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## Knowledge Versus Acknowledgment: Rethinking the Alford Plea in Sexual Assault Cases

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Claire L. Molesworth<sup>1</sup>

### INTRODUCTION

*Inherent in social consciousness are the intertwined demands for truth and justice. These two issues can be translated practically into the desire to see the truth established and the desire for punishment. It's a mysteriously powerful, almost magic notion, because in many cases almost everyone knows the truth. Everyone, for example, may know who the human rights abusers are and what they did; and the abusers know that everyone knows, and everyone knows that they know. Yet there remains a need to make everything explicit.<sup>2</sup>*

Criminologist John J. Moore, discussing the political situation in El Salvador

When we strive for social justice, we strive for truth and equality. For victims of sexual offenses—crimes based on deception and power—attaining truth and equality from the judicial system is a fundamental step to recovery.<sup>3</sup> One important aspect of a victim's recovery is the emotional and psychological healing that begins when a defendant acknowledges the acts he<sup>4</sup> committed.<sup>5</sup> In contravention to a victim's recovery process is the "Alford" plea, a procedure that allows a defendant to enter a plea of guilty while maintaining his innocence. Typically, a defendant accepts an Alford plea during plea negotiations when the State has a strong case against him, and he realizes a jury likely would find him guilty, but he refuses to admit he committed the crime. An Alford plea is then valid as long as a judge finds "strong evidence of [the defendant's] actual guilt."<sup>6</sup> For Alford pleas taken in sexual offense cases, the "strong evidence" of guilt may be established by a victim's statement about the assault. This type of plea

often appeals to defendants in sexual offense cases who wish to avoid the social stigma of admitting that they committed sexual offenses.

This article will examine why the Alford plea is an ineffective tool when used in plea negotiations for cases involving sexual assault and molestation, where a victim's ability to recover from the crime often depends on attaining a sense of justice when the defendant acknowledges the crime he committed.<sup>7</sup> Because an Alford defendant need not admit guilt, the Alford plea's essential difference from a "straight plea" (one in which the defendant admits he committed the crime) is that the victim never receives the defendant's personal acknowledgment that he committed the offense. International human rights law is instructive on the notion of acknowledgment, and a growing body of scholarship on the healing power of acknowledgment has developed recently.<sup>8</sup> In discussing human rights violations on an international scale, philosopher Thomas Nagel posited that a significant difference exists between a victim's private, personal knowledge that she suffered a crime and the public acknowledgment that occurs when a person admits he committed a crime.<sup>9</sup> Society as a whole benefits when a victim hears the truth acknowledged during the criminal process, and the Alford plea prevents this acknowledgment from occurring.

The lack of acknowledgment created by an Alford plea is particularly problematic in sexual offense cases. Sexual offenses differ from other crimes because they involve a deep psychological trauma that cannot be repaired by monetary reparation (as when property is stolen from a victim) or physical healing (as when a victim suffers physical injury, such as a broken nose in an assault).<sup>10</sup> Additionally, in the vast majority of sexual offenses, the victim knows the defendant—who may be a friend, family member, or neighbor.<sup>11</sup> Because of the growing force of victims' rights advocacy, legal professionals have begun to examine these differences in recent years.<sup>12</sup> However, little has been written about how the Alford plea is used in sexual assault cases.

In this article, I advocate that prosecutors in Washington State should stop taking Alford pleas in plea negotiations in sexual assault cases because a victim receives important validation of her experience when the perpetrator admits his guilt, which can be an essential step in the healing process. The King County Prosecuting Attorney's Office is a leader in advocating for victims' rights, particularly in sexual assault cases, but many other prosecutors' offices are not equally focused on victims' rights. Because of its commitment to victims' rights, the King County Prosecuting Attorney's Office has adopted a general policy against taking Alford pleas in sexual offense cases. This informal policy not only emphasizes a commitment to victims' rights, but also allows flexibility for instances when an Alford plea is necessary. It thus provides a model for other prosecutors to follow in better meeting the special needs of victims of sexual offenses.

In order to demonstrate the Alford plea's ineffectiveness in sexual offenses, I explore the concept of acknowledgment as used in the international human rights context and apply it on a local level to the prosecution of sexual offenses in Washington State. In Section I, I discuss the origin of the Alford plea. In Section II, I analyze how the international human rights model has provided acknowledgment for victims by forcing perpetrators of war crimes to publicly admit their guilt. I then use these international concepts to argue in favor of restricting Alford pleas for sexual offenses in the United States. In Section III, I provide an overview of sexual assault crimes in Washington, focusing on how the Alford plea has been used in these types of offenses. In Section IV, I examine the reasons why a prosecutor may take an Alford plea, and I compare those reasons with the drawbacks of the Alford plea for victims. Finally, in Section V, I set forth the argument for the policy shift in Washington State prosecutors' offices to prohibit the use of Alford pleas in sexual assault cases.

## I. THE DEVELOPMENT OF THE ALFORD PLEA

### *A. The Use of Plea Bargains*

Plea bargaining has become a popular tool in criminal cases and, although criticized, is generally accepted as an important component of the criminal justice system.<sup>13</sup> In fact, in the criminal justice systems of the fifty states, the vast majority of criminal cases are disposed of without a trial through the entry of a guilty plea.<sup>14</sup> The United States Supreme Court has announced that, assuming the plea bargain is administered properly, plea negotiation is to be encouraged as a benefit to all.<sup>15</sup> As a practical matter, a prosecutor's usual objective is to obtain a plea that is close to the result that would be obtained if the defendant were convicted as charged.<sup>16</sup> Additionally, prosecutors derive benefits from negotiating a plea agreement; they "dispose of cases efficiently, maintain control over caseloads, and avoid the risk of acquittal" by a jury.<sup>17</sup> In an overburdened court system where only 5 percent of cases go to trial, the criminal justice system would virtually grind to a halt if prosecutors and defense attorneys did not use plea negotiating.

For a guilty plea to be valid, it must be voluntarily given by the defendant.<sup>18</sup> Because a plea is only involuntary when it is "the result of force or threats or of promises" extraneous to the agreement itself,<sup>19</sup> prosecutors have wide latitude in setting the terms of plea agreements. Accordingly, a plea bargain may be conditioned upon the defendant agreeing to certain conditions, such as cooperating with the State in an investigation, giving testimony for the prosecution against another defendant, completing a rehabilitation program, making restitution to the victim, promising to stay away from the victim, refraining from any further violation of the law, engaging in dispute resolution, or even promising to move out of the jurisdiction.<sup>20</sup>

*B. Creation of the Alford Plea*

In 1970, the United States Supreme Court created what is now known as the Alford plea in *North Carolina v. Alford*.<sup>21</sup> The Court held that a plea of guilty is voluntary even when the defendant maintains his innocence by refusing to admit his participation in the acts constituting the crime.<sup>22</sup> The Court further held that defendants may knowingly and voluntarily plead guilty even while protesting their innocence if the judge finds “strong evidence of [the defendant’s] actual guilt.”<sup>23</sup>

To avoid facing the death penalty, defendant Henry Alford, charged with first-degree murder, pleaded guilty to second-degree murder while maintaining his claim of innocence.<sup>24</sup> The State had a strong case against Alford for first-degree murder,<sup>25</sup> which is a capital offense under North Carolina law.<sup>26</sup> The victim in the case was killed when he answered a knock at his door and was shot as he began to open it.<sup>27</sup> Although there were no eyewitnesses to the crime, witnesses testified that shortly before the victim was killed, Alford came home and picked up his gun, stated his intention to kill the victim, and later returned home and declared that he had carried out the killing.<sup>28</sup> Although Alford claimed witnesses would substantiate his alibi, they only confirmed his guilt.<sup>29</sup> Despite this testimony from witnesses, Alford maintained that he had not committed the murder. He claimed he pleaded guilty because he faced the death penalty if he did not do so.<sup>30</sup> “I pleaded guilty on second degree murder because they said there is too much evidence,” Alford told the court. “I ain’t shot no man, but I take the fault for the other man.”<sup>31</sup> After stating that he authorized his lawyer to enter a plea of guilty to second-degree murder, Alford added, “I’m not guilty, but I plead guilty.”<sup>32</sup>

Although avoiding the death penalty was Alford’s primary motivation for entering a guilty plea, the Court determined the plea was valid.<sup>33</sup> The Court maintained that the standard for determining the validity of guilty pleas “was and remains whether the plea represents a voluntary and intelligent choice among the alternative course of action open to the defendant.”<sup>34</sup>

Even though Alford would not have pleaded guilty but for the opportunity to avoid the death penalty, his guilty plea still was the product of a “free and rational choice,” particularly because he was represented by competent counsel who advised him that the plea would be to his advantage.<sup>35</sup>

Alford maintained his innocence but insisted on making a plea because, in his view, he had absolutely nothing to gain by a trial and much to gain by pleading.<sup>36</sup> The State had an overwhelming case against Alford, which substantially negated his claims of innocence and further provided a means by which the judge could test whether the plea was intelligently entered.<sup>37</sup> Therefore, the Court held that given the strong factual basis for the plea demonstrated by the State and Alford’s clearly expressed desire to enter it despite his professed belief in his innocence, the trial court did not commit constitutional error in accepting Alford’s plea.<sup>38</sup> The Court clarified, however, that its holding did not mean that a trial court judge *must* accept every constitutionally valid guilty plea merely because a defendant wishes to so plead.<sup>39</sup>

While the Alford plea originated in 1970,<sup>40</sup> *nolo contendere* pleas, also rooted in the concept of maintaining one’s innocence, have existed since medieval times.<sup>41</sup> The pleas have little substantive difference, so the distinction between the pleas is essentially cosmetic. *Nolo contendere* pleas (“I do not wish to contend”), once known as pleas *non vult contendere*, originated from a procedure whereby a defendant, hoping to avoid imprisonment, tried to end the prosecution by offering money to the king.<sup>42</sup> Although English courts stopped using the plea more than three centuries ago, *nolo contendere* pleas remain available in some American courts.<sup>43</sup> Today, the Federal Rules of Criminal Procedure allow defendants to plead *nolo contendere* with the permission of the court.<sup>44</sup>

Although the practical consequences of the two pleas are the same, Alford and *nolo contendere* pleas differ in two respects.<sup>45</sup> First, unlike Alford pleas, *nolo contendere* pleas “avoid estoppel in later civil litigation.”<sup>46</sup> Second, defendants who plead *nolo contendere* simply refuse

to admit guilt, while defendants making Alford pleas affirmatively protest their innocence.<sup>47</sup> While the nolo contendere plea differs from the Alford plea, the Supreme Court determined that there was no constitutional difference between the pleas because “the Constitution is concerned with the practical consequences, not the formal categorizations, of state law.”<sup>48</sup>

