CONSTITUTIONAL LAW—CONTEMPORANEOUS DECLARATIONS OF INNOCENCE DO NOT NECESSARILY INVALIDATE GUILTY PLEAS—*State of North Carolina v. Henry C. Alford*, 400 U.S. 25 (1970)—Alford was indicted for first degree murder under a North Carolina statute that restricted the death penalty of jury convicions.[1] Upon advice of his attorney and others, Alford pleaded guilty to second degree murder but maintained his innocence. He was sentenced to 30 years imprisonment, the North Carolina statutory maximum.[2] Following a series of appeal actions, Alford's conviction was reversed by the United States Court of Appeals for the Fourth Circuit,[3] which found Alford's plea to be coerced by a statutory penalty scheme that was unconstitutional under *United States v. Jackson*.[4] North Carolina appealed, and the United States Supreme Court reversed the Fourth Circuit in a six to three decision.[5] The Supreme Court held that guilty pleas representing "a voluntary and intelligent choice among the alternative courses of action" are valid.[6] Neither the existence of an unconstitutional penalty scheme nor defendant's inability to admit his guilt invalidates his plea when the judge is satisfied that it has a factual basis.[7]

The *Alford* case raises two important questions concerning current guilty plea standards. First, what is a coerced guilty plea? Second, what safeguards remain in the guilt determining process to prevent disadvantaged but possibly innocent defendants from convicting themselves when subjected to strong prosecutorial and judicial pressures to plead guilty? The North Carolina statute under which Alford was initially indicted contained the *Jackson* defect. Alford asserted and maintained his innocence while entering the guilty plea recommended by his court-appointed

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[1] The pertinent North Carolina Statutes were: N.C. Gen. Stat. § 14-17 (1969): Murder in the first and second degree defined; punishment. A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premediated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

N.C. Gen. Stat. § 15-162.1 (1965) (repealed 1969): Plea of guilty of first degree murder, first degree burglary, arson or rape. . . .

(b) In the event such plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that th punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgment that the defendant be imprisoned for life in the State's prison. . . .

[2] *See* Transcript of Proceedings, North Carolina v. Alford, in the Superior Court, Forsyth County, North Carolina (December 2, 1963 Term); Supplemental Brief for Appellant at 7-23, North Carolina v. Alford, 400 U.S. 25 (1970).

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

[4] 390 U.S. 570 (1968): Three defendants were indicted under the Federal Kidnapping Act, 18 U.S.C. § 1201(a) (*see* note 40 *infra*) for, *inter alia*, transporting across state lines a person they had kidnapped, held for ransom and harmed before releasing. On appeal from the district court's dismissal of this count of the indictment, 262 F. Supp. 716 (D. Conn. 1967), the Supreme Court held that the Act's death penalty provision was invalid because it imposed an impermissible burden on the exercise of the fifth amendment right not to plead guilty and the sixth amendment right to trial by jury. This burden resulted from the fact that only the jury could impose the death penalty. Therefore, guilty pleas were needlessly and impermissibly encouraged in order to avoid the risk of a death sentence.

[5] North Carolina v. Alford, 400 U.S. 25 (1970).

[6] *Id.* at 31.

[7] *Id.* at 30, 36.

attorney. Yet, without trial of these obvious factual and constitutional disputes between himself and the state, Alford was sentenced to prison.

To answer these questions, a mere reading of the Supreme Court's *Alford* decision is not enough. In support of its holding, the Court suggested that the validity of Alford's plea could not be seriously questioned in view of the "overwhelming evidence against him."[8] The trial record, however, shows only circumstantial evidence[9] while Alford's attorney speaks of possible jury prejudice.[10] The *Jackson* decision, relied upon by the fourth circuit in reversing Alford's conviction, was severely limited by the Supreme Court's subsequent *Parker v. North Carolina*[11] and *Brady v. United States*[12] decisions. Nevertheless, the requirement that the guilty pleader admit committing the crime charged remained. With the addition of *Alford*, the question of a guilty pleader's actual guilt seems to have been reduced to a practical nullity. To understand these developments and the current state of the law, a more detailed examination of *Alford* and its predecessors is necessary.

On December 2, 1964, Alford was brought to trial in Winston-Salem, North Carolina for the murder of Nathaniel Young. Courtroom testimony was received from the arresting officer, Alford and two state's witnesses. It tended to show that Alford and Young had argued over whether Alford could make his white girl friend leave Young's house. Apparently she wanted more money than Alford had to be intimate with him. As a result of Young's intercession, Alford left without the girl but took her coat which Young and another tried unsuccessfully to retrieve. A short time later, Young answered a knock and was shot and killed through the partially open door. At this point, the accounts of Alford and the state diverge. The arresting officer testified as to his discussions with people who reported seeing Alford the night of the murder. They included, among others, the black woman Alford lived with and a man she had ejected from their house. According to the officer, these people described Alford's argument with Young, saw Alford with his shotgun, heard him threaten to kill Young and heard his subsequent confession. Upon cross-examination, the officer acknowledged that Alford's gun was clean when found, and that there was no ballistics evidence to associate it with the murder. One of the two state's witnesses called by the defense testified that he heard Alford say he had shot a man, but he was unable to corroborate the officer's story further. The other witness reported seeing Alford with his gun but had not seen any shells nor heard him threaten Young by name. Subsequently, Alford, testifying in his own behalf, denied arguing with Young or returning to Young's house after leaving with the woman's coat. No one saw who fired the shot. Before passing sentence, the Court interviewed Alford and brought out his long criminal record which included terms for murder, armed robbery, forgery and assault with a deadly weapon.[13]

Before trial, Alford's state-appointed attorney interviewed all of the state's witnesses and all the witnesses suggested by Alford except one who could not be located.[14] He discussed Alford's plea with him several times and advised that he could not win against the state's evidence. He recommended that Alford plead guilty to avoid the risk of a jury imposed death sentence. Alford's sister and others

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[8] *Id.* at 37.

[9] Transcript of Proceedings, *supra* note 2.

[10] *See* discussion at note 16 *infra.*

[11] 397 U.S. 790 (1970).

[12] 397 U.S. 742 (1970).

[13] Transcript of Proceedings, *supra* note 2.

[14] Brief for Appellant at 10, North Carolina v. Alford, 400 U.S. 25 (1970).

who participated in the discussions agreed.[15] At Alford's post conviction hearing in December 1964, Alford's attorney was asked if he had told ". . . the defendant that things would go bad for him because the woman involved was a white woman." The attorney recalled telling Alford:

> . . . the facts were aggravated . . . [and] I didn't think the jury would look upon it favorably. . . . [T]he place that it had occurred, . . . wasn't one of the most commendable places in the county. . . . [C]oncerning if there was any prejudiced persons . . . I could not tell who was prejudiced, and that . . . might affect him. . . .[16]

At the trial, apparently fearing for his life, Alford pleaded guilty:

> 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.[17]

Following sentencing, Alford pursued a series of post conviction actions, appeals, and habeas corpus petitions charging *inter alia*, that his plea was coerced, that his house was illegally searched and that he was denied effective assistance of counsel.[18] These reached a successful conclusion at the Court of Appeals for the Fourth Circuit in November, 1968.[19] There, by a two to one decision, (Haynsworth, C. J., dissenting)[20] the court held that ". . . the North Carolina statutory scheme was the primary motivating force to affect tender of the plea, especially since throughout the proceedings Alford had protested his innocence."[21] Based on its interpretation of *United States v. Jackson*,[22] this conclusion required that the judgment entered on Alford's guilty plea could not stand.[23] The court read *Jackson* to hold that:

> . . . a prisoner is entitled to relief if he can demonstrate that his plea was a product of [the impermissible] burdens [of a statutory penalty scheme like that of North Carolina]—specifically, that his principle motivation to plead guilty or to forego a trial by jury was to avoid the death penalty.[24]

Although Alford had pleaded guilty to second degree murder, conviction of which does not entail the death penalty,[25] the court noted that "[f]or all that appears in the record, the state had not surrendered its right to prosecute petitioner for first degree murder until the time when he agreed to plead guilty to second degree murder."[26] Haynsworth, dissenting, agreed with the majority's reading of *Jackson* but held that the *Jackson* decision was irrelevant when defendant's plea was to a non-capital offense.[27] He apparently did not agree that the prosecutor at the Alford trial had retained his right to charge Alford with first degree murder.

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15 Brief for Appellee at 3-4, North Carolina v. Alford, 400 U.S. 25 (1970).

16 Supplemental Brief for Appellee at 3, North Carolina v. Alford, 400 U.S. 25 (1970).

17 400 U.S. at 28 n.2.

18 *See* Appendix, Counsels' Briefs at 1-4, North Carolina v. Alford, 400 U.S. 25 (1970).

19 *Id.* at 1-3.

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

21 *Id.* at 349.

22 390 U.S. 570 (1968).

23 405 F.2d at 349.

24 *Id.* at 347.

25 *See* note 1 *supra.*

26 405 F.2d at 347 n.17.

27 *Id.* at 350.

