THE *ALFORD* PLEA TURNS FIFTY: WHY IT DESERVES ANOTHER FIFTY YEARS

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I. INTRODUCTION

Fifty years ago, in *North Carolina v. Alford*,[1] the United States Supreme Court ruled that it does not violate due process for a judge to accept a guilty plea from a defendant who maintains his innocence.[2] *Alford* pleas are problematic to some, as they allow for the punishing of a defendant who has neither been adjudicated guilty nor admitted guilt. This essay critically evaluates the arguments against *Alford* pleas. It demonstrates that these anti-*Alford* plea arguments are largely a product of misunderstandings regarding innocence determinations, what constitutes coercion, and the impracticality of abolishing the practice. Furthermore, this essay discusses the overlooked benefits *Alford* pleas offer to defendants, victims, the criminal justice system, and society at large.

II. HISTORY OF THE *ALFORD* PLEA

The practice of negotiating a reduced punishment in return for a guilty plea dates back to the "confessions" of the thirteenth century.[3] Plea bargaining has been on a steady upward trajectory throughout United States history, closely linked to increases in criminalization.[4] In the eighteenth century, jury trials were predominantly "judge-dominated, lawyer-free procedures conducted so rapidly that plea bargaining was unnecessary."[5] In the nineteenth century, more complex rules of evidence and a more adversarial process resulted in increased caseloads and an accompanying increased incentive to plea bargain.[6] Courts would often invalidate plea agreements in post-Civil War America, allowing defendants to withdraw their pleas based on prece-

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1. 400 U.S. 25 (1970).
2. North Carolina v. Alford, 400 U.S. 25, 31 (1970).
3. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 13 (1979).
4. *Id.* at 6.
5. John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 L. & SOC'Y REV. 261, 261 (1979).
6. *Id.*

dents prohibiting incentives in return for guilty pleas.[7] In the early twentieth century, increased criminalization and the accompanying increases in caseloads helped form our modern plea system.[8]

The percentage of convictions from guilty pleas in federal courts from 1908 to 1916 rose from 50% to 72%.[9] By 1925, almost 90% of criminal convictions were the result of guilty pleas.[10] In the 1970 case of *Brady v. United States*,[11] the United States Supreme Court reluctantly upheld the constitutionality of plea bargaining.[12] This case secured the modern, more lenient standard that plea agreements are only required to be "voluntary."[13] According to this new standard, as long as a plea is not the result of "actual or threatened physical harm or [made] by mental coercion overbearing the will of the defendant,"[14] it is considered voluntary. The advent of DNA testing in the 1990s increased awareness of innocent defendants who had accepted guilty pleas.[15] But this awareness did little to stall the growth of plea bargaining, which continued on its upward trajectory to the present, where 97% of federal felony convictions are the result of a plea.[16]

The Supreme Court decided in *Alford* that it does not violate due process for a judge to accept a guilty plea from a defendant who maintains his innocence.[17] However, the Court also stipulated that acceptance of such a plea is left to the discretion of the trial court judge.[18] Therefore, *Alford* does not create a legal right for defendants to have their pleas accepted.[19]

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7. Lucian E. Dervan & Vanessa A. Edkins, *Criminal Law: The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 8 (2013).

8. *Id.* at 9-10.

9. *Id.* at 10.

10. *Id.*

11. 397 U.S. 742 (1970).

12. Brady v. United States, 397 U.S. 742, 743 (1970) (upholding a plea where the defendant claimed his acceptance of a fifty-year plea offer was the result of induced fear of the threat of the death penalty if he went to trial).

13. *Brady*, 397 U.S. at 750.

14. *Id.*

15. Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 L. & HUM. BEHAV. 611, 611 (2016).

16. Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/.

17. North Carolina v. Alford, 400 U.S. 25, 38 (1970).

18. *Alford*, 400 U.S. at 38 n.11 ("Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead.").

19. *Id.*

Because *Alford* pleas are guilty pleas,[20] Federal Rule of Criminal Procedure 11 requires that they be made voluntarily, knowingly, and intelligently, "with sufficient awareness of the relevant circumstances and likely consequences."[21] One significant difference between traditional pleas and *Alford* pleas is that the defendant's admission of guilt in a traditional plea generally serves as the required "factual basis" for the judge's acceptance of the plea.[22] In an *Alford* plea, the judge must establish the factual basis for accepting the plea based on an independent assessment.[23]

The notion of punishing someone in the absence of an adjudication of guilt and without an admission of guilt may strike laypeople as problematic.[24] And some legal scholars are vehemently opposed to it, as demonstrated by the Albert W. Alschuler quote, "[i]f anything short of torture can shock your conscience, *Alford* pleas should."[25] Regardless, *Alford* pleas are recognized as necessary by criminal justice experts[26] and practiced in forty-seven states and the District of Columbia.[27]

III. REFUTING THE ARGUMENTS AGAINST *ALFORD* PLEAS

A. ARBITRARINESS

Because *Alford* pleas are at the discretion of prosecutors and judges,[28] they can be arbitrarily applied. Particular judges,[29] prosecutors,[30] and even defense attorneys[31] may not allow *Alford* pleas.