Since the Supreme Court’s decision in *Alford*, the Alford plea has become commonly used when a defendant chooses to accept a plea bargain but still claims he did not commit the offense. In fact, forty-seven states, including Washington, permit Alford pleas (sometimes called best-interest pleas).<sup>49</sup>

### C. *The Alford Plea in Washington*

Although pleas of nolo contendere are not permitted under Washington law,<sup>50</sup> the state recognizes the Alford plea and calls it by that name.<sup>51</sup> In 1976, the Washington State Supreme Court decided *State v. Newton*, the Washington counterpart to *Alford v. North Carolina*, in which it adopted the Alford plea. In *Newton*, the court determined that a defendant may enter a guilty plea while refusing to admit guilt for the crime charged.<sup>52</sup> The court held that a factual basis for a guilty plea may come from any source the trial court finds reliable, not merely the admissions of the defendant. If a defendant desires to plead guilty but refuses to admit guilt, the court may accept the plea if the factual basis can nevertheless be established from another source.<sup>53</sup>

In *Newton*, several witnesses provided strong testimonial evidence that the defendant, Edwin Newton, killed the victim, Robert Campbell.<sup>54</sup> One witness stated that Newton left the witness’s home one evening with a .22 caliber revolver after Newton had told the witness he had a grudge against Campbell.<sup>55</sup> Later that evening, Newton returned and told the witness that he had killed a person.<sup>56</sup> The next day, Newton forced the witness to pull the car over so that he could show the witness a dead body hidden in the ditch.<sup>57</sup> Another witness heard Newton say he did not like Campbell and



that he was going to kill him.<sup>58</sup> A third witness provided an affidavit stating that Newton had driven him to a particular location, showed him a dead body in a ditch, and had threatened the witness with death if he did not help Newton move the body.<sup>59</sup> Finally, a deputy sheriff provided an affidavit indicating that he had arrested Newton, who had a .22 caliber pistol in his possession, and Newton told the sheriff he had an argument with Campbell and Campbell was killed in a struggle over the gun.<sup>60</sup> Although Newton claimed Campbell was drunk and attacked him with a knife, there were no signs of a struggle.<sup>61</sup> Newton signed a guilty plea for second-degree murder, but before he signed it, he deleted the sentence admitting that he committed the crime in the manner charged.<sup>62</sup> The statement also contained no factual account of what occurred or how the defendant was charged.<sup>63</sup>

On appeal, Newton claimed the guilty plea was invalid because the prison sentence constituted a violation of his due process rights because it had no factual basis.<sup>64</sup> On review, the Washington State Supreme Court determined that the requisite factual basis for a guilty plea may be obtained from sources other than the defendant.<sup>65</sup> The court followed the reasoning of similar federal cases,<sup>66</sup> finding that Washington's requirement for a "factual basis" could be established through evidence other than the defendant's admission of guilt.<sup>67</sup> Since then, Washington courts have consistently upheld the validity of the Alford plea.<sup>68</sup>

## II. THE HUMAN RIGHTS MODEL OF ACKNOWLEDGMENT

Use of the Alford plea in the context of sexual offenses is flawed because it robs the victim of the opportunity to hear the defendant acknowledge and accept responsibility for the horror the victim suffered. This acknowledgment can be a critical step in a victim's recovery.<sup>69</sup> Although the concept of acknowledgment has not played a role in academic discussions of victims' rights domestically, it has been a basis for international human rights initiatives, most notably, the truth and reconciliation commissions.<sup>70</sup> In truth commissions, either the state or

individual perpetrators are held accountable to victims by publicly acknowledging the human rights atrocities they committed, even if the individual perpetrators are never prosecuted or held legally accountable.<sup>71</sup> I begin this section by describing early efforts to address human rights crimes on an international scale. Then, I discuss how these early efforts developed into modern international criminal courts and truth commissions. Finally, I explore the theoretical underpinnings of these types of forums, which often spring from a desire to acknowledge the atrocities suffered by individual victims. These concepts are the theoretical foundation for my argument that the Alford plea deprives victims of the important acknowledgment that occurs when a defendant admits his guilt.

Recognizing the rights and needs of individual victims is a central issue in international human rights law. In the wake of World Wars I and II, the international community sought accountability for human rights crimes by creating the Nuremberg Tribunals, which were established by agreement among the four victorious allied powers: France, the Soviet Union, the United Kingdom, and the United States.<sup>72</sup> From the Nuremberg Tribunals came the Nuremberg Principles, which were guidelines for determining what constituted a war crime.<sup>73</sup> The Nuremberg Principles established tribunals that prosecuted World War II crimes, imposed individual criminal liability for grave international crimes, and were later construed to require states to prosecute these crimes.<sup>74</sup> Nuremberg established the general principle that states owe a duty to prosecute certain grave violations of human rights.<sup>75</sup>

In recent years, developments in international criminal law aimed at providing redress to victims, including the International Criminal Tribunals for the former Yugoslavia and Rwanda, have further advanced these principles.<sup>76</sup> Another key development in recognizing the importance of individual victims' rights was the establishment of the International Criminal Court (ICC),<sup>77</sup> created by the United Nations through the Rome Statute in 1998.<sup>78</sup> The ICC provides a forum to decide the most serious

international crimes: genocide, crimes against humanity, and war crimes.<sup>79</sup> The court is headquartered in The Hague.<sup>80</sup> By creating clear mandates and encouraging individual victims' participation in the proceedings, many believe the ICC "truly laid the parameters with which a movement toward victims' rights was translated into international law."<sup>81</sup>

However, some observers have levied criticism against the ICC.<sup>82</sup> In a speech written for President Bush, Ambassador John Bolton criticized the ICC's authority as "vague and excessively elastic."<sup>83</sup> He expressed concern about how the ICC would interpret such vague language, warning of "the real risk that an activist court and prosecutor can broaden their language essentially without limit."<sup>84</sup> Bolton also worried about giving the power of law enforcement to an entity outside the U.S. national government.<sup>85</sup> He questioned the ICC's deterrent effect because he doubted war criminals would pay attention to the ICC's authority.<sup>86</sup> Additionally, others criticize the practicality and logistical limits of the ICC.<sup>87</sup> Despite the criticisms, many agree that using international law in this way has an important symbolic function, which can make a significant contribution to satisfying victims' "thirst for accountability."<sup>88</sup>

Similarly, truth commissions also provide a crucial vehicle for victims to hear public acknowledgment of the crimes they suffered. Typical truth commissions are bodies set up to investigate a history of violations of human rights in a particular country; they can include violations by the military, other government forces, or armed opposition forces.<sup>89</sup> Human rights scholar Priscilla Hayner explains how the Commission on the Truth for El Salvador operated, writing in her groundbreaking study of truth commissions, Priscilla Hayner points out, "The Truth Commission report in the end confirmed what many people, particularly Salvadorans, have long accepted as true, but official acknowledgment of the widespread abuses was important in itself."<sup>90</sup>

Truth commissions are distinguishable from formal legal accountability models, such as the ICC, which focus on prosecuting individuals.<sup>91</sup> In fact,

prosecutions are very rare after a truth commission report, and most truth commission mandates prevent the reports from playing an active role in later criminal prosecutions.<sup>92</sup> Professor Colm Campbell explains that international humanitarian law can provide important reference points for the construction of legal and moral culpability, whether through a straightforward application of the established law or through more creative approaches such as truth commissions.<sup>93</sup> However, Campbell recognizes that many individuals would question whether truth commissions or any legal formulation “can adequately encapsulate the full horror of mass atrocities, and others query whether such creative law-making is compatible with principles of Western legality.”<sup>94</sup>

Both the ICC and the truth commission model rely heavily on the concept of acknowledgment set out by philosopher Thomas Nagel. Nagel is credited with conceiving the theory of acknowledgment, which he articulated at the 1988 Aspen Institute Conference. Explaining why knowledge must be official, Nagel ventured: “[i]t’s the difference between knowledge and acknowledgment. It’s what happens and can only happen to knowledge when it becomes officially sanctioned, when it is made part of the public cognitive scene.”<sup>95</sup>

As criminologist John Moore, quoted at the beginning of this article, explained regarding the political situation in El Salvador, inherent in social consciousness are “the intertwined demands for truth and justice.”<sup>96</sup> He asserts that these two issues translate into the desire to see the truth established and the desire for punishment.<sup>97</sup> “It’s a mysteriously powerful, almost magic notion,” he contends, “because in many cases almost everyone knows the truth. Everyone, for example, may know who the human rights abusers are and what they did; and the abusers know that everyone knows, and everyone knows that they know. Yet there remains a need to make everything explicit.”<sup>98</sup>

Often a country’s civilian population is aware of the abusers’ identities and their actions during a period of violence.<sup>99</sup> Therefore, although a

significant role of a truth commission is to establish a factual record of the country's history, the importance of a truth commission lies in its capacity to acknowledge the truth rather than merely finding facts.<sup>100</sup> As Hayner points out, "An official acknowledgment of the facts outlined in a truth commission report by government or opposition forces can play an important psychological role in recognizing 'truth' which has long been denied."<sup>101</sup> Thus, the commission offers "an official acknowledgment of long-silenced facts."<sup>102</sup>

For example, when Chilean President Patricio Aylwin released the report of the National Commission on Truth and Reconciliation to the public, he made an emotional appeal in a televised public broadcast.<sup>103</sup> In the broadcast, he begged for pardon and forgiveness from the families of the victims.<sup>104</sup> After having their claims brushed aside for so many years, survivors often cite this event as a powerful moment.<sup>105</sup> Following the broadcast, Aylwin sent the commission's report to each of the victims with a letter noting the page on which his or her case was listed.<sup>106</sup>

Hayner also points to Juan Méndez, a human rights lawyer, who characterizes Nagel's acknowledgment theory by explaining that "knowledge that is officially sanctioned, and thereby made 'part of the public cognitive scene' . . . acquires a mysterious quality that is not there when it is merely 'truth.' Official acknowledgment at least begins to heal the wounds."<sup>107</sup> Although acknowledgment may not be enough by itself, writes Méndez, "It goes a long way towards justice and reconciliation."<sup>108</sup> Applied domestically in the context of sexual assault, victim advocates often notice that victims often hold tightly to any procedure that acknowledges what happened to them and validates they are telling the truth, such as a court granting a protective order for the victim or requiring the defendant to register as a sex offender.<sup>109</sup>

