Conversely, the government can withdraw its obligation to enter the bargained-for sentence if the defendant breaches by lying.[38] The defendant also has remedies if there is a breach of the agreement after its acceptance by the court, as any alterations made by the prosecutor to the terms of the plea bargain after its conclusion may render the guilty plea involuntary.[39]

2. The Rationale for Plea Bargaining

There are several rationales that support the practice of plea bargaining for criminal sentencing. The speed with which a plea bargain can be concluded is beneficial to both parties as "[t]he defendant saves the anxiety and cost of litigation, and the prosecutor frees up resources to pursue other criminals."[40] Plea bargaining is good for society in general; Chief Judge Easterbrook argues that the entire criminal justice system is characterized by "allocating scarce resources. Police, judges, prosecutors, jails and jailers, and defense counsel are costly, and society gains by conserving their use."[41] From an economic perspective, plea bargains "provide[] a means by which prosecutors can obtain a larger net return from criminal convictions, holding resources constant."[42]

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34. *See* Ross, *supra* note 15, at 717 (discussing defendant's motivations to plea bargain).

35. *See id*. (discussing prosecutor's motivations to plea bargain).

36. Scott & Stuntz, *supra* note 16, at 1914.

37. *See* Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J. CRIM. L. & CRIMINOLOGY 943, 944–45 (2007) (discussing flexibility of plea-bargaining system in terms of benefitting defendant); Ross, *supra* note 15, at 722–23 (discussing remedies for breaching plea bargains).

38. Ross, *supra* note 15, at 730.

39. *See* Harris v. State, 671 N.E.2d 864, 870 (Ind. Ct. App. 1996) (affirming sexual assault conviction based on *Alford*-type plea of defendant, who admitted to committing sexual act but maintained that it was consensual).

40. Easterbrook, *supra* note 27, at 297; *see also* Roland Acevedo, Note, *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) (describing disadvantages created by Bronx temporary plea ban); Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 8, 2008, at A1 (describing overwhelming demand for public defenders lacking resources to accommodate new clients).

41. Easterbrook, *supra* note 27, at 290; *see also* Santobello v. New York, 404 U.S. 257, 260 (1971) (discussing limited available resources within U.S. justice system).

42. Scott & Stuntz, *supra* note 16, at 1915.

There are also clear advantages for the plea-bargaining defendant, who gains a degree of control over his destiny by working with the prosecution toward a bargained-for sentence. Many scholars support the defendant's right to bargain for his punishment; he exchanges certain constitutional rights[43] and the potential of being acquitted in a trial for a certain and minimized outcome.[44] Likewise, the prosecution may not achieve the harshest possible sentencing for a crime, but is guaranteed to obtain a conviction.[45]

There are significant tactical advantages to plea bargaining as well. Even the Supreme Court has acknowledged the role of tactics in the criminal justice system; as Justice Rehnquist discussed in *Henderson v. Morgan*,[46] the defendant's guilty plea was a

> tactically sound decision . . . to plead to second-degree murder in order to escape the greater penalties which might result from a first-degree murder conviction. . . . [We] placed a great weight on the fact that . . . "the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage."[47]

To summarize, the process of plea bargaining is simple: the defendant forgoes a criminal trial and decides to plead, the prosecution and the defendant's counsel hammer out a compromise of charges and sentencing, and the plea is presented to the court, which determines whether it will accept the terms of the plea bargain.[48] The court has discretion to accept or reject the plea proposed by the parties and, until the plea is accepted, either party is free to withdraw from the plea bargain.[49] Once accepted, the plea becomes an enforceable contract binding the defendant and the criminal justice system.[50]

3. Requirements to Plea Bargain

For a plea to be constitutionally valid, it must be made "knowingly, intelligently, and voluntarily."[51] The plea is made intelligently if the defendant has the capacity to plea bargain, meaning that he is able to consult with a lawyer and understand the facts of the proceedings against him.[52] According to the Federal Rules of Criminal

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43. Such rights include the right to trial by a jury of his peers, the right to cross-examine witnesses, and protection from self-incrimination found in the Fourth, Fifth, Eighth, and Fourteenth Amendments. See *infra* notes 57–58 and accompanying text for a discussion of the rights exchanged by the defendant.

44. *See* Easterbrook, *supra* note 27, at 297 (describing certainty of plea-bargaining process).

45. *See* Scott & Stuntz, *supra* note 16, at 1915 (discussing advantages of plea bargaining when viewed as contract).

46. 426 U.S. 637 (1976).

47. *Henderson*, 426 U.S. at 658 (Rehnquist, J., dissenting) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

48. *See* Ross, *supra* note 15, at 718 (describing plea-bargaining process).

49. *See Guilty Pleas*, *supra* note 32, at 395–96 (describing plea-bargaining process).

50. *See* Ross, *supra* note 15, at 722 (describing plea-bargaining process).

51. *Guilty Pleas*, *supra* note 32, at 403.

52. *See* Carter v. Scully, 745 F. Supp. 854, 856 (E.D.N.Y. 1990) (quoting Dusky v. United States, 362 U.S. 402, 403 (1960) (discussing circumstances under which a court would deny defendant's capacity to plea bargain)).

Procedure, a plea is voluntary if it is not coerced or made as a result of promises beyond the plea agreement itself.[53]

A plea has been made knowingly if it is the result of informed consent.[54] In *People v. Rizer*,[55] the court described this standard as "a free and intelligent waiver of the three enumerated rights necessarily abandoned by a guilty plea and an understanding of the nature and consequences of the plea."[56] The enumerated rights that must be abandoned are the right to confront and cross-examine witnesses, a full trial, and protection from self-incrimination.[57] A plea bargain thus results in the effective waiver of a defendant's Fourth, Fifth, Eighth, and Fourteenth Amendment rights.[58]

Beyond the *Brady v. United States* standard of knowledge, intelligence, and voluntariness, however, plea bargaining has other specifically defined limits. First, a defendant cannot waive his or her right to effective counsel.[59] Second, courts require a factual basis to support the plea.[60] The factual basis may come from a variety of sources, including witness testimony,[61] outside evidence,[62] or the defendant's own credible admission of guilt.[63]

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53. FED. R. CRIM. P. 11(b)(2); *see also* United States v. Brown, 117 F.3d 471, 478 n.5 (11th Cir. 1997) (stating that voluntariness for *Alford* plea is similar to other pleas). See Ross, *supra* note 15, at 719; Curtis J. Shipley, Note, *The Alford Plea: A Necessary But Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1070 (1987), for a discussion of the rule's application.

54. *See* Ross, *supra* note 15, at 720 (describing informed consent to waive certain rights).

55. 484 P.2d 1367 (Cal. 1971).

56. *Rizer*, 484 P.2d at 1369.

57. *See* Henderson v. Municipality of Cool Valley, 17 F. Supp. 2d 1044, 1045–47 (E.D. Mo. 1998) (discussing extent of waiver of defendant's constitutional rights).

58. *Id.* Courts generally consider the extent to which a defendant understands the nature and consequences of a plea to be limited to the immediate scope of the proceedings, satisfying themselves that a defendant made an intelligent waiver if he understood how the three rights he waived were implicated in the plea bargaining and sentencing at hand. *See* Boykin v. Alabama, 395 U.S. 238, 242-43 (1969) (discussing court's duty to establish record of waiver). This means that the court generally has little or no duty to account for all foreseeable collateral consequences as a result of waiver. *See* People v. Birdsong, 958 P.2d 1124, 1128 (Colo. 1998) (holding that court's obligation to inform defendant of consequences is limited); Wilfong v. Commonwealth, 175 S.W.3d 84, 102 (Ky. Ct. App. 2004) (stating that court had no obligation to inform defendant of long-term consequences of *Alford* plea to sexual assault conviction).

59. *See* Ross, *supra* note 15, at 721 (describing scope of waiver).

60. As the Court observed in *Boykin*,

> A majority of criminal convictions are obtained after a plea of guilty. If these convictions are to be insulated from attack, the trial court is best advised to conduct an on the record examination of the defendant which should include . . . the acts sufficient to constitute the offenses for which he is charged.

395 U.S. at 244 n.7 (quoting Commonwealth *ex rel.* West v. Rundle, 237 A.2d 196, 197–98 (Pa. 1968)).

61. *See, e.g.*, Holscher v. State, 282 N.W.2d 866, 866-67 (Minn. 1979) (finding guilty plea supported by testimony of three witnesses satisfied factual basis); Ross, *supra* note 15, at 721 (describing factual basis as testimony by government witnesses).

62. "Establishment of a factual basis for a plea may be satisfied by . . . evidence presented to the court by the prosecutor." Mills v. State, No. 89,012, 2003 WL 22387749, at *2 (Kan. Ct. App. Oct. 17, 2003) (citing State v. Snyder, 701 P.2d 969 (1985)).

63. *See* Green v. Koerner, No. 07-3262-RDR, 2008 U.S. Dist. LEXIS 50184, at *4–5 (D. Kan. June 30, 2008) (discussing sources of factual basis for plea in North Carolina v. Alford, 400 U.S. 25, 37-38 (1970)).

