Missouri Law Review

Volume 68
Issue 4 *Fall 2003*

Article 4

Fall 2003

Plea Best Not Taken: Why Criminal Defendants Should Avoid the Alford Plea, A

Bryan H. Ward

A Plea Best Not Taken: Why Criminal Defendants Should Avoid the *Alford* Plea

Bryan H. Ward[*]

I. INTRODUCTION

Criminal 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, often a prerequisite to consummating a plea bargain, yet fear going to trial due to the perceived inevitable result of a finding of guilt. Since 1970 these defendants have had the benefit of a hybrid plea known as the *Alford* plea—a reference to the case of *North Carolina v. Alford*[1]—in which the United States Supreme Court upheld a plea of guilty made by a defendant who contemporaneously asserted his innocence to the underlying offense. Since *Alford*, criminal defense attorneys have been able to offer their clients the option of maintaining their claims of innocence while still taking advantage of a plea bargain offer which would require them to plead guilty.[2] Some commentators and criminal defense attorneys see the *Alford* plea as a positive step for criminal defendants who wish to maintain their innocence without losing the ability to lock in a good plea bargain with a guilty plea.[3] As the old adage prophetically states, "Be careful

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* Director of Clinical Programs and Assistant Professor of Law, Ohio Northern University College of Law. B.A., 1983, Ohio Northern University; J.D., 1986, University of North Carolina at Chapel Hill; Ph.D., 1993, The Ohio State University. The author wishes to thank the law faculty of Ohio Northern University and in particular Professors Howard Fenton, Scott Gerber and Liam O'Melinn for their useful comments. The author also wishes to thank Heather Cherepkai and Danielle Groh for their research assistance.

1. 400 U.S. 25 (1970).

2. The *Alford* plea is not a rarely occurring event. A recent check on Westlaw discovered 1,319 "hits" on the phrase "*Alford* plea" in all courts in the past ten years alone.

3. *See, e.g.*, DAVID ROSSMAN, 2-9 CRIMINAL LAW ADVOCACY § 9.26[2][a-c] (2002); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Earl G. Penrod, *The Guilty Plea Process in Indiana: A Proposal to Strengthen the Diminishing Factual Basis Requirement*, 34 IND. L. REV. 1127 (2001); Curtis J. Shipley, *The* Alford *Plea: A Necessary But Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063 (1987); Steven E. Walburn, *Should the Military Adopt an* Alford*-type Guilty Plea?*, 44 A.F. L. REV. 119 (1998). Interestingly, those who have come out in opposition to the *Alford* plea have typically claimed that it is too lenient to the criminal defendant and undermines justice. *See, e.g.*, Steven E. Henderson, *Hijacked from Both Sides—Why Religious Extremists and Religious Bigots Share an Interest in Preventing Academic Discourse on Criminal Jurisprudence Based on the First Principles of Christianity*, 37 IDAHO L. REV. 103, 122-23 (2000) (stating that *Alford* pleas are inconsistent with Christian criminal jurisprudence); Jeffrey A. Klotz et al., *Cognitive*

what you ask for because you just might get it." This admonition is particularly the case with the *Alford* plea.

It is the thesis of this Article that the *Alford* plea is not the boon to criminal defendants that some commentators and criminal defense attorneys perceive it to be. Availing oneself of an *Alford* plea may result in a stiffer sentence than that imposed on someone who merely pleads guilty. In addition, in some types of cases, it may be more likely that a defendant's probation will be revoked if he utilizes an *Alford* plea and wishes to continue to maintain his innocence. Finally, in some situations it may be more difficult to be released on parole if a defendant has sought the benefit of an *Alford* plea but continues to assert his innocence. Courts have consistently upheld sentence aggravation for defendants who have pled guilty, but maintained their innocence based on their "lack of remorse." In addition, courts have revoked defendants' probation because after utilizing the *Alford* plea and asserting their innocence, they fail to admit their offense as part of a probation-mandated counseling program. Finally, courts have upheld the denial of parole to defendants who have utilized the *Alford* plea, professed their innocence, and then failed to admit their guilt while in prison.

After examining the *Alford* decision in detail, this Article will first look at the broad arguments in favor of this type of plea. This Article will then focus on the body of case law dealing with the *Alford* plea and its effect on sentencing, probation and parole. While examining these cases this Article will also focus on the variety of arguments offered by criminal defendants who contend that it is impermissible to require an *Alford*-type defendant to express remorse for the offense or admit to the offense in any other context.[4] This Article will conclude

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Restructuring Through Law: A Therapeutic Jurisprudence Approach to Sex Offenders and the Plea Process, 15 U. PUGET SOUND L. REV. 579, 583-86 (1992) (stating that *Alford* pleas are inconsistent with therapeutic jurisprudence); David A. Starkweather, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 866-67 (1992) (stating that *Alford* pleas are contrary to retributive justice); Victor I. Vieth, *When the Child Abuser Is a Child: Investigating, Prosecuting and Treating Juvenile Sex Offenders in the New Millennium*, 25 HAMLINE L. REV. 47, 67-68 (2001) (stating that *Alford* pleas are inappropriate when dealing with sexual offenders).

4. It is useful at this point to address the obvious objection to any attempt to extend the future benefits of a protestation of innocence to any *Alford* plea defendant. Cynics would contend that the *Alford* plea is merely a means by which a criminal can once more avoid accepting responsibility for his actions. While it is undoubtedly true that a fair number of defendants who utilize the *Alford* plea do so for reasons other than being factually innocent, the fact remains that our justice system permits these pleas to be entered. That being the case, those who choose to avail themselves of the *Alford* plea should not be afforded less due process than anyone in the system—whatever the plea they choose. The system as a whole should never undermine the informed nature of a guilty plea—even for a guilty defendant.

by reevaluating the arguments advanced in favor of the *Alford* plea in light of the cases examined.

II. *NORTH CAROLINA V. ALFORD*

Proponents of the *Alford* plea often forget the basic history of the case. Henry C. Alford found his case before the United States Supreme Court because he had objected to the trial court's acceptance of his guilty plea. Alford had repeatedly challenged the acceptance of the plea based on his contention that his plea of guilty had been involuntarily induced.[5] This challenge gained momentum for Alford only after the United States Supreme Court's decision in *United States v. Jackson*.[6] On appeal from the denial of his second habeas corpus motion, Alford argued that, as in *Jackson*, Alford had been denied his rights under the Fifth and Sixth Amendments as incorporated by the Fourteenth Amendment.[7] In North Carolina, an accused who pled guilty to a capital offense could only be sentenced to life in prison, whereas, if the same defendant took his case to a jury and lost, the jury had the authority to impose the death penalty.[8] Alford argued that, in such circumstances, a criminal defendant is compelled to forgo his right to a trial by jury and right to refrain from self-incrimination in order to spare his life.[9] It was precisely this "chilling effect" that the Court in *Jackson* had precluded.[10] The Fourth Circuit Court of Appeals agreed with Alford and vacated the judgment entered on Alford's plea.[11] Interestingly, it was only in a footnote at the end of the opinion that the majority even referred to the issue of a guilty plea being accepted by a defendant who vocally protests his innocence. As the court noted,

> Whether petitioner is in reality guilty or innocent has not been judicially determined. In any event, petitioner has never conceded his guilt. That fact alone should have precluded plea bargaining under the rule announced in *Bailey v. MacDougall*. "Plea bargaining that induces an innocent person to plead guilty cannot be sanctioned.

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5. Alford v. North Carolina, 405 F.2d 340, 341-42 (4th Cir. 1968), *vacated by* 400 U.S. 25 (1970).

6. 390 U.S. 570 (1968). The *Jackson* Court invalidated the capital punishment clause of the Federal Kidnapping Act because it encouraged defendants to waive their constitutional right to trial by providing for no more than life imprisonment for those who plead guilty, and reserving the death penalty for those who went to trial and lost. *Id.* at 581-83.

7. *Alford*, 405 F.2d at 343.

8. *Id.* at 344.

9. *Id.* at 343.

10. *Jackson*, 390 U.S. at 581.

11. *Alford*, 405 F.2d at 349.

> [Negotiation] must be limited to the quantum of punishment for an admittedly guilty defendant."[12]

It was on the issue of voluntariness and the applicability of *Jackson* that the case came before the Supreme Court. References to Alford's protestations of innocence at the time of the acceptance of his guilty plea were rare in the parties' briefs. Alford argued that "plea bargaining should never be permitted where a defendant consistently proclaims his innocence and declares that he is submitting his guilty plea only to avoid a more severe penalty."[13] In addition, Alford contended, "Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment."[14] Oddly enough, the State of North Carolina tended to agree with the proposition that only those who acknowledge guilt should be permitted to plead guilty when it observed, "[D]efendants who acknowledge[] their guilt and wish to avoid the ignominy of public trial have traditionally been allowed to plead guilty . . . ."[15]

Despite the paucity of argument regarding protestations of innocence and pleas of guilty the Supreme Court devoted the largest part of its majority opinion to a justification of the trial court's actions in *Alford* on this issue. The Court quickly dismissed the basis of the lower court's ruling by contending that the decision in *Jackson* did not alter the fundamental standard which "was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."[16] The Court concluded that simple fear of the death penalty was not enough, without other evidence, to conclude that the plea was not "the product of a free and rational choice."[17] The Court did not stop there however, noting, "[W]e would, without more, vacate and remand the case for further proceedings . . . if it were not for other circumstances appearing in the record which might seem to warrant an affirmance of the Court of Appeals."[18]

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12. *Alford*, 405 F.2d at 349 n.22 (quoting Bailey v. MacDougall, 392 F.2d 155, 158 n.7 (4th Cir. 1968).