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20. Allison D. Redlich & Asil Ali Ozdogru, Alford *Pleas in the Age of Innocence*, 27 BEHAV. SCI. & L. 467, 468 (2009) ("To be clear, Alford pleas are guilty pleas.").

21. *Brady*, 397 U.S. at 748.

22. *Alford*, 400 U.S. at 32.

23. State v. Newton 552 P.2d 682, 686 (Wash. 1976) (en banc) ("[T]he factual basis for [a guilty] plea may come from any source the trial court finds reliable, and not just the admissions of [the] defendant.").

24. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and NOLO Contendere Pleas*, 88 CORNELL L. REV. 1361, 1363 (2003) (stating that *Alford* pleas "undermine the procedural values of accuracy and public confidence in accuracy and fairness"); United States v. Bednarski, 445 F.2d 364, 366 (1st Cir. 1971) ("[T]he public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail.").

25. Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1412 (2003).

26. Bibas, *supra* note 24 at 1370, 1374 (referring to those who criticize Alford pleas as "[t]he few").

27. Redlich & Ozdogru, *supra* note 20, at 471.

28. North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970).

29. *See Alford*, 400 U.S. at 38 n. 11 (explaining that the trial judge has the ultimate discretion on whether to accept an *Alford* plea).

30. James W. Diehm, *Pleading Guilty While Claiming Innocence: Reconsidering the Mysterious* Alford *Plea*, 26 U. FLA. J.L. & PUB. POL'Y 27, 38 (2015).

31. *Id.* at 38, 42-43.

Therefore, a defendant in one case may be afforded an *Alford* plea while another similarly situated defendant may not.[32] Furthermore, Indiana, Michigan, and New Jersey have complete bans on *Alford* pleas, thus creating an additional element of geographic arbitrariness.[33] This arbitrariness is not only unfair, but also damages the reputation of the legal system.

Response

In a limited sense, *Alford* pleas are somewhat arbitrary.[34] But it is unclear how pointing this out supports the abolishment of the practice. In the absence of *Alford* pleas, traditional plea bargaining would still be arbitrary. Meaning, similarly situated defendants may receive vastly disparate non-*Alford* plea offers—or no plea offer at all—based on numerous arbitrary factors. It is a peculiar proposal to deny one defendant the benefit of an *Alford* plea on the arbitrariness grounds that some other similarly situated defendant might not be offered an *Alford* plea. While abolishing the practice of *Alford* pleas does remove any arbitrariness involved, it is difficult to see who benefits from this course of action. The defendant who was not offered an *Alford* plea receives no benefit, while the defendant who would have been offered an *Alford* plea is worse off.

The focus on making the criminal justice system less arbitrary is somewhat misguided. Using this expansive definition of the word "arbitrary," many aspects of the criminal justice system would qualify. Variables such as the makeup of the jury, officer errors in gathering evidence, jurisdiction where the crime occurred, and quality of legal representation all affect legal outcomes. Even factors as trivial as how hungry the judge is,[35] the recent performance of a local sports team,[36] and the weather[37] affect trial outcomes.

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32. *Id.* at 38.

33. Jenny Elayne Ronis, *The Pragmatic Plea: Expanding Use of the* Alford *Plea to Promote Traditionally Conflicting Interests of the Criminal Justice System*, 82 TEMP. L. REV. 1389, 1399 (2010).

34. And even this concession may be too generous. Arbitrary is defined as "existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will." *Arbitrary*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/arbitrary (last visited Mar. 9, 2020).

35. Kurt Kleiner, *Lunchtime Leniency: Judges' Rulings Are Harsher When They Are Hungrier*, SCI. AM. (Sept. 1, 2011), https://www.scientificamerican.com/article/lunchtime-leniency/ (finding that judges are significantly more likely to grant a parole request when they are not hungry).

36. Ozkan Eren & Naci Mocan, *Emotional Judges and Unlucky Juveniles*, 10 AM. ECON. J.: APPLIED ECON. 171, 173 (2018), https://www.aeaweb.org/articles?id= 10.1257/app.20160390 (finding that an unexpected loss from a prominent team in the state correlated with an increase in the duration of sentences handed down the following week).

37. Anthony Heyes & Soodeh Saberian, *Temperature and Decisions: Evidence from 207,000 Court Cases*, 11 AM. ECON. J.: APPLIED ECON. 238, 240 (2019) (finding that a

B. Collateral Consequences

There are collateral consequences that defendants may not take into consideration when they decide to accept an *Alford* plea. These misunderstandings are not surprising given the amorphous nature by which *Alford* pleas allow defendants to assert their innocence while simultaneously entering a guilty plea. For example, a defendant may not be aware that the lack of remorse inherent in an *Alford* plea can be an aggravating factor that increases the harshness of sentencing.[38] Defendants may also find it more difficult to be released on parole for this same reason.[39] In sex offender cases, *Alford* pleas may add points to the assessment of defendants' level of risk posed to society due to their refusal to accept responsibility for their actions.[40]

