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## EQUIVOCAL GUILTY PLEAS—SHOULD THEY BE ACCEPTED?

*North Carolina v. Alford*, 91 S. Ct. 160 (1970).

At his arraignment on a felony charge the defendant, when required to plead, states: ". . . Even though I am pleading guilty to that charge, *it is a lie on my part. I am doing so on the advice of counsel.*"[1] Should the trial judge accept such a plea? This question has long been a thorn in the side of the administrators of criminal justice, and courts have come to widely different conclusions. The United States Supreme Court in *North Carolina v. Alford*[2] has added another dimension to the problem, without offering any apparent solution.

Before a federal court may accept any guilty plea, even an unequivocal one, it must determine that the plea is being made voluntarily and intelligently.[3] Further, the court must assure itself that a factual basis for the plea exists.[4] State courts, however, have a lesser obligation to their defendants who unequivo-

1. State v. Stacy, 43 Wash. 2d 358, 360, 261 P.2d 400, 401 (1953) (emphasis by the court).

2. North Carolina v. Alford, 91 S. Ct. 160 (1970). Alford was charged with first-degree murder in a North Carolina court. The prosecutor agreed to accept a plea of guilty to second-degree murder. While pleading guilty to the lesser charge, Alford stated to the court: ". . . I ain't shot no man. . . . I just pleaded guilty because they said if I didn't they would gas me for it. . . .

. . . I'm not guilty but I plead guilty." *Id.* at 163 n.2. *See* notes 8-15 *infra* and accompanying text for further discussion of the case.

3. Brady v. United States, 397 U.S. 742, 749-755 (1970); FED. R. CRIM. P. 11.

4. Authorities cited note 3 *supra*.

cally plead guilty. In state courts constitutional due process is observed if the court establishes that the plea is voluntary and intelligent.[5] There is no requirement that a state court take the additional step, regarded as essential in the federal system, of determining that a factual basis for the plea exists.[6] But when a defendant equivocates—hedges his plea of guilty with a protestation of innocence—state courts are now required to take the further step of assuring that the plea is accurately grounded on facts constituting the offense charged.[7]

In *North Carolina v. Alford*[8] the defendant had pleaded guilty to second degree murder on the advice of counsel. In court Alford coupled his plea with a protestation of innocence.[9] The trial court heard the evidence against Alford, evidence which indicated a distinct probability of first-degree murder. After Alford testified, the court accepted his plea of guilty to murder in the second degree, notwithstanding his insistence upon his innocence. After conviction and sentencing Alford commenced a series of petitions for post-conviction relief, and he was ultimately successful.[10] The precise issue on appeal to the Supreme Court was whether Alford's fear of the death penalty for first-degree murder stripped his guilty plea to second-degree murder of its voluntariness. The Supreme Court held that it did not, citing *Brady v. United States*.[11] The Court went further, however, taking the opportunity to settle the further question of whether or not an equivocal guilty plea can be constitutionally accepted:[12]

> . . . An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to

5. Boykin v. Alabama, 395 U.S. 238, 243, 244 (1969). *See* North Carolina v. Alford, 91 S. Ct. 160, 164 (1970).

6. Mr. Justice Harlan complained, in his *Boykin* dissent that the decision there announced imposed the full requirements of FED. R. CRIM. P. 11 on the states. Boykin v. Alabama, 395 U.S. 238, 245 (1969). This would appear to be inaccurate, since the majority opinion required only that the state court determine that the plea is voluntary and intelligent.

7. North Carolina v. Alford, 91 S. Ct. 160 (1970).

8. 91 S. Ct. 160 (1970).

9. See text accompanying note 2 *supra*.

10. Alford v. North Carolina, 405 F.2d 340 (4th Cir. 1968).

11. 397 U.S. 742 (1970). *Brady* was handed down after the fourth circuit had vacated Alford's conviction. The *Brady* court held that a guilty plea to kidnapping was neither coerced nor invalid because the defendant made it in fear of the death penalty.