13. Brief for Appellee at 11, North Carolina v. Alford, 400 U.S. 25 (1970) (No.14), *available at* 1969 WL 100915.

14. Supplemental Brief for Appellee at 4, North Carolina v. Alford, 400 U.S. 25 (1970) (No. 14), *available at* 1970 WL 116891.

15. Appellant's Brief at 11-12, North Carolina v. Alford, 400 U.S. 25 (1970) (No. 14), *available at* 1969 WL 100914.

16. North Carolina v. Alford, 400 U.S. 25, 31 (1970).

17. *Id.*

18. *Id.* It is interesting to note how the record of the trial court's proceedings was not part of the overall record in any of Alford's prior habeas corpus actions before the 1967 court of appeals case. As the court of appeals observed, "[T]his is the first time that the transcript of petitioner's original trial and of his state post-conviction proceedings

The Court then proceeded to the crux of the case: the inconsistency between the manner in which Alford pled guilty and what had historically been accepted as proper guilty plea procedure. As the Court acknowledged, it had previously observed in *Brady v. United States*[19] that "a guilty plea is a grave and solemn act to be accepted only with care and discernment . . . . Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment."[20] Despite this statement the *Alford* Court proceeded to allow a court to accept the guilty plea of a criminal defendant who vocally protested his or her innocence. The Court analogized these cases to cases in which a no contest plea had been entered.[21] The Court pointed out a number of no contest cases that upheld a court's ability to impose a prison sentence on a defendant who has pled no contest.[22] The *Alford* Court then went on to note, "[T]hese cases would be directly in point if Alford had simply insisted on his plea but refused to admit the crime. The fact that the plea was denominated a plea of guilty rather than a plea of nolo contendere is of no constitutional significance . . . ."[23] The Court's holding is simple: while there is no constitutional right to plead guilty and yet profess innocence, a trial court may accept such a plea if the defendant intelligently and voluntarily concludes that his interests require such a plea and if the record contains evidence of guilt.[24]

Many people forget that it was the state in *North Carolina v. Alford* that sought the result that so many defense attorneys now praise. The prosecution in *Alford* sought to impose the guilty plea on Henry Alford irrespective of his recorded protestations of innocence. Alford challenged this plea throughout the state courts and sought habeas corpus relief in federal court on two occasions, all based on his contention that it was fundamentally inconsistent to claim innocence and yet plead guilty. Defense attorneys should keep in mind that the *Alford* plea was not a fundamental right wrested from an unwilling prosecution, but rather was a means by which the prosecution was able to retain a questionable plea of guilty. This being the case, defense attorneys would be well served to maintain a healthy degree of skepticism when presented with the opportunity to accept an *Alford* plea by an eager state's attorney. While the philosophical objections to

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have both been before the full court." Alford v. North Carolina, 405 F.2d 340, 343 (4th Cir. 1968), *vacated by* 400 U.S. 25 (1970).

19. 397 U.S. 742 (1970).

20. *Id.* at 748.

21. *Alford*, 400 U.S. at 35-37.

22. *Id.*

23. *Id.* at 37. For an excellent historical criticism of the Court's conflating the no contest plea with the plea in *Alford*, see Neil H. Cogan, *Entering Judgment on a Plea of Nolo Contendere: A Reexamination of* North Carolina v. Alford *and Some Thoughts on the Relationship Between Proof and Punishment*, 17 ARIZ. L. REV. 992 (1975).

24. *Alford*, 400 U.S. at 37-38.

such a plea are obvious, it is the practical consequences that are the focus of this Article.[25] First, however, it may be useful to examine some of the arguments in favor of the plea propounded by its supporters.

III. WHY WE SHOULD ALL LEARN TO LOVE THE *ALFORD* PLEA

Over time a number of justifications for the *Alford* plea have been advanced from the perspective of the defendant and defense counsel. These justifications have had the effect of becoming "common knowledge" for the defense bar. It is important to recognize that these justifications are advanced exclusively from the perspective of the defendant and do not typically consider the effect of *Alford* pleas on the justice system as a whole.[26]

The primary justification given by *Alford* plea advocates is that such a plea minimizes the severity of the punishment a defendant receives.[27] The argument is that, as with any other form of plea bargaining, an *Alford* plea that is associated with a plea bargain includes an implied promise of a lesser sentence.[28] As is the case with all plea bargains, the hope of a reduction in punishment is the prime motivation for defendants to waive a significant number of constitutional rights

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25. Philosophically, it may be difficult for the outside observer to understand who the plea is really intended to help. Most casual observers would be hard pressed to understand why any innocent defendant would willingly enter a plea of guilty. Sadly, there are a number of reasons why a truly innocent defendant might be willing to plead guilty. They include:

> (1) the potentially overwhelming nature of the evidence against him; (2) the disparity in punishment between conviction by plea and conviction at trial; (3) a desire to protect family or friends from prosecution; (4) the conditions of pretrial incarceration; (5) a concern that fuller inquiry at trial may result in disclosure of additional facts which could increase the sentence in the present case or result in additional prosecutions; (6) a desire to expedite the proceedings because of feelings of hopelessness, powerlessness, or despair when faced with the power of the state; (7) pressure from family, friends, or attorneys; and (8) "ignorance, deception, delusion, feelings of moral guilt, or self-destructive inclinations."

John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88, 96-97 (1977) (quoting State v. Durham, 498 P.2d 149, 151 (Ariz. 1972)).

26. For one criticism of the underlying rationale for *Alford* pleas, see Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 SMU L. REV. 567, 573 (1996) ("An equivocal plea of guilty invites suspicion about the processes of justice. And that suspicion, inevitably, does serious damage to the symbolic, deterrent, and correctional functions of criminal law.").

27. ROSSMAN, *supra* note 3, § 9.26[2][a].

28. *Id.*

and enter a plea of guilty (or no contest) to a criminal charge.[29] This implied promise is often coupled with an implied threat that if a defendant chooses to exercise his or her right to a trial, particularly a bench trial, the punishment could be significantly greater.[30] Often this implied threat carries overtones of a "going to trial penalty," which has been uniformly invalidated by courts of appeals where the record clearly shows that the trial court imposed such a penalty.[31] The added benefit of the *Alford* plea, according to some observers, is that the defendant may obtain the benefits of a plea bargain, and avoid the dangers of trial, without actually admitting that he committed the offense in question. As one commentator has noted, "[W]hile an accused may be reluctant to admit guilt to the charged offense, he may be willing to enter an *Alford* plea to the charge . . . in order to lessen the potential maximum punishment faced."[32] Thus, the *Alford* plea offers a perceived advantage for the defendant who refuses to admit his guilt, but wishes to obtain the benefit of a plea bargain.

A second perceived advantage is that of certainty. Not only will the *Alford*-type defendant receive a lesser sentence pursuant to a plea agreement, he will also have the benefit of knowing what his sentence will be prior to its imposition.[33] This knowledge is thought to be a great benefit to the risk averse defendant. If a particular defendant cannot tolerate the risk and uncertainty of going to trial and relying upon a judge's discretion at sentencing, should he be found guilty, he may be willing to sacrifice the right to a jury trial to ensure a particular sentence or range of sentences. Of course, as all criminal defense attorneys know, there is no guarantee that a particular sentence will be imposed insofar as the court is not bound, with respect to sentencing, by any plea bargain agreement to which it was not a party.[34] Commentators have argued that the risks associated with going to trial are so enormous that defendants may choose to plead guilty so as to be able to avoid those risks. *Alford*-type defendants, they

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29. *See* F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 201 (2002).

30. "The primary force behind plea bargaining is differential sentencing. Defendants plead guilty because they believe that if they stood trial they would be punished more severely. This incentive underlies almost all plea bargains no matter whether they involve charge concessions, explicit sentence concessions, or implicit sentence concessions." WILLIAM F. MCDONALD, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 93 (1985).

31. *See* United States v. Stockwell, 472 F.2d 1186 (9th Cir. 1974).

32. Walburn, *supra* note 3, at 142.

33. ROSSMAN, *supra* note 3, § 9.26[2][b].

34. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.3(e), at 930 (2d ed. 1992).

claim, may thus not only avoid the risk of trial and the uncertainty it holds, but may do so without being forced to admit guilt.[35]

Finally, commentators have observed that the *Alford* plea is good for defendants and defense counsel in that it takes away a major incentive for defendants to lie—both to their attorneys and in court.[36] The argument is that criminal defendants are under enormous pressure to lie to their counsel regarding guilt or innocence. Should the defendant admit his or her guilt, the defense attorney is limited by the rules of professional conduct in the manner in which he can represent the accused.[37] Should the defendant deny his involvement, the attorney may have nothing to work with in plea negotiations. This may affect the manner in which the attorney negotiates a plea bargain or may restrain an attorney from seeking a plea agreement if an admission of guilt is a prerequisite. Even if an acceptable plea agreement is negotiated, the criminal justice system encourages the defendant to lie. If the defendant enters a plea of guilty, absent the *Alford* plea, the defendant must often also admit the facts which establish the charge. For an innocent defendant who has decided that it is in his best interests to accept a plea bargain the choices are clear: either lie and admit guilt or run the risk of an uncertain result by rejecting the plea and proceeding to trial.[38] This scenario also poses an ethical dilemma for the attorney. Is it ethical to permit a client to lie in court and plead guilty when they have privately indicated their innocence?[39] The *Alford* plea removes many of these concerns. The defendant is perceived to be free to tell the truth with the knowledge that the opportunity to plea bargain will exist whether he denies actual guilt or not. Attorneys are no longer placed in ethical dilemmas and defendants are no longer encouraged to lie.[40]

IV. DOES THEORY MATCH REALITY?

Despite these facially appealing arguments, the history and use of the *Alford* plea indicate that there is a great gap between the expected benefits and the actual

35. As Rossman notes, as long as high stakes risks are a part of the criminal justice system, "courts should not force defendants to run the risk, and pretend that it is in their best interest." ROSSMAN, *supra* note 3, § 9.26[2][b].