A defendant can forgo a full trial and plead guilty, or in some jurisdictions, he or she may alternatively enter a plea of nolo contendere[64] or an *Alford* plea. The nolo contendere plea has its origins in early medieval practice, when defendants offered to pay a sum of money instead of serving a prison sentence.[65] The defendant's claim of nolo contendere has the same immediate effect as a guilty plea, but the defendant does not confess his guilt, and is not estopped from pleading not guilty on the same facts in a subsequent trial.[66] In federal courts, the nolo contendere plea is permitted for certain crimes under the Federal Rules of Criminal Procedure with the court's permission, and many states also accept the plea under similar circumstances.[67]

B. The Alford *Plea*

Similar to, but not exactly a species of the nolo contendere plea, the *Alford* plea is an explicit assertion of innocence while pleading guilty.[68] Stephanos Bibas explains the distinction: "*Alford* and nolo contendere pleas differ in two main ways: First, nolo contendere pleas avoid estoppel in later civil litigation, while *Alford* pleas do not. Second, defendants who plead nolo contendere simply refuse to admit guilt, while defendants making *Alford* pleas affirmatively protect their innocence."[69] The *Alford* plea further departs from traditional nolo contendere pleas because courts have broader discretion to accept an *Alford* plea:[70] "Although these pleas are not forbidden by the Constitution, neither are they required. Because defendants have no right to plead guilty, judges may refuse to accept *Alford* pleas and states may forbid them by statute or rule."[71]

Nonetheless, the *Alford* plea particularly appeals to a certain subsection of criminal defendants. A defendant with a criminal record who believes that the costs of going to trial outweigh the effect of the conviction will be attracted to plea bargaining.[72] Those who believe themselves to be innocent,[73] or are unwilling or

64. Literally, "I do not wish to contend." BLACK'S LAW DICTIONARY 1147 (9th ed. 2009).

65. *Alford*, 400 U.S. at 35 n.8.

66. *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1370–71 (2003) (describing effects of nolo contendere plea).

67. *Id*. at 1370–71.

68. *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1165–66 (2008) (describing permissible scope of nolo contendere pleas, compared to *Alford* pleas); Mark Gurevich, *Justice Department's Policy of Opposing Nolo Contendere Pleas: A Justification*, 6 CAL. CRIM. L. REV. 2, ¶ 10–13 (2004), *available at* http://www.boalt.org/CCLR/v6/v6gurevich.htm (describing nolo contendere pleas).

69. Bibas, *supra* note 66, at 1373.

70. *See* Shipley, *supra* note 53, at 1068 (describing difference between *Alford* and nolo contendere pleas). Because a nolo defendere pleading defendant literally refuses to contest the charges against him and the court may accept the plea without a rigorous factual basis, this particular plea is typically limited to white-collar crimes. Jana L. Kuss, Comment, *Endangered Species: A Plea for the Preservation of Nolo Contendere in Alaska*, 41 GONZ. L. REV. 539, 543 (2006). Essentially, courts are unlikely to accept nolo contendere pleas for violent crimes because it would permit someone to "take the fall" for acts that society finds particularly reprehensible without substantial proof that he actually did those things. *Id.*

71. Bibas, *supra* note 66, at 1372.

72. *Id.* at 297.

unable to confess their guilt, will be particularly interested in pursuing *Alford* pleas to resolve compelling criminal cases against them.[74]

1. *North Carolina v. Alford*[75]

The *Alford* plea arises from the 1970 Supreme Court case, *North Carolina v. Alford*.[76] Henry Alford was indicted for first-degree murder on December 2, 1963.[77] His court-appointed attorney attempted to substantiate Alford's alibi, but to Alford's surprise, witnesses' statements tended to incriminate him.[78] Although there were no eyewitnesses to the crime, witnesses testified that prior to the murder, Alford retrieved his gun and stated his intent to kill the victim, and later confessed that he had succeeded.[79]

Under North Carolina law at the time, a first-degree murder was punishable by the death penalty or life imprisonment, while conviction of a second-degree murder could be punished by two to thirty years in prison.[80] Because of the witness testimony, Alford's attorney made a tactical decision to recommend that Alford plead guilty in order to avoid a trial.[81] As later described in *Webster v. State*,[82]

> [w]hether [his attorney] realized or disbelieved [Alford's] guilt, he insisted on [Alford's] plea because in [the attorney's] view [Alford] had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming evidence against [Alford], a trial was precisely what neither [Alford] nor his attorney desired.[83]

When asked if he wished to plead guilty, Alford told the court,

> 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.
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> . . . I'm not guilty but I plead guilty.[84]

The trial court accepted his plea and sentenced him to thirty years in prison, the maximum sentence available for second-degree murder.[85]

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73. *See* Henderson v. Morgan, 426 U.S. 637, 650 (1976) (White, J., concurring) (citing Boykin v. Alabama, 395 U.S. 238 (1969)) (stating that application of *Alford* plea is at defendant's request); Alschuler, *supra* note 22, at 1412-13 (describing defendants likely to be interested in negotiating for *Alford* plea).

74. *See* Ahart v. Bradshaw, 122 F. App'x 188, 195 (6th Cir. 2005) (discussing situations in which *Alford* plea is appropriate).

75. 400 U.S. 25 (1970).

76. *Alford*, 400 U.S. at 26 (finding defendant's guilty plea entered with simultaneous assertion of innocence was voluntary and supported by sufficient evidence to be acceptable).

77. *Id.*

78. *Id.* at 27–28.

79. *Id.* at 28.

80. *Id.* at 27 n.1.

81. *Id.* at 28.

82. 708 N.E.2d 610 (Ind. Ct. App. 1999).

83. *Webster*, 708 N.E.2d at 614 (quoting Ross v. State, 456 N.E.2d 420, 422 (Ind. 1983)).

84. *Alford*, 400 U.S. at 28 n.2.

85. *Id.* at 29.

In his appeal, Alford argued that the plea was involuntary because it was "the product of fear and coercion."[86] The court denied relief and found that the plea was made voluntarily and met requirements that it was "'willingly, knowingly, and understandingly' made on the advice of competent counsel and in the face of a strong prosecution case."[87] Following this decision, both the United States District Court for the Middle District of North Carolina and the Court of Appeals for the Fourth Circuit denied his habeas corpus petitions, agreeing that his plea was made voluntarily.[88]

On appeal, however, a divided Fourth Circuit panel reversed and held that his plea should have been rejected by the trial court because Alford "tendered his plea of guilty at a time that he was the subject of impermissible burdens," that is, his desire to avoid a death sentence.[89] The Supreme Court granted certiorari in 1970, vacated the Fourth Circuit's judgment, and ultimately remanded the case for further proceedings.[90]

The Supreme Court addressed the voluntariness of Alford's plea, and whether his lack of admission of guilt impeded acceptance of the plea.[91] The Court held that the plea was not compelled under the Fifth Amendment, having previously found in *Brady v. United States*[92] that the court may permit a plea motivated by a desire to limit one's sentence and avoid the possibility of the death penalty.[93] Alford's plea was rational and acceptable, therefore, because it represented "a voluntary and intelligent choice among the alternative courses of action."[94]

Next, the Court held that a defendant need not admit guilt for his guilty plea to be acceptable.[95] Had Alford's assertions of innocence been credible, the trial court should have rejected the plea and conducted a full trial.[96] However, sufficient evidence in the form of the witnesses' testimony suggested to the Court that Alford's protestations of innocence were not "sincere" enough to merit rejecting his guilty plea.[97]

The Court analogized Alford's plea to a nolo contendere plea, in which the defendant does not contest the charges.[98] The Court determined that any distinction between Alford's express assertion of innocence, as opposed to the lack of admission of guilt in a nolo contendere plea, was of no constitutional significance.[99] While federal courts and some state courts discourage accepting guilty pleas when the defendant protests his innocence, the Supreme Court held that where there is a sufficient factual basis for a defendant to enter a guilty plea, courts are left to their own discretion to accept the plea in the face of a defendant's simultaneous assertion of innocence.[100]

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86. *Id.*
87. *Id.*
88. *Id.* at 29-30.
89. Alford v. North Carolina, 405 F.2d 340, 343 (4th Cir. 1968).
90. *Alford*, 400 U.S. at 31.
91. *Id.* at 31–33.
92. 397 U.S. 742 (1970).
93. *Alford*, 400 U.S. at 31 (citing Brady v. United States, 397 U.S. 742 (1970)).
94. *Id.*
95. *Id.* at 36.
96. *Id.* at 32.
97. *Id.*
98. *Id.* at 35 n.8.
99. *Id.* at 37.
100. *Id.* at 39.

2. Acceptance of the *Alford* Plea

Following the Supreme Court's ruling, courts have diverged in their acceptance of the *Alford* plea.[101] Courts that have completely rejected the *Alford* plea include Indiana,[102] Michigan,[103] and New Jersey,[104] and federal courts strongly discourage the pursuit of an *Alford* plea by defendants.[105]

These courts tend to find plea bargaining generally problematic and contrary to the purpose of the criminal justice system.[106] They also identify the *Alford* plea's preclusive effect in future cases as a flaw because the plea is "often admissible in a subsequent criminal case against the defendant [and is] not objectionable as hearsay when offered against the defendant in a later proceeding."[107]

Rejection of the *Alford* plea is also urged by these courts for potentially yielding inconsistent results when applied to certain crimes and criminal hearings.[108] In sexual assault cases, for example, successful completion of a treatment program may be required as part of the defendant's sentencing,[109] yet his strict maintenance of innocence throughout the program may preclude "success" where completion of a program requires a participant to confess to having committed a sexual assault.[110] In sentencing hearings, a defendant's assertion of innocence may act as a mitigating factor,[111] whereas parole hearings may hold that same assertion of innocence as a negative factor when determining whether a criminal defendant has been reformed by the system.[112]

States that frequently use the *Alford* plea include Louisiana, Mississippi, Missouri, Pennsylvania, and Ohio.[113] Missouri federal courts, for example, have held that the

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101. *See* Shipley, *supra* note 53, at 1067 nn.49–50 (presenting one group of cases which accepted *Alford* pleas and another group of cases which rejected *Alford* pleas).