12. Some lower courts had held that acceptance of an equivocal guilty plea would be a violation of due process per se. *See, e.g.*, United States *ex rel.* Metz v. Maroney, 404 F.2d 233 (3d Cir. 1968); United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966).

admit his participation in the acts constituting the crime.[13] But it is clear that the Court sanctioned the result in *Alford* only because the trial court had properly determined that the plea was based on highly probable guilt.[14] The *Alford* Court concluded by remarking that state courts were free to reject equivocal pleas in any event, and that there is no constitutional right to have a guilty plea accepted.[15]

Consequently, the state of the law appears to be that state courts may accept equivocal guilty pleas, or they may reject them entirely. But when an equivocal plea is accepted, the trial court must insure that the plea is accurate by holding an inquisition into the facts of the crime. The *Alford* rule is simple and direct, but it is suggested that it is deceptively so. It will be argued in the following Note that the real issues involved in the equivocal guilty plea may be obscured behind the *Alford* rule, and that the protective thrust of the decision may be misdirected.

A very brief look at some of the characteristics of the equivocal guilty plea may help clarify the issues. First, what makes a guilty plea equivocal? The equivocal element will generally arise from doubts cast by a defendant's testimony at the pleading, or from the known circumstances of the offense.[16] For example, the equivocal element may spring from a defendant's recital of his version

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13. 91 S. Ct. at 167 (1970).

14. Despite the lack of a clearly enunciated rule, the Court's repeated advertence to the trial court's finding of a factual basis for the plea clearly establishes this additional element as the keystone of the opinion. For example, the Court in *Alford* stated:

> Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea. . . .

*Id.* at 167 n.10. The question of how probable a defendant's guilt must be was not decided, although the Court characterized the evidence against Alford as "overwhelming." Lower courts have employed other formulations. Griffin v. United States, 405 F.2d 1378 (D.C. Cir. 1968) ("high probability"); Commonwealth v. Cushnie, 433 Pa. 131, 249 A.2d 290 (1969) (sufficient evidence of guilt for a jury to convict).

15. 91 S. Ct. at 168 n.11. There had been some suggestion in lower court opinions that under certain circumstances a defendant does have an absolute right to have his guilty plea accepted. *See, e.g.*, City of Burbank v. General Electric Co., 329 F.2d 825 (9th Cir. 1964) (anti-trust prosecution).

16. Unless there is some signal to alert the court to possible discrepancies between the charge and the actual offense, a miscarriage of justice may result. This dependence upon what may be a purely fortuitous discovery of the problem appears to be the basis for the requirement, in some jurisdictions, that every guilty plea must be examined for a factual basis. *See* FED. R. CRIM. P. 11; *Resolution of the Judges of the United States District Court for the District of Columbia* (1959), *noted in* Everett v. United States, 336 F.2d 979, 980 n.3 (1964). The American Bar Association recommends that the factual basis be determined for all guilty pleas. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY (Approved Draft 1968) [hereinafter cited as STANDARDS]. *See also* D. NEWMAN, CONVICTION 233-235 (1966) [hereinafter cited as NEWMAN].

of the facts, indicating an improper charge if proved.[17] Or it may arise from a defendant's inability to remember or admit essential elements of the crime or participation.[18] Or, in the extreme case, the "equivocation" may consist of a defendant's outright denial of guilt.[19] Courts appear to be about equally divided on the question whether to accept guilty pleas under such circumstances.[20]

The next question might logically be asked is: What is the implication of an equivocal guilty plea? For example, is the defendant's tergiversation a signal that he may be innocent,[21] or