Hayner further investigates the notion of truth and acknowledgment by looking to the work of Aryeh Neier, president of the Open Society Institute and former executive director of Human Rights Watch.<sup>110</sup> Neier argues that

the need for truth-seeking corresponds to how hidden the atrocities were.<sup>111</sup> “Everything about these crimes was intended to be deniable,” contends Neier, “[w]here deception is so central to the abuses, then truth takes on a greatly added significance. The revelation of truth in these circumstances takes on a certain amount of power.”<sup>112</sup> Likewise, deception is a key component in crimes of sexual assault because sexual assault between strangers represents only a small minority of sexual offenses.<sup>113</sup> Instead, far more often, the defendant has a relationship of some sort with the victim.<sup>114</sup> Gaining a victim’s trust requires building a relationship with the victim (referred to as “grooming” in molestation cases), and violating the victim’s trust epitomizes the deepest type of deception.<sup>115</sup>

Additionally, Hayner delineates the difference between trials and truth commissions based on the involvement of victims in the respective processes.<sup>116</sup> While a trial functions to investigate the specific acts of the accused perpetrators, a truth commission focuses on the experience of victims.<sup>117</sup> Therefore, during a trial, victims are called to testify as witnesses, and their testimony usually covers only a narrow set of events pertinent to the charges.<sup>118</sup> In contrast, truth commissions focus more on the victims’ experiences.<sup>119</sup> “By listening to victims’ stories, perhaps holding public hearings, and publishing a report that describes a broad array of experiences of suffering, commissions effectively give victims a public voice and bring their suffering to the awareness of the broader public.”<sup>120</sup> For instance, during the hearings for the commission in South Africa, therapists saw a distinct increase in the public’s understanding and appreciation of victims’ needs.<sup>121</sup> For some victims and survivors, Hayner writes, this process may have a cathartic or healing effect.<sup>122</sup>

Hayner further argues that truth commissions support the notion that there is “an inherent *right to truth*” held by all victims, survivors, and by society as a whole.<sup>123</sup> Human rights activists argue that implied within the obligation to investigate and punish human rights crimes is the inherent right of the citizenry to learn the results of such investigations.<sup>124</sup> The idea

that victims have a right to truth or a right to receive information is central to the concept of acknowledgment, and these broad international concepts may be applied on a domestic scale to sexual offenses. For instance, although a child may have personal knowledge of the molestation she suffered, healing may come from the defendant acknowledging the harm he inflicted. The child's right to truth is not merely *knowing* the truth, but hearing the defendant admit the truth publicly and acknowledge the suffering he caused.

### III. SEXUAL ASSAULT IN WASHINGTON

To evaluate the importance of acknowledgment for victims of sexual offenses, we must first examine how Washington law treats victims of these crimes. I begin this section by outlining the types of sexual offenses recognized in Washington and the prevalence of these types of crime. Then, I address how the criminal justice system deals with victims of sexual offenses. In the next two subsections, I discuss victims' rights legislation and issues surrounding victims' participation in the process of a criminal prosecution. Lastly, I address how the Alford plea operates specifically in sexual offense cases and the problems associated with using the plea for these types of crimes.

#### *A. Sex Offenses and Victims in Washington*

The sex offenses punishable in Washington can be divided into three groups.<sup>125</sup> The first group includes crimes that apply regardless of the victim's age.<sup>126</sup> This group of crimes includes rape,<sup>127</sup> indecent liberties,<sup>128</sup> and incest.<sup>129</sup> Rape has three degrees, first through third, with first degree being the most serious.<sup>130</sup> The second group of sexual offenses deals specifically with crimes against children.<sup>131</sup> The crimes in this group are rape of a child, sexual misconduct with a minor, and child molestation.<sup>132</sup> The third group of crimes includes other offenses outside the scope of this

article, in particular the crime of sexually violating human remains and the offense of voyeurism.<sup>133</sup>

Nearly 40 percent of the women in Washington State have been sexually assaulted during their lifetime.<sup>134</sup> Lucy Berliner, director of the Harborview Center for Sexual Assault and Traumatic Stress in Seattle, Washington, quantified the incidents and prevalence of sexual assault in Washington State in a 2001 study.<sup>135</sup> The study consisted of 1,325 interviews with women whose age ranged from eighteen- to ninety-six-years-old and whose racial and ethnic breakdown was roughly similar to the general population of Washington State.<sup>136</sup> Berliner quantified the number of sexual assault incidents based on sexual assault type and found that 23 percent of the women had been victims of rape, 12 percent had been victims of attempted rape, 15 percent had been victims of indecent liberties, 9 percent had been unable to consent (because of alcohol or drugs), 7 percent had been victims of child rape, and 18 percent were victims of child molestation.<sup>137</sup> The large majority of sexual assault experiences (rape, attempted rape, and indecent liberties) occurred when the woman was under eighteen-years-old; while those experiences could occur at any time in a woman's life, they were more likely to take place in childhood.<sup>138</sup> Almost one-fifth of the women had been victimized on different occasions by different offenders.<sup>139</sup> The relationship of the offender to the victim ranged from strangers, to fathers, and to intimate partners, but the largest groups of offenders were acquaintances or persons known but not related to the victim.<sup>140</sup> Only 61 percent of the women reported that they had ever told anyone about their experience, although younger women were more likely to have told someone.<sup>141</sup>

Berliner found that few of the women reported their experience to the police (only 15 percent) and that age was an important factor in this statistic—women under thirty-years-old were more likely (26 percent) to file a police report than older women.<sup>142</sup> Because most sexual assault victims do not report these violations to the police, their experiences will



not show up in official statistics.<sup>143</sup> The highest rate of reporting occurred in young women who had been raped (30 percent).<sup>144</sup> Of those who did report their rape, more than one-third had a legal advocate (39 percent).<sup>145</sup> The women reported that criminal charges were filed in half of the cases.<sup>146</sup> Victims who had told another person were twice as likely to report the violation to the police (19 percent), compared to those who did not tell anyone (9 percent). Most victims who reported their sexual assault found the police to be at least somewhat helpful, but one-fourth reported that the police were not at all helpful.<sup>147</sup> Few of the women sought other supportive services following their victimization.<sup>148</sup> Only 38 percent of the women who experienced victimization as a child and 39 percent who were assaulted as an adult sought professional services such as counseling, medical attention, or rape crises services.<sup>149</sup>

These statistics demonstrate the prevalence of sexual assault in Washington State and provide a foundation for examining attitudes of law enforcement and social service agencies toward sexual assault victims, which the next section explores.

#### *B. Change in Law Enforcement and Social Service Attitudes Toward Victims of Sexual Offenses*

Acknowledgment is vital to each interaction a victim has with police and social service agencies. At each step in the investigation and treatment process, procedures may either make a victim feel supported and believed or reinforce a victim's feelings of fear and uncertainty.

Law enforcement attitudes toward victims of sexual offenses have changed noticeably since the 1970s, which some attribute to modifications in evidentiary requirements of courts coupled with changes in societal myths and attitudes about rape.<sup>150</sup> A study of police investigating rape and sexual offenses in the Philadelphia area in the late 1970s found that male police officers were more likely to question the credibility of "extremely obese women" and "women who (had) seen psychiatrists."<sup>151</sup> This attitude

likely reflected the societal myth that rape was an act of sex—therefore no one would rape an “unattractive” woman—as well as assumptions that women with any history of therapy would be more likely to falsely claim rape.<sup>152</sup> Since then, attitudes in many jurisdictions have begun changing because of revisions in state statutes and courtroom procedures that protect victims’ rights and because of the development of training curriculum provided in police academies.<sup>153</sup> Additionally, most urban police units and prosecutor’s offices have developed special sex crimes units whose members specialize in dealing with victims of sex crimes.<sup>154</sup> In Washington State, King County has led efforts to create specialized departments for sexual offense crimes by creating its Special Assault Unit.<sup>155</sup> In fact, King County served as a model for creating these types of units in urban centers nationally—a similar unit now exists in every metropolitan police and prosecutor’s office in the country.<sup>156</sup>

Because many victims’ first contact with the legal system is with police and prosecutors, this specialized training is essential. Police attempt to interview the victim as early as possible after she has reported the assault.<sup>157</sup> Later on, the victim is interviewed extensively, possibly numerous times.<sup>158</sup> Each interview requires the victim to review the assault and recall details that may assist police and prosecutors in investigating and ultimately prosecuting the crime.<sup>159</sup>

Following the arrest, identification, and formal charging of the defendant, the victim meets with the assigned prosecutor to prepare the case for trial. In many jurisdictions, the victim is assigned a victim advocate as soon as she reports the assault. For example, several leading victim advocacy groups operate in King County and work directly with the King County Prosecuting Attorney’s Office to provide advocates to victims, including the Children’s Response Center, the Harborview Center for Sexual Assault & Traumatic Stress, the Seattle Police Department’s victim advocacy program, and King County Sexual Assault Resource Center (KCSARC).<sup>160</sup> Founded in 1976, KCSARC is the largest sexual assault victims’ service

organization in Washington.<sup>161</sup> Responsible for creating nationally-recognized prevention, education, and therapeutic programs, KCSARC's work has been replicated around the country.<sup>162</sup> KCSARC and the other advocacy groups listed above have worked in collaboration with the King County Prosecuting Attorney's Office to create its legal advocacy program, which is the model for similar programs in counties throughout the United States.<sup>163</sup> Through King County's legal advocacy program, a victim is immediately assigned an individual advocate—a counselor with specific knowledge of the legal system as it relates to sexual assault cases—who helps the victim navigate the legal process.<sup>164</sup>

Victim advocates not only aid victims in the practicalities of navigating legal and social services but also help prevent secondary victimization.<sup>165</sup> Part of the rationale behind advocacy programs such as KCSARC is to prevent secondary victimization,<sup>166</sup> also known as revictimization, which results from insensitive, victim-blaming treatment from social service or government personnel that exacerbates the trauma of the sexual assault.<sup>167</sup> Secondary victimization may occur when police or prosecutors question victims about their prior sexual histories or about how they behaved or were dressed at the time of the assault.<sup>168</sup> Although this information is necessary for investigating and prosecuting the crime, victims report these experiences to be highly distressing, particularly if victims were discouraged from reporting the assault by family, police, or the offender himself.<sup>169</sup>

Because these experiences may be highly distressing, taking an Alford plea actually may be preferable from a victim's perspective because it means the victim is not required to testify in court.<sup>170</sup> As Megan Allen, legal advocacy manager of KSARC, points out, every victim is different and reacts to the experience differently; some victims prefer to have the criminal process wrapped up as quickly and efficiently as possible.<sup>171</sup> Testifying may be highly traumatic for a victim because the victim must explain the sexual assault in detail in front of an array of people, including jurors, judges, courtroom personnel, attorneys, courtroom observers, and the

defendant.<sup>172</sup> Consequently, if a victim does not have to testify in court, she avoids this experience altogether.<sup>173</sup> A defendant's guilty plea also reduces the chance that if the case proceeded to trial, a judge or jury would find the defendant not guilty, another outcome with potentially devastating effects for a victim.<sup>174</sup>