Response

Ensuring that defendants are aware of the consequences of their legal decisions is a valid concern. Federal Rule of Criminal Procedure 11 requires that the defendant understand:

> the nature of each charge to which the defendant is pleading; any maximum possible penalty, including imprisonment, fine, and term of supervised release; any mandatory minimum penalty; any applicable forfeiture; the court's authority to order restitution; the court's obligation to impose a special assessment; . . . the court's obligation to . . . appl[y] [the] Sentencing Guideline[s], and the court's discretion to depart from those guidelines under some circumstances.[41]

Furthermore, in *Brady v. United States,*[42] the United States Supreme Court held that in order for a guilty plea to be accepted, the defendant must be "fully aware" of the consequences.[43] It is true that taking away options defendants have—such as *Alford* pleas—would serve to limit the potential for defendants to be misinformed. But the more pragmatic course of action seems to be simply ensuring that defendants are informed regarding all potential consequences.

10°F increase in outdoor temperature reduced favorable outcomes by 6.55%, despite the judgments being made indoors).

38. Bryan H. Ward, *A Plea Best Not Taken: Why Criminal Defendants Should Avoid the* Alford *Plea*, 68 Mo. L. Rev. 913, 921-22 (2003); *see also* Smith v. Commonwealth, 499 S.E.2d 11 (Va. Ct. App. 1998). In *Smith v. Commonwealth*, the court rejected the notion that an *Alford* plea required the trial court to disregard the defendant's lack of remorse. *Smith*, 499 S.E.2d. at 12. The court maintained that an *Alford* plea is the same as any other guilty plea for sentencing purposes. *Id.* at 14.

39. Ward, *supra* note 38, at 914.

40. *Id.* at 934-35.

41. Fed. R. Crim. P. 11(b)(1)(G)-(M).

42. 397 U.S. 742 (1970).

43. Brady v. United States, 397 U.S. 742, 755 (1970) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd*, 356 U.S. 26 (1958)).

C. HINDERS REHABILITATION

Alford pleas hinder defendants' contrition, education, and reform.[44] In the absence of *Alford* pleas, defense attorneys would be incentivized to "persuade clients to face up to [their crimes]."[45] Only after defense attorneys "break down their clients' illusions and denials"[46] can the rehabilitation process begin.

Response

It is true that denial is detrimental to a criminal's treatment and reform,[47] especially for sex offenders.[48] But it is unclear that a coerced, one-time confession made in order to avoid the devastating consequences of a trial conviction really serves as an admission for purposes of contrition and long-term reform.

Defense attorneys often must convince delusional clients of the unlikely odds of success at trial. But that is very different from a duty to "provide moral as well as legal counsel, advising clients that it is right to admit their crime"[49] and should therefore try to "penetrat[e] clients' denials . . . ."[50] This practice requires defense attorneys to play the role of judge and not only predict the likelihood of success at trial, but the ultimate innocence or guilt of their clients—a determination that is sometimes even unknowable to the defendants themselves.[51] Placing this burden on defense attorneys is even more problematic when done during plea bargaining. At such an early stage in the trial process, the investigation into the defendant's culpability is often incomplete. Informing a defendant who insists on his innocence that it is in his best interest to accept a plea offer may often be good advice. But trying to convince a defendant who insists on his innocence that he is in fact guilty may violate the duty of a defense attorney to zealously advocate for his client.[52]

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44. Bibas, *supra* note 24, at 1389.
45. *Id.* at 1405.
46. *Id.* at 1375.
47. *Id.* at 1395 (using the first step of the twelve-step Alcoholics Anonymous program as just one example).
48. *Id.* at 1393-1400.
49. *Id.* at 1405.
50. *Id.*
51. This could be due to the defendant not having a memory of the incident. Curtis J. Shipley, *The* Alford *Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1063 (1987). Another way a defendant could be uncertain as to his ultimate innocence or guilt is if the crime required a specific *mens rea*. In close scenarios, it could be unclear even to the defendant if his mental state rises to the required level.
52. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 1983) ("A lawyer shall provide competent representation to a client."); MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 1983) ("A lawyer shall act with reasonable diligence and prompt-

The perplexing notion that defense attorneys at the plea-bargaining stage would be able to ascertain with certainty whether a defendant who maintains his innocence is lying is present in some anti-*Alford* advocacy literature. For example, "[c]riminal defense attorneys are occasionally confronted with a conundrum—a defendant who insists that he is innocent, yet against whom the evidence is overwhelming. Such defendants refuse to admit their guilt . . . ."[53] The use of the subjective term "overwhelming" is telling. The burden of proof in criminal trials is so high that—in a sense—"overwhelming" evidence is always required for a conviction. This further demonstrates the impracticality of defense attorneys determining their clients' guilt or innocence. Where exactly is the line for how much evidence is required to "overwhelm" their clients' assertions of innocence? Furthermore, beliefs that initially appear to be "overwhelmingly" supported by the evidence may become far less clear once additional evidence is considered. Meaning, the guilt of defendants that initially appears "overwhelming" may become much less so after a trial.