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17. *See, e.g.*, Griffin v. United States, 405 F.2d 1378 (D.C. Cir. 1968) (question of self-defense); United States *ex rel.* Metz v. Maroney, 404 F.2d 233 (3d Cir. 1968) (question of intent to murder); Tremblay v. Overholser, 199 F. Supp. 569 (D.D.C. 1961) (question of insanity); People v. Hetherington, 379 Ill. 71, 39 N.E.2d 361 (1942) (question of intent to murder); People v. Morrison, 348 Mich. 88, 81 N.W.2d 667 (1957) (question whether second mortgagee knew that property was already mortgaged); State v. Jones, 267 Minn. 421, 127 N.W.2d 153 (1964) (question of participation as principal); State *ex rel.* Grattan v. Tahash, 262 Minn. 18, 113 N.W.2d 342 (1962) (question of intent to abandon); State *ex rel.* Dehning v. Rigg, 251 Minn. 121, 86 N.W.2d 723 (1957) (question of intent to abandon); Harris v. State, 76 Tex. Crim. 126, 172 S.W. 975 (1915) (questions of self-defense, insanity); State v. Rose, 42 Wash. 2d 509, 256 P.2d 493 (1953) (question of intent in assault).

18. *See, e.g.*, Hulsey v. United States, 369 F.2d 284 (5th Cir. 1966) (defendant couldn't remember, had been drinking); Maxwell v. United States, 368 F.2d 735 (9th Cir. 1966) (defendant could not remember, had been intoxicated); United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966) (defendant's mind "a complete black [sic]"); State v. Martinez, 89 Idaho 129, 403 P.2d 597 (1965) (defendant could not recall incident); State *ex rel.* Oney v. Tahash, 277 Minn. 394, 152 N.W.2d 526 (1967) (defendant could not remember, had been drinking, taking "pills"); State *ex rel.* Crossley v. Tahash, 263 Minn. 299, 116 N.W.2d 666 (1962) (defendant did not recall, had been drinking); State v. Leyba, 80 N.M. 190, 453 P.2d 211 (1969) (defendant did not remember); Commonwealth v. Cushnie, 433 Pa. 131, 249 A.2d 290 (1969) (defendant did not know how crime occurred); Commonwealth v. Cottrell, 433 Pa. 177, 249 A.2d 294 (1969) (defendant could not remember).

19. *See, e.g.*, North Carolina v. Alford, 91 S. Ct. 160 (1970); Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967); McCoy v. United States, 363 F.2d 306 (D.C. Cir. 1966); State v. Reali, 26 N.J. 222, 139 A.2d 300 (1958); People v. Nixon, 21 N.Y.2d 338, 287 N.Y.S.2d 659, 234 N.E.2d 687 (1967); State v. Stacy, 43 Wash. 2d 358, 261 P.2d 400 (1953).

20. Of the twenty-five cases cited in notes 17-19 *supra*, thirteen courts affirmed the convictions and twelve reversed them. No clear patterns or rules evolve from the cases, each decision appearing to turn on the particular facts of the case. There would appear to be some inconsistency even within the same jurisdiction. *See generally* NEWMAN at 22, 27. The only recurring theme is that acceptance of the plea should be discretionary with the trial court. *See, e.g.*, McCoy v. United States, 363 F.2d 306 (D.C. Cir. 1966); Tremblay v. Overholser, 199 F. Supp. 569 (D.D.C. 1961); Commonwealth v. Cottrell, 433 Pa. 177, 249 A.2d 294 (1969); State v. Stacy, 43 Wash. 2d 358, 261 P.2d 400 (1953).

21. Included in the term "innocent" are those who may be guilty

emotionally disturbed,[22] or merely unable or unwilling to admit his guilt?[23] Or is the defendant perhaps trifling with the court, possibly hoping to lay the ground-work for a post-conviction appeal?[24]

Finally, a short catalog of some of the policy considerations weighing in the balance between accepting and rejecting equivocal guilty pleas may help to bring the issues into focus. Points which could be or have been advanced in favor of accepting such pleas include the generally recognized importance of guilty pleas to the functioning of the judicial process.[25] Rejection of equivocal pleas, at least where a factual basis for the plea can be determined, might impose an appreciably heavier burden on the administrators of justice. In view of the number of ways in which doubt may be cast upon a plea,[26] and the often uncertain implications of the doubt,[27] rejection of such pleas, according to this argument, would be not only expensive but largely futile. Secondly, it has been pointed out that when a guilty plea is refused, and the defendant is forced to stand trial, the consequences to the defendant can be drastic.[28] Third, it could now be argued, the factual basis test presently required by *Alford* will serve well enough to weed out the innocent among the equivocators.