102. *See* Ross v. State, 456 N.E.2d 420, 423 (Ind. 1983) (holding that accepting *Alford* plea was reversible error).

103. *See* People v. Butler, 204 N.W.2d 325, 330 (Mich. Ct. App. 1972) (rejecting *Alford*-type plea and holding that plea acceptability is determined by guilt or innocence of defendant).

104. *See* State v. Korzenowski, 303 A.2d 596, 597 n.1 (N.J. Super. Ct. App. Div. 1973) (rejecting *Alford*-type plea "notwithstanding the recent decision").

105. *See* Bibas, *supra* note 66, at 1377 (describing current scope of *Alford*'s acceptance); Gurevich, *supra* note 68, ¶ 21 (stating that United States Attorney's Manual directs federal prosecutors not to consent to nolo contendere pleas); Shipley, *supra* note 53, at 1068 (stating that federal judges commonly reject *Alford* pleas, even in states where *Alford* plea is accepted).

106. *Cf.* FED. R. CRIM. P. 11(a)(2)–(3) (requiring defendant to obtain permission of court to enter plea bargain).

107. Claire L. Molesworth, Note, *Knowledge Versus Acknowledgement: Rethinking the* Alford *Plea in Sexual Assault Cases*, 6 SEATTLE J. FOR SOC. JUST. 907, 933 (2008).

108. *See, e.g.*, Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 555–56 (2008) (explaining how parole boards' focus on admissions of guilt creates barrier for inmates who continue to assert innocence).

109. *See, e.g.*, Wilfong v. Commonwealth, 175 S.W.3d 84, 92 (Ky. Ct. App. 2004) (holding that *Alford* plea defendant in sexual assault case was required to complete rehabilitation program).

110. Molesworth, *supra* note 107, at 937.

111. *See* People v. Griffiths, 445 N.E.2d 521, 529 (Ill. App. 1983) (rejecting contention that assertion of innocence at sentencing resulted in imposition of more severe sentence).

112. Medwed, *supra* note 108, at 493–95.

113. *See* Bibas, *supra* note 66, at 1377 (surveying application of *Alford* plea).

Alford plea remains an explicit maintenance of innocence (as opposed to a mere refusal to admit guilt).[114] Missouri state courts find that "[a]n *Alford* plea . . . 'stands on equal footing with one in which an accused specifically admits the commission of the particular act charged.'"[115] Ohio considers the *Alford* plea to function identically to a plea of nolo contendere, yet continues to accept both distinct pleas.[116]

Other states accept the *Alford* plea but view it more narrowly. For example, North Carolina interprets the *Alford* plea to be a species of nolo contendere, in which the defendant makes no admission of guilt at sentencing.[117] Wisconsin finds that the assertion of an *Alford* plea is relevant only during sentencing, becoming indistinguishable from a guilty plea in later proceedings.[118] In Rhode Island, trial judges are permitted discretion to accept the plea, which results in criminal conviction and may be used later as a distinct sentencing factor, or to estop relitigation of the criminal case in collateral proceedings.[119] Washington only accepts the plea for certain crimes—for example, Seattle bans the plea's application in sexual assault cases except in extraordinary circumstances.[120]

3. Subsequent Developments

a. Factual Basis

As the *Alford* plea case law has developed, courts have explored and resolved the theoretical conflicts between an assertion of innocence and the entry of a guilty plea. Any valid plea must have a factual basis, it must be voluntary, and must contemplate an intelligent waiver of trial rights.[121] While the factual basis for a plea bargain often comes from the defendant's own admission of guilt, in *State v. Newton*,[122] the Washington high court asserted that "[a] factual basis for [a guilty] plea may come from any source the trial court finds reliable, and not just the admissions of [the] defendant."[123] That court found that sufficient proof necessary for acceptance of a plea

114. Simpson v. Camper, 743 F. Supp. 1342, 1348 (W.D. Mo. 1990) (denying voluntariness of plea in case at bar, but setting forth requirements for successful *Alford* plea), *vacated as moot by* 974 F.2d 1030 (8th Cir. 1992).

115. Wilson v. State, 813 S.W.2d 833, 843 (Mo. 1991) (en banc) (quoting Jenkins v. State, 788 S.W.2d 536, 538 (Mo. Ct. App. 1990)).

116. *See, e.g.*, State v. Denton, No. 11376, 1989 WL 159195, at *1 (Ohio Ct. App. Dec. 29, 1989) (holding that nolo contendere plea entered in open court constituted valid *Alford* plea where defendant "in [his] own mind [was] contesting some of the issues").

117. North Carolina v. Alford, 400 U.S. 25, 37 (1970).

118. *See, e.g.*, Warren v. Richland County Circuit Court, 223 F.3d 454, 458 (7th Cir. 2000) (holding that *Alford* plea was entered appropriately under *Brady* standards, and defendant could not challenge voluntariness when unanticipated circumstances arose in post-conviction setting).

119. *See, e.g.*, Armenakes v. State, 821 A.2d 239, 242–44 (R.I. 2003) (describing *Alford* plea as "more comfortable" than other pleading options, and holding that it resulted in functional conviction).

120. Molesworth, *supra* note 107, at 938.

121. *See* United States v. Ruiz, 536 U.S. 622, 629 (2002) (discussing constitutional requirements for valid plea bargain). See also *supra* Part II.A.3 for a discussion of the requirements to enter a valid plea bargain.

122. 552 P.2d 682 (Wash. 1976).

123. *Newton*, 552 P.2d at 686.

may come from witness testimony or outside evidence without the defendant's admission.[124]

The District Court for the Eastern District of Wisconsin considered the necessary quantum of proof required for a court to accept the plea, independent of the defendant's voluntary testimony, in *United States v. Feekes*.[125] In *Feekes*, the court relied on *Alford* to find that an express admission of guilt is "not a constitutional requisite to the imposition of criminal penalty."[126] Furthermore, if an independent factual basis for a guilty plea exists, it cannot be invalidated based on the defendant's "inability to remember" or unwillingness to confess to the crime.[127]

Scholars have noted, however, that the reliable outside factual basis standard becomes problematic in certain situations, such as sexual assault cases.[128] If the victim recants her testimony, a defendant's *Alford* plea may be overturned "because the factual basis for the plea is often based primarily (or only) on a victim's testimony."[129] Nevertheless, so long as a prosecutor can present a strong and reliable factual demonstration of the defendant's guilt, the defendant's own admission is a moot point and unnecessary to the court's acceptance of his guilty plea.[130]

b. Voluntariness

The factual basis of the plea is strongly tied to the issue of voluntariness.[131] In some courts, the *Alford* plea will not be considered voluntary *without* an independent factual basis.[132] According to the Seventh Circuit in *Higgason v. Clark*,[133] "*Alford* tells us that strong evidence on the record can show that a plea is voluntary."[134] In *Willett v. Barnes*,[135] for example, the defendant's first-degree murder plea was overturned by the Supreme Court of Utah for lack of evidence in the record, which stated that "nothing supports a finding that an adequate factual basis existed at the time Willett entered his plea."[136] The court described the rationale behind requiring a sufficient factual record for a court to accept an *Alford* plea: "[a] court cannot be satisfied that a guilty plea is

124. *Id.* See also *supra* notes 60–63 and accompanying text for further discussion of the factual basis standard.

125. 582 F. Supp. 1272 (E.D. Wis. 1984).

126. *Feekes*, 582 F. Supp. at 1274 (quoting North Carolina v. Alford, 400 U.S. 25, 37 (1970)).

127. *Id.* at 1274–75.

128. *See, e.g.*, Molesworth, *supra* note 107, at 930 (indicating that *Alford* pleas pose challenges in sexual assault cases).

129. *Id.*

130. *See* State v. Salinas, 887 P.2d 985, 987 (Ariz. 1994) (discussing requirements for valid factual basis).

131. *See* Shipley, *supra* note 53, at 1069–70 (describing constitutional requirements for voluntariness).

132. This largely avoids the issue of one individual "taking the fall" for another. The court in *State v. Morgan* held that "where a defendant enters a plea of guilty even though maintaining her innocence, the plea is not voluntary unless basic facts surrounding the charge are presented." No. 65973, 1994 WL 408080, at *2 (Ohio Ct. App. Aug. 4, 1994) (citing State v. Casale, 518 N.E.2d 579, 582 (Ohio Ct. App. 1986).

133. 984 F.2d 203 (7th Cir. 1993).

134. *Higgason*, 984 F.2d at 207.

135. 842 P.2d 860 (Utah 1992).

136. *Willett*, 842 P.2d at 861.

knowing and voluntary unless the record establishes facts that would place the defendant at risk of conviction should the matter proceed to trial."[137]

Courts have expanded on the idea of voluntariness, and further determined that an *Alford* plea can be made voluntarily, despite the apparent conflict between the defendant's assertions of innocence and acceptance of guilt. Like all pleas, an *Alford* plea is voluntary if not "'the result of force or threats or of promises' extraneous to the agreement itself."[138] Courts have found that, so long as the defendant is aware of his trial rights and his ability to waive them, and he also understands the elements of the crime to which he pleads guilty, there is no voluntariness problem in entering an *Alford* plea.[139]

c. Waiver

Courts have found the *Alford* plea acceptable where the defendant is aware of the trial rights he waives. On this point, the courts have viewed the *Alford* plea as merely another strategy between prosecutors and defendants, one which may encourage a risk-averse defendant to maximize his control over the outcome of his case.[140] In *Alford*, for example, the defendant told the court that he pled guilty based on his attorney's advice, specifically to avoid a trial in which he would be charged with a capital crime.[141] In subsequent cases, the courts have emphasized the acceptability of an *Alford* plea only where a defendant is represented by competent counsel, is aware of the elements of the crime to which he pleads, and understands that he will be convicted without the protection of the Fourth, Fifth, Eighth, and Fourteenth Amendments.[142]

4. Post-Conviction Effects

As a result of its relatively recent pedigree, the *Alford* plea has resulted in unique consequences as defendants with *Alford* plea convictions filter through the criminal justice system.[143] For example, defendants run into new challenges when they seek to assert the inadequacy of their attorneys' representation in malpractice suits.[144] Conversely, the *Alford* plea presents opportunities for victims to resolve civil suits against the defendant that would not be available had the defendant entered a plea of nolo contendere in the original criminal case.[145]

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137. *Id.* at 862.