Similarly, many victims have difficult experiences with the medical system and report feeling violated, depressed, and anxious after their contact with medical professionals.<sup>175</sup> Therefore, in addition to victim advocacy programs, specialized medical examination programs at hospitals are meant to offset the trauma of a post-assault examination. Programs such as the Washington State Sexual Assault Nurse Examiner (SANE) program aim to provide sensitive care to victims of sexual assault while collecting legally sound forensic evidence.<sup>176</sup> Specially trained SANE nurses provide victims with timely and professional medical examinations which are consistently held admissible in legal proceedings.<sup>177</sup>

Once criminal proceedings begin, victims often face significant challenges. As Mary Koss and Karen Bachar, experts in sexual assault research, explain:

In the criminal justice system, charges are brought in the name of the state. The victim may opt out of the system by declining to cooperate with prosecution but may be at risk of being compelled to testify by subpoena. When victims do wish for the case to proceed, they have little control of whether it, in fact, will be pursued by the prosecutor. Even when rape victims brought a legal advocate with them to interact with prosecutors, 2 of 3 rape victims had their cases turned down for prosecution, and 8 of 10 turndowns were against the victims' expressed wishes (Campbell et al., 1999). Victims have a right to be informed of a plea agreement under many state victims' rights schemes but typically have little recourse to oppose it.<sup>178</sup>

Because a victim's experiences with police and prosecutors have a significant impact on how a victim recovers from sexual assault, as more

agencies establish procedures intended to support victims, victims' personal knowledge of the assault or molestation they suffered takes on the "officially sanctioned" character described by Juan Méndez when he explained the acknowledgment theory.<sup>179</sup> Thus, official acknowledgment in the form of victim-oriented procedures may be a step toward healing the wounds caused by the assault or molestation.

### *C. Victims' Rights Legislation*

While official acknowledgment is one step in victim recovery, another step is victims' rights legislation. Victims of crime have taken a more active role in criminal proceedings because of victims' rights legislation enacted in recent years.<sup>180</sup> As of 2000, every state had passed some form of legislation to benefit victims.<sup>181</sup> In fact, thirty-two states have recognized victims' rights by raising protections to the state constitutional level.<sup>182</sup> In Washington State, RCW 7.69.030 protects the rights of victims, survivors, and witnesses of crime. One provision states that a "reasonable effort" must be made to provide rights for victims, which the act enumerates.<sup>183</sup> The statute lists sixteen specific rights, including the right to be informed of the date, time, and location of the trial;<sup>184</sup> the right to be informed of the final disposition of the case;<sup>185</sup> the right to have a secure waiting area during court proceedings that does not require victims to be in close proximity to defendants and families or friends of defendants;<sup>186</sup> and the right to make a personal statement during the defendant's sentencing hearing.<sup>187</sup> In particular, victims of violent crimes or sex crimes must receive a written statement of their rights as crime victims<sup>188</sup> and must be able to have a victim advocate or another support person present at any prosecutorial or defense interview or during any judicial proceeding.<sup>189</sup> Prosecutors use these rights as protocol for working with victims. For example, the Victim Assistance Unit of the King County Prosecuting Attorney's Office automatically notifies victims and survivors of victims when felony charges are filed and provides notice of trial and sentencing dates.<sup>190</sup> With the

adoption of legislation focused on acknowledgment of the experience of victims, Washington has demonstrated its commitment to victims' rights in the criminal process by acknowledging the experience of victims and by protecting victims' rights.

*D. Victims' Role in the Criminal Prosecution Process*

As Washington State legislators have increased their emphasis on victims' rights in recent years, so too should prosecutors throughout the state. By establishing procedures that encourage defendants to acknowledge victims' experiences, prosecutors declare their commitment to the important role victims play in the criminal prosecution of sexual offenses.

Victims typically provide input regarding plea agreements at two stages of the criminal justice process: first when conferring with the prosecutor during plea bargaining and second when addressing the court, either orally or in writing, before the entry of a plea.<sup>191</sup> As mentioned earlier, the majority of criminal cases result in a plea rather than a trial. For instance, in 2006, 332 cases were filed with the Special Assault Unit, the subdivision of the King County Prosecuting Attorney's Office that prosecutes sexual assault and crimes involving child victims.<sup>192</sup> Of these cases, only seventy-four ended in a trial, which means that 77 percent of these cases were resolved without trial.<sup>193</sup> Cases resolved without trial include cases that are dismissed, cases in which the defendant pleads as charged, or cases where the prosecutors negotiate a plea.<sup>194</sup> Therefore, as many as 258 cases in King County were resolved without trial. Hypothetically, even if only 5 percent of those cases were the result of Alford pleas, as many as thirteen victims in King County that year may have been deprived of the emotional and psychological healing that begins when a defendant acknowledges the acts that he committed.

Some victims may object to the prosecutor reducing the charged crime as part of the plea bargain and, thus, may favor going to trial.<sup>195</sup> Because the trial experience can be emotionally taxing, other victims may prefer the

prosecutor to make a plea bargain with a defendant.<sup>196</sup> Victims usually must testify in open court to the public, where spectators may be in the courtroom for various reasons: waiting for their turn for other official court business, watching the trial in support of the defendant, or watching the trial as an interested member of the public.<sup>197</sup> The process of testifying means the victim must relive the rape or molestation numerous times—at interviews, at pre-trial hearings, and in court.<sup>198</sup> The victim must relive the experience by explaining it to a group of strangers every time she testifies.<sup>199</sup> Ann Wolbert Burgess and Lynda Lytle Holmstrom, experts in the field of sexual assault, explain, “The court process recapitulates, in a psychological manner, the original rape situation.”<sup>200</sup> Additionally, victims report reliving the rape as they mentally prepare for trial.<sup>201</sup> As one victim described, “Going to court frightens me. I’ve been reliving the rape to have it straight . . . I want to be mentally prepared so as not to stammer and to have an answer ready.”<sup>202</sup> Furthermore, a victim must endure cross-examination, which often causes a person to feel like she is the one on trial.<sup>203</sup>

Many victims describe the period of time during which the criminal proceedings take place as though time was suspended.<sup>204</sup> Before the trial concludes, some victims must constantly relive the rape or molestation and thus can easily become so preoccupied with what has happened that she is not really living.<sup>205</sup> Some describe this period as “treading water” until the ordeal is over.<sup>206</sup> “I’m so relieved it’s over,” one victim described, “[i]t was the worst five months I’ve had in my life. . . . It’s like taking a big millstone off from around my neck.”<sup>207</sup> As another victim described: “I can’t think of anything else except the trial. It’s on my mind all the time. It’s pushed all my other problems aside.”<sup>208</sup>

Consequently, an important step in a victim’s recovery process comes when the case is finally resolved. The outcome of the trial can affect a victim in a variety of ways, and a guilty verdict may be as difficult as a not-guilty verdict. Some contend, however, that whatever the verdict, the

victim always loses.<sup>209</sup> If the defendant is found not guilty, victims may experience an array of feelings including embarrassment that the jury did not believe their version of the story, fear the defendant may do something to them, shock that the defendant was acquitted, and disbelief that the defendant will not be punished.<sup>210</sup> Although one would expect a victim to experience joy and relief when a jury convicts the defendant, many victims report feeling dissatisfied or ambivalent about a guilty verdict.<sup>211</sup> Some victims report feeling sorry for the defendant or worried that the defendant needs help rather than prison.<sup>212</sup> As one victim described:

I don't think he deserved what he got. . . . He needs help and he sure won't get it at Walpole. . . . I felt sorry for him. He looked so pathetic. What he did was wrong. They said he was on drugs. Having the gun and all was wrong. But I don't think jail will help him. . . . I hope it isn't too tough on the guy, I hate to see people punished.<sup>213</sup>

Additionally, receiving a guilty verdict does not necessarily alleviate a victim's fear about the defendant: "I have fear that when he does get out of prison he might try and get back at me. There were friends of his at the trial and I still wonder if they will try to do something—get revenge in some way."<sup>214</sup>

Despite fear and anxiety, some victims do report positive feelings about news of a conviction, although, perhaps surprisingly, only a minority.<sup>215</sup> For example, one victim explained in an interview:

VICTIM: It was a victory.

INTERVIEWER: How do you feel about his going to prison?

VICTIM: Good—the best place for him. Wish it was for longer. He's just an animal. Nothing could help him. But he's off the street now.

INTERVIEWER: How did you feel about seeing the offender?

VICTIM: I knew my position. Now *I* had the upper hand. . . . He felt like I did [before]. The tables were turned.<sup>216</sup>



For the victim, a verdict—whether guilty or not-guilty—does not come easily. Although the victim may have a greater chance of experiencing positive feelings from a guilty verdict, it does not necessarily serve as an adequate resolution of the experience.<sup>217</sup> However, when a defendant enters an Alford plea, the victim is deprived of the chance to receive either acknowledgment of wrongdoing by the defendant or a guilty verdict by the jury, and is only left with the court's entry of a guilty verdict.<sup>218</sup> Therefore, an emphasis on the sense of acknowledgment a victim receives is an important aspect of the victim's recovery process and should be factored into the plea bargaining process.

#### *E. Alford Pleas in Sexual Assault Cases*

Although Alford pleas are familiar and commonly used in Washington State, they pose particular challenges in sexual assault cases because convictions for Alford pleas may be overturned if the victim recants. Victims may be more likely to feel pressure to recant in these cases because in the vast majority, the victim and defendant have a personal relationship.<sup>219</sup> Because a personal relationship exists, the defendant may garner support from people close to the victim. For these people, it is often easier to believe the defendant's claim that he is innocent (particularly in cases involving family members) rather than face the reality that the sexual assault was occurring and they did not realize it or do anything to stop it.