Against accepting equivocal guilty pleas it has been argued that acceptance of such pleas invites collateral attack on the plea after conviction.[29] Second, it could be argued that if a proper

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only of a lesser offense than the one charged. This problem is recurrent in crimes of intent, or attempt. Also included are those who may have a defense (*e.g.*, self-defense). It is unlikely that many defendants are completely innocent. NEWMAN at 15-16.

22. Insanity cases are the extreme example. Also included are those who, while not insane, are clearly psychotic, and perhaps more deserving of treatment than of punishment.

23. *See, e.g.*, Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967).

24. *See, e.g.*, Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967) (court accused equivocating defendant of "dilly-dallying"); State v. Stacy, 43 Wash. 2d 358, 261 P.2d 400 (1953) (equivocal plea leaves conviction open to collateral attack). *See also* 8 J. MOORE, FEDERAL PRACTICE ¶ 11.03 [4], 11-52 (2d ed. 1970) [hereinafter cited as MOORE]; STANDARDS at 33.

25. *See, e.g.*, Griffin v. United States, 405 F.2d 1378 (D.C. Cir. 1968); HALL, KAMISAR, LAFAVE AND ISRAEL, MODERN CRIMINAL PROCEDURE 924-946 (1969) [hereinafter cited as HALL]; MOORE ¶ 11.02 at 11-4 to 11-5; NEWMAN at 3-6.

26. *See* notes 15-19 *supra* and accompanying text.

27. *See* notes 21-24 *supra* and accompanying text.

28. *See, e.g.*, United States *ex rel.* Metz v. Maroney, 404 F.2d 233 (3d Cir. 1968) (The prosecutor agreed to a plea to second-degree murder, stating that he would recommend "not less than seven years." The court refused the equivocal plea, defendant stood trial on first-degree murder and got life.) Tremblay v. Overholser, 199 F. Supp. 569 (D.D.C. 1961) (The court refused a plea to intoxication, found defendant not guilty by reason of insanity, and committed her indefinitely to a mental hospital). *See also* HALL at 983.

29. *See, e.g.*, State v. Stacy, 43 Wash. 2d 358, 261 P.2d 400 (1953); MOORE ¶ 11.03 [4], at 11-52; STANDARDS at 33.

"factual basis" must be found for the plea, it might just as well be found by trial.[30] But whether or not this argument is valid, a more basic objection to accepting equivocal pleas is that where doubt is cast upon the guilty plea, the commitment to the trial process, rather than to an inquisitional procedure, should prevail in adjudicating guilt.[31] Third, it has been pointed out that defendants who feel that they have been "railroaded" into jail are very likely to resist correctional measures, thus rendering a principal purpose of incarceration nugatory.[32] A defendant who will not or cannot admit his guilt, according to this argument, is more likely to resent his sentence than a defendant who has unreservedly acknowledged guilt.[33]

It is suggested that behind the problem of interpreting the equivocal guilty plea, and behind the arguments adduced for and against its acceptance, lurks a seminal problem in jurisprudence. It is further suggested that if this jurisprudential problem can be correctly identified, the derivative question of what to do with equivocal guilty pleas can be more clearly answered. At the risk of receding somewhat from the point of immediate legal relevance, it may nonetheless be helpful to consider this jurisprudential problem in a more pristine form.[34]

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30. The American Bar Association believes the factual basis test will take "far less time" than "full-scale trials." STANDARDS at 32. Moore notes that the original version of the change to FED. R. CRIM. P. 11 required that the court satisfy itself "that the defendant in fact committed the crime charged." The version finally adopted, however, merely requires that the court determine that a "factual basis" for the plea exists. *See* note 3 *supra* and accompanying text. Moore comments that the version finally adopted "contemplates a somewhat looser procedure" than the investigation which would have been necessary to meet the test originally proposed. MOORE ¶ 11.03 [4], at 11-47 to 11-48.