Even if one assumes that rare cases exist when a defense attorney can be absolutely certain of his client's guilt, how are defense attorneys supposed to draw the line between defendants that are absolutely guilty—and therefore in need of persuasion to accept a plea—and those who are only highly likely to be guilty? Finally, the objection that *Alford* pleas hinder the process of defense attorneys persuading clearly guilty defendants to confess to their crimes is largely a moot point. This is because in cases where the defendant is so obviously guilty, a prosecutor is unlikely to offer—and a judge is unlikely to accept—an *Alford* plea.[54]

D. Violates Right Against Self-Incrimination

Some claim that *Alford* pleas violate a defendant's constitutional right against self-incrimination.[55] This claim usually comes in one of two forms. The defendant may claim that this constitutional infringement stems from post-conviction treatment that requires the disclo-

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ness in representing a client."); *see also* Model Rules of Prof'l Conduct, pmbl. (explaining that "a lawyer zealously asserts the client's position under the rules of the adversary system," "can be a zealous advocate on behalf of a client," and has an "obligation zealously to protect and pursue a client's legitimate interests").

53. Ward, *supra* note 38, at 913. It should be noted that other anti-*Alford* advocates do recognize the impossibility of knowing who is guilty and innocent. *See, e.g.*, Redlich & Ozdogru, *supra* note 20, at 468 ("We note at the outset that we cannot provide data or insight into the proportion of persons who enter Alford pleas who are factually innocent.").

54. North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970).

55. U.S. Const. amend. V.

sure of illegal conduct.[56] Or, the claim may stem from when a defendant—in order to accept an *Alford* plea—is required to admit to actions associated with his guilty plea.[57]

Response

It is true that an *Alford* plea may require court-ordered counseling which in turn might require an admission of guilt.[58] Guilty pleas—of which *Alford* pleas are a subset—do waive the right against compulsory self-incrimination.[59] But there are protections against the use of statements obtained through court-required counseling being used against the defendant.[60] Therefore, the practice does not incur Fifth Amendment implications.[61] Even anti-*Alford* plea advocates admit that "the self-incrimination argument has few legs to stand on when contesting a post-conviction requirement that defendants acknowledge their guilt."[62]

E. Promotes Efficiency over Accuracy

While the efficiency that *Alford* pleas bring to the criminal justice system is beneficial, accuracy should be more important.[63] More specifically, the accuracy in not punishing innocent defendants is more important than efficiency.[64]

Response

This objection lacks substance because there is no objective, quantifiable matrix by which to measure the tradeoff between accuracy and efficiency.[65] Therefore, the only way the objection would be meaningful is if it were altered to be more absolute such as, "No amount of efficiency gain could possibly justify any loss in accuracy of identifying innocent defendants."[66] But such an absolute position is clearly un-

56. Ward, *supra* note 38, at 937.
57. *Id.* at 938.
58. *Id.* at 927.
59. Boykin v. Alabama, 395 U.S. 238, 243 (1969).
60. Ward, *supra* note 38, at 938.
61. *Id.*
62. *Id.*
63. Bibas, *supra* note 24, at 1382.
64. *Id.*
65. For example, it would be nonsensical for the objector to claim that for every "unit" of efficiency gained by the *Alford* plea, two "units" of accuracy are lost.
66. *See* Redlich & Ozdogru, *supra* note 20, at 487 (providing an example of this more absolutist position with "there are many who would argue that, even if only a small percentage of [those who entered an *Alford* plea] were innocent, it would be too many").

tenable. The criminal justice system makes numerous tradeoffs between efficiency and accuracy.

Anti-*Alford* plea advocates correctly point out that efficiency is not the final word on what criminal justice policies should be adopted. But it is unclear that the benefits in efficiency from *Alford* pleas would be outweighed by the costs of decreased accuracy. It is also not clear that the gains in efficiency from *Alford* pleas are accompanied by a net loss in accuracy. The two are not mutually exclusive. Increased efficiency from *Alford* pleas frees up law enforcement and court resources that can then be invested in more accurate determinations of innocence—therefore increasing accuracy.

F. Coercion

As with traditional plea bargains, *Alford* pleas are highly coercive. The average sentence disparity between what is offered in a plea and what would result from a trial conviction is 500%.[67] This extreme disparity serves to coerce defendants into accepting a plea instead of going to trial to prove their innocence.

Response

The existence of the *Alford* plea serves to increase the autonomy of defendants; it in no way decreases the defendant's autonomy through coercion. The option of going to trial is always present. An *Alford* plea is simply an additional option. Presenting an additional option to a decisionmaker while keeping the original option available cannot be said to be coercive no matter how attractive the new option is perceived. The fact that 97% of convictions are the result of guilty pleas[68] is not evidence of coercion, only evidence of how advantageous pleas are to defendants. This comes as no surprise, as *Alford* pleas provide numerous ancillary benefits to the defendant, such as the ability to save face. They allow defendants to more easily protect valuable relationships and more successfully seek future employment.[69] Another benefit of an *Alford* plea is the flexibility it offers the defendant. This flexibility is demonstrated in *Falkner v. Foshaug*,[70] where the defendant was able to win on a malpractice theory because he maintained his innocence through the use of an *Alford* plea.[71]

67. Berthoff v. United States, 140 F. Supp. 2d 50, 68 (D. Mass. 2001).
68. Yoffe, *supra* note 16.
69. Bibas, *supra* note 24, at 1378.
70. 29 P.3d 771 (Wash. Ct. App. 2001).
71. Falkner v. Foshaug, 29 P.3d 771, 777 (Wash. Ct. App. 2001).