138. Ross, *supra* note 15, at 719 (quoting FED. R. CRIM. P. 11(d)).

139. *See* United States v. Brown, 117 F.3d 471, 476–77 (11th Cir. 1997) (holding that "constitutionally valid guilty pleas must be knowing and voluntary").

140. *See* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987 (1992) (discussing "negotiating framework" of plea bargains in general).

141. North Carolina v. Alford, 400 U.S. 25, 27–29 (1970).

142. *See* Henderson v. Morgan, 426 U.S. 637, 644–45 & n.13 (1976) (upholding conviction and dismissing habeas claim).

143. *See* Warren Moïse, *Sailing Between Scilla and Charybdis: Nolo Contendere and Alford Pleas*, S.C. LAWYER, May 2006, at 11 (discussing uncertainties regarding impact of *Alford* pleas on subsequent civil litigation).

144. *See id*. (discussing preclusive effect of *Alford* pleas in subsequent civil litigation).

145. *See* Bibas, *supra* note 66, at 1373 (stating that *Alford* pleas do not allow re-litigation of convictions in civil suits unlike nolo contendere pleas).

a. Malpractice

Prevailing on a legal malpractice claim is generally difficult for criminal defendants.[146] A successful legal malpractice claim must show that "(1) the attorney owed the plaintiff a duty, (2) the attorney breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) damages occurred."[147]

Two hurdles often stand between the defendant with a criminal conviction and a successful malpractice claim against his attorney. First, courts generally require post-conviction relief as a condition to bringing malpractice claims; the conviction sparking the malpractice claim must be overturned before the defendant has standing.[148] Second, most courts find that, as a matter of public policy, the criminal defendant caused his own injury by committing a crime, and any misconduct by his attorney is not sufficient proximate cause to justify overturning his criminal conviction.[149]

These policy rationales raise novel concerns in the context of a defendant entering an *Alford* plea.[150] A defendant is unlikely to know about the *Alford* plea but for his attorney's advice; however, the court's acceptance of the *Alford* plea is effectively a guilty plea resulting in a criminal conviction.[151] A defendant may therefore believe that he has a valid malpractice claim in that he consistently maintains his innocence, yet entered an *Alford* plea upon his attorney's advice.[152] The defendant may believe that this is the "but-for" causation needed to establish his claim.

Nevertheless, because the defendant entering an *Alford* plea must have a sufficient outside factual basis of guilt to support the plea,[153] a court is likely to uphold traditional policy rationales for dismissing the defendant's malpractice claim.[154] The facts underlying the plea indicate sufficient guilt to support the theory that the defendant's

146. *See* Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1251, 1255 (2003) (stating that difficulty of prevailing in criminal malpractice suits is tantamount to "special protection from civil liability for substandard conduct" for defense attorneys).

147. Peeler v. Hughes & Luce, 909 S.W.2d 494, 496 (Tex. 1995) (citing Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989)).

148. *See* State *ex rel.* O'Blennis v. Adolf, 691 S.W.2d 498, 503–04 (Mo. Ct. App. 1985) (citing *In re* Estate of Laspy, 409 S.W.2d 725 (Mo. Ct. App. 1966)) (holding that innocence was essential element of plaintiff's malpractice claim and that his prior guilty plea estopped him from establishing it); Duncan, *supra* note 147, at 1258–59 (stating that postconviction relief is requirement of cause of action).

149. *See Peeler*, 909 S.W.2d at 500 (Phillips, C.J., dissenting) (discussing policy reasons for traditionally dismissing criminal malpractice claims).

150. *See* Owens v. Harrison, 86 P.3d 1266, 1267–68 (Wash. Ct. App. 2004) (affirming dismissal of malpractice suit where *Alford* plea was never recommended by attorney).

151. *See* Thorp v. Strigari, 800 N.E.2d 392, 400 (Ohio Ct. App. 2003) (permitting statute barring malpractice suits against public defenders to stand); Gurevich, *supra* note 68, ¶ 41 (reflecting on Justice Department's concern with not sentencing innocent defendants).

152. *See* Larson v. Hunt, No. 01-00-01196-CV, 2002 WL 922410, at *3 (Tex. App. May 16, 2002) (finding no coercion where plea was made subsequent to attorney's advice); Duncan, *supra* note 147, at 1277-78 (stating that defendant must show that he would have been better off but for his attorney's negligence

153. *See* Shipley, *supra* note 53, at 1070–71 (describing requirements of *Alford* plea).

154. *See Peeler*, 909 S.W.2d at 495–97 (explaining policy rationales behind dismissing criminal malpractice claims).

own actions were the underlying cause of his conviction, and therefore the defendant is responsible for any subsequent injury the conviction has caused him.[155]

Furthermore, courts generally believe that the criminal justice system itself has sufficient checks in place to prevent a defense attorney's actions from rising to the level of malpractice.[156] In the case of a defendant entering an *Alford* plea, the requirements placed upon the court to ensure that he has knowingly waived specific constitutional rights should suffice to minimize the effectiveness of subsequent arguments by the defendant that he was never informed, by his attorney or otherwise, of the consequences of his plea.

b. Collateral Estoppel

One of the major distinctions between the *Alford* plea and nolo contendere is that the defendant's entry of an *Alford* plea generally forecloses him from relitigating the issue of his guilt in subsequent civil cases arising from the same facts, where the nolo contendere plea does not.[157] A collateral estoppel "bars a party from relitigating an issue that has been 'actually litigated and necessarily decided in [a] prior proceeding'"[158] 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.[159]

When a defendant enters a nolo contendere plea, collateral estoppel will not apply in a subsequent civil suit because the defendant consents to accept punishment without any charges being actually litigated or determined.[160] An *Alford* plea, on the other hand, is entered as a type of guilty plea and has been properly pleaded and determined.[161]

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155. *See id.* at 497-98 (noting for public policy reasons that illegal conduct, not negligence of counsel, is cause in fact of injuries stemming from convictions).

156. *See* Duncan, *supra* note 147, at 1284 ("[C]ourts have maintained that reliance on the tort system is unnecessary as the criminal justice system already provides criminal defendants with adequate protection from negligent lawyering.").

157. *See* Bibas, *supra* note 66, at 1373 (describing differences between pleas); Moïse, *supra* note 144, at 11 (differentiating estoppel effect between pleas).

158. Kuss, *supra* note 70, at 546 (citations omitted).

159. *Id.* at 546–47.

160. *See id.* at 555–56 (discussing Restatement (Second) of Judgments, explaining that "if the charges are uncontested, they are necessarily unlitigated" (quoting Lichon v. Am. Universal Ins. Co., 459 N.W.2 288, 298 (Mich. 1990))).

161. The court in *State v. Salinas* described the circumstances under which *Alford* pleas are generally taken:

Although it may seem incongruous to foreclose the issue of a defendant's guilt where he protests his innocence, and not when he merely accepts the charges against him, public policy considerations support this outcome.[162] First, the collateral estoppel effect of the *Alford* plea should enter into a defendant's calculations when determining whether and what type of plea to enter.[163] Knowing that he will be foreclosed from challenging his guilt in subsequent civil proceedings means that a defendant will be discouraged from trying to enter an *Alford* plea for every criminal conviction.[164]

Second, the outside factual basis supporting the entry of the *Alford* plea becomes relevant.[165] Where there is a sufficient factual basis to support a criminal court's acceptance of a guilty plea, those facts are likely to satisfy a civil court's preponderance of the evidence standard,[166] unlike a nolo contendere plea, which the court may accept "without the usual prerequisite of fully satisfying the [c]ourt that the defendant has in fact committed the crime charged."[167] Collateral estoppel, therefore, only applies where the court and the defendant have conceded that the facts of the case would render a finding against the defendant.[168] The collateral estoppel effect of the *Alford* plea thus contributes to judicial efficiency by foreclosing relitigation of the same facts where they are virtually guaranteed to result in the same outcome.[169]

III. DISCUSSION

The *Alford* plea is an important tool in the prosecutor's plea-bargaining toolbox because it is invoked by a unique demographic of criminal defendants. Some defendants do not need the *Alford* plea or will not plea bargain: for example, defendants who go to trial and were not offered an acceptable plea bargain by the prosecutor, or who think that their case has sufficient strength to merit acquittal.[170] A standard guilty plea appeals to the guilty defendant who believes he has been offered an attractive plea bargain when compared to the risks of going to trial.[171] Nolo contendere

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> [T]he entry of a plea pursuant to *Alford* rests on the defendant's *acknowledgement* that he is entering the plea of guilty despite his protestation of innocence because he recognizes that in view of the quantity and quality of evidence against him, conviction of the offense, or of a greater crime, or of multiple offenses, may occur if he goes to trial.

880 P.2d 708, 711 (Ariz. Ct. App. 1994), *vacated by* 887 P.2d 985 (Ariz. 1994).

162. *See* Bibas, *supra* note 66, at 1373–74 (describing public policy interests in efficiency and resolution of cases served by *Alford* plea).