31. NEWMAN at 4.

32. NEWMAN at 44-45; STANDARDS at 36-52. *See generally* HALL at 924 *et seq.*

33. A defendant may more particularly resent his conviction where he has steadily and completely denied guilt than where he has only revealed doubts concerning specific elements of the crime, or where he "can't remember." *See* notes 17-19, 22-23 *supra* and accompanying text. The Pennsylvania Supreme Court will apparently accept an equivocal plea under the latter circumstances, but not when a complete denial is made. *Compare* Commonwealth v. Cottrell, 433 Pa. 177, 249 A.2d 294 (1969) *with* State v. Rose, 42 Wash. 2d 509, 256 P.2d 493 (1953). Moore comments: ". . . To accept a plea in the face of a complete denial of involvement, regardless of the strength of the incriminating evidence, is to invite collateral attack." MOORE ¶ 11.03 [4], at 11-52. Nonetheless, the United States Supreme Court in *Alford*, faced with just such a denial, sanctioned the acceptance of the plea.

34. On first blush, it would appear that we are dealing here with the same issues involved in plea-bargaining (negotiated pleas), or in with-

Aristotle, in the *Nicomachean Ethics*,[35] defines injustice as the intentional infliction of injury contrary to the wish of the person injured. From this premise, a sorites leads to the conclusion that an innocent man who asks for punishment may be foolish, but if he thinks the bargain[36] good, no injustice results from punishing him, for his will is done.[37] But while a man cannot act unjustly toward himself, Aristotle remarks that justice has not been done to society, which is interested only in punishing the guilty.[38] Rephrasing the problem in terms of the guilty plea, we arrive at the question: Has a court constitutionally discharged its obligation to see that justice is done when it has assured itself that the individual's bargain with society is voluntarily and intelligently (knowingly) made? Or must it also assure itself that the plea, and its subsumed conviction,[39] are accurate?[40] In other words, are we

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drawal of guilty pleas. But this conclusion may be misleading as well as inaccurate. Plea bargaining occurs before a plea has been accepted, and the problems here generally concern the fairness of the bargain (to defendant and to society) after the plea has been accepted. That is, the negotiated plea problem *assumes* that a plea has been accepted. The problem with the equivocal plea, on the other hand, is *whether* to accept the plea at all, regardless of how it was "negotiated." Similarly, problems in withdrawal of pleas occur after acceptance. While many of the same considerations are relevant to all three aspects of the plea, it is suggested that all three are derivative from a common jurisprudential problem. Consequently, it may be more helpful to go back to "first principles" rather than to attempt to distinguish the derivative from the fundamental (albeit more contemporary) related problems in pleading. In fact, failure to distinguish seminal from derivative questions has apparently led to some "muddy" conclusions. *See* note 36 *infra* and accompanying text.

35. Book V translated in FULLER, PROBLEMS OF JURISPRUDENCE (temp ed. 1949) [hereinafter cited as FULLER]. This translation was specially prepared.

36. The bargain in question refers strictly to the defendant's admission of guilt, and not to the *fairness* of the bargain negotiated with the prosecutor. *See* note 34 *supra*. There would appear to be some confusion in the use of the term "bargain" in this regard. For example, the cover of Vol. 91, No. 4 of the *Supreme Court Reporter* (in which *Alford* appears) refers to *Alford* as "the plea bargaining case." But the major concern in *Alford* is not with defendant's bargain with the prosecutor. The Court somewhat tersely disposed of this aspect of the case in favor of the state. *See* notes 11-12 *supra* and accompanying text. On the contrary, the principal problem addressed was whether Alford's equivocation amounted to a valid plea at all. *See* notes 12-14 *supra* and accompanying text. An analogy from the law of contracts may help to illustrate the point. Even though there has been a valid acceptance (plea), the contract (plea bargain) may still be attacked because it is unconscionable, or because it was made under duress, etc. Thus, there are two distinct problems: Was there an acceptance (plea)? Was the contract (plea bargain) unconscionable, etc. (fair)? The mechanics, indeed, the very justification of plea bargaining, is a large and distinct problem, wholly outside the scope of this discussion.