North Carolina appealed to the United States Supreme Court, where the fourth circuit was reversed on its faulty reading of *Jackson*.[28] The *Alford* case was originally argued before the Court in the October term of 1969 but was not decided until after reargument in 1970. In their initial briefs,[29] counsels for both parties relied primarily upon *Jackson*, differing only as to whether or not it should be applied retroactively. Before reargument, the Supreme Court decided *Parker v. North Carolina*[30] and *Brady v. United States*,[31] both of which sharply limited *Jackson*'s applicability. In their supplemental briefs, counsels for Alford and North Carolina concentrated on whether Alford's plea was voluntary or coerced.[32]

In its *Alford* decision, the Supreme Court held that the fact that a statutory penalty scheme was unconstitutional under *Jackson* did not invalidate a guilty plea simply because it was motivated by that scheme. The standard enunciated was that the plea must represent ". . . a voluntary and intelligent choice among the alternative courses of action open to the defendant."[33] Having concluded that unconstitutional motivation is not necessarily coercion, the Court still had the de novo problem of Alford's declaration of innocence. Casting about for some precedent to show the constitutionality of such an attenuated guilty plea, the Court hit on the device of equating it with nolo contendere:

> Implicit in the *nolo contendere* cases is a recognition 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.[34]

Therefore, a guilty plea accompanied by protestations of innocence also may be accepted and sentence passed if the judge finds that the plea was voluntarily and intelligently entered.[35] By such semantic legerdemain, unwillingness to admit guilt was made constitutionally equivalent to a declaration of innocence. The remaining considerations for valid guilty pleas are the presence of counsel and the existence of a strong state case to satisfy the judge that there is a factual basis for the plea as required by Federal Rule of Criminal Procedure 11.[36] Almost incidentally, the Court upheld the right of states to offer criminal defendants a lesser charge in return for a guilty plea.[37]

How a guilty plea motivated by an unconstitutional penalty scheme can be valid

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[28] The majority of the fourth circuit held that ". . . the incentive supplied to petitioner to plead guilty by the North Carolina statutory scheme was the primary motivating force to effect tender of the plea. . . . Under *Jackson* therefore, the judgment . . . cannot stand." 405 F.2d at 349. Haynsworth, C.J., dissenting, agreed: ". . . [T]he victim of the very pressures *Jackson* sought to avoid ought not to be left to suffer their consequences." 405 F.2d at 350. The Supreme Court disagreed with both: "That he would not have pleaded (*sic*) 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. . . . The standard fashioned and applied by the Court of Appeals was therefore erroneous. . . ." 400 U.S. at 31.

[29] *See* Brief for Appellant and Brief for Appellee, 400 U.S. 25 (1970).

[30] 397 U.S. 790 (1970).

[31] 397 U.S. 742 (1970).

[32] *See* Supplemental Brief for Appellant and Supplemental Brief for Appellee, 400 U.S. 25 (1970).

[33] 400 U.S. at 31.

[34] *Id.* at 36.

[35] *Id.* at 38.

[36] *Id.* at 31, 38 n.10; FED. R. CRIM. P. 11: ". . . .The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

[37] *Id.* at 39.

is best understood by a review of the *Jackson*, *Parker v. North Carolina*[38] and *Brady v. United States*[39] decisions. The Federal Kidnapping Act's penalty provisions, dealt with in *Jackson*, provided that the death penalty could be assessed only by a jury.[40] Therefore, only those who asserted the right to contest their guilt before a jury risked the death penalty. In *Jackson*, the Court held that "[t]he inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial."[41] The chilling effect of such a penalty scheme is the "manner [in which it] needlessly penalizes the assertion of a constitutional right."[42] The Court noted that its ruling did not invalidate all penalty schemes in which a jury has the power to recommend the death penalty, suggesting that those in which ". . . the choice between life imprisonment and capital punishment is left to the jury in *every* case—regardless of how the defendant's guilt has been determined"[43] —would be legitimate. A statement in the decision little noted by subsequent commentators[44] served as the basis for the later *Parker* and *Brady* decisions:

> . . . [T]he fact that the Federal Kidnapping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury, hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily.[45]

In *Brady*, the Court reviewed the conviction of a defendant who had pleaded guilty under the Federal Kidnapping Act before the *Jackson* decision and who now sought release on the basis that his plea was coerced. Referring to the little noticed limitation that it had placed on the *Jackson* holding,[46] the Court ruled that while "*Jackson* prohibit[ed] the imposition of the death penalty under [the Federal Kidnapping Act] . . ." it did not hold that ". . . all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not."[47] The standard for judging the validity of pleas reiterated by the *Brady* Court was that they ". . . are valid if both 'voluntary' and 'intelligent.' "[48]

Launching into a discussion of plea motivation, the *Brady* Court noted that ". . . [t]he State to some degree encourages pleas of guilty at every important step in the criminal process"[49] and that such pleas are generally valid unless produced by threatened physical harm or mental coercion overbearing the will of the defendant.[50]

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[38] 397 U.S. 790 (1970).

[39] 397 U.S. 742 (1970).

[40] The Federal Kidnapping Act, 18 U.S.C. § 1201(a), provides: Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnapped . . . and held for ransom . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

[41] 390 U.S. at 581.

[42] *Id.* at 583.

[43] *Id.* at 582.

[44] *See, e.g.*, Poe, *Capital Punishment Statutes in the Wake of United States v. Jackson*, 37 GEO. WASH. L. REV. 719 (1968-69); *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 156 (1968-69).

[45] 390 U.S. at 583.

[46] *Id.*

[47] Brady v. United States, 397 U.S. 742, 747 (1970).

[48] *Id.*

[49] *Id.* at 750.

[50] *Id.*

> . . . [B]ecause guilty pleas are not constitutionally forbidden [and] because the criminal law characteristically extends to a judge or jury a range of choice in setting the sentence in individual cases, . . . both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. For a defendant . . . the advantages of pleading guilty and limiting the probable penalty . . . [are that] his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State . . . [the] advantages . . . [are] more promptly imposed punishment . . . and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved. . . .
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> . . . [I]t is [not] unconstitutional for the State to extend a benefit to the defendant who in turn extends a substantial benefit to the State. . . .[51]

Finally, the Court noted that it ". . . would have serious doubts about [Brady's guilty plea] if the . . . offers of leniency substantially increased the likelihood that defendants advised by competent counsel would falsely condemn themselves."[52]

> . . . [O]ur view [in this case] is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged. In the case before us, nothing in the record impeaches Brady's plea or suggests that his admissions in open court were anything but the truth. . . .
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> . . . [W]e have no reason to doubt that his solemn admission of guilt was truthful.[53]

In coming to grips obliquely with the fact that Brady was convicted under a statute containing an unconstitutional penalty provision, the Court noted that ". . . a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise."[54] In another case decided the same day, *McMann v. Richardson*,[55] the Court expanded upon its denial of retroactivity to the *Jackson* rule for pre-*Jackson* defendants. The Court noted that:

> . . . [A] *per se* constitutional rule invalidating . . . guilty pleas . . . entered prior to *Jackson* . . . would be an improvident invasion of the State's interests in maintaining the finality of guilty-plea convictions that were valid under constitutional standards applicable at the time. It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act.[56]

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[51] *Id.* at 751-53.
[52] *Id.* at 758.
[53] *Id.*
[54] *Id.* at 757.
[55] 397 U.S. 759 (1970).
[56] *Id.* at 774.

The *Parker v. North Carolina*[57] case also decided the same day dealt with a defendant's claim that his guilty plea to a charge of first degree burglary was invalid as motivated by a capital punishment scheme since declared unconstitutional under *Jackson*. The Court similarily rejected this appeal noting that while the statute under which he was convicted contained an unconstitutional penalty provision, Parker's ". . . otherwise valid plea is not involuntary because induced by [his] desire to limit the possible maximum penalty to less than that authorized if there is a jury trial."[58]

McMann and *Parker* were four to three decisions with one concurring opinion. Justice Brennan, with Justices Douglas and Marshall, vigorously dissented to both and later in the *Alford* case. The same three agreed with the Court's decision in *Brady* on its facts but disagreed with its reasoning. In his separate opinions, Justice Brennan accused the "Court [of] mov[ing] yet another step toward the goal of insulating all guilty pleas from subsequent attack no matter what unconstitutional action of government may have induced a particular plea."[59] The thrust of Brennan's argument was that the majority had misconstrued its own holding in *Jackson*.

> Apparently in the Court's view, we invalidated the death penalty in *Jackson* because it "encouraged" pleas that are perfectly valid despite the encouragement. Rarely, if ever, have we overturned an Act of Congress for what proves to be so frivolous a reason. . . . [T]he result [is that] . . . those who resisted the pressures identified in *Jackson* and after a jury trial were sentenced to death receive relief, but those who succumbed to the same pressures and were induced to surrender their constitutional rights are left without any remedy at all. Where the penalty scheme failed to produce its unconstitutional effect, the intended victims obtain relief; where it succeeded, the real victims have none.[60]

Concerning the majority's finding ". . . that 'there [is no] evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty,' "[61] Justice Brennan comments that ". . . it has never been thought that an individual's mental state must border on temporary insanity before his confession or guilty plea can be found 'involuntary.' "[62]

Justice Brennan then attacked the types of criminal justice system pressures that induce an innocent man to plead guilty, especially those of legislative origin.[63]

> We are dealing here, with the legislative imposition of a markedly more severe penalty if a defendant asserts his right to a jury trial and a concomitant legislative promise of leniency if he pleads guilty. This is very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power. No such flexibility is built into the capital penalty scheme where the government's harsh terms with respect to punish-

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[57] 397 U.S. 790 (1970).

[58] *Id.* at 795.

[59] McMann v. Richardson, 397 U.S. 759, 775 (1970).

[60] Parker v. North Carolina, 397 U.S. 790, 807-08 (1970).

[61] *Id.* at 800 n.2.

[62] *Id.*

[63] *See, e.g.*, Bailey v. MacDougall, 392 F.2d 155, 158 n.7 (4th Cir.), *cert. denied* 393 U.S 847 (1968): "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*." (emphasis added).

