Justice Department's Policy Of Opposing Nolo Contendere Pleas: A Justification

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I. Introduction

¶1For many, a criminal defendant is either guilty or innocent and should thus either assume responsibility for her crime by pleading guilty or contest her guilt and stand trial.[1] The nolo contendere plea provides a third alternative, where the defendant declines to contest guilt, but instead waives her right to trial and consents to be punished as if guilty.[2] Unlike a guilty plea, the nolo contendere plea is inadmissible in subsequent civil proceedings.[3] This plea has ancient origins, dating back to medieval England,[4] and has long been allowed in the American federal courts.[5] When the Federal Rules of Criminal Procedure were adopted in 1946, the nolo contendere plea was retained in Rule 11 and remains an option to this day.[6] Despite its longstanding use, the plea has been criticized by many, often in strong language.[7] Judge Learned Hand called it a "foolish concept;"[8] a district court called it a "mockery" of the law under which the plea was frequently entered.[9] In 1953, Attorney General Brownell issued a directive which stated that the nolo contendere plea was "one of the factors which has tended to breed contempt for Federal law enforcement."[10] These critics argued that the nolo contendere pleas left the public confused about the defendant's guilt, led to low sentences and allowed some guilty defendants avoid collateral consequences of their guilt.[11] Some courts refuse to accept nolo contendere pleas across the board;[12] the Department of Justice instructs federal prosecutors not to consent to them.[13]

¶2Supporters of the nolo contendere plea argue that it conserves judicial and systemic resources, because removing the threat of collateral civil consequences encourages criminal defendants to capitulate and accept punishment.[14] This is especially true in the anti-trust context where the threat of private civil trials, including treble damage actions, could make criminal penalties insignificant in comparison.[15]

¶3This article examines the evolution of the nolo contendere plea and its use since the time it was adopted in the Federal Rules of Criminal Procedure in 1946. Specifically, it focuses on the arguments for and against nolo contendere, as reflected in the Justice Department's policy of not accepting nolo contendere pleas except on rare occasions. It argues that developments in collateral estoppel doctrine over the last fifty years have diminished the usefulness of the plea for the criminal justice system. Furthermore, it argues that changes in public perception of white-collar crime make the nolo contendere plea even less desirable because it perpetuates the outdated view that economic crime is not morally blameworthy. The article then proposes a different approach to these competing views on nolo contendere pleas. Specifically, the article concludes that the inherent differences between the role of the prosecutor and of the judge justify the different treatment of the nolo contendere plea by these actors. This article concludes that even if the nolo contendere plea is useful in federal courts, the current DOJ policy of declining consent to it is fully justified because the prosecutor's role is very different from that of the judge.

II. History of the Nolo Contendere Plea

A. English Roots

¶4Throughout its history, the plea of nolo contendere (also known as "non vult")[16] has been seen not as an express admission of guilt, but rather as the defendant's consent to be punished as if guilty and a prayer for leniency.[17] The myriad cases that have discussed the plea do not give a clear picture of precisely what a defendant admits when she enters a nolo plea.[18] One court described it as "in effect, a plea of guilty;"[19] another as a query directed to the court to determine the defendant's guilt,[20] while one scholar has dubbed it "a gentleman's plea of guilty."[21]

¶5The plea likely originated in early medieval England as a practice of allowing defendants to avoid imprisonment and end a criminal matter by offering to pay a sum of money to the king.[22] One 15th-century case reported that a defendant entering the plea did not admit guilt, but rather "that he put himself on the grace of our Lord, the King, and asked that he might be allowed to pay a fine."[23] An early 18th-century case noted that a defendant pleading nolo contendere could introduce evidence of innocence in mitigation of punishment, while a defendant receiving a guilty verdict from a jury was precluded from doing so by the actual finding of guilt.[24] Hawkins, the leading authority on English law of that period defined the nolo contendere plea as follows:

An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the King's mercy, and desiring to submit to a small fine: in which case, if the court think fit to accept of such submission, and make an entry that defendant posuit se in gratiam regis, without putting him to a direct confession, or plea (which in such cases seems to be left to discretion), the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall if the entry is quod cognovit indictamentum.[25]

¶6The plea appears not to have been used in England for centuries, with the last reported case dating to 1702.[26]

B. Use in America

¶7The nolo contendere plea has been used in some American courts since the 19th century.[27] The federal courts examined its availability for the first time in the 1912 case of Tucker v. United States.[28] Tucker was prosecuted for a violation of the Internal Revenue Act and was fined and imprisoned by the trial court after entering a nolo contendere plea.[29] For lack of an existing federal statute or rule, the appellate court relied on common law (i.e., on the Hawkins definition quoted above) to hold that a defendant entering the nolo plea could only be fined, but not imprisoned.[30] Thus, a judge following Tucker could not accept the nolo plea to an offense for which imprisonment was mandatory.[31] Likewise, if an offense had both a fine and an imprisonment alternative as punishment, the defendant entering a nolo plea could only be subject to a fine.[32]

¶8The Tucker limitation against a prison sentence after a nolo plea was repudiated by the United States Supreme Court in Hudson v. United States, where the defendants were indicted for mail fraud.[33] The court upheld the defendants' two-year prison sentences, acknowledging that an

opposite holding "would only hamper [the courts'] discretion and curtail the utility of the plea."[34] This holding was reiterated in North Carolina v. Alford, where the court observed:

Implicit in the nolo contendere cases is a recognition that the Constitution does not bar imposition of a prison sentence upon the accused who is unwilling expressly to admit his guilt but … is willing to waive his trial and accept the sentence.[35]

¶9The Alford court held that an admission of guilt was not constitutionally required for imposition of a criminal penalty, which in Alford was 30-years imprisonment.[36]

III. The Current Doctrine

A. Similarities to the guilty plea; sentencing

¶10The plea of nolo contendere is a device by which a defendant may decline to contest the issue of guilt or innocence.[37] The authority of federal courts to accept the plea derives from Federal Rule of Criminal Procedure 11(a), which provides: "A defendant may plead guilty, not guilty, or nolo contendere."[38] For purposes of conviction and sentencing, the nolo contendere plea has the same effect in the defendant's case as a plea of guilty.[39] The nolo contendere plea, like a guilty plea, waives the defendant's right to trial.[40] This means that once the plea is accepted, the judgment that follows is a conviction.[41] Furthermore, courts have to follow the same procedure for accepting a nolo contendere plea as for accepting a guilty plea.[42] The court must address the defendant personally and make sure that she understands the charge and the consequences of the plea.[43] The court must also ensure that the plea is entered voluntarily.[44]

¶11Because a nolo contendere plea is identical to a guilty plea in these regards, it has the same consequences where the fact of conviction, not the fact of guilt, is relevant.[45] Thus, both a nolo contendere plea and a plea of guilty count as a prior conviction under multiple-offender statutes.[46] Likewise, the nolo plea is admissible to impeach the defendant's credibility if she later takes the witness stand in an unrelated matter.[47] Similarly, a conviction after a nolo plea operates as any other conviction when a statute provides for revocation of a license for those convicted of a specific type of crime,[48] or when the former defendant is required to fill out a government form asking whether she had been convicted in the past.[49]

¶12Lastly, upon entry of a nolo contendere plea the judge can impose the same sentence as the defendant would have received on a plea of guilty.[50] It is not clear whether this principle is followed in practice. On the one hand, entering the plea prevents the judge from seeing all the evidence of the defendant's involvement in the alleged criminal acts.[51] If defense counsel can convince the court that the defendant is pleading nolo contendere out of a concern for efficient judicial administration, the defendant may receive a lighter sentence for such ostensibly good intentions.[52]

¶13On the other hand, under the Federal Sentencing Guidelines a defendant pleading nolo contendere may receive a higher sentence than one pleading guilty. This is so because a defendant who accepts responsibility and pleads guilty may be eligible for a two- or three-level downward adjustment under the Guidelines[53] Although the nolo contendere plea is equivalent to a plea of guilty in many respects, a judge may view it as falling short of the acceptance of responsibility required for the adjustment.[54]

