Endangered Species: A Plea for the Preservation of
Nolo Contendere in Alaska

Jana L. Kuss*

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I. INTRODUCTION

The plea of nolo contendere, though commonly used in Alaska courts,¹ is largely
misunderstood. Nolo contendere, in Latin, literally means "I will not contest it."² In

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¹ See, e.g., Miller v. State, 617 P.2d 516, 518 (Alaska 1980) (discussing the basis for and
a criminal proceeding, it permits a defendant to maintain her innocence while simultaneously consenting to punishment as if she were guilty. Although the plea has been used in America for more than a century, modern nolo contendere jurisprudence varies from state to state and remains a topic of intense debate, particularly as to the collateral civil effects (if any) of such a plea.

This article examines the evolution and development of the nolo contendere plea in the United States and discusses the current state of nolo contendere jurisprudence. In particular, it addresses the similarities and differences between the modern nolo plea as it is used in both Alaska and in the federal system. Next, the article discusses the doctrine of collateral estoppel and explains how Alaska courts have historically applied this doctrine to nolo contendere pleas. In doing so, it traces the development of Alaska case law and highlights the Alaska Supreme Court’s recent decision in Lamb v. Anderson. The article then argues that the court’s decision to bar all civil litigants from contesting the elements of a crime to which they previously pled nolo contendere is flawed both as a matter of law and policy. First, it contends that Alaska courts have improperly applied collateral estoppel to nolo pleas on two grounds: (1) a nolo plea, by definition, obviates the requirement that an issue actually be litigated; and (2) collateral estoppel cannot be fairly applied to nolo pleas because a defendant who pleads nolo may lack the incentive to contest the charges in a criminal case. Second, the article calls for a reversal of the court’s decision in Lamb v. Anderson so as to preserve the nolo plea from extinction. It contends that, as a matter of policy, collateral estoppel cannot properly be applied to the nolo plea because it would render the plea meaningless by abolishing the defining feature of the nolo plea and eviscerating its practical function and utility. The article thus offers reasons, both pragmatic and legal, as to why the Alaska Supreme Court’s recent decision to extend collateral estoppel to nolo pleas is untenable and urges the Court to preserve the nolo contendere plea in Alaska rather than relegate it to an endangered species status.

II. THE EVOLUTION OF NOLO CONTENDERE

A. Historical Origins and Development

Like so many other features of the American criminal justice system, the plea of nolo contendere originated in England. The plea was recognized at English law as a means by which a defendant could admit guilt without actually confessing to the crime. This article explores the historical context of the nolo contendere plea and examines its development in the American legal system. It discusses the evolution of the plea in both Alaska and in the federal system, highlighting the similarities and differences in their application.

2. Scott, 928 P.2d at 1237 (Alaska App. 1996) (quoting 1A CHARLES ALAN WRIGHT, FEDERAL PRACTICE & PROCEDURE §177 (3d ed. 1999)).
4. See discussion infra Parts II and III.
common law, not by name, but rather as an "implied confession." According to Hawkins, a leading authority on the judicial history of pleas, 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. By consenting to punishment in this manner, a defendant was able to avoid not only a direct confession, but also the collateral estoppel consequences associated with a confession of guilt. Thus, an implied confession was a useful and practical device by which a defendant, seeking to avoid an admission of guilt (and potential imprisonment), could "make an end of the matter" by simply throwing himself on the grace of the King and offering to pay a fine.

However, it was not until its integration into the American criminal justice system that the "implied confession" blossomed into the formal plea of nolo contendere. The plea of nolo contendere first appeared in American courts in the nineteenth century, finding "refuge as part of the common law" and, in some

Contendere: Its Nature and Implications, 51 YALE L.J. 1255, 1255 (1942) (noting that "the plea was known to the English common law as early as the reign of Henry VI"); see also North Carolina v. Alford, 400 U.S. 25, 36 n. 8 (1970). Although it has its origins in English common law, the nolo contendere plea not been used in English courts since 1702. K. A. Drechsler, Annotation, Plea of nolo contendere or non vult contendere, 152 A.L.R. 253, 254 (1944).

7. See id. at 454 n. 2; Lenvin & Meyers, supra note 5, at 1255-56 (referring to Hawkins's treatise as the "approved statement" on the plea of nolo contendere); Drechsler, supra note 5, at 255.
8. Hudson, 272 U.S. at 453 (quoting 2 W. HAWKINS, PLEAS OF THE CROWN 466 (8th ed. 1824)). An implied confession was nothing more than a petition to the King that was "at least an appeal for mercy, and at most a consent to be fined." Id. at 454-55. In his book, Pleas of the Crown, Hawkins defined an "implied confession" 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 such a submission, and make an entry that the 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 be where the entry is quod cognovit idictamentum.

Id. at 453 (quoting 2 W. HAWKINS, PLEAS OF THE CROWN 466 (8th ed. 1824)).
9. Hudson, 272 U.S. at 453 (quoting 2 W. HAWKINS, PLEAS OF THE CROWN 466 (8th ed. 1824)). Hawkins draws a clear distinction between a confession of guilt (i.e. an express confession), which estops a defendant from pleading "not guilty" to an action brought afterwards against him for the same matter", and an implied confession, which does not. Id; see also Tseung Chu v. Cornell, 247 F.2d 929, 937 (9th Cir. 1957).
10. Alford, 400 U.S. at 35 n.8 (citing F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 517 (2d ed. 1909)).
11. Hudson, 272 U.S. at 455 (noting that "in modern practice [the implied confession] has been transformed into the formal plea of nolo contendere"); Tseung Chu, 247 F.2d at 937.
12. Federal courts first discussed the nolo plea in Tucker v. United States, a 1912 case in which the 7th Circuit Court of Appeals, relying on Hawkins, held that the nolo contendere plea was
instances, through express statutory recognition. Since that time, it has enjoyed widespread acceptance in the United States—a fact evidenced by the plea’s availability both in Federal courts and in an overwhelming majority of state courts. Yet, despite its prevalence and continued use, the nolo plea has remained remarkably unchanged from its original, accepted definition (as stated by Hawkins).

Like the implied confession, the nolo plea’s defining characteristic is its provision for immunity from any collateral estoppel effects in subsequent civil litigation. Indeed, only available to defendants subject to a fine (not those facing imprisonment). Tucker v. United States, 196 F. 260, 267 (7th Cir. 1912); see also Lenvin & Meyers, supra note 5, at 1256 & n. 12.

13. Drechsler, supra note 5, at 255.

14. See Hudson, 272 U.S. 451; see generally United States v. Norris, 281 U.S. 619 (1930); Tucker, 196 F. 260. See also Fed. R. CRIM. P. 11 advisory committee’s note (noting that “the plea of nolo contendere has always existed in federal courts”); Wright, supra note 3, at §177 (remarking that the nolo plea “has always been permitted in federal courts”).


16. Lenvin & Meyers, supra note 5, at 1256. See also Drechsler, supra note 5, at 255 (remarking that Hawkin’s “description must still be considered as the approved statement of the essential characteristics of the plea and as the starting point for every discussion as to its real nature”).

17. See Hudson, 272 U.S. at 455 (explaining that “like the implied confession, [the plea of nolo contendere] does not create an estoppel...”); United States v. Jones, 119 F. Supp. 288, 290 (S.D. Cal. 1954) (opining that “the main, if not only, modern purpose of nolo contendere” is to avoid exacting an admission which could be used as an admission in subsequent potential litigation).
the only major difference between the modern nolo plea and its English predecessor is that the nolo plea has the effect of a plea of guilty for the purposes of the case in which it is entered. Nevertheless, misunderstandings about the precise consequences of a nolo plea persist and continue to plague federal and state courts alike.