> ment are stated in unalterable form. . . . Thus [a] penalty scheme [that is unconstitutional under *Jackson*] . . . presents a clear danger that the innocent, or those not clearly guilty, or those who insist upon their innocence, will be induced nevertheless to plead guilty.[64]

Justice Brennan also notes that "[i]t has frequently been held . . . that a guilty plea induced by threats or promises by the trial judge is invalid because of the risk that the trial judge's impartiality will be compromised and because of the inherently unequal bargaining power of the judge and the accused."[65] In his brief dissent to *Alford*, Justice Brennan, in effect, confirms that the fears he expressed in his other opinions had now been constitutionalized by the Supreme Court:

> Today the Court makes clear that its previous holding was intended to apply even when the record demonstrates that the actual effect of the unconstitutional threat was to induce a guilty plea from a defendant who was unwilling to admit his guilt.[66]

Thus, the *Alford* decision has greatly narrowed the grounds for attacking a guilty plea as being coerced. *Jackson* had seemed to hold out the promise that no unnecessary state encouragement of guilty pleas was permissible. Though that case specifically proscribed only statutes which limited the death penalty to not guilty pleaders, any judicial or legislative scheme offering lesser penalties for guilty pleas appeared to have the same constitutional defect.[67] But then the *McMann, Parker, Brady* trio dispelled that misconception by pointing out that only the statutes were unconstitutional, not the guilty plea convictions generated by them. The remaining *Brady* limitation, that the defendant reasonably believe himself guilty, was removed by *Alford*. The rule now seems to be that as long as the defendant retains any power of decision, as long as his will is not overborne by mental coercion, as indicated by the presence of uncomplaining counsel, his guilty plea will stand up. The *Alford* Court adds that the plea must have a factual basis, but that apparently means little more than a strong enough state case to secure an indictment.

Before attempting to determine what safeguards remain to protect the innocent from pleading guilty under pressure, it is necessary to review some of the kinds of pressures to which they are exposed. Since the previously cited cases deal primarily with the influence of sentences on pleas, the following discussion will be limited to that consideration and the part the prosecutor, judge and defense counsel play in it.

The *Alford* Court traced the practice of judicial sentence bargaining back to early English cases in which defendants unsure of their trial prospects sought to mitigate their punishment by a nolo contendere plea. The defendant thereby consented that he be punished and prayed for leniency but did not expressly admit his guilt.[68] The Court also found no constitutional distinction between nolo pleas and Alford's guilty plea.

> The fact that [Alford's] plea was denominated a plea of guilty rather than a plea of nolo contendere is of no constitutional significance . . . for the Constitution is concerned with the practical consequences, not the formal categorizations of state law.[69]

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[64] Parker v. North Carolina, 397 U.S. 790, 809 (1970).

[65] *Id.* at 804.

[66] 400 U.S. at 40.

[67] *See The Supreme Court, 1967 Term, supra* note 44, at 161.

[68] 400 U.S. at 35 n.8.

[69] 400 U.S. at 37. *See also* discussion and cases cited 400 U.S. at 35-36 and n.8.

But, it is clear that the nolo plea often has a different practical effect than a guilty plea and therefore a different motivation. A defendant concerned with subsequent tort liability arising out of his alleged criminal acts does not make his civil plaintiff's proof by a nolo plea as he would by a guilty plea. It is easy to see why a criminally guilty defendant might wish to minimize his civil risks by a nolo plea. It is difficult, if not impossible, to visualize pressures external to the criminal justice system that would induce him to plead guilty while protesting his innocence.

The state and lower federal courts have differed as to whether a guilty plea accompanied by protestations of innocence can be accepted. Some hold that the law authorizes a conviction only where guilt is shown.[70] Others have concluded that they should not force any defense on a defendant in a criminal case particularly where the advancement of that defense might end in disaster. He must be permitted to judge for himself in this respect.[71] In spite of its facile equating of nolo and guilty pleas, the Supreme Court too had experienced difficulty with the question before *Alford*. In 1962, in *Lynch v. Overholser*, the Court inferred that there would have been no constitutional error had a trial court accepted a defendant's guilty plea even though evidence before that court indicated that the defendant had a valid defense.[72] Two years later, in *Malloy v. Hogan*, the Court ruled that ". . . state and federal [courts] are . . . constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth."[73] But the *Alford* decision settled the matter.

> . . . [A]n express admission of guilt . . . is not a constitutional requisite to the imposition of a criminal penalty. An individual accused of a 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.[74]

The Fourth Circuit, whose decision in *Alford* was reversed by the Supreme Court, obviously got caught up in the same problem. In 1968, it held that: "Plea bargaining that induces an innocent person to plead guilty cannot be sanctioned."[75] The next year the same court said:

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[70] *See, e.g.*, Hulsey v. United States, 369 F.2d 284, 287 (5th Cir. 1966); United States *ex rel.* Elkins v. Gilligan, 256 F. Supp. 244, 255-157 (S.D.N.Y. 1966); People v. Morrison, 348 Mich. 88, 81 N.W.2d 667 (1957); State v. Reali, 26 N.J. 222, 139 A.2d 300 (1958); State v. Leyba, 80 N.M. 190, 193, 453 P.2d 211, 214 (1969); Harris v. State, 76 Tex. Crim. 126, 131, 172 S.W. 975, 977 (1915); State v. Stacy, 43 Wash. 2d 358, 361-64, 261 P.2d 400, 402-03 (1953).

[71] *See, e.g.*, Griffin v. United States, 405 F.2d 1378 (D.C. Cir. 1968); Bruce v. United States, 379 F.2d 113, 119-20 (D.C. Cir. 1967); McCoy v. United States, 363 F.2d 306, 308 (D.C. Cir. 1966): ". . . guilt or the degree of guilt, is at times uncertain or elusive . . . . An accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty. . . ."; City of Burbank v. General Electric Co., 329 F.2d 825, 835 (9th Cir. 1964) (dictum); State v. Martinez, 89 Idaho 129, 138, 403 P.2d 597, 602-03 (1965); People v. Hetherington, 379 Ill. 71, 39 N.E.2d 361 (1942); State *ex rel* Crossley v. Tahash, 263 Minn. 299, 307-08, 116 N.W.2d 666, 671-72 (1962); Commonwealth v. Cottrell, 433 Pa. 177, 249 A.2d 294 (1969). *Cf.* United States *ex rel* Brown v. La Vallee, 424 F.2d 457 (2d Cir. 1970); Maxwell v. United States, 368 F.2d 735, 739 n.3 (9th Cir. 1966) (trial judge may either accept or reject an otherwise valid guilty plea containing a protestation of innocence).

[72] 369 U.S. 705, 719 (1962), *referred to in* 400 U.S. at 35.

[73] 378 U.S. 1, 8 (1964).

[74] 400 U.S. at 37.

[75] Bailey v. MacDougall, 392 F.2d 155, 158 n.7. (4th Cir. 1968).

> We think that plea bargaining serves a useful purpose both for society and the prisoner and is a permanent part of the criminal courtroom scene. . . . Here it seems rather obvious that in return for pleading guilty to one count permitting the court ample latitude for adequate punishment . . . the prosecutor agreed, quite properly we think, to dismiss the other count.[76]

It is clear that plea or sentence bargaining is responsible for most of the guilty pleas entered in state criminal courts. Studies in Massachusetts[77] show that at the indictment stage 13.2% of the defendants entered guilty pleas. By trial, however, 67.8% pleaded guilty, and over 93.2% of the pleas were to lesser charges than those for which the defendants were indicted.[78] Studies in Cook County Illinois (Chicago) show that 84% of all felony cases were disposed of without trial and suggest that between 70 and 80% of the criminal court's guilty pleas were negotiated.[79] The variation in percent of convictions by guilty plea from jurisdiction to jurisdiction is fairly wide. It ranges from 95.5% in New York County through 85.2% in Massachusetts to 66.8% in Pennsylvania. The average for trial courts of general jurisdiction in states where the information is available is 87%.[80] The percentage of guilty or nolo contendere pleas in federal district court criminal actions is lower (75%) but still impressive.[81] The importance of guilty pleas to the American criminal justice system is obvious. Chief Justice Burger said last August that a reduction in guilty pleas from 90% to 80% would require doubling the present number of judges, lawyers and courtrooms.[82]

Since a guilty plea, unless rejected which rarely occurs, leads inevitably to sentence without trial, a process that increases guilty pleas must exert some kind of pressure on criminal defendants. In *Brady* the Supreme Court viewed lighter sentences by the state as the constitutional *quid pro quo* for the guilty plea of a defendant who sees slight possibility of acquittal. Such pleas conserve the state's judicial and prosecutorial resources for other cases ". . . in which there is substantial doubt that the State can sustain its burden of proof."[83] So viewed, plea bargaining pressures are used only in circumstances where they produce the same result as a trial but with substantial savings to the state. A University of Pennsylvania Law School survey of 43 states suggests that such a view is unrealistic. It showed that most prosecutors who utilized negotiated pleas stated that they prepared indictments with plea bargaining in mind and that the factor that most often influenced them to negotiate for a guilty plea was the weakness of their case.[84] If one assumes that the weaker the state's case the more likely that the defendant is innocent, the conclusion that the coercive pressures of plea bargaining are used most often on the innocent is inescapable. The United States Supreme Court in *Powell v. Alabama* eloquently expostulated the plight of the defendant subjected to these pressures.

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[76] United States v. Williams, 407 F.2d 940, 948-49 (4th Cir. 1969).

[77] Carney & Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 SUFFOLK U.L. REV. 292 (1968-69).

[78] *Id.* at 306.

[79] Notes and Comments, *The Role of Plea Negotiation in Modern Criminal Law*, 46 CHI.-KENT L. REV. 116 (1969).

[80] Carney & Fuller, *supra* note 77.