37. FULLER at 54-56.

38. *Id.* at 57-58. Aristotle adduces the example of suicide, an illegal act. While the one to suffer is the suicide himself, no wrong is done him because he consented to the act. But society is wronged because the law is broken.

39. It has been said that a confession is only an admission of conduct, while a guilty plea logically subsumes the consent to be punished in addition to the admission of the act. North Carolina v. Alford, 91 S. Ct. 160,

concerned with the justice of the bargain or the justice of the conviction?[41]

The cases dealing with equivocal guilty pleas bring the conflict between the justice of the bargain and the justice of the conviction into sharper focus. The Court of Criminal Appeals of Texas has stated:

> . . . Our law only authorizes a conviction where guilt is shown. If there be no legal guilt, a conviction could not be sustained, although the defendant entered a plea of guilty.[42]

The United States District Court for Connecticut has held that it was "utterly unreasonable" for counsel to recommend a guilty plea without cautioning the defendant that "no matter what, he should not plead guilty unless he believed himself guilty."[43] On the other hand, the Supreme Court of Iowa stated:

> . . . It matters not whether the defendant is in fact guilty, the plea of guilty is just as effectual as if such was the case. Reasons other than the fact that he is guilty may induce a defendant to so plead . . . and the right of

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164 (1970); Kercheval v. United States, 274 U.S. 220, 223 (1927).

40. The term "accurate," as used here, does not refer to the situation in which a defendant pleads guilty to a lesser, but logically impossible offense. Attacks on this type of conviction go to the plea-bargaining problem, not to the problem of essential innocence. *See* notes 21, 34, and 36 *supra* and accompanying text. Convictions upon voluntary and intelligent guilty pleas to nonsequitur offenses are not vulnerable to attack merely because the offense is, or was, logically anomalous. People v. Foster, 19 N.Y.2d 150, 278 N.Y.S.2d 603, 225 N.E.2d 200 (1967).

41. This dilemma appears to find echoes in legal problems other than those concerning guilty pleas. For example, the evidentiary corpus delicti rule requires that the state prove its case even though the defendant has confessed the crime and pleaded guilty. C. McCORMICK, LAW OF EVIDENCE 229-231 (1954). Or the problem could be considered from the point of view of the withdrawing of guilty pleas. Some courts seem to suggest that alleged innocence after a guilty plea is not grounds for attacking the plea. Adam v. United States, 274 F.2d 880 (10th Cir. 1960), *construing* 28 U.S.C. § 2255 (providing remedies on a motion attacking sentence). But FED. R. CRIM. P. 32(a) provides in part:

> . . . [B]ut to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

One court interpreting Rule 32(a) has concluded that it is broader in scope than § 2255, and that consequently the question of innocence may be properly raised. Sims v. United States, 272 F. Supp. 577 (D. Md. 1966), *aff'd*, 382 F.2d 294 (4th Cir. 1967), *cert. denied*, 390 U.S. 961 (1968). Moore feels that the question of innocence may be raised only under Rule 32(a), and not under section 2255. MOORE ¶ 11.03 [4], at 11-59. The conflict between the justice of the bargain and the justice of the conviction would seem to be central to both the foregoing problems.

42. Harris v. State, 76 Tex. Crim. 126, 129, 172 S.W. 975, 977 (1915).

43. United States v. Rogers, 289 F. Supp. 726, 729 (D. Conn. 1968).

the defendant to so plead has never been doubted.[44]

And the United States Circuit Court for the District of Columbia has said:

> . . . An accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty . . . .[45]

Although not always apparent in the cases themselves,[46] it is suggested that courts dealing with equivocal guilty pleas, as represented by the quotations above, have positioned themselves along a spectrum having as its termini the two competing concepts, the justice of the bargain and the justice of the conviction. If in fact these two positions can be taken to represent countervailing attitudes about equivocal pleas, what has been the effect of the *Alford* decision on the legal balance?

