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*

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It has been generally recognized that the plea of nolo (or non vult) contendere performs no function not already well served by the plea of guilty,[1] and this is generally true insofar as the present day nolo contendere is concerned. Nolo contendere is, for example, acceptable to serious and nonserious charges alike;[2] it is, "for the purposes of punishment, the same as the plea of guilty."[3] The Supreme Court has held that upon entry of nolo contendere, an accused may be both fined and

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1. *See* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 1.1(a), Commentary at 16 (Approved Draft, 1968) (case for the plea of nolo contendere not strong enough to justify a minimum standard supporting its use); ALI CODE OF CRIMINAL PROCEDURE § 209 & Commentary at 642 (Official Draft, 1930) (all pleas other than pleas of guilty and not guilty abolished). *See generally Amendments to the Federal Rules of Criminal Procedure with Advisory Committee Notes,* 62 F.R.D. 271, 277 (1974) [hereinafter cited as *Advisory Committee Notes*].

2. *See* Lenvin & Meyers, *Nolo Contendere: Its Nature and Implications,* 51 YALE L.J. 1255, 1258-63 (1942).

3. *Advisory Committee Notes, supra* note 1.

imprisoned,[4] and although it has been said repeatedly that the entry of nolo contendere "cannot be used against a defendant as an admission in a subsequent criminal or civil case,"[5] in subsequent administrative proceedings it has been so used.[6]

Despite this substantial overlap of nolo contendere and guilty pleas, an examination of the origin and evolution of the former reveals that much of what is now accepted about nolo contendere was not initially true. What is now called nolo contendere—namely, a plea resulting in the entry of judgment without an express admission or a verdict of guilt—was, in its common law forms, unacceptable to felony charges though acceptable in misdemeanor cases. Such a plea was treated differently for purposes of punishment than a plea of guilty, and was unavailable as an admission in subsequent litigation. These characteristics of the plea of nolo contendere seem not to have been historical accident, but rather the product of a fundamental relationship between the certainty of proof provided by such a plea and the permissible severity of punishment and other consequences resulting from its entry.

While the history of the development of nolo contendere has other implications,[7] its most immediate significance is in demonstrating the historical relationship between certainty of proof and severity of punishment in criminal prosecutions. Arising from this framework are questions as to the modern day propriety of entering judgment to a felony charge where the accused has pleaded nolo contendere or has pleaded guilty while protesting his innocence,[8] and the severity of the sentence which should be imposed in such a case. When presented with such questions five years ago in *North Carolina v. Alford*,[9] the United States Supreme Court failed adequately to deal with the policies implicit in the historical usage of nolo contendere and similar pleas, and thus left uncertain the propriety of entering judgment to a felony upon a plea of nolo contendere.

4. *See* Hudson v. United States, 272 U.S. 451 (1926) (a sentence of 1 year and 1 day may be imposed following a plea of nolo contendere to conspiracy to use and use of the mails to defraud).

5. FED. R. CRIM. P. 11(e)(6); *Advisory Committee Notes, supra* note 1, at 278.

6. *See, e.g.*, Qureshi v. Immigration and Naturalization Serv., 519 F.2d 1174 (5th Cir. 1975) (deportation proceeding); Sokoloff v. Saxbe, 501 F.2d 571, 574-75 (2d Cir. 1974) (certificate revocation proceeding); Maryland State Bar Ass'n v. Agnew, 271 Md. 543, 548 & n.5, 318 A.2d 811, 814 & n.5 (1974) (disbarment proceeding). *See also* the admirable survey in Note, *Use of the Nolo Contendere Plea in Subsequent Contexts*, 44 S. CAL. L. REV. 737 (1971).

7. It might have a bearing, for example, on whether there existed at common law a general relationship between criminal procedure and penology. *See* Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 378-80 (1970).

8. The Supreme Court noted in North Carolina v. Alford, 400 U.S. 25, 37 (1970), that a nolo contendere plea is essentially the same as the plea of guilty accompanied by a protestation of innocence.

9. 400 U.S. 25 (1970).

This article will analyze the English common law evolution of the plea of nolo contendere and relate fundamental principles drawn from that background to the *Alford* decision and to the future course of the law in this area. First, the *Alford* case will be discussed briefly, with concentration on the Court's discussion of nolo contendere. The historical development of the plea will then be traced, and principles governing its use and acceptability at common law will be suggested. Returning to *Alford*, the article will re-examine the Court's treatment of the plea entered in that case and discuss some of the issues left unresolved by the decision.

THE SUPREME COURT'S DECISION IN *Alford*

In *North Carolina v. Alford*,[10] the Supreme Court faced a challenge to the acceptability of a defendant's plea of guilty, accompanied by assertions of innocence, to a second-degree murder charge. The facts, according to the prosecution,[11] were as follows: Henry Alford and a woman friend came to Nathaniel Young's house, where they first drank and then argued about going to bed.[12] Alford asked his friend to leave with him and, when she refused, tried to make her leave; she, with Young's backing, still refused.[13] Alford then ran off with his friend's coat, outrunning Young and another man who gave chase.[14] When Alford reached his home six blocks away, he was breathing hard, as if he had been running.[15] He told the woman with whom he had been living and another woman who was present that he was going to kill Young and the other man who had chased him,[16] and proceded to remove a shotgun and four shells from his closet.[17] The women asked him not to kill anyone, but he again indicated his intention to do so and left.[18] Two persons saw Alford carrying a gun in the direction of Young's house.[19] Ten to fifteen minutes after Alford had run from

10. *Id.*
11. The facts in *Alford* were developed in a summary presentation of evidence before the trial judge. A police officer who summarized the state's case, two witnesses who verified portions of the officer's summary, and defendant Alford were heard at this proceeding. *Id.* at 27-28.
12. Record at 3, 7, State v. Alford, Dec. 2, 1963 Term (Super. Ct., Forsyth County, N.C., Dec. 9, 1963) (testimony of E.I. Weatherman, the investigating detective).
13. *Id.* at 3-4, 7 (testimony of E.I. Weatherman).
14. *Id.* at 4, 7 (testimony of E.I. Weatherman).
15. *Id.* at 3-5 (testimony of E.I. Weatherman).
16. *Id.* at 5 (testimony of E.I. Weatherman); *id.* at 12-13 (testimony of Shirley Wright, the second woman) (only as to Alford's intention to kill someone).
17. *Id.* at 5 (testimony of E.I. Weatherman); *id.* at 12-13 (testimony of Shirley Wright) (only as to the gun).
18. *Id.* at 5-6 (testimony of E.I. Weatherman); *id.* at 13 (testimony of Shirley Wright) (only as to her statement to Alford).
19. *Id.* at 5 (testimony of E.I. Weatherman).

Young's house, Young opened his door about 8 to 10 inches in response to a knock and was fatally shot.[20] No one saw the assailant;[21] however, 35 minutes after Alford had left his house he returned and informed the woman with whom he lived that he had killed Young at his door and that he would leave her the household furniture.[22] During the next 4 to 5 hours, prior to his arrest, Alford told two other persons that he had shot a man.[23] No test was made on the shell that killed Young;[24] Alford's shotgun, which was seized in his closet before his arrest, was found clean but recently fired.[25]

Alford was indicted in state court for first-degree murder, a capital charge under state law.[26] He had a choice of going to trial and subjecting himself to a possible death penalty, or of pleading guilty to first or a reduced degree of murder and subjecting himself only to a term of imprisonment.[27] The prosecutor agreed to accept a plea of guilty to second-degree murder, and Alford's attorney persuaded Alford to enter into the plea bargain.[28] Accordingly, when the case was called for trial, Alford's attorney entered the plea of guilty on Alford's behalf to second-degree murder, and no trial was held.[29] Instead, several witnesses summarily testified about the events described above in a manner which would have been, for the most part, inadmissible were there a trial.[30] Alford, who also testified, denied most of the events described by the prosecution witnesses.[31] He stated:

> . . . I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all.[32]

In response to a question from his attorney, Alford also said:

> Well, I'm still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence; that the jury will prosecute me on—on the second. You told me to plead guilty, right. I don't—I'm not guilty but I plead guilty.[33]

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20. *Id.* at 4 (testimony of E.I. Weatherman).
21. *Id.* (testimony of E.I. Weatherman).
22. *Id.* at 5 (testimony of E.I. Weatherman).
23. *Id.* at 6-7 (testimony of E.I. Weatherman); *id.* at 10 (one of the persons).
24. *Id.* at 9 (testimony of E.I. Weatherman).
25. *Id.* at 8-9 (testimony of E.I. Weatherman).
26. N.C. GEN. STAT. § 14-17 (1969); *see* North Carolina v. Alford, 400 U.S. 25, 26-27, 27 n.1 (1970).
27. 400 U.S. at 27 n.1.
28. *Id.* at 27.
29. Record at 5, North Carolina v. Alford, 400 U.S. 25 (1970) [hereinafter cited as Record].
30. *See* text & notes 11-25 *supra.*
31. Record at 5-7.
32. *Id.* at 7.
33. *Id.* at 8.

Alford was sentenced to 30 years in prison, the maximum permitted by state law for second-degree murder.[34] Just 4 months after sentencing, Alford sought postconviction relief, claiming that his plea of guilty was the product of fear and coercion and therefore invalid.[35] This contention was rejected by the state court, and his petition for a writ of habeas corpus later was denied by the federal district and appeals courts.[36] Several years later Alford again petitioned for a writ of habeas corpus in the federal courts on the same ground. This time, although the district court denied relief, the court of appeals reversed,[37] holding that the state statutory scheme—whereby Alford was subject to imprisonment should he plead guilty but possibly to death should he insist on trial—created, under *United States v. Jackson*,[38] impermissible burdens on his right to a jury trial and right not to plead guilty.[39] The court of appeals held further that since Alford's plea of guilty was primarily motivated by these burdens, it was involuntary.[40]

On appeal the Supreme Court reversed. Noting that *Jackson* did not provide the test for determining the voluntariness of a plea of guilty, the Court announced that the proper test was:

> whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. That [Alford] would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice . . . .[41]

Under this standard, the Court found Alford's plea of guilty valid, despite the various factors and considerations which may have prompted the plea.[42]

Since no issue other than the voluntariness of the plea was presented or briefed,[43] the Court without further inquiry could have reversed

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34. N.C. GEN. STAT. § 14-17 (1969); *see* North Carolina v. Alford, 400 U.S. 25, 27 n.1, 29 (1970).
35. Record at 1.
36. North Carolina v. Alford, 400 U.S. 25, 29-30 (1970); Alford v. North Carolina, 405 F.2d 340, 341-42 (4th Cir. 1968), *vacated & remanded*, 400 U.S. 25 (1970); Record at 1-2.
37. Alford v. North Carolina, 405 F.2d 340 (4th Cir. 1968), *vacated & remanded*, 400 U.S. 25 (1970).
38. 390 U.S. 570 (1968). In *Jackson* the Supreme Court held that, absent sufficient justification, the establishment of a death penalty applicable only to those defendants asserting their right to a jury trial is an unconstitutional penalty on that right. *Id.* at 581-83.
39. 405 F.2d at 343-47.
40. *Id.* at 347-49.
41. 400 U.S. at 31.
42. *Id.* at 37-39.
43. Under a point related to *Jackson*, however, Alford's brief did state:
> [P]lea bargaining should never be permitted where a defendant consistently proclaims his innocence and declares that he is submitting his guilty plea only

and remanded. Troubled by Alford's protestation of innocence, however, the Court went on to consider the issue raised by Alford's denial of guilt. The Court framed the issue as "whether a guilty plea can be accepted when it is accompanied by protestations of innocence and hence contains only a waiver of trial but no admission of guilt."[44] Stated somewhat differently, the issue was whether "an express admission of guilt [in the entry of a plea of guilty] . . . is . . . a constitutional requisite to the imposition of [*sic*] criminal penalty."[45] Noting that lower courts were divided on the issue, the Court looked to two of its own decisions for "relevant principles."[46]

In *Lynch v. Overholser*,[47] the issue had been whether a District of Columbia statute providing for the compulsory commitment of persons found not guilty by reason of insanity was applicable to persons who did not wish to place their sanity in issue[48] and who therefore pleaded guilty or refused to rely on a defense of insanity at trial. Petitioner argued that, were the statute so applicable, such persons would be deprived of liberty without due process of law.[49] In order to render the statute consistent with other District of Columbia mental health statutes and to interpret the statute so as to avoid "not insubstantial" constitutional doubts, the Court held that the statute was applicable "only to a defendant acquitted on the ground of insanity who has affirmatively relied upon a defense of insanity, and not to one, like the petitioner, who has maintained that he was mentally responsible when the alleged offense was committed."[50] In so holding, the *Lynch* court refused to recognized an absolute right to have one's guilty plea accepted.[51] Remarkably, the *Alford* Court cited *Lynch* as implying that "there would have been no constitutional error had [petitioner's plea of guilty] been accepted even though evidence before the judge indicated that there was a valid defense."[52]

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to avoid a more severe penalty. "Plea bargaining that induces an innocent person to plead guilty cannot be sanctioned. Negotiation must be limited to the quantum of punishment for an admittedly guilty defendant." Bailey v. MacDougall, 392 F.2d 155, 158 n.7 (4th Cir. 1968). Alford has never been "admittedly guilty."