[81] Fay, *"Bargained For" Guilty Pleas*, 4 CRIM. L. BUL. 265 (1968).

[82] Oelsner, *The Court Upholds the Right to Bargain*, N.Y. Times, Nov. 29, 1970, § 4, at 12, col. 3.

[83] 397 U.S. at 752.

[84] Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 901, 905 (1964).

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[85]

Against these pressures, the judicial system has sought to erect safeguards. *Powell* extols the importance of the guiding hand of counsel at every step, and *Alford* makes its clear that competent counsel is an important element in determining the voluntariness of a defendant's plea.[86] Since *Gideon v. Wainwright*, it is impossible to force a criminal defendant to trial without aid of counsel,[87] but the mere presence of counsel does not insure that a defendant will intelligently understand and exercise his options. Counsel must be effective. Several factors suggest that the level of effectiveness required to protect defendants from pressures to plead guilty are far above the mere constitutional standards. First, one is faced by the fact that many defendants are represented by court appointed counsel who, while ethically bound to their clients, are not economically bound. Second, the D.C. Circuit has announced that counsel is not ineffective in the constitutional sense unless his assistance is ". . . of such a kind as to shock the conscience of the court and make the proceedings a farce and a mockery of justice."[88] And in *McMann*, the Supreme Court noted that there is ". . . *inherent uncertainty in guilty-plea advice* [which does not make it] . . . an issue promising a meaningful and productive evidentiary hearing long after entry of the guilty plea." (emphasis added).[89]

It is interesting to speculate on the soundness of his counsel's advice to *Alford*. The evidence, as Alford himself noted in his plea, was all circumstantial.[90] None of the witnesses at the trial heard Alford threaten the victim by name or confess to his murder. None of them saw him outside his house with the shotgun. But the arresting officer's report of the statement of other witnesses not present at trial was not contradicted. The state admitted having no evidence that Alford's gun was the murder weapon or that it had been fired. The trial judge did not attempt to find

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[85] Powell v. Alabama, 287 U.S. 45, 69 (1932).

[86] 400 U.S. at 31. *See also* Brady v. United States, 397 U.S. 742, 754 (1970); Parker v. North Carolina, 397 U.S. 790, 804 (1970) (dissenting opinion): ". . . [T]he presence of counsel is a factor to be taken into account in any overall evaluation of the voluntariness of a . . . guilty plea." (Brennan, Douglas and Marshall, J.J., dissenting); Miranda v. Arizona, 384 U.S. 436, 466 (1966): "[Counsel's] presence would insure that statements made in the government-established atmosphere are not the product of compulsion."

[87] 372 U.S. 335, 344 (1963): ". . . [P]rocedural and substantive safeguards designed to assure fair trials . . . cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him.

[88] Smith v. United States, 324 F.2d 436, 440 (D.C. Cir. 1963).

[89] McMann v. Richardson, 397 U.S. 759, 774 (1970).

[90] 400 U.S. at 28 n.2: "Well, I'm still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence. . . . You told me to plead guilty, right. I don't—I'm not guilty but I plead guilty."

out from Alford if he was guilty but did review in detail his previous criminal record.[91] Alford's counsel recalled advising Alford that he did not believe the jury would look favorably upon Alford's case because of the place where Alford had been and the possible prejudices of jurors.[92] Ignoring regional differences, the case against Alford was certainly not air-tight.[93]

The lower federal courts and the Supreme Court have both noted that the judge should not participate in the plea bargaining process. When a defendant receives an offer from a judge he ". . . needs no reminder that if he rejects the proposal and stands upon his right to trial and is convicted, he faces a significantly longer sentence."[94] In discussing the various valid pressures on a defendant to plead guilty, the *Brady* Court excludes ". . . the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty."[95] The ABA in its *Standards Relating to Pleas of Guilty* states that the judge must not participate in plea discussions.[96] Judicial acceptance of plea bargaining assumes that the presence of a fair and impartial judge will insure against abuse.[97] How valid is that assumption?

In the late 1950s the Yale Law Journal sent a questionnaire to 240 federal district judges, 140 of whom returned answers.[98] Ninety three, or 66%, of these indicated that it was accepted practice to take guilty pleas into consideration in sentencing. The average sentence reduction accorded those who pleaded guilty was in excess of 40%.[99] Thirty four of those questioned conceded that guilty pleas saved the government a great deal of time and money.[100] While a judge may not participate in plea bargaining, it is highly unlikely that his favorable treatment of guilty pleaders is a very well kept secret.

For many defendants, then, the counterbalances envisioned by the Supreme Court as protections against abuse of plea bargaining seem illusory indeed. For a defendant represented by court appointed counsel, an effective attack on inadequate representation is almost impossible. Prosecutors, instead of using plea bargaining to lighten the defendant's burden when he is faced with an air-tight case, use it to lighten their own burdens when their case is weak. Judges implement the prosecutors efforts by regularly extending concessions to guilty pleaders, cutting sentences on the average by nearly half. Couple these hazards with the fact that in federal courts the indictment to sentence delay in jury trials is two and one half times that

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[91] Transcript of Proceedings, *supra* note 2.

[92] Supplemental Brief for Appellee at 3.

[93] *But see* 400 U.S. at 37: ". . . [H]e had absolutely nothing to gain by a trial . . . [b]ecause of the overwhelming evidence against him. . . ."

[94] United States *ex rel* Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D.N.Y. 1966).

[95] Brady v. United States, 397 U.S. 742, 751 n.8 (1970).

[96] Standards Relating to Pleas of Guilty § 3.3, at 11, 71-72.

[97] See 400 U.S. at 38 & n.10; Boykin v. Alabama, 395 U.S. 238 (1969); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 136 (1967): "The judge's role is not that of one of the parties to the negotiation, but that of an independent examiner to verify that the defendant's plea is the result of an intelligent and knowing choice and not based on misapprehension or the product of coercion."

[98] Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956-57).

[99] *Id.* at 207 n.19.

[100] *Id.* at 219.

for guilty pleas,[101] and it becomes fairly obvious that the state has structured the plea bargaining system to force defendants to plead guilty as the lesser of two evils.[102]

But, in spite of its practical faults, a negotiated plea system may be inherently fair. Its benefits were listed by the Supreme Court in *Brady*. The defendant limits his penalty exposure. The correctional process can begin immediately. The practical burdens of a trial are eliminated. Punishment begun promptly after the admission of guilt may be more effective. The state conserves scarce judicial and prosecutorial resources.[103] The disadvantages, on the other hand, are substantial. For the procedural and evidentiary standards and safeguards of the trial process, are substituted the generally standardless process of administrative guilt determination. Most prosecutors who participate have no formal rules or procedures with respect to plea bargaining.[104] Therefore, the generally prevalent practices of overcharging and negotiating in the face of weak cases are engaged in on an *ad hoc* basis. Since, as a rule, there is no acknowledgement by the prosecutor or defendant that an arrangement has been reached, it is impossible for the judge or public to be aware of the terms of the bargain, the pressures that may have been brought to bear or the propriety of these arrangements.[105]

Inherent in the guilty plea itself and independent of pleading pressures is a waiver of important constitutional trial rights. These include the fifth amendment privilege against self-incrimination and the sixth amendment rights to trial by jury and confrontation of one's accusers. Such waivers have been legalized by the Supreme Court but only when they are knowingly and intelligently made.[106]

The *Alford* Court suggested that the judge could test the quality of Alford's plea by the weight of the evidence against him, assuming apparently that the guilty plea must be voluntary if the evidence is strong.[107] But by what standards is that evidence to be evaluated? The defendant is not required to put on a defense; therefore the effectiveness of his counsel's preparation cannot be evaluated, The exclusionary rules which control the evidence collecting and presenting practices of law enforcement agencies are effective only at the trial and do not come under scrutiny after a guilty plea. Jerome Skolnick is concerned that guilty pleas may serve to shield from public view a "patterned occurence of violations of criminal law by police"[108] in such areas as search and seizure, eavesdropping and confession. At best it appears that the standard for guilt confirmation after a guilty plea has become "more likely than not" guilty rather than guilty "beyond a reason-

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[101] ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 269 (1968).

[102] Griffiths, *Ideology and Criminal Process for a Third Model of the Criminal Process*, 79 YALE L.J. 359, 398 (1970).

[103] 397 U.S. 742, 752 (1970).

[104] Note. *Guilty Plea Bargaining*, *supra* note 84 at 900. 70.2% of the prosecuting officers who engaged in plea bargaining reported that their office had not established any formal rules or procedures with respect to plea bargaining.

[105] Carney and Fuller, *supra* note 77, at 294.

[106] *See* United States v. Jackson, 390 U.S. 570, 583-84 (1968); Rogers v. United States, 340 U.S. 367, 370 (1951); Salinger v. United States, 272 U.S. 542, 548 (1926); Diaz v. United States, 223 U.S. 442 (1912).

[107] 400 U.S. at 38-39; "In view of the strong factual basis for the plea demonstrated by the State . . . we hold that the trial judge did not commit constitutional error in accepting it. . . . The prohibitions against involuntary and unintelligent pleas should not be relaxed . . . ."

[108] SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 14 (1966).

able doubt." The *Alford* Court, for instance, holds that in view of the strong factual basis for Alford's plea, the trial judge did not commit constitutional error in accepting it but also noted in favorably quoting *Lynch v. Overholser*[109] that there would have been no constitutional error even though the evidence before the judge indicated that there was a valid defense.