Pleas are required to be made knowingly, intelligently, and voluntarily.[72] The existence of a disparity between plea offer and trial sentence upon conviction does nothing to render the defendant's acceptance of the plea to be unknowing, unintelligent, or involuntary. An analogy serves to illustrate: If someone accepted a $30,000 offer for his $20,000 car, this extreme disparity would in no way serve to negate how the offer was accepted knowingly, intelligently, and voluntarily. Furthermore, anyone who claimed to be acting on behalf of the seller's best interest by proposing a ban on such generous automobile offers would rightly be viewed with great skepticism.

Coercion is a highly peculiar issue for an anti-*Alford* advocate to present in support of abolition. This is because removing the *Alford* plea would serve to *increase* the level of coercion defendants face. Defendants who would have accepted an *Alford* plea would now be forced to begrudgingly admit guilt in order to avoid trial, thus functionally creating a forced confession. This is illustrated in the *Alford* case itself, where the three dissenting justices, Brennan, Douglas, and Marshall, stated that Henry Alford's plea was not voluntary because he was "so gripped by fear of the death penalty."[73] But without the *Alford* plea, this gripping fear of the death penalty would have likely caused him to confess to a crime he maintained he did not commit.

G. Innocence

"[The United States plea-bargain system] is marvelously designed to secure conviction of the innocent."[74] The notion that innocent people should not be punished is axiomatic in the U.S. criminal justice system.[75] The system is designed with trials as the mechanism by which guilt is determined. These trials provide defendants with numerous constitutional protections that are lost when a plea offer is accepted.

Furthermore, there are many features of the criminal justice system that incentivize innocent defendants to accept pleas, even if they

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72. ABA Standards for Crim. Justice Pleas of Guilty, at xvi (Am. Bar Ass'n 1999), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pleas_guilty.pdf (discussing the obvjective of the ABA standards is to "maximize the fairness of the process and the likelihood that the defendant has entered such a plea knowingly and voluntarily, fully understanding the consequences").

73. North Carolina v. Alford, 400 U.S. 25, 40 (1970) (Brennan, J., dissenting) (quoting Brady v. United States, 397 U.S. 742, 750 (1970)).

74. Alschuler, *supra* note 25, at 1414.

75. *Blackstone's Ratio: Is It More Important to Protect Innocence or Punish Guilt?*, Cato Inst., https://www.cato.org/policing-in-america/chapter-4/blackstones-ratio (last visited Mar. 9, 2019) ("The American system, grounded in the British Common Law, has long erred on the side of protecting innocence. . . . As the preeminent English jurist William Blackstone wrote, '[B]etter that ten guilty persons escape, than that one innocent suffer.'").

might be better off going to trial. Examples include unreasonably high bail that forces defendants to remain in prison while awaiting trial, the risk of being treated unfairly by a judge who would have preferred the case plead out, overcharging, and public defenders whose compensation structure incentivizes biased advice to convince defendants to accept pleas.

Response

The notion that *Alford* pleas promote the punishing of innocent defendants stems from misunderstandings regarding the nature of innocence in criminal trials. While defendants who enter an *Alford* plea are allowed to do so while maintaining their innocence, their innocence can only be known with certainty by the defendant.[76] At the plea stage of a trial, prosecutors and judges make probabilistic determinations as to the defendant's guilt based on the limited information available at the time.

Given the scale of *Alford* pleas, innocent defendants have certainly accepted them.[77] Therefore, *Alford* pleas have been the mechanism by which innocent people have been punished. But the knowledge that a large-scale criminal justice policy will imprison some innocent people is not *per se* justification for its abolishment. Furthermore, the fact that defendants accepting *Alford* pleas maintain their innocence does not mean that, as a group, the majority are innocent. Even anti-*Alford* plea advocates admit that a "substantial majority" of *Alford* pleas are from guilty defendants.[78] One survey of defense attorneys concluded that "[a]lmost all interviewees agreed that innocent defendants use [*Alford* pleas] infrequently."[79]

It is important to note that an innocent defendant who would have been offered an *Alford* plea is not going to be freed if *Alford* pleas are abolished. Rather, he will be faced with the dilemma of either entering a false confession in order to receive the benefits of a plea or facing the harsh consequences of a trial. Forcing innocent defendants into this dilemma in an effort to protect them from accepting an *Alford*

76. And sometimes even the defendant cannot know if he is guilty or innocent. *See supra* note 51.

77. *See* Diehm, *supra* note 30, at 34 (estimating that 3% of federal defendants and 6.5% of state defendants entered *Alford* pleas). With over two million people incarcerated in the U.S.—the vast majority in state prisons—this essay estimates that 100,000 inmates accepted *Alford* pleas. While it is ultimately unknowable exactly who is innocent and who is not, it is incredibly unlikely that all 100,000 currently incarcerated defendants who accepted *Alford* pleas are guilty.