Brief for Appellee at 11, North Carolina v. Alford, 400 U.S. 25 (1970).

44. 400 U.S. at 33.
45. *Id.* at 37.
46. *Id.* at 34.
47. 369 U.S. 705 (1962).
48. *Id.* at 708-10.
49. *Id.* at 709 & n.5. In such a case, the evidence upon which commitment would have been based would be only "evidence sufficient to warrant a reasonable doubt as to [the person's] mental responsibility as of the time he committed the offense charged," whereas a greater showing of mental incompetence was required for civil commitment. *Id.* at 709 n.5.
50. *Id.* at 710.
51. *Id.* at 719.
52. 400 U.S. at 35; *see* 32 OHIO ST. L.J. 426, 434 (1971).

In the other case relied upon by the Court, *Hudson v. United States*,[53] the issue was "whether a United States court, after accepting a plea of nolo contendere, may impose a prison sentence."[54] The defendant was sentenced to imprisonment for 1 year and 1 day following a plea of nolo contendere to charges of conspiring to use and using the mails to defraud. His argument that, as a matter of common law, "the plea in effect is conditioned upon the imposition of a lighter penalty" than imprisonment[55] was rejected by the Court, finding the "historical background [of the plea] too meager and inconclusive to be persuasive in leading us to adopt the limitation as one recognized by the common law."[56] The *Alford* Court drew upon *Hudson* and lower court cases following it for the implication that "the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence."[57]

Equating Alford's plea with a plea of nolo contendere, the Court did not view his failure expressly to admit guilt as a constitutional obstacle to imposing a criminal penalty upon him.[58] Nor did the Court "perceive any material difference between a plea that refused to admit commission of the criminal act and a plea [such as Alford's] containing a protestation of innocence."[59] The Court emphasized that Alford had remained firm in his waiver of a jury trial despite his denial of guilt,[60] and that the record and evidence presented in a summary fashion before the trial court substantially impugned defendant's assertions of innocence,[61] thereby providing a more than adequate factual basis for the plea.[62] Consequently, the Court concluded that acceptance of Alford's plea and rendering of judgment thereon was constitutionally permissible.[63]

Although the *Alford* decision has been the subject of prior commentary,[64] the Court's treatment of defendant's equivocal plea of guilty to a felony charge has not been analyzed with reference to the concepts

53. 272 U.S. 451 (1926).
54. *Id.* at 451.
55. *Id.*
56. *Id.* at 457.
57. 400 U.S. at 36.
58. *Id.* at 37.
59. *Id.*
60. *Id.* at 32.
61. *Id.* at 37-38.
62. *Id.* at 38 & nn.10-11; *see* FED. R. CRIM. P. 11(f) ("court should not enter a judgment upon [a plea of guilty] without making such inquiry as shall satisfy it that there is a factual basis for the plea.").
63. 400 U.S. at 38.
64. *See, e.g.*, 39 FORDHAM L. REV. 773 (1971); 49 N.C.L. REV. 795 (1971); 32 OHIO ST. L.J. 426 (1971).

and principles that emerged in the common law development of such pleas. When viewed in this historical light, *Alford* appears noticeably deficient in its failure to discuss several inconsistencies between the effect given defendant's plea in *Alford* and the effect it apparently would have had at common law. Examination of the original utility and scope of equivocal pleas which gradually evolved into that of nolo contendere reveals a rather sharp contrast with the *Alford* approach.

THE UNAVAILABILITY OF EQUIVOCAL PLEAS IN FELONY CASES

From at least the 13th century, the law of England has accepted in felony cases only two kinds of plea to the merits—confession, what we now call a plea of guilty;[65] and denial, what we now call a plea of not guilty,[66] effectively pleaded from 1215 until 1772 only if joined with consent to a recognized mode[67] of proof.[68] A plea such as nolo contendere or any other plea by which an accused refused either to confess or deny/consent was unacceptable in felony cases,[69] either by itself or as an

65. The common law confession was a confession of judgment and hence a waiver of all defenses not cognizable in arrest of judgment. *See* Cogan, *Guilty Pleas: Weak Links in the "Broken Chain,"* 10 CRIM. L. BULL. 149, 153-54 (1974).

66. Like the present plea of not guilty, denial could be accompanied by other defenses. *See generally* PLACITA CORONE (J. Kaye ed. 1966) (circa 1274-75) (cases of appeal).

67. The phrase "mode of proof" is taken from R. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 62-84 (1973).

68. With respect to the two kinds of allowable pleas, see 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 390, 402-03 (S. Thorne ed. 1968) (circa 1250-58) [hereinafter cited as BRACTON]; BRITTON 11 (1540) (circa 1291-92); E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 177-80 (1642); 2 FLETA 85 (H. Richardson & G. Sayles eds. 1955) (circa 1290); 2 M. HALE, HISTORIA PLACITORUM CORONAE 225 (1736) (a summary version of which was published in 1678); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 647, 650-52 (1923 reprint of 1898 ed.); T. SMITH, DE REPUBLICA ANGLORUM 78-79 (1583). With respect to the necessity of consent from 1215 until 1772, see text accompanying notes 74-92 *infra*. Since for most of the relevant period, a refusal to deny and a refusal appropriately to consent following a denial both were ineffective as pleas, *see* authorities cited *supra*; text & notes 69-70 *infra*, the plea of denial joined with consent will hereinafter be referred to as denial/consent.

69. Indeed, it was not until 1772 that an English court could enter judgment against a person refusing to plead acceptably. It was then provided:

> That if any Person . . . being arraigned on any Indictment, or Appeal for Felony, or on any Indictment for Piracy, shall, upon such Arraignment, stand mute, or will not answer directly to the Felony, or Piracy, such Person so standing Mute, as aforesaid, shall be convicted of the Felony or Piracy charged in such Indictment or Appeal; and the Court before whom he shall be so arraigned shall thereupon award Judgment and Execution against such Person, in the same Manner as if such Person had been convicted by Verdict or Confession of the Felony, or Piracy . . . .

An Act for the more effectual proceeding against Persons standing Mute on their arraignment for felony or piracy, 12 Geo. 3, c. 20 (1772). In 1827, there was a partial return to past practice when the law was changed to provide:

> That if any Person, being arraigned upon or charged with any Indictment or Information for Treason, Felony, Piracy, or Misdemeanor, shall stand mute of Malice, or will not answer directly to the Indictment or Information, in every such Case it shall be lawful for the Court, if it shall so think fit, to order the proper Officer to enter a Plea of "Not guilty" on Behalf of such Person; and the Plea so entered shall have the same Force and Effect as if such Person had actually pleaded the same.

equivalent of an acceptable plea.[70] With the exception of a handful of cases,[71] judgment on a felony charge was not until 1772,[72] and then only briefly, entered against an accused who refused to confess or deny/consent.[73] This result seemingly was the product of a concern for certainty of proof and of a correspondence between such certainty and the severity of the consequences flowing from judgment.

Following the abolition of trial by ordeal in 1215,[74] there was doubt concerning the appropriate mode by which to try persons accused of major crimes, particularly those "of whom suspicion [was] had that they [were] guilty of those things for which they [were being] restrained."[75] The royal response to the dilemma was not an order requiring that such persons be tried, nor that they be adjudged convicted;[76] instead, it was ordered that they be imprisoned, subject to the

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An Act for further improving the Administration of Justice in Criminal Cases in England, 7 & 8 Geo. 4, c. 28, § II (1827).

70. *Cf.* authorities cited note 68 *supra*. The absence of such deviant pleas from felony cases also indicates their unacceptability. Interestingly, the author of FLETA grouped the accused who refused to consent to a recognized mode of proof with the accused who were unwilling to answer (*nichil respondere velit*). 2 FLETA, *supra* note 68, at 85. Use of terminology like "velit respondere" to describe persons choosing whether to defend against charges of felony was not uncommon. *See* 2 BRACTON, *supra* note 68, at 390 (*se defendere voluerit; velit se defendere*), 403 (*se defendere velit*); BRITTON, *supra* note 68, at 11 (*se voillent acquiter*); PLACITA CORONE, *supra* note 66, at 4 (*se voille defendere*).

71. *See* text & note 78 *infra*; authorities cited & discussion note 79 *infra*.

72. *See* discussion note 69 *supra*.

73. *See* BRITTON, *supra* note 68, at 11; E. COKE, *supra* note 68, at 177-80; 2 FLETA, *supra* note 68, at 85; 2 M. HALE, *supra* note 68, at 225; 2 F. POLLOCK & F. MAITLAND, *supra* note 68, at 650-52.

74. It has been asserted that before 1215 a person could be subjected to trial by ordeal without his consent. *See* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 65, 70 (1898), *citing* THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILLE 173 (G. Hall ed. 1965) (circa 1181). In 1215, however, the Fourth Lateran Council forbade the clergy from participating in the ordeal ceremony, and the English promptly obeyed. *See* 2 F. POLLOCK & F. MAITLAND, *supra* note 68, at 599 & nn.4-6. As a result, in prosecutions by the king, trial by jury became the only recognized mode of proof other than confession.

75. CALENDAR OF THE PATENT ROLLS 1216-1225, at 186 (1219):

> quo judicio deducendi sunt illi, qui rettati sunt de latrocinio, murdro, incendio, et hiis similibus . . . illi qui rettati sunt de criminibus predictis majoribus, et de eis habeatur suspicio quod culpabiles sint de eo unde rettati sunt . . . .—
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> through what [mode of] trial those [persons] are to be led [i.e., tried] who are restrained for robbery, murder, arson and like things . . . those [persons] who are restrained for the aforesaid major crimes, and of whom suspicion is had that they are guilty of those things for which they are restrained . . . .

Compare the translation in Wells, *The Origin of the Petty Jury*, 27 L.Q. REV. 347, 352 (1911).

76. This should be contrasted with contemporaneous cases in which accused felons caught with the mainour, that is, in possession of the goods, or redhanded with hands or knife dripping with blood over the victim's body, were immediately hung. Bracton characterized these cases as ones which "probationem non admittat in contrarium per quam dedicere . . . vel defendere possit . . . mortem et feloniam . . ."; "[do] not admit of proof to the contrary . . . by which he may repudiate or deny the death and the felony . . . ." 2 BRACTON, *supra* note 68, at 386. *See also* PLEAS OF THE CROWN FOR THE COUNTY OF GLOUCESTER 145 n.174 (F. Maitland ed. 1884) [hereinafter cited as PLEAS OF THE CROWN FOR GLOUCESTER]. At least two cases of this kind are reported for the year 1221, noting that the accused "non potest dedicere"—is not able to deny

court's discretion to do otherwise.[77] In the years immediately following, where accused denied and consented, they were tried by juries; where accused refused to deny/consent, the courts did not—save in one known instance all-too-briefly reported[78]—exercise their discretion by entering judgment without trial against such accused, even where they were of evil fame. In most reported instances, these obdurate accused were tried by juries,[79] though occasionally they were allowed to abjure without trial,[80] or were imprisoned without trial.[81]

Although there may have been some thought in the early 13th century of entering judgment without confession or denial and consent

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(Walkelinus son of Rannulfi's Case, case 174, PLEAS OF THE CROWN FOR GLOUCESTER, *supra* at 45; Willelmus son of Matillidis' Case, case 394, *id.* at 92); one case reported in 1222, noting that the accused "non potest defendere"—is not able to defend (Thomas son of Ricardi's Case, case 138, 2 BRACTON'S NOTE BOOK 117 (F. Maitland ed. 1887), *cited in* J. THAYER, *supra* note 74, at 71 n.3), and another noting that "non potest dedicere" (John's Case, PLEAS OF THE CROWN FOR GLOUCESTER, *supra* at 152); and one for 1224, again noting that "non potest dedicere" (Ivo Scottus' Case, case 1908, 11 CURIA REGIS ROLLS (1955), *cited in* 2 BRACTON, *supra* note 68, at 386, transl. n.14).