36. *See, e.g.*, Shipley, *supra* note 3, at 1074.

37. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(4), DR 7-109(A)(6) (1980); MODEL RULES OF PROF'L CONDUCT R. 3.3, R. 3.4 (2001).

38. Shipley, *supra* note 3, at 1073.

39. *Id.* at 1074; *see also* Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 989 n.91 (1989).

40. Removing the incentive for criminal defendants to lie is seen to be a major benefit to the criminal justice system as a whole insofar as it cannot be healthy for a system seeking truth to, in certain circumstances, reward dishonesty. Shipley, *supra* note 3, at 1073.

results. In particular, *Alford* pleas have resulted in anything but certainty and avoidance of risk. For a defendant facing sentencing, probation revocation, or parole review, the entry of an *Alford* plea often provides a false sense of security as to the results which will be obtained. In addition, it has become apparent that lying might be necessary in order to ensure the results that the *Alford* plea was intended to provide.

V. SENTENCING

Perhaps the most important factor in any plea bargaining situation is the ultimate penalty facing the defendant. As discussed above, a prime incentive for those who are asked to forgo their right to trial, right to a jury, right to confront their accusers and call witnesses on their behalf, and their right to force the prosecution to prove their guilt beyond a reasonable doubt is that they will receive a lesser and somewhat certain punishment. The *Alford* plea is intended to pass this benefit on to those defendants who have calculated that a guilty plea is in their best interests, but cannot bring themselves to admit the accusations in question. The reality is that pleading guilty while professing innocence may insert an element of risk and uncertainty into the sentencing process that does not exist for those who merely plead guilty.

This unexpected element is that of remorse.[41] Remorse, as it affects sentencing, is intended to reflect the defendant's contrition and measure the likelihood that the defendant will engage in future criminal activity.[42] Remorse finds its way into the sentencing process in two ways. Some jurisdictions view remorse as a mitigating factor. If a defendant exhibits remorse to the court (or to the proper authorities during any pre-sentence investigation) the court may impose a lesser sentence than for a defendant who does not exhibit remorse.[43] Other jurisdictions view "lack of remorse" as an aggravating factor at the time

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41. For my purposes "lack of remorse" also includes the failure of a defendant to "accept responsibility" for his actions—an alternative phrase frequently used for the same concept.

42. *See, e.g.*, Fair v. State, 268 S.E.2d 316 (Ga.1980); Thomas v. Commonwealth, 419 S.E.2d 606, 619 (Va. 1992); State v. Jones, 444 N.W.2d 760, 763 (Wis. Ct. App. 1989).

43. Five states specifically address remorse statutorily as a mitigating factor. CAL. PENAL CODE § 502(k)(2) (West 1999); FLA. STAT. ANN. § 921.0026(2)(J) (West 2001); N.C. GEN. STAT. § 15A-1340.16(e)(11), (15) (2001); OKLA. STAT. ANN. tit. 22, § 982(B) (West Supp. 2003); R.I. CT. RULES ANN. SUPERIOR CT. SENTENCING BENCHMARKS 1(i) (Michie 2002). For case law indicating the appropriateness of considering remorse as a mitigating factor at sentencing, see, e.g., State v. McKinney, 946 P.2d 456, 458 (Alaska Ct. App. 1997); Commonwealth v. Mills, 764 N.E.2d 854, 866 n.9 (Mass. 2002); State v. Buttrey, 756 S.W.2d 718, 722 (Tenn. Crim. App. 1988).

of sentencing.[44] In these jurisdictions the court may, and in some circumstances must, enhance a defendant's sentence if he or she does not display an appropriate, or sincere, level of remorse at sentencing (or before the proper authorities during the course of a pre-sentence investigation). While the appropriateness of remorse as a factor to consider in sentencing is debatable in any circumstance,[45] the application of such a factor is particularly suspect in the case of an *Alford*-type defendant. Remorse is defined as "a feeling of compunction or deep regret and repentance for a sin or wrong committed."[46] By definition, *Alford*-type defendants have no remorse because they deny all participation in any way in the

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44. Ohio is the only state to statutorily define "lack of remorse" as an aggravating factor at sentencing. OHIO REV. CODE ANN. § 2929.12(D)(5) (Anderson 2002). For case law indicating the appropriateness of considering "lack of remorse" as an aggravating factor at sentencing, see, e.g., State v. Landrigan, 859 P.2d 111 (Ariz. 1993); People v. Gonzales, 926 P.2d 153, 156 (Colo. Ct. App. 1996); Isaaks v. State, 386 S.E.2d 316, 323 (Ga. 1989); State v. Trevino, 980 P.2d 552, 560 (Idaho 1999); People v. Mulero, 680 N.E.2d 1329, 1337 (Ill. 1997); McAbee v. State, 770 N.E.2d 802, 806 (Ind. 2002); State v. Dicks, 473 N.W.2d 210, 216 (Iowa Ct. App. 1991); State v. Hanby, 957 P.2d 428, 437 (Kan. 1998); State v. Young, 786 So. 2d 228, 229-30 (La. Ct. App. 2001); State v. Goodale, 711 A.2d 848, 849 (Me. 1998); Jennings v. State, 664 A.2d 903, 910 (Md. 1995); People v. Calabro, 419 N.W.2d 791, 793 (Mich. Ct. App. 1988); State v. Shreves, 60 P.3d 991, 996 (Mont. 2002); State v. Jackson, 265 N.W.2d 850, 853 (Neb. 1978); State v. Hammond, 742 A.2d 532, 538-39 (N.H. 1999); State v. O'Donnell, 564 A.2d 1202, 1206 (N.J. 1989); Swafford v. State, 810 P.2d 1223, 1237 (N.M. 1991); People v. Griswold, 747 N.Y.S.2d 872, 873 (N.Y. App. Div. 2002); Camron v. State, 829 P.2d 47, 57 (Okla. Crim. App. 1992); Commonwealth v. Miller, 724 A.2d 895, 902 (Pa. 1999); State v. Mollicone, 746 A.2d 135, 138 (R.I. 2000); State v. Clegg, 635 N.W.2d 578, 580 (S.D. 2001); State v. Daly, 641 A.2d 91, 93 (Vt. 1993); State v. Ramires, 37 P.3d 343, 352 (Wash. Ct. App. 2002); State v. Baldwin, 304 N.W.2d 742, 750-52 (Wis. 1981); Yates v. State, 723 P.2d 37, 38 (Wyo. 1986).

45. It can be argued that remorse is a factor which should not be considered at sentencing for two reasons. First, it is nearly impossible for a court to accurately assess the level of sincerity of a person who professes remorse at the time of sentencing. One can certainly argue that factors to be considered for purposes of sentencing should be as objective as possible to remove additional layers of subjective discretion from the criminal justice system. In addition, the use of such a factor arguably encourages lying to the court, with every criminal defendant being compelled to exhibit an appropriate level of remorse, no matter how insincere that may in fact be. Surely the system should not encourage defendants to offer false apologies during sentencing merely to avoid a potential sentence enhancement.

46. OXFORD ENGLISH DICTIONARY Vol. XIII, at 598 (2d ed. 1989).

crime.[47] One would assume, therefore, that *Alford*-type defendants would be spared an assessment of their remorse at sentencing.

Unfortunately for *Alford*-type defendants, such an assumption is incorrect. Courts throughout the country have consistently and nearly uniformly refused to "exempt" *Alford*-type defendants from an assessment of remorse at the time of their sentencing.[48] The rationale for these decisions is nearly always the same.[49] The courts conclude that the mere fact that an *Alford* plea is entered affords the defendant no rights different from one who pleads guilty or is found guilty.[50] Rather, the courts conclude, for example, that the Supreme Court's decision in *Alford* "does not require . . . that a court accept a guilty plea from a defendant while simultaneously treating the defendant as innocent for purposes of sentencing. . . . Although an *Alford* plea allows a defendant to plead guilty amid assertions of innocence, it does not require a court to accept those assertions."[51] Elaborating on this point, other courts have noted, "'There is nothing inherent in the nature of an *Alford* plea that gives a defendant any rights, or promises any limitations, with respect to the punishment imposed after the conviction.' . . . The defendant's assertion of innocence extends only to the plea itself."[52] One might

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

48. *See, e.g.*, Clark v. State, 366 S.E.2d 361 (Ga. Ct. App. 1988); State v. Howry, 896 P.2d 1002 (Idaho Ct. App. 1995); State v. Philpot, No. M2000-01999-CCA-R3-CD, 2001 WL 473842 (Tenn. Crim. App. May 2, 2001); Smith v. Commonwealth, 499 S.E.2d 11 (Va. Ct. App. 1998); State v. Westcott, No. 97-0419-CR, 1998 WL 692827 (Wis. Ct. App. Oct. 7, 1998); *Weaver*, 1992 WL 126807.

49. There is a somewhat different rationale for those jurisdictions in which "lack of remorse" is not an aggravating factor, but rather the presence of remorse is a mitigating factor at sentencing. The best example is found in the federal cases dealing with *Alford* pleas and the Federal Sentencing Guidelines. The guidelines afford a point reduction for sentencing purposes for those defendants who demonstrate remorse. Not surprisingly, many *Alford*-type defendants object to the problem their plea creates in such a system. This argument makes no headway, however, with federal courts strictly adhering to the guideline requirement that the defendant clearly accept responsibility before receiving the acceptance of responsibility reduction. *See, e.g.*, United States v. Harlan, 35 F.3d 176 (5th Cir. 1994). One rationale for this may be that in the case of a benefit bestowed rather than a punishment inflicted the courts are less inclined to be concerned with the defendant's ability to obtain the benefit.