78. Alschuler, *supra* note 25, at 1417.

79. Bibas, *supra* note 24, at 1378.

plea is highly counterintuitive and counterproductive.[80] "Pressing innocent defendants to confess would generate only a sense of victimization and of the cruelty and hypocrisy of our legal system."[81] It would also cause "serious negative externalities" on society at large by damaging the public's perception of a just legal system.[82]

Simply put, it makes no sense to deny innocent defendants who refuse to lie about their guilt the benefits afforded to their guilty counterparts or their innocent counterparts who are willing to lie to accept a traditional plea. Such a policy would serve to punish those who are least deserving of punishment—the innocent with a moral code so stringent that they are not willing to lie even to avoid the consequences of trial which may include death.

Additionally, innocent defendants would be confronted by an additional dilemma when facing the coercion to enter a traditional guilty plea or face trial. Namely, a traditional guilty plea, which requires an innocent defendant to admit guilt is technically the crime of perjury or making a false statement.[83]

The high burden of proof in criminal court, the protections afforded defendants, and the requirement that jury verdicts be unanimous, all help protect against innocent defendants accepting pleas. This is because the likelihood of a defendant accepting a plea is—in part—a function of his predicted likelihood of conviction at trial.

Studies into the thought process of innocent defendants who are confronted with a plea offer also support the notion that false pleas are rare. Innocent defendants are more likely than their guilty counterparts to insist on a trial.[84] This is due to perceptions of fairness,[85] an unwillingness to lie,[86] and increased confidence that the truth will

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80. Naturally, it would be ideal to simply drop the charges against all innocent defendants, but this statement is operating under the real-world conditions that we cannot identify who is innocent and guilty with absolute certainty at the plea-bargaining stage of a trial.

81. Alschuler, *supra* note 25, at 1422.

82. Bibas, *supra* note 24, at 1386.

83. *See* United States v. Dunnigan, 507 U.S. 87, 94 (1993) ("A witness testifying under oath or affirmation [commits perjury under federal law] if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory. This federal definition of perjury by a witness has remained unchanged in its material respects for over a century. It parallels typical state-law definitions of perjury . . . .").

84. *See* Avishalom Tor, Oren Gazal-Ayal & Stephen M. Garcia, *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL L. STUD. 97, 99 (2010).

85. Redlich & Shteynberg, *supra* note 15, at 613. For a real-life example of how a defendant can be driven to seemingly irrational behavior based on a sense of unfairness, see the case of *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), as discussed in Tor, Gazal-Ayal & Garcia, *supra* note 84, at 98-99.

86. Redlich & Shteynberg, *supra* note 15, at 613.

somehow come out at trial.[87] Reading some anti-*Alford* plea literature causes one to question whether the writers understand that innocence is ultimately unknowable. The following quote provides an example: "Defense attorneys have reported advising defendants to plead guilty although the attorneys themselves had no doubt of their innocence."[88] Defense attorneys simply cannot make such an absolute determination—especially not at the plea-bargaining stage of trial.

The following anti-*Alford* plea analogy provides another example: "To use Dostoyevsky's example, no hope of good consequences can justify society's murdering a single innocent child."[89] But Dostoyevsky's position assumes that it is known that the child to be murdered is innocent. Again, this is not analogous to *Alford* pleas, because they are precluded if the court knows of the defendant's innocence—or even of the defendant's unlikelihood of conviction at trial. A more analogous example than the one from Dostoyevsky would be this: As a society we are accepting of the fact that some non-zero amount of defendants are convicted and sentenced for crimes they did not commit. This understanding is acceptable because we do not know, at the time, which convicted defendants are innocent. In the same way, it is acceptable to allow some innocent defendants to enter *Alford* pleas and therefore receive punishment since we do not know which defendants are innocent.

Finally, pointing out features of the criminal justice system that incentivize innocent defendants to accept a plea—such as unreasonably high bail—does little to justify the abolishment of *Alford* pleas. The same argument would apply to traditional pleas. Rather than abolishing *Alford* pleas, enacting legislation aimed at reforming the bail system would be a far more pragmatic and targeted approach to addressing this issue.

H. Violates Criminal Burden-of-Proof Standards

Retributive justice requires a high degree of certainty to punish someone accused of a crime.[90] *Alford* pleas apply a standard of proof significantly less than the "beyond a reasonable doubt" standard afforded defendants in criminal trials.[91]

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87. *See* W. Larry Gregory, John C. Mowen & Darwyn E. Linder, *Social Psychology and Plea Bargaining: Applications, Methodology, and Theory*, 36 J. Personality & Soc. Psychol. 1521, 1521 (1978).

88. Alschuler, *supra* note 25, at 1422.

89. Bibas, *supra* note 24, at 1384.

90. Lauren Hartz, *"I Ain't Shot No Man": Reconciling* Alford *Pleas and Punishment Theory*, 6 Dartmouth L.J. 368, 376 (2008).