B. Face-saving benefits for the defendant

¶14Same sentencing notwithstanding, a plea of nolo contendere is potentially attractive to many defendants. Underlying the plea is a refusal to admit (or contest) guilt, so nolo contendere can be used as a face-saving device. This face-saving goes beyond the criminal charges to which the nolo plea is offered, because the defendant is not estopped from denying guilt and facts underlying the criminal conviction in subsequent trials.[55] This factor may be particularly important to defendants who heavily rely on their reputations, such as public figures or corporations. For example, former United States Vice President Spiro Agnew pleaded nolo contendere to charges of tax evasion[56] after a federal investigation unveiled a bribery scheme involving kickbacks from government contractors.[57] Mr. Agnew subsequently wrote a book offering his version of the events that led up to the scandal and his resignation from office.[58] Although the scandal had largely discredited Mr. Agnew as a public figure, his ability to plead nolo contendere may well have added some credibility to his account.[59]

¶15Similarly, corporations may find the use of the plea for face-saving attractive.[60] First, it lets the corporate defendant avoid a trial, with its concomitant expense and negative public relations.[61] It removes the threat that incriminating evidence, damaging to the public image of the corporation, could surface during discovery.[62] More importantly, because the defendant does not have to admit guilt, nothing prevents it from publicly claiming that the violation was technical and that it took the sentence voluntarily simply to avoid the difficulties of litigation.[63] Even in subsequent civil litigation, the defendant is not estopped from denying either its guilt or its involvement in any illegal activity.[64]

C. Civil consequences for the defendant

¶16The most important distinction between a plea of guilty and nolo contendere lies in its use in subsequent civil litigation. The nolo contendere plea may not be used against the defendant in a subsequent civil action based on the same acts or omissions to prove that the defendant in fact committed the acts or omissions.[65]

¶17Nolo contendere pleas have been particularly frequent in the context of anti-trust prosecutions.[66] Anti-trust defendants often prefer a plea of nolo contendere to a lengthy trial to avoid the associated expense and adverse publicity.[67] A nolo contendere plea also has a significant advantage over the guilty plea under Section 5 of the Clayton Act.[68] Under Section 5 of the Clayton Act[69] a civil or criminal judgment obtained by the government is prima facie evidence in a later private suit as to matters which have estoppel effect between the parties to the judgment.[70] Once the government proves, in civil or criminal litigation, that a defendant is guilty of anti-trust violations and the defendant is convicted (or found liable), third parties can use that defendant’s conviction in their own private treble damage suits.[71] Such prior convictions shift the burden of proof from the plaintiff to the defendant – the defendant must prove that no anti-trust violations have occurred to escape liability.[72] However, the Section is subject to an exclusionary provision taking “consent judgments and decrees” outside its scope.[73] In interpreting this provision, courts have held that a nolo contendere plea is a consent judgment, while a guilty plea is not.[74] Thus, a defendant who can convince the court to accept its nolo contendere plea will not have the burden of proving lack of anti-trust violations in subsequent civil trials.

¶18The drafters of the Federal Rules of Criminal Procedure had this effect in mind when they retained the plea of nolo contendere in the federal courts.[75] It is important to understand the context in which this decision was made. The Rules date to the period before the modern offensive non-mutual collateral estoppel doctrine was developed.[76] At that time, civil plaintiffs could not use a prior verdict to preclude a defendant from asserting a defense, unless they were a party to the litigation involving the prior verdict.[77] That doctrine was referred to as "mutuality of estoppel" and remained in place until the 1970's, when courts began to allow use of preclusion by non-mutual parties, i.e., plaintiffs and defendants who were not parties to the original litigation.[78] In that context, the burden shifting allowed under the Clayton Act for private treble damage suits was an exception to the rule. Prior to 1970's, a guilty plea in the context of anti-trust prosecution amounted to a subsequent presumption against the defendant, while a similar plea in a different context did not. Today, however, the doctrine of non-mutual collateral estoppel creates a presumption against the defendant in all contexts that is even stronger than the presumption granted by the Clayton Act. A defendant that pled guilty in a prior criminal case can be estopped from denying his guilt in a subsequent civil action.[79] On the other hand, the presumption against anti-trust defendants under the Clayton Act is rebuttable. As a result, the anti-trust defendant today may be in a better position than a defendant in a different context.[80]

¶19An example may illustrate this point better. First consider the legal landscape prior to the 1970s development of non-mutual collateral estoppel. The government brings a claim against D1 for anti-trust violations. P1, a party affected by the anti-competitive practices of D1, wants to recover damages against D1 after the government trial. If D1 pleads guilty to the government charges, the plea is considered a "consent decree" under Section 5 of the Clayton Act, and the plaintiff P1 is entitled to take advantage of a rebuttable presumption of D1's liability. No such presumption is available if D1 entered a nolo contedere plea, which would not be seen as a "consent decree" within the meaning of Section 5 of the Clayton Act. By comparison, for violations outside the anti-trust context, if the government had previously brought charges against D2 , no presumption would be available for P2's action against D2, whatever D2's plea. The development of non-mutual collateral estoppel changed the situation for P2 and D2. The abandonment of the mutuality requirement for offensive collateral estoppel means that a plaintiff (hence "offensive") that was not a party (hence "non-mutual") to the original action can preclude the defendant from re-arguing the issue decided in the original action.[81] Practically, this means that P2 can now estop D2 from re-arguing innocence.[82] In most circuits, D2's guilty plea operates in the same way as a verdict against D2, while a nolo contendere plea does not. Thus, the evolution of the doctrine of offensive non-mutual collateral estoppel increased the importance of the plea of nolo contendere and made it relevant to areas well outside of the original anti-trust context.[83]

D. Related pleas

¶20Somewhat similar to a nolo contendere plea is the Alford plea.[84] In North Carolina v. Alford, the defendant was charged with first-degree murder, a capital crime in North Carolina.[85] At the time, North Carolina law provided that "if a guilty plea to a charge of first-degree murder was accepted by the prosecution and the court, the penalty would be imprisonment, rather than death."[86] Alford claimed he was innocent, even in the face of strong

evidence against him, but because of the seriousness of such evidence pleaded guilty to avoid the threat of the death penalty.[87] He later claimed that his plea was a product of fear and coercion, because it was only made to avoid the threat of the death penalty.[88] Recognizing that most guilty pleas "consist of both a waiver of trial and an express admission of guilt," the Supreme Court held that the admission of guilt was "not a constitutional requisite to the imposition of criminal penalty."[89] While ruling that accepting such pleas is not prohibited either by the Bill of Rights or by the Fourteenth Amendment, the Court left room for states to prohibit the practice.[90] Although Alford actually pleaded guilty, the Court extended its holding to nolo contendere pleas as well, stating that "[t]he fact that his [Alford's] plea was denominated a plea of guilty rather than a plea of nolo contendere is of no constitutional significance with respect to the issue now before us, for the Constitution is concerned with the practical consequences, not the formal categorizations, of state law."[91]

IV. The Players

A. Responsibilities of the Prosecutor

¶21The United States Attorney's Manual instructs federal prosecutors not to consent to nolo contendere pleas, except in the most unusual circumstances.[92] Even if such circumstances are present, acceptance of a nolo plea requires explicit approval of officials in the Justice Department.[93] The Principles of Federal Prosecution section of the Manual explains that when a nolo plea is offered, the prosecutor is required to "make an offer of proof of the facts known to the government to support the conclusion that the defendant has in fact committed the offense charged."[94] When the plea is allowed by the court over the government's objection, the prosecutor should urge the court to make the defendant admit publicly the facts underlying the criminal charge.[95] The prosecutor should state for the record why the government believes the plea to be against the public interest and should oppose the dismissal of charges to which the defendant did not offer a nolo contendere plea.[96]