B. The Law of Nolo Contendere

The plea of nolo contendere, construed literally, means "I will not contest it." "It is a mere statement of unwillingness to contest and no more." Courts, in their attempts to characterize the nolo plea, have accorded it a variety of labels, including:

... a confession; an implied confession; a quasi confession of guilt; a plea of guilty; substantially, though not technically, a plea of guilty; a conditional plea of guilty; a substitute for a plea of guilty; a mild form of pleading guilty to an indictment; a formal declaration that defendant will not contend; a query directed to the court to decide the defendant's guilt; a compromise between the government and the defendant; and an agreement on the part of the defendant that the facts charged may be considered as true for the purposes of the particular case.

The plea has also been referred to as "a gentleman's plea of guilty" due to its popularity among high-profile defendants in anti-trust prosecutions. Apart from its

18. See Hudson, 272 U.S. at 455 ("[L]ike the plea of guilty, [the plea of nolo contendere] is an admission of guilt for the purposes of the case."); Norris, 281 U.S. at 622; Tseung Chu, 247 F.2d at 937; Lenvin & Meyers, supra note 5, at 1257 ("In an ordinary case, the acceptance of a plea of nolo contendere has the same consequences as a plea of guilty.").

19. Although the core characteristics of the nolo plea have generally remained unaltered over time, "misunderstandings concerning its use and consequences persist." Lenvin & Meyers, supra note 5, at 1256. Though not considered in this article, it should be noted that the plea of nolo contendere often has consequences beyond mere estoppel in subsequent civil proceedings. For instance, a nolo plea often serves as a basis for impeachment in later proceedings. See, e.g. Lowell v. State, 574 P.2d 1281 (Alaska 1978). "It is admissible in a subsequent probation revocation proceeding to prove a violation of law." State v. Ruby, 650 P.2d 412, 414 (Alaska Ct. App. 1982). And it serves as a "conviction" for immigration purposes. See Tseung Chu, 247 F.2d at 937-38.

20. See generally Drechsler, supra note 5.

21. The plea of nolo contendere or "no contest" is also commonly referred to as a "plea of non vult" or "plea of nolle contendere." Drechsler, Drechsler, supra note 5, at 254.

22. Scott, 928 P.2d at 1237 (quoting WRIGHT, supra note 3, at §177).

23. Id. "The so-called plea of 'nolo contendere'... is not a plea in the strict sense of the term in the criminal law, but a formal declaration by the accused that he will not contend with the prosecuting authority under the charge." Jones, 119 F. Supp. at 291.

24. Drechsler, supra note 5, at 256-58.

25. See Lenvin & Meyers, supra note 5, at 1255.
many labels, however, the law of *nolo contendere* is (for the most part) well established.\(^2\)

In federal court, the plea of *nolo contendere* is authorized by Federal Rule of Criminal Procedure 11, which permits a defendant to enter a plea of *nolo contendere* only with the court’s consent.\(^27\) Once entered, the court may, in its discretion, either accept the plea or reject it.\(^28\) However, before a *nolo contendere* plea can be accepted, the court must consider “the parties’ views and the public[‘s] interest in the effective administration of justice”\(^29\) and must personally address the defendant to ensure that the plea is voluntary and that the defendant understands both the charges and the consequences of the plea.\(^30\) If accepted, a *nolo contendere* plea has “all the effect of a plea of guilty for the purposes of the case.”\(^31\) It is, in effect, a *de facto* plea of guilty for the purposes of the criminal proceeding in which it is entered:

With respect to the case in which it was entered, a plea of *nolo contendere* . . . has the same effect as a plea of guilty. It is an admission of every essential element of the offense well pleaded in the charge, and is tantamount to an admission of guilt for the purposes of the case. Nothing is left for the court to do but enter judgment on the plea. No issue of fact remains. In almost every respect[,] the plea of *nolo contendere* resembles the plea of guilty.\(^32\)

Despite its striking resemblance to a guilty plea, the plea of *nolo contendere* is unique in two important respects. The primary, and perhaps most significant, difference between a *nolo* plea and a guilty plea is that the former generally cannot be used in a subsequent civil action to estop the defendant from denying the facts on which the criminal charge was based.\(^33\) Moreover, unlike a guilty plea, “a *nolo* plea

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26. See Drechsler, supra note 5.

27. Rule 11(a) provides: “A defendant may plead not guilty, guilty, or (with the court’s consent) *nolo contendere*.” FED. R. CRIM. P. 11(a).

28. See FED. R. CRIM. P. 11(a)-(b).


30. See FED. R. CRIM. P. 11(b); WRIGHT, supra note 3, at §177. The court need not determine if there is a factual basis for the plea. *Alford*, 400 U.S. at 36 n.8 (commenting that, while Rule 11 prohibits the court from accepting a guilty plea without establishing a factual basis for such plea, it imposes “no similar requirement for pleas of *nolo contendere*” because “it was thought desirable to permit defendants to plead *nolo* without making any inquiry into their actual guilt”).

31. Norris, 281 U.S. at 622. “When accepted by the court, [the plea of *nolo contendere*] becomes an implied confession of guilt, and, for the purposes of the case only, equivalent to a plea of guilty.” *Jones*, 119 F. Supp. at 291.

32. WRIGHT, supra note 3, at §177, quoted in Scott, 928 P.2d at 1237; see also Norris, 281 U.S. at 623; Carl T. Drechsler, Annotation, *Plea of nolo contendere or non vult contendere*, 89 A.L.R.2d, 540, 547 (1963). “Commentators and courts universally agree that when a defendant pleads no contest to a crime, the defendant waives his or her right to challenge the State’s proof of the essential elements of that crime.” *Scott*, 928 P.2d at 1236.

may be accepted [by the court] without the usual prerequisite of fully satisfying the court that the defendant has in fact committed the crime charged. These differences have made the nolo plea a remarkably useful tool, not only in dealing with defendants who deny guilt, but also in dealing with those who elect to remain mute.

In Alaska, the plea of nolo contendere, though similar to its federal counterpart in many respects, is treated somewhat differently. Most significantly, Alaska is the only state that permits a defendant to "plead nolo contendere as a matter of right." This means that unlike federal courts, Alaska courts are bound to accept a defendant's nolo plea to the extent that it is knowing and voluntary, whether or not there is a reasonable basis for the plea. Rather, a defendant's right to enter a plea of nolo contendere is absolute and "neither the prosecution nor the court can prevent him from doing so." Alaska is also unique in that it has explicitly made a nolo contendere plea admissible in subsequent collateral proceedings. It has no rule akin to either Federal Rule of Criminal Procedure 11(f) or Federal Rule of Evidence 410, which both clearly