91. *Id.*

Response

This argument is misleading because the higher "beyond a reasonable doubt" standard is taken into consideration during the plea process. The prosecutor's decision of what plea to offer, the defendant's decision of what plea to accept, and the judge's decision of what plea to allow are all predicated on the likelihood of conviction at trial—where the stringent "beyond a reasonable doubt" standard applies. Furthermore, the logic in this argument would apply equally to *Alford* pleas and traditional pleas alike. Therefore, if consistently applied, it would lead to the abolishment of all plea bargaining. This is simply not practical. No large city in the United States has abolished plea bargaining for a long period of time.[92]

I. HARM TO SOCIETY

When *Alford* pleas are allowed, society is harmed in many ways. The practice of accepting *Alford* pleas "breed[s] public doubt and lack of respect for the criminal justice system."[93] *Alford* pleas "cause citizens to suspect coercion and injustice,"[94] "muddy the criminal law's moral message,"[95] and "permit equivocation and ambiguity when clarity is essential."[96] Furthermore, "unjustified leniency is a spur to further criminal activity" and "the criminal gloats[] at the law's impotence."[97]

Response

Lay people claiming to lose respect for the criminal justice system due to *Alford* pleas does not mean that the alternative of abolishing the practice would result in increased respect. This is a complicated issue that requires a careful examination of the nuanced costs and benefits on both sides. The fact that only three states have banned the practice[98] demonstrates how the decisionmakers who understand the process generally support *Alford* pleas.

Anti-*Alford* plea advocates such as the ones quoted in the above argument are quick to point out the alleged downsides of the practice. But that is only one side of the equation. These alleged downsides

92. Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 612-13 (2005) ("In the modern era no large city in the United States has gone for a long period without some form of widely practiced plea bargaining.").

93. Diehm, *supra* note 30, at 41.

94. Alschuler, *supra* note 25, at 1418.

95. Bibas, *supra* note 24, at 1363.

96. *Id.* at 1364.

97. Ralph Adam Fine, *Plea Bargaining: An Unnecessary Evil*, 70 MARQ. L. REV. 615, 618, 627 (1987).

98. Redlich & Ozdogru, *supra* note 20, at 471.

must be weighed against the positive effects of *Alford* pleas—something anti-*Alford* advocates often neglect. On the issue of how the practice affects the public at large, there are numerous benefits that outweigh any potential downsides. For example, abolishing *Alford* pleas would likely result in more trials.[99] This would result in further judicial delays for future cases and the use of limited resources that could be more efficiently used elsewhere to prevent and punish crime.

As this criticism alleges, a criminal justice system that allows the punishment of someone who maintains his innocence could negatively affect society's views. But abolishing *Alford* pleas would result in the coercing of innocent defendants to admit guilt,[100] which would likewise "tarnish[ ] the integrity of the court."[101] *Alford* pleas make future job prospects easier for defendants[102] and avoid "embarrassment and shame before family and friends."[103] Therefore, they help defendants move on to productive, law-abiding lives, which is a clear benefit to society.

While there are no quantitative studies analyzing this, basic principles of negotiation dictate that, since defendants benefit from maintaining their innocence, an *Alford* plea can result in a harsher sentence than a traditional plea for similarly situated defendants.[104] Given the extreme disparity between the punishment received from a plea bargaining or a trial conviction,[105] this is a benefit of *Alford* pleas.

Finally, the attempt to bifurcate how *Alford* pleas affect society apart from how they affect defendants is misguided. This is because every member of society may one day be accused of a crime where the option of an *Alford* plea would benefit them immensely. In this way, the benefits that *Alford* pleas offer defendants are also benefits to society at large.

J. Harm to Victims

"[W]hen a defendant enters an Alford plea, the victim is deprived of the chance to receive either acknowledgement of wrongdoing by the defendant or a guilty verdict by the jury, and is only left with the

99. This is because some defendants benefit greatly from the ability to maintain their innocence in an *Alford* plea. Once this aspect is removed and they are left with only a traditional plea offer where they must admit guilt, the alternative of going to trial becomes less unsatisfactory by comparison.

100. *See supra* Part III.F.

101. Shipley, *supra* note 51, at 1073.

102. Bibas, *supra* note 24, at 1378.

103. *Id.* at 1377.

104. Ward, *supra* note 38, at 914 ("Availing oneself of an Alford plea may result in a stiffer sentence than that imposed on someone who merely pleads guilty.").