163. *See id.* at 1084 (describing collateral estoppel as function of *Alford* plea).

164. *Id.*

165. *Id.* at 1071–72.

166. *See* 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)) (stating that plaintiff in malpractice action must prove innocence by preponderance).

167. Kuss, *supra* note 70, at 544-45 (quoting United States v. Hines, 507 F. Supp. 139, 140 (D.C. Mo. 1981)).

168. *See* Bibas, *supra* note 66, at 1373 (describing evolution of nolo contendere plea and *Alford* plea doctrine).

169. *See* Shipley, *supra* note 53, at 1076–77 (discussing issue preclusion).

170. *See* Scott & Stuntz, *supra* note 16, at 1914 (making case for enforceability of plea bargains, and pointing out that defendant has right to force prosecutor to prove case against him at trial).

171. To determine which pleas will be considered "attractive," Judge Easterbrook weighs the costs and benefits to each side of the plea bargain, and concludes that where the prosecutor's offer and the defendant's

pleas are appropriate for innocent or guilty defendants who do not contest the charges made against them but wish to avoid an estoppel on their conviction in later civil cases.[172] The *Alford* plea, on the other hand, is a superior option for innocent defendants who perceive their odds of acquittal at trial as being too slim, innocent defendants who believe the costs of going to trial (in terms of time and money) are greater than the consequence of having a criminal conviction, and innocent defendants with prior convictions for whom a criminal record is of less consequence.[173]

A. The Alford *plea serves public interests in efficiency and justice.*

The *Alford* plea is an appealing option because it increases the attractiveness of plea bargaining to resolve cases for both prosecutors and defendants.[174] It gives a defendant the option to maintain his innocence while giving his counsel a chance to act in a tactically sound way, even when the defendant may be not be acting in his own best interest by asserting his innocence in the face of a contrary set of facts.[175] Simultaneously, it permits prosecutors to obtain the convictions they desire.[176] Plea bargaining in general is good practice; there is no evidence that attempted bans on plea bargaining have resulted in any benefits for either criminal defendants or prosecutors.[177] Restrictions on plea bargaining lead to decreased efficiency in the criminal justice system and no appreciable increase in just outcomes, underscoring the importance of contract-style plea bargaining.[178]

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willingness to accept a bargain overlap, a successful plea bargain can be made. Easterbrook, *supra* note 27, at 297.

172. For this reason, nolo contendere pleas are more commonly invoked by white collar criminal defendants, who seek to avoid civil liability where monetary damages would be relatively crippling when compared to criminal consequences. *See* Gurevich, *supra* note 68, ¶ 2 (citing increased likelihood of civil litigation in white collar crime and potential for high civil damages as reasons put forth for using nolo contendere plea). On the other hand, *Alford* pleas are more appealing to "typical" criminal defendants, who may be more concerned with emotional and moral reasons for maintaining their innocence, and more likely to be recidivist or indigent. *See* Bibas, *supra* note 66, at 1373 (describing differences between nolo contendere and *Alford* pleas).

173. Scholars recognize that the relative harshness of the American criminal system makes going to trial highly risky for defendants, whereas plea bargaining supports the defendant's right to control the exchange of entitlements with the criminal system as he sees fit. *See* Ross, *supra* note 15, at 718–19 (noting that advantages held by prosecutor include limited sentencing discretion of courts and ability of defendants to influence sentencing); Scott & Stuntz, *supra* note 16, at 1913 (discussing norms of efficiency and autonomy).

174. Scott and Stuntz go so far as to assert that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." Scott & Stuntz, *supra* note 16, at 1912.

175. *See, e.g.*, North Carolina v. Alford, 400 U.S. 25, 31 (1970) (holding that defendant may plead guilty on his lawyer's advice while maintaining his innocence, despite witness testimony confirming his guilt).

176. *See* Scott & Stuntz, *supra* note 16, at 1914 (explaining both parties' desires and how they inform creation of equitable plea bargain).

177. *See, e.g.*, Acevedo, *supra* note 40, at 1013 (describing due process problems and overall concerns about effectiveness of justice system following Bronx County temporary ban on plea bargaining). Both sides of the courtroom find themselves under considerable strain; not only prosecutors but public defenders find their hands tied by policy insensitive to the realities of the criminal justice system. *See* Eckholm, *supra* note 40, at 1 (stating that public defenders' lack of resources amounts to violation of constitutional right to counsel for poor).

178. *See* Acevedo, *supra* note 40, at 1013 (explaining negative effects of ban on plea bargaining in Bronx County criminal justice system).

The *Alford* plea offers plea-bargaining parties many benefits. It promotes the agency of the defendant by increasing his plea-bargaining options.[179] For the same reason, it promotes criminal justice system efficiency.[180] It protects the potentially innocent defendant by giving him the ability to maintain his innocence and at the same time resolve his criminal charges.[181] And finally, it still leaves victims a civil remedy by collaterally estopping the defendant from asserting his innocence in a subsequent civil proceeding.[182]

1. Increasing acceptance of the *Alford* plea promotes the agency of the defendant.

Courts have already accepted the *Alford* plea for many types of crimes.[183] A specific ban on the *Alford* plea for particular crimes, such as in cases of sexual assault, is contrary to the purpose of plea bargaining in general.[184] Furthermore, a narrow ban on entry of the plea deprives the defendant of opportunities that would be available for him for crimes that are equally serious but of a different nature.[185] If a defendant is to be permitted to plea bargain at all, it is because there is a consensus among courts and scholars that he should be given a degree of agency in determining the outcome of his case.[186] To permit him to plea bargain without providing him with a full range of plea-bargaining options deprives him of that agency.[187]

2. The *Alford* plea promotes system-wide efficiency.

Achieving efficiency in the criminal justice system requires not only the speedy resolution of criminal cases, but doing so with a similar level of accuracy and justice as would be achieved with a more deliberate and lengthy approach. The *Alford* plea

179. *See* Ross, *supra* note 15, at 717 (explaining rationale behind plea bargaining in general).

180. *See id.* (stating benefits of system where prosecution is not compulsory and plea bargaining is permitted).

181. Judge Easterbrook approaches this issue with the goal of efficient deterrence. "[P]lea bargaining is desirable, not just defensible, if the system attempts to maximize deterrence from a given commitment of resources." Easterbrook, *supra* note 27, at 309.

182. *See* Bibas, *supra* note 66, at 1373 (distinguishing *Alford* plea from nolo contendere plea, which does not create collateral estoppel).

183. *See id.* at 1377 (describing *Alford* plea's broad acceptance, especially in Louisiana, Pennsylvania, and Ohio).

184. *See* Acevedo, *supra* note 40, at 1008 (discussing lack of efficiency and agency leading to substantive due process injustices because of Bronx County temporary ban on plea bargaining).

185. Essentially, courts would be required to make threshold judgments at plea-bargain hearings as to whether certain kinds of crimes were worse than others, instead of determining whether a particular defendant's plea was acceptable. *See* Bowers, *supra* note 68, at 1165–66 (describing inconsistency in availability and scope of nolo contendere and *Alford* pleas, in felony and misdemeanor cases).

186. Critics of limited plea-bargaining rights correctly argue that limitations infringe upon defendants' contracting rights and create unfair advantages for prosecutors, while courts have approached this argument from a more tactical perspective, pointing out that defendants should be permitted to make the most intelligent plea for their case. *See* Henderson v. Morgan, 426 U.S. 637, 657–58 (1976) (Rehnquist, J., dissenting) (discussing tactical advantages to *Alford* plea); Scott & Stuntz, *supra* note 16, at 1913 (discussing necessity of permitting defendants to exchange entitlements with prosecutors).

187. *See* Acevedo, *supra* note 40, at 1013 (noting that defendants deprived of plea-bargaining opportunities were not vindicated by plea-bargaining ban situation).

promotes this type of efficiency by encouraging defendants who are unable or unwilling to plead unqualifiedly guilty to bypass a lengthy trial, when there is a sufficient factual basis to suggest that they would not prevail.[188]

Furthermore, the *Alford* plea promotes efficiency in the criminal justice system through accuracy, because the plea explicitly captures the defendant's belief in his innocence as well as his willingness and eligibility to plead guilty.[189] First, defendants given the option to enter an *Alford* plea are less likely to balk at the idea of plea bargaining for sentencing, with the result that plea bargaining can be concluded with fewer negotiations and faster outcomes.[190] Second, courts can be more skeptical about a defendant who, having had the opportunity to plead as accurately as possible, attempts to "change his story" on appeal, thus preserving resources for cases of genuine factual or legal dispute.[191]

Beyond criminal justice, the *Alford* plea promotes system-wide interests in efficiency as well. This benefit is underscored when considering the *Alford* plea's effect on civil malpractice suits brought by criminal defendants against their attorneys.[192] Criminal defendants usually cannot file malpractice claims against their attorneys if they have been convicted, without first obtaining some kind of post-conviction relief.[193] Even so, some jurisdictions additionally require proof of actual innocence before a defendant can file a malpractice claim.[194] This stems from a public policy belief that a defendant should not be permitted to assert that his lawyer's actions caused his conviction, when the underlying reason for his conviction was actually the crime he committed.[195]

Therefore, a court reviewing an *Alford* plea defendant's claim—while not absolutely foreclosed from hearing *all* such malpractice claims[196]—is generally even less conducive to permitting a malpractice claim than other pleas, because a defendant would have to allege that his attorney acted in some way that deprived him of fully understanding the proceedings or that he was convicted through some kind of mistake.[197] Since the *Alford* plea already incorporates safeguards by requiring the satisfaction of the voluntariness of the plea, accompanied by an explicit waiver of

188. *See* Ahart v. Bradshaw, 122 F. App'x 188, 195 (6th Cir. 2005) (discussing appropriate application of *Alford* plea).