50. *See, e.g.*, State v. Jarrett, No. 02C01-9808-CC-00251, 1999 WL 222439, at *3 (Tenn. Crim. App. Apr. 19, 1999).

51. *Howry*, 896 P.2d at 1004.

52. *Westcott*, 1998 WL 692827, at *3 (quoting State *ex rel.* Warren v. Schwarz, 566

fairly ask why a criminal defendant would ever enter an *Alford* plea if, as these cases suggest, the possible result is a sentence greater than for a defendant who merely pled guilty.

The Virginia Court of Appeals, recognizing the contradiction, made a valiant attempt to impose some safety valve for the wayward *Alford*-type defendant in *Smith v. Commonwealth*.[53] However, this effort merely reenforces the illogic of the situation. In *Smith* the defendant, Damien Smith, Jr., argued that entering an *Alford* plea required the court to disregard his lack of remorse at the time of sentencing.[54] The court adopted the usual reasoning[55] and concluded that an *Alford* plea was like any other guilty plea for sentencing purposes.[56] The court went on, however, to attempt to minimize the harsh nature of such a finding by observing, "Appellant's denial of responsibility would not be inconsistent with an expression of sympathy for the victims of the 'situation' to which he referred during allocution. . . . [A]n expression of remorse does not presuppose acceptance of criminal responsibility."[57] The court rationalized this conclusion by noting, "Appellant was not compelled to testify against himself; he merely had to choose whether to show sympathy for the victims."[58] One need not be unduly cynical to have serious reservations about the "advice" given by the *Smith* court.[59] It seems very unlikely that a court willing to consider an *Alford*-type defendant's remorse, or lack thereof, would accept a denial of responsibility coupled with an expression of sympathy for the victim as an adequate expression of sincere remorse.[60] That such "advice" would be suggested merely illustrates the

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N.W.2d 173, 177 (Wis. Ct. App. 1997)).

53. 499 S.E.2d 11 (Va. Ct. App. 1998).

54. *Id.* at 12.

55. *See supra* notes 50-52 and accompanying text.

56. *Smith*, 499 S.E.2d at 14.

57. *Id.*

58. *Id.* A Tennessee court attempted to square this circle by noting,

> [T]he trial court may not rely upon a defendant's unwillingness to acknowledge guilt in denying probation since a "best interest" or *Alford* plea by definition does not acknowledge guilt. Nonetheless, a best interest plea, as in the present case, does not immunize the defendant from questions which implicate relevant sentencing considerations, such as lack of remorse . . . .

State v. Philpot, No. M2000-01999-CCA-R3-CD, 2001 WL 473842, at *3 n.6 (Tenn. Crim. App. May 2, 2001).

59. In fact, in *Smith*, the court observed that the defendant "acknowledged that he 'hurted [sic] people in my life, my family' and was 'ashamed of being in this situation.'" *Smith*, 499 S.E.2d at 14. Nevertheless, this was not enough for the court, which noted that the "appellant did not mention the victims of the shootings or their families." *Id.* Given the level of education and articulation of most criminal defendants, attaining the "appropriate" level of remorse would seem a very difficult task.

60. *See* People v. Bilski, 776 N.E.2d 882, 891-92 (Ill. App. Ct. 2002) (observing "that defendant entered an *Alford* plea—pleading guilty while maintaining his innocence.

irrationality of considering the remorse of *Alford*-type defendants at sentencing and again forces the question—why would you ever choose the *Alford* plea?

An additional statutory issue presents itself when considering the conundrum of *Alford* pleas and sentencing. Some jurisdictions statutorily require certain disclosures at the time a defendant enters a guilty plea. A possible argument is that failure to disclose the consequences of an *Alford* plea would violate those statutory requirements. For example, Federal Rule of Criminal Procedure 11 requires that the court address the defendant in open court and determine that the defendant understands:

> 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 apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances.[61]

One "applicable" federal sentencing guideline permits courts to reduce a sentence based on the "acceptance of responsibility" reduction.[62] Federal courts have consistently held that *Alford*-type defendants who are denied this reduction are not "penalized" for their plea, but are simply not given the benefit extended to other defendants.[63] Yet, one could argue that, as part of the requirement to disclose "any applicable sentencing guidelines," a defendant should be advised of the unavailability of an acceptance of responsibility reduction when he utilizes an *Alford* plea and does not express remorse.

To see how this argument might play out in the states it is instructive to look at Ohio. Pursuant to the Ohio Revised Code the sentencing judge shall consider an offender's failure to show genuine remorse for the offense as a factor indicating that the offender is likely to commit future crimes.[64] If the Ohio version of Federal Rule of Criminal Procedure 11 included any inquiry into the defendant's knowledge of the applicable sentencing guidelines, statutory disclosure of the negative consequences of an *Alford* plea at sentencing in Ohio would arguably be required. This disclosure is not statutorily mandated,

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Proceeding in this manner is, at best, an equivocal acceptance of responsibility.") (internal citation omitted); *see also* State v. Williams, 937 S.W.2d 330, 334 (Mo. Ct. App. 1996) ("A subsequent guilty plea pursuant to *Alford* eliminates any showing of remorse or taking of responsibility by the appellant.").

61. FED. R. CRIM. P. 11(b)(1)(G-M).

62. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2002).

63. *See* United States v. Knight, 96 F.3d 307, 310 (8th Cir. 1996).

64. OHIO REV. CODE ANN. § 2929.12(D)(5) (Anderson 2002).

however, because Ohio's version of Federal Rule of Criminal Procedure 11 omits reference to sentencing guidelines.[65]

VI. PROBATION

The expectations of a criminal defendant who has entered an *Alford* plea may extend well beyond the initial plea and sentencing. A plea bargain is often "sold" to the defendant on the promise that he or she will not have to admit any criminal wrongdoing. While this is true at the time of entering the plea, jurisdictions throughout the country have uniformly concluded that defendants may not continue to maintain their innocence thereafter. Often, when a criminal defendant is placed on probation, he or she is expected to participate in counseling or other programs intended to assist the defendant in avoiding the conduct that resulted in the criminal conviction in question, rather than being sentenced to serve actual jail time. In many circumstances, this counseling addresses the events that led to the conviction. This is particularly true when counseling sex offenders. The convicted sex offender, if placed on probation, is usually required to engage in sexual offender counseling which often requires the offender to "admit responsibility" for the underlying offenses.[66] For the *Alford*-type defendant, there is an inherent contradiction between the requirements of his plea and the requirements of the mandatory counseling program. The defendant often wishes to fall back upon the conditions of *his* guilty plea—a plea without an admission. The courts, however, have consistently held that this expectation is flawed.[67] Thus, an *Alford*-type defendant who refuses to acknowledge his offense during the course of counseling may have his probation revoked and his underlying sentence imposed despite the expectations as to the admission of responsibility that the *Alford* plea creates.

This is a very real possibility for the *Alford*-type defendant, as a large proportion of the cases in which the *Alford* plea is utilized involve sex offenses.[68] One can understand why a defendant would be most reluctant to admit, of all of the types of criminal offenses, those offenses involving sexual misconduct. Nonetheless, it is that very type of offense that often requires a future admission

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65. OHIO R. CRIM. P. 11.

66. Jonathan Kaden, *Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination*, 89 J. CRIM. L. & CRIMINOLOGY 347, 365 (1998).

67. *See, e.g.*, People v. Birdsong, 958 P.2d 1124, 1130 (Colo. 1998); State v. Jones, 926 P.2d 1318, 1321 (Idaho Ct. App. 1996); Northwest v. LaFleur, 583 N.W.2d 589, 590 (Minn. Ct. App. 1998); State v. Butler, 900 P.2d 908, 911 (Mont. 1995); State v. Alston, 534 S.E.2d 666, 670 (N.C. Ct. App. 2000); State *ex rel.* Warren v. Schwarz, 579 N.W.2d 698, 711 (Wis. 1998).

68. In fact, in every *Alford* plea case involving an appeal of the revocation of the defendant's probation reviewed for this Article (eleven in all) the underlying offense involved some form of sexual misconduct.

of guilt in counseling. It is a point of some debate as to whether the admission is necessary for success in sex offender counseling,[69] but it is undeniable that courts and court-sponsored counseling programs emphasize acknowledging responsibility for one's offenses.[70]

When the offender objects to a revocation of his probation based on his refusal to admit his past misconduct he often points to his *Alford* plea as justification. Some defendants contend that if they were permitted to plead guilty and were not required to accept responsibility for their offense it would be contrary to the "deal" that this requirement would arise later on. Clearly, this argument is based on the offender's expectation that the *Alford* plea negates the need to ever admit the offense. As some defendants have claimed, maintaining one's innocence pursuant to an *Alford* plea should be considered a lawful excuse[71] for later refusing to admit the offense during court-ordered counseling. The argument seems to view the problem as one of a breach of the plea agreement, or as an example of fundamental unfairness if not logical inconsistency. The courts have rejected this "lawful excuse" argument.[72] The mere fact that one has entered an *Alford* plea does not confer any rights with respect to future conduct and terms of probation.[73] As the court in *State ex rel. Warren v. Schwarz*[74] succinctly stated, "Put simply, an *Alford* plea is not the saving grace for defendants who wish to maintain their complete innocence.