77. CALENDAR OF THE PATENT ROLLS 1216-1225, *supra* note 75, at 186: "teneantur in prisona nostra . . . . [R]elinquimus discrecioni vestre hunc ordinem predictum observandum . . . ."—they shall be held in our prison . . . . [W]e have left to your discretion the observance of the aforesaid order . . . .

78. Henricus le Ireys's Case, case 1724 (1226), 3 BRACTON'S NOTE BOOK, *supra* note 76, at 563, *cited in* J. THAYER, *supra* note 74, at 72 *and in* R. PUGH, IMPRISONMENT IN MEDIEVAL ENGLAND 24 n.12 (1968); *see* 2 BRACTON, *supra* note 68, at 390 & nn.7-8, 391 (an accused tendering an ineffective plea "quasi convictus . . . remanebit"—will remain . . . quasi-convicted), 402 ("quasi convictus"); F. POLLOCK & F. MAITLAND, *supra* note 68, at 651 ("Bracton does not like to speak out plainly about this matter.").

79. *See, e.g.*, Petrus and Johannes' Case, case 67 (1219), 2 BRACTON'S NOTE BOOK, *supra* note 76, at 58 (the accused were hanged); Thomas son of Huberti's Case, case 728 (1221), ROLLS OF THE JUSTICES IN EYRE . . . GLOUCESTERSHIRE, WARWICKSHIRE AND STAFFORDSHIRE 1221-1222, at 332 (D. Stenton ed. 1940) (accused was hung); Thomas de la Hethe's Case, case 767 (1221), *id.* at 346 (accused was hung) (the foregoing cases are reported also by 2 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 322 n.(n) (S. Emlyn ed. 1778), and by SELECT PLEAS OF THE CROWN 99 (case 153), 100 (case 157) (F. Maitland ed. 1888)); Matillidis' Case, case 111 (1221), PLEAS OF THE CROWN FOR GLOUCESTER, *supra* note 76, at 31; Willelmus de Fonte's Case, case 213 (1221), *id.* at 51; Willelmus de Lichelade's Case, case 229 (1221), *id.* at 55; Rogerus Wulmangere's Case, case 316 (1221), *id.* at 75; Henricus' Case, case 330 (1221), *id.* at 79; Rogerus le Frankelein's Case, case 414 (1221), *id.* at 98; Hugh's Case (1222), *id.* at 151, n.435; Hugo Molendinarius' Case, case 136 (1222), 2 BRACTON'S NOTE BOOK, *supra* note 76, at 115; Anonymous Case (1235), referred to in Wells, *supra* note 75, at 353.

In only three of the above cases was judgment clearly entered, even though the accused were tried and apparently found guilty in each instance. In two of the cases, Thomas son of Huberti's Case, *supra*, and Thomas de la Hethe's Case, *supra*, the unusual practice of taking a verdict from not only 12 jurors but also from 24 knights "chosen for the purpose other than the aforesaid 12" was utilized. Thomas son of Huberti's Case, *supra*. In the third case, Petrus and Johannes' Case, *supra*, the itinerant justices who permitted judgment to be entered upon the jury's verdict were punished for having done so.

80. Robertus Caperun's Case, case 877 (1221), ROLLS OF THE JUSTICES IN EYRE . . . GLOUCESTERSHIRE, WARWICKSHIRE AND STAFFORDSHIRE 1221-1222, *supra* note 79, at 381; Johannes Alfolc's Case, case 1208 (1221), ROLLS OF THE JUSTICES OF EYRE . . . LINCOLNSHIRE 1218-1219 AND WORCESTERSHIRE 1221, at 588 (D. Stenton ed. 1934). In Henricus' Case, case 330 (1221), PLEAS OF THE CROWN FOR GLOUCESTER, *supra* note 79, at 79, Henricus was permitted to abjure following trial.

81. Henricus Piteriche de Wuttone's Case, case 435 (1221), PLEAS OF THE CROWN FOR GLOUCESTER, *supra* note 76, at 103.

to trial,[82] it soon was abandoned. By midcentury, an accused who refused to confess or deny/consent was apparently coerced, not into confessing, but rather into consenting to trial.[83] In 1275, this coercion was codified for one class of accused, notorious felons of evil fame.[84] The statute required that they have "prison forte et dure," strong and hard imprisonment, "as they which refuse to stand the common Law of the Land."[85] By the turn of the century, the coercion became more pronounced and eventually degenerated (perhaps due to a misreading of the statute) into the deadly "peine forte et dure," strong and hard pain.[86] This practice lasted more than four centuries,[87] encouraged by the rule that death from *peine* did not work a forfeiture of an accused's lands and tenements.[88] It is noteworthy, however, that throughout their history, prison and *peine* were viewed as coercion for consenting to trial[89] and penance for refusing the common law,[90] never as conviction

82. *See* 2 F. POLLOCK & F. MAITLAND, *supra* note 68, at 651.

83. *See* E. COKE, *supra* note 68, at 178; 2 M. HALE, *supra* note 79, at 321-22; 1 F. PALGRAVE, THE RISE AND PROGRESS OF THE ENGLISH COMMONWEALTH 268-69 (1832); F. POLLOCK & F. MAITLAND, *supra* note 68, at 651; R. PUGH, *supra* note 78, at 24-25. *But see* J. Thayer, *supra* note 74, at 80 n.1. For the period 1772-1827 the law of England briefly abandoned established practice and provided that judgment be entered against an accused who would not confess or deny. In 1827 it reverted to traditional practice in part by providing that should an accused refuse to plead acceptably, a plea of not guilty would be entered. *See* discussion note 69 *supra*.

84. Statute of Westminster the First, 3 Edw. 1, c. 12 (1275) ("ne se voillent mettre en enquestes des felonies").

85. *Id.*

86. For the gruesome details, *compare* BRITTON, *supra* note 68, at 11; 2 FLETA, *supra* note 68, at 85; Nicholas de C's Case, PLACITA CORONE, *supra* note 66, at 17-18, 20; *and* THE MIRROR OF JUSTICES 173, para. 134 (W. Whittaker ed. 1895) (circa 1285-90), *with* John de Dorley's Case, Y.B. 30-31 Edw. 1 (1302), ROLLS SERIES 510 (A. Harwood ed. & transl. 1863); Y.B. Mich. 8 Hen. 4, f. 1, pl. 2 (1406), *translated in* A SOURCE BOOK OF ENGLISH LAW 14-16 (A. Kiralfy ed. & transl. 1957) [hereinafter cited as SOURCE BOOK]; Y.B. 4 Edw. 4, f. 11, pl. 18 (1464), *translated in* 2 M. HALE, *supra* note 79, at 318; R. KEILWEY, RELATIONES QUORUNDAM CASUUM SELECTORUM 70 (1602) (1506 case); Richard Weston's Case (1615) (Coke, C.J.), 2 T. HOWELL, COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 911, 914 (1816); *and* 2 L. PIKE, A HISTORY OF CRIME IN ENGLAND 194-95, 283-85 (1968 reprint). *See generally* 2 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 298-300 (1883); J. THAYER, *supra* note 74, at 74-81.

87. In addition to the authorities cited in note 68 *supra*, see Anthony Kirley's Case (1614), 1 COUNTY OF MIDDLESEX, CALENDAR TO THE SESSIONS RECORDS 389-91 (W. LeHardy ed. 1935) [hereinafter MIDDLESEX SESSIONS RECORDS]; George Fisher (Fysher)'s Case (1613), *id.* at 145; John Battye's Case (1613), *id.* at 165.

88. *See* Y.B. Trin. 14 Edw. 4, f. 7, pl. 10 (1474), *translated in* SOURCE BOOK, *supra* note 86, at 16-17.

89. D. BARRINGTON, OBSERVATIONS ON THE STATUTES 65 (2d ed. 1776); BRITTON, *supra* note 68, at 11; 2 FLETA, *supra* note 68, at 85 ("committed . . . until he has learnt his lesson and asks leave to acquit himself of the charge according to the law"); 2 M. HALE, *supra* note 79, at 319; George Thorely's Case (1673), J. KELYNG, A REPORT OF DIVERS CASES IN PLEAS OF THE CROWN 27 (1708); Nicholas de C's Case, PLACITA CORONE, *supra* note 66, at 17-18, 20; *id.* at xxxv-xxxvi.

90. *See* Henricus Lamberd's Case, case 57 (1326), 4 SELECT CASES IN THE COURT OF KING'S BENCH 163 (G. Sayles ed. 1957) [hereinafter SELECT CASES] ("communem legum regni refutant"—"reject the common law of the realm"); Thomas de Kettering-ham's Case, case 24 (1331), 5 SELECT CASES, *supra* at 57-58 (G. Sayles ed. 1958) ("communem legem refutat"—"spurns the common law"); Michael Smith of Yelden's Case (1332), SELECT CASES FROM THE CORONERS' ROLLS 81 (C. Gross ed. 1896) ("penance"); BRITTON, *supra* note 68, at 11 ("penance"); E. COKE, *supra* note 68, at

for the felony charged.[91]

The primary reason for not entering judgment on a felony charge against an accused who refused to confess or deny/consent may well have been the following: confession was the product of a mode of proof —one's admission against oneself—recognized at common law as providing sufficient proof upon which to enter judgment. Denial/consent resulted in a verdict by another mode of proof—trial by jury—also recognized as providing sufficient proof.[92] However, an accused's refusal to confess or deny/consent, even if characterized as an implied admission, provided no such sufficient proof, evil fame of the accused notwithstanding. An accused might have refused to confess or deny/consent for many reasons, including among others, avoidance of forfeiture of lands and tenements, and distrust of the mode of proof. Thus, while it might have been reasonable to imply guilt from an accused's refusal to expressly admit or deny, such an implied admission appears not to have been clothed with enough certainty to constitute sufficient proof for a felony.[93] Misdemeanors, on the other hand, were treated somewhat differently.[94]

THE AVAILABILITY OF EQUIVOCAL PLEAS IN MISDEMEANOR CASES

Proof which would have been insufficient to determine felonies appears to have been considered sufficient at common law in the 13th

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179 ("refuseth to stand to the Common Law of the Land"; "penance"); 2 M. HALE, *supra* note 79, at 314-22 ("contempt in refusing his legal trial"; "penance"); text accompanying note 85 *supra*. Hale recommended that prior to infliction of *peine* "the judge hear the witnesses upon oath to give a probable testimony of his guilt . . . ." 2 M. HALE, *supra* at 321; *cf.* Anthony Kirley's Case (1614), 1 MIDDLESEX SESSIONS RECORDS, *supra* note 87, at 390 (evidence heard before judgment of *peine* entered). *Compare* Hale's recommendation *with* FED. R. CRIM. P. 11(f) (court cannot accept guilty plea "unless it is satisfied that there is a factual basis for the plea").

91. *See* Y.B. Mich. 8 Hen. 4, f. 1, pl. 2 (1406), *translated in* SOURCE BOOK, *supra* note 86, at 14-16; Y.B. Trin. 14 Edw. 4, f. 7, pl. 10 (1474), *translated in* SOURCE BOOK, *supra* at 16-17; E. COKE, *supra* note 68, at 179 (it would be "against all our Books, and against constant and continuall experience"); 2 M. HALE, *supra* note 79, at 319; 1 F. PALGRAVE, *supra* note 83, at 270.

92. It may be that early in the 13th century, trial by jury was not generally recognized as providing sufficient proof; hence the necessity of the accused's consent. *See* PLEAS OF THE CROWN FOR GLOUCESTER, *supra* note 76, at xxxix. At midcentury, when coercion of consent is known to have occurred, *see* text accompanying note 83 *supra*, one would suspect that trial by jury was increasingly recognized as providing sufficient proof. Whether the enduring necessity of consent was the product of formalism, *see* PLEAS OF THE CROWN FOR GLOUCESTER, *supra* at xl; J. THAYER, *supra* note 74, at 69, or the avoidance of forfeitures, *see* text accompanying note 88 *supra*, can only be conjectured.