34. United States v. Hines, 507 F.Supp. 139, 140 (D.C. Mo. 1981) (citing Wright, supra note 3, at §177); see also Miller, 617 P.2d at 518 (commenting that, unlike guilty pleas, the court need not find "a reasonable basis for a plea of nolo contendere").
37. Miller, 617 P.2d at 518 (emphasis added) (citing Alaska R. Crim. P. 11(a)). See also Pletnikoff, 765 P.2d at 980 (Matthews, C.J., dissenting). It has even been suggested that, because defendants may enter nolo pleas as a matter of right, "guilty pleas are virtually non-existent in felony cases in Alaska." Id. at 981 n. 2.
38. Miller, 617 P.2d at 518. (referencing Alaska R. Crim. P. 11(c)-(d)). If it finds that a defendant's plea is knowing and voluntary, it cannot reject the plea. Id.
39. See id.
40. See Pletnikoff, 765 P.2d at 980 (Matthews, C.J., dissenting). According to Chief Justice Matthews, "the nolo plea is... a concession" in the federal system (as opposed to Alaska, where defendants can plead nolo as a matter of right) because "[i]t is afforded only where the defendant deserves it or when other circumstances indicate its desirability." Id.
41. Ruby, 650 P.2d at 413-14.
42. See Lowell, 574 P.2d at 1285 (nolo plea is admissible for impeachment purposes in subsequent proceedings); Ruby, 650 P.2d at 414 (nolo plea is admissible in a subsequent probation proceedings to prove a violation of law).
43. FED. R. CRIM. P. 11(f) provides: "The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410."
44. FED. R. EVID. 410 provides, in relevant part:
   [E]vidence 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:
   (1) a plea of guilty which was later withdrawn;
   (2) a plea of nolo contendere;
   (3) any statement made in the course of any proceedings under Rule 11 of the Federal
state that *nolo* pleas are inadmissible. Instead, it is a well-accepted rule in Alaska that *nolo* pleas are not only admissible in later collateral proceedings, but also constitute a substantial probative force.

However, apart from these variations, Alaska law has been otherwise "consistent with the general law governing pleas of *nolo contendere*"—that is, until recently. As I will discuss below, the Alaska Supreme Court, in a string of recent decisions, implicitly undermined and ultimately overturned the longstanding rule that *nolo* pleas are not *conclusive* against defendants in a subsequent collateral proceeding (although they still possess substantial evidentiary value). In doing so, the court has not only contravened the law of collateral estoppel, but it has threatened the *nolo* plea's continued existence by diminishing its overall purpose and utility.

III. COLLATERAL CIVIL CONSEQUENCES: THE THREATENED EXISTENCE OF THE
*NOLo CONTENDERE* PLeA IN ALASKA

A. The Doctrine of Collateral Estoppel

The doctrine of collateral estoppel (or issue preclusion) bars a party from relitigating an issue that has been "actually litigated and necessarily decided in [a] prior proceeding." For the doctrine to apply, four factors must be met:

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Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

FED. R. EVID. 410 (emphasis added).

45. See Pletnikoff, 765 P.2d at 979 (Matthews, C.J., dissenting). Federal Rule of Evidence 803(22) also implicitly acknowledges the inadmissibility of *nolo* pleas by suggesting that "a conviction based on upon a plea of *nolo contendere* is hearsay." *Id.* at 979-80.

46. Ruby, 650 P.2d at 414.

47. *Id.* The phrase "general law" is used to refer to federal law to the extent that federal law stands for the principle that *nolo* pleas have *no* preclusive effect in a subsequent civil litigation.

48. See *id.* (explaining a plea of *nolo contendere* "does not collaterally estop [a defendant] from protesting his innocence and, consequently, [a defendant] should be given an opportunity, if he requests it, to put on evidence which would support his contention that is not guilty of [the crime with which he is charged]").

49. See generally *id.*

1. the party against whom the preclusion is employed was a party to or in privity with a party to the first action;
2. the issue precluded from relitigation is identical to the issue decided in the first action;
3. the issue was resolved [i.e. "actually litigated"] in the first action by a final judgment on the merits; and
4. the determination of the issue was essential to the final judgment.  

To be "actually litigated," an issue must be "properly raised by the pleadings or otherwise," "submitted for determination," and actually determined.  

However, the doctrine is not without exceptions. For instance, collateral estoppel ordinarily does not apply where a defendant lacks the incentive to litigate in the first suit, or where a defendant is deprived of a full and fair opportunity to litigate in the first suit (i.e. defendant enjoyed procedural opportunities in the second action that were not available in the first). Nor does it apply where a "plaintiff in the subsequent litigation could have joined in the original suit" or "when judgment in the first action is inconsistent with earlier decisions in other cases."  

B. The Preclusive Effect of a Nolo Plea in Subsequent Civil Litigation

In Alaska, collateral estoppel is often applied to bar the relitigation of a criminal conviction in subsequent civil proceedings where such conviction is obtained through a plea. But, while a conviction based on a plea of guilty has always precluded a defendant from relitigating the essential elements of the same offense in a subsequent civil action, the preclusive effect of a nolo contendere plea in Alaska has long been

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51. Ross v. Alaska, 189 F.3d 1107, 1111 (9th Cir. 1999) (citing Wilson, 977 P.2d at 726). When interpreting the elements of collateral estoppel, Alaska courts turn to the RESTATEMENT (SECOND) OF JUDGMENTS for guidance. See id. at 1111 n.5; Jackinsky v. Jackinsky, 894 P.2d 650, 654 (Alaska 1995). See also Adoption of A.F.M., 15 P.3d at 268 n.46 (noting that “[f]actor (3) encompasses the requirement that an issue be ‘actually litigated.’”).

52. See generally RESTATEMENT (SECOND) OF JUDGMENTS §27, cmt. d & cmt. e. For a discussion of the ‘actually litigated’ requirement and its relevance in determining a nolo plea’s preclusive effect, see discussion infra Part III(A) and accompanying notes.

53. Adoption of A.F.M., 15 P.3d at 268; Jackinsky, 894 P.2d at 655.


55. See Hitachi Cable, 547 F. Supp. at 643; see also Ross, 189 F.3d at 1112.

56. Hitachi Cable, 547 F. Supp. at 643.

57. See, e.g., Pletnikoff, 765 P.2d at 978-79 (holding that the prior criminal proceeding against the defendant did not have a collateral estoppel effect on the civil suit because the original conviction was not a final judgment).

58. Pletnikoff, 765 P.2d at 979 n.1 (Matthews, C.J., dissenting) (citing Hitachi Cable, 547 F. Supp. at 641-44). Some states, including California and Wisconsin, have refused to apply collateral
unclear. As discussed below, Alaska courts have historically refrained from deciding whether, as a general proposition, a nolo plea has any collateral estoppel effect in a subsequent civil litigation. Instead, the Alaska Supreme Court has simply disposed of the issue on public policy grounds by holding that collateral estoppel bars civil plaintiffs from using their nolo plea as a sword to benefit from their own wrong. The court specifically declined, however, to address whether collateral estoppel would similarly operate to bar a civil defendant from relitigating the elements of a prior criminal offense reduced to judgment by a nolo plea—even though it implied in a series of past decisions that collateral estoppel would apply to civil defendants and plaintiffs alike. Indeed, it was not until recently, in Lamb v. Anderson, that the Alaska Supreme Court finally provided an affirmative answer to this question and quieted any remaining doubts as to the preclusive effect of a nolo plea in a subsequent civil suit.

