The latin "nolo contendere" translates to "I am unwilling to contest". An accused who enters a plea of nolo contendere (also referred to as a "no contest plea" or "nolo plea") declares to the court that he or she does not contest the charges against him or her. The plea is not to be confused with a declaration of criminal guilt. The United States allows no contest pleas in its criminal justice system. Canada does not.

Are you a law nerd who likes reading? Because in this blog post I discuss the advantages and disadvantages of the no contest plea by looking at the American plea bargaining system. At the end of the post, I explain briefly why a no contest plea cannot exist under the current state of Canadian law.

Arguments in Favour of the Nolo Contendere Plea

A quick alternative to a trial that conserves judicial resources

Those who support the use of the nolo plea point to the practical role it has served in the administration of justice as one of its advantages. Entering a nolo plea dispenses with the need for potentially lengthy trials and allows courts to divert judicial resources elsewhere in its enormous caseload. Scholars like Frank Easterbrook praise the nolo plea for its ability to resolve cases efficiently and inexpensively.[1] Courts, too, have expressed their satisfaction with the positive results of the plea. For instance, the court in *United States v Safeway Stores, Inc.* (1957) held that

[1] Frank H Easterbrook, "Plea Bargaining as Compromise" (1992) 101:8 Yale LJ 1969; Nathan B. Lenvin & Ernest S Myers, "Nolo Contendere: Its Nature and Implications", 51:8 Yale LJ 1255 at 1256-7.

t. 416.583.1510 | f. 647.361.8199 | e. chris@sewrattan.com | w. sewrattan.com
180 BLOOR STREET WEST, SUITE 1201, TORONTO, ONTARIO M5S 2V6

the time and expense that could be saved is a factor that is considered when deciding whether to accept a nolo contendere plea.[2]

Courts have also endorsed guilty pleas for the resulting conservation of judicial resources, and their reasons can be applied to the case of nolo pleas. In *Santobeilo v New York* (1971), the Supreme Court stated that plea bargains are highly desirable because they conserve resources, are "prompt and largely final" dispositions, and they allow the correctional process to begin quickly. The court in *Brady v United States* (1970) made a similar holding, emphasizing that guilty pleas benefit both the court and the defendant by foregoing the expenses and burdens of a trial and expediting dispositions and the commencement of punishments.[3] Warren Burger (1970) painted a more tangible picture to illustrate the savings that result from a guilty plea. He noted, "A reduction from 90 per cent to 80 per cent in guilty pleas requires the assignment of twice the judicial manpower and facilities – judges, court reporters, bailiffs, clerks, jurors and courtrooms. A reduction to 70 per cent trebles this demand."[4] Guilty pleas have certain benefits that nolo pleas do not.

A quick alternative to a trial that conserves financial costs for defendants

Another advantage of the nolo plea is it saves defendants the cost of going to trial. Imagine a teenager is charged with a drunk driving offence. He has previously been convicted of minor traffic violations and thus has a criminal record. Going to trial would require paying expensive legal fees and taking time off from school and work to attend court. The teenager may decide that the financial costs of defending the charge at trial outweigh the costs of having another conviction

[2] *United States v Safeway Stores, Inc*., 20 FRD 451 (1957).
[3] *Brady v United States,* 397 US 742 at 397 (1970).
[4] Warren Burger, "The State of the Judiciary – 1970" (1970) ABA J 56 at 929.

on his criminal record. He could plead guilty to the charge and avoid the large financial costs of a trial, but what if he does not want to admit guilt? Should he, then, take his chances at trial and consume judicial resources simply because he stubbornly refuses to admit he is guilty? In such a case, pleading nolo contendere would be an expeditious option to avoid the prohibitive costs of a trial while also conserving judicial resources.[5]

An alternative to a trial that could reduce adverse trial outcomes

Some defendants may prefer to plead nolo contendere than go to trial and risk adverse trial outcomes, as seen in *Post v Bradshaw* (2010).[6] Post was charged with robbery and capital murder in Ohio. Because of overwhelming evidence against him, his many confessions to the crimes, and his refusal to plead guilty in exchange for a life sentence, his counsel decided that pleading nolo contendere was the best way to prevent him from receiving a death sentence.[7] They recognized that pleading nolo contendere would put Post's fate in the hands of a three-judge panel for sentencing rather than a jury, which was desirable given the weak mitigation evidence in the case.[8] They hoped that the court would consider the plea a mitigating factor at sentencing. The court did not find the plea to be an act of contrition, however, and instead sentenced Post to death.[9]