Regardless of the faults of a plea bargaining system, guilty pleas promote judicial economy. The criminal courts, aided by the lesser proof standards, the absence of procedural controls and defendant's dearth of appeal bases[110] have a powerful tool for the conservation of their resources. The function of these resources is the protection of the public by screening out and dealing with the guilty through appropriate sentences. It is obvious that to the extent that plea bargaining ensnares the innocent, it prostitutes the resources it conserves. But what about the sentences themselves? Strict justice would seem to require that a defendant's sentence be determined by his particular character and the nature of the crime he committed, with no penalty for innocence.[111] Plea bargaining, on the other hand, is fueled by the availability of disparate sentences for the same crime and defendant. This discrepancy is most obvious when one considers that the offer of zero penalty for guilty pleas would reduce the state's trial burden to zero. Such a result would put the criminal on the same footing with the non-criminal, except for the slight inconvenience of the bargaining process. The victory of expediency over integrity would be complete.

For a defendant to benefit from a bargained sentence he must understand the factors involved. He is required to intelligently determine the value of the ratio $\frac{S_{GP}}{S_G \times P_G}$, where S_{GP} is the sentence awarded for a guilty plea, S_G is the sentence assessed after conviction at trial and P_G is the probability of conviction at trial. An intelligent, knowledgeable defendant will plead guilty when this ratio is less than one. Since the probability of conviction is always less than one, the ratio can never be one or more unless S_G is greater than S_{GP}. As suggested above, there are a number of factors at work in plea bargaining that can produce this result. Among them are:

1. the higher penalty available due to the fact that prosecutors overcharge for plea bargaining purposes.[112]
2. the charge reduction offered by the prosecutor for a guilty plea.[113]
3. the existence of a *Jackson*-type penalty scheme.

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[109] 369 U.S. 705, 719 (1962); *see* discussion at note 77 *supra.*

[110] *See* discussion at note 86 *supra*; and Brady v. United States, 397 U.S. 742, 757 (1970): "The rule that a plea must be intelligently made . . . does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision."

[111] *See* MODEL PENAL CODE § 6.01, Comment (Tent. Draft No. 2, 1954) at 10-11: "This section reflects a number of the most important conclusions embodied in the draft. It is premised on the view that the length and nature of the sentences of imprisonment authorized by the Code must rest in part upon the seriousness of the crime and not as has been argued, solely on the character of the offender;" and PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGER OF CRIME IN A FREE SOCIETY 144 (1967): "A judge when he sentences needs facts about the offender and his offense."

[112] Note, *Guilty Plea Bargaining, supra* note 84, 905 (Over half the prosecutors who utilized the negotiated plea stated that they prepared indictments with plea bargaining in mind.).

[113] *Id.*

4. the effect on the sentencer of the prosecutor's comments on the defendant's failure to plead guilty.[114]
5. the bonus given by the sentencing judge for a guilty plea.[115]

By throwing its weight behind plea bargaining, which for its utility requires that the value of the ratio be equal to or greater than one, the Supreme Court has accorded these factors (with the exception of the *Jackson*-type penalty scheme) at least implicit constitutional sanction. For the criminal defendant, guilty or innocent, the Court's *Alford* decision can have only two consequences: greater pressure to plead guilty and longer sentences for not-guilty pleaders.

It is now possible to suggest an answer to the second question propounded at the outset: What safeguards remain in the guilt determining process? The rights of criminal defendants have suffered a significant set-back. After laboriously developing safeguards for the accused in his unequal contest with the state, the Supreme Court has abruptly reversed its ground. As a result, criminal defendants trapped into pleading guilty by unconstitutional penalty provisions still extant,[116] by prosecutorial and judicial plea bargaining pressures and by just plain bad advice have convicted themselves. They need not believe they are guilty. It is enough that they "voluntarily and intelligently" repeat the ritual words that confer sentence without trial. The court need not prove nor believe they are guilty. A factual basis for the plea suffices. That standard implies that anyone who is indicted may be convicted upon a guilty plea. While perhaps inescapable where an unpressured defendant enters a guilty plea, such a standard is a prostitution of justice when applied to one who steadfastly maintains his innocence. It is in no sense equivalent to the proof beyond a reasonable doubt standard previously required when a criminal defendant's innocence was in dispute. With the need to purge a man of his delusions of innocence before accepting his guilty plea eliminated, the percentage of guilty plea convictions will undoubtedly rise well above the present average of 87%.

Walker B. Lowman

UNIFORM COMMERCIAL CODE—REQUIREMENT FOR A SECURITY AGREEMENT UNDER SECTION 9-203(1)(b)—*In re Mann*, 318 F. Supp. 32 (W.D. Va. 1970)—Prior to 1966, Security National Bank of Roanoke (Bank) extended credit to Mann, a merchant of pianos, organs and other musical equipment. On January 5, 1966, five days after the Uniform Commercial Code became effective in Virginia,[1] Bank filed a duly executed financing statement which included the title "Financing Statement," the names and addresses of Bank and its debtor, and otherwise com-

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[114] Note, *The Influence of the Defendant's Plea*, *supra* note 98, at 207 n.20 (Thirty judges affirmed that it was the practice of the District Attorney at the pre-sentence hearing to stress the fact that the convicted person pleaded not guilty and was found guilty by a jury.).

[115] *Id.* at 221-22: "Judges have indicated that a defendant pleading not guilty may incur additional punishment because he . . . does not contribute to the efficient administration of justice."

[116] Including as of May 15, 1969: 18 U.S.C. 1111 (1964) (murder); 21 U.S.C. 176 (b) (1964) (sale of narcotics to minors); 42 U.S.C. 2274-76 (1964) (atomic secrets); 18 U.S.C. 2113 (e) (1964) (bank robbery); D.C. Code Ann. § 22-2801 (1967) (rape); La. Code Crim. Pro. art. 557 (1966); N.H. Rev. Stat. Ann. § 585; 4, 5 (1968); Tex. Code Crim. Proc. art. 1,14 (1966); and Wyo. Stat. Ann. § 6-59 (1957).

[1] January 1, 1966. VA. CODE ANN. § 8.10-101 (Added Vol. 2A 1965).

plied with U.C.C. § 9-402.[2] The word "collateral" appeared in the statement no less than four times; the property purportedly secured was described as follows:

> Inventory of new pianos, organs, including hi-fidelity equipment and stereo tape recorders, as well as all other miscellaneous inventory including but not limited to the above items together with all documents of title representing such collateral as well as accounts receivable and contract rights now in existence or hereafter arising or acquired.[3]

Subsequent to the filing of this statement, Mann executed nine trust receipts in favor of Bank, each of which listed as collateral particular items by make, model and serial number. One of these receipts indicated that it was a renewal of a previous note.

On December 2, 1966, Mann executed a security agreement with the Small Business Administration (SBA), "whereby he granted to the latter a security interest in accounts receivable and inventory."[4] The SBA filed its financing statement on January 12, 1967.[5]

During Mann's subsequent bankruptcy proceedings the SBA conceded the enforceability of Bank's security interest in those items specifically listed in the trust receipts but asserted that by reason of the absence of a signed security agreement,[6] Bank's claimed interest in accounts receivable and general inventory was unenforceable. Bank maintained that its financing statement had been intended by the parties to be a security agreement and that it met the Code's requirements as such.[7] The referee, reading the financing statement and the trust receipts together as a security agreement, held that Bank had an enforceable security interest in the inventory and accounts. The SBA petitioned to review the referee's order.

The district court agreed that Bank had an enforceable security interest in those items identified in the trust receipts, but reversed, holding that the financing statement could not substitute for a signed security agreement. After first noting that priority of interests in the same collateraal is determined by order of filing,[8] the court compared perfection of a security interest by the filing of a financing statement[9] with enforceability under the Article 9 statute of frauds.[10] Observing that a security agreement is effective according to its terms,[11] the court held the trust receipts to have created enforceable security interests but also that the financing statement could not expand such interests beyond the items described in those receipts.[12]

The court observed correctly that its decision was within the weight of prevailing judicial authority and relied primarily on *Mid-Eastern Electronics, Inc., v. First National Bank of Southern Maryland*[13] as foreclosing Bank's reliance on the financing

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[2] UNIFORM COMMERCIAL CODE (1962 official text) [hereinafter cited as U.C.C.] Local enactments will be cited to the official sections, with changes material to the discussion noted. The Virginia U.C.C. is found in VA. CODE ANN. (Added Vol. 2A 1965).

[3] In re Mann, 318 F. Supp. 32, 33 (W.D. Va. 1970).

[4] *Id.* at 34.

[5] In re Mann, 318 F. Supp. 32, 34 (W.D. Va. 1970).

[6] U.C.C. § 9-203(1)(b).

[7] *Id.*

[8] U.C.C. § 9-312(5)(a).

[9] U.C.C. § 9-402.

[10] U.C.C. § 9-203.

[11] U.C.C. § 9-201.

[12] In re. Mann, 318 F. Supp. 32, 36 (W.D. Va. 1970).