105. Berthoff v. United States, 140 F. Supp. 2d 50, 68 (D. Mass. 2001).

court's entry of a guilty verdict."[106] "[T]here is no closure resulting from a procedure where the proceedings are terminated by a process where the defendant is permitted to continue to deny culpability while receiving a reduced sanction."[107]

Response

The claim that *Alford* pleas do not provide victims closure is false. *Alford* pleas allow immediate closure compared to the closure eventually received after a trial and the exhaustion of all subsequent appeals. *Alford* pleas also save victims from reliving their victimization through testifying in court. Additionally, they avoid the possibility of the ultimate lack of closure a victim can receive—going through the uncertainty, inconvenience, and trauma of a trial only to see the defendant acquitted. For some crimes, this outcome of a victim experiencing his victimizer being acquitted is more likely than a conviction.[108]

A further benefit of *Alford* pleas is how they help victims pursue legal recourse in civil court. Because *Alford* pleas are guilty pleas, collateral estoppel applies.[109] Therefore, a defendant who enters an *Alford* plea is generally precluded from relitigating his innocence in a future civil proceeding.[110]

IV. ARGUMENTS FOR *ALFORD* PLEAS

A. THE *ALFORD* CASE AS ILLUSTRATIVE

The facts of the *Alford* case illustrate the benefits *Alford* pleas offer. When confronted with overwhelming evidence of his guilt, Henry Alford chose to accept a plea offer that resulted in a thirty-year sentence in order to avoid a trial that could have resulted in the death penalty.[111] The notion of barring *Alford* pleas and therefore forcing a course of action that could result in Henry Alford's death is surely

106. Claire L. Molesworth, *Knowledge Versus Acknowledgement: Rethinking the* Alford *Plea in Sexual Assault Cases*, 6 SEATTLE J. FOR SOC. JUST. 907, 930 (2007).

107. Diehm, *supra* note 30, at 40.

108. *FAQ Detail: What is the Probability of Conviction for Felony Defendants?*, BUREAU JUST. STAT., https://www.bjs.gov/index.cfm?ty=QA&iid=403 (last visited Mar. 9, 2020). Defendants originally charged with felony assault have a 45% conviction rate. *Id.* And even this statistic is generous because it does not count crimes committed where no arrest was made. John Gramlich, *Most Violent and Property Crimes in the U.S. Go Unsolved*, PEW RES. CTR. (Mar. 1, 2017), https://www.pewresearch.org/fact-tank/2017/03/01/most-violent-and-property-crimes-in-the-u-s-go-unsolved/. Less than half of violent crimes and less than 20% of property crimes result in an arrest (another instance where the victim receives no closure). *Id.*

109. Bibas, *supra* note 24, at 1373.

110. *Id.*

111. North Carolina v. Alford, 400 U.S. 25, 29 (1970).

worse than any of the arguments against the practice discussed in this essay.

B. Civil Trial Analogy

Settlement offers in civil proceedings share similarities with plea offers in criminal proceedings. Comparing the two provides insight into the desirability of allowing the accused to take responsibility while maintaining innocence. For example, consider when opposing civil litigants reach a settlement agreement whereby the defendant agrees to pay the plaintiff without an admission of wrongdoing—which is similar to an *Alford* plea in criminal court. It is difficult to see the harm of such a practice. The plaintiff and the defendant both benefit from the arrangement—otherwise they would not have agreed to the settlement. And the courts and society benefit from the more efficient use of resources. Banning civil settlements where the plaintiff maintains he has done no wrong is as impractical and unnecessary as banning *Alford* pleas.

C. Benefits Attorney–Client Relationship

By allowing innocent defendants to maintain their innocence during their plea, *Alford* pleas reduce the risk of ethical dilemmas caused by an innocent defendant lying in court to receive a traditional plea.[112] Without an *Alford* plea option, an attorney is faced with the dilemma of allowing an innocent client to lie in court or to deny his client the benefits of a plea offer.[113] Therefore, the existence of *Alford* pleas promotes honesty between an attorney and his client.[114] This increased honesty allows the attorney to better assess the strength of the case, better plan trial strategy, minimize potentially harmful surprises, and better advise the defendant.[115]

D. Reduces the Role of Judges as Thought Police

Alford pleas save judges the arduous task of delving into the psyche of each defendant to determine if he is in fact confessing guilt. *Alford* pleas also save judges from having to regulate the defendant's out-of-court speech. This is because—with traditional pleas—issues can arise when a defendant states his willingness to confess guilt in

112. Shipley, *supra* note 51, at 1074.
113. *Id.*
114. *Id.*
115. *Id.*

court to obtain a plea but then makes contradictory statements regarding his innocence.[116]

V. CONCLUSION

Anti-*Alford* advocates present valid criticisms of the practice. However, many of these criticisms are far less persuasive when understood in their proper context, when the effects of abolishment are considered, and when the downsides are balanced against the benefits. For example, the criticism that *Alford* pleas are arbitrary is significantly weakened when put in the context of the inherent arbitrariness of the criminal justice system overall.[117] Also, the coercion present in *Alford* pleas may seem problematic until the alternative of coerced confessions is considered. When one carefully weighs the benefits and downsides of *Alford* pleas, it quickly becomes apparent that the first fifty years of the practice has provided an overall benefit to defendants, victims, courts, and society.

116. *See, e.g.*, Commonwealth v. Gordy, 73 A.3d 620, 628 (Pa. Super. Ct. 2013) ("Appellant pled guilty on one occasion. He then moved to withdraw his pleas. His motion alleged his innocence, a fair and just reason to grant plea withdrawal in this case.").

117. *See supra* notes 35-37 and accompanying text.