

THE CASE FOR NOLO CONTENDERE

Introduction

Judge: And are you pleading guilty because you are in fact guilty?

Client: Yes... Well, actually, no. I don't think I am guilty. But...

Judge: Counsellor, would you like a recess so that you can explain to your client the risks of too much candor with the tribunal?

Attorney: Um, yes, sure, Your Honor. Thank you.

...

Attorney: We've talked about this guilty plea for a long time. Now you want to go to trial?

Client: No way! For one thing, I can't afford a trial. You said a trial would take two weeks and cost \$100,000. You know I can't afford that. And besides, you explained that I'd probably be convicted anyway, that a jury wouldn't understand my explanation even though it's true. And you also explained that I'd probably get a higher sentence, under those Guidelines you talked about. So no, I don't want to go to trial.

Attorney: Well, if you don't plead guilty and if you can't tell the judge you're pleading because you are in fact guilty, then the judge will order us to go to trial.

Client: Sounds crazy to me, but if that's what it takes, I'll tell him I'm actually guilty.

It *is* crazy. If a criminal defendant is willing to accept the full measure of punishment for his deeds, why should he also be required to recite under oath a statement he doesn't believe to be true?

Anyone who has been a judge or prosecutor or defense attorney or probation officer knows that there is seldom a clear moral line, at least in the defendant's mind, between guilty and not guilty. It's usually "Yes, but..." or "No, but..." As in, "Yes, I guess I'm guilty but I didn't know the gun was loaded," or "Yes, but I didn't mean to do that much harm", or "No, I believe I'm not guilty, but I see that the circumstantial evidence makes it look as if I'm guilty" or "No, I don't feel guilty, but in retrospect I see that I should have acted differently."

There is a third option in the law, besides guilty and not guilty: the *nolo contendere* plea. "I do not contest..." the prosecution's case.¹

1. What is sometimes seen as a fourth option is an *Alford* plea. Named after the Supreme Court decision in *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970), this plea is in fact not a fourth option but a plea-bargained

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When a defendant enters a *nolo* plea, he is not required to admit his guilt, but the range of possible sentences he will face at sentencing is exactly the same as if he had admitted his guilt.

The *nolo* plea has been in and out of the shadows of the American legal system for a long time², but rarely if ever has it been analyzed by courts or legislatures. This article will try to fill that void. Based on that analysis and my own professional experience, the conclusion I have drawn is that *nolo* pleas should be available as a right to criminal defendants.

The current status of the *nolo* plea in American courts

1. Federal courts

In American federal courts, a defendant may plead *nolo contendere* but only with the permission of the judge. Rule 11(a)(3) of the Federal Rules of Criminal Procedure provides, in pertinent part:

Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the efficient administration of justice.

Thus, a criminal defendant need not get the federal prosecutor's consent before he enters a *nolo* plea, but he does need the judge's approval. And in making that approval decision, the federal judge is directed to consider the parties' arguments—and generally the prosecution will argue, at least weakly, against acceptance of the *nolo* plea³—and he is required also to consider the public interest in the efficient administration of justice.

This last phrase, “the public interest in the efficient administration of justice,” is important, because although it sounds neutral, in fact it encourages federal judges to accept *nolo* pleas. Forcing the parties to go through a show trial, just because the defendant feels unable to utter the word “guilty” in public, is hardly an “efficient” use of the public's tax dollars.

State courts

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variant of a guilty plea, in which the defendant is permitted to plead guilty, with all the normal consequences of such a plea, while maintaining on the record that he is innocent. This can only be done with the agreement of the prosecutor, rarely given in the federal system, and after satisfying the judge that there is sufficient evidence on the record to establish the defendant's guilt.

2. The plea was known to the English common law as early as the reign of Henry IV.” Lenvin and Meyers, *Nolo Contendere: Its Nature and Implications*, 51 Yale L.J. 1255 (____).
3. The United States Attorneys Manual prohibits federal prosecutors from agreeing to a *nolo* plea, “except in the most unusual circumstances and only after a recommendation for doing so has been approved” by the appropriate Justice Department official. USAM 9-16.015. In practice, unless the prosecutor feels strongly that the *nolo* plea is unjustified, the prosecutor will, at the time of the *nolo* plea, simply recite Justice Department policy in opposition and then stand back and let the defense make its argument in favor of the plea.