In those jurisdictions which adhere to the justice-of-the-bargain principle,[47] that is, in those jurisdictions where the concern is primarily with the voluntariness and intelligence of the plea,[48] the effect of *Alford* is to impose the further obligation of insuring, as far as possible, that the plea is accurate as well. But there is a tacit assumption in the *Alford* requirement that gives rise to some doubts about the efficacy of the new rule. That assumption is that the innocent are more likely than the guilty to equivocate in pleading.[49] But what reason is there to believe that this assumption is valid? It has been noted that emotional disturbance, which may lead to an inaccurate plea, is difficult to detect in the short space of an arraignment.[50] And it is difficult to imagine why an emotionally disturbed person would be likely to reveal his problem by hedging his plea. *A fortiori*, a truly innocent, rational man who, for his own reasons,[51] chooses to "take the rap" is least

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44. State v. Kaufman, 51 Ia. 578, 580, 2 N.W. 275, 276 (1879) (dictum).

45. McCoy v. United States, 363 F.2d 306, 308 (D.C. Cir. 1966). *Compare* United States v. Rogers, 289 F. Supp. 726 (D. Conn. 1968) (the view that an innocent person will be convicted anyway is "not only cynical but unwarranted"). *See* HALL at 977-989.

46. *See* note 20 *supra* and accompanying text.

47. *See* notes 20 and 46 *supra* and accompanying text.

48. *See* note 39 *supra* and accompanying text.

49. *See* passage quoted note 14 *supra*. The assumption may be deduced from the fact that the additional requirement (factual basis test) is imposed upon courts accepting equivocal guilty pleas, as opposed to non-equivocal pleas. Since, in the case of the former, the court must find a factual basis, but may omit this step in the case of the latter, the clear implication is that innocence is more likely to be uncovered among the equivocators. Since the guilty plea itself subsumes both admission of the crime and consent to be punished (*see* note 39 *supra*), the extra solicitude in the case of the equivocator cannot be to confirm a guilt already admitted. Rather, the object must be to discover latent innocence.

50. STANDARDS at 31.

51. For example, a rational, innocent man may choose to plead guilty in order to protect another person (from altruistic motives or otherwise), in order to cover another greater crime, or because he is simply afraid of the jury or of the court (as where defendant has escaped and been recaptured before trial. *See* State v. Reali, 26 N.J. 222, 139 A.2d 300 (1958)).

likely of all to tergiversate when pleading. Finally, there is no evidence that those guilty of only a lesser crime are more likely to equivocate. Indeed, it may well be that chief among the equivocators are the merely reluctant guilty and the dissemblers.[52] Consequently, the asserted nexus between equivocation and inaccuracy of plea (innocence of crime charged) would appear to be problematic at best. Yet *Alford* singles out the equivocator for the factual basis test, while ignoring those whose pleas are superficially free from doubt. But if these latter pleas are just as likely, if not more likely, to be factually suspicious,[53] then *Alford's* protective reach will have been extended to the wrong defendants.

But there is a more fundamental objection to the acceptance of equivocal guilty pleas in justice-of-the-bargain jurisdictions. It would seem that if the concern is with the voluntariness and intelligence of the plea, any equivocation should *eo ipso* require rejection of the plea. By his equivocation, the pleader has signalled his dissatisfaction with the bargain, or at the very least, his latent unwillingness to make it. Thus, regardless of whether equivocators are more likely to be innocent or not, courts concerned with the justice of the bargain should not accept equivocal pleas. Better practice in these jurisdictions should require an unequivocal admission of guilt. In this regard, the practice in United States military courts is instructive.