Convictions for Alford pleas may be overturned if the victim recants because the factual basis for the plea is often based primarily (or only) on a victim's testimony. The large majority of sexual offense cases involve only the defendant's word against that of the victim, who may be a small child, a family member, or someone else over whom the defendant wields considerable control, such as a girlfriend or a wife.<sup>220</sup> Because a court must find a factual basis other than the defendant's admission of guilt in order to accept an Alford plea, the basis may rest solely on the *victim's* account of

the assault. Therefore, if the victim ever recants, the conviction may be overturned or revoked.<sup>221</sup>

The vast majority of sexual offenses are one-on-one encounters with little or no physical evidence.<sup>222</sup> Often no evidence exists other than the statement of the individual victim.<sup>223</sup> For instance, if a child was molested by her neighbor, the prosecutor's primary evidence may be the girl's description of the incident and the defense's only evidence may be the defendant's testimony that he did not commit the offense. In the absence of witness testimony, and in the absence of physical evidence of harm inflicted on the child, all that would be left are the victim's and the defendant's contradictory claims. As Allen explains, proving "[a] sexual assault case falls on the credibility of the victim."<sup>224</sup>

Allen also points out that sexual assault is unique because in the vast majority of cases, the defendant has a relationship with the victim, whether it be a friend, a family member, pastor, or a neighbor.<sup>225</sup> When such a relationship exists, people close to the defendant and victim tend to take sides.<sup>226</sup> The closer the relationship between the victim and the defendant (for example, between a parent and a child), the more taking sides occurs among people close to the situation, such as friends and family.<sup>227</sup> The defendant may complain that he was railroaded into entering a guilty plea, a complaint that friends and family accept more easily than the reality that the sexual assault was occurring.<sup>228</sup>

In cases where the victim and defendant are family members, where certain family members support the defendant, victims also may be influenced by guilt or pressure to recant in order to spare the defendant from jail.<sup>229</sup> Victim advocate Keri Newport describes one such situation in which the defendant was the boyfriend of the victims' mother. Newport said, "When [the defendant] took the Alford plea, it confirmed to the . . . mother of [the] victim that the system had railroaded her beloved partner and her devotion to him grew, because he was so noble as to not put [her child] through the trial process even though the system was unfair to him."<sup>230</sup>

Allen explains, “Parents often don’t want to believe what happened, so they let the system dictate. . . . Because of the relationship, acknowledgment becomes so much more important.”<sup>231</sup> The dynamic of sexual offenses depends on using deception to cultivate a relationship with the victim—and the opposite of deception is honesty.<sup>232</sup> Until the defendant is honest with the victim and others involved, a victim cannot begin to rebuild.<sup>233</sup> As Allen points out, “Alford pleas enable offenders to continue the deception and manipulation.”<sup>234</sup>

#### IV. ALFORD IN THE REAL WORLD

The Alford plea has both positive and negative consequences for victims of sexual assault. On the one hand, taking an Alford plea provides a resolution to the case without requiring the victim to relive the experience through testifying. A defendant also may be more likely to take the plea if he does not have to admit guilt, particularly in a sex crime. On the other hand, upon further examination, these reasons do not outweigh the value to a victim of hearing a defendant acknowledge his guilt. When a defendant does not acknowledge his guilt, a victim is left with only her own knowledge of what she suffered because the defendant does not take responsibility for the crime. The victim and society do not receive the benefit of the defendant acknowledging his actions. For this and other reasons, some prosecutors in Washington, and the King County Prosecuting Attorney’s Office in particular, have begun discouraging Alford pleas in cases involving sexual assault or molestation.<sup>235</sup>

##### *A. Pro-Alford: Reasons to Use an Alford Plea*

As noted, Alford pleas appear to be a useful tool in some criminal cases. Alford pleas provide an efficient mechanism for prosecutors to dispose of cases, saving them time, and the state money, by avoiding trial. With an Alford plea, the defendant may receive a reduced sentence, and the victim is spared the aforementioned pain of trial. Certain prosecutor’s offices may

even encourage taking Alford pleas to lighten caseloads, particularly those offices concerned more with minimizing costs than with ensuring victims' rights or with protecting the integrity of the system. This type of prosecutor's office may encourage its deputies to take the plea—it increases the office's statistics for finding defendants guilty, while minimizing the drain on the office's resources. Further, as a policy matter, the office could gain the benefit of a guilty plea with less time and cost than if deputies proceeded to trial. For individual prosecutors, too, the considerations may be similar. A guilty plea means one more case removed from a prosecutor's busy caseload, which means more time and energy to focus on her many other cases.<sup>236</sup>

Additionally, and more validly, prosecutors may advocate for taking an Alford plea because a defendant may be more likely to plead guilty without having to admit guilt. This benefits prosecutors because they may obtain a conviction without the possibility that a jury may acquit the defendant. It also benefits defendants because they can still maintain their innocence, which is particularly appealing in sex crimes where there is a high social stigma attached to the crime.

Furthermore, similar to a guilty plea, an Alford plea is often admissible in a subsequent criminal case against the defendant.<sup>237</sup> An Alford plea and related statements are not objectionable as hearsay when offered against the defendant in a later proceeding,<sup>238</sup> but rather are admissible against the defendant as admissions by a party opponent.<sup>239</sup> In *State v. Price*, a Washington court found that an Alford plea and related statements in domestic violence cases were admissible as an admission of guilt in a later prosecution for the murder of the same victim.<sup>240</sup>

An Alford plea does not normally have collateral estoppel effect in a later case.<sup>241</sup> For example, an Alford plea made by the defendant in a criminal case would not preclude the victim from bringing a civil suit against the defendant. In *Clark v. Baines*, the Washington Supreme Court found that a caregiver's Alford plea to assault with sexual motivation did not have

collateral estoppel effect.<sup>242</sup> Therefore, the caregiver was not precluded from litigating the probable cause element of the malicious prosecution claim that he filed in response to the civil action against him.<sup>243</sup> In the criminal proceedings, the caregiver did not have the opportunity to fully litigate the issues.<sup>244</sup> Giving the Alford plea preclusive effect in a subsequent civil action would have worked an injustice against the caregiver because he would not have had the opportunity to pursue his claim.<sup>245</sup>

As stated earlier, the Alford plea also may be preferable to some victims who wish to avoid the trauma of testifying or who want the criminal process wrapped up as quickly and efficiently as possible.<sup>246</sup>

#### *B. Anti-Alford: Why the Alford Plea Should Be Avoided*

While an Alford plea may offer benefits in certain situations, the King County Prosecuting Attorney's Office has shifted away from taking Alford pleas in sexual assault cases, both out of concern for victims and due to practical concerns that a defendant's conviction based on an Alford plea will be overturned.<sup>247</sup> As discussed earlier, a court cannot enter judgment unless it is satisfied that a factual basis exists for the plea.<sup>248</sup> In establishing a factual basis for the plea, the judge must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information."<sup>249</sup> In most instances, the defendant's statement provides the court with a factual basis, but a factual basis must be established from other sources if the defendant enters an Alford plea.<sup>250</sup>

When a victim's testimony alone establishes the factual basis, the defendant may withdraw the plea if the victim recants.<sup>251</sup> *State v. D.T.M.*, for instance, illustrates how a court can overturn an Alford plea when a victim recants.<sup>252</sup> In this Washington case, the defendant's nine-and-a-half-year-old stepdaughter told a neighbor her stepfather had tried to rape her.<sup>253</sup> The police and the Department of Social and Health Services investigated, and D.T.M. was charged with first-degree child rape and first-degree child

molestation.<sup>254</sup> The court accepted the defendant's Alford plea to the charge of first-degree child molestation, which he entered in order to take advantage of the State's agreement to dismiss the charge of first-degree rape.<sup>255</sup> A few days after the defendant entered the plea, the child told her mother and a friend of her mother's that she made up the allegations against her stepfather.<sup>256</sup> They then told the defendant's attorney and a paralegal in the law office that the child had fabricated the sexual abuse allegations against her stepfather because she was mad at him and wanted to get him in trouble.<sup>257</sup> The child said she had gotten the idea of accusing him of rape from a television movie.<sup>258</sup> The defendant then moved to withdraw his guilty plea, but the court denied the motion because it determined the recantations did not meet the standard required for newly discovered evidence to grant a new trial.<sup>259</sup> The defendant appealed the decision,<sup>260</sup> and the court of appeals reversed the trial court's denial of the motion.<sup>261</sup> It determined the recantation was admissible because there was no other factual basis on which to accept the plea.<sup>262</sup>

Conversely, even if the victim recants, a defendant is not entitled to withdraw an Alford plea if other evidence establishes a factual basis for the guilty plea.<sup>263</sup> Though not a sexual assault case, *In re Clements* involved the use of an Alford plea, where the defendant was convicted of residential burglary and fourth-degree assault; but before sentencing, the victim gave a videotaped statement retracting some of her allegations.<sup>264</sup> The victim told police that the defendant had entered her apartment without permission.<sup>265</sup> She reported that she had attempted to end her relationship with the defendant, but he had repeatedly returned to her apartment.<sup>266</sup> According to the victim, the defendant returned to her apartment one day when she was not home, pounded on the door, entered through a window on which she had recently placed new locks, and removed some of her belongings in two book bags.<sup>267</sup> The defendant later returned to the apartment when the victim was home and grabbed her arm, causing some bruising.<sup>268</sup> The victim's fourteen-year-old son was present in the apartment and gave a

statement corroborating much of her account.<sup>269</sup> Before sentencing, the victim contacted the defendant's attorney and told him that she had made up some of the allegations and claimed she had been upset that the defendant had cheated on her.<sup>270</sup>

*In re Clements* also likely illustrates a situation in which the victim recanted in order to protect the defendant. Although the victim recanted, the court concluded the defendant could not withdraw his plea because there was additional unrecanted evidence to support the plea—in particular, evidence that the victim's son called his mother to report that the defendant was banging on the front door, possibly trying to enter the apartment.<sup>271</sup> Additionally, police found one of the victim's book bags in the carport after the defendant was arrested.<sup>272</sup> Therefore, the court distinguished this case from *D.T.M.* because evidence independent from the victim's statement also supported the guilty plea.<sup>273</sup>

Invalidating a conviction based on the victim's recantation is especially likely in sexual assault or molestation cases involving family members because often a victim feels a tremendous amount of pressure to withdraw her claim.<sup>274</sup> As discussed in the previous section, this pressure may come from other relatives who believe and support the defendant.<sup>275</sup> Often in sexual assault cases involving family members, people within the family cannot face the possibility that their close relative committed a sexual assault—it is easier to believe the victim is not telling the truth.<sup>276</sup> Family members may feel convinced that the defendant is innocent and may make the victim feel guilty about sending the defendant to jail. In some situations, pressure may come from threats or harassment from the defendant's friends or family.<sup>277</sup> The pressure also may be inadvertent; for instance, if a child sees the financial and emotional hardship she has wrought on her family for exposing her father's molestation, she may feel pressure to recant.<sup>278</sup> Finally, if family members believe they can handle a defendant's "problems" within the family, they may convince the victim to withdraw her accusations in order to bring the defendant home.