¶22In explaining the rationale for this policy, the United States Attorney's Manual relies on a departmental directive issued in 1953 by then Attorney General Herbert Brownell, Jr.:

One of the factors which has tended to breed contempt for the Federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of nolo contendere. While it may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending, I can see no justification for it as an everyday practice, particularly where it is used to avoid certain indirect consequences of pleading guilty, such as loss of license or sentencing as a multiple offender.[97] Uncontrolled use of the plea has lead to shockingly low sentences and insignificant fines which are not deterrent to crime.[98] As a practical matter it accomplished little that is useful even where the Government has civil litigation pending. Moreover, a person permitted to plead nolo contendere admits his guilt for the purpose of imposing punishment for his acts and yet, for all other purposes, and as far as the public is concerned, persists in its denial of wrongdoing. It is no wonder that the public regards consent to such a plea by the Government as an admission that is has only a technical case at most and that the whole proceeding was just a fiasco.[99] [internal footnotes added]

¶23Attorney General Brownell also observed that in some jurisdictions the prosecuting attorney's consent is required for the entry of the plea.[100] As explained below, this is not the case in the federal courts.

B. Responsibilities of the Court

¶24Consent of the court is required to enter a nolo contendere plea and the defendant has no absolute right to such a plea.[101] Although the government must be heard, its consent is thus not required for entry of a nolo contendere plea.[102] In an often-cited case, United States v. Jones,[103] the district court held that the DOJ policy instructing the United States Attorneys not to consent to nolo contendere pleas was not binding on the courts.[104] The court did not find any evidence that the plea was abused by the defendant and agreed with the defendant's argument that criminal prosecution should not be used to procure an advantage in a subsequent civil action.[105] In a similar case from the same period, United States v. Cigarette Merchandisers Association,[106] the government argued that the victims of the defendant's anti-trust violations should be allowed to take advantage of the government's prosecution in their own treble damage suits.[107] The court agreed with the government's argument in general, but noted that because the government had already commenced a companion civil trial based on the same charges, there was no need to obtain a guilty verdict in the criminal proceedings.[108] In both cases, the court accepted the nolo contendere plea over the government's objection.[109]

¶25Although it is not bound to follow the government view on the acceptance of a nolo contendere plea, the court gives it serious consideration, as Rule 11 suggests.[110] For example, United States v. Standard Ultramarine & Color Co. involved a massive anti-trust action against defendants representing close to 38% of the sales in the nation's dry colors industry.[111] The court formulated a number of factors to use in deciding whether public interest was best served by acceptance or rejection of the proposed nolo plea.[112] Among these factors –

to be given relative, but by no means controlling weight, is the view of the Attorney General. As chief enforcement officer his judgment, that from an over-all national viewpoint the prospect of conviction rather than a nolo plea will more readily vindicate the public interest, should be considered.[113]

¶26The court in Standard Ultramarine followed the government's recommendation and rejected the defendant's nolo contendere plea.[114] Several authorities suggest that this is a more common route for a court to take. The 1975 Amendments to Rule 11, for example, explicitly required the judge to giving "due consideration of the views of the parties and the interest of the public in the effective administration of justice."[115] The First Circuit observed in 1980 that district courts very rarely accept nolo contendere pleas over government objection and cited the Cigarette Merchandisers case as the only case where such an acceptance had occurred to date.[116] There have been cases since 1980 where a defendant's offer of a nolo contendere plea was accepted by a court over government's objection, but these are the exceptions, not the rule.[117]

V. Discussion

A. Unlike the guilty plea, the nolo contendere plea does not significantly improve efficiency or conserve resources

¶27Some supporters of the nolo contendere plea argue that the plea promotes efficiency and helps conserve judicial and prosecutorial resources.[118] This argument runs parallel to that frequently advanced in support of the plea bargaining system as a whole. The nolo contendere plea is a device which may ensure more defendants waive their right to trial, thereby freeing up judicial resources and ensuring a speedier resolution of the case.[119] It is axiomatic that the acceptance of guilty pleas helps rid our judicial system of cases where there is no genuine dispute about the guilt or innocence of the accused, and the opposing sides are simply arguing about the punishment to be imposed.[120] Guilty pleas also help to avoid unnecessary delays in resolution of cases, which is often in the best interests of all participants: the defense counsel, the prosecutor, the judge, law enforcement officers, witnesses and the accused.[121] Acceptance of guilty pleas allows the court and the prosecutors to prioritize cases based on their seriousness or other factors: for example, by pleading out the misdemeanors, the prosecutors can dedicate their attention to felonies.[122] Entry of plea has the secondary effect of precluding appellate reversal of the court's preliminary rulings.[123] Law enforcement agencies also benefit from the plea, as it will "absolve the police of potential liability for false arrest … and authenticate the prosecutor's claim to have won still another victory in the ongoing battle against crime."[124]

¶28Some claim that because nolo contendere pleas allow defendants to avoid certain negative consequences (see above), some defendants who would have gone to trial if a guilty plea were their only option could enter the nolo plea instead. Thus, by agreeing to a nolo contendere plea, the prosecutor could conserve judicial and prosecutorial resources and speed up the resolution of the case for those defendants who would not plead guilty.

¶29This argument hinges on the assumption that among defendants pleading nolo contendere in the current system, most would have gone to trial if nolo contendere were not an option.[125] This assumption is questionable today, because criminal penalties under sentencing guidelines and mandatory minimum sentences now make the nolo contendere route a far less favorable alternative for defendants. In reality, the nolo contendere plea could simply be a more desirable option for a defendant who would have pled guilty anyway.[126] If nolo contendere pleas are only utilized by those who might have pled guilty, there is no enhanced judicial economy. On the contrary, this could be a waste of judicial and legal resources, since allowing the defendant to avoid pleading guilty will add costs to subsequent civil litigation.[127] Thus, the absence of contemporary empirical data showing that defendants pleading nolo contendere would have otherwise gone to trial casts doubt on this conservation-of-resources argument.[128]

¶30Moreover, the availability of nolo contendere pleas is not nearly as significant to the criminal justice system as the ability to accept guilty pleas. The Supreme Court has recognized, in Santabello v. New York, that without plea-bargaining the criminal justice system would be overwhelmed and rendered incapable of dealing with the tremendous caseload currently resolved by guilty pleas.[129] Justice Burger observed that "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."[130] Even if that were true of the plea bargaining system as a whole, there is no evidence to suggest that unavailability of nolo contendere pleas would have such drastic effects as well. After all, the federal criminal justice system is functioning today despite federal prosecutors' continuing refusal to consent to nolo contendere pleas.[131] Moreover, several states do not recognize the nolo contendere plea at all.[132] Furthermore, even

though judges may be the strongest advocates for judicial economy, in most reported cases, the judges themselves have expressed their reservations about accepting the plea.[133] One court even went so far as to expressly reject the avoidance of litigation costs as an argument for accepting the plea, arguing that where respect for the law was at stake, cost of enforcement was of little consequence.[134] For these reasons, arguments advanced in support of maintaining the plea bargaining system do not extend to supporting acceptance of nolo contendere pleas.