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69. Kaden, *supra* note 66, at 367-69. Kaden notes that the conventional view of sex offender counseling is that confrontation with one's past is absolutely necessary to overcome denial, which is an inhibitor to successful counseling. Other therapists argue, however, that the confrontational approach is potentially detrimental to the offender by reinforcing the lack of control the offender has over his conduct. These therapists prefer a motivational approach which seeks to encourage changes in behavior by inspiring a desire to change in the offender.

70. *Id.* at 365.

71. *Alston*, 534 S.E.2d at 669.

72. *Id.*; *see also Butler*, 900 P.2d at 911-12 (concluding that revocation for failure to admit prior conduct in counseling ordered as part of probation was permissible even with an *Alford*-type defendant if the defendant was aware at the time of entering the plea that he would be required to successfully complete sex offender counseling and that he would not be able to successfully complete the counseling without admitting the allegations).

73. One exception to the failure of courts to accept the "legal excuse" argument and its fundamental fairness underpinnings is that of *People v. Walters*, 627 N.Y.S.2d 289, 291 (N.Y. Co. Ct. 1995), in which an *Alford*-type defendant had his probation revoked for refusing to admit his offense during counseling. The court held that "to require defendant to admit his factual guilt during treatment, upon threat of incarceration, is directly inconsistent with the plea agreement entered into . . . ." *Id.* The court overturned the revocation "[a]s a matter of fairness, and in the interests of justice." *Id.*

74. 579 N.W.2d 698 (Wis. 1998).

Rather, it is a device that defendants may call upon to avoid the expense, stress and embarrassment of a trial and to limit one's exposure to punishment."[75]

A more innovative argument is that, before it is appropriate to revoke an *Alford*-type defendant's probation for failure to subsequently admit an offense, the defendant must know of the possible consequences of the *Alford* plea as it pertains to court-ordered counseling and probation. Defendants argue that if they are not informed at sentencing of the possibility that they must later admit their guilt, then due process demands that the probation revocation be overturned or that a withdrawal of the *Alford* plea be permitted. The due process argument is premised primarily on *Boykin v. Alabama*,[76] in which the Supreme Court held that a guilty plea could not be accepted unless it was intelligently and voluntarily made.[77] Knowledge of the terms of the guilty plea is crucial. As the Court observed in *Boykin*, "Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality."[78] However, most courts have summarily rejected this argument as well, contending that such *Alford* pleas are voluntary and intelligent despite the missing information. The courts note that the revocation of probation due to a failure to admit prior misconduct is at most a collateral consequence of the *Alford* plea, and that due process does not require the disclosure of potential consequences to the defendant at the time they enter a guilty plea.[79]

The distinction between collateral consequences and direct consequences is one of great constitutional import. The Supreme Court in *Brady v. United States*[80] held that it is necessary for a defendant to be "fully aware" of the direct consequences of a guilty plea in order for the plea to be acceptable.[81] Over time the courts have provided a piecemeal definition of "direct consequences," mainly in a case-by-case evaluation of what information needs to be provided to a defendant who seeks to enter a guilty plea.[82] In general, however, a direct consequence is viewed as one which has a definite, immediate and largely automatic effect on the range of the defendant's punishment.[83] Conversely, courts have concluded that it is not necessary to advise the defendant of the

75. *Id.* at 707.

76. 395 U.S. 238 (1969).

77. *Id.* at 243.

78. *Id.* at 242-43.

79. *See, e.g.*, People v. Birdsong, 958 P.2d 1124, 1128 (Colo. 1998); *Warren*, 579 N.W.2d at 708-09.

80. 397 U.S. 742 (1970).

81. *Id.* at 755.

82. For a general discussion of direct consequences jurisprudence see JAMES E. BOND, PLEA BARGAINING AND GUILTY PLEAS §§ 3.38-3.43(b) (2d ed. 1982); LAFAVE & ISRAEL, *supra* note 34, § 21.4(d), at 936.

83. Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973).

collateral consequences of a plea of guilty.[84] Defining "collateral consequences" has also been pursued on a case-by-case basis. In the context of an *Alford*-type defendant who is facing probation revocation for failing to subsequently admit guilt as part of a court-ordered counseling program, a typical court rejection of a due process claim points out that any information about the future effect of the *Alford* plea is only information about a collateral consequence. As one court observed:

> [The defendant's] probation would not have been revoked had he admitted his guilt at the probationary treatment programs he attended during his five years on probation. Stated differently, the consequence of probation revocation for failure to admit guilt during sex offender counseling is not direct and immediate, or even "inevitable" as [defendant] asserts. It will instead depend upon defendants' willingness to admit their guilt in a rehabilitative setting—a situation which the circuit court, even if it is aware of all the consequences attendant to the commission of a sexual offense such as this one, could not be expected to anticipate or predict.[85]

No court that I am aware of has ever held the potential ramifications of an *Alford* plea described above as anything but a collateral consequence of the guilty plea. As such, there is no duty upon the trial judge to advise the defendant of the possibility of probation revocation (and, consequently, no due process violation if the possibility of probation revocation is not mentioned).[86] As the court in *People v. Birdsong*[87] observed, revocation of probation for an *Alford*-type defendant is not automatic because "an individual might be willing to admit to

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84. *See* BOND, *supra* note 82, § 3.44; LAFAVE & ISRAEL, *supra* note 34, § 21.4(d), at 936.

85. State *ex rel.* Warren v. Schwarz, 579 N.W.2d 698, 708 (Wis. 1998).

86. The likelihood of any court finding these potential problems as anything other than "collateral consequences" is remote. As the Seventh Circuit Court of Appeals observed in reviewing the Wisconsin Supreme Court's decision in *State ex rel. Warren v. Schwarz*,

> [H]aving analyzed the same factors in its inquiry that this court would examine to determine whether Warren's right to due process was violated, and having reached the same result, we cannot say that the Wisconsin court's determination was "contrary to, or involved an unreasonable application of clearly established federal law" or was "based on an unreasonable determination of the facts."

Warren v. Richland County Circuit Court, 223 F.3d 454, 457 (7th Cir. 2000) (quoting 28 U.S.C. § 2254(d) (2000)) (discussing *Warren*, 579 N.W.2d 698).

87. 958 P.2d 1124 (Colo. 1998).

something in a therapeutic setting but not in a court of law."[88] The *Birdsong* court went further by identifying judicial economy as another reason why the potential negative consequences of an *Alford* plea should not be considered anything but "collateral consequences." As the court proclaimed,

> We do not expect a trial court to maintain working familiarity with all requirements of certain types of treatment programs so as to be able to advise defendants with particularity about those requirements before accepting pleas that involve probation. That responsibility falls to the defendant and his or her counsel.[89]

Absent a dramatic change in judicial philosophy nationwide, the voluntary and intelligent due process argument in connection with *Alford* pleas is, for all practical purposes, dead.[90]

One alternative to focusing on due process and the consequences of an *Alford* plea when examining probation revocation may be to focus on the unique nature of probation rather than attack the plea itself. Courts have consistently held that a criminal defendant is entitled to due process during the course of a revocation proceeding just as in the case in chief.[91] Courts have also held that in order for someone to have their probation revoked, they must have been informed of the type of conduct that could lead to the revocation.[92] As the court in *United States v. Simmons* observed, "An essential component of these due process rights

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88. *Id.* at 1128.

89. *Id.* The *Birdsong* court's reasoning is questionable. Assuming that it is the responsibility of the defendant or his counsel to discover the requirements of a particular program, one can envision a situation in which counsel makes inquiries to the sentencing judge and may not, according to the reasoning in *Birdsong*, be able to expect an answer. Given that often the treatment programs are outsourced to private counseling groups, one would hope that at the time of contracting with a counseling group the judge had at least inquired as to the requirements of the programs provided.

90. Even if the courts were to view the possibility of probation revocation as a direct consequence of an *Alford* plea, the *Alford*-type defendant would not be guaranteed relief. The majority of jurisdictions do not find such "technical" violations of court imposed required disclosures to necessarily require overturning of a sentence or withdrawal of a plea. As the United States Supreme Court observed in *United States v. Timmreck*, the result of the court's oversight must result in some significant prejudice to the defendant and be a substantial injustice. If the result was a sentence permitted by the statute, the Court concluded, the defendant was not prejudiced and the "technical" violation would be considered harmless error. United States v. Timmreck, 441 U.S. 780, 783-84 (1979).

91. *See* United States v. Dane, 570 F.2d 840 (9th Cir. 1977).

92. *See id.*; *see also* United States v. Gallo, 20 F.3d 7 (1st Cir. 1994); United States v. Simmons, 812 F.2d 561 (9th Cir. 1987).

is that individuals be given fair warning of acts which may lead to revocation."[93] This right to fair warning appears to require that the warning be given at the time of sentencing rather than after the plea has been accepted.[94]

Some courts have adopted the notion of "fair notice" when considering an *Alford*-type defendant facing probation revocation for failure to admit responsibility for the underlying offense in subsequent court-ordered counseling programs.[95] In *State v. Faraday* the defendant pled guilty, via an *Alford* plea, to sexual assault.[96] He was placed on probation and required to complete sexual offender treatment.[97] Ultimately, he faced revocation of his probation for failure to complete the treatment.[98] Specifically, he was discharged from the program for refusing to admit his guilt.[99] The *Faraday* court focused on the notion of "fair notice."[100] The court observed, "'[T]here is a fundamental inconsistency between an *Alford* plea and a probation condition that requires an admission of guilt. . . .' Such an inconsistency is allowable if a defendant has fair notice that a future denial of guilt may result in a violation of a condition of probation."[101] Finding no such "fair notice" for the defendant, the court in *Faraday* refused to uphold the revocation of probation.[102] The utility of this approach is obvious. The court effectively avoided the entire discussion of "direct" versus "collateral" consequences and a difficult analysis of whether the plea in question was voluntary, knowing and intelligent as required by the Due Process Clause. Rather, *Faraday* focused on the revocation process, and the fundamental fairness notion inherent in the concept of "fair warning."