[13] 380 F.2d 355 (4th Cir. 1967).

statement. The *Mid-Eastern* court had denied enforceability of a security interest claimed on promissory notes and a filed financing statement with the words:

> As the [creditor] can proffer no writing signed by the debtor giving, even sketchily, the terms of the security agreement it is unenforceable.[14]

The *Mann* court's opinion concludes with the observation that, inasmuch as the SBA had constructive notice of Bank's claimed security interest,[15] the decision might seem unduly harsh, but that it was demanded by the necessary technicalities of the Code, Bank simply having used a form inappropriate to its purposes.[16]

The Code provides that a non-possessory "security interest is not enforceable against the debtor or third parties . . . unless the debtor has signed a security agreement which contains a description of the collateral . . . ."[17] "Security agreement" is defined as "an agreement which creates or provides for a security interest,"[18] and " '[a]greement' means the bargain of the parties in fact as found in their language or by implication from other circumstances . . . ."[19] Certainly, this language of itself does not require the creditor to produce a writing containing every facet of the parties' bargain over the debtor's signature. For example, in keeping with an underlying purpose to simplify the law of commercial transactions[20] and an attempt to reduce formal requirements to a minimum[21] "any description" of the collateral which reasonably identifies what is described suffices.[22] The only requirements for enforceability dictated by the Code, then, are the debtor's signature, a description of the collateral and a writing.[23] The financing statement filed by Bank in *In re Mann* was all this, and more. Why should the financing statement not legally satisfy the requirement for a signed security agreement? The Code does not say specifically that it may not, and clearly does provide that the security agreement may be filed as a financing statement.[24] However logical a reading of the Code, this initial conclusion is not current law. To date, the courts hold that mere evidence of indebted-

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[14] Mid-Eastern Electronics, Inc. v. First Nat'l Bank of Southern Maryland, 380 F.2d 355, 356 (4th Cir. 1967).

[15] There is no claim by SBA that it was mislead as to the collateral secured, nor does it appear that an exhaustive examination of Mann's credit was made prior to granting the loan. Brief for Security Nat'l Bank at 5, 8, *In re Mann*, 318 F. Supp. 32 (W.D. Va. 1970); Brief for S.B.A. at 4, *In re Mann*, 318 F. Supp. 32 (W.D. Va. 1970).

[16] In re Mann, 318 F. Supp. 32, 36 (W.D. Va. 1970).

[17] U.C.C. §9-203(1)(b).

[18] U.C.C. § 9-105(1)(h).

[19] U.C.C. § 1-201(3).

[20] U.C.C. § 1-102(2)(a).

[21] U.C.C. § 9-203 Comment 1.

[22] U.C.C. § 9-110. It is worthy of some note that this section is absent from the court's opinion in *In re Mann*. While the specificity of the descriptions in the trust receipts may have had probative weight to the trier of fact, the description contained in the financing statement was legally sufficient. *See generally United States v. Antenna Systems, Inc.*, 251 F. Supp. 1013 (D.N.H. 1966); *Security Tire and Rubber Co. v. Hlass*, 246 Ark. 1084, 441 S.W.2d 91 (1969). *Mann* is not a decision based upon adequacy of description.

[23] *See* U.C.C. § 9-203 Comment 1.

[24] U.C.C. § 9-402(1). Because the security agreement must describe "the collateral," and the financing statement need only "indicate the types" of collateral, the statement's description may not suffice for the agreement, with the unfortunate result that the unwary creditor can end up with a security interest attached and perfected but nonetheless unenforceable. While Professor Gilmore has observed that "[t]here is no excuse for the failure of the two sections to mesh with respect to the description requirement," 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 11.4 at 347 (1965), the pitfall still exists.

ness and a financing statement, taken together, do not create or provide for an enforceable non-possessory security interest.[25]

In considering whether a financing statement satisfies the Code's requirements for a signed security agreement, three questions will underlie the discussion: What is the nature and content of the security agreement required by the Code? What objectives are served by the requirement? Does or should a financing statement fail to meet security agreement criteria as a matter of law? The discussion will conclude that the requirement for a signed security agreement can and should be permitted to vary somewhat with local law and the facts of each case, and further, that judicial language which establishes rigid requirements may frustrate the objectives of the Code and the flexibility of the courts.[26]

Initially, it should be noted that a signed security agreement is not required to create, attach or perfect a non-possessory security interest, but only to enforce one.[27] The separate requirement for a signed writing contained in § 9-203(1)(b) can be viewed as nothing more than a technicality grounded in the ancient history of the statute of frauds. However, examination of the drafters' Comment 1 to the section suggests that technicalities were precisely what they sought to avoid:

> Here as elsewhere in this Article . . . formal requisites are reduced to a minimum. The technical requirements of acknowledgment, accompanying affidavits, etc., common to much chattel mortgage legislation, are abandoned. The only requirements for the enforceability of non-possessory security interests in cases not involving land are (a) a writing; (b) the debtor's signature; and (c) a description of the collateral . . . .[28]

Viewed from the confines of this Comment alone, Bank's financing statement in *Mann* was more than adequate; it was a writing over the debtor's signature which contained a description of the collateral.[29] Yet it was held inadequate as a signed security agreement; something more was required. The "something more" has been explored by the courts but has as yet escaped precise judicial definition.

A leading case[30] holding a financing statement inadequate to enforce a claimed security interest was *American Card Co. v. H.M.H. Co.*,[31] in which the court stated:

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[25] *See, e.g.*, Safe Deposit Bank and Trust Co. v. Berman, 393 F.2d 401 (1st Cir. 1968); Scott v. Stocker, 380 F.2d 123 (10th Cir. 1967); Mid-Eastern Electronics, Inc. v. First Nat'l Bank of Southern Maryland, 380 F.2d 355 (4th Cir. 1967); In re Burkhard, 6 U.C.C. REP. SERV. 244 (Bkrptcy. Ct., S.D. Ohio 1969); In re Rand, 6 U.C.C. REP. SERV. 1129 (Bkrptcy. Ct., D. Me. 1969); M. Rutkin Elec. Supply Co. v. Burdette Elec., Inc., 98 N.J. Super. 378, 237 A.2d 500 (1967); American Card Co. v. H.M.H. Co., 97 R.I. 59, 196 A.2d 150 (1963).

[26] Two minor preliminary points are warranted: First, while the *Mann* court stated the issue as one of priority and purported to limit its decision to the relative priorities of the two creditors, *In re Mann*, 318 F. Supp. 32, 33, 36 (W.D. Va. 1970), this language should be disregarded. While any discussion of preferred creditors involves priority in a larger sense, this is not the "priority" of the Code. *Compare* U.C.C. §§ 9-301 to 9-318 *with* §§ 9-201 to 9-208. The *Mann* decision turns on enforceability and not on priority, as the decision itself implicitly recognizes. Bank's security interest was either enforceable or it was not. Second, this discussion makes no attempt to question any courts' decision that an enforceable security interest was not created *in fact*. Rather, the point of focus is the ways in which such a factual conclusion has and should be stated in law.

[27] U.C.C. § 9-204(1) provides in part: "A security interest cannot attach until there is agreement (subsection (3) of Section 1-201) that it attach and value is given and the debtor has rights in the collateral." *See* 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 11.5 at 353 (1965).

[28] U.C.C. § 9-203 Comment 1.

[29] *See* note 3 *infra*.

[30] And the first construction of the Code by the Supreme Court of Rhode Island.

[31] 97 R.I. 59, 196 A.2d 150 (1963).

> [W]hile it is possible for a financing statement and a security agreement to be one and the same document . . . it is not possible for a financing statement which does not contain the debtor's grant of a security interest to serve as a security agreement.[32]

Citing *American Card*, other courts have held that the requirements of § 9-203(1)(b) are satisfied *if*, in addition to that section's stated requisites, the writing also contains language granting the creditor a security interest in the collateral.[33] Such granting language is not explicitly demanded by the Code. Moreover, to the extent that § 9-203(1)(b) is the Article 9 statute of frauds, a requirement for a granting clause might be inconsistent with prior law in those jurisdictions where a statement of consideration is not a requisite of enforceability.[34]

Prestigious academic authority has taken issue with *American Card*. Professor Gilmore has labeled it an "unfortunate decision," asserting that a granting clause is not required by § 9-203 and suggesting that the financing statement at issue satisfied the statute of frauds.[35] In addition, he continues, the financing statement was ample evidence of the parties' intent to create a security interest. The argument concludes with the observation that the *American Card* court would have held the interest enforceable if the debtor had signed "two pieces of paper instead of one" and the comment that the court "gives [the Code] an effect reminiscent of the worst formal requirements holding under the nineteenth century chattel mortgage acts."[36] Professors Willier and Hart assert that *American Card* is wrong if it holds as a matter of law that a financing statement cannot satisfy the requirement for a signed security agreement.[37]

Other authorities, including the courts, have been more favorable to the *American Card* reasoning. For example, one bankruptcy court, holding that a financing statement and a promissory note did not make enforceable a claimed security agreement, followed *American Card*, noting that "[t]he very essence of a security agreement is the provision or creation of a security interest."[38] However, this court did suggest that, depending upon its terminology, a financing statement could satisfy the requirement for a signed security agreement.[39]

Still other courts have adopted a less restrictive view, emphasizing the terms of claimed security agreements. The decision upon which the *Mann* court primarily relied, *Mid-Eastern Electronics*,[40] characterized the § 9-203(1)(b) requirement as in the nature of the statute of frauds. In finding unenforceable a security interest claimed on the strength of promissory notes and a financing statement, that court

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[32] *Id.* at 62, 196 A.2d at 152.

[33] *See, e.g.*, Scott v. Stocker, 380 F.2d 123 (10th Cir. 1967); Kaiser Aluminum & Chemical Sales, Inc. v. Hurst, —— Iowa ——, 176 N.W.2d 166 (1970).

[34] This point was argued by Bank in the principal case. Brief for Security Nat'l Bank at 5, *In re Mann*, 318 F. Supp. 32 (W.D. Va. 1970). *See generally* 2 A. CORBIN, CONTRACTS, § 501 at 699 (1950).

[35] 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 11.4 at 347 (1965).

[36] *Id.* at 348.

[37] W. WILLIER AND F. HART, U.C.C REP.—DIGEST ¶ 2-1679, A6 (1970).

[38] In re Rand, 6 U.C.C. REP. SERV. 1129, 1134 (Bkrptcy. Ct., D. Me. 1969).