Post sought a federal writ of habeus corpus from the district court, which was denied, and then sought an appeal of the denial at the court of appeals in 2010. One of his claims in seeking habeus corpus was that ineffective assistance of counsel regarding the nolo plea made his plea involuntary. But the court thought otherwise, finding the decision to forgo the right to a jury

[5] David L Shapiro, "Should a Guilty Plea Have Preclusive Effect?" (1984) 70 Iowa L Rev 27 at 41.
[6] *Ibid*.; Albert W Alschuler, "The Defense Attorney's Role in Plea Bargaining" (1975) 84:6 Yale LJ 1179 at 1297.
[7] *Post v Bradshaw*, 621 F3d 406 at 430 (2010).
[8] *Ibid* at 416.
[9] *State v Post,* 513 NE2d 754 at 757 (1987).

objectively reasonable. The Court explained, "[b]y pleading no contest, [Post] would 'avoid the ordeal' of a guilt phase and have his sentence determined without the sentencing court hearing all of the adverse testimony that would be produced at trial. Leaving his fate in the hands of jurors who would have heard the strong case against him could have resulted in a conviction and death sentence. Thus, even though the three-judge panel did not consider the plea to be mitigating at sentencing, Post was no worse off than he would have been had he gone to trial and only stood to possibly gain an advantage. The court of appeals consequently dismissed Post's appeal.

Caldwell and McDermott (1999) raise a noteworthy point about a defendant's autonomy in pleading guilty to avoid the death penalty that could be applied to the case of nolo pleas. They ask that where a prosecutor has screened a case and made an informed filing decision, does a defendant not have a right to admit to a charge and plead guilty? Would it not oppose statutory and judicial authority to say a defendant does not have such a right under such circumstances?[10] This argument goes back to the conclusion drawn from *Miller v State* (1980) regarding a defendant's choice to enter a plea. Once the state has done its job – in this case, screening a case and determining there is enough evidence to convict a defendant at trial – that is the end of the state's role. The defendant should then be free to choose how to proceed based on the options available to him or her. If pleading no contest is an available option, then why should a defendant not be allowed to choose it? A prosecutor's decision to lay a charge indicates that he or she thinks the case should result in a conviction. A plea of no contest would result in a conviction, thereby satisfying both the prosecutor and the defendant who chooses the plea.

[10] H Mitchell Caldwell & Anthony X McDermott, "Life in the Balance: Is There a Right to Plead Guilty Even If It Is to Avoid the Death Penalty?" (1999) 104 Dick L Rev 409 at 412.

Conviction cannot be used in future civil proceedings related to the same facts as the criminal proceeding

Defendants may wish to plead no contest in a criminal prosecution to avoid an admission of fault in a subsequent civil prosecution. Rule 410(a)(2) of the American *Federal Rules of Evidence* states that a nolo contendere plea cannot be used as evidence against the defendant who made the plea in a civil case.[11] Thus, a no contest plea does not stop an individual from denying the facts of a criminal case in a related civil case.[12] For example, suppose Carl punches Ben at a party and breaks his jaw. Carl is charged with assault in a criminal trial, and Ben plans to sue Carl in a civil trial for damages. If Carl pleads no contest in the assault trial, then he is not prevented from denying that he assaulted Ben at the civil trial, and Ben's lawyer cannot use Carl's plea as an admission of guilt to prove liability.

Mark Gurevich (2004) contends that no contest pleas are more commonly used in cases of white collar crime where monetary damages in resulting civil suits can be particularly high.[13] He cites anti-trust cases an example, as treble damage actions can be especially crippling. Given how high a financial cost white collar defendants stand to pay if they lose in civil court, pleading no contest and accepting criminal penalties in criminal court may be preferable.[14]

In *United States v Jones* (1954) the district court in California took a liberal approach to allowing a no contest plea to be entered for the purpose of avoiding potential repercussions in a civil suit. The court stated, ". . . in the absence of some reason why a defendant should not have

[11] Legal Information Institute, *Federal Rules of Evidence* (2015) , r 410.
[12] Thomas C Hayden Jr, "Plea of Nolo Contendere" (1965) 25:3 Md L Rev 227 at 228.
[13] Mark Gurevich, "Justice Department's Policy of Opposing Nolo Contendere Pleas: A Justification" (2004) 6 Cal Crim L Rev 2 at paras 10-13.
[14] *Ibid*.

the benefit of the plea, the Court will ordinarily allow it to be entered." There seemed to be strong approval for the strategic use of the nolo plea.