189. *Cf.* Gurevich, *supra* note 68, ¶ 27 (discussing contribution of nolo contendere and plea bargaining in general to efficiency and conservation of resources).

190. *Id.*

191. *See* Easterbrook, *supra* note 27, at 318 (stating that "[i]t is not enough that the defendant changed his mind or that the plea has turned out to be a tactical blunder").

192. *See* Duncan, *supra* note 147, at 1272 (discussing preservation of judicial resources).

193. *See id.* at 1258–89 (discussing requirements to bring malpractice action in various jurisdictions).

194. *See* State *ex rel.* O'Blennis v. Adolf, 691 S.W.2d 498, 503–04 (Mo. Ct. App. 1985) (citing *In re* Estate of Laspy, 409 S.W.2d 725, 728 (Mo. Ct. App. 1966)) (holding that permitting malpractice claim without proof of innocence would permit criminal defendant "to profit by his own fraud").

195. *Id.* at 504 (citing *In re* Estate of Laspy, 409 S.W.2d at 728) (dismissing suit on public policy reason for punishing criminal defendant and not his attorney).

196. *See, e.g.*, Falkner v. Foshaug, 29 P.3d 771, 776 (Wash. Ct. App. 2001) (permitting malpractice claim against defense attorney who failed to properly defend *Alford*-pleading client).

197. *See* Owens v. Harrison, 86 P.3d 1266, 1267–68 (Wash. Ct. App. 2004) (denying malpractice claim). *But see Falkner*, 29 P.3d at 771 (finding that attorney's failure to adequately represent defendant merited opportunity to bring malpractice suit).

constitutional rights,[198] it is rare that a claim that these rights were violated by an attorney's actions would survive.[199]

By virtually foreclosing such issues except in truly extraordinary situations, the *Alford* plea contributes to system-wide efficiency by preserving judicial resources for malpractice cases where there are compelling factual disputes, and not where there is independent corroboration of guilt, as in the typical *Alford* plea scenario.[200] This encourages broader use of the *Alford* plea by making it unlikely that a defendant could bring a malpractice claim against his attorney in a malpractice suit simply for having advocated entry of an *Alford* plea.[201] Criminal attorneys, especially court-appointed attorneys, will be more likely to suggest the *Alford* plea under appropriate circumstances even in jurisdictions where its application is rare, without fear that an unconventional (although appropriate) plea bargain might expose them to malpractice liability.[202]

3. The *Alford* plea gives innocent defendants the same opportunities as guilty defendants.

In addition, the *Alford* plea is a crucial tool for the innocent defendant.[203] A defendant who believes himself to be innocent has a constitutional right to trial.[204] If not for the *Alford* plea, however, going to trial would be his only option, even if he perceived the costs of conviction to be overwhelming.[205]

If the justice system permits a guilty defendant some control over charging and sentencing through plea bargaining, it makes no sense to deprive innocent defendants

198. *See* Cobbins v. Commonwealth, 668 S.E.2d 816, 820 (Va. Ct. App. 2008) (denying malpractice suit where defendant claimed to be unaware of rights waived, but had in fact reviewed and signed written waiver after being advised by court); Ross, *supra* note 15, at 720 (discussing explicit waiver required by Rules of Criminal Procedure).

199. *Cf.* Duncan, *supra* note 147, at 1279–80 (describing voluntariness of guilty or nolo contendere plea as break in causal chain of attorney's negligence).

200. A similar argument could be made for the estoppel effect contributing to system-wide efficiency. *See* Ross, *supra* note 15, at 719 (describing presumption of voluntariness where defendant is advised by judge that guilty plea will be binding and there is some factual basis).

201. Some states further underscore the importance of encouraging public defenders to take and resolve cases by granting them immunity from malpractice. *See* Thorp v. Strigari, 800 N.E.2d 392, 400 (Ohio Ct. App. 2003) (dismissing malpractice claim where criminal defendant entered no-contest plea under public defender's advice, holding that state may place reasonable regulation on right to bring legal negligence suits against public defenders).

202. *See* Larson v. Hunt, No. 01-00-01196-CV, 2002 WL 922410, at *2–4 (Tex. App. May 16, 2002) (dismissing malpractice claim where plaintiff had entered no-contest plea to sexual assault of child, holding that suit was barred under statute of limitations and plaintiff could not maintain suit against his defense attorney).

203. *But see* Alschuler, *supra* note 22, at 1412 (noting that *Alford* plea applies to innocent defendants, but claiming that to permit plea bargaining by innocent defendants ought to simply "shock [the] conscience").

204. *See* U.S. CONST. amend. VII (guaranteeing trial by jury for all). Nevertheless, Curtis Shipley asserts that "innocent defendants often face considerable incentives to plead guilty." Shipley, *supra* note 53, at 1086.

205. Scott & Stuntz, *supra* note 16, at 1913. Alternatively, an innocent defendant would have to knowingly lie to the court. Shipley, *supra* note 53, at 1073 n.101.

of the same opportunity.[206] The criminal justice system should not blindly subject a defendant who believes that he is innocent to the mercy of the murky and unpredictable trial system where a guilty defendant, in the exact same circumstances, has the option to bargain.[207]

4. The preclusive effect of the *Alford* plea permits redress for victims where the nolo contendere plea would not.

The estoppel effect of the *Alford* plea helps to resolve latent concerns about victims' rights and the lack of vindication they might feel as a result of being deprived of their day in court.[208] The idea that every victim wants or needs to stand up in a court setting and testify about a crime committed against him, however, is not necessarily true.[209] Furthermore, the concern that a victim loses out on seeing the defendant "confess his sins" to the courtroom would not be satisfied by eliminating the *Alford* plea, or any form of plea bargaining.[210] A criminal defendant need not testify even if he chooses to go to trial;[211] therefore, under any plea bargain, or even at the conclusion of a full criminal trial, a defendant may never have to speak to the victim, let alone be forced to make some kind of public confession.[212] The conclusion of a criminal trial may even result in acquittal, which would hardly serve to vindicate the feelings of the victim of a crime.[213]

Ultimately, instead of arguing that the *Alford* plea is bad for victims, critics should realize that its estoppel effect actually makes the *Alford* plea more palatable than other plea-bargaining options.[214] By collaterally estopping the criminal defendant from relitigating his guilt in a subsequent civil suit, the *Alford* plea provides a victim with a clear avenue for public redress, if that is what the victim desires.[215]

The rationale behind the estoppel effect is twofold: first, even if the defendant asserts his innocence, an *Alford* plea will not be accepted unless there is a sufficient

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206. *See* Scott & Stuntz, *supra* note 16, at 1913 (arguing for freedom of contract of criminal defendants); Shipley, *supra* note 53, at 1073 (arguing that if general plea-bargaining system is permitted, defendants should be free to choose which plea they enter).

207. Bibas points out that the number of innocent defendants in the criminal justice system is unknowable. In his interviews with trial lawyers, he has discovered that they often believe that at least some of their clients who take advantage of no contest pleas such as nolo contendere and the *Alford* plea are indeed innocent. Bibas, *supra* note 66, at 1384–85.

208. Molesworth, *supra* note 107, at 930.

209. This is especially so in crimes such as domestic violence. *See, e.g.*, Kirsch, *supra* note 20, at 392-98 (explaining various reasons why domestic abuse victims are reluctant to participate in prosecution of their abusers).

210. *See* U.S. CONST. amend. V (providing protection against self-incrimination).

211. *Id.*

212. *See generally* Hazlett, *supra* note 20.

213. *See* Ross, *supra* note 15, at 717 (stating that plea bargaining reduces "risk" of acquittal).

214. *See* Duncan, *supra* note 147, at 1272 (discussing process of collateral estoppel).

215. Concerns that an *Alford* defendant may be recovery-proof because of the likelihood that he is indigent or recidivist are without merit. There is no guarantee that a criminal defendant in any subsequent civil suit on the same facts has the resources to pay damages; therefore, eliminating a defendant's option to enter an *Alford* plea based on likelihood of recovery is baseless. *See* Gurevich, *supra* note 68, ¶ 2 (noting that nolo contendere plea is usually invoked by white collar criminal defendants in antitrust litigations).

outside factual basis supporting the defendant's guilt to satisfy the court.[216] This factual basis, in turn, can satisfy the preponderance of the evidence standard of proof in a subsequent civil trial on the same facts.[217] Second, preclusion creates a disincentive for defendants to choose to enter an *Alford* plea for any and every indictment.[218] By raising the long-term costs of entering an *Alford* plea, collateral estoppel narrows the field of defendants who would rationalize the costs and benefits of the *Alford* plea in their favor. [219]

B. Classical criticisms of the Alford *plea lack merit.*

The *Alford* plea has incurred some criticism since its inception, but when subjected to critical analysis it becomes clear that skeptics' arguments lack merit. Furthermore, criticisms particularly aimed at the *Alford* plea would not be resolved by its elimination—it is possible that such a solution would in fact lead to worse conditions for criminal defendants, victims, and the criminal justice system as a whole.

1. Victim-centric concerns raised by the *Alford* plea are system-wide and not *Alford* plea-specific.

Many critics single out the *Alford* plea for being particularly insensitive towards the economic and emotional recovery of victims.[220] Claire Molesworth, for example, argues that the *Alford* plea is contrary to international human rights norms, which focus on giving victims the satisfaction of seeing the people who committed atrocities brought to public justice.[221] It is undisputed that the *Alford* plea permits a defendant to resolve a criminal accusation without ever having to admit his guilt, and its entry may deprive a victim of his or her day in court.[222] American criminal cases, however, are

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216. *See* United States v. Feekes, 582 F. Supp. 1272, 1275 (E.D. Wis. 1984) (applying standards of voluntariness and factual basis).