93. Consequently, at least one Quarter Sessions apparently treated some felonies as ordinary misdemeanors. *See* examples cited in note 131 *infra*.

94. It is not clear whether a refusal to confess or deny/consent was sufficient in cases of treason. *See generally* An Acte for Murther and malicious Bloudshed within the Courte, 33 Hen. 8, c. 12 (1541); J. BELLAMY, THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES 23-58 (1970); E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 217 (4th ed. 1669).

and 14th centuries to determine offenses less serious than felonies.[95] For example, judgment for trespasses which were subject to making fine[96] appears to have been entered during this period not only upon confession[97] or trial,[98] but also upon an implied admission. Thus, a plaintiff and defendant's compromise of a private action for trespass was deemed sufficient proof of defendant's having broken the king's peace, thereby subjecting him to making fine.[99] Similarly, plaintiff's compromise, withdrawal of, or failure to prosecute an action for trespass was deemed sufficient proof of his having pleaded falsely, in whole or part, thereby subjecting him to making fine.[100]

The proof considered sufficient in the 13th and 14th centuries was

95. *Cf.* 2 F. POLLOCK & F. MAITLAND, *supra* note 68, at 652 (offenses subject to amercement, that is, a pecuniary penalty set by the court rather than by statute).

96. Making fine was a process, in use from about the 13th to perhaps the 17th century, whereby the court and the accused bargained on the amount of money sufficient to "make fine," that is, to reach a concord or settlement for the accused's contempt of the king or breach of the king's peace. For a general discussion of fines, see Beecher's Case, 77 Eng. Rep. 559, 563-66 (1609); 3 M. BACON, A NEW ABRIDGEMENT OF THE LAW, *Fines and Amercements*, at 169-88 (5th ed. H. Gwillim 1798); 2 E. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND OR, A COMMENTARY UPON LITTLETON (14th ed. F. Hargrave & C. Butler 1791) ch. 11, § 194 (1628); J. FOX, THE HISTORY OF CONTEMPT OF COURT 118-19, 137-56, 164-97 (1927); W. LAMBARD, EIRENARCHA 458-68 (1582). For a discussion of bargaining, see CROWN PLEAS OF THE WILTSHIRE EYRE 1249, at 101-02 (C. Meekings ed. 1961) [hereinafter WILTSHIRE EYRE]; J. FOX, *supra* at 141; 2 F. POLLOCK & F. MAITLAND, *supra* note 68, at 517. Fines could be coerced by a writ of *capias*, that is imprisonment. See J. FOX, *supra* at 118-19; W. LAMRARD, *supra* at 455, 459; 2 SELECT CASES, *supra* note 90, at CX-CXI (G. Sayles ed. 1938); WILTSHIRE EYRE, *supra* at 101. Imprisonment was to remain in effect, however, only so long as necessary to reach a bargain. *See* 2 R. BROOKE, LA GRAUNDE ABRIDGEMENT, *Imprisonment*, at 100 (1573); J. FOX, *supra* at 137-56 *passim*. *But see* R. PUGH, *supra* note 78, at 14-16.

Although there was no clear distinction in the 13th century between trespasses subject to making fine and trespasses subject to amercement, *see* J. FOX, *supra* at 119-36 *passim*, thereafter the more serious trespasses were subject to making fine and the less serious to amercement. *See* J. FOX, *supra* at 119-56 *passim*; W. LAMBARD, *supra* at 460-61; 2 SELECT CASES, *supra*. For a general discussion of amercements, see authorities dealing with fines cited *supra*. Amercements were not coerced by imprisonment, but rather were enforced by distress, that is, a transfer of a chattel from the wrongdoer to the injured party. *See* Griesley's Case, 77 Eng. Rep. 530, 535-36 (C.P. 1588); 2 SELECT CASES, *supra* at CX.

97. *See e.g.*, Robertus son of Iohannis de Dunham's Cases, cases 21-23, RECORDS OF SOME SESSIONS OF THE PEACE IN THE CITY OF LINCOLN 1351-1354 AND THE BOROUGH OF STAMFORD 1351, at 7-8 (E. Kimball ed. 1971); cases 72-74, *id.* at 26-27; cases 134-135, *id.* at 46; Henricus de Carleton's Case, case 27, *id.* at 8-9; case 75, *id.* at 27; case 136, *id.* at 46; Iohannes Faukes de Burton's Case, case 29, *id.* at 9; case 59, *id.* at 19-20; case 139, *id.* at 47; Iohannes son of Rogeri de Glentworth de Linc's Case, case 32, *id.* at 10; case 41, *id.* at 14-15; case 49, *id.* at 16-17; case 67, *id.* at 23-24; case 139, *id.* at 47.

98. *See, e.g.*, Robertus son of Roberti de Bolewik's Case, case 26 (1331), 5 SELECT CASES, *supra* note 90, at 63; Thomas de Carleton's Case, case 27 (1331), *id.* at 64; Robertus de Hotot de Carleton's Case, case 46 (1336); *id.* at 91.

99. *See, e.g.*, Walter son of Walter of Litleton's Case, case 205 (1249), WILTSHIRE EYRE, *supra* note 96, at 191; John of Eston's Case, case 211 (1249), *id.* at 192; Richard of Danes' Case, case 294 (1249), *id.* at 206.

100. *See, e.g.*, Thomas de Elylaunde's Case, case 191 (1244), THE LONDON EYRE OF 1244, at 78 (H. Chew & M. Weinbaum eds. 1970); Walter son of Walter of Litleton's Case, case 205 (1249), WILTSHIRE EYRE, *supra* note 96, at 191; Cristiane Quest's Case, case 43 (1323), 4 SELECT CASES, *supra* note 90, at 108 (G. Sayles ed. 1957); Margaret Child's Case, case 2 of Roll B, Assize Roll 33 (1363), SESSIONS OF THE PEACE FOR BEDFORDSHIRE 1355-1359, 1363-1364, at 102 (E. Kimball ed. 1969) [hereinafter SESSIONS OF THE PEACE FOR BEDFORDSHIRE]. *See also* R. PUGH, *supra* note 78, at 9-13.

reflected in the responsive pleadings which were acceptable in cases involving trespasses subject to making fine. An accused in such cases was permitted to respond that "non potest dedicere"—he is not able to deny[101]—notwithstanding the fact that he had not been caught with the mainour or red-handed, and notwithstanding the fact that an inability to deny was not an explicit admission of guilt.[102] More importantly, an accused apparently was permitted to respond that "ponit se in gratiam domini Regis"—he puts himself in the grace of the lord King—notwithstanding the fact that a submission of this kind also was not an explicit admission of guilt.[103]

It is not clear exactly when and in what contexts a plea of *ponit se in gratiam* without any other proof became an acceptable basis for judgment.[104] There were many instances in several courts in the 13th, 14th and 15th centuries where the accused appeared and "fecit finem"—made fine—without any reported response or no response other than "petit se admitti per finem cum domino rege"—he seeks to be received to make fine with the lord king.[105] These might have been instances of *ponit se in gratiam*, or—since seeking to make fine with the king was the customary practice following conviction, confession, and *non potest dedicere*[106]—they might instead be instances of these other responses.

The doubt surrounding the acceptability of these equivocal pleas

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101. *See* discussion note 76 *supra*.

102. *See, e.g.*, Henry Dun's Case, case 127 (1249), WILTSHIRE EYRE, *supra* note 96, at 176; Adam's Case, case 55 (1338), 5 SELECT CASES, *supra* note 90, at 109-10 ("non potest dedicere . . . et ponit se inde ad graciam regis"); Ricardus Bernard's Case, case 59 (1340), *id.* at 123-24; Alexander Fastolf' de Iernemutha's Case, case 4 (1342), 6 SELECT CASES, *supra* note 90, at 14 (G. Sayles ed. 1965) ("dicunt quod . . . dedicere non possunt [e]t ponunt se inde ad graciam domini regis"); Waresius atte Capele's Case, case 46 (1350), *id.* at 71 ("dicit quod non potest premissa dedicere et ponit se inde in graciam regis").

103. See text & notes 120-52 *infra*.

104. Resort to the plea of *ponit se in gratiam*, once its acceptance was recognized, is not surprising. One can well imagine that an accused (particularly one imprisoned following attachment) would wish to avoid coercive imprisonment and make fine immediately. *See* discussion note 96 *supra*.

105. *See, e.g.*, Stephanus Aurifaber de Wyndesouere's Case, case 1018 (1248), THE ROLL AND WRIT FILE OF THE BERKSHIRE EYRE OF 1248, at 389 (M. Clanchy ed. 1973) ("finem fecit"); Iohannes de Claghton's Case, case 41 (1348), 6 SELECT CASES, *supra* note 102, at 65 ("finem facit cum domino rege"); Hugo Cole's Case, case 10 of Roll B, Assize Roll 33 (1363), SESSIONS OF THE PEACE FOR BEDFORDSHIRE, *supra* note 100, at 109 ("petunt se admitti ad finem faciendum cum domino rege") (Kimball, the editor, believes with respect to this and several other like cases that the accused "apparently pled guilty," *id.* at 28); Robertus son of Thome de Haldanby's Case, case 112 (1372), 6 SELECT CASES, *supra* at 164 ("petit se admitti ad finem cum domino rege"); Ricardus Gray's Case, case 48 (1410), 7 SELECT CASES, *supra* note 90, at 197 (G. Sayles ed. 1971) ("fecerunt finem cum domino rege"); *cf.* the brief entries in 1 RECORDS OF SOME SESSIONS OF THE PEACE IN LINCOLNSHIRE 1381-1396 (E. Kimball ed. 1955).

106. *See, e.g.*, Willelmus Iuel's Case, case 9 of Roll B, Assize Roll 33 (1363), SESSIONS OF THE PEACE FOR BEDFORDSHIRE, *supra* note 100, at 108-09 (confession); Thomas de Carleton's Case, case 27 (1331), 5 SELECT CASES, *supra* note 90, at 64 (trial); Ricardus Bernard's Case, case 59 (1340), *id.* at 123-24 (*non potest dedicere*).

was illuminated to some extent by the remarkable *Robert of Kelsey's Case*[107] from the London Eyre of 1321. Robert of Kelsey and a host of codefendants, late officials of London and members of their faction, were accused of having "bound themselves reciprocally with mutual oaths to maintain and foment false pleas of parties in the City of London . . . to the prejudice of the lord King . . . and to the loss and oppression of the middling people of the City aforesaid."[108] According to the report[109] of the case, when Robert was asked to plead, he responded: "Jeo voille demurer en la grace le Roi"—I wish to wait upon the King's grace.[110] According to record one, he "petit quod ipse admittatur ad graciam Regis . . ."—asks that he might be admitted to the King's grace in this concern.[111] But according to record two, "ponit se in graciam domini Regis"—he puts himself on the grace of the lord King.[112] It appears evident from these versions of Robert's response that something like *ponit se in gratiam* was at least known.

It also appears evident, however, that the acceptability of *ponit se in gratiam* when not accompanied by a traditional plea was subject to disagreement, the court having rejected Robert's response. According to the report, Robert was then asked whether he admitted the charge and wished to wait upon the king's grace. When he responded negatively, he was told that he must either "deny it, or admit it, for otherwise you are not answering."[113] According to record one, he was told that the king's grace was not within the justice's power,[114] but according to record two, he was told that he must first admit the charges before putting himself in the king's grace.[115] When Robert continued to refuse, the report of the case has the court stating:

> Then you cannot deny it, for no other enrolment can be made than that you admit it, or deny it and wait upon the country [i.e., request a jury trial], or that you cannot deny it. And because you will not say anything else, the enrolment will have to be 'And he could not deny it.'[116]

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107. (1321), YEAR BOOKS OF EDWARD II, THE EYRE OF LONDON, 14 EDWARD II, A.D. 1321, at 44-47 (H. Cam ed. 1968).
108. *Id.* at 45.
109. The report is a collation of four manuscripts, labelled by Cam as D (written during the Eyre, *id.* at cxxxix); E (written during Edward II's time, *id.* at cxliv); F (transcribed in the 17th century from a manuscript written in the 14th century, *id.* at cxlv); and H (written in the mid-14th century, *id.* at cxlviii). What is denominated in the text as "record one" is the official record of the Eyre, *id.* at xii; "record two" is a manuscript written in the mid-14th century. *Id.*
110. *Id.* at 44.
111. *Id.* at 46.
112. *Id.* at 47.
113. *Id.* at 45.
114. *Id.* at 46.
115. *Id.* at 47.
116. *Id.* at 45. The court's original language was: "Dunqe ne poez dedire qar altre

According to record one, "Robertus non respondet nec vult . . . dedicere,"[117]—Robert does not respond nor wishes to deny. And according to record two, "Robertus nichil aliud voluit dire (?) quam ut prius,"[118]—Robert does not wish to say other than as before. From these proceedings it appears that in lieu of confession, *non potest dedicere* was an acceptable alternative in this prosecution for trespass, even if the accused would not tender it. Accordingly, judgment was rendered against Robert as one who had not denied the charges brought against him, and he was committed to prison.[119] In this 1321 case, then, the court exhibited a willingness to accept a plea of nondenial, but would not accord the same treatment to *ponit se in gratiam*. Robert's proferring of the latter plea, however, clearly indicates that it was in use at that time.