[39] In re Rand, 6 U.C.C. REP. SERV. 1129 (Bkrptcy. Ct. D.Me. 1969) (*dicta*). This court put considerable emphasis on the intent element of the Code's definition of "signed." U.C.C. § 1-201(39). *See* 25 U. PITT. L. REV. 619 (1964), in which the student author supports the *American Card* rationale, characterizing the § 9-203(1)(b) requirement almost solely in the nature of the statute of frauds.

[40] Mid-Eastern Electronics, Inc. v. First Nat'l Bank of Southern Maryland, 380 F.2d 355 (4th Cir. 1967). *See* note 13 *supra.*

held that the signed writing must at least sketch the terms of the security agreement.[41] The *Mid-Eastern* rationale has been followed widely.[42] However, Professors Willier and Hart suggest that the *Mid-Eastern* court held as a matter of law that a financing statement cannot satisfy the requirement for a signed security agreement and argue that, once the explicit requisites for a financing statement[43] have been met, the existence of a security agreement is a question of fact.[44] It is submitted that their view is in accord with the language and intent of Article 9.

The most striking facet of the *American Card* and *Mid-Eastern* approaches is that both focus primarily on and state requirements for the *content* of the writing proffered as a § 9-203(1)(b) signed security agreement. Clearly, the words contained in the writing are material, but they are not central. Rather, the Code's separate requirement for a *signed* security agreement is based not on content but on function. Faced with a financing statement proffered as a signed security agreement a court's primary concern should be whether the writing functioned as a security agreement. To this end, the words contained in the given writing are material, not because they satisfy a non-existent requirement for a "granting clause" or a "sketch of terms," but because they are part of a finding that the writing does or does not represent the parties' creation of or provision for a security interest. Support for this approach demands an examination of the function served by the signed writing within the general scheme of Article 9.

The drafters obviously intended the requirement for a signed security agreement to function in part as a statute of frauds.[45] This use of and reason for the § 9-203(1)(b) requirement deserves discussion if only for the attention given it by the courts and commentators. The requirement is in accord with pre-Code law dictates that interests in personal property be evidenced by signed documents. "Security agreement" is defined as "an agreement which creates *or provides for* a security interest."[46] " 'Signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing."[47] One function of the signed writing, then, is that of demonstrating the debtor's intent to create or provide for a security interest.[48] Such a demonstration by writing is unnecessary where the creditor is in possession of the collateral,[49] because the debtor's intent is more obvious.

Given a writing describing collateral over the debtor's signature, the question is not what other language the proffered document must contain but rather whether the debtor intended by signing to create or provide for a security interest.[50] To this end, the content of the document is probative but not determinative. With respect to the statute of frauds, the emphasis is on the existence of the writing, not on its content. In the drafters' words:

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[41] Mid-Eastern Electronics, Inc. v. First Nat'l Bank of Southern Maryland, 380 F.2d 355, 356 (4th Cir. 1967).

[42] *See, e.g.*, In re Mann, 318 F. Supp. 32 (W.D. Va. 1970); In re Rand, 6 U.C.C. REP. SERV. 1129 (Bkrptcy. Ct., D.Me. 1969); M. Rutkin Elec. Supply Co. v. Burdette Elec., Inc., 98 N.J. Super. 378, 237 A.2d 500 (1967).

[43] U.C.C § 9-402

[44] W. WILLIER AND F. HART, U.C.C. REP.—DIGEST ¶ 2-1683, A11 (1970).

[45] U.C.C. § 9-203 Comment 5.

[46] U.C.C. § 9-105(1)(h) (emphasis supplied).

[47] U.C.C. § 1-201(39).

[48] Professor Gilmore's commentary on *American Card* supports this analysis. *See* the discussion accompanying notes 35 and 36 *supra.*

[49] *Compare* U.C.C. § 9-203(1)(a) *with* § 9-203(1)(b); *see* U.C.C. §9-203 Comment 3.

[50] For a judicial examination of the meaning of the word "signed" which nonetheless held

> [T]he requirement . . . that the debtor sign a security agreement is not intended to reject, and does not reject, the deeply rooted doctrine that a bill of sale although absolute in form may be shown to have been in fact given as security.[51]

The question is whether in fact a security agreement has been created or provided for. Where the document proffered as a signed security agreement contains only the minimal information required, whether or not that document functioned as a security agreement can be determined only by examination of the facts and circumstances surrounding its signing, by the part it played in the parties' transaction(s).

In this light, the usefulness of a rigidly defined statute of frauds is doubtful. Certainly it results in the reduction to writing of certain agreements. It may help to call the attention of the debtor to the importance and legal significance of his agreement by requiring him to perform the act of signing. On the other hand, the inclusion of the statute of frauds in Article 9 can be argued to be more the result of history than of a realistic appraisal of commercial reality. The debtor's signature is no legal guarantee of his intent to create an agreement,[52] and the statute of frauds may be invoked to deny justice as easily as to serve it.[53] Moreover, the wide diversity of commercial transactions which give rise to security interests demands flexibility in determining whether a document functioned as a security agreement. Such flexibility may be frustrated by anything more than minimal technical requisites for the writing. The court which holds as a matter of law that a signed security agreement must contain a granting clause sets precedent of no more utility than that set by the court which holds that any writing satisfying the technical requisites of § 9-203(1)(b) is an enforceable security agreement. Both conclusions, if stated as conclusions of law, frustrate the flexibility of the words "security agreement."

But discussion of the requirement for a signed writing from the point of view of the statute of frauds alone does not reach the essence of the objectives and practical use of that requirement. In a classical sense, the statute of frauds is applied negatively to a claimed agreement as between immediate parties, whereas the essence of Article 9 is priority of interests, implying the existence of a third party, a second creditor or a trustee in bankruptcy. It is not coincidence that all the decisions construing § 9-203 cited herein arose out of bankruptcy or receivership actions. The whole of Article 9 is concerned with the creation, attachment, perfection and enforceability of security interests, interests which have validity to a creditor primarily to the extent that they represent rights as against other creditors. The sole creditor can obtain a judgment and levy on his debtor's assets; he has little need of priority. This difference in emphasis is reflected in a comparison of § 9-203 with the Article 2 statute of frauds,[54] which, while containing the same technical requisites for a writing,[55] is directed to enforceability as between the immediate parties to an agreement, not to one of the parties as against a third party. Moreover, application of the statute of frauds is essentially negative; it is used to preclude enforceability of claimed interests. To say that a proffered document fails to satisfy the statute of frauds is not to say what objectives are served by a writing which goes beyond the

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that the existence of a signed security agreement depends upon its terminology, *see In re Rand*, 6 U.C.C. REP. SERV. 1129 (Bkruptcy. Ct., D.Me. 1969).

[51] U.C.C. § 9-203 Comment 4.

[52] Reflected by the Code's emphasis on the bargain of the parties in fact. U.C.C. § 1-201(3), § 9-204(1).

[53] 2 A. CORBIN, CONTRACTS, § 275, at 13-14 (1950).

[54] U.C.C. § 2-201.

[55] U.C.C. § 2-201 Comment 1.

statute's minimum requisites. One of these objectives is that of evidencing the terms of the agreement.

The Article 9 creditor is concerned with enforceability of a security agreement which "is effective according to its terms, between the parties, against purchasers of the collateral and against creditors."[56] A real commercial utility of the signed writing lies in its evidentiary function. "The requirement of a written record minimizes the possibility of future disputes as to the terms of a security agreement and as to what property stands as collateral for the obligation secured."[57] To the extent that the terms of a security agreement are reduced to writing, that agreement is more likely to be clarified in both fact and legal consequence. If the terms of a security agreement are written, dispute and litigation are reduced. If litigation does ensue, a more complete written agreement will minimize the creditor's expenses of litigating. Moreover, a written agreement containing more than the minimal requisites of § 9-203(1)(b) will reduce the necessary effort of the courts, no mean objective in days of overloaded dockets. That the drafters intended the signed security agreement to serve these evidentiary functions may be sufficient grounds for courts to demand that a document reflect the security agreement and not just satisfy the technical requirement for a signed writing.

Because the Article 9 security agreement has the major portion of its impact in the claims of creditor as against creditor, another argument can be made for including the terms of the agreement in the signed writing. The debtor in bankruptcy, for example, often may not have a vital interest in which of his creditors enforces its claim on his property; the collateral is lost to him no matter which creditor prevails. This being so, the debtor may have little interest in arguing that a security agreement never existed in fact, attacking the sufficiency of the description of collateral, and so forth. Certainly the creditor with the more complete writing is the closer to enforceability of the interest claimed, all other Article 9 factors being equal.[58]

The foregoing argument should not be extended too far. The secured creditor who wants to insure enforceability of his interest is free to demand that any and all terms of the agreement be included in the signed writing. Indeed, the drafters assumed that the secured party would not be content with a writing which barely satisfies the formal requisites of § 9-203(1)(b).[59] Surely the creditor should be in the best position to know what is required for creation, perfection and enforceability of a security interest. Moreover, while it is true that minimal requisites for enforceability may permit the hypothetical unscrupulous creditor to enforce or expand a spurious security interest,[60] it is just as true that extensive and rigid formal requisites may prevent the scrupulous creditor from enforcing an honest one. Fear of the open-ended security agreement should not overshadow the facts of an honest attempt to create or reserve a security interest. To repeat, the trier of fact should determine the adequacy of the signed document on the basis of its function in light of all the facts and circumstances, of which only one is the writing making up its content.

There are, however, other practical reasons for requiring the signed security agreement to contain more than the minimum requisites of § 9-203(1)(b), argu-

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[56] U.C.C. § 9-201.

[57] U.C.C. § 9-203 Comment 3.

[58] U.C.C. § 9-203 Comment 1.