Faraday aside, however, while *Alford*-type defendants may expect to be able to continue their protestations of innocence beyond the short time frame of the entry of their guilty plea, the reality is that the vast majority of courts have dashed those expectations. In particular, when an *Alford*-type defendant is required to enter into a counseling program as a condition of his or her probation, failure to admit guilt within the context of counseling may be deemed a

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93. *Simmons*, 812 F.2d at 565.

94. *Dane*, 570 F.2d at 844 (noting that "where the warning is not contained in a formal condition, the record must be closely scrutinized to determine whether the defendant did, in fact, receive the requisite warning").

95. *See* State v. Faraday, 794 A.2d 1098 (Conn. App. Ct. 2002); State v. Birchler, No. 00AP-311, 2000 WL 1473152 (Ohio Ct. App. Oct. 5, 2000).

96. *Faraday*, 794 A.2d at 1100-01.

97. *Id.* at 1101.

98. *Id.*

99. *Id.* at 1105.

100. *Id.* at 1108-09.

101. *Id.* at 1109 (quoting State v. Fisk, 682 A.2d 937, 938 (Vt. 1996)).

102. *Id.* A similar result was reached in *State v. Birchler*, which preceded *Faraday* and was used as support for the "fair notice" concept. State v. Birchler, No. 00AP-311, 2000 WL 1473152, at *3 (Ohio Ct. App. Oct. 5, 2000).

counseling failure that may result in revocation of probation. *Alford*-type defendants cannot rely upon the courts to advise them of this fact, and when courts do fail to so warn, defendants have not been successful in arguing that the lack of this information should render their guilty plea suspect.

VII. PAROLE

For those *Alford*-type defendants who are sentenced to jail, the specter of later having to admit their guilt is not removed. Many of these defendants will ultimately seek parole from a prison sentence and at that time their expectations with respect to their *Alford* plea may exceed reality. Most states have adopted a process whereby an inmate seeking early release is required to appear before the parole board to give reasons why early release should be permitted. Part of that process may include consideration of the inmate's remorse, or lack thereof, for the offense committed.[103] For the *Alford*-type inmate, the problem is obvious. If defendants consistently profess their innocence, as permitted at the time of their plea, they may be denied parole due to their failure to express remorse or failure to possess insight into the offense which led to their incarceration.

Once again, the courts have denied *Alford*-type defendants the right to rely upon their *Alford* plea and continue to profess their innocence without ramifications. The seminal case on this issue is *Silmon v. Travis*.[104] In *Silmon*, the inmate, Herman Silmon, pled guilty to manslaughter via an *Alford* plea.[105] He was sentenced to five to fifteen years in prison and appeared before the parole board for consideration after serving five years of his sentence.[106] Ultimately, he was denied parole based on the parole board's conclusion that "he lack[ed] remorse and insight and accepted no responsibility for the actions that resulted in the brutal homicide of his wife."[107] Silmon contended that he was merely acting consistently with his *Alford* plea in which he denied responsibility for the crime and that it was "irrational" for the parole board to deny him parole.[108] On this basis alone, the court easily concluded that the parole board's decision was permissible. As the court concluded,

> The court's acceptance of his plea without an admission of culpability was not an indication that the State viewed him as innocent. . . . Nor was there any promise that petitioner would be treated as "innocent" by the Parole Board. . . . Petitioner received the benefit of his

103. *See, e.g.*, COLO. REV. STAT. ANN. § 17-22.5-404 (West 2002).
104. 718 N.Y.S.2d 704 (N.Y. 2000).
105. *Id.* at 705.
106. *Id.*
107. *Id.* (internal quotations omitted).
108. *Id.* at 706.

> negotiated plea when he was not required to admit to the specific facts of the crime before the court.[109]

Despite the fact that a due process argument was not raised, the *Silmon* court went further and argued that the potential denial of parole due to a failure to admit guilt is a "collateral consequence," thus undercutting the due process argument as well. As the court observed, "There is no allegation that the court failed to advise petitioner of the direct consequences of his plea."[110] The court went further, stating, "A court accepting an *Alford* plea could, if it wished, additionally advise a defendant that collateral consequences might later result from a refusal to admit guilt—as, for example, in connection with parole."[111]

If anything, the few courts that have considered the arguments of *Alford*-type defendants who have been denied parole based on a failure to accept responsibility for their crimes have been more dismissive of the argument than those courts considering probation. One court noted bluntly that the *Alford* aspect of the argument "does not affect the analysis."[112] Another *Alford*-type defendant who asserted a "fundamental right" to be able to deny his offense because of the *Alford* plea was informed, "*Alford* pleas do not afford appellant a protected liberty interest in denying conduct for which he has been lawfully convicted."[113]

No reported case law specifically addresses the issue of whether or not information regarding the effect of the *Alford* plea on a request for parole is considered a direct or collateral consequence of the guilty plea, but parole cases in general offer little support for a due process argument. While the courts are expected to advise a defendant pleading guilty to an offense that the offense in question renders him ineligible for parole,[114] there is no requirement that the judge discuss eligibility in general or the normal aspects of eligibility.[115] Similarly, the fact that a parole board may deny a defendant's request for parole is considered a "collateral consequence" that need not be disclosed.[116] Given the existing case law, it would be astounding if any defendant could prevail on the due process argument in a parole denial case.

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109. *Id.* at 707.

110. *Id.* at 707 n.2.

111. *Id.*

112. Cable v. Warden, N.H. State Prison, 666 A.2d 967, 969 (N.H. 1995).

113. Northwest v. LaFleur, 583 N.W.2d 589, 591 (Minn. Ct. App. 1998).

114. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.4(d), at 170, 170 n.97 (2d ed. 1999).

115. *See* Bell v. North Carolina, 576 F.2d 564, 565 (4th Cir. 1978).

116. Holland v. United States, 427 F. Supp. 733, 741 (E.D. Pa. 1977), *aff'd*, 571 F.2d 571 (3d Cir. 1978).

VIII. A FALSE REMEDY

One of the greatest obstacles to the entire body of due process arguments is that while the arguments may or may not be compelling, the remedy for the successful litigant may be no remedy at all. In the vast majority of the cases involving the *Alford* plea and its unexpected consequences the defendants have not offered the due process argument. They tend to rely on rather amorphous arguments about fairness and inconsistency. The reason is obvious. For the successful *Alford* plea/due process litigant the remedy is a withdrawal of the prior plea and a return to square one. For most, this is no remedy at all. For defendants who entered their *Alford* pleas after being confronted with overwhelming evidence of their own guilt, starting over and going to trial is not an appealing scenario. If they were to simply enter into the same plea agreement the problems they had with the *Alford* plea would not go away. Rather, the trial court would likely only provide them with enough information about the likely consequences so as to avoid a future due process argument. One would have to ask, again, is it all worth it?

IX. OTHER PROBLEMS

A relatively new problem for *Alford*-type defendants is the Sexual Offender Registration Act, otherwise known as Megan's Law.[117] Most states have some version of this law which allows information to be released to the public with respect to an individual defendant based upon the level of risk he poses. Many states utilize a worksheet to determine the level of risk the offender poses.[118] Part of the worksheet examines post-offense behavior and assigns points for refusing to "accept responsibility" for the sexual conduct in question.[119] The more points a defendant acquires, the more severe the risk. Other states utilize the worksheet as a basis for evaluating potential criminal sentences.[120] *Alford*-type defendants are, obviously, pointing to this worksheet as another example of the unknown

117. For a comprehensive listing of existing state versions of "Megan's Law," otherwise known as Registration, Disclosure and Notification statutes, see Alan R. Kabat, Note, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 AM. CRIM. L. REV. 333, 359-61 (1998).

118. There are a number of different worksheets utilized by the states including the Sexual Offender Registration Act Risk Assessment Instrument (used in New York); the Rapid Risk Assessment for Sexual Offense Recidivism (used in California); the Sexual Offender Risk Assessment (used in Tennessee); the Minnesota Sex Offender Screening Tool (MnSOST); the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R); and the Static-99. Many of these are considered actuarial assessments with a focus on static factors only, while others rely on offender input as well.

119. *See, e.g.*, People v. J.G., 655 N.Y.S.2d 783, 785-86 (N.Y. Sup. Ct. 1996).

120. *E.g.*, TENN. CODE ANN. § 39-13-705 (Supp. 2001).

consequences of an *Alford* plea. Courts in both New York and Tennessee have addressed the problem and have denied the *Alford*-type defendant any relief.[121] The rationale is nearly identical to that which permitted the use of "lack of remorse" as an aggravating factor for sentencing *Alford*-type defendants. As a New York Supreme Court observed, "The defendant cannot have it both ways. He cannot protest his innocence while pleading guilty by way of an [*Alford*] plea and then claim that no consequences or conditions subsequent to the plea should apply to him."[122] Once again one ponders why the *Alford* plea would ever be chosen in those jurisdictions in which Megan's Law is in effect and this worksheet is utilized.[123] Why insist on one's innocence when the mere act of doing so may result in being classified as a high risk sexual offender subject to community notification? The risk of utilizing an *Alford* plea when state law uses a sexual offender worksheet is great. Merely insisting on innocence may result in a defendant being classified as a high risk sexual offender subject to community notification. Given the stigma associated with sexual offenses, an accused sexual offender is likely to see a benefit in the *Alford* plea because he may at least protest his innocence to those present in the courtroom at the time of sentencing. Yet, in the long run, this face saving device may result in more widespread knowledge of the defendant and his crime than if he merely pled guilty.