The acceptability of *ponit se in gratiam* appears to have become fixed by the mid-14th century or the early 15th century at the latest. The Devon Quarter Sessions report one instance in 1351-53 where such a plea was accepted,[120] and King's Bench reports one in 1373.[121] *Ponit se in gratiam*'s most well-known early occurrence, found in a 1431 *Year Book* discussion, evidences its sufficiency as the sole proof for determining a trespass, notwithstanding the fact that it was only an implied admission. Indeed, the discussion clearly indicates that *ponit se in gratiam* was sufficient to determine a trespass, though insufficient to work an estoppel in a subsequent civil case.

> Weston. If one is indicted for trespass, and he surrenders (submits?) himself and makes fine, will he be received afterwards to plead not guilty?
>
> Paston. Yes, certainly.
> This was conceded by the entire court.
>
> Weston. It is on the record that he confesses (i.e., pleads guilty).
>
> Babington. If the entry is so, he will be estopped (from pleading not guilty); but the entry is not so, but the entry is thus: that he puts himself in the grace of the Lord King, and asks that he be received (to make) a fine . . . .[122]

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enroullement ne poet estre fait, ou qe vous le grauntez, ou le dediez e demurer en pais, . . . ou qe vous ne poez dedire. . . . E pur ceo si vous ne volez altre chose dire il covent lenroullement estre *et non potuit hoc dedicere*." *Id.* (emphasis in original).

117. *Id.* at 46.

118. *Id.* at 47 (question mark in original).

119. *Id.* at 47.

120. Anonymous Case, PROCEEDINGS BEFORE THE JUSTICES OF THE PEACE IN THE FOURTEENTH AND FIFTEENTH CENTURIES, EDWARD III TO RICHARD III, at 84 (B. Putnam ed. 1938).

121. Robert's Case, case 114 (1373), 6 SELECT CASES, *supra* note 102, at 166.

122. Y.B. 9 Hen. 6, f. 60, pl. 8 (1431). The language used in the report of the case reads:

Although the published records do not reveal the extent to which *ponit se in gratiam* was used in the 15th and 16th centuries, it apparently was prevalent enough in Quarter Sessions that the leading writers of justice-of-the-peace manuals mentioned it at some length. Lambard, writing in 1582, said:

> But the other, (which I call Confession after a manner) is only a not denying, in which the partie doth cunninglie, and (after a sort) take the fault upon him, without confessing himselfe guiltie thereof; as where he putteth himselfe in *Gratiam Regina* without any more . . . .[123]

In 1583, Crompton referred to the practice as one by which an accused makes fine "oue protestac' "[124]—with protestation, and as one by which he "render luy"[125]—surrenders or submits himself. And Dalton, writing in 1618, referred to it as one by which accused "yeeld themselues, and pray to be admitted to their fine . . . ."[126]

The published records for the 17th century inform us that *ponit se in gratiam* was prevalent in Quarter Sessions in forms—as would later be said of the similar, early 18th century New York practice—"as manifold as the roads to salvation."[127] Lancashire Quarter Sessions records for the period 1601-6 indicate that accused "though pleading not guilty, place (put) themselves at (on) the Queen's (King's) mercy (grace)" for charges of assault,[128] riot,[129] unlawful entry,[130] unlawful

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> Weston. Si ō soit ēdite de Trñs, & il se rēd, & face fine; seī il receu apres a pledī Riē culp̄?
> Paston. Ouy veramēt.
> Quod fuit cōcessū p Tout le Court.
> Weston. Il ē de record quod cognovit.
> Babington. Si l'ētre soit issint, il sera estoppe: mez l'ētre n'ē pas issint, mes l'ētr ē tiel, quod posuit se in gratiam Dñi Regis, & petit se admittit [*sic*] per finem.

See also the translation of this passage in Hudson v. United States, 272 U.S. 451, 456 n. 3 (1926). The discussion continues:

> [q]uar si ō soit indite d' Feloñ, & ad chīe de pdon, & pl'd' ceo, & prie allowance d' c̄, ceo ne pveī pas q̄ il est culp̄, mes l'Roy ad exclu luy m̄ p l'chīe: & jeo & Tout le Court sumus ēconī vous en c point, & c.—
>
> Therefore if one be indicted for felony, and has a charter of pardon, and pleads it, and prays that it be allowed, this does not prove that he is guilty, but that the King has excluded himself from so proving by his charter; and I and the entire court are against you on this point.

123. W. LAMBARD, *supra* note 96, at 427. The passage continues: "or (by Protestation that he is not guiltie) pleadeth his pardon: And such a Confession (if I maye so call it) doeth not so conclude him, but that he may afterward pleade Not guiltie in any Action brought againste hym." The source for these statements can be found in Y.B. 9 Hen. 6, f. 59, 60, pl. 8 (1431).

124. A. FITZHERBERT & R. CROMPTON, L'OFFICE ET AUCTHORITIE DE IUSTICES DE PEACE f. 105 b (1583).

125. *Id.* at f. 106. *See also* Y.B. 9 Hen. 6, f. 59, 60, pl. 8 (1431) (se rēd).

126. M. DALTON, THE COUNTREY IUSTICE 93 (1618).

127. J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 592 (1944).

128. *See, e.g.*, Elizabeth Shireson's Case (1601-2), 1 LANCASHIRE QUARTER SESSIONS RECORDS, QUARTER SESSIONS ROLLS 1590-1606, at 136-37 (J. Tait ed. 1917) (unlawful entry as well as assault charged); William Sefton's Case (1602), *id.* at 151; James Pendleburie's Case (1603), *id.* at 181, 183; Henry Crosseley's Case (1602-3), *id.* at 193,

taking,[131] gambling,[132] and trade[133] and miscellaneous[134] offenses. Middlesex Quarter Sessions records for the period 1613-15 indicate that accused "plead (protest) that they are not guilty and submit (put) themselves to (on) the mercy of the Court (King) to a fine (to be fined)" for charges of assault and battery,[135] riot[136] and a trade offense.[137] Warwick Quarter Sessions records for the period 1682-83

195; Thurstan Walworke's Case (1603), *id.* at 194-95; Anne Wood(e)'s Case (1603), *id.* at 194-95; Ralph Pille's Case (1603), *id.* (fighting); Arthur Asheton's Case (1604), *id.* at 222; William Ma(e)chy(e)n's Case (1604), *id.*; Ralph Birche's Case (1604-5), *id.* at 248, 250; James Stringer's Case (1604-5), *id.* (unlawful entry as well as assault charged); Peter Orrell's Case (1604-5), *id.*; Ralph Pycrofte's Case 1604-5), *id.* at 262-63; Simon Oppenshawe's Case (1604-5), *id.*; Thomas Platt(e)'s Case (1605), *id.* at 258-59; Richard Sharpus (Sharples)' Case (1605), *id.*; Thomas Ryley's Case (1605), *id.* at 280-81; Edmund Starkey's Case (1605), *id.*; William Makand(t)'s Case (1605), *id.* at 288, 290; Thomas Lees's Case (1605), *id.*; Charles Romesbothome's Case (1605-6), *id.* at 300-02; Alexander Crompton's Case (1605-6), *id.* at 287, 290; Ralph Norres' Case (1605-6), *id.* at 300, 302; Richard Booth(e)'s Case (1605-6), *id.*

129. *See, e.g.*, Robert Kirkeham's Case (1603), *id.* at 188-89; William Tompson's Case (1604), *id.* at 218-19; Robert Bamber's Case (1605), *id.* at 279, 281.

130. *See, e.g.*, James Clerke (Clearke)'s Case (1601-2), *id.* at 139-40; William Pye's Case (1602), *id.* at 158; Thomas Harrison(Harison)'s Case (1603), *id.* at 168-69; William Barton's Case (1603), *id.*; Richard Fryth's Case (1603), *id.* at 172; Nicholas Hartley's Case (1603), *id.* at 194-95; Richard Walton's Case (1603-4), *id.* at 201-02; Henry Boyes' Case (1603-4), *id.* at 209-10; Alice Wall's Case (1604), *id.* at 222; Abraham Milne(Mylne)'s Case (1604-5), *id.* at 248, 250; Robert Orrell's Case (1604-5), *id.* at 249-50; George Seddon's Case (1604-5); *id.*; Thomas Ormyshawe(Ormyshaw)'s Case (1604-5), *id.* at 259; Margery Boatman's Case (1605), *id.* at 255-56; William Chorley's Case (1605), *id.* at 280-81; Jane Fletcher's Case (1605-6), *id.* at 301-02.

131. *See, e.g.*, Robert Brade the younger's Case (1604), *id.* at 218-19 (cut down and took an ash tree, value 40d.); James Crosley's Case (1604), *id.* at 221-22 (entered someone's woods and took an "oller"); Christopher Hindle's Case (1604), *id.* at 235 (took a dagger worth 3s. and some money); Edward Tyldesley's Case (1604-5), *id.* at 259 (broke into someone's house and took L5); Thomas Crosse's Case (1605), *id.* at 264-65 (broke into someone's house and took turf); James Goose's Case (1605), *id.* at 265-66 (took four loads of rushes, value 12d.); Christopher Marsden's Case (1605), *id.* at 268-70 (took a heifer, value 40s.). All of these cases appear to have been treated as ordinary trespass cases.

132. *See* William Eccles' Case (1603), *id.* at 198-99; John Backehouse(Bachouse)'s Case (1605), *id.* at 266.

133. *See, e.g.*, John Carter's Case (1601-2), *id.* at 137 (kept a tippling house without a license); William Noblet's Case (1603), *id.* at 199 (entertained rogues and vagabonds); Lawrence Greenefelde's Case (1605), *id.* at 266 (kept an alehouse without a license and allowed unlawful games); John Haugh(Haughe)'s Case (1605), *id.* at 269-70 (kept a tippling house without a license).

134. *See, e.g.*, William Borwicke(Barwicke)'s Case (1602), *id.* at 156 (refused to relieve two poor persons); John Cockerom's Case (1603), *id.* at 185-86 (did not attend church); Anne Faireclough(Fayrecloughe)'s Case (1603-4), *id.* at 222 (spoke scandalous words); John Clerke's Case (1604), *id.* at 221-22 (killed someone's "cur bitche"); James Dryven's Case (1604), *id.* at 235 (set fire to someone's goods); William Croskill(Croskell)'s Case (1604-5), *id.* at 265-66 (kept a greyhound for coursing hares and killed one, value 4d.); Edward Winder(Wynder)'s Case (1605), *id.* at 265-66 (slandered); Janet Worthington's Case (1605), *id.* at 268, 270 (interfered with a bailiff); Charles Holland(e)'s Case (1605), *id.* at 288, 290 (eavesdropped); Edmund Sharples' Case (1605-6), *id.* at 301-02 (was a common drunkard and disturber of the peace).

135. Henry Heynsworth's Case (1613), 1 MIDDLESEX SESSIONS RECORDS, *supra* note 87, at 139 (also charged with wounding, fined 6s., 8d.); Richard Holte's Case (1613), *id.* at 140 (fined 5s.); John Thorton's Case (1613), *id.* at 174 (also charged with wounding, fined 3s., 4d.); John Trewman's Case (1614), 2 *id.* at 91 (fined 2s., 4d.) (W. LeHardy ed. 1936); John Clarke's Case (1615), *id.* at 326 (fined 12d.).