Courts in other states do not prevent a nolo plea from being used against a defendant in a civil suit. In Alaska, for example, a criminal conviction arising from a plea of nolo contendere *can* be used as evidence against the defendant in a subsequent civil lawsuit, if certain criteria are met. The Alaska Supreme Court held in *Lamb v Anderson* (2006) that if the prior conviction was for a serious criminal offence and the defendant was given the opportunity for a full and fair hearing, then a conviction arising from a nolo plea will estop the defendant from denying any element of the offence established by the conviction in a future civil action.[15]

The court acknowledged concerns that allowing a no contest plea to preclude liability in related civil actions may not seem fair. To ease such concerns, they noted that this advantage of a nolo plea is only granted where trial courts determine a nolo plea should be accepted – that is, where the defendant understands the plea will result in a conviction the way a guilty plea would and that the conviction could be used in subsequent cases to establish the defendant's involvement in the conduct related to the offence.[16] Without an acknowledgement of understanding of these points from the defendant, the nolo plea will not be granted.

The court also emphasized that the prior conviction must be for a serious offence in order for estoppel to not apply. Defendants who plead no contest to less serious offences will be estopped from denying liability in civil actions. Because statistics show that the plea is used most frequently for less serious crimes, estoppel will likely apply to most defendants. Notably, the court cited its acknowledgment in *Scott v Robertson* (1978) that a defendant who pleads guilty to a minor offence may do so simply because the cost of defending the offence is greater than the cost of having the

[15] *Lamb v Anderson*, 147 P3d 736 at para 46 (Alaska 2006).
[16] *Ibid* at para 47.

conviction on his or her criminal record.[17] The court noted in *Scott* that, "We first require that the prior conviction be for a serious offence in order that the accused have the motivation to defend himself fully", and that a conviction for a minor offence "is not credible evidence of guilty conduct."[18] This reasoning by the court highlights two important points: 1) the less serious the offence, the less motivated a defendant may be to fight the charge at trial; and, by extension, the more appealing a no contest plea becomes; and 2) a conviction for a minor offence is not evidence of guilty conduct, but evidence of a cost-benefit analysis that determines pleading no contest is more advantageous than going to trial.

Benefits accused persons who are unable or unwilling to admit to elements of a crime

There are a number of factors that persuade some defendants to plead nolo contendere other than the fact that they are guilty, one being that they cannot remember committing the crime. Pleading guilty where a person legitimately cannot accept guilt for a crime because they do not know whether they committed it would be wrong.

Intoxication

For example, a defendant may not remember committing a crime due to intoxication from drugs or alcohol. In *Huot v Commonwealth* (1973), the defendant was charged with the first degree murder of a woman whom he had dated several times before her death. The defendant and the victim had gone out to a club on the night of the murder. The defendant drank a considerable amount of alcohol before he and the victim left for the victim's house.[19] The police responded to a call made by the defendant hours later and found him trying to resuscitate the victim, who had

[17] *Scott v Robertson,* 583 P2d 188 at para 54 (Alaska 1978).
[18] *Ibid*.
[19] *Huot v Commonwealth*, 292 NE2d 700 at 93 (1973).

been badly beaten. The defendant was charged with first degree murder and pled guilty to second degree murder after his lawyer explained the various pleas available and their consequences.[20]

The defendant later filed a petition for a writ of error in the Supreme Judicial Court of Suffolk, Massachusetts, claiming that his guilty plea was not knowing and voluntary but the result of coercion and terror by his lawyer.[21] A hearing on his petition was held and it was determined that the plea was knowing and voluntary, made after an inquiry by the judge, and was not unconstitutional. The court held the defendant's lawyer did not advise or coerce him into pleading guilty against the defendant's wishes.

There was some discrepancy in the testimony provided by the defendant's lawyer at trial and at the petition hearing. When the guilty plea was requested at trial, the lawyer told the judge that Huot did not have a full and clear recollection of his activities after leaving the club. He also stated that Huot did "remember enough of the facts -- and he tells me -- to know that he is the person responsible for this homicide." However, at the petition hearing four years after the plea, the lawyer's account of what Huot told him changed slightly. The lawyer stated Huot had never admitted guilt to him and that Huot, "said words to the effect that it must have been him, but that he could not remember having committed the crime." Despite these differing accounts, the court did not accept the lawyer's testimony at the hearing entirely and ruled that his testimony to the trial judge was more likely to be accurate than testimony given four years after the plea.[22]

This is a troubling ruling from Huot's perspective, because if the lawyer's account four years later was in fact the true account, then Huot was convicted of a crime that he cannot be sure he even committed. Is it fair for a defendant to admit guilt to a crime that he or she may not have

---

[20] *Ibid* at 92.
[21] *Ibid* at 96.
[22] *Ibid* at 95.

been responsible for solely to gain a lower sentence? Those who answer "no" would likely prefer a plea which allows a defendant in Huot's situation to neither accept nor deny the charges against them – a plea like the nolo contendere plea.