217. *Cf.* 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).

218. *Cf.* Shipley, *supra* note 53, at 1084–85 (noting that courts differ regarding whether *Alford* pleas have preclusive effect).

219. Shipley best describes how the *Alford* plea achieves this balancing act between permitting the *Alford* plea where it ought to be pleaded, while discouraging indiscriminate application:

> [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. . . . [I]f *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.

Id. at 1084–85, 1088.

220. *See, e.g.*, Medwed, *supra* note 108, at 537 (noting emotional benefit to victims when perpetrators admit wrongdoing); Molesworth, *supra* note 107, at 908 (linking victim recovery to admission of guilt by defendant).

221. Molesworth, *supra* note 107, at 930, 940.

222. *See id.* at 930–32 (faulting plea bargaining, and *Alford* plea in particular, within American criminal system, for depriving victim and society from receiving benefit of defendant acknowledging his actions).

resolved between the state and the defendant; while a victim may be called on to give testimony, and may reasonably feel gratified by seeing the defendant found guilty in a court of law, the individual victim's interests are ultimately subordinated to other public policy interests in community safety and order.[223]

Concerns about the victim's sense of retribution would not be resolved by any form of plea bargaining; by definition, plea bargaining deprives a victim of his "day in court," as there is no trial.[224] As previously discussed, a ban on all plea bargaining disserves the entire system.[225] In addition, there are many cases of victims who do not wish to give testimony in which the *Alford* plea remains an appropriate alternative to trial.[226] Ultimately, the criminal system is designed to resolve the defendant's debt to society, and as such, should focus on the relationship between the defendant and the system during the trial or plea bargaining process.[227]

Instead, issues between the victim and defendant may be resolved in a later civil case.[228] Under these circumstances, there is actually a benefit to victims in permitting the defendant to enter an *Alford* plea as opposed to pleading nolo contendere: the *Alford* plea results in a collateral estoppel, precluding the criminal defendant from relitigating his innocence in a subsequent civil proceeding, so that the victim-plaintiff has a lesser burden of proof to recover civil damages.[229]

2. Defendant-centric concerns regarding the *Alford* plea can be easily resolved by discussing post-conviction effects with potential *Alford* plea defendants.[230]

Some critics attack the *Alford* plea on what they call the "innocence" problem. Albert Alschuler, for example, argues that permitting the court to accept *Alford* pleas leads to substantial due process problems by "sending someone to prison who has neither been found guilty nor admitted his guilt."[231] However, the Supreme Court resolved this issue in *North Carolina v. Alford*.[232] The *Alford* Court found no due process violation, because acceptance of any *Alford* plea should be grounded in a factual basis outside the defendant's confession.[233]

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223. The criminal system is often described in terms of the relationship between the defendant and the state. While the victim of a crime may play a role in terms of testimony or proof, criminal prosecution is motivated by societal interests in order, not necessarily individual desires for retribution. *See* United States v. Feekes, 582 F. Supp. 1272, 1274 (E.D. Wis. 1984) (discussing process of plea bargain); Fisher, *supra* note 37, at 944–45 (discussing "bargaining chips" between defendant and state).

224. *See, e.g.*, Scott & Stuntz, *supra* note 16, at 1933–34 (describing mechanics of plea bargain process).

225. *See, e.g.*, Acevedo, *supra* note 40, at 1013 (noting that limits on plea bargaining strain entire system).

226. *See* Bowers, *supra* note 68, at 1165–66 (noting that *Alford* pleas are accepted for crimes of all degrees of seriousness). See *supra* notes 191–95 and accompanying text for a discussion of the benefits of using the *Alford* plea.

227. Easterbrook, *supra* note 27, at 290 (describing this relationship in terms of outcome interests and bargaining power).

228. *See* Bibas, *supra* note 66, at 1373 (explaining difference in effect of collateral estoppel between *Alford* pleas and nolo contendere pleas).

229. *Id.*

230. *See generally* Chin & Holmes, *supra* note 15.

231. Alschuler, *supra* note 22, at 1412.

232. 400 U.S. 25, 37–38 (1970) (discussing plea in terms of Alford's best interest).

233. *Alford*, 400 U.S. at 37–38.

As explained in *Green v. Koerner*,[234] there is "no due process violation because the factual basis for the guilty plea 'substantially negated' defendant's claim of innocence while entering the plea and provided a means by which the judge could test whether the plea was being 'intelligently entered.'"[235] Furthermore, what conflict may exist between the defendant's insistence upon maintaining his innocence and the strong factual basis permitting sentencing would not necessarily be resolved through trial if a defendant can be convicted on the facts presented, regardless of his assertions of innocence.

Other critics question the voluntariness of the *Alford* plea, expressing concern that an innocent defendant will feel coerced to enter an *Alford* plea instead of pursuing his case to trial, or that he may not understand the rights he forfeits by entering a plea.[236] However, courts have determined that an *Alford* plea is as voluntary as any other type of plea, so long as it is accompanied by sufficient factual evidence to support a finding of guilt and the record shows that the defendant was made aware of the rights he waived.[237]

Furthermore, the *Alford* plea is subject to the same precautions as other pleas. As explained in *Harris v. State*,[238] "[a] petitioner's conviction will be vacated if the record fails to disclose that the defendant was advised of the right to a jury trial, right of confrontation and right to avoid self-incrimination."[239] Moreover, where there is concern that a defendant's plea was not voluntary, there is always an opportunity for review.[240] So long as a plea is not "'the result of force or threats or of promises' extraneous to the agreement itself," the court will find the agreement was voluntarily made.[241]

Some critics are particularly concerned with collateral consequences of *Alford* pleas. Daniel Medwed, for example, points out that refusal to admit guilt may be held against the defendant in later parole hearings.[242] This concern was already addressed in *Burrell v. United States*,[243] when the court determined that a conviction pursuant to an *Alford* plea could qualify as a predicate felony conviction for the purposes of some statutes.[244] As far as the *Burrell* court was concerned, an *Alford* plea functions like a conventional guilty plea post-conviction, and is distinguishable from the nolo contendere plea only with regard to its preclusive effect.[245]

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234. No. 07-3262-RDR, 2008 U.S. Dist. LEXIS 50184, at *2 (D. Kan. June 30, 2008).

235. *Green*, 2008 U.S. Dist. LEXIS 50184, at *4 (quoting *Alford*, 400 U.S. at 37-38).

236. *See* Bowers, *supra* note 68, at 1123 (arguing that prosecutors exert unfair advantages over defendants when determining plea bargains).

237. *See* United States v. Brown, 117 F.3d 471, 478 n.5 (11th Cir. 1997) (stating that even *Alford* pleas must "be entered 'voluntarily, knowingly, and understandingly'" (quoting *Alford*, 400 U.S. at 37)); United States v. Feekes, 582 F. Supp. 1272, 1274 (E.D. Wis. 1984) (describing factual basis rationale).

238. 671 N.E.2d 864 (Ind. Ct. App. 1996).

239. *Harris*, 671 N.E.2d at 870.

240. *See* Scott & Stuntz, *supra* note 16, at 1958 (describing process for review after plea bargain is made).

241. Ross, *supra* note 15, at 719 (quoting FED. R. CRIM. P. 11(d)).

242. Medwed, *supra* note 108, at 556.

243. 384 F.3d 22 (2d Cir. 2004).

244. *Burrell*, 384 F.3d at 28–31.

245. *Id.* at 29.

> To the extent Connecticut law does draw a distinction between *Alford* and nolo contendere pleas on the one hand, and standard guilty pleas on the other, it is not in the fact of conviction, but in the evidentiary use that can be made of these different pleas as admissions of factual guilt in subsequent proceedings: . . . "The only practical difference is that the plea of nolo contendere may not be used against the defendant as an admission in a subsequent criminal or civil case."[246]

Such concerns can be easily resolved if the court warns the defendant of potential future conflicts when determining whether the plea is valid.[247] So long as a defendant is aware of potential negative consequences when entering an *Alford* plea, he should have the agency to determine whether he is willing to face these later consequences.[248] If he still decides to enter the *Alford* plea, it is unlikely that he will be able to successfully challenge his conviction on these grounds, because he was already informed of potential negative consequences.[249]

In *Cobbins v. Commonwealth*,[250] for example, the Court of Appeals of Virginia ended a defendant's appeal after entering an *Alford* plea then requesting continuances to obtain private counsel.[251] The court noted that the trial court questioned Cobbins about his decision to enter *Alford* pleas to the charges against him, and that Cobbins stated that he "[did] not wish to take the chance with a jury trial" and understood the consequences "beyond a shadow of a doubt."[252] The Court of Appeals then denied Cobbins' argument that he required an opportunity to seek private counsel, because of the strength of the record against him[253] and the trial court's thorough investigation into his comprehension of the consequences of the plea and bad faith attempts to manipulate the trial system.[254] *Cobbins* therefore represents the way in which the *Alford* plea's stringent standards for questioning the defendant's understanding of the plea can contribute to judicial efficiency by foreclosing later arguments on those grounds.[255]

In contrast, *Falkner v. Foshaug*[256] demonstrates the flexibility of the *Alford* plea with respect to accommodating both judicial efficiency and the extraordinary case in which a defense attorney fails to adequately defend his client.[257] In this case, the defendant was able to maintain his malpractice suit precisely because he consistently asserted his innocence.[258] By maintaining his innocence, the court determined that Falkner would be able to show that it was his attorney's negligent representation and

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246. *Id.* (quoting State v. Faraday, 842 A.2d 567, 588 n.17 (Conn. 2004)).