B. The plea may confuse the public

¶31The nolo contendere plea may leave the general public confused and even skeptical of the integrity of the judicial system.[135] First, like a guilty plea, the nolo plea prevents the public from seeing the full scope of the defendant's violation and keeps from the public eye all the details that would otherwise emerge in litigation and discovery. Unlike the guilty plea, however, the nolo contendere plea also leaves the public wondering whether the defendant is actually guilty. From the public's perspective, the defendant is either guilty or innocent and thus should either admit her guilt by pleading guilty or contest it in a jury trial.[136] If she is innocent, she should be acquitted (or the prosecutor should drop charges or the judge should dismiss the case) and spared the penalty. If guilty, she should be found culpable on the facts and punished accordingly. Allowing the defendant to maintain innocence by refusing to contest guilt, yet be convicted and sentenced may suggest that the prosecutor did not really have a case against the defendant but instead used "persuasion" to secure a conviction.[137] The "persuasive" means at prosecutor's disposal are many – from threat of continued harassment to delay of proceedings, during which the defendant may be incarcerated or simply uncertain about her fate.[138] While plea bargaining and the accompanying prosecutorial persuasion do not pose a constitutional problem,[139] they may create an appearance of impropriety and feed public indignation with government overreaching.[140]

¶32The public is prone to even greater confusion when the nolo contendere plea is tendered in the white-collar crime context. Use of the plea for face-saving and avoiding collateral consequences was described above. It suggests that the plea is particularly attractive to white-collar criminals, who are extremely concerned with maintaining reputations and avoiding bad publicity and civil liability. The plea may serve to perpetuate the traditional misconception of white-collar crime as activity that is illegal but not truly criminal.[141] This notion, of course, could be an expression of a public preference that traditional crimes, such as burglary, murder and rape, are more important than price-fixing or mail fraud.[142] If that were the case, prosecutors could arguably justify accepting nolo contendere pleas and nominal fines from white-collar defendants by pointing to the need to spend more resources on traditional crimes that society views as a higher priority.[143]

¶33Yet, sociological evidence suggests a different explanation for the public's lax attitude towards economic crime. Professor Conklin has argued that the public is "resigned, not permissive" vis-à-vis white collar criminals.[144] He explained the leniency towards such defendants both from the standpoint of the public at large and from the perspective of the players involved directly in trials. White collar crimes are often very complex and hard to explain in lay terms; the victims are harder to identify and the effects on them are less direct.[145] Because they are often well-educated and respected members of their communities, the defendants may be more sympathetic to the public.[146] The defendants also appear more sympathetic to judges

and prosecutors, as they often share the same world outlook and similar educational and professional backgrounds.[147] Since they are relatively more sophisticated than the run-of-the-mill petty thief or drunken rapist, white-collar defendants are not caught as often, and thus may not appear to be as pervasive of a problem.[148]

¶34Nonetheless, there has been a gradual recognition of the significance of economic crime in our society. Historically, it was not uncommon for a judge to base acceptance of a nolo contendere plea on the technical nature of white-collar crime.[149] In accepting a nolo plea in Socony-Vacuum Oil,[150] for example, the judge argued that anti-trust violations were malum prohibitum, not malum in se, and thus not worth the full moral stigma or punishment. The nolo contendere plea is consistent with that view, since it does not prevent the defendant from characterizing his crime as a mere technical violation and not morally blameworthy.

¶35The recent public and legislative reactions to massive corporate scandals such as Enron and WorldCom demonstrate that such reasoning is no longer acceptable. With enactment of the Federal Sentencing Guidelines, Congress has attached sizable jail sentences for financial machinations. The more recent Sarbanes-Oxley Act of 2002 provides for even more severe punishment.[151] The clear message of such legislation is that corporate crime today is criminal in both the technical and moral senses of that word. Thus, whatever useful function the nolo contendere plea may have served in a society that viewed economic crime as merely unsportsman-like conduct is no longer present today.

C. The plea may provide an unfair windfall for the guilty

¶36As discussed above in part II, the plea of nolo contendere may have two other closely related adverse effects. On the one hand, it may allow a guilty person to receive the unwarranted benefit of freedom from subsequent civil liability.[152] On the other, it may cause an innocent defendant to accept the criminal sentence in order to avoid the harassment and embarrassment of a trial.[153]

¶37The proponents of accepting the plea of nolo contendere may argue that it prevents the criminal justice system from being used as a forum for civil litigation.[154] Even if this argument had some force half a century ago, it makes less sense today in light of the evolution of the collateral effects of the guilty plea. First, the public view of anti-trust violations (the primary area of use of the plea, as contemplated by the Rules drafters[155]) has changed immensely since the 1940s. In the past, antitrust violations were seen as minor, as illegal, but not truly criminal; today they are seen as serious criminal acts, often classified as felonies.[156] Second, because of the evolution of the collateral estoppel doctrine, described in part III.C, nolo contendere pleas became useful to defendants in areas other than anti-trust violations,[157] and a defendant whose nolo contendere plea is accepted gets a much greater windfall in a much broader context today than the drafters of Rule 11 realized or intended.

¶38The criminal justice system itself has evolved to make the nolo contendere pleas less attractive. In the past, a defendant could expect a nominal fine, benefiting the view that economic crimes were technical violations or non-compliance with some regulatory rules, rather than evil crimes.[158] Today, fines for white collar crimes have increased significantly and resemble less

and less the proverbial slap on the wrist they were often compared to in the past.[159] Imprisonment for federal economic crime has become standardized and significant.

¶39Changes to Rule 11 also suggest the same trend of narrowing the practice of accepting nolo contendere pleas. Before 1974, the Rule gave judges wide discretion to accept the plea, providing no guidance about what factors to consider.[160] After 1974 amendments, the Rule requires the court to give due consideration to the views of the parties and to the "public interest in the effective administration of justice."[161] This is clearly a limitation on the original broad scope of the rule. Congress appears to have limited the plea in the face of the changing context.[162]

¶40To summarize, there is even more reason to oppose the nolo contendere plea for its civil liability consequences today than in the past. The windfall that a defendant would receive from a nolo plea is much greater today, because the collateral effects of a guilty plea have grown in use and importance. In addition, the public perception of white collar crimes, the traditional context for nolo pleas, has changed to a view that these are not just minor technical violations of government regulatory policy, but rather serious crimes. As a result, there is a greater concern about the use of the nolo contendere plea as a vehicle to let a guilty defendant escape just punishment.

D. The nolo contendere plea may be a trap for the innocent

¶41The Department of Justice policy of non-acceptance of a nolo contendere plea also reflects a concern about sentencing an innocent defendant. This is apparent from a comparison of Justice Department's treatment of nolo contendere and Alford pleas: in identical language, the United States Attorney's Manual instructs against consent to either plea.[163] If civil litigation were the only issue at stake in the DOJ policy, the Manual could have made Alford pleas acceptable, since unlike the nolo contendere plea, an Alford-type guilty plea is admissible as evidence against the defendant in subsequent civil litigation just as any other guilty plea. The identical treatment of the nolo and Alford pleas by the Manual could indicate a concern over the characteristic they share, namely, a reluctance to sentence a defendant who maintains (or declines to contest) his innocence.

¶42The legislative history of Rule 11, however, suggests that Congress was less concerned about sentencing an innocent defendant.[164] While it may be invoked frequently to avoid civil liabilities, the nolo plea seems to have been designed also for the innocent defendant who for some reason preferred to waive the right to trial rather than contest guilt. Hypothetically, if the courts wanted to restrict the plea to the guilty defendants, they could impose a requirement that the judge make a factual determination that the defendant committed the crime charged. This way a defendant who in the court's opinion was innocent would be required to face trial and only the guilty would be sentenced. In fact, this precise arrangement was proposed and subsequently rejected by the Advisory Committee on Criminal Rules in 1962.[165] As adopted, Rule 11(f) only requires the judge to establish a factual basis for a guilty plea, not for a nolo contendere plea.[166] The fact that this requirement to establish guilt for nolo contendere pleas was considered and rejected illustrates that a deliberate choice was made to open the nolo contendere plea to potentially innocent defendants.

VI. Differing Roles of Judges and Prosecutors

¶43Whether or not the foregoing was the intended result of the version of Rule 11 that was adopted, it underscores the Department of Justice policy of treating the nolo contendere plea as an unacceptable version of the guilty plea. The federal prosecutor's role in the criminal justice system is very different from that of a judge, so the rationales underlying their policies vis-à-vis nolo contendere pleas may also differ.