About three-quarters of American states permit entry of *nolo contendere* pleas. See Appendix A hereto. On the other hand, about a dozen American states appear not to recognize the *nolo* plea at all⁴. So far as I can determine, however, this is not because those states have considered the issue and rejected the option of a *nolo* plea, but rather they haven't thought about it at all; their procedural rules talk only, in the context of arraignments, about a defendant entering a not guilty or guilty plea during his initial appearance.⁵ Other states do recognize the plea but restrict its use; two of them require the prosecution's consent⁶, and one allows it for misdemeanors but not for felonies.⁷ But again I have been unable to locate any analysis in those states to support these distinctions.

The Time Has Come to Allow Nolo Pleas Freely

In the past, the public has viewed *nolo* pleas with some suspicion. The pleas have been seen as, and sometimes have actually been, ploys for rich defendants to escape the consequences of their crimes. Spiro Agnew famously entered a *nolo* plea to federal tax charges in 1973 but continued to proclaim his innocence to a generally disbelieving public.

a. The moral objection

Part of Americans' thirst for retribution—and retribution is of course one of the classic goals of the criminal law—is a desire to hear the malefactor confess in public and say that he's sorry: if, and only if, he does that, people who feel strongly about retribution are willing to give him a break at sentencing.

But if the public understands that a *nolo* plea does not entitle a defendant to a break at sentencing, the sentencing hearing and the sentence itself should suffice to quench our thirst for retribution. The sentencing hearing is open to the public and the range of sentencing options open to the judge is exactly the same on a *nolo* plea as on a guilty plea.

b. The sense that a *nolo* plea allows a defendant to sweep the incriminating facts under the rug.

4. For instance, Idaho, Indiana and Iowa appear only to allow guilty or not guilty pleas. See Appendix A for the status of *nolo* pleas in the 50 American states.

5. Alabama's Rules, for example, do not permit a defendant to plead *nolo* at arraignment but contain no Rule governing the extent of permissible pleas at a later stage of the proceedings. See Appendix A.

6. Montana and North Carolina.

7. Mississippi.

It has been said⁸ that defendants plead *nolo* partly because they don't want people to know how bad they've really been.

But these days, in federal court and many state courts, the criminal rules require a prosecutor to explain in open court what the prosecution case would have consisted of if the case had gone to trial⁹, and current sentencing hearings allow both the prosecutor and any victim who is present to be heard.¹⁰ There is no possibility of sweeping incriminating facts under the rug, and certainly no more for a *nolo* plea than for a guilty plea.

c. "A *nolo* plea lets defendant get away with a slap on the wrist."

This is a common perception among people not acquainted with the criminal law.

But, of course, there is no difference between the range of punishment a guilty plea opens up and the range opened up by a *nolo* plea. And in fact, a defendant who pleads *nolo* is opening himself up to the possibility of a *greater* sentence than a defendant who pleads guilty. Federal judges are required to take the Federal Sentencing Guidelines into account when imposing sentence¹¹, and one of the factors judges are required to consider under the Sentencing Guidelines is "acceptance of responsibility."¹² Other things being equal, a defendant who pleads guilty has a much better chance of a reduced sentence because of acceptance of responsibility than does a defendant who stands mute and simply does not contest the prosecution's case.

d. "A *nolo* plea deprives the victims of a defendant's crime of the opportunity to get compensation from him.

It is certainly true that the legal effect of a guilty plea is different from the legal effect of a *nolo* plea, in that in a follow-on civil suit on behalf of a criminal defendant's victims, the plaintiffs' counsel can simply introduce the defendant's guilty plea but he can't do that if the defendant has pleaded *nolo*.¹³

But the victims of a defendant who pleads *nolo* are not without remedies.

8. E.g., Mark Gurevich, *Justice Department's Policy of Opposing Nolo Contendere Pleas: A Justification*, 6 Cal.Crim.Law Rev. 2, 5 (2005).

9. Fed.R.Crim.P.11(b)(3); and, e.g., Vermont R.Crim.P. 11.

10. Fed.R.Crim.P.32(i)(4)(A) and (B).

11. Fed.R.Crim.P.32(d)

12. Sentencing Guidelines, 3E1.1.

13. Fed.R.E. 410(a)(2). California is an exception to this rule; Section 1016(3) provides that a *nolo* plea can be used in a civil proceeding but only if the plea was to a felony.

In the first place, a federal sentencing judge has the opportunity and, in many cases, the obligation¹⁴, to order the defendant to make restitution to his victims. Such a restitution order may be enforced directly by the victims¹⁵. This is as true for a defendant who enters a *nolo* plea as for a defendant who pleads guilty or who is convicted at trial.