Shame and other effects of legally admitting guilt

Another reason why defendants may want to plead nolo contendere is because they are too ashamed to admit to the elements of an offence. A person who shoplifts may not want to admit in a public trial that he or she intentionally committed such a crime.[23] A person charged with assault against a family member or a sexual offence may not want to admit guilt to these crimes before family, friends, or co-workers.[24] Indeed, fear of shame from family members was the most common answer provided by interviewees in Stephanos Bibas' 2003 study when asked why they thought defendants refused to admit guilt. One defence lawyer interviewed even shared that he schedules his clients' guilty pleas for late Friday afternoons and misleads his clients' families about the date of guilty pleas, to help his clients plead more easily and with less shame in empty courtrooms.[25] This measure demonstrates just how difficult it can be for defendants to plead guilty and why having a plea that does not require them to admit guilt is beneficial.

Some of the lawyers in Bibas' study suggested that defendants may avoid admitting guilt because of certain collateral consequences. For example, admitting guilt to a crime may hinder future employment opportunities because of the stigma associated with criminal records for serious offences. Having a nolo contendere plea on one's record may make it easier to relieve concerns of

---

[23] Kent W Roach et al., "A Plea for Nolo Contendere in the Canadian Criminal Justice System" (1998) 40 CLQ 243; Joseph Di Luca, "Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada" (2005) 50 Crim LQ 14 at 30 [*Di Luca*].
[24] *Ibid*.
[25] *Ibid*.

prospective employers, as a person can note that he or she never admitted guilt and that this was recognized and accepted by a court. Similarly, admitting guilt to a crime could have negative consequences in a future child-custody battle, but pleading nolo contendere may be more reassuring to a judge who understands the many reasons why nolo pleas are used.[26]

Reputation and Publicity

Another collateral consequence that can be prevented by a no contest plea is having to admit guilt in a later civil suit and subsequently tarnish one's reputation and public image. As discussed, because no contest pleas generally preclude estoppel in collateral civil suits, a defendant who pleads no contest in a criminal trial cannot be estopped from denying guilt and facts of the crime in any following civil litigation. The case of Spiro Agnew, former Vice President of the United States, illustrates this point. Agnew pled no contest to tax evasion charges after a federal investigation uncovered government contractors providing kickbacks as bribes. Agnew wrote a book after his criminal trial to explain his account of the events leading up to the charges and his later resignation as Vice President.[27] Although Agnew's reputation was significantly tarnished after the scandal, Mark Gurevich (2004) argues that Agnew's no contest plea may have provided credibility to his version of events.[28]

Corporations may also wish to plead no contest to avoid negative publicity that would damage their reputation. As Victoria Kanawalsky (1980) notes, the no contest plea allows corporate defendants to avoid a trial and the expenses and negative publicity with which it comes.[29]

---

[26] *Ibid*.
[27] *Ibid*.

[28] *Ibid*.
[29] Victoria Kanawalsky, "Nolo Contendere: Acceptance in the Federal Courts" (1980) 10 Memphis St U L Rev 550 at 556-557.

Any incriminating evidence that could be brought out during the discovery phase would also be avoided.[30] Furthermore, because a no contest plea is not an admission of guilt, a corporate defendant is not precluded from publicly asserting that the conviction was only technical. And as discussed, a corporate defendant is not estopped from denying guilt or any conduct connected to the crime it was convicted of in future civil actions.[31]

The Arguments Against the No Contest Plea

Potential for Wrongful Convictions

Concern has been raised about whether defendants who enter pleas truly understand the elements of the plea, and therefore whether some who choose to enter a plea are actually innocent. This concern is exacerbated in situations where prosecutors hold a great amount of power. Critics of plea bargaining argue that there is often a power imbalance between prosecutors and defendants; and the more power prosecutors hold, the more likely it is that the plea bargains made are better for prosecutors than defendants.[32] They add that prosecutors holding more power make it more likely that innocent defendants will plead guilty, leading to wrongful convictions.[33] The difference in power, combined with a lack of understanding of the plea's meaning, has led to defendants using the Alford Plea without fully understanding the repercussions.[34] There may be concern that the same could happen to those who enter a no contest plea.