¶44In 1935, Justice Sutherland defined the role of the federal prosecutor as follows:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[167]

¶45Several practical consequences follow from this broad statement of prosecutorial policy. First, the prosecutor has an obligation to bring charges only against a defendant he believes is guilty.[168] Conversely, if the prosecutor believes that the defendant is, in fact, innocent, he should not bring criminal charges in the first place. But the prosecutor's goal is more than just securing a conviction, it is also

making certain that the general purposes of the criminal law – assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous offenders, and rehabilitation of offenders – are adequately met, while making certain also that the rights of individuals are scrupulously protected.[169]

¶46This interest in justice is also evidenced by the fact that our criminal justice system imposes additional safeguards to make sure charges are not brought against innocent defendants, e.g. the requirement of a grand jury indictment.[170]

¶47Thus, the prosecutor evaluates evidence as does a judge or a jury, but does so before the trial commences. In this light, by accepting a nolo contendere plea over government objection from a defendant the judge believes is or may be innocent, the court is suggesting that the prosecution made a mistake in its pre-trial determination of the defendant's guilt.[171] So if a prosecutor were to consent to a nolo contendere plea it may appear to the general public that (1) the prosecutor failed in her own calculus, and (2) the system's safeguards did not operate correctly to weed out the innocent defendant before trial. This confusion does nothing to improve the respect for the executive branch, the judiciary or the law enforcement agencies.[172]

¶48Second, if a defendant's innocence were to become apparent once the trial is underway, either the judge or the prosecutor can end the trial -- the former by dismissing the case, the latter by dropping charges. Nevertheless, to end the trial in this fashion the judge and the prosecutor have to meet very different requirements. The judge may (and, actually, must) "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction."[173] However, finding the evidence to be insufficient involves a high legal hurdle: the court may only so find "if, after viewing the evidence in the light most favorable to the prosecution and drawing all reasonable inferences in the government's favor, it concludes no rational trier of fact could

have found the defendant guilty beyond a reasonable doubt."[174] Furthermore, the judge is not allowed to assess witness credibility in determining the sufficiency of government's evidence.[175]

¶49Unlike the judge, the prosecutor has largely unfettered discretion whether to bring or to drop charges.[176] This discretion is only limited by the internal policies of the Justice Department.[177] Because the court's hurdle for dismissing the case is so high, the judge may face a defendant she feels is innocent and yet be unable to grant a motion to acquit. If in that situation the judge thinks that the defendant should not be subjected to unnecessary litigation against an express wish to plead, the judge may be justified in accepting the nolo contendere plea. Because the government's hurdle for dropping charges is significantly lower, the prosecutor does not have that excuse for accepting the nolo contendere plea. Instead, the prosecutor who believes a defendant is innocent should drop charges.

¶50Third, even under the Federal Sentencing Guidelines the judge has considerable discretion in choosing the sentence from the recommended range and in granting or denying downward or upward departures.[178] While the prosecutor may make a sentencing recommendation, including one for a mitigated sentence, she does not have control of the outcome. The judge is thus in a better position to craft the punishment appropriate to the guilt or innocence of a defendant pleading nolo contendere than the prosecutor is. The prosecutor is limited to giving or withholding consent to the plea. Thus, even if the judge may intend to reserve the nolo contendere plea for the innocent defendant in some cases, the prosecutor should be required to withhold consent and not recommend the plea to the court.

VII. Conclusion

¶51Despite its occasional use in federal criminal courts, the nolo contendere plea has been criticized by many ever since it was made part of the Federal Rules of Criminal Procedure. Even if it served a useful function in the past, the recent developments in criminal and civil law limit its practicality and make its use today questionable. In the context of economic crime, the plea perpetrates the notion that the so-called white collar criminals are somehow less morally culpable than others. This notion has no place in today's society, as evidenced by increased public scrutiny of recent accounting scandals and other massive financial frauds. The abandonment of mutuality for collateral estoppel has increased the windfall reaped by guilty defendants pleading nolo contendere, as compared to their peers pleading guilty.

¶52These arguments for abandonment of the nolo contendere plea in federal courts supplement reasons for the Justice Department's policy of opposing nolo pleas. Unlike a judge, the prosecutor has unfettered discretion to bring or drop charges, limited only by the DOJ's internal policy. The prosecutor can exercise this discretion to prosecute only those she believes guilty. DOJ's policy provides an important and practical disincentive for prosecutors to charge defendants who may be actually innocent but would consider pleading nolo contendere and facing a sentence to avoid further hardships. Opposition to the plea helps resolve the public's confusion about the actual guilt of those convicted in federal courts, and avoids the appearance of prosecutorial impropriety that would arise if a sentence were to be meted out to a defendant whose guilt is questionable. Considerations of judicial economy may justify the availability of the nolo contendere plea in federal courts for rare occasions. Nonetheless, because of the unique

role of the prosecutor in our criminal justice system, the Department of Justice should maintain its policy of denying consent to offers of nolo contendere pleas.

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[1] See Nathan B. Lenvin & Ernest S. Meyers, Nolo Contendere: Its Nature and Implications, 51 Yale L.J. 1255, 1268 (1942).

[2] 5 Wayne F. LaFave et al., Criminal Procedure § 21.4(a) (2d ed. 1999).

[3] Id.

[4] See North Carolina v. Alford, 400 U.S. 25, 36 n.8 (1970).

[5] Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 177 (3d ed. 1999).

[6] Federal Rules of Criminal Procedure with Notes and Proceedings of the Institute conducted by the New York University School of Law 21 (1946) [hereinafter "N.Y.U. Institute"].

[7] Id. at 162.

[8] Id. at 188.

[9] United States v. American Bakeries Co., 284 F. Supp. 864, 869 (W.D. Mich.), reconsidered, 284 F. Supp. 871 (1968).

[10] United States Attorney's Manual § 9-27.500; United States v. Jones, 119 F. Supp. 288, 292 n.1 (S.D. Cal. 1954) .

[11] See, e.g., infra notes 97 - 99 and accompanying text.

[12] See, e.g., United States v. Dorman, 496 F.2d 438, 440 (4th Cir. 1974) (Upholding district judge's general policy against nolo contendere pleas except in tax evasion cases as within the judge's discretion).

[13] United States Attorney's Manual § 9-16.010.

[14] See Edward Lane-Reticker, Nolo Contendere in North Carolina, 34 N.C. L. Rev. 280, 291 (1956); Patrick W. Healey, Note, The Nature and Consequences of the Plea of Nolo Contendere, 33 Neb. L. Rev. 428, 433 (1954).

[15] See infra for a more detailed discussion.

[16] See LaFave, supra note 2 , §21.4(a).

[17] North Carolina v. Alford, 400 U.S. 25, 36 n.8 (1970).

[18] Id.

[19] United States v. Food & Grocery Bureau, 43 F.Supp. 974, 979 (S.D. Cal. 1942), aff'd 139 F.2d 973 (9th Cir. 1943).

[20] State v. Hopkins, 88 A. 473 (Del. 1913).

[21] Lenvin & Meyers, supra note 1 , at 1255.

[22] Alford, 400 U.S. at 36 n.8. See also Lenvin & Meyers, supra note 1 , at 1255.

[23] Alford, 400 U.S. at 36 n.8 (quoting Anon., Y.B.Hil., 9 Hen. 6, f. 59, pl. 8 (1431)).

[24] Id. (citing Regina v. Templeman, 1 Salk 55, 91 English Reprint 54 (K.B. 1702)).

[25] 2 Hawkins, A Treatise of the Pleas of the Crown 466 (8th ed. 1824), quoted in Lenvin & Meyers, supra note 1, at 1256; also quoted in Tucker v. United States, 196 F. 260, 263 (7th Cir. 1912)..

[26] Lenvin & Meyers, supra note 1 , at 1256.