In addition, some prosecutors (as well as defense attorneys) refuse to accept Alford pleas because they make defendants ineligible for any sort of treatment program<sup>279</sup> aimed at defendants who have been convicted of sex crimes. In Washington, this treatment comes in the form of a Special Sex Offender Sentencing Alternative (SSOSA), which allows outpatient community treatment for adult felony sex offenders who qualify for the program.<sup>280</sup> In Washington, there is no statutory prohibition preventing Alford defendants from receiving a SSOSA, but a trial court would likely not ever grant an Alford plea defendant a SSOSA because the program explicitly requires that the defendant admit to the offense.<sup>281</sup> As Brian Holmgren writes, on behalf of the American Prosecutors Research Institute, “[o]ffenders who maintain their innocence or Alford type pleas are not appropriate candidates for treatment programs. Good treatment programs require complete admissions to the index offense, and many require acknowledgment of other offense behavior, including conduct that has previously been undisclosed.”<sup>282</sup> Although no data exists on how many offenders request SSOSAs and are denied the option by the court,<sup>283</sup> a study on the effectiveness of SSOSA found that defendants who admit their offense and appear more stable are more likely to remain in the community and enter treatment, and thus less likely to reoffend.<sup>284</sup> Because a defendant may not be eligible for a treatment program after making an Alford plea,<sup>285</sup> the plea impedes the healing process for the defendant as well as the public at large.

#### V. ACKNOWLEDGMENT AS THE UNDERPINNING OF POLICIES THAT DISCOURAGE ALFORD PLEAS IN SEXUAL OFFENSE CASES

In order to provide the most effective redress for victims of sexual offenses while allowing adequate flexibility, prosecutors’ offices in Washington State should follow the model of King County and implement policies that discourage prosecutors from accepting Alford pleas in plea negotiations for sexual offense cases. Although Alford pleas should be



avoided in sexual offense cases, strict solutions such as a statutory ban on the plea would be too rigid and would not allow prosecutors to use the plea in the rare case where it is appropriate. Instead, if individual prosecuting attorney's offices implement policies generally prohibiting Alford pleas in plea negotiations, they support victims while maintaining discretion for individual cases.

Recently, the King County Prosecuting Attorney's Office enacted a policy that prohibits taking Alford pleas when negotiating pleas in sexual offenses, except in cases where the plea may be a better option.<sup>286</sup> (However, when a defendant pleads guilty as charged, there likely is little a prosecutor can do to prevent him from entering an Alford plea.<sup>287</sup>) The rationale for King County's policy against Alford pleas is based both on the practical concern of a court acquitting the defendant if the victim recants and on the value of the defendant acknowledging the harm caused to the victim.<sup>288</sup> In general, an exception to allow an Alford plea may be made on rare occasions where a factual basis for the guilty plea existed even without the victim's testimony, where the defendant is absolutely unwilling to take a straight plea, or where the victim prefers the Alford plea over testifying in court.<sup>289</sup> Formulating the policy as a guideline rather than a rule allows flexibility for these situations. For instance, if a defendant absolutely refused a straight plea, and other evidence ensured the finality of the plea even if the victim recanted, an exception might be made.<sup>290</sup>

By implementing this baseline rejection of the Alford plea, prosecutors will affirm their commitment to victims' rights. When a prosecutor rejects an Alford plea in plea bargaining negotiations, the defendant may admit his guilt, and a victim finally has the opportunity to receive the acknowledgment that has become essential to her healing, as evidenced through truth commissions and other similar procedures in international human rights law. As Nagel points out, the difference between knowledge and acknowledgment is vital for victims.<sup>291</sup> Only when a victim's knowledge "is made part of the public cognitive scene" does the victim's

knowledge become sanctioned.<sup>292</sup> For some victims, a sense of acknowledgment may come from a guilty verdict at trial. However, as Allen explains, “Even if [Alford defendants] take the consequence, they’re not taking responsibility.”<sup>293</sup> Until the defendant takes responsibility, the victim and the public never receive the sense of closure and validation that comes when the defendant admits his guilt.

This sense of acknowledgment is critical for a victim’s recovery process. For some victims, “more important than the legal case is to hear them say they did it and they’re sorry,” says Allen.<sup>294</sup> “So often, that’s all they want to hear.”<sup>295</sup> Newport also recollects such situations: “A few other [victims] I’ve worked with were horrified that the Alford plea was an option and that [the defendant] took it. They felt he ‘got away with it’ because of the denial involved in the plea.”<sup>296</sup> Newport further explained the psychology: “They wanted him to have to admit to everyone in the courtroom, all his supporters, the attorneys, the judge and to the victim, that he really did commit the crime.”<sup>297</sup> Newport contends, “With the strong feeling victims have that no one will believe them, the Alford plea does nothing to help them feel they were heard and believed.”<sup>298</sup>

Berliner, whose study on the prevalence of sexual assault in Washington was referenced earlier, points out that the principle that a sexual assault victim would rather hear her offender admit guilt than not is a principle so basic it almost goes without saying.<sup>299</sup> Still, Berliner emphasizes that in counseling a victim of a sexual offense, she is careful to prioritize recovery based on the victim’s own internal feelings, instead of the victim’s reactions to the defendant’s behavior such as admitting or denying his guilt.<sup>300</sup> “Ultimately victims cannot get what they really want from the criminal justice system in most cases because what they would like is for [the] offender to genuinely appreciate the wrong and harm of what they have done and be sorry,” asserts Berliner, and “[t]his just about never happens.”<sup>301</sup> This, she says, is why she focuses a victim on attaining her own sense of justice from within herself rather than putting her recovery in

the hands of the criminal justice system or on the defendant.<sup>302</sup> But while a victim's recovery process ultimately must come from within herself, for many victims a prosecutor's choice to take an Alford plea creates a difficult roadblock in this process.<sup>303</sup>

In addition, pleas without confessions "muddy the criminal law's moral message," as Stephanos Bibas indicates.<sup>304</sup> Although scholars such as Bibas have not used the same acknowledgment language as international human rights scholars have used, the message is much the same. Bibas writes:

[Alford pleas] permit equivocation and ambiguity when clarity is essential. This equivocation, in turn, undermines denunciation of the defendant and vindication of the victim and the community's moral norms. Sacrificing these substantive goals is too high a price for an efficient plea procedure. Procedures that undercut substance have little point, as the point of procedure is to serve substance. Yet substantive values for the most part are not even on the proceduralists' radar screens. Thus, guilty pleas should be reserved for those who confess.<sup>305</sup>

By implementing policies against Alford pleas, such as King County's approach, prosecutors affirm their commitment to the long-term goals of victim recovery, defendant rehabilitation, and community well-being. While the Alford plea can provide some relief to a victim who does not want to testify, prosecutors who do not follow this model risk encouraging the pleas as an efficient means for a busy prosecutor to resolve a case and clear a file from her caseload. If prosecutors put into practice more procedures meant to foster the defendant's acknowledgment of the crime he committed, the legal system will take an important step toward realizing the same commitment to victims' rights that underpins international human rights law—that is, a step toward satisfying victims' "thirst for accountability."<sup>306</sup> By instituting policies that discourage accepting Alford pleas whenever possible, prosecutors will encourage defendants to acknowledge the harm they inflicted both on the individual victim and on society.

## VI. CONCLUSION

Although Alford pleas may be appropriate in certain cases, they often do not provide long-term solutions when used in sexual offense cases. A court may vacate a guilty plea if the victim later recants. Many Alford pleas are based solely on the victim's report of the crime, so if a victim recants because of the natural feelings of guilt associated with sexual assault, pressure from family members, or pressure from the defendant himself, the recantation jeopardizes the conviction. Further, Alford pleas not only prevent victims from gaining acknowledgment of the crime they suffered, but also prevent defendants from receiving treatment. For these reasons, the victim and society do not receive the important acknowledgment that occurs when a defendant admits guilt. Therefore, prosecutors should implement policies against taking Alford pleas in sexual offense cases whenever feasible.

The question of whether Alford pleas are appropriate in sexual offense cases should be evaluated by examining both the purpose of making a plea bargain and the plea bargain's effect on the victim and on society. Alford pleas in sexual offense cases prevent victims from obtaining the closure that occurs when a defendant acknowledges that he harmed the victim. When a defendant enters a guilty plea while still maintaining his innocence, he remains in power, thus never allowing the victim and society to fully recover because the defendant never fully accounts for the crime.

A critical social justice connection exists between the concept of acknowledgment in the international context and in sexual assault cases in our country: repairing the truth and equality that is lost when a victim suffers harm. The importance of acknowledgment has been emphasized in international human rights law and put into practice in international courts and truth commissions. In these forums, a victim's experience is publicly acknowledged. These same values and procedures that emphasize the role victims have in the justice process should be recognized and respected domestically as well. While a victim might find a certain solace in knowing

the “truth,” real justice, for the victim and for society, does not occur until a defendant acknowledges the crime that he committed.

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<sup>2</sup> William Calathes, *Salvadoran Amnesty: Criminology and the Development of a “Just” Justice System*, Paper Presented at the First International Conference of Jurists Sponsored by the Salvadoran Institute of Legal Studies in San Salvador, El Salvador, 7–8 (Dec. 7–9, 1990), quoted in John J. Moore, Jr., Note, *Problems with Forgiveness: Granting Amnesty Under the Arias Plan in Nicaragua and El Salvador*, 43 STAN. L. REV. 763, 771 n.185 (1991).

<sup>3</sup> Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 607 (1994) [hereinafter Hayner, *Fifteen Truth Commissions*].

<sup>4</sup> Throughout this article, I use the pronoun *he* to refer to the defendant or offender and the pronoun *she* to refer to the victim of sexual assault. I do not mean to indicate that all sex offenders are male or that all victims are female. While some sex offenses are committed by women, particularly against children, the vast majority of sex offenders are male. See, e.g., ROB FREEMAN-LONGO, CTR. FOR SEX OFFENDER MGMT., U.S. DEP’T OF JUSTICE, MYTHS AND FACTS ABOUT SEX OFFENDERS (Aug. 2000), <http://www.csom.org/pubs/mythsfacts.html>. Likewise, although some victims of sex offenses are men, the vast majority of victims of sexual assault are female. See, e.g., CRIME STATISTICS UNIT, TENN. BUREAU OF INVESTIGATION, SEX OFFENSE RESEARCH BRIEF 5 (Aug. 2006), [http://www.tbi.state.tn.us/Info%20Systems%20Div/TIBRS\\_unit/Publications/Sex%20Offenses%20Study.pdf](http://www.tbi.state.tn.us/Info%20Systems%20Div/TIBRS_unit/Publications/Sex%20Offenses%20Study.pdf). These gender statistics may be different for child victims, but I chose to keep the pronouns uniform in order to make the article easier to read.

<sup>5</sup> Hayner, *Fifteen Truth Commissions*, *supra* note 3, at 607.