[59] This is not to suggest that there are degrees of enforceability; rather, it is an all or nothing situation. A security interest is either enforceable or it is not. *See* note 26 *supra.*

[60] *See* In re Rand, 6 U.C.C. REP. SERV. 1129 (Bkrptcy, Ct. D.Me. 1969).

ments in addition to those already discussed.[61] Some measure of "technicality in form" may be desirable for two reasons. First, the potential secured creditor wants a security interest which can be enforced almost automatically, without the courts; he does not care to anticipate litigation costs every time a debtor defaults on the underlying obligation or files a petition in bankruptcy. Also in the interest of economy, the creditor wants forms and procedures which he can use with minimum advice from counsel. Both the debtor and the potential second creditor have more than a passing curiosity in the enforceability of the first creditor's security interest. These considerations of expense and certainty are part and parcel of the commercial reality which concerned the drafters[62] and bear directly on the cost of credit.

Second, the judicial invocation of § 9-203(1)(b), like the historical statute of frauds, may serve as a convenient way of saying that the believability of an agreement is questionable. In this light, the "technicality" of § 9-203(1)(b) can be employed by a court when convenient to serve justice or may be otherwise circumvented or ignored.[63] Thus, when a court says that a creditor's claimed security interest is unenforceable because he has used a form inappropriate to his purpose,[64] it may express the view that the usefulness of the form in commercial practice is questionable or that the creditor has failed to demonstrate a security agreement.

The numerous pre-Code ways of creating interests in personal property evolved over time from the needs of diverse commercial situations. In their effort to unify prior law and bring it to a more workable form within the context of modern commercial practice, the Code's drafters broadly defined "security interest"[65] to include the interests created by these diverse situations. It follows that the concept of agreements which create or provide for security interests[66] must be similarly broad if Article 9 is to apply over the wide scope of security interests created by contract.[67] Accordingly, the phrase "security agreement" encompasses such diverse labels as "chattel mortgage," "conditional sale," "trust receipt" and "factor's lien."[68] On the other hand, the broadness of the phrase "security agreement" should not obscure the fact that, while the law of security interests is unified in Article 9, the commercial situations in which those interests are created are no less diverse.[69] Rigid judicially defined requisites for the content of a signed agreement may seriously narrow the broadness of the phrase, to the exclusion of some of those commercial situations.

The existence and validity of any security agreement must be determined with reference to the commercial situation within which it arose, from examination of its use by the parties in their particular transaction. Similarly, the enforceability of a security agreement must depend in part upon the commercial context of its creation. The title and content of the written agreement should not overshadow the facts of the interest for which it provides. Thus, a lease intended by the parties to create

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[61] *See* discussion accompanying notes 48 to 58 *supra.*

[62] *See, e.g.,* U.C.C. §9-101 Comment.

[63] *See generally* 2 A. CORBIN, CONTRACTS, § 275 (1950).

[64] In re Mann, 318 F. Supp. 32, 36 (W.D. va. 1970) *citing* Safe Deposit Bank and Trust Co. v. Berman, 393 F.2d 401, 404 (1st Cir. 1968).

[65] U.C.C. § 1-201(37).

[66] U.C.C. § 9-105(1)(h).

[67] U.C.C. § 9-102(2); § 9-101 Comment.

[68] U.C.C. § 9-105 Comment 1.

[69] As the Article recognizes in its extensive differentiation of collateral, U.C.C. § 9-109, and complicated rules of priority, U.C.C. § 9-312. While they simplied the overlying concept of security agreement, the drafters cannot be faulted for failure to be either specific or complicated elsewhere.

a security interest, even though it contained no "granting clause," has been read together with a filed financing statement to satisfy the § 9-203(1)(b) requirement for a signed security agreement.[70] Obviously, where property is "leased" with an option to purchase, the lessor/seller reserves a security interest; the lessee does not "grant" him one. Accordingly, a "granting clause" would not reflect the parties' agreement and should not be required by a court for enforceability. Before denying the enforceability of a claimed security interest, the trier of fact might first determine whether that interest was granted or reserved.

Given a written lease containing a description of the collateral over the debtor's signature, if the circumstances of the commercial transaction show that a security interest was reserved, the lease should be enforceable as a security agreement. There is indeed no other way in which the creditor's interest will be protected. By the same token, written assignment of diary proceeds found to have functioned as a security agreement was enforced as such, even though these proceeds were excluded from the signed document titled "security agreement."[71] To satisfy § 9-203(1)(b) "the security agreement must be in writing but not in any particular form,"[72] and a creditor's letter accepted in writing by the debtor may function as an enforceable security agreement with respect to an account receivable.[73] In *Redisco, Inc., v. United Thrift Stores, Inc.*,[74] the court found an enforceable security agreement in the facts of the parties transactions, trust receipts, bills of sale and a filed financing statement. That court commented:

> The Uniform Commercial Code was designed to bring the body of commercial law into the contemporary world of business . . . . It would hardly be consistent with that design . . . to reestablish in new form limitations which reflect a passion for legal technicality over commercial reality.[75]

Applying this approach to the use of a financing statement to satisfy the requirements of § 9-203(1)(b), there is no reason *in law* why the duly filed statement cannot serve as a signed security agreement. This is not to say that any financing statement satisfying the formal requisites should be enforceable as a signed security agreement, nor is such a conclusion implicit in the Code. The prime question is whether, within the circumstances of a particular transaction, the statement functioned as a security agreement *in fact*, as has already been submitted.[76] In normal course, the function of the financing statement is quite different. Unlike the security agreement, "[a] financing statement does not create [or provide for] the security

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[70] *In re Walter v. Willis, Inc.*, 313 F. Supp. 1274 (N.D. Ga. 1966). *Accord, In re Atlanta Times, Inc.*, 259 F. Supp. 820 (N.D. Ga. 1966); *General Elec. Credit Corp. v. Bankers Commercial Corp.*, 244 Ark. 984, 429 S.W.2d 60 (1968). These cases suggest that some courts implicitly differentiate for purposes of U.C.C. § 9-203(1)(b) those situations in which an interest is reserved from those in which one is granted. This is desirable insofar as it represents an examination of the facts of a particular transaction. However, if conclusions are stated as law, resulting precedent may develop cases analogous to those based on whether a transaction was a chattel mortgage or a conditional sale, a type of case grounded in technicalities the drafters sought to avoid.

[71] In re Schreiber, 7 U.C.C. REP. SERV. 365 (Bkrptcy. Ct., W.D. Wis. 1969).

[72] Citizens & S. Nat'l Bank v. Capital Constr. Co., 112 Ga. App. 189, 190 144 S.E.2d 465, 466 (1965).

[73] Citizens & S. Nat'l Bank v. Capital Constr. Co., 112 Ga. App. 189, 144 S.E.2d 465 (1965).

[74] 363 F.2d 11 (3d Cir. 1966).

[75] *Id.* at 14.

[76] *See* discussion accompanying notes 50 to 60 *supra.*

interest, but merely gives notice to creditors that a security interest is claimed."[77] It may be filed before the interest attaches,[78] may describe only the types of collateral in which the interest is claimed,[79] and under some circumstances need not be signed by the debtor.[80]

Separate sections of Article 9 set forth the requirements for a signed security agreement and a financing statement because each document was intended to serve a different function, not because the drafters sought to require two pieces of paper instead of one. There is no reason why the two functions cannot be combined in the same document once the formal requisites of each are satisfied, as indeed a copy of the former can be filed as the latter.[81] The financing statement in *Mann* satisfied the formal requisites of § 9-203(1)(b); the repeated appearances of the word "collateral" might suggest that a security agreement was being provided for; the trier of fact, after examining the facts and circumstances of the parties' transactions, found that an agreement did exist. Nothing in the Code explicitly demanded that this finding be reversed. Perhaps unfortunately, the reversing court stated its conclusion as a matter of law.

The formal requisites of the required signed security agreement are minimal, consistent with the broadness of the concept of that agreement itself. The practical arguments for greater formality in the written agreement are not decisive. On the one hand, more extensive formal requirements may result in greater certainty, predictability and commercial and judicial economy. On the other, these same formalities, or technicalities, may needlessly complicate the law of secured transactions, result in "paper battles" having little relation to commercial practice, and reduce the ability of Article 9 to encompass new security devices as these arise in business transactions. However these policy issues are resolved, the court which states as a matter of law, outside the context of a particular transaction, that a financing statement or any other document because of its content cannot serve as a signed security agreement, sets precedent which reduces its own flexibility. Of course, an out of context statement of the reverse is just as limiting on the courts ability to interpret the requirement with the flexibility it demands. Much to be preferred is the opinion stating that, in light of the facts of the case, a proffered document did or did not function as a signed security agreement.

In any event, as many courts appear to read § 9-203, the Code technician who contents himself with a writing satisfying only the formal requisites of that section does so to his client's peril.

L. M. McCorkle

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[77] In re Schreiber, 7 U.C.C. REP. SERV. 365, 366 (Bkrptcy. Ct., W.D. Wis. 1969); *see* U.C.C. § 9-402 Comment 2.

[78] U.C.C. § 9-402(1). A fact given more judicial attention in the present problem than its worth. *See, e.g., Kaiser Aluminum & Chemical Sales, Inc., v. Hurst,* —— Iowa ——, 176 N.W.2d 166 (1970), a case which states its conclusion in an unfortunate way, whatever the validity of that conclusion.

[79] U.C.C. § 9-402(1).

[80] U.C.C. § 9-402(2).

[81] U.C.C. § 9-402(1).

[82] In re Mann, 318 F. Supp. 32 (W.D. Va. 1970). *See* discussion accompanying notes 2 to 3 *supra.*