1. The “Implied” Rule

One of the traditional, defining characteristics of the nolo plea is that it cannot be used against a defendant in a later civil suit arising from the same criminal episode. Nevertheless, Alaska courts have consistently avoided the question of whether a nolo contendere plea has any preclusive effect in a subsequent civil litigation, at least as it pertains to a civil defendant. While the Alaska Supreme Court has suggested in a series of recent decisions that collateral estoppel may operate to bar both civil plaintiffs and civil defendants from relitigating an issue to which they previously pled nolo contendere, it has generally applied collateral estoppel only in cases where a civil plaintiff seeks to use a prior nolo contendere plea as a ‘sword’ rather than as a estoppel to guilty pleas on the basis that a guilty plea, by nature, is not “actually litigated.” See Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd., 58 Cal.2d 601, 605, 375 P.2d 439, 441 (1962); Mrozek v. Intra Fin. Corp., 281 Wis.2d 448, 468, 699 N.W.2d 54, 63 (2005).

59. See Pletnikoff, 765 P.2d at 976 n.2.
61. Burcina v. City of Ketchikan, 902 P.2d 817, 820-22 (Alaska 1995) (citing ALASKA STAT. § 09.65.210 (2005), which prohibits a civil plaintiff from recovering for her own illegal acts by denying the facts of an offense to which she previously pled nolo contendere); see also Sun, 830 P.2d at 777 n.9; Lord v. Fogcutter Bar, 813 P.2d 660, 662-63 (Alaska 1991).
62. See supra note 60.
66. See Richard B., 71 P.3d at 832 n.86; Lashbrook, 957 P.2d at 330 n.2.
67. See Richard B., 71 P.3d at 832 n.86; Lashbrook, 957 P.2d at 330 n.2.
NOLO CONTENDERE IN ALASKA

As a result, Alaska’s collateral estoppel jurisprudence has historically provided little insight into what effect, if any, a nolo contendere plea would have in a later civil litigation—that is, unless the party who plead nolo contendere is a civil plaintiff. The question of whether a nolo contendere plea has any preclusive effect in a later civil suit first arose in Pletnikoff v. Johnson. In that case, a rape victim sued her attacker (Pletnikoff) and was awarded summary judgment as to liability based on his prior criminal conviction for rape. However, Pletnikoff’s criminal conviction was later overturned on appeal and Pletnikoff pled nolo contendere to rape charges. Pletnikoff appealed the grant of summary judgment to the Alaska Supreme Court. In a 4-1 decision, the court held that Pletnikoff’s overturned criminal conviction had no collateral estoppel effect in a later civil action because it was no longer a final judgment. The court expressly refrained from deciding whether Pletnikoff’s nolo plea had any preclusive effect, noting that such issue was never adequately briefed.

Pletnikoff is most notable, however, for its solo dissent, in which Chief Justice Matthews argued at length that Pletnikoff’s nolo plea should collaterally estop him from contesting his liability in a subsequent civil suit. Justice Matthews’ reasoning was twofold. First, he contended that the federal law exception to collateral estoppel for nolo contendere pleas could not similarly be applied in Alaska because of significant differences between federal and state nolo contendere law. In particular, he stressed that the consequences of a nolo plea should be narrowly construed in Alaska because it is available to all defendants as a matter of right. Second, Matthews reasoned that, because the nolo contendere plea serves no real or useful function, it should be subject to collateral estoppel, if not abolished altogether.

68. See Burcina, 902 P.2d at 820-22; Sun, 830 P.2d at 774-77; Lord, 813 P.2d at 663; Pletnikoff, 765 P.2d at 979-82 (Matthews, C.J., dissenting).
69. See Pletnikoff, 765 P.2d at 981 n.2 (Matthews, C.J., dissenting).
70. 765 P.2d 973.
71. Id. at 974.
72. Id.
73. Id.
74. Id. at 976.
75. Pletnikoff, 765 P.2d at 976 n.2.
76. Id. at 979-82 (Matthews, C.J., dissenting).
77. Id.
78. Id. at 979-80 (pointing out the differences between state and federal court rule-based and decisional law). For a discussion of a these differences, see infra notes 36-46 and corresponding text.
79. Id. at 981 (“Taking as given that in Alaska a defendant may plead nolo as a matter of right, it appears sound to give a narrow construction to the consequences of a nolo plea. The exception to the rule of collateral estoppel which is afforded a defendant who pleads nolo in the federal system may make sense in deserving cases, but there is little to recommend its application to all cases.”).
80. Pletnikoff, 765 P.2d at 981-82 (Matthews, C.J., dissenting) (“So far as logic and
According to Matthews, the only real benefit that flows from the nolo plea is that it is available to all defendants in Alaska as a matter of right.\textsuperscript{81}

Three years later, in \textit{Sun v. State},\textsuperscript{82} the Alaska Supreme Court again revisited the issue of whether a nolo plea had any collateral estoppel effect.\textsuperscript{83} In that case, a convicted felon (Sun) plead nolo contendere to felony assault on an Alaska State Trooper and subsequently filed a personal injury suit against the troopers for using excessive force in order to apprehend him.\textsuperscript{84} On summary judgment, the trial court held that AS 09.17.030\textsuperscript{85} precluded Sun from recovering damages.\textsuperscript{86} The Alaska Supreme Court affirmed,\textsuperscript{87} holding that Sun was "collaterally estopped from denying the fact that he pointed [a] rifle" at a trooper by virtue of his former nolo plea.\textsuperscript{88} In reaching this conclusion, the court relied exclusively on AS 09.17.030, which bars a person who is injured in the course of a felony and who pleads nolo contendere to that felony from later recovering for such injury by contesting the fact that he actually committed such felony.\textsuperscript{89} AS 09.17.030 is the statutory embodiment of the public policy principle that a plaintiff cannot use his nolo plea as a sword (rather than a shield against liability) in order to recover damages caused by his own felonious activity.\textsuperscript{90} Yet, the court once again declined to comment as to the collateral estoppel effect of a nolo plea on civil defendants.\textsuperscript{91}

\begin{footnotesize}
\begin{itemize}
\item 81. \textit{Id.} at 982. Although Matthews cites the practical and face-saving considerations which "allegedly speak for a retention of the [nolo] plea," he quickly dismisses such benefits on the basis that they are an insufficient justification for the plea's existence. \textit{Id.} at 981.
\item 82. 830 P.2d 772 (Alaska 1992).
\item 83. \textit{Sun}, 830 P.2d at 777.
\item 84. \textit{Id.} at 773-74.
\begin{quote}
A person who suffers personal injury or death... may not recover damages for the personal injury or death if the injury or death occurred while the person was engaged in the commission of a felony, the person has been convicted of the felony, including conviction based on guilty plea or a plea of nolo contendere.
\end{quote}
\item 86. \textit{Sun}, 830 P.2d at 774.
\item 87. \textit{Id.} at 778.
\item 88. \textit{Id.} at 777.
\item 89. \textit{Id.; see supra note 85.}
\item 90. \textit{Id.} at 775. \textit{See also Burcina}, 902 P.2d at 820 ("This court has recognized the public policy principle which precludes a person who has been convicted of a crime from imposing liability on others for the consequences of that antisocial conduct."). Other states also follow this general public policy rule. \textit{See id.} at 821 (citing Cole v. Taylor, 301 N.W.2d 766, 768 (Iowa 1981); Glazier v. Lee, 171 Mich. App. 216, 220, 429 N.W.2d 857, 859 (1988)).
\item 91. \textit{Sun}, 830 P.2d at 777 n.9.
\end{itemize}
\end{footnotesize}
It was not until 1995, in the seminal case of *Burcina v. City of Ketchikan*, that the Alaska Supreme Court first announced that “a civil plaintiff is collaterally estopped from relitigating any element of a criminal charge to which he has pled *nolo contendere*.” The court held that a mental patient’s prior plea of *nolo contendere* for arson barred him from relitigating the issue of his mental capacity in a later civil suit against his mental health facility and psychiatrist. Although the court based its holding on the express language of AS 09.17.030, which sets forth the “general policy rule that a person should not be able to rely on an illegal act to maintain a cause of action,” it noted that Alaska’s decisional law and Chief Justice Matthews’ dissent in *Pletnikoff* particularly bolstered its conclusion.