In the second place, even though a victim can't use the *nolo* plea to completely establish his civil liability case against the criminal defendant, he may use any relevant statement, made by the defendant at his sentencing hearing, to help establish his *prima facie* case. For instance, if the defendant, perhaps to mitigate his inability to "accept responsibility," says at sentencing, "You see, judge, I admit Relevant Facts A and B and C but I honestly can't admit Relevant Fact D," the victim can use the defendant's admission as to A, B against the defendant. Fed.R.Ev. 801(d)(2)(A) and (D). If the defendant had entered a straight guilty plea, of course, he would have been admitting to A, B, C and D (all the elements—relevant facts-- of the offense) and the victim could simply use the guilty plea by itself to establish the defendant's liability. But a *nolo* plea will usually relieve the victim of a significant part of his civil liability burden.

Conclusions

1. The plea of *nolo contendere* should be available to defendants as of right.

The traditional reluctance of law- and rule-makers to recognize the plea of *nolo contendere* to dispose of criminal charges is outdated and wrong. It is outdated because modern sentencing procedure deals with all of the old objections to the plea, and it is wrong because it requires a defendant to pretend in public to a moral contrition which he does not wholly feel, in order to avoid a lengthy, expensive and unnecessary trial, a trial which is in nobody's best interest.

2. Until the criminal rules are amended to provide that option explicitly, judges should accept every *nolo* plea offered to them.

The federal rules clearly encourage judges to accept *nolo* pleas whenever they feel they can. By giving judges complete discretion as to whether to accept the plea or not, and then directing them to consider "the public interest in the *efficient* administration of justice", the rule-makers have discouraged judges from requiring defendants to undergo an unnecessary trial.

The Practical Effect of Allowing Defendants to Plead Nolo as of Right

As a practical matter, the percentages of *nolo* and guilty pleas may remain about the same if the change I suggest comes into effect. After all, a defendant who pleads *nolo*, at least in federal court, is taking a significant risk that the sentencing judge will conclude that he has not accepted responsibility and will accordingly give him a higher sentence than he would have received after

14. 18 USC section 3663A.

15. 18 USC section 3664(m)(1)(B).

a guilty plea. Many defendants, however strongly they feel about their innocence or near-innocence, simply won't want to take that risk.

But if a defendant believes strongly that he doesn't feel himself to be guilty, a *nolo* plea will allow him to explain that feeling to the sentencing judge.¹⁶ And his effort to explain that to the judge will allow the judge to have a better sense of the person he's sentencing. Perhaps the sentence will go up; perhaps it will go down. Either way, the judge will have the chance, indeed the duty¹⁷, to explain his feelings about the defendant's culpability in the course of explaining his sentence. So, the sentencing on such a *nolo* plea will be educational both for the sentencing judge and the defendant. And for the public as well.

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16. Even if he chooses not to explain his reservation to the judge, the *nolo* plea avoids the deception involved when a defendant tells the judge he's guilty when he doesn't believe he is.

17. 18 USC sec3553(c).

APPENDIX A

Alabama: Ala. R. Crim. P. 14.2(c)

Nolo not one of the pleas that can be entered at arraignment; no rule governing pleas available at a later stage

Alaska: Alaska R. Crim. P. 11(a), (c)

Recognizes *nolo* pleas to the same extent as guilty pleas

Arizona: Ariz. R. Crim. P. 17.1(c)

Recognizes *nolo* pleas, language tracks Federal Rule

Arkansas: Ark. R. Crim. P. 24.3

Recognizes *nolo* pleas

California: Calif. Penal Code [sec] 1016(3)

Recognizes *nolo* pleas; plea can be used against defendant in a follow-on civil case but only if plea was to a felony

Colorado: Colo.Rev.Stat. [sec] 16-7-207

Recognizes *nolo* pleas to the same extent as guilty pleas

Connecticut

Apparently allowed. *State v. Rivers*, SC 17665 (2007) No rule found.

Delaware: Del. R. Crim. P. 11(a)

Recognizes *nolo* pleas; tracks language of Federal Rule

Florida: FL R.Crim.P. 3.172

Recognizes *nolo* pleas, no apparent limitation

Georgia: G. Code sec. 17-7-95

Recognizes *nolo* pleas; explicitly states that *nolo* plea can't be the basis of disqualification from state privileges such as voting, jury service

Hawaii: HI R.Crim.P. 11
Recognizes nolo pleas; language tracks federal rule

Idaho: ID R.Crim.P. 11(a)
Does not allow nolo pleas

Illinois: Allows nolo pleas in practice. No rule found.