X. OTHER ARGUMENTS

A. Ineffective Assistance of Counsel

Aside from the arguments offered above, defendants have attempted some additional, though less well-argued, attacks on the unanticipated consequences of the *Alford* plea problem. The first adopts the argument made by some courts that it is the defense attorney's responsibility to advise the defendant of the unexpected consequences of the *Alford* plea.[124] If, as some courts have asserted, it is the duty of defense counsel to advise the *Alford*-type defendant of the long term consequences of the plea, should it not therefore be ineffective assistance of counsel in those instances in which that information is not provided?[125] Some

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121. *Id.*; State v. Ketchum, No. E2001-02008-CCA-R3CD, 2002 WL 1008218, at *5 (Tenn. Crim. App. May 17, 2002).

122. *J.G.*, 655 N.Y.S.2d at 787.

123. A similar scoring of remorse can be found in the Idaho Domestic Violence Evaluation, in which evaluators consider the remorse of the defendant for the act of domestic violence in question when recommending aggression counseling or other appropriate treatment. IDAHO R. CRIM. P. 33.3.

124. People v. Birdsong, 958 P.2d 1124, 1128 (Colo. 1998).

125. The argument that it is counsel's responsibility to advise the defendant of

Alford-type defendants have made this argument, seeking to withdraw their previous guilty pleas due to their attorney's ineffective assistance or mistaken advice.[126] Success for these defendants has been no easier than for those raising due process arguments. The test applied by the courts is whether, but for defense counsel's advise, the defendant would have refused to plead guilty and would have proceeded to trial.[127] In the *Alford* plea context, no reported opinion has found this test to be satisfied. One court rejected the ineffective assistance of counsel argument by returning to the distinction between direct and collateral consequences.[128] When looked at in this light, the court concluded, ineffective assistance of counsel could only arise when a defendant was not advised of the "direct" consequences of his plea, not merely "collateral" consequences.[129] Under this line of reasoning, one must question what role counsel actually plays, given that the courts are also only required to advise defendants of "direct" consequences.

The other approach taken to deny a defendant's motion to withdraw a previous guilty plea due to ineffective assistance or mistaken advice is to simply discount the severity of counsel's omissions or inaccuracies. In *State v. Moddison* the defendant alleged that defense counsel had provided him incorrect information on two separate issues associated with probation.[130] The court conceded that "some of this advice was inaccurate."[131] Nonetheless, such inaccuracies, according to the court, did not warrant a withdrawal of the guilty plea.[132] The court concluded that the defendant "had a solid understanding that his sentence was ultimately subject to the court's unfettered discretion . . . ."[133] Given that "knowledge," the court observed that it could not "see how Moddison can reasonably argue that any inaccuracies in the advice described above mean that his decision to enter into a plea agreement was based on a misunderstanding so fundamental as to render that decision an uninformed one."[134] The court went on to suggest that the real reason Moddison entered a plea agreement was

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these long term consequences was best advanced in *Birdsong*. *See id.*

126. *See* State v. Moddison, 926 P.2d 253 (Mont. 1996); Wellington v. Comm'r, N.H. Dep't of Corr., 666 A.2d 969 (N.H. 1995).

127. *Moddison*, 926 P.2d at 259; *Wellington*, 666 A.2d at 971.

128. An excellent examination of the relationship between collateral consequences of guilty pleas and ineffective assistance of counsel is found in Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002).

129. *Wellington*, 666 A.2d at 971-72.

130. *Moddison*, 926 P.2d at 259.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

because of the overwhelming evidence of his guilt.[135] Such arguments simply reveal a misunderstanding of the perceived utility of the *Alford* plea. If the only reason the plea was entered was the overwhelming evidence of guilt, why not just plead guilty? The reason is simple—the defendant wishes to obtain the perceived benefit of retaining the ability to protest his innocence. Clearly, the efficacy of this benefit would be of paramount importance to a defendant in weighing his options. To have counsel provide incorrect information about these benefits (or provide no information at all) would, it seems, clearly affect the defendant's decision to enter the plea.

B. Self-Incrimination

A second unusual argument offered by *Alford*-type defendants when confronted with a subsequent demand that they admit their guilt is to claim that such a requirement deprives them of their right against self-incrimination.[136] This argument could apply in two scenarios. First, an *Alford*-type defendant could protest any post-conviction treatment requirements that would require him to disclose other improper or illegal conduct as part of the overall treatment. This is a valid concern, particularly for sexual offender treatment in which disclosure of the defendant's entire sexual history may be considered vital to effective treatment.[137] At least one court has noted the concern this raises and implicitly contended that such requirements would be improper. In *State v. Jones*[138] an Idaho appeals court observed that while it was accepted that a guilty plea waived one's right against self incrimination, "[t]he waiver applies with respect to those offenses to which the defendant pleads guilty, but it is not to be construed 'as being a blanket waiver with respect to other offenses that might be charged against [the defendant] later.'"[139] This principal was confirmed by the United States Supreme Court in *Minnesota v. Murphy*,[140] where the court observed that, while it may be necessary to ask incriminating questions as part of administering a probation system, the answers may not be used against the defendant.[141]

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135. *Id.*

136. The Fifth Amendment to the Constitution of the United States provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. This protection was extended to the states via the Fourteenth Amendment in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

137. *See, e.g.*, Katherine Corry Eastman, *Sexual Abuse Treatment in Kansas's Prisons: Compelling Inmates to Admit Guilt*, 38 WASHBURN L.J. 949, 952-53 (1999).

138. 926 P.2d 1318 (Idaho Ct. App. 1996).

139. *Id.* at 1322-23 (quoting Krogmann v. United States, 225 F.2d 220, 226 (6th Cir. 1955)).

140. 465 U.S. 420 (1984).

141. *Id.* at 437.

The second and more common scenario is that in which the *Alford*-type defendant argues that his right against self incrimination is violated when he is required to admit to conduct associated with his guilty plea. Courts considering this argument have uniformly rejected it.[142] The first rationale for rejecting such a claim is that it is commonly accepted that a guilty plea carries with it the waiver of certain rights, including the right against compulsory self-incrimination.[143] Second, states often have statutory prohibitions against the use of information obtained in the context of parole or probation against the defendant. In *Razor v. Commonwealth* for example, the court noted that Kentucky statutes expressly prohibit the use of information gained by probation or parole officers in their official capacity as evidence against a defendant in any court.[144] In light of these protections, the self-incrimination argument as to a post-conviction requirement of acknowledgment of guilt will not succeed. When additional criminal charges cannot be based on statements made by defendants after sentencing and many state statutes prohibit statements made to probation and parole officers from being used against defendants, the self-incrimination argument has few legs to stand on when contesting a post-conviction requirement that defendants acknowledge their guilt.

XI. SOLUTIONS?

Despite the rather complex web of problems that spin out of an *Alford* plea, the solution is arguably obvious. The central theme running throughout this Article has been the lack of knowledge defendants have with respect to the real consequences of an *Alford* plea. If we wish to continue accepting the *Alford* plea, we must find a way to fill in the knowledge gaps. One way would be to place the burden upon criminal defense attorneys. Courts could rule that failure to advise

142. *See* People v. Fleming, 3 P.3d 449, 452 (Colo. Ct. App. 1999); Razor v. Commonwealth, 960 S.W.2d 472, 474 (Ky. Ct. App. 1997); State v. Butler, 900 P.2d 908 (Mont. 1995). Interestingly, the defendant in *Fleming* also attempted a double jeopardy argument, claiming that it was improper for him to be required to complete a psychosexual evaluation for purposes of determining appropriate counseling when he, by *Alford* plea, pled guilty to a simple assault rather than the originally charged sexual assault. The court denied this argument, favorably quoting the Colorado Sex Offender Management Board guidelines: "While it is preferable that sexual crimes not be plea bargained to non-sexual crimes, such plea bargains sometimes occur. However, this does not eliminate the need for the offender to be assessed based on the factual basis of the case." *Fleming*, 3 P.3d at 452 (quoting COLO. SEXUAL OFFENDER MGMT. BD., STANDARDS AND GUIDELINES FOR THE ASSESSMENT, EVALUATION, TREATMENT AND BEHAVIORAL MONITORING OF ADULT SEX OFFENDERS 452 (1998)).

143. *Butler*, 900 P.2d at 911 (citing Boykin v. Alabama, 395 U.S. 238, 243 (1969)).

144. *Razor*, 960 S.W.2d at 474 (citing KY. REV. STAT. ANN. § 439.510 (Michie 1999)).

the defendant of all of the potential consequences of an *Alford* plea would constitute ineffective assistance of counsel and could result in a negation of the original plea and a return to square one. The problem here is twofold. First, the threat of a finding of ineffective assistance of counsel is no great leverage on a criminal defense attorney. While criminal defense attorneys would obviously prefer that such a finding not be part of the record, there are no actual consequences of such a finding.[145] In fact, defense attorneys may encourage such findings because they will assist their clients in obtaining a new trial or other remedy.[146] Second, such a remedy is too drawn out and costs the defendant too much time and effort. By the time a reviewing court has determined that the defendant should have been told of the possible consequences of his plea he will likely have already suffered the consequences or a great amount of time will have elapsed. Forcing defense attorneys to fill in the knowledge gap is simply not an efficient way to inform defendants of the potential consequences of an *Alford* plea.