In the years following *Burcina*, a veritable patchwork of cases arose in Alaska which purported to apply *Burcina’s* decisive ruling. The first of these cases, *Howarth v. Alaska Public Defender Agency*, was decided in 1996. In *Howarth*, the Alaska Supreme Court relied on *Burcina* in holding that collateral estoppel barred a client (Howarth) from denying, in a subsequent malpractice suit against his public defender, the essential elements of the offense to which he plead *nolo contendere*. In reaching this conclusion, the court rejected Howarth’s assertion that his crime was not a “serious offense” and that it was therefore improper to apply collateral estoppel for a lack of incentive to litigate. Just two years later, in *Lashbrook v. Lashbrook*, the Alaska Supreme Court again relied on *Burcina* in rendering its
decision. In that case, a former wife sought to permanently modify custody after her ex-husband pled nolo contendere to domestic assault and weapons charges. In a footnote to that decision, the court observed that, on remand, the ex-husband would be estopped from challenging the elements of the crimes to which he previously pled nolo contendere. Although this proposition was mere dicta and thus had no precedential value, it was still ground-breaking because it represented the first time that the Alaska Supreme Court explicitly extended Burcina’s holding to a civil defendant.

Finally, in a pair of decisions issued in 2003, Alaska courts reaffirmed the notion first advanced by the court in Lashbrook—i.e. that a nolo plea, whether entered by a civil defendant or a civil plaintiff, has a collateral estoppel effect in a subsequent civil suit. In Richard B. v. State, Department of Health and Social Services, the Alaska Supreme Court considered whether the state properly terminated the parental rights of a defendant (Richard B.) who plead nolo contendere to charges of domestic violence and substance abuse. In dicta, the court pointed out that, if the defendant had challenged his conviction in a civil suit rather than through an application for post-conviction relief, he “would . . . have been precluded by his conviction from denying the conduct on which [his crime] was based.” Similarly, in Register v. State, a stabbing victim filed a civil suit to recover damages against two defendants who had entered a plea of nolo contendere to second degree assault. On summary judgment, the trial court ruled that the defendants were estopped from denying they had stabbed the victim. The defendants appealed and the Alaska Court of Appeals affirmed. Citing Burcina and its progeny, the Court of Appeals suggested that the traditional rule that a nolo plea cannot be used against a defendant who is later “sued for damages arising from the criminal episode” may “no longer be the law” in

102. Lashbrook, 957 P.2d at 330 n.2.
103. Id. at 327-28.
104. Id. at 330 n.2 (citing Burcina, 902 P.2d at 822).
105. See id.
106. See Richard B. v. State, Dep’t of Health & Soc. Servs., 71 P.3d 811 (Alaska 2003); Register v. State, 71 P.3d 337 (Alaska App. 2003). In these decisions, however, the court cites Lashbrook only in dicta to suggest that all civil litigants, whether plaintiff or defendant, are estopped from contesting the elements of an offense to which they have previously plead nolo contendere.
107. 71 P.3d 811.
109. Id. at 832 (citing Lashbrook, 957 P.2d at 330 n.2; Burcina, 902 P.2d at 822).
110. 71 P.3d 337.
111. Register, 71 P.3d at 338.
112. Id. at 339.
113. Id. at 342.
Alaska. The court instead expressly acknowledged the existence of an implied rule in Alaska—i.e. that collateral estoppel is equally applicable to civil defendants and civil plaintiffs who previously pled nolo contendere.

2. Lamb v. Anderson

On December 22, 2005, the Alaska Supreme Court issued an order in Lamb v. Anderson that resolved, once and for all, any doubts as to the precise collateral civil effects of a nolo contendere plea. In Lamb, a motorcyclist (Lamb) filed a civil suit for personal injury damages after being hit by a drunk driver (Anderson). During the course of litigation, "Lamb moved for partial summary judgment as to liability for punitive damages," arguing that Anderson's plea of nolo contendere to a charge of second degree assault conclusively established his recklessness for punitive damages in the pending civil action. The superior court denied Lamb's motion. Lamb responded, filing a petition for review with the Alaska Supreme Court which sought to invoke collateral estoppel against Anderson based on his previous plea of nolo contendere. The Alaska Supreme Court granted Lamb's petition and certified the following question on appeal: "Is a civil defendant who has entered a no contest plea to a criminal charge collaterally estopped from denying the essential elements of the offense in a resulting civil action?"

In a brief order, the court answered this question in the affirmative, holding that "[a] civil defendant who has pled no contest to a serious criminal offense is collaterally estopped, in [a] civil case, from disputing the essential elements of the offense." The court thus expressly extended the rule of Scott v. Robertson and Howarth v. State to civil defendants. More importantly, however, the court legitimized the 'implied rule' set forth in Burcina and its progeny by explicitly

114. Id. at 339 (citing Lashbrook, 957 P.2d at 330 n.2; Howarth, 925 P.2d 1333; Burcina, 902 P.2d at 822).
115. Id.
116. 126 P.3d 132.
117. Lamb, 126 P.3d at 132.
118. Id.
119. Id.
120. Id. The superior court also denied a subsequent motion for reconsideration filed by Lamb. Id.
121. Lamb, 126 P.3d at 132-33.
122. Id. at 132-33.
123. Id. at 133. The court issued an order in this case, rather than a full opinion (which will follow later), in order to preserve the scheduled trial date of January 9, 2006. Id.
124. Id. The court also held that, for the purposes of this new rule, "all felonies are serious offenses." Lamb, 126 P.3d at 133 (quoting Howarth, 925 P.2d at 1334).
125. Lamb, 126 P.3d at 133 (citing Scott v. Robertson, 583 P.2d 188 (Alaska 1978); Howarth, 925 P.2d 1330.)
applying collateral estoppel to all civil litigants (i.e. plaintiffs and defendants) seeking to dispute the elements of an offense to which they plead nolo contendere.126

IV. A CALL FOR THE PRESERVATION OF NOLO CONTENDERE: THE LEGAL AND PRAGMATIC REASONS FOR LIMITING THE COLLATERAL CIVIL EFFECTS OF THE NOLO CONTENDERE PLEA IN ALASKA

Though ostensibly sound, the Alaska Supreme Court's recent decision to extend collateral estoppel to civil defendants who have entered a plea of nolo contendere suffers from two fatal flaws. First, the court's decision in Lamb is untenable as a matter of law because it has improperly and unfairly applied the doctrine of collateral estoppel to nolo contendere pleas. Second, and most importantly, the court's decision cannot be sustained as a matter of pragmatism or policy because it has stripped the nolo plea of its defining characteristic and eviscerated its practical function and utility. By expanding, rather than limiting, the collateral civil effects of the nolo plea, the Alaska Supreme has effectively diminished the usefulness of the nolo contendere plea and rendered it meaningless. Because both law and policy demand the retention of the nolo plea in Alaska, it is only proper that the Alaska Supreme Court reconsider its decision in Lamb and save the nolo plea from impending extinction.