[27] Id. See also Tucker v. United States, 196 F. 260, 264-265 (7th Cir. 1912); United States v. Hartwell, 26 F. Cas. 196 (1st Cir. 1869); Commonwealth v. Horton, 26 Mass. 206 (1829).

[28] 196 F. 260 (7th Cir. 1912).

[29] Id. at 261-62.

[30] Id. at 266-67.

[31] Id.

[32] Id. This rule was not followed in all circuits, however. See, e.g., United States v. Lair, 195 F. 47 (8th Cir. 1912) (affirming a two-year prison sentence and a $2,500 fine entered upon a nolo contendere plea to an indictment charging the importation of an alien prostitute).

[33] 272 U.S. 451 (1926).

[34] Id. at 457. Because the felony of mail fraud was punishable by fine or imprisonment or both, the court did not get to a chance to declare the plea permissible in cases with mandatory imprisonment. Id. at 451.

[35] North Carolina v. Alford, 400 U.S. 25, 36 (1970).

[36] Id. at 29, 38. See infra notes 75 -83 and accompanying text; see also Developments in the Law -- Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1350 (1979) [hereinafter Corporate Crime]; see John E. Conklin, Illegal But Not Criminal 109 (1977).

[37] LaFave, supra note 2 , § 21.4(a).

[38] Fed. R. Crim. P. 11(a)(1).

[39] See, e.g., United States v. Norris, 281 U.S. 619, 623 (1930).

[40] See Fed. R. Crim. P. 11(c)(4) ("...if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial."). See also Wright & Miller, supra note 5 , § 177 n.10.

[41] Id. § 177.

[42] See LaFave supra, note 2, § 21.4(a) n.13.

[43] Fed. R. Crim. P. 11(c). See, e.g., Manley v. United States, 588 F.2d 79, 81 n.3 (4th Cir. 1978) (holding there is no distinction between guilty and nolo contendere pleas for the purpose of ascertaining whether the plea was intelligent and voluntary); Duke v. Cockrell, 292 F.3d 414, 416 (5th Cir. 2002).

[44] Fed. R. Crim. P. 11(d). See also Manley, 588 F.2d at 81; United States v. Brogan, 519 F.2d 28, 28-29 (6th Cir. 1975). United States v. Barnes, 504 F. Supp. 330 (D.C. Okla. 1980). Other procedures required are also similar between the two pleas. See Wright & Miller, supra note 5 , § 177.

[45] Healey, supra note 14 , at 430.

[46] See, e.g., United States v. Garcia, 42 F.2d 604 (10th Cir. 1994).

[47] See, e.g., United States v. Sonny Mitchell, 934 F.2d 77, 77-79 (5th Cir. 1991).

[48] See, e.g., Tempo Trucking & Transfer Corp. v. Dickson, 405 F. Supp. 506, 517 (E.D.N.Y. 1975).

[49] See, e.g., Qureshi v. INS, 519 F.2d 1174, 1175-76 (5th Cir. 1975).

[50] LaFave, supra note 2 , § 21.4(a) n.14. See also United States v. Dorman, 496 F.2d 438 (4th Cir. 1974).

[51] Victoria Kanawalsky, Note, Nolo Contendere: Acceptance in the Federal Courts, 10 Memphis St. U. L. Rev. 550, 557-58 (1980).

[52] Kanawalsky supra note 51, at 557-58. See also Bequai, White Collar Plea Bargaining, 13 Trial 38, 39 (July 1977); Herbert Edelhertz, The Nature, Impact and Prosecution of White Collar Crime in B. James George, Jr., White Collar Crimes: Defense and Prosecution 68 (1971) (acceptance of the nolo contendere plea over the government's objection is almost always followed by an imposition of a light or nominal sentence).

[53] See U.S. Sentencing Guidelines Manual § 3E1.1 and n.3 (2001).

[54] See, e.g., United States v. Bennett, 161 F.3d 171 (3d Cir. 1998) (holding that the sentencing judge could properly deny the defendant a downward adjustment of his sentence on the grounds that the defendant's nolo contendere plea did not amount to an acceptance of responsibility). Indeed, the fact that defendant entered a nolo plea is one factor the court may consider in determining whether to grant an adjustment for acceptance of responsibility. See United States v. Morris, 139 F.3d 582, 584 (8th Cir. 1998); United States v. Burns, 925 F.2d 18, 20-21 (1st Cir. 1991).

[55] Wright & Miller, supra note 5 , § 177. United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 170 (S.D.N.Y. 1955).

[56] Under 26 U.S.C. Internal Revenue Code, § 7201 (attempt to evade or defeat tax).

[57] United States v. Agnew, Crim. No. 73-0535 (D. Md. 1973).

[58] See Spiro Agnew, Go Quietly … or else (1980). See also Agnew v. State, 51 Md. App. 614, 625 n. 11 (1982) (describing the book and holding that its publication waived Agnew's attorney-client privilege as to the conversations with his counsel described therein).

[59] Ironically, face saving was about the only benefit Agnew got from the nolo contendere plea. In Agnew v. State, 51 Md. App. at 621-22, 651-53, a state civil action following the criminal case, the nolo contendere plea was admitted as evidence against Agnew and maintained on appeal as a harmless error.

[60] See Kanawalski, supra note 51, at 550-551.

[61] Id. at 556-557.

[62] Id.

[63] For an example of such behavior, see Note, Section 5 of the Clayton Act and the Nolo Contendere Plea, 75 Yale L.J. 845, 849 n.10. After entering nolo contendere pleas in United

States v. American Oil Co., 65 Cr. 150(3) (E.D. Mo. 1965), corporate officials "volunteered" $2 million in "damages" for a covenant not to sue and proceeded to publicly deny any knowledge of any activities constituting antitrust violations.

[64] Wright & Miller, supra note 5 , § 177. United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 170 (S.D.N.Y. 1955).

[65] See United States v. Dorman, 496 F.2d 438 (4th Cir. 1974); Hudson v. United States, 272 U.S. 451, 453 (1926). See also Fed. R. Crim. P. 11(e)(6) ("evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: …(B) a plea of nolo contendere") and Fed. R. Evid. 410 (same).

[66] See Wright & Miller, supra note 5 , § 177. See also N.Y.U. Institute supra note 6 , at 188, discussing anti-trust suits as the major use of nolo contendere pleas.

[67] Id.

[68] 15 U.S.C. § 16(a) (2002).

[69] 15 U.S.C. § 16(a) (2002).

[70] See Corporate Crime, supra note 36, at 1351.

[71] Id. at 1351-1352. See also cases listed in 10 A.L.R. Fed. 328 (1972).

[72] See Corporate Crime, supra note 36, at 1351.

[73] 15 U.S.C. § 16(a) (2002).

[74] See, e.g., Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963) (holding that judgments on nolo contendere pleas were within the exclusionary proviso as a "consent judgment," while those on guilty pleas were not).

[75] See N.Y.U. Institute, supra note 6 , at 188, where Judge Youngquist explains: "It [the nolo contendere plea] was designed primarily to deal with the consequences of a plea of guilty in a criminal anti-trust case in connection with a treble damage suit following it, and it was thought that for practical purposes it would be better to let a corporation, for instance, charged with the violation of the anti-trust laws plead nolo contendere rather than to plead guilty because of the consequences that might follow." See also id. at 162.

[76] The Federal Rules of Criminal Procedure were first adopted in 1946. In that first version Rule 11 also allowed nolo contendere pleas. Id. at 21.

[77] Corporate Crime, supra note 36, at 1350.

[78] Id. See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) (abandoning the mutuality requirement for defensive use collateral estoppel); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (abandoning the mutuality requirement for offensive use of collateral estoppel and finding that the SEC's earlier declaratory judgment against the defendants was preclusive in a subsequent trial by private plaintiffs).