136. Christopher Pickford's Case (1613), 1 MIDDLESEX SESSIONS RECORDS, *supra* note 87, at 287 (also charged with assault and battery, fined 12d.).

137. Martin Farrell's Case (1614), 2 MIDDLESEX SESSIONS RECORDS, *supra* note 135, at 115 (tippling without a license).

indicate that accused made fine "with protestation of not guilty" for charges of extortion[138] and a trade offense.[139] And West Kent Quarter Sessions records for the period 1744-67 indicate that accused "submitted" to charges of assault[140] keeping a disorderly house,[141] and trade[142] gambling,[143] poor law[144] and miscellaneous other offenses.[145]

Notwithstanding the acceptability of *ponit se in gratiam* and related responses for four centuries, several circumstances appear to indicate—particularly in the late 16th and early 17th centuries—that their lesser certainty of proof, as compared, for example, with confession's greater certainty, might have inhibited their entry to the most serious trespasses. Although the published records are not conclusive, the absence or virtual absence of *ponit se in gratiam* in cases of the most serious trespasses appears purposeful. The Middlesex Quarter Sessions for the period 1613-15, for example, reveal no "submissions to the mercy of the court" for nonfelonious larceny and related offenses, although there were 109 convictions following trial and 11 following confessions for such offenses.[146] Since whipping was the almost invariable punishment for poor accused convicted of nonfelonious larceny, the absence of submissions may have resulted from fear of the whip; yet all 11 confessions preceded whipping. Similarly, the Lancashire Quarter Sessions for the period 1601-6, at which about 200 accused "placed themselves on the king's mercy," reveal only seven to charges of unlawful taking,[147] 20 to 25 times less than the normal occurrence of such charges.[148] Although *ponit se in gratiam* pleas to trade offenses were not uncommon at other sessions,[149] at Middlesex, where such offenses appear to have been punished severely, there was only one such plea and that strangely without record of fine.[150] Finally, it is interesting that while *ponit se in*

138. Christopher Cruffe's Case (1683), 8 WARWICK COUNTY RECORDS, QUARTER SESSIONS RECORDS 33 (H. Johnson ed. 1953).
139. Richard Meades' Case (1682), *id.* at 11.
140. *See, e.g.*, William Bartholomew's Case (1744), 6 KENTISH SOURCES, CRIME AND PUNISHMENT 201 (E. Melling ed. 1969); James Holliday's Case (1745), *id.* at 203; Mary Chittenden's Case (1746), *id.* at 202; James Goodchild's Case (1751), *id.* at 203; Thomas Conner's Case (1754), *id.* at 202.
141. William Finch's Case (1744), *id.* at 203.
142. George Arnold's Case (1751), *id.* at 201 (using false weights).
143. Joseph Dell's Case (1753), *id.* at 202 (keeping a common skittle ground).
144. William Arthur's Case (1757), *id.* at 201; James Ellis' Case (1767), *id.* at 202.
145. Barbara Dellinger's Case (1752), *id.* at 202 (not watching with the constables).
146. Author's tabulation from 1 MIDDLESEX SESSIONS RECORDS, *supra* note 87; 2 *id.*, *supra* note 135.
147. *See* cases cited note 131 *supra*. It is not certain whether all of these cases were considered larceny.
148. *See* J. COCKBURN, A HISTORY OF ENGLISH ASSIZES 1558-1714, at 97 (1972).
149. *See, e.g.*, cases cited notes 133, 137, 142 *supra*.
150. Martin Farrell's Case (1614), 2 MIDDLESEX SESSIONS RECORDS, *supra* note 135, at 115.

gratiam appears to have been prevelant in Quarter Sessions, its use appears to have been minimal[151] in King's Bench.[152]

These factors give substantial evidence of a correlation between the seriousness of the offense charged and the acceptability of a *ponit se in gratiam* plea. A similar correlation seems to have existed in the area of punishment. Because the plea of *ponit se in gratiam* presented proof of guilt with reduced certainty, the punishment meted out to the accused appears to have been correspondingly reduced. Several analyses of the plea during this period substantiate the existence of such a practice. William Lambard, in a discussion of *ponit se in gratiam*, stated:

> But here it is good to learne, whether the Iustices be compellable to admit such a confession by a manner, being altogither deuised in favour of offendours, and for deceiuing of the Queene; or whether they may driue the party either to a absolute confession (for increase of the Fine) or to his Trauerse, that (failing therein) he may be imprisoned, and fined also.[153]

Implicit in this passage is the practice of imposing a lesser penalty on one pleading *ponit se in gratiam* than would be levied had he confessed or been convicted following trial. Such a practice is consistent with regarding this plea as providing proof of guilt less certain than was provided by confession or jury verdict.[154]

A contemporary passage from Fitzherbert and Crompton gives further evidence not only that the plea of *ponit se in gratiam* led to a reduced punishment, but that it may have been used in a common law form of plea bargaining.

> If a defendant be indicted under a statute which provides that a sum certain be forfeited, and then he wishes to submit himself to it, and prays that he be received for his fine before he is

151. *See* Rex v. Williams, Comb. 18, 90 Eng. Rep. 317 (1687); Queen v. Templeman, Farr. (7 Mod.) 40, 87 Eng. Rep. 1081; 1 Salk. 55, 91 Eng. Rep. 54 (1702). These cases are the only known uses of nolo contendere in *English Reports*.

152. Ordinary criminal cases were not commonly tried before King's Bench, although such cases, when raising difficult questions of law, might be removed to King's Bench for trial. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 212-13 (7th ed. 1956).

153. W. LAMBARD, EIRENARCHA 512 (1599). Compare the text quotation with the following seemingly modern passage from W. LAMBARD, EIRENARCHA 578 (1619):

> And althought it may seeme good husbandry to take such a fine by a maner of confession before conuiction, rather than to hazard the losse of all the profit that may come to the K. therby (as indeed that must ensue, if no conuiction be had) yet who seeth not, that the other way is much more serviceable, and that this is but to looke through the fingers (as we say) and to strike or flap at a fault with a Fore taile, and none other.

154. It is interesting in this regard that Lambard indicates that a confession leads only to payment of the full fine, while a jury verdict could be followed by both imprisonment and a fine. This might reflect the belief that greater certainty attended a jury verdict, regardless of whether consent to trial was voluntary or forced, than attended a forced confession.

> convicted under the statute, quaere whether the Court may assess a smaller fine than is mentioned in the statute; it seems that it is so, because it is uncertain whether he will be convicted of the offence or not.[155]

This passage, which seems to model a modern notion of plea bargaining, suggests that a plea may be accepted in return for lighter punishment where conviction, with the possibility or probability of heavier punishment, is uncertain; in this regard, the passage may account for the prevalence of pleas such as *ponit se in gratiam*, whereby an accused could preclude the possiblity of heavier punishment and the court could preclude the possibility of no punishment and, in particular, no fine.[156] The passage seems to go further, however, since it does not simply approve the notion of plea bargaining, but also justifies disregard of a statutory, fixed-penalty provision. In doing so, the passage parallels Lambard's logic in this way: a fixed penalty provided by statute should be imposed only where the certainty of proof contemplated by the statute to convict is present; where there is less certainty of proof, the fixed penalty may be disregarded and a lesser penalty imposed.

A similar logic may also be seen in a 1633 opinion of Sir Robert Heath, Chief Judge of the Common Pleas,[157] answering affirmatively the question posed by Crompton:

> *Qu.* Whether it be in the power of any general Quarter-Sessions to mitigate any penalty upon a Statute Law; if the Party indicted shall submit himself to the fine of the Court, and wave the traverse?
>
> *Resol.* If the Party be convicted, or confesse the fault, it is not in the Power of the Court to mitigate the Fine, in such cases where the Statute makes it certain. But if the Party indicted protesting his innocency, yet *quia noluit placitare cum domino rege* puts himself into the grace of the Court, the Court may impose a moderate Fine and order to forbear the prosecution.[158]

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155. A. FITZHERBERT & R. CROMPTON, *supra* note 124, at f. 106. The writers' language reads:

> Si loffender soyt indict sur tiel estatute que done summe certayne destre forf. et puis il voile render luy mesme, et prye destre admit a son fyne auant que est conuict sur le estatute, quere si le Court poyt assesser pluys petyte fyne que est mencyon in lestatute, il semble que cye, car est incertayne le quel serra conuict de loffence ou nemy.

156. *See* note 153 *supra*. While the lack of estoppel effect may also explain why an accused chose to plead *ponit se in gratiam*, it alone does not explain why an implied admission was acceptable to trespass and why such an admission without further proof seems to have inhibited punishment.

157. This opinion was part of a widely utilized body of "answers framed by Heath . . . to some questions put to him by gentlemen on the Norfolk circuit and other questions submitted to him by the Privy Council." *See* SOMERSET ASSIZE ORDERS 1629-1640, at xxviii (T.G. Barnes ed. 1959) [hereinafter SOMERSET ASSIZE ORDERS].

158. *Resolutions of the Judges of Assizes* (1633), M. DALTON, THE COUNTRY JUSTICE 118, 119 (T.M. ed. 1666). The quoted discussion is also reproduced in SOMERSET ASSIZE ORDERS, *supra* note 157, at 64-65, from another edition of *The Country Justice*.

Viewed together, the discussions of Lambard, Fitzherbert and Crompton, and Heath reflect a common underlying theme: the acceptability of pleas such as *ponit se in gratiam* at English common law depended upon the seriousness of the offense charged and, once accepted, dictated the resultant punishment. The rise of *ponit se in gratiam* at a time when proof of lesser certitude was acceptable for misdemeanor than for felony, and the apparent use of *ponit se in gratiam*, particularly in the late 16th and early 17th centuries, as a plea-bargaining and punishment-reducing device, manifest that central theme. Equivocal pleas such as *ponit se in gratiam*, lacking the degree of certainty embodied in a confession or jury verdict after trial, were deemed insufficient modes of proof for rendering judgment on serious charges. Conversely, when such pleas were accepted, the resultant punishment was flexibly lessened in accordance with the lesser certainty of proof provided by the plea.[159]

The common law relationship between certainty of proof and the seriousness with which an offense would be regarded[160] explains why *ponit se in gratiam* did not arise with respect to felonies, but did with respect to misdemeanors—an implied admission was proof of insufficient certainty upon which to put a person to death.[161] Similarly, it explains why plea bargaining could avoid fixed penalty provisions; if the legislature intended a fixed penalty for "conviction," a lesser penalty was warranted for something less than conviction.[162] Finally, it explains why *ponit se in gratiam* disappeared when it became equated with "confession,"[163] confession being clothed with more certainty than *ponit se in gratiam*.[164] This latter development was reflected in the corresponding rise of the plea of nolo contendere.

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159. Despite the discussions of Fitzherbert and Crompton and Heath, whether the entry of *ponit se in gratiam* actually inhibited punishment in practice remains in doubt. On the one hand, in Middlesex it appears that charges which could have been treated as felonies were treated as trespasses. *See* cases cited note 131 *supra*. But on the other, a comparison of an admittedly small number of similarly described assaults and batteries in Middlesex does not reveal any distinction between treatment following trial and following "submission to the mercy of the court."

For example, hurting and wounding received the following punishments: following trial, 3s., 4d., 1 MIDDLESEX SESSIONS RECORDS, *supra* note 87, at 139; L6, 13s., 4d., *id.* at 335; 2s., 6d., *id.* at 356; following submission, 6s., 8d., *id.* at 139 (accused was Irish); 3s., 4d., *id.* at 174. This might be because dissimilar offenses were described similarly as a result of the entry of *ponit se in gratiam*, but might also be because similar offenses were treated similarly despite an entry of *ponit se in gratiam*.

160. *See* text accompanying notes 153-58 *supra*.

161. *See* text accompanying notes 91-94 *supra*. This is not inconsistent with the fact that prison and *peine* often resulted in death. Death was not inevitable and indeed was avoidable if the accused consented. *See* authorities cited note 68 *supra*.

162. *See* text accompanying notes 155-58 *supra*.

163. *See* text & notes 170-73 *infra*.

164. *See* text accompanying note 122 *supra*.