A. Collateral Estoppel Cannot Fairly be Applied to Nolo Pleas

To the extent that it would work a substantial injustice, it is neither appropriate nor fair to apply collateral estoppel to a conviction based on a plea of nolo contendere.127 Indeed, where the application of collateral estoppel would be particularly unfair to a defendant, "[a] court need not sanction its use."128 "[C]ollateral estoppel is, after all, a flexible doctrine meant to serve the ends of justice not to subvert them."129 However, subverting the ends justice is exactly what the Lamb court accomplished by broadly applying collateral estoppel to nolo pleas. As discussed below, it is patently unfair to apply collateral estoppel to nolo pleas because: (1) a nolo plea cannot, by definition, be considered "actually litigated," and (2) civil defendants who plead nolo contendere may have lacked the incentive to fully and vigorously litigate in a criminal proceeding.

126. See id. at 133 n.4 (citing Pletnikoff, 765 P.2d at 977 (Matthews, C.J., dissenting); Burcina, 902 P.2d at 822; Lashbrook, 957 P.2d at 330 n.2; Richard B., 71 P.3d at 832).
127. See Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation, 402 U.S. 313, 333 (1971) (noting that "fairness" is a major consideration in determination the applicability of collateral estoppel and that a party must have a fair opportunity and a sufficient incentive to litigate in the first action); Hossler v. Barry, 403 A.2d 762, 769 (Me. 1979); Michelle T. v. Crozier, 495 N.W.2d 327, 329-30 (Wis. 1993) ("Attempts to invoke collateral estoppel... have historically been conditioned by requirements designed to protect against unfairly disadvantaging parties.").
128. Hossler, 403 A.2d at 769 (citing Bahlerv. Fletcher, 474 P.2d 329 (Or. 1970)).
129. Id.
A Nolo Plea, by Definition, is not “Actually Litigated”

The application of collateral estoppel to a plea of nolo contendere is inappropriate because a nolo plea, by definition, “obviates actual adjudication”—an essential element of collateral estoppel. One of the requirements of collateral estoppel is that an issue must have been actually litigated in a prior action. According to the Restatement (Second) of Judgments, an issue is “actually litigated” only after it “is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined.” However, where an issue might have been but was not actually litigated and determined in a prior action, a judgment is not conclusive in a subsequent action. Thus, it is well-settled that an issue is not “actually litigated” for the purposes of collateral estoppel where: (1) an issue is raised by one party and admitted by the other before evidence on the issue is adduced at trial; (2) an issue is subject to stipulation, or (3) judgment is entered by confession, consent, or default.

Likewise, in a criminal context, a plea of nolo contendere is also not considered to have been “actually litigated”—at least not in terms of collateral estoppel jurisprudence. The logic underlying this rule is simple. The essence of a plea of

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131. See Jackinsky v. Jackinsky, 894 P.2d 650, 655 (Alaska 1995) (adopting RESTATEMENT (SECOND) OF JUDGMENTS §27 (1982)). RESTATEMENT § 27 provides: “When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”


133. RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. e (1982).

134. Id. See also Jackinsky, 894 P.2d at 655; Nelson v. Jones, 787 P.2d 1031, 1036 n.4 (Alaska 1990). There is, however, a narrow exception to this rule: with respect to one or more issues, a judgment derived from confession, consent, stipulation or default is considered conclusive where the parties entered into “an agreement manifesting such an intention.”

135. See RESTATEMENT (SECOND) OF JUDGMENTS § 85, cmt. b (1982) (finding that collateral estoppel “does not apply where [a] criminal judgment was based on a plea of nolo contendere” because “[a] plea of nolo contendere by definition obviates actual adjudication and...[thus] is not an admission.”). The RESTATEMENT (SECOND) OF JUDGMENTS § 85 position, i.e. that a plea of nolo contendere obviates actual adjudication and thus cannot be held to be preclusive, has been adopted by many courts. See, e.g., Slayton v. Willingham, 726 F.2d 631, 634 (10th Cir. 1984); Rawling v. New Haven, 587 A.2d 439, 445 (Conn. 1988); Hoppes v. Utica Mut. Ins. Co., 506 A.2d 294, 297 (N.H. 1985) (“a plea of nolo contendere in an earlier criminal prosecution will raise no estoppel, since that plea neither controverts nor confesses the facts upon which the conviction must rest”); Crowell v. Heritage Mut. Ins. Co., 346 N.W.2d 327, 329 n.2 (Wis. Ct. App. 1984) (“A plea of... nolo contendere in [a] criminal suit does not draw any issues into controversy and does not support the use of collateral estoppel.”).
nolo contendere is in its name: "I will not contest it."\(^{136}\) With this in mind, it therefore follows that, "[i]f the charges are uncontested, they are necessarily unlitigated"\(^{137}\) and that, absent actual litigation, a nolo plea has no preclusive effect.\(^{138}\)

A nolo contendere plea, therefore, is not unlike a stipulation or a judgment entered by confession, consent or default.\(^{139}\) Like a nolo plea, stipulations and judgments based on confession, consent, or default are not the product of actual litigation and thus are not conclusive in a subsequent action.\(^{140}\) In Nelson v. Jones,\(^{141}\) the Alaska Supreme Court addressed the preclusive effect of a stipulation.\(^{142}\) In that case, the court held that collateral estoppel barred relitigation of the issue of sexual abuse.\(^{143}\) It reasoned that, while a "stipulation was not binding on the trial court," it did "constitute[] evidence on the issue of abuse" which, taken together with the evidence adduced at trial, was virtually insurmountable proof of abuse.\(^{144}\) In doing so, the court relied on the Restatement (Second) of Judgments § 85 for guidance, adopting the general rule that an issue reduced to judgment by concession or stipulation "is not conclusively determined for purposes of collateral estoppel" and is not binding in a subsequent action unless there is a clear manifestation of intent to the contrary.\(^{145}\)

Although Nelson dealt only with the preclusive effect of a stipulation,\(^{146}\) the Court's reasoning in Nelson is equally instructive here. A nolo plea is, for all practical purposes, the criminal equivalent of a stipulation and even a judgment by consent.\(^{147}\)


\(^{138}\) See Jackinsky, 894 P.2d at 655.

\(^{139}\) Compare Jackinsky, 894 P.2d at 655, with RESTATEMENT (SECOND) OF JUDGMENTS § 85, cmt. b.

\(^{140}\) See RESTATEMENT (SECOND) JUDGMENTS § 85, cmt. b; Lipsky v. Commonwealth United Corp., 551 F.2d 887, 893-94 (2d Cir. 1976) (noting that consent decrees, like nolo contendere pleas, may not be used in subsequent proceedings for collateral estoppel purposes, since the issues sought to be precluded were not actually litigated).

\(^{141}\) 787 P.2d 1031 (Alaska 1990).

\(^{142}\) Nelson, 787 P.2d at 1035.

\(^{143}\) Id. at 1035-36.

\(^{144}\) Id. at 1035 (emphasis added).


\(^{146}\) Nelson, 787 P.2d at 1035.