Indiana: IN Code, Title 35-35-3-3
Does not allow nolo pleas

Iowa: IA R. Crim.P. 2.8(2)
Does not allow nolo pleas

Kansas: KS Stat.Ann. sec. 22-3210
Allows nolo pleas

Kentucky: Allows nolo pleas in practice

Louisiana: LA Code of Crim.P. Art. 552
Recognizes nolo pleas in non-capital cases; plea is equivalent to guilty plea for all criminal purposes, e.g. double jeopardy, sentencing enhancements

Maine: ME R.Crim.P. 11(a)
Recognizes nolo pleas with consent of court to same extent as guilty pleas

Maryland: MD Rules sec. 4-242
Recognizes nolo pleas with consent of court

Massachusetts: MA R.Crim.P. 12
Recognizes nolo pleas with consent of court

Michigan: MI R.Crim.P. 6.301, 6.302
Recognizes nolo pleas

Minnesota: MN R.Crim.P. 14.01
Nolo pleas not allowed

Mississippi: MS R.Crim.P. 15.3
Only allows nolo pleas in misdemeanor cases

Missouri: MO R.Crim.P. 24.02(a)
Nolo pleas not allowed

Montana: MT Code sec. 46-16-105
Recognizes nolo pleas with consent of judge and prosecutor

Nebraska: NE Rev.Stat. sec. 29-1819.02
Allows nolo pleas

Nevada: NV Rev. Stat. sec. 174.035
Recognizes nolo pleas to same extent as guilty pleas

New Hampshire: NH Rev. Stat. sec. 605.6, NH R.Crim.P. 11(b)
Recognizes nolo pleas with consent of court

New Jersey: NJ Rules of Court 7:6-2(a)
Only recognizes guilty and not-guilty pleas at arraignment; no reference to pleas available after arraignment

New Mexico: NM R.Crim.P. 5-304
Allows nolo pleas

New York: NY Consol. Laws 220.10
Does not allow nolo pleas

North Carolina: NC Gen.Stat. art. 57, sec. 15A-1011
Recognizes nolo pleas with consent of judge and prosecutor

North Dakota: ND R.Crim.P. 11(a)

Nolo pleas not allowed; only recognizes guilty and not-guilty pleas

Ohio: OH R.Crim.P. 11(A)

Recognizes nolo pleas with consent of court; plea cannot be used against defendant later in either criminal or civil cases

Oklahoma: 22 OK Stat. sec 22-515

Only recognizes guilty and not-guilty pleas

Oregon: 2017 ORS 135.335

Recognizes nolo pleas with consent of court; language tracks federal rule

Pennsylvania: 234 Pa. Code, Pa.R.Crim.P. 590(A)

Allows nolo pleas with consent of court

Rhode Island: RI R.Crim.P. secs. 12-10-4, 12-12-22

Allows nolo pleas, no apparent limitation

South Carolina: SC Code of Laws secs. 17-23-80, 17-23-40

Only allows nolo pleas in misdemeanor cases

South Dakota: SD Codified Laws, sec. 23A-7-2

Allows nolo pleas, no apparent limitation

Tennessee: TN R.Crim.P. 11(a)

Allows nolo pleas with consent of court; language tracks Federal Rule

Texas: TX Code of Crim.P. art. 27.02(5)

Allows nolo pleas; plea cannot be used against defendant in civil suit

Utah: UT R.Crim.P. 11(b)

Allows nolo pleas, no apparent limitation

Vermont: VT R.Crim.P. 11(a)

Allows nolo pleas with consent of court; language tracks federal rule

Virginia: VA Code sec. 19.2-254

Allows nolo pleas, even over objection of court and prosecutor; the court “shall not refuse to accept a plea of nolo contendere”

Washington: WA Court Rules 4.2

No mention of nolo pleas; defendant may plead guilty, not guilty or not guilty by reason of insanity

West Virginia: WV R.Crim.P 11

Allows nolo pleas with consent of court; language tracks federal rule

Wisconsin: WS Stat. sec. 971.06

Allows nolo pleas with consent of court

Wyoming: Robinson v. State, 2016 WY 90, 378 P.3d 599 (Wyo. 2016)

Nolo pleas allowed