---

[30] *Ibid*.
[31] Charles Alan Wright & Arthur R Miller, *Federal Practice and Procedure: Criminal* (West Group St, 1999) at 177.
[32] Joan Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent," (2010) 56 Crim LQ 116 at 128 [*Brockman*].
[33] *Ibid*.
[34] Bryan H Ward, "A Plea Best Not Taken: Why Criminal Defendants Should Avoid the Alford Plea," (2008) 68:4 Missouri L Rev 1913 at 938.

Effect on victims of crime and the public's views of the legitimacy of the criminal justice system

Those who oppose the no contest plea also argue that it deprives victims of vindication. Victims and members of the public may feel that a defendant who pleads no contest has not accepted responsibility for the harm caused.[35] Additionally, victims are not able to have their day in court, which for some may provide the sense of satisfaction and closure that they need to move past their victimization. No contest pleas can therefore leave victims of crime frustrated with the criminal justice system.

Joseph Di Luca (2005) notes that prosecuting crimes at trial has social benefits that may be lost if guilty pleas are entered; and this argument can be extended to the case of no contest pleas. He explains that thorough trials can improve public perceptions of the administration of justice by showing the public that the criminal justice system works. Trials can also be effective in exposing police or prosecutorial misconduct that may otherwise be left uncovered in cases with plea bargains.[36] For instance, the police or prosecution may entice a defendant to waive constitutional arguments and instead plead guilty, leaving prosecutorial and police abuses undiscovered.[37] The same can be said when a person enters a plea of no contest.

Ethical considerations for defence lawyers

Some think that nolo pleas often put defence lawyers in an ethical dilemma in terms of information-gathering on a client. Defence lawyers may deliberately choose not to hear all of the

[35] Carol Turowski, "Guilty But Innocent," *Huffington Post: The Blog* (17 April 2012), online: <http://www.huffingtonpost.com>.
[36] *Ibid*.
[37] *Ibid* at 32-33.

facts about a client's guilt in order for them to be able to legally make arguments that oppose the undiscovered facts. Is this purposeful picking and choosing of information-gathering ethical? Should a lawyer bar a client from sharing his or her full account of the facts in exchange for a technical advantage? Many would argue "no".

Others argue that nolo pleas arise out of poor legal advice given to relieve busy lawyers of busy caseloads. Indeed, Alschuler (1968) argues that many defendants are not fully informed, rational actors who choose to enter a plea after a cost-benefit analysis; rather, they receive poor legal advice from lawyers whose extremely busy caseloads result in them encouraging their clients to enter a plea.[38] Is it ethical for a lawyer – either for reasons of personal efficiency or cost-benefit strategy – to advise a client to plead no contest? Again, many would argue "no".

Adopting a plea of no contest would be the wrong way to make policy, in theory

Adopting a plea of no contest in Canada would require amending the definition of a guilty plea under section 606 of the *Criminal Code*. Josh Weinstein (2003) offers the following definition for an Alford plea to be adopted in Canada: "…the plea is an admission of the offence or, in the alternative, an admission by the accused that overwhelming evidence of the essential elements of the offence exists."[39] This definition could also apply to the adoption of the no contest plea.

Amending the conditions of a guilty plea is not sufficient to make the no contest plea consistent with section 606, however. Piccinato (2015) notes that as a matter of public policy, section 606 is meant to ensure that accuseds who plead guilty also demonstrate remorse for their

[38] Albert W Alschuler, "The Prosecutor's Role in Plea Bargaining" (1968) 36 U Chi L Rev 50 at 60.
[39] Josh Weinstein, "Innovations in the Plea of "Guilty": The Alford Plea" (August 2003), *Voir Dire: CBA Natl Crim J S Newsletter*, online: <www.cba.org> at para 2.

conduct.[40] The combination of meeting the criteria listed in section 606 and showing remorse for committing a crime is what makes a more lenient penalty available to accuseds.[41] The no contest plea is therefore unavailable in Canadian law at this time.

[40] Milica Potrebic Piccinato, "The Principles Guiding Resolution Discussions," (2004) *Government of Canada Department of Justice*, online: <http://www.justice.gc.ca> at para 7.
[41] *Ibid*.