\(^{147}\) See, e.g., United States v. Safeway Stores, Inc., 20 F.R.D. 451, 457 (N.D. Tex. 1957) (referring to nolo pleas, in the context of the Clayton Act, as the equivalent of "consent judgments and decrees"); United States v. Jones, 119 F. Supp. 288, 290 (S.D. Cal. 1954) (commenting that "the statement 'nolo contendere' becomes in effect a consent that the Court may proceed to accept the
“Throughout its history, ... the plea of no\lo contende\re has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for lenience[e].”148 The no\lo plea thus represents a compromise,149 wherein the defendant throws himself on the grace of the court in exchange for leniency.150 Similarly, a stipulation is a voluntary agreement between opposing parties in a proceeding; a compromise to the extent that each party surrenders something in concession to the other.151 Furthermore, like no\lo pleas, stipulations are often “designed to simplify, shorten or settle litigation, or save costs.”152 The unmistakable parallels between the no\lo plea and a stipulation make it clear that the rule adopted in Nelson should apply equally to no\lo pleas.153 To the extent that judgments based on no\lo pleas are inconclusive compromises, they fall...
outside the purview of the doctrine of collateral estoppel. As such, collateral estoppel cannot properly be used to bar defendants from contesting their nolo pleas in subsequent civil proceedings.

2. Defendants Who Plead Nolo Contendere May Lack the Incentive to Fully Litigate in a Criminal Context

Another situation in which unfairness often arises is where a defendant lacks the incentive to fully and vigorously litigate in the first action. In such a situation, the application of collateral estoppel is ordinarily not justified. However, this argument assumes that a defendant is motivated solely by the prospect of imprisonment in deciding whether to contest a criminal charge or accept a plea. This is not necessarily so.

Though important, imprisonment is not the only factor that must be considered to determine if a person had sufficient incentive to litigate in a criminal case. Indeed, there are many reasons why a person may want to plead nolo contendere rather than contest a charge or plead guilty. Even the Alaska Supreme Court has noted that “a person may not wish to contest [a] charge for a variety of reasons and, though innocent, may wish to plead nolo contendere instead.” Such reasons may include: (1) saving expense and avoiding notoriety; (2) avoiding unpleasant publicity;
(3) avoiding a hostile jury; or (4) refusing to contest the charge due to a hopeless lack of witnesses.\textsuperscript{164}

For instance, it is not inconceivable that a person may choose to plead \textit{nolo contendere} in order to preserve personal dignity or "save face," even when charged with a serious offense.\textsuperscript{165} A plea of \textit{nolo contendere} is attractive to many defendants and is a powerful face-saving device primarily because it is a refusal to admit (or contest) guilt.\textsuperscript{166} A \textit{nolo} plea permits a defendant to "maintain his innocence both publicly and privately while consenting to an adjudication of guilt" and thus avoid the humiliation associated with a public confession or a protracted and often public trial.\textsuperscript{167} This face-saving benefit is of particular importance for those defendants who rely heavily on their reputations\textsuperscript{168}—such as public figures\textsuperscript{169} and corporations.\textsuperscript{170}

\begin{footnotesize}
\begin{enumerate}
\item Pletnikoff, 765 P.2d at 982 (Matthews, C.J., dissenting).
\item See Gurevich, supra note 166, at ¶14. Perhaps the most well-known individual to have used the \textit{nolo} plea as a face-saving device is former Vice President Spiro Agnew. \textit{Id}. After entering a plea of \textit{nolo contendere} to federal tax evasion charges, Agnew published a book recounting his "version of events that led up to the scandal and his resignation from office." \textit{Id}; see generally United States v. Agnew, 428 F. Supp. 1293-1294 (D. Md. 1977); Agnew v. State, 446 A.2d 425, 428 (Md. App. 1982). According to one commentator, Agnew's "ability to plead \textit{nolo contendere} may well have added some credibilidad to his account" even though Agnew's reputation was largely damaged by the criminal proceedings. Gurevich, supra note 166, at ¶14. See also Walt Star, \textit{Tom Delay Will Plea 'Nolo Contendere'}, DAILY KOS, Sept. 29, 2005, http://dailyskos.com/storyonly/2005/9/29/11568/3496 (suggesting that Tom Delay will plead \textit{nolo contendere}, just as Spiro Agnew did, in order to avoid "political prosecution").
\item See Gurevich, supra note 166, at ¶15; Wright, supra note 3, at § 177 (noting the \textit{nolo} plea's popularity in antitrust cases as a tool to avoid adverse publicity). See also Edward Iwata, \textit{High-Profile Corporate Defendants Turn to Keker USA TODAY}, Feb. 3, 2004, http://www.usatoday.com/_money/industries/energy/2004-02-03-keker_x.htm (remarking that, in anti-trust cases, high-profile corporate clients are often persuaded to plead \textit{nolo contendere} in order to save them from "potentially harsher penalties and a heap of bad publicity"). According to Gurevich, the \textit{nolo} plea is often an attractive option for corporations facing criminal charges: [C]orporations may find the use of the \textit{nolo} plea for face-saving attractive. First, it lets
\end{enumerate}
\end{footnotesize}
Then again, a criminal defendant may just “find it preferable to accept a light punishment offered by the prosecution in exchange for a nolo contendere plea, rather than face far worse consequences both in terms of criminal punishment and civil liability.” It is not uncommon for a criminal defendant, even if innocent, to plead nolo contendere—particularly if “the overwhelming strength of the state’s case” makes it futile to go to trial or if the defendant has no basis for pleading guilty because she simply cannot remember committing any crime. Still other defendants may use a nolo plea as a “psychological crutch.” Whatever the case, there are a litany of reasons why a criminal defendant may accept a nolo plea and it should not be casually assumed that a defendant has sufficient incentive to litigate merely because she is charged with a serious offense. Even innocent defendants may have a broad range of motivations for entering a plea of nolo contendere rather than contesting a charge. Thus, because it is entirely conceivable that a criminal defendant who pleads nolo contendere may lack sufficient incentive to litigate in a criminal case, it was improper for the Alaska Supreme Court to extend the application of collateral estoppel to civil defendants.

the corporate defendant avoid a trial, with its concomitant expense and negative public relations. It removes the threat that incriminating evidence, damaging to the public image of the corporation, could surface during discovery. More importantly, because the defendant does not have to admit guilt, nothing prevents it from publicly claiming that a violation was technical and that it took the sentence voluntarily simply to avoid the difficulties of litigation.

Gurevich, supra note 166, at ¶15 (citations omitted).


172. Shipley, supra note 171, at 1063. “Defendants may not remember committing crimes because of psychological blocks, mental instability, or because they were injured, intoxicated, or under the influence of drugs at the time.” Id. at 1063 n.4.

173. Stephanos Bibas, Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas, 88 CORNELL L. REV. 1361, 1374 (2003). Some defendants may “refuse to admit guilt because of psychological obstacles, egos, and shame”—even if doing so is against their best interests. Id.


175. See id.; Patrick W. Healy, Note, The Nature and Consequences of the Plea of Nolo Contendere, 33 NEB. L. REV. 428, 434 (1954) (“[I]t is not at all inconceivable that to some offenses a defendant, even though innocent, might desire to plead nolo contendere rather than undergo the burdens and expenses of trial...”).