In courts-martial any statement of the accused inconsistent with his plea of guilty must be expunged from the record before the plea will be accepted.[54] But military courts go further. They require that the plea be rejected unless the court is satisfied that the defendant has pleaded guilty "because he is convinced that his is in fact guilty."[55] Indeed, the defendant will be made to say that *he* is convinced that he is in fact guilty.[56] By focusing on the defendant as the final arbiter of his subjective guilt, the military courts have perhaps met most of the objections to the justice-of-the-bargain point of view.[57] The basis for collateral attack on

52. *See* notes 23-24 *supra* and accompanying text.
53. *See* note 16 *supra* and accompanying text.
54. MANUAL FOR COURTS-MARTIAL UNITED STATES ¶ 70, at 12-9 to 12-10, app. 8a, at A8-9 to A8-10 (1968) [hereinafter cited as MANUAL]; MILITARY JUDGES GUIDE 3-1 to 3-7 (Dept. of the Army Pamphlet 27-9, 1969) [hereinafter cited as GUIDE].
55. MANUAL ¶ 70 at 12-9.
56. *Id.* app. 8a, at A8-10. In the version recommended in the GUIDE, the military judge asks the accused: "Are you pleading guilty (not only in the hope of securing a lenient sentence but) because *you feel in your own mind that you are guilty*?" GUIDE at 3-3 (emphasis added).
57. *See* notes 29-33 *supra* and accompanying text.

the plea will have largely disappeared with the equivocation,[58] as will the case of the disgruntled prisoner, resisting rehabilitation and bombarding courts with post-conviction writs because his mind is being "gnawed by the cankering tooth of doubt" about being "railroaded" over protests of innocence.[59]

In jurisdictions concerned primarily with the justice of the conviction,[60] *Alford* should have no effect at all. Where the court is concerned with the accuracy of the plea as well as with its voluntariness and intelligence, all guilty pleas should be subjected to a factual basis test.[61] To single out the equivocator on the basis of an asserted connection, tenuous at best,[62] between possible innocence and a hedged plea, is to drag a red herring across the trial of the real solution. For in justice-of-the-conviction jurisdictions the solution must be that *all* guilty pleas be screened for accuracy.[63]

*Summary*: It would appear that *Alford*, without favoring one side or the other in the jurisprudential dispute, in encouraging the states to make their own choices, has shed little light on the underlying issues. Rather, *Alford* has extended the full panoply of federal rules protection to a class of defendants who may not need it, while ignoring a class of defendants who may require it. And in regard to the latter class, *Alford* may even divert attention from the effort to give closer scrutiny to *all* guilty pleas. It is suggested that whatever may be required by constitutional due process, the equivocal guilty plea is inconsistent with the administration of justice when considered from the point of view of the defendant; and that acceptance of any guilty plea, equivocal or otherwise, without an investigation of its factual basis, is inconsistent with the administration of justice when considered from the point of view of society.[64]

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58. *See* notes 29 and 41 *supra* and accompanying text.

59. *See* notes 32-33 *supra* and accompanying text.

60. It should not be inferred that military courts are such jurisdictions. The emphasis in the military system is on guilt in fact, and not upon the justice of the bargain. Both the MANUAL and the GUIDE provide for a determination of the factual basis of the plea where there is any doubt about its accuracy; and, if the doubts are substantial, trial follows. MANUAL ¶ 70, at 12-10 app. 8a, at A8-9 to A8-10. GUIDE at 3-4.

61. Other avenues may of course lead to the discovery of plea infirmities, *e.g.*, the pre-sentence report or the post-pleading hearing. NEWMAN at 10-22. But the likelihood of discovery by these means is too variable and erratic to be reliable at present, although improvement seems to be the trend. *Id.* Nonetheless, to accept the plea first and then investigate its validity would seem to be putting the cart before the horse.

62. *See* notes 49-52 *supra* and accompanying text.

63. *See* note 16 *supra*.

64. No suggestion is made here that either the justice-of-the-bargain or the justice-of-the-conviction point of view is preferable to the other. This Note is concerned only with discovering the bases of the points of view, and with developing what would appear to be logically consistent treatment of equivocal guilty pleas derived therefrom.