BIRTH OF THE PLEA OF NOLO CONTENDERE

The general absence of the term "nolo contendere" from the cases[165] and texts indicates that the term was not in common usage at an early time. Nolo contendere's first substantive appearance seems to have been in the 1716 edition of Farresly's *Modern Cases* and in the 1717 edition of Salkeld's *Reports*, in the report of *The Queen v. Templeman*.[166] The issue in the case was whether an accused, after confessing to an indictment for assault, could offer affidavits to prove self-defense in mitigation of his fine. Chief Justice Holt held that an accused could not offer such affidavits following a finding of guilt but could following a confession. This result although seemingly consistent with Lambard's logic[167] appears somewhat inconsistent with the great certitude with which confession was long associated.[168] The inconsistency is removed but another produced by Holt's argument in support of the holding: "[T]he entry upon a confession is only *non vult contendere cum domina Regina & pon. se in gratiam Curiae.*"[169] The explanation essentially viewed *ponit se in gratiam* as an implicit supplement to a formal plea, denominated as non vult contendere, which together constituted a form of confession. As already noted, however, since about the time of *Robert of Kelsey's Case*[170] in 1321, *ponit se in gratiam* normally was not preceded by a formal plea, particularly one described as a confession. Although there is no clear explanation for the change, one possible explanation is the apparently quiet demise of *ponit se in gratiam* as a plea in itself in late 18th or early 19th century England. There seem to have been no reported cases announcing its demise. The only statutes which might have contributed thereto are the seemingly innocuous ones which provided justices of the peace with general forms for the recording of convictions by both trial and confession,[171] and the statute which provided that a plea of not guilty could be entered upon an accused's refusal to answer directly.[172] In any event, *ponit se in gratiam* and related responses were being

165. *See* cases cited note 151 *supra*.

166. Farr. (7 Mod.) 40, 87 Eng. Rep. 1081; 1 Salk. 55, 91 Eng. Rep. 54 (1702).

According to one authority, Farresly's work "possesses no great authority . . . ;" Salkeld's "has not been questioned, except in a single instance . . . ." J. WALLACE, THE REPORTERS 382, 399 (1882).

167. *See* text accompanying notes 153-54 *supra*.

168. *See* text accompanying note 122 *supra*.

169. 1 Salk. at 55, 91 Eng. Rep. at 54.

170. (1321), YEAR BOOKS OF EDWARD II, THE EYRE OF LONDON, 14 EDWARD II, A.D. 1321, at 44-47 (H. Cam. ed. 1968). See text accompanying notes 107-17 *supra*.

171. *See, e.g.*, An Act to Facilitate Summary Proceedings before Justices of the Peace and others, 3 Geo. 4, c. 23 (1822); An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions, 11 & 12 Vict., c. 43, § 14 (1848).

172. An Act for further improving the Administration of Justice in Criminal Cases in England, 7 & 8 Geo. 4, ch. 28, § 2; see note 69 *supra*.

regarded less as implied admissions and more as confessions in the early 18th century,[173] and the rise of nolo contendere may have signaled this development.

Nolo contendere thus seems to be of recent origin. No published case or textwriter is known to have used the term before Farresly's first edition in 1716 and Salkeld's in 1717. Three years later, the first textwriter who appears to have made use of the term "contend" with respect to *ponit se in gratiam*, framed this much quoted description of the plea:

> An Indirect or Implied Confession is where the Defendant, in a Case not Capital, doth not directly own Himself Guilty, but will own His Guilt, and submit to a Small Fine, rather than contend. In which Case, if the Court thinks fit, They may in Discretion accept of such submission to the King's Mercy.[174]

Although before 1721, *ponit se in gratiam* in New York was known only as submission, denial of guilt yet submission, and putting oneself on the court's mercy,[175] after 1721, "the plea of *nolo contendere* came into use . . . [but] it was at first only rarely used . . . . After the middle of the century, examples become more numerous."[176] This evidence of nolo contendere's recent vintage, however, must be viewed with caution in light of nolo contendere's appearance in the 1724 edition of Comberbach's *Report of Several Cases*, in the report of *Rex v. Williams*, a 17th century case.[177] Notwithstanding Comberbach's supposed unreliability,[178] some weight must be given to his report that the

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173. Many 18th and 19th century references to *ponit se in gratiam* spoke of it in terms of a confession of sorts. *See, e.g.*, 1 R. BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER, at 531 (21st ed. 1810) ("implied confession"); 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW * 431 (1847) ("implied confession"); 2 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 466 (1788) ("implied confession"—"posuit se in gratiam regis"); T. WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 634 (2d ed. 1722) ("indirect or implied confession"). Lambard, of course, had earlier used the term "confession after a manner." *See* text accompanying note 123 *supra*.

174. T. WOOD, *supra* note 173. The passage continues: "By which . . . Indirect Confession the Defendant shall not be barr'd to plead Not Guilty to an Action for the same Fact, as He will be where He directly and expressly Confesses the Indictment." *Id.* The passage quoted in the text is remarkably similar to 2 W. HAWKINS, *supra* note 173 (Hawkins does not use "indirect" confession nor "rather than contend"; he does use "posuit se in gratiam regis," which Wood omits).

175. *See* J. GOEBEL & T. NAUGHTON, *supra* note 127, at 592-93 & n.180.

176. *Id.* at 593. While nearly every subsequent reference by a textwriter to nolo contendere appears to have been to Salkeld, *see* 3 M. BACON, *supra* note 96, *Fines and Amercements*, at 185; 2 T. CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY, *Fin*[*e*] (1764), many subsequent references to *ponit se in gratiam* failed even to use the term. *See* 1 R. BURN, *supra* note 173, at 531-32; 4 J. COMYNS, A DIGEST OF THE LAWS OF ENGLAND, *Indictment* (*k*) *Confession*, at *551 (5th ed. 1825) (citation to Salkeld without reference to nolo contendere).

177. Comb. 18, 90 Eng. Rep. 317 (1687).

178. Wallace characterized Comberbach's work in this manner: "A posthumous note book, published by the author's son, and therefore, perhaps, more pardonable for its worthlessness." J. WALLACE, *supra* note 166, at 396.

accused "pleaded the *common plea,* quod non vult contendere cum domino Rege . . . ."[179]

Regardless of its precise source and date of inception, the plea of nolo contendere developed into a recognized and acceptable mode of proof in modern American jurisprudence.[180] It is generally viewed today as "a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorities the court for purposes of the case to treat him as if he were guilty."[181] Equating the plea of nolo contendere with the plea of guilty in this manner substantially disregards the common law distinctions that were drawn to accommodate equivocal pleas such as *ponit se in gratiam* and the limitations imposed on their acceptability. Consequently, the fundamental relationship between certainty of proof and the seriousness with which an offense would be regarded has been undermined.

The abandonment of pleas such as *ponit se in gratiam* which were indicative of that relationship has had at least one interesting effect—it has channeled into essentially one plea, the plea of guilty,[182] all manner of decision not to defend. As a result, accused who have wished to terminate their prosecutions without plenary trials, yet who have not acknowledged their guilt, have been induced to enter pleas of guilt, either absolute or for purposes of a summary trial, which have not been sincere and often not very positive. As a further result, courts have entered judgments of conviction and imposed sentences of imprisonment upon proof the certainty of which has often been wanting. The Supreme Court's opinion in *North Carolina v. Alford*[183] exemplified this phenomenon.

REEXAMINATION OF *North Carolina v. Alford*

Analysis of the *Alford* decision in light of the historical common law treatment of equivocal pleas to criminal charges reveals several significant discrepancies. The fundamental issue raised in *Alford,* but not directly addressed by the Court,[184] was whether the due process requirements necessary to fine or imprison a person accused of a felony

179. Comb. at 19, 90 Eng. Rep. at 317 (emphasis added). Quaere whether "common plea" might not refer to a plea entered in an inferior court.

180. *See generally* Lenvin & Meyers, *Nolo Contendere: Its Nature and Implications,* 51 YALE L.J. 1255 (1942); Note, *The Nature and Consequences of the Plea of Nolo Contendere,* 33 NEB. L. REV. 428 (1954).

181. North Carolina v. Alford, 400 U.S. 25, 35 (1970).

182. As already noted, the plea of nolo contendere today functions practically as a plea of guilty with respect to its consequences. *See* text accompanying notes 1-6, 181 *supra.*

183. 400 U.S. 25 (1970).

184. For the *Alford* Court's framing of the issues, see text accompanying notes 44-45 *supra.*

are satisfied by a judgment of the court following a plea which does not admit guilt and a summary presentation of incriminating testimony, most of which would not be admissible at trial. A corollary issue, also disregarded by the *Alford* Court, was the permissibility of imposing the maximum sentence in such a situation.

With respect to the absence of an admission, history plainly does not support the Court's suggestion that judgment for a crime such as Alford's, a felony, could at common law be entered without trial on a plea which did not expressly admit guilt.[185] An examination of the English background of such pleas leads to the contrary conclusion, a conclusion which was founded upon a common law concern for certainty of proof.[186] Such a concern is manifest in our jurisprudence; quite ironically, it was reaffirmed contemporaneously with *Alford* in an opinion holding that judgment of delinquency could be entered, following trial, only upon proof beyond a reasonable doubt.[187]

The *Alford* Court relied on *Hudson v. United States*[188] for the proposition that judgment on a felony charge resulting in imprisonment could be entered on a plea of nolo contendere.[189] Examination of *Hudson*, however, reveals that it too was deficient from an historical standpoint. The *Hudson* Court's study of history uncovered "no suggestion that would warrant the conclusion that a court, by the mere acceptance of the plea of nolo contendere, would be limited to a fine in fixing sentence."[190] Although the *Hudson* Court purported to review the English common law background leading to such pleas, it looked no further than *The Queen v. Templeman*,[191] several 18th and 19th century textwriters, and four earlier authorities upon which the textwriters relied.[192] Despite its recognition that these historical sources dealt with cases of trespass,[193] the *Hudson* Court failed to realize the significance of that fact. By accepting the equivocal plea of nolo contendere and

185. *See* North Carolina v. Alford, 400 U.S. 25, 35 n.8 (1970).
186. *See* text accompanying notes 92-94 *supra*.
187. *In re* Winship, 397 U.S. 358 (1970). This concern has been reaffirmed more recently in a criminal case, *see* Mullaney v. Wilbur, 421 U.S. 684 (1975), and in civil commitment cases. *See In re* Ballay, 482 F.2d 648, 669 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078, 1095 (E.D. Wis. 1972), *vacated & remanded on other grounds*, 414 U.S. 473 (1974).
188. 272 U.S. 451 (1926).
189. 400 U.S. at 35-36. For a discussion of *Hudson* and the *Alford* Court's reliance on that case, see text accompanying notes 53-57 *supra*.
190. 272 U.S. at 456.
191. Farr. (7 Mod.) 40, 87 Eng. Rep. 1081; 1 Salk. 55, 91 Eng. Rep. 54 (1702); see note 151 *supra*.
192. 272 U.S. at 453-57. The earlier authorities were Y.B. 11 Hen. 4, f. 65, pl. 21 (1410) (a case of "express confession"); Y.B. 9 Hen. 6, f. 59, 60, pl. 8 (1431) (see text discussion following note 121 *supra*); A. FITZHERBERT, LA GRANDE ABRIDGEMENT, *Estoppel* ¶ 24 (1514? 1516?); W. LAMBARD, *supra* note 96.
193. 272 U.S. at 456.

entering judgment thereon in a felony case, the *Hudson* Court disregarded the common law distinction between cases of felony and trespass for purposes of determining the sufficiency of such pleas.

It is possible, however, that the result in *Hudson* merely reflected a more recent, American view as to where the line should be drawn between serious and nonserious crimes. The penalty in that case, imprisonment for 1 year and 1 day, may not have been considered severe enough to require a greater certainty of proof, despite the fact that the crime was classified as a felony. Short terms of imprisonment have been held in other areas of criminal procedure not to require safeguards guaranteed where more substantial deprivations of liberty are threatened. For instance, in *District of Columbia v. Clawans*,[194] the Supreme Court held that the right to jury trial in all criminal cases, guaranteed by the sixth amendment to the Constitution, did not extend to petty offenses, including those punishable by 90 days' imprisonment.[195] The dividing line between serious and petty crimes was eventually drawn at 6 months' imprisonment.[196] On the other hand, in *Argersinger v. Hamlin*,[197] the Supreme Court held that the right to counsel—another right which is dependent on the seriousness of the crime charged—is available wherever imprisonment is the penalty. Here again the determinative criterion is not the classification of the crime as misdemeanor or felony, but the severity of the potential punishment.