<sup>6</sup> *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

<sup>7</sup> As much as possible in this article, I have tried to acknowledge that every sexual assault victim is different, and that no one victim has the same experience recovering from sexual assault. However, for the purpose of clarity, I have made certain generalizations in this article regarding how victims react to sexual assault.

<sup>8</sup> See PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS 26 (2002) [hereinafter HAYNER, UNSPEAKABLE TRUTHS]; Terence S. Coonan, *Rescuing History: Legal and Theological Reflections on the Task of Making Former Torturers Accountable*, 20 FORDHAM INT’L L.J. 512, 548 n.229 (citing STATE CRIMES: PUNISHMENT OR PARDON 93 (The Aspen Inst. ed., 1989)); Hayner, *Fifteen Truth Commissions*, *supra* note 3, at 599; Gerald J. Mekjian & Mathew C. Varughese,

*Hearing the Victim's Voice: Analysis of Victim's Advocate Participation in the Trial Proceeding of the International Criminal Court*, 17 PACE INT'L L. REV. 1, 8 (2005); Calathes, *supra* note 2.

<sup>9</sup> Coonan, *supra* note 8, at n.229 (citing STATE CRIMES: PUNISHMENT OR PARDON 93 (The Aspen Institute ed., 1989)).

<sup>10</sup> Karl Hanson, *The Psychological Impact of Sexual Assault on Women and Children: A Review*, 3 SEXUAL ABUSE: J. RES. & TREATMENT 187 (1990).

<sup>11</sup> Interview with Megan Allen, Legal Advocacy Manager, King County Sexual Assault Res. Ctr., in Renton, Wash. (Feb. 2, 2007).

<sup>12</sup> ROB HALL, RAPE IN AMERICA 17 (1995) (citing T.W. MCCAHERN ET AL., THE AFTERMATH OF RAPE (1979)).

<sup>13</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 361 (1978).

<sup>14</sup> Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 717 (2006).

<sup>15</sup> *Bordenkircher*, 434 U.S. at 361.

<sup>16</sup> G. NICHOLAS HERMAN, PLEA BARGAINING 5 (1997).

<sup>17</sup> Ross, *supra* note 14, at 717.

<sup>18</sup> *Id.* at 719.

<sup>19</sup> FED. R. CRIM. P. 11(d).

<sup>20</sup> HERMAN, *supra* note 16, at 2.

<sup>21</sup> *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 37–38.

<sup>24</sup> *Id.* at 38.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 26–27.

<sup>27</sup> Peg Schultz, Comment, *The Alford Plea in Juvenile Court*, OHIO N.U. L. REV. 187, 187–88 (2006) (citing 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, 994–95 (1976)).

<sup>28</sup> *Alford*, 400 U.S. at 28.

<sup>29</sup> *Id.* at 27.

<sup>30</sup> *Id.* at 28.

<sup>31</sup> *Id.* at 28 n.2.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 31.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 38.

<sup>37</sup> *Id.* at 37–38.

<sup>38</sup> *Id.* at 38.

<sup>39</sup> *Id.* at 38 n.11.

<sup>40</sup> *Id.* at 25.

<sup>41</sup> Warren Moise, *Sailing Between the Scilla and Charybdis: Nolo Contendere and Alford Pleas*, S.C. LAW., May 17, 2006, at 10 (citing F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 517 (2d ed. 1909)).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> FED. R. CRIM. P. 11(a)(2)–(3); HERMAN, *supra* note 16, at 125.

<sup>45</sup> Stephanos Bilbas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1373 (2003).

<sup>46</sup> *Id.* *But see* 5 KARL B. TEGLAND, *WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE*, § 410.4 (4th ed. 2006) (stating that Washington law is unsettled as to whether the defendant's Alford plea is admissible in a civil suit).

<sup>47</sup> Bilbas, *supra* note 45.

<sup>48</sup> *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

<sup>49</sup> Bilbas, *supra* note 45, at 1372 n.52.

<sup>50</sup> ROYCE A. FERGUSON, 12 *WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE, WITH FORMS* § 1110 (2d ed.).

<sup>51</sup> *State v. Ehli*, 62 P.3d 929, 932 (Wash. Ct. App. 2003).

<sup>52</sup> *State v. Newton*, 552 P.2d 682, 686 (Wash. 1976).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 683.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 684.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 686.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 686.

<sup>68</sup> *State v. Talley*, 949 P.2d 358, 362 (Wash. 1998); *State v. Ehli*, 62 P.3d 929, 932 (Wash. Ct. App. 2003); *State v. Paul*, 12 P.3d 1036, 1037 n.2 (Wash. Ct. App. 2000).

<sup>69</sup> Hayner, *Fifteen Truth Commissions*, *supra* note 3, at 607; *see also* Interview with Megan Allen, *supra* note 11.

<sup>70</sup> Hayner, *Fifteen Truth Commissions*, *supra* note 3, at 599.

<sup>71</sup> Mekjian & Varughese, *supra* note 8, at 11 (citing CHERIF M. BASSIOUNI, *POST-CONFLICT JUSTICE* 58 (2002)).

<sup>72</sup> BETH VAN SCHAACK & RONALD SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT* 26 (2007).

<sup>73</sup> Mekjian & Varughese, *supra* note 8, at 8 (citing Raquel Aldana-Pendell et al., *In Vindication of Justiciable Victim's Rights to Truth and Justice for State Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399, 1403–04 (2002)).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 11 (citing CHERIF M. BASSIOUNI, POST-CONFLICT JUSTICE 58 (2002)).

<sup>77</sup> *Id.* at 15.

<sup>78</sup> Jerry Fowler, *The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations*, HUM. RTS. BRIEF, Fall 1998, at 1, reprinted in SCHAACK & SLYE, *supra* note 72, at 65.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Mekjian & Varughese, *supra* note 8, at 20.

<sup>82</sup> John Bolton, *Speech Two: Reject and Oppose the International Criminal Court*, in TOWARD AN INTERNATIONAL CRIMINAL COURT? 37 (Alton Frye ed., 1999), reprinted in SCHAACK & SLYE, *supra* note 72, at 76. Notably, the United States is not a signatory to the ICC. Until recent years, the United States actively endorsed international criminal justice and supported establishing a permanent criminal court. The United States signed the treaty that created the ICC in the waning days of the Clinton administration, but the Bush administration has been characterized as having “active opposition” to the ICC. In fact, the Bush administration made the unprecedented move of “unsigned” the treaty in May 2002 for many of the reasons set out in the text. The United States opposed the treaty because it was concerned the ICC would exercise authority over any conduct that occurred in a state that had accepted the ICC’s jurisdiction. SCHAACK & SLYE, *supra* note 72, at 75.

<sup>83</sup> Bolton, *supra* note 82.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Colm Campbell, *Peace and the Laws of War: The Role of International Humanitarian Law in the Post-conflict Environment*, 839 INT'L REV. RED CROSS 627 (2000) [hereinafter Campbell, *Peace*].

<sup>88</sup> *Id.*

<sup>89</sup> Hayner, *Fifteen Truth Commissions*, *supra* note 3, at 599.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 604.

<sup>92</sup> *Id.*

<sup>93</sup> Campbell, *Peace*, *supra* note 87, at 627–51.

<sup>94</sup> *Id.*; see also MARTHA MINOW, BREAKING THE CYCLES OF HATRED 15 (2002) (emphasizing that the search for a mode of response is “profoundly doomed” because no response can be adequate when faced with the atrocities of mass violence).

<sup>95</sup> Coonan, *supra* note 8.

<sup>96</sup> Calathes, *supra* note 2.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*



- <sup>99</sup> Hayner, *Fifteen Truth Commissions*, *supra* note 3, at 607.
- <sup>100</sup> *Id.*
- <sup>101</sup> *Id.* at 607–08.
- <sup>102</sup> HAYNER, UNSPEAKABLE TRUTHS, *supra* note 8, at 26.
- <sup>103</sup> *Id.*
- <sup>104</sup> *Id.*
- <sup>105</sup> *Id.* (citing Discurso de S.E. el Presidente de la Republica, Don Patricio Aylwin Azocar, al dar a Conocer a la Ciudadania el Informe de la Comisión de Verdad y Reconciliación, (Mar. 4, 1991), published in English as *Statement by President Aylwin on the Report of the National Commission on Truth and Reconciliation*, in 3 TRANSITIONAL JUSTICE 169 (Neil Kritz ed., 1995)).
- <sup>106</sup> *Id.*
- <sup>107</sup> *Id.* (citing Juan Méndez, *Review of A Miracle, a Universe*, by Lawrence Weschler, 8 N.Y.L. SCH. J. HUM. RTS. 577, 583–84 (1991)).
- <sup>108</sup> *Id.*
- <sup>109</sup> Interview with Megan Allen, *supra* note 11.
- <sup>110</sup> HAYNER, UNSPEAKABLE TRUTHS, *supra* note 8, at 26.
- <sup>111</sup> *Id.*
- <sup>112</sup> *Id.* (citing Telephone Interview by Priscilla Hayner with Aryeh Neier, President, Open Society Institute (July 31, 1996)).
- <sup>113</sup> Interview with Megan Allen, *supra* note 11.
- <sup>114</sup> *Id.*
- <sup>115</sup> *Id.*
- <sup>116</sup> HAYNER, UNSPEAKABLE TRUTHS, *supra* note 8, at 28.
- <sup>117</sup> *Id.*
- <sup>118</sup> *Id.*
- <sup>119</sup> *Id.*
- <sup>120</sup> *Id.*
- <sup>121</sup> *Id.*
- <sup>122</sup> *Id.*
- <sup>123</sup> *Id.* at 30–31.
- <sup>124</sup> *Id.* at 31.
- <sup>125</sup> WASH. PRAC., CRIMINAL LAW, § 2401.
- <sup>126</sup> *Id.*
- <sup>127</sup> WASH. REV. CODE §§ 9A.44.040(1), 9A.44.050(1), 9A.44.060(1) (2007).
- <sup>128</sup> *Id.* § 9A.44.100(1).
- <sup>129</sup> *Id.* § 9A.64.020.
- <sup>130</sup> *Id.* §§ 9A.44.040(1), 9A.44.050(1), 9A.44.060(1).
- <sup>131</sup> WASHINGTON PRACTICE: CRIMINAL LAW, § 2402.
- <sup>132</sup> *Id.*
- <sup>133</sup> WASHINGTON PRACTICE: CRIMINAL LAW, § 2403.
- <sup>134</sup> LUCY BERLINER, SEXUAL ASSAULT EXPERIENCES AND PERCEPTIONS OF COMMUNITY RESPONSE TO SEXUAL ASSAULT: A SURVEY OF WASHINGTON STATE WOMEN 10 (2001).