[79] See, e.g., Gelb v. Royal Global Ins. Co., 798 F.2d 38 (2d. Cir. 1986) (jury verdict of guilty estopped the defendant from relitigating the issue in subsequent civil trial); United States v. Bejar-Matrecios, 618 F.2d 81, 83 (9th Cir. 1980) ("the doctrine of collateral estoppel applies equally whether the previous criminal conviction was based on a jury verdict or a guilty plea"); United States v. Section 18, 976 F.2d 515, 519 (9th Cir. 1992) (Noting that "it is settled law in this circuit that a guilty plea may be used to establish issue preclusion in a subsequent civil suit," but declining to apply estoppel where the precise issue at point in the civil case was not part of the prior guilty plea); Nathan v. Tenna Corp., 560 F.2d 761, 763 (7th Cir. 1977) ("a criminal conviction based upon a guilty plea conclusively establishes for purposes of a subsequent civil proceeding that the defendant engaged in the criminal act for which he was convicted."); Appley v. West, 832 F.2d 1021, 1026 (7th Cir. 1987) (same).

[80] The application of collateral estoppel is not without bounds however. In particular, the court applying an earlier criminal conviction to estop a civil defendant has discretion to determine its fairness. If the estoppel "would be unfair to a defendant, a trial judge should not allow [it]." Parklane Hosiery, 439 U.S. at 652 (1979). For example, estoppel does not apply when the party against whom an earlier decision is asserted did not have a "full and fair opportunity to litigate the claim or issue." Kremer v. Chemical Constr. Co., 456 U.S. 461, 480-81 (1982).

[81] See, e.g., Stephen C. Yeazell, Civil Procedure 844 (5th ed. 2000). See also Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (abandoning the mutuality requirement for offensive use of collateral estoppel and finding that the SEC's earlier declaratory judgment against the defendants was preclusive in a subsequent trial by private plaintiffs).

[82] See supra note 79 and accompanying text.

[83] See Charles E. Torcia, Wharton's Criminal Procedure § 314 (13th ed. 1989) (listing contexts where the nolo contendere plea has been used). See also John M. Bray, Nolo Pleas in Tax Cases, 26 Tax Law. 435, 436 (1973).

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

[85] Id. at 26-27.

[86] Id. at 27 n. 1.

[87] Id. at 28.

[88] Id. at 29.

[89] Id. at 37.

[90] Id. at 39.

[91] Id. at 37.

[92] United States Attorney's Manual § 9-16.010.

[93] Id. (requiring the approval of Assistant Attorney General responsible or of the Associate Attorney General, Deputy Attorney General or the Attorney General).

[94] United States Attorney's Manual § 9-27.520.

[95] Id.

[96] Id. § 9-27.530.

[97] This difference between the guilty and nolo contendere pleas is no longer present. See supra text accompanying notes 48 -49 .

[98] Because economic crime is seen as a more serious issue today than in the 1950s, the once nominal fines have given way to more serious penalties. This difference has also lost its bite. See infra text accompanying notes 151 and 159 .

[99] Departmental Directive of Attorney General Herbert Brownell, Jr. (1953), quoted in Principles, supra note 94 , at § 9-27.500 and in United States v. Jones, 119 F. Supp. 288, 292 n.1 (D. Cal. 1954) [hereinafter Brownell's Directive].

[100] Id.

[101] Fed. R. Crim. P. 11(b). Various circuits have held that the judge has wide discretion in accepting or rejecting the defendant's offer to plead nolo contendere. See, e.g., United States v. Cepeda Penes, 577 F.2d 754, 756 (1st Cir. 1978) ("[A]cceptance of a nolo plea is solely a matter of grace…"); United States v. Gratton, 525 F.2d 1161, 1163 (7th Cir. 1975) ("[I]t seems at least arguable that the acceptance of a nolo plea is so broadly a matter of discretion that a judge's policy against such a plea is itself within [the judge's] discretion."); United States v. Dorman, 496 F.2d 438, 440 (4th Cir. 1974) (Judge's general policy against nolo pleas except in tax evasion cases was within judge's discretion); United States v. Bearden, 274 F.2d 1031, 1036 (6th Cir. 2001) (It was within judge's discretion to reject the nolo contendere plea where the defendant failed to offer any compelling reason for not doing so).

[102] See United States v. Jones, 119 F. Supp. 288 (D. Cal. 1954). Although government's consent is not required in federal courts, some states do require prosecutor consent before the nolo contendere plea is entered. Others ban the plea completely.

[103] 119 F. Supp. 288 (D. Cal. 1954).

[104] Id. This case was decided at a time when Rule 11(b) did not require the court to consider prosecution's view on the matter. Before the 1975 amendments the Rule only required consent of court for entry of the plea. However, in view of other precedents it does not seem likely that the Jones court would have come out differently even after the 1975 amendments (the Rule's present form) have been adopted. See Kanawalski, supra note 51, at 561.

[105] Id.

[106] 136 F. Supp. 212 (S.D.N.Y. 1955).

[107] Id. at 213.

[108] Id.

[109] Id.

[110] Fed. R. Crim. P. 11(b). See United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167 (S.D.N.Y. 1955); United States v. Thompson, Inc., 621 F.2d 1147 (1st Cir. 1980).

[111] Standard Ultramarine, 137 F. Supp. at 168-169.

[112] Id. at 172. In addition to the government's view, discussed below, these factors included the nature and the duration of the violation, the size and power of the defendant in its industry, the impact on the economy and the deterrent effect provided by acceptance of the nolo plea. Id.

[113] Id.

[114] Id.

[115] Fed. R. Crim. P. 11(b) (Advisory Committee Notes). This requirement was not present in the original rule, but was added by the 1975 amendments.

[116] Thompson, 621 F.2d at 1150, citing United States v. Cigarette Merch. Ass'n, 136 F. Supp. 212 (S.D.N.Y. 1955).

[117] See, e.g., United States v. Yonkers Contracting Co., 689 F. Supp. 339 (S.D.N.Y. 1988). Practitioners have made similar claims; for example, Herbert Edelhertz, Chief of Fraud Section in DOJ's Criminal Division, wrote: "Judges usually decline to accept a nolo plea unless the prosecutor consents openly, or tacitly by the lack of intensity of his objections." Edelhertz, supra note 52 , at 69. Some writers claim, however, that such instances are far more numerous than the reported cases suggest. See Kanawalsky, supra note 51 , at 563 n. 105, citing J. Conklin, supra note 36, at 119; Bray, supra note 83 , at 445-46.

[118] See Lane-Reticker, supra note 14 , at 291; Healey, supra note 14 , at 433.

[119] See, e.g., Arthur Rosett & Donald R. Cressey, Justice by Consent: plea bargains in the American courthouse 34-37 (1976). See also United States v. Safeway Stores, Inc., 20 F.R.D. 451 (N.D.Tex. 1957) (holding that saving of time and expense is a factor in the decision to accept a plea of nolo contendere); but see United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 170 (S.D.N.Y. 1955) ("The suggestion that the Government forego its right, and indeed its duty, to uphold the integrity of our laws because of the heavy cost of prosecution falls of its own weight. Cost of enforcement in terms of manpower and money is of little consequence when necessary to assure decent respect for, and compliance with, our laws.").

[120] Rosett & Cressey, supra note 119 , at 35. The authors also demonstrate that the significance of judicial economy goes beyond clearing the courts' dockets. Trials impose costs both on the participants and on society as a whole, for example, by requiring the presence of jurors and witnesses and by wasting time in unavoidable scheduling conflicts. Id. The United States Supreme Court also defended the plea bargaining system on numerous occasions. See, e.g., Corbitt v. New Jersey, 439 U.S. 212, 218-220 (1978) (guilty pleas may be encouraged by offering substantial benefits in return for them); Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned.").

[121] Rosett & Cressey, supra note 119 , at 35.

[122] Id.

[123] Kanawalsky, supra note 51 , at 556, citing D. Jones, Crime Without Punishment 111 (1979).

[124] Id.