247. *See* Ross, *supra* note 15, at 720 (describing court's existing burden to explain rights forfeited by plea bargaining).

248. *See* Scott & Stuntz, *supra* note 16, at 1911 (advocating plea bargaining for defendants' rights).

249. *See* People v. Rizer, 484 P.2d 1367, 1369 (Cal. 1971) (describing standards for informing defendant about plea bargain consequences).

250. 668 S.E.2d 816 (Va. Ct. App. 2008).

251. *Cobbins*, 668 S.E.2d at 820.

252. *Id.* at 818.

253. *Id.*

254. *Id.* at 820.

255. *Id.*

256. 29 P.3d 771 (Wash. Ct. App. 2001).

257. *Falkner*, 29 P.3d at 772.

258. *Id.* at 777.

not his own bad acts which caused his conviction.[259] Such an outcome in an outlier case demonstrates the way in which the *Alford* plea can act as an escape valve—an acknowledgment that a defense attorney has considerable leverage in determining the best plea for his defendant,[260] while preventing purely mechanical application of nontrial resolutions for cases when the outcome would be patently unjust.[261]

3. Justice-centric concerns with the *Alford* plea would not be resolved by specifically eliminating the *Alford* plea.

Some critics assert that the *Alford* plea provides a convenient "out" for defendants who do not wish to admit their guilt.[262] The other side of this coin, however, is that the *Alford* plea permits innocent defendants, or defendants who are unable to admit guilt for lack of memory, to stand before a judge and plead guilty without lying.[263] In its own way, the *Alford* plea thus promotes integrity and respect for the judicial system, when other plea-bargaining options might cause the defendant to simply lie to a judge in order to achieve his goals.[264]

Other critics have dismissed the *Alford* plea for encouraging resolution over truth-seeking.[265] However, this accusation cannot be leveled at the *Alford* plea in particular, but at the entire process of plea bargaining as a whole.[266] Furthermore, the *Alford* plea promotes truth-seeking by emphasizing the requirement of an independent factual basis outside the defendant's confession before the court can accept the defendant's plea bargain.[267] Truth-seeking should be emphasized regardless of whether a defendant goes to trial or resolves his case by plea bargaining, but that does not make an emphasis on case resolution a bad thing.[268] The entire system is admittedly overloaded;[269] permitting

259. *Id.*

260. *See* Schulhofer, *supra* note 141, at 1991 (arguing that "the attorney-client relationship is not the voluntary contractual arrangement postulated by economic theory, but a partly or wholly involuntary relationship infected by pervasive conflicts of interest and the virtual nonexistence of effective means to monitor counsel's loyalty and performance in the low-visibility plea negotiation setting").

261. Where courts accept an *Alford* plea as essentially identical to a guilty plea, they may base their decision whether to hear a malpractice suit arising from an *Alford* plea "on considerations of collateral and judicial estoppel." *Falkner*, 29 P.3d at 777. Therefore, while the plea functions identically to a guilty plea in the immediate criminal proceedings, it may preserve certain issues for later reconsideration that a standard guilty plea would foreclose. *Id*.

262. *See* Alschuler, *supra* note 22, at 1416 (stating that defendants availing themselves of *Alford* pleas are under "psychological barriers" and in denial (quoting Bibas, *supra* note 66, at 1400)).

263. Shipley, *supra* note 53, at 1073.

264. *Id.* at 1072–74.

265. Fisher believes that these two goals are mutually exclusive, instead of multiple means to the same end. Fisher, *supra* note 37, at 995.

266. *See* Scott & Stuntz, *supra* note 16, at 1933 (describing interests served and costs avoided by plea bargaining); Shipley, *supra* note 53, at 1086 (describing most *Alford* plea concerns as general plea-bargaining concerns leveled at relatively new doctrine).

267. Because the defendant's statement of innocence could not support a guilty finding in a trial absent sufficiently incriminating evidence, courts require a quantum of evidence sufficient to support a theoretical trial conviction before accepting the defendant's plea as voluntary and acceptable. *See* State v. Shell, No. 71736, 1997 WL 675448, at *5 (Ohio Ct. App. Oct. 30, 1997) (discussing whether application of *Alford* plea need be in defendant's best interest); Ross, *supra* note 15, at 719 (discussing process of plea bargaining).

268. *See* Scott & Stuntz, *supra* note 16, at 1913 (asserting importance of efficiency and autonomy in criminal system that permits plea bargaining).

a defendant to resolve his case without the extensive requirements of investigation and mounting an extensive defense may ultimately result in a more just outcome than the alternative—the possibility that defendants are left languishing in jail on unresolved charges.[270] In the resolution of a criminal case, the emphasis should remain on an equitable outcome for the defendant.[271] If the defendant and the prosecutor are both satisfied by the terms of a plea bargain, then together they should be permitted to resolve their case short of trial.[272]

Finally, there is concern that the *Alford* plea engenders inconsistent results beyond the courtroom.[273] Molesworth notes that acceptance of an *Alford* plea may render the defendant ineligible to participate in rehabilitation programs.[274] In *Wilfong v. Commonwealth*,[275] for example, the defendant challenged a sentencing statute requiring participation in a sexual treatment program subsequent to the court's acceptance of an *Alford* plea to one count of rape in the first degree.[276] The court, however, was unconcerned with potential conflicts between Wilfong's protestations of innocence and mandatory enrollment in the Sexual Offenders program, and held that the acceptance of an *Alford* plea "did not imply that he could unconditionally maintain his innocence for any and all purposes, [and that] his probation could be revoked for his refusing to admit guilt in conjunction with his treatment."[277]

Essentially, the court held that Wilfong was fully informed of the potential consequences of his guilty plea, including state legislation requiring rehabilitation, when he made the decision to plead guilty.[278] Furthermore, the court emphasized that the *Alford* plea's unique character is only important during the plea-bargaining process itself.[279] After the court accepts an *Alford* plea, the defendant is convicted of the bargained-for crime and must accept the required sentencing as he would have had he pled guilty or nolo contendere.[280]

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269. The Supreme Court in *Santobello v. New York* admitted to the great number of cases and limited capacity in the American criminal justice system, noting that to realistically resolve all cases by trial would require a massive increase in court resources. 404 U.S. 257, 260 (1971); *see also* Acevedo, *supra* note 40, at 992 & n.47 (discussing Bronx temporary ban on plea bargaining and effect on case load); Eckholm, *supra* note 40, at A1 (stating that public defenders lack sufficient resources).

270. *See* Acevedo, *supra* note 40, at 1013 (noting problematic side effects of plea-bargaining ban).

271. *See* Easterbrook, *supra* note 27, at 290 (discussing plea-bargaining system in terms of costs and benefits between individual defendant and overall deterrence factors desired by criminal system).

272. *See id.* at 297 (describing balancing of interests in achieving successful and acceptable plea bargain).

273. Inconsistencies include being rendered ineligible for rehabilitation programs, and negative consequences for parolees who fail to express remorse for their crimes. *See, e.g.*, Medwed, *supra* note 108, at 493 (discussing negative effects of lack of remorse at parole hearings); Molesworth, *supra* note 107, at 937 (discussing refusal of some prosecutors to offer *Alford* pleas because of later problems with required admissions of guilt in rehabilitation programs).

274. Molesworth, *supra* note 107, at 937.

275. 175 S.W.3d 84 (Ky. Ct. App. 2004).

276. *Wilfong*, 175 S.W.3d at 89–90.

277. *Id.* at 102.

278. *Id.* at 103.

279. *See id.* at 102 (describing consequences of entering *Alford* plea as equivalent to guilty plea).

280. *See* Gurevich, *supra* note 68, ¶ 41 (describing ultimate effects of plea bargains).

IV. CONCLUSION

It has been recognized that criminal defendants largely lack the skills necessary to successfully navigate the criminal system alone and rarely have the capacity to be their own best advocates.[281] The *Alford* plea recognizes that a particular defendant may insist upon maintaining his innocence for personal or moral reasons that seem illogical to those trained in the system—for example, Alford's own assertion of innocence despite having bragged of his intent and successful commission of murder.[282] Nonetheless, such defendants should not be deprived of the opportunity to plea bargain. In this way, the *Alford* plea maintains access to all facets of the criminal justice system even when a defendant does not appreciate its subtleties.

The *Alford* plea balances a variety of criminal justice goals traditionally considered to be in opposition: individual defendants' and victims' interests, and system-wide interests in efficiency and justice. The *Alford* plea contributes to defendants' agency by increasing their options when plea bargaining. Its collateral estoppel effect permits victims a form of redress not contemplated by other kinds of pleas. By encouraging plea bargaining when appropriate, the *Alford* plea contributes to system-wide efficiency, and by giving innocent defendants the same options as guilty defendants, the plea permits just outcomes for all defendants.

Ultimately, the *Alford* plea serves a unique subset of criminal defendants for a variety of reasons. Its current use is limited in scope and inconsistent in application. To limit or abandon the *Alford* plea, as advocated by some scholars, would cripple defendants' capacity to bargain fairly with prosecutors for an equitable outcome to their criminal cases. Instead, courts should encourage broader use of the *Alford* plea, as it will contribute to much-needed system efficiency and equity between the defendant and the system while simultaneously promoting resolution and victim redress in a way not contemplated by other plea-bargaining options.

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281. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (asserting that even indigent criminal defendants have right to state-appointed counsel in felony cases).

282. North Carolina v. Alford, 400 U.S. 25, 28–31 (1970).

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