<sup>135</sup> *Id.* The study was supported by the Office of Victims Advocacy and the Washington State Office of Community Development.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* Numbers do not total because of multiple victimization experiences.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* The study did not inquire about the reasons victims' experiences with police were not helpful, so it is not possible to know whether these findings reflect how they were treated or because there was an unsatisfactory outcome.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> HALL, *supra* note 12.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 17–18.

<sup>155</sup> KING COUNTY PROSECUTING ATTORNEY, OFFICE OVERVIEW, CRIMINAL DIVISION (Apr. 12, 2001), <http://www.metrokc.gov/proatty/overview/criminal.htm>.

<sup>156</sup> *Id.*

<sup>157</sup> HALL, *supra* note 12, at 19.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 20.

<sup>160</sup> See Children's Response Center, <http://www.childrensresponsecenter.org/> (last visited Mar. 22, 2008); Harborview Center for Sexual Assault and Traumatic Stress, <http://depts.washington.edu/hcsats/index.htm> (last visited Mar. 22, 2008); King County Sexual Assault Resource Center, <http://www.kcsarc.org/about.htm> (last visited Apr. 10, 2008); Seattle Police Department Domestic Violence Victim Advocacy, <http://www.seattle.gov/police/prevention/DV/dvactions.htm> (last visited Mar. 22, 2008).

<sup>161</sup> King County Sexual Assault Resource Center, *supra* note 160.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> King County Sexual Assault Resource Center, Services and Resources for Victims, [http://www.kcsarc.org/Victim\\_resources.htm](http://www.kcsarc.org/Victim_resources.htm) (last visited Mar. 22, 2008).

<sup>165</sup> *Id.*

<sup>166</sup> Rebecca Campbell, *Rape Survivors' Experiences With the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?*, 12 VIOLENCE AGAINST WOMEN 30, 30–31 (2006) [hereinafter Campbell, *Rape Survivors' Experiences*].

<sup>167</sup> *Id.* at 31.

<sup>168</sup> *Id.* (citing Rebecca Campbell et al., *Community Services for Rape Survivors: Enhancing Psychological Well-being or Increasing Trauma?*, 67 J. CONSULTING & CLINICAL PSYCHOL. 847 (1999) [hereinafter Campbell et al., *Community Services*]; Rebecca Campbell et al., *Preventing the "Second Rape": Rape Survivors' Experience with Community Service Providers*, 16 J. INTERPERSONAL VIOLENCE 1239 (2001) [hereinafter Campbell et al., *Preventing the "Second Rape"*]; Rebecca Campbell et al., *The Sexual Assault and Secondary Victimization of Female Veterans: Help-Seeking Experiences in Military and Civilian Social Systems*, 29 PSYCHOL. WOMEN Q. 97 (2005) [hereinafter Campbell et al., *The Sexual Assault*]).

<sup>169</sup> *Id.* (citing Campbell et al., *Community Services*, *supra* note 168; Campbell et al., *The Sexual Assault*, *supra* note 168).

<sup>170</sup> Interview with Megan Allen, *supra* note 11.

<sup>171</sup> *Id.*

<sup>172</sup> Campbell, *Rape Survivors' Experiences*, *supra* note 166, at 31.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Nancy Young, *SANE Programs Reach Midlife*, FOCUS! Winter 2003, at 3.

<sup>177</sup> *Id.*

<sup>178</sup> Mary B. Koss & Karen J Bacher, *Expanding a Community's Justice Response to Sex Crimes Through Advocacy, Prosecutorial, and Public Health Collaboration: Introducing the RESTORE Program*, 19 J. INTERPERSONAL VIOLENCE 1435, 1439 (2004).

<sup>179</sup> HAYNER, UNSPEAKABLE TRUTHS, *supra* note 8.

<sup>180</sup> OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, LEGAL SERIES BULLETIN #7, VICTIM INPUT INTO PLEA AGREEMENTS 1 (Nov. 2002), available at <http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin7/ncj189188.pdf>.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> WASH. REV. CODE § 7.69.030 (2007), amended by 2008 Wash. Legis. Serv. Ch. 286 (West).

<sup>184</sup> *Id.* § 7.69.030(12).

<sup>185</sup> *Id.* § 7.69.030(2).

<sup>186</sup> *Id.* § 7.69.030(6).

<sup>187</sup> *Id.* § 7.69.030(14).

<sup>188</sup> *Id.* § 7.69.030(1).

<sup>189</sup> *Id.* § 7.69.030(10).

<sup>190</sup> KING COUNTY PROSECUTING ATTORNEY, VICTIM ASSISTANCE, CRIME VICTIMS' RIGHTS, <http://www.metrokc.gov/proatty/Victim/Rights.htm> (last visited Mar. 22, 2008).

<sup>191</sup> OFFICE FOR VICTIMS OF CRIME, *supra* note 180.

<sup>192</sup> Interview with Rich Anderson, Senior Deputy Prosecuting Attorney, King County Prosecuting Attorney's Office, in Kent, Wash. (Feb. 13, 2007).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Interview with Megan Allen, *supra* note 11.

<sup>196</sup> *Id.*

<sup>197</sup> ANN WOLBERT BURGESS & LYNDA LYTLE HOLMSTROM, RAPE: CRISIS AND RECOVERY 300 (1979) [hereinafter BURGESS & HOLMSTROM, RAPE].

<sup>198</sup> *Id.* at 303.

<sup>199</sup> *Id.* at 318.

<sup>200</sup> LYNDA LYTLE HOLMSTROM & ANN WOLBERT BURGESS, THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS 232 (1978) [hereinafter HOLMSTROM & BURGESS, VICTIM].

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 224.

<sup>204</sup> *Id.* at 230.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> BURGESS & HOLMSTROM, RAPE, *supra* note 197.

<sup>209</sup> HOLMSTROM & BURGESS, VICTIM, *supra* note 200, at 254.

<sup>210</sup> *Id.* at 255.

<sup>211</sup> *Id.* at 256.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 257.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*; Interview with Megan Allen, *supra* note 11.

<sup>219</sup> Interview with Megan Allen, *supra* note 11.

<sup>220</sup> Interview with Rich Anderson, *supra* note 192.

<sup>221</sup> State v. D.T.M., 896 P.2d 108, 110 (Wash. Ct. App. 1995).

<sup>222</sup> Interview with Rich Anderson, *supra* note 192.

<sup>223</sup> *Id.*

<sup>224</sup> Interview with Megan Allen, *supra* note 11.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Interview with Rich Anderson, *supra* note 192.

<sup>230</sup> E-mail from Keri Newport, Victim Advocate, King County Sexual Assault Resource Center (Jan. 27, 2007) (on file with author).

<sup>231</sup> Interview with Megan Allen, *supra* note 11.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> Interview with Rich Anderson, *supra* note 192.

<sup>236</sup> Although these reasons may not be the norm, particularly in jurisdictions such as King County that encourage deputy prosecutors to obtain a just result in every case, these reasons are sometimes cited in support of the Alford plea's "efficiency." Many

prosecutors offices exist that do not possess King County's same commitment to victims' rights and obtaining a just outcome for the victim and the defendant.

<sup>237</sup> State v. Price, 109 P.3d 27 (Wash. Ct. App. 2005).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Clark v. Baines, 84 P.3d 245 (Wash. 2004).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> Interview with Megan Allen, *supra* note 11.

<sup>247</sup> Interview with Rich Anderson, *supra* note 192.

<sup>248</sup> CrRLJ 4.2(d); *see* State v. Sass, 820 P.2d 505 (Wash. 1991); State v. Newton, 552 P.2d 682, 685 (Wash. 1976).

<sup>249</sup> In re Bratz, 5 P.3d 759, 764 (Wash. Ct. App. 2000); *see* State v. S.M., 996 P.2d 1111 (Wash. Ct. App. 2000).

<sup>250</sup> In re Ness, 855 P.2d 1191 (Wash. Ct. App. 1993).

<sup>251</sup> State v. D.T.M., 220, 896 P.2d 108, 110 (Wash. Ct. App. 1995).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 110.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 109.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 110.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 111.

<sup>262</sup> *Id.*

<sup>263</sup> In re Clements, 106 P.3d 244, 248 (Wash. Ct. App. 2005).

<sup>264</sup> *Id.* at 246.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 247.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 248.

<sup>274</sup> Interview with Rich Anderson, *supra* note 192.

<sup>275</sup> *Id.*

<sup>276</sup> Interview with Megan Allen, *supra* note 11.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> Brian K. Holmgren, *Structuring Charging Decisions, Plea Negotiation and Sentencing Recommendations for Sex Offenders in the Wake of Sexual Predator Statutes*, AM. PROSECUTORS RES. INST., available at [http://www.ndaa.org/publications/newsletters/apri\\_update\\_vol\\_11\\_no\\_5\\_1998.htm](http://www.ndaa.org/publications/newsletters/apri_update_vol_11_no_5_1998.htm).

<sup>280</sup> DENISE KEEGAN, WASH. STATE DEP'T OF CORR., SURVEY OF CRIMINAL JUSTICE PROFESSIONALS: REASONS FOR SPECIAL SEX OFFENDER SENTENCING ALTERNATIVE (SSOSA) SENTENCE REVOCATIONS 4 (2001).

<sup>281</sup> Interview with Rich Anderson, *supra* note 192.

<sup>282</sup> Holmgren, *supra* note 279.

<sup>283</sup> Roxann Lieb & Scott Mason, *Sex Offender Sentencing in Washington State*, 10 FED. SENT'G REP. 85, 3 (1997).

<sup>284</sup> KEEGAN, *supra* note 280.

<sup>285</sup> Holmgren, *supra* note 279.

<sup>286</sup> Interview with Rich Anderson, *supra* note 192.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> Coonan, *supra* note 8.

<sup>292</sup> Campbell, *Peace*, *supra* note 87, at 627–51.

<sup>293</sup> Interview with Megan Allen, *supra* note 11.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> E-mail from Keri Newport, *supra* note 230.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> Interview with Lucy Berliner, Director, Harborview Center for Sexual Assault and Traumatic Stress, in Seattle, Wash. (Feb. 20, 2007).

<sup>300</sup> *Id.*

<sup>301</sup> E-mail from Lucy Berliner, Director, Harborview Center for Sexual Assault and Traumatic Stress (Feb. 9, 2007) (on file with author).

<sup>302</sup> *Id.*

<sup>303</sup> Interview with Lucy Berliner, *supra* note 299.

<sup>304</sup> Bilbas, *supra* note 45, at 1363.

<sup>305</sup> *Id.* at 1364.

<sup>306</sup> Campbell, *Peace*, *supra* note 88.