[125] See, e.g., Lane-Reticker, supra note 14 , at 291.

[126] See, e.g., United States v. Standard Ultramarine and Color Co., 137 F. Supp. 167 (S.D.N.Y. 1955) (holding that defendant in a major anti-trust conspiracy prosecution for price-fixing was not entitled to a nolo contendere plea as a matter of right and observing that "if the defendants were permitted to plead nolo contendere, [the balance] would be disproportionately in their favor without countervailing benefit to the public interest.")

[127] See supra notes 65 -74 and accompanying text for a discussion of civil consequences of the nolo contendere plea as opposed to a guilty plea.

[128] See Section 5 of the Clayton Act and the Nolo Contendere Plea, supra note 63 , for related data from the early 1960s.

[129] Santabello v. New York, 404 U.S. 257 (1971).

[130] Id. However, the view that a criminal justice system is unworkable without plea bargaining is not shared by everyone. Numerous attempts to get rid of pleading entirely or in part have been made. For example, the New York State Legislature banned plea bargaining on a limited scale, when it increased the penalties for serious drug offenses and then removed the possibility of a guilty plea to a lesser offense. One of the consequences of this law was a decrease in the number of arrests and charges for the stipulated offenses, presumably because police and prosecutors felt it was unjust to apply overly harsh laws to small-time offenders. See Rosett & Cressey, supra note 119 at 165-166. Second, the state of Alaska imposed a complete ban on plea bargaining in 1975, which was not lifted until 1993. See Douglas D. Guidorizzi, Comment, Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics, 47 Emory L.J. 753, 774-776 (1998). Third, Philadelphia prohibited plea bargains in the 1970s and 1980s. See Stephen Schulhofer, Is Plea Bargaining Inevitable?, 97 Harv. L. Rev. 1037 (1984). Even if the criminal justice system is still workable without plea bargaining, some have argued that the ban on the practice could have a socially discriminative effect and "a world without plea bargaining would disproportionately harm both the innocent and the poor…" Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1934 (1992).

[131] See supra notes 92 -100 describing USAM prohibition on nolo pleas.

[132] Healey, supra note 14 , at 428 n.6.

[133] See, e.g., United States v. Brighton Bldg. & Maint. Co., 431 F. Supp. 1118, 1121 (N.D. Ill. 1977) (nolo contendere pleas are "generally looked upon with disfavor and should be accepted by the court only in the most exceptional circumstances"); United States v. Minnesota Mining & Mfg. Co., 249 F. Supp. 594, 594 (E.D. Ill. 1966) ("Frankly speaking, it is very difficult for this Court to justify the acceptance of a nolo plea in any criminal case."); United States v. Faucette, 223 F. Supp. 199, 200 (S.D.N.Y. 1963) ("reluctant to accept it unless 'the circumstance of the case are so exceptional as to appeal to a favorable exercise of [the court's] discretion.'") (quoting United States v. Chin Doong Art, 193 F. Supp. 820, 822 (E.D.N.Y. 1961)); United States v. Bagliore, 182 F.Supp. 714, 716 (E.D.N.Y. 1960) ("the general policy of this Court is hostile to the acceptance of the plea…"). See also Kanawalsky, supra note 51 , at 561.

[134] United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167 (S.D.N.Y. 1955). See supra text accompanying notes 119 -123 and, in particular, note 119 .

[135] Kanawalsi, supra note 51 , at 551.

[136] For example, see Nathan April's comments in N.Y.U. Institute, supra note 6 , at 258. See also Lenvin & Meyers, supra note 1 , at 1268.

[137] See Brownell's Directive, supra note 99 .

[138] See Rosett & Cressey, supra note 119 , at 21, 27.

[139] See Santabello v. New York, 404 U.S. 257 (1971).

[140] See Brownell's Directive, supra note 99 .

[141] See Conklin, supra note 36, at 109.

[142] Id. at 17.

[143] However, implementation of the Federal Sentencing Guidelines since November 1987 has reflected precisely the opposite sentiment, since it increased punishment for white collar offenses.

[144] Id. at 109.

[145] Id.

[146] Id.

[147] Id.

[148] Id.

[149] 2 Lester B. Orfield, Orfield's Criminal Procedure under the Federal Rules § 11:14 (Mark S. Rhodes ed., 13th ed. 1985).

[150] 23 F. Supp. 531, 532 (D. Wis. 1938).

[151] See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat 745 (codified as amended in 15 U.S.C. §§ 7201 nt.). Section 1106 of the Act raised criminal penalties under Securities Exchange Act of 1934. In particular, it increased the 10-year maximum incarceration to 20 years. It also raised the maximum fines for individuals from $1 million to $5 million for individuals and from $5 million to $25 million for corporations. Id.

[152] See LaFave, supra note 2 , § 21.4(a).

[153] See id.

[154] See id.

[155] See N.Y.U. Institute, supra note 6 , at 162, 188.

[156] See supra notes 149 -151 and accompanying text.

[157] See supra text accompanying note 83 .

[158] Kanawalski, supra note 51, at 562.

[159] Id. See also United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 172 (S.D.N.Y. 1955).

[160] N.Y.U. Institute, supra note 6 , at 21.

[161] Fed. R. Crim. P. 11(b).

[162] Kanawalsky supra note 51 , at 570. This change could also be a response to commentators complaining that courts are given discretion but no guidance for their decision to accept or reject the plea. See, e.g., Lane-Reticker, supra note 14 , at 291.

[163] Cf. United States Attorney's Manual § 9-16.010 ("United States Attorneys are instructed not to consent to a plea of nolo contendere except in the most unusual circumstances and then only after a recommendation for so doing has been approved by the Assistant Attorney General responsible or by the Associate Attorney General, Deputy Attorney General, or the Attorney General."); § 9-16.015 ("United States Attorneys are instructed not to consent to a so-called "Alford plea," … except in the most unusual circumstances and then only after a recommendation for so doing has been approved by the Assistant Attorney General responsible for the subject matter or by the Associate Attorney General, Deputy Attorney General, or the Attorney General.")

[164] See Fed. R. Crim. P. 11.

[165] Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure 4 (1962). See also Wright & Miller, supra note 5 , § 177.

[166] Fed. R. Crim. P. 11(f).

[167] Berger v. United States, 295 U.S. 78, 88 (1935).

[168] See United States Attorneys' Manual § 9-27.220 ("The attorney for the government should commence … prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction.")

[169] Id. § 9-27.110.

[170] U.S. Const. amend. V.

[171] United States Attorneys' Manual § 9-27.220 ("no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact.").

[172] See Brownell's Directive, supra note 99 .

[173] Fed. R. Crim. P. 29(a).

[174] United States v. Reyes, 302 F.3d 48, 52 (2d Cir. 2002). See also United States v. Loe, 262 F.3d 427, 432 (5th Cir. 2001) (holdng that trial court properly did not err in granting defendant's acquittal motion, unless "a reasonable jury could conclude that the relevant evidence, direct or circumstantial, established all of the essential elements of the crime beyond a reasonable doubt when viewed in the light most favorable to the verdict"). For a more permissive standard, see United States v. Espinosa, 300 F.3d 981, 983 (8th Cir. 2002) (explaining that the judge may not dismiss a case unless "the evidence, viewed in the light most favorable to the government, is such that a reasonable doubt as to the existence of any essential elements of the crime charged.")(quoting United States v. Mundt, 846 F.2d 1157, 1158 (8th Cir. 1988).

[175] See United States v. Arache, 946 F.2d 129, 137-138 (1st Cir. 1991).

[176] See, e.g., United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) (holding that the U.S. Attorney "exercises discretion as to whether or not there shall be a prosecution in a particular case… the courts are not to interfere with the free exercise of the discretionary power of the attorneys of the United States in their control over criminal prosecutions."); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973).

[177] See supra note 168 and accompanying text.

[178] See generally U.S. Sentencing Guidelines Manual.