The better way to handle *Alford* pleas would be to affirmatively require the court to provide the defendant with knowledge about the consequences of the proposed plea. At the time of the acceptance of the plea the court would be required to inform the defendant that he is entitled to claim his innocence only at the time of sentencing. After the change of plea hearing is over, the defendant is no longer entitled to proclaim innocence as part of the plea agreement. Refusing to admit guilt to probation officers, counselors, parole officers and other rehabilitation officers may result in the defendant having his sentence enhanced (or not reduced), probation revoked, parole denied, or being classified as a sexual offender. Were that to occur, the defendant could not claim that he is permitted to deny his guilt as part of his plea bargain. The court would then be required to ask the defendant if he understood these consequences. The court would finally be required to ask the defendant if, knowing these consequences, he still wished to enter an *Alford* plea. This requirement is not overly onerous as the court already engages in a lengthy colloquy with the defendant with respect to a number of other rights which will be affected by a plea of guilty.

The only difficulty is finding the means by which courts would be required to provide such information. Theoretically, the courts could impose these requirements on themselves if they view the above mentioned colloquy as constitutionally required. However, it is likely to be pointless to continue to argue that such information is necessary in order to protect due process. The direct versus collateral consequences debate is not likely to shift, particularly

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145. *See* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 62 (2000).

146. For a discussion of this tactic, see United States v. Altamirano, 633 F.2d 147, 150-52 (9th Cir. 1980); Cross v. United States, 392 F.2d 360, 367 (8th Cir. 1968); and Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531, 1541 (1963).

because a finding that the consequences of an *Alford* plea are direct consequences of a guilty plea would likely open the door for reexamination of other sentencing consequences the courts have labeled as collateral— something well beyond the intent of the underlying argument. Rather, the more appropriate mechanism would be statute or rule. The state legislatures or Congress could pass rules of criminal procedure that require the court to advise the defendant of the consequences of an *Alford* plea. Only then will a mechanism exist whereby the knowledge gap can be filled.

Once a defendant has been advised of the limitations on his ability to protest his innocence and the potential consequences of an *Alford* plea, he may decide for himself whether the negative aspects of the plea outweigh the positives. Many defendants will no doubt still enter an *Alford* plea, but many may also reevaluate the utility of the plea. Given the long term consequences, the sentencing risk after trial would be less than the risk of enhanced sentencing, denial of probation, or later denial of parole simply due to the choice of an *Alford* plea. In any event, a defendant could make an assessment with full knowledge. It is much easier to accept negative results if the results were contemplated in a informed manner by a defendant willing to take the risks.

XII. CONCLUSION

At the end of the day, the main question is whether the *Alford* plea is really the boon to criminal defendants that some perceive it to be. To engage in such an evaluation, it is useful to reflect on the perceived advantages of the plea: certainty, minimizing severity, and, for lack of a better word, honesty. It has been contended that the *Alford* plea allows for minimization of punishment for defendants (as do most plea bargains) while still permitting them to protest their innocence. Is this really the case? As has been illustrated above, because of the "remorse" factor, the *Alford*-type defendant may face a greater penalty than the defendant who merely pled guilty. While courts have gone to some lengths to claim that *Alford*-type defendants do not, per se, get enhanced sentences for "lack[ing] remorse,"[147] the reality is that the *Alford*-type defendant must go through some rather complicated explications in order to appear remorseful and yet maintain his claim of innocence as permitted by the plea itself.

In addition, the severity of a punishment cannot be evaluated only at the time of sentencing. In the case of the *Alford* plea, punishments are arguably more severe because the likelihood of having probation revoked or parole denied is greater than for those who simply enter a guilty plea. It is very likely that *Alford*-type defendants who insist on proclaiming their innocence will have their probation revoked if counseling requires some acknowledgment of guilt. They are also likely to be denied parole if the parole board demands some type of

147. Smith v. Commonwealth, 499 S.E.2d 11, 14 (Va. Ct. App. 1998).

contrition. Thus, the *Alford*-type defendant is not gaining a bargain. He is not likely to be able to profess innocence and receive a less severe sentence. Rather, he will receive the perception of such a bargain, only to have this perception destroyed. If the purpose of the *Alford* plea is only to persuade a reluctant defendant to plead guilty with promises of the ability to profess innocence, then it is quite successful. If the purpose is truly to provide a "bargain" to the defendant, then it is false gold.

The same can be said of the perceived benefit of certainty. Proponents of the *Alford* plea argue that, just as with other plea bargains, the *Alford* plea allows the defendant to acquire a degree of certainty as to his eventual punishment in exchange for a guilty plea with the added bonus of being able to profess innocence. In reality, however, as the cases have illustrated, the *Alford*-type defendant is subject to more uncertainty as to his punishment than the typical defendant who merely pleads guilty. First, at sentencing, the *Alford*-type defendant is unsure whether his continued claims of innocence will enhance his sentence or will deny him a mitigation of his sentence because of "lack of remorse." Second, if placed on probation, the *Alford*-type defendant may be subject to revocation of probation for continuing to profess innocence during counseling, even though the court does not have to inform him of this possibility at sentencing. Finally, the *Alford*-type defendant sentenced to prison may be denied parole because of his continuing claim of innocence, even though the sentencing court need not inform him of this possibility. In all of these situations, the adverse consequences flow from the defendant's adherence to a claim of innocence that the court permitted at sentencing. The only certain thing about the *Alford*-type defendant's punishment is that it will likely be something the defendant did not expect at the time he entered the plea.

Finally, proponents claim that the *Alford* plea does not encourage the defendant to lie—thus encouraging some form of honesty with counsel and the courts. Of all of the professed advantages of the *Alford* plea, this is the most misguided. If we assume that a truly innocent defendant utilizes the *Alford* plea, and sees it as an advantage to plead guilty despite his innocence in order to obtain a plea bargain, then it is true that *at the time of entering the plea* the *Alford* plea enables the defendant to be honest. Yet, from then on, honesty will only enhance the punishment the defendant might face. At sentencing, the defendant is expected to express remorse, yet it is not reasonable to expect remorse from a truly innocent defendant. Thus, honesty is discouraged at sentencing. If the defendant is placed on probation with a counseling requirement, he may be expected to accept responsibility for the crime in order to successfully complete that program. Yet, an innocent defendant could not honestly admit to committing the offense. Thus, to avoid revocation of his probation, the innocent, honest *Alford*-type defendant would be wise to lie. If in prison, the parole board may demand accepting responsibility for the offense as a basis for granting parole. Yet, once again, the innocent *Alford*-type defendant could not honestly admit to committing the offense and would be encouraged to lie in order to obtain parole.

Surely, honesty within the system should extend beyond the date of entering a guilty plea. Is it really an advantage to encourage honesty at sentencing only to discourage it at every other occasion within the criminal justice system?

The prime beneficiary of the *Alford* plea is the criminal defense attorney. Gone are the days when defense counsel, confronted with a defendant adamantly insisting on his innocence, was forced to either forgo a favorable plea bargain or compel his client to admit guilt on the record. Confronting a defendant with the need to plead guilty was rarely a pleasant experience for defense counsel and in many instances could be perceived as borderline unethical. With the *Alford* plea, however, defense counsel can negotiate a favorable plea agreement, and the defendant does not even have to admit guilt. This approach avoids all of the unpleasantness associated with confronting a defendant with the need to accept responsibility in exchange for a favorable plea. What defense attorney would not prefer this approach to the pre-*Alford* alternatives?[148] This affection for the *Alford* plea may make defense counsel hesitant to explain all of the details of the long term consequences of an *Alford* plea, assuming that defense counsel is even aware of those consequences.

Perhaps even more troubling is the fact that the judiciary, despite frequent expressions of distaste for the *Alford* plea, continues to accept it. In the *Alford* decision, the Court provided a way out for the courts when it noted, "Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes to so plead.... Likewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence."[149] Despite this, courts continue to approve *Alford* pleas at both the federal and state level. Why? It could be argued that as unpalatable as the *Alford* plea is, it does have the virtue of taking a case off the active docket and freeing up the court's time for the typical backlog of cases. In large urban areas docket pressure would seem to encourage an even greater acceptance of the *Alford* plea by the judiciary. This consequence was not unforeseen. As one commentator noted soon after the *Alford* decision,

> It is submitted that the *Alford* decision is due at least in part to the crowded-docket anxiety, the fear that the courts will be overwhelmed unless the instances in which the plea of guilty is allowed are increased. But the cure for the problem of the crowded docket is legislative and administrative reform, not an undermining of the very rights that the courts are designed to protect.[150]

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148. *See* Alschuler, *supra* note 3, at 1278-89 (describing the tactics criminal defense attorneys utilized prior to *Alford* when dealing with defendants who insisted on their innocence).

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

150. Timothy J. Simmons, *Voluntariness of Guilty Pleas*, 49 N.C. L. REV. 795, 801

One suspects that this conclusion was correct and the continuing acceptance of the *Alford* plea, in part, is based on this rationale.

Conceptually, the *Alford* plea is illogical. Judges are most aware of this, perhaps explaining a great deal of the *Alford* plea jurisprudence detailed by this Article. As one court observed in passing,

> [I]t is unseemly, to say the least, for courts—whose charge is justice—to condone convictions without trial of those who proclaim their innocence. Indeed, the expediency-based practice has all the hallmarks of an Alice-in-Wonderland charade. Since it permits defendants who are in fact guilty to think they are getting away with something, the *Alford*-type plea also impedes rehabilitation.[151]

Given these perceptions, it is little wonder that courts have consistently and nearly uniformly denied *Alford*-type defendants the right to continue to profess their innocence beyond the time of their plea. In light of the overwhelming body of cases imposing significant long term hardships on those who choose the *Alford* plea, it is clear that defendants should look at the *Alford* plea with more than just a bit of suspicion. Perhaps the best *Alford* plea is the plea not taken.

(1971).

151. State v. Weaver, No. 91-2568-CR-FT, 1992 WL 126807, at *2 n.1 (Wis. Ct. App. 1992) (internal citations omitted).