The Court recognized in *Argersinger* that differing policy considerations result in varying standards of seriousness, depending upon the right or safeguard which is to be invoked.[198] The possibility is thus clear that something in excess of imprisonment for 1 year and 1 day may be the appropriate cutoff point at which a punishment becomes too serious to be meted out upon proof as uncertain as a nolo contendere or other equivocal plea. The *Alford* Court, however, made no effort to determine what was a serious crime for this purpose, and in fact, did not even recognize this as a legitimate issue in the case. Instead, a 30-year sentence, the maximum for the crime charged, was imposed with little

194. 300 U.S. 617 (1937).
195. *Id.* at 625-27. The Court there stated:

> If we look to the standard which prevailed at the time of the adoption of the Constitution, we find that confinement for a period of ninety days or more was not an unusual punishment for petty offenses, tried without a jury . . . . [W]e know that there were petty offenses, triable summarily under English statutes, which carried possible sentences of imprisonment for periods from three to twelve months.

Id. at 625-26.
196. Baldwin v. New York, 399 U.S. 66 (1970).
197. 407 U.S. 25 (1972).
198. *Id.* at 30-36.

concern shown for the uncertainty of the proof upon which such a severe deprivation of liberty was based.

Even were the felony of second-degree murder, carrying a maximum sentence of 30 years in prison, not considered sufficiently serious to demand a greater certainty of proof than an equivocal plea of guilty and a summary presentation of the prosecution's case, it is arguable that something less than the maximum sentence should be given in such a case. The common law practice was to reduce the sentence where the plea was *ponit se in gratiam*, in accordance with the lesser degree of proof provided by such a plea.[199] If the full punishment was to be imposed, the state must establish the accused's guilt through some recognized mode of proof. Using this reasoning, it could be argued that Alford should have been given a lighter sentence than the maximum for the crime to which he pleaded, in reflection of the uncertainty generated by his equivocal plea.[200]

The *Alford* Court's reliance on *Lynch v. Overholser*,[201] a case involving statutory interpretation and inapposite constitutional implications, seemingly was also misplaced.[202] In *Lynch*, where the defendant desired to forego an available insanity defense and instead admit his guilt, he thereby supplied all the proof necessary to convict himself. In *Alford* the accused's refusal expressly to admit guilt left the proof necessary to convict him severely deficient. While defendant's refusal in *Lynch* to rely on a psychiatrist's report indicating a possible defense might raise questions as to whether the admission of guilt really is all the proof necessary to convict, [203] it was by no means as troubling as Alford's express assertions of innocence. The common law requirement of admission, in the absence of a verdict or some other recognized mode of proof, in felony cases should not be treated lightly. Indeed the Supreme Court itself has stated "[t]hat a guilty plea is a grave and solemn act to be accepted only with care and discernment . . . . Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed

199. *See* text accompanying notes 153-54 *supra*.

200. The counter-argument, of course, is that the potential sentence has already been reduced by allowing the defendant to plead guilty to a less serious crime than the one with which he was originally charged. In Alford's case, the 30-year sentence could be considered a significant reduction from the potential death sentence available under the original charge of first-degree murder. *See* North Carolina v. Alford, 400 U.S. 25, 26-27 & n.1 (1970).

201. 369 U.S. 705 (1962).

202. For a discussion of *Lynch* and the *Alford* Court's reliance on that case, see text accompanying notes 47-52 *supra*.

203. Compare the court's refusal to accept a plea of guilty, where an adequate defense was apparent, reported in G. STAUNFORDE, LES PLEES DEL CORON, ch. 51, 142C (1567 ed.).

the acts charged in the indictment."[204]

Although the *Alford* Court recognized that "[o]rdinarily, a judgment or conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind,"[205] the Court determined that "an express admission of guilt . . . is not a constitutional requisite to the imposition of [*sic*] criminal penalty."[206] The Court then declared that "[a]n 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 admit his participation in the acts constituting the crime."[207] Great weight was placed on the accused's right to waive trial.[208] The Court noted that "Alford [had not] wavered in his desire to have the trial court determine his guilt without a jury trial. Although denying the charge against him, he nevertheless preferred the dispute between him and the State to be settled by the judge in the context of a plea of guilty proceeding rather than by a formal trial."[209] According to the Court, where "a defendant intelligently concludes that his interests require entry of a guilty plea,"[210] neither an express admission of guilt nor a trial verdict is necessary for accepting the plea and rendering judgment thereon.[211]

History again does not support the Court's conclusion that an accused's desire to waive trial of the issue of guilt is a sufficient basis for rendering judgment on a felony charge, even though guilt is not expressly admitted. In felony cases, it appears that an accused at common law could not waive the necessity of either an express admission or the verdict of a recognized mode of proof.[212] In cases of misdemeanor, it does not appear that an accused could waive what an accused felon could not; rather it seems that proof of less certainty, in particular, implied admissions, was acceptable.[213]

The refusal of the common law to recognize waiver of trial in the absence of express admission of guilt to a felony charge was based on a fundamental concern for maintaining a proper relationship between certainty of proof and severity of consequences.[214] The Supreme Court has concluded apparently that this fundamental concern—fundamental

204. Brady v. United States, 397 U.S. 742, 748 (1970).
205. 400 U.S. at 32.
206. *Id.* at 37.
207. *Id.*
208. *Id.* at 32, 36-38.
209. *Id.* at 32.
210. *Id.* at 37.
211. *Id.* at 36-38.
212. *See* text accompanying notes 74-91 *supra.*
213. *See* text accompanying notes 95-100 *supra.*
214. *See* text accompanying notes 92-94 *supra.*

not only at common law but to the Constitutional as well—may be waived. At the same time, however, the *Alford* Court manifested a concern for certainty of proof through its repeated references to the "State's telling evidence,"[215] presented in summary fashion before the trial judge, "which substantially negated [the defendant's] claim of innocence . . . ."[216] This "overwhelming evidence,"[217] according to the Court, was sufficient to effectuate defendant's waiver of trial and to warrant imposition of judgment on his equivocal plea of guilty.[218] Although the *Alford* Court was satisfied with this "mode of proof," it presumably would not have sufficed at common law—and perhaps should not be sufficient under the Constitution—since it does not guarantee the degree of certainty that the common law required in felony cases and that might be found due even now in cases of extended imprisonment.

CONCLUSION

The crucial conflict posed by viewing *Alford* in historical perspective is that of the accused's willingness and desire to waive trial without expressly admitting guilt, on the one hand, against the fundamental historical concern in felony cases for certainty of proof[219] provided only by the recognized modes of either confession or trial verdict, on the other.[220] If the common law view were adopted in this situation, courts

215. 400 U.S. at 32.
216. *Id.* at 38.
217. *Id.* at 37.
218. *Id.* at 37-38.
219. *Cf.* Patton v. United States, 281 U.S. 276 (1930) (trial of issues of fact by 12 jurors held waivable in serious cases).
220. The Federal Rules of Criminal Procedure and the Uniform Rules of Criminal Procedure seemingly address this conflict to some extent and at least reflect a concern for, if not lending potency to, the certainty of proof requirement. With respect to guilty pleas, judgment may not be entered thereon unless a "factual basis for the plea" is found by the trial court. FED. R. CRIM. P. 11(f); *see* North Carolina v. Alford, 400 U.S. 25, 38 & nn.10-11 (1970). This requirement is usually construed to mean that the accused's alleged conduct must constitute the crime charged. *See* Gentile, *Fair Bargains and Accurate Pleas*, 49 B.U.L. REV. 514, 521 (1969). The lack of any settled guidelines to govern inquiries into the "factual basis," however, make it improbable that this requirement will contribute greatly to the accuracy of guilty pleas.

The Advisory Committee Notes to the Federal Rules of Criminal Procedure discuss the issue of "whether a judge may accept a plea of guilty where there is a factual basis for the plea but the defendant asserts his innocence." *Advisory Committee Notes, supra* note 1, at 286. Although the Committee recognized *Alford* as the controlling authority in this area, it advocated a policy of reluctance in accepting guilty pleas accompanied by protestations of innocence. Like the *Alford* Court, the Committee equated such a plea with one of nolo contendere, but the Committee used that similarity as a basis for contending that a court has broad discretion in determining whether to accept such a plea. *Id.*; *see* FED. R. CRIM. P. 11(b). In the exercise of this discretion, the Committee favored rejection of ambiguous guilty pleas, stating: "The defendant who asserts his innocence while pleading guilty or nolo contendere is often difficult to deal with in a correctional setting, and it may therefore be preferable to resolve the issue of guilt or innocence at the trial stage rather than leaving that issue unresolved, thus complicating subsequent correctional decisions." *Advisory Committee Notes, supra* note 1, at 286.

would face the potential dilemma of either forcing an unwilling defendant to submit to trial or allowing him to avoid imprisonment simply by protesting his innocence when he enters his plea.[221] This approach seemingly would give no effect to an attempted waiver of trial by the defendant.[222] Alford essentially advocated this result when he argued "that the State should not have allowed him [to waive the right to a trial] but should have insisted on proving him guilty of murder in the first degree."[223] The *Alford* Court clearly rejected this contention, however, by declaring that "this is not the mandate of the Fourteenth Amendment and the Bill of Rights."[224] Thus, defendant's clear desire to waive trial outweighed any deficiency in the certainty of proof resulting from the summary presentation of evidence before the trial court. As a result, the countervailing considerations which prompted the common law distinctions between felony and misdemeanor cases for purposes of acceptability of equivocal pleas have been abandoned; more importantly, the historical concern for certainty of proof in the context of plea offerings has been substantially diluted.

This reluctance to accept guilty pleas made under protest may also be discerned from the Uniform Rules of Criminal Procedure, which apparently merge the nolo contendere and guilty pleas into a single plea of admission. UNIFORM RULE OF CRIMINAL PROCEDURE 444(a) (1974) (defendant may simply plead that "he admits the charge"). This change focuses attention on what has always been the most important element of a guilty plea—the accused's admission that he committed the crime charged. *See* Brady v. United States, 397 U.S. 742, 748 (1970). The plea of admission under the Uniform Rules, like the plea of guilty under the Federal Rules, cannot be accepted without a finding of a sufficient "factual basis for the offense . . . to which the defendant pleads." UNIFORM RULE OF CRIMINAL PROCEDURE 444(b)(3) (1974).

Although both the federal and uniform rules thus maintain to some degree the relationship between certainty of proof and severity of consequences they fail to fully consider the implications of this common law correlation. The federal rules' recommended rejection of protested guilty pleas seemingly does not rest upon a concern for certainty of proof, but rather upon a desire to avoid subsequent correctional problems. *Advisory Committee Notes, supra* note 1, at 286. Similarly, the strength of the uniform rules' new emphasis upon the admission element of the guilty plea is diluted by the provision in the comment to rule 444(b)(3): "If the trial judge is otherwise satisfied that there is a factual basis for the plea, it is not required that he call upon the defendant to make an unequivocal confession of guilt." Thus, protection for the common law's concern for certainty of proof under these rules, though admittedly greater than that afforded by *Alford*, nevertheless may be somewhat illusory.

221. Some courts apparently would resolve this dilemma in favor of forcing a defendant to trial by refusing to accept an ambiguous or equivocal plea. *See, e.g.*, Hulsey v. United States, 369 F.2d 284, 287 (5th Cir. 1966); State v. Leyba, 80 N.M. 190, 193, 453 P.2d 211, 214 (1969); State v. Stacy, 43 Wash. 2d 358, 363, 261 P.2d 400, 402 (1953). These courts apparently view the certainty of proof requirement as outweighing any right of the defendant to waive trial.

222. This approach deviates greatly from the emphasis placed on a defendant's ability and right to voluntarily and intelligently waive trial. *See* text accompanying notes 205-11 *supra*. The possible acceptance of a nolo contendere plea in federal courts without the necessity for inquiry into its factual basis further indicates the respect which is accorded an accused's decision to waive trial. *See* FED. R. CRIM. P. 11(b), (f). *See generally* discussion note 220 *supra*.

223. 400 U.S. at 38-39.

224. *Id.* at 39.