B. Granting the Nolo Plea Preclusive Effect in Subsequent Civil Proceedings Would Render it Meaningless

Collateral estoppel cannot properly be used to bar a civil defendant from contesting the elements of a prior offense reduced to judgment by a plea of nolo contendere because to do so would, for all intents and purposes, render the plea of nolo contendere meaningless. 178 According a conviction based on a nolo plea preclusive effect in a subsequent civil proceeding would erode the plea’s usefulness by (1) effectively abolishing the rule that a nolo plea may not be used as an admission of guilt in a subsequent civil proceeding, and (2) eviscerating the practical and functional utility of the nolo plea. 179

1. The Defining Feature of the Nolo Plea Would be Abandoned

Though a defendant in Alaska may plead nolo contendere as a matter of right, 180 the defining characteristic of a nolo contendere plea has always been that it permits a defendant to avoid potential future repercussions caused by an admission of guilt—particularly in future civil litigation. 181 Historically, the essence of a nolo contendere plea lied in the fact that it could not be used as an admission of guilt in subsequent collateral proceedings. 182 The plea was not an express admission of guilt, but rather was viewed as “a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency.” 183 It was “a mere statement of unwillingness to

178. See supra note 33.
179. See Univ. of West Virginia Bd. of Tr. v. Fox, 197 W. Va. 91, 96, 475 S.E.2d 91, 96 (1996) (concluding that permitting a conviction based on a nolo plea to be used in a subsequent collateral proceeding “would effectively abolish the rule that a no contest plea may not be used as an admission of guilt and would effectively destroy the utility of the plea”).
182. See generally North Carolina v. Alford, 400 U.S. 25, 35 n.8 (1970) (under English common law, the distinction between a nolo plea and a jury verdict of guilty was that “in the former the defendant could introduce evidence of innocence in mitigation of punishment, whereas in the latter such evidence was precluded by the finding of actual guilt”); Fed. R. Crim. P. 11 advisory committee’s note (asserting that the nolo plea’s desirability derives from the fact that no inquiry is made into the defendant’s guilt).
contest and no more."\textsuperscript{184} In fact, the only time that a plea of \textit{nolo contendere} had the same effect as a guilty plea was in the criminal case it which it was entered.\textsuperscript{185}

Thus, by finding that a \textit{nolo} plea \textit{per se} establishes liability in a subsequent civil proceeding, the Alaska Supreme Court effectively abolished the rule that a plea of \textit{nolo contendere} was not an admission of guilt beyond the criminal case and thereby rendered the traditional, defining characteristic of a plea of \textit{nolo contendere} (i.e. avoiding the admission of guilt inherent in pleas of guilty) meaningless.\textsuperscript{186} It accomplished this by making the plea tantamount to a guilty plea in all proceedings and eliminating the one feature that traditionally distinguished a \textit{nolo} plea.\textsuperscript{187} Instead of preserving the \textit{nolo} plea, the \textit{Lamb} court single-handedly gutted the plea of its fundamental purpose and desirability.\textsuperscript{188}

While some critics may claim that the Alaska Supreme Court was justified in applying collateral estoppel to civil defendants in order to prevent an unfair windfall to the guilty,\textsuperscript{189} such a claim is without merit.\textsuperscript{190} A criminal defendant who enters a plea of \textit{nolo contendere} does not get a "free pass" in subsequent civil proceedings; rather, her \textit{nolo} plea is substantial probative evidence of guilt.\textsuperscript{191} This is particularly important for two reasons. First, the evidentiary value of a \textit{nolo contendere} plea makes it such that, even if a civil defendant's \textit{nolo contendere} plea was afforded no preclusive effect, the plaintiff's ability to recover damages would not be hindered.\textsuperscript{192} Rather, the only injury that would befall the plaintiff is that she would be required (like other normal litigants) to demonstrate the facts underlying the civil defendant's \textit{nolo} plea.\textsuperscript{193} Also, a plaintiff would not be prevented from using the \textit{nolo contendere} plea at trial as evidence against the civil defendant.\textsuperscript{194} The force of this evidence,

\begin{itemize}
\item \textsuperscript{184} Scott v. State, 928 P.2d 1234, 1237 (Alaska Ct. App. 1996).
\item \textsuperscript{185} Id. (noting that a \textit{nolo} plea is "tantamount to an admission of guilt for the purpose of the [criminal] case."). See Tseung Chu v. Cornell, 247 F.2d, 929, 938 (9th Cir. 1957) ("While all jurisdiction do not agree, it is the majority rule that a plea of \textit{nolo contendere} is an implied admission of guilt, and has the same effect as a plea of guilty, so far as the proceedings on an indictment are concerned.").
\item \textsuperscript{186} See Univ. of West Virginia Bd. of Tr. v. Fox, 197 W. Va. 91, 96, 475 S.E.2d 91, 96 (1996); Fed. R. Evid. 410 advisory committee's note.
\item \textsuperscript{187} Lamb v. Anderson, 126 P.3d 132, 133 (Alaska 2005).
\item \textsuperscript{188} Id.
\item \textsuperscript{189} See, e.g., Gurevich, supra note 166, at ¶36-40.
\item \textsuperscript{190} See Burcina v. City of Ketchikan, 902 P.2d 817, 882 n.11 (Alaska 1995).
\item \textsuperscript{191} A \textit{nolo contendere} plea is admissible in subsequent civil proceedings and should be considered with other evidence adduced at trial. See id. (quoting Pletnikoff v. Johnson, 765 P.2d 973, 979-80 (Alaska 1988) (Matthews, C.J., dissenting) (noting that neither Alaska Rule of Evidence 410 nor Alaska Criminal Rule 11(e)(6) explicitly make a plea of \textit{nolo contendere} inadmissible); see generally Scott v. Robertson, 583 P.2d 188, 193 (Alaska 1978).
\item \textsuperscript{192} See generally Robertson, 583 P.2d at 193.
\item \textsuperscript{193} See generally id.
\item \textsuperscript{194} See Burcina, 902 P.2d at 822 n.11.
\end{itemize}
taken in combination with other evidence adduced at trial, would likely be difficult to
counter.\textsuperscript{195} It is thus difficult to comprehend how any plaintiff would be prejudiced if
the court had refused to apply collateral estoppel to civil defendants.\textsuperscript{196}

Second, and most importantly, confining the \textit{nolo contendere} plea to an
evidentiary arena strikes an important balance between a defendant’s right to have his
day in court and a plaintiff’s right to recover damages.\textsuperscript{197} By treating a \textit{nolo contendere}
plea as probative rather than conclusive, the court can preserve a plaintiff’s right to recover damages \textit{without} depriving a civil defendant of the
opportunity “to contest the truth of the matters admitted by plea,... present all the facts
surrounding the nature of the charge and the plea, and... \textit{explain why the plea was entered}.”\textsuperscript{198} As a matter of fairness, a civil defendant should not be precluded from
defending against potential future liability by opposing a plaintiff’s claims.\textsuperscript{199} As
previously noted, collateral estoppel is meant to “serve the ends of justice” rather than
“subvert them.”\textsuperscript{200} In the end, the only benefit that a defendant would derive from the
non-application of collateral estoppel is to be afforded the opportunity to defend
himself against civil liability and have his day in court.\textsuperscript{201} Thus, to preserve the
identity and purpose of the \textit{nolo cotendere} plea, it is imperative that the Alaska
Supreme Court reevaluate its extension of the doctrine of collateral estoppel to civil
defendants based on their previous \textit{nolo contendere} pleas.\textsuperscript{202}

2. The \textit{Nolo} Plea’s Practical Function and Utility Would be Eviscerated

By precluding a civil defendant from contesting the elements of a crime to which
she previously pled \textit{nolo contendere}, the Alaska Supreme Court has, in effect,
eviscerated the plea’s practical function and utility.\textsuperscript{203} Though some may argue that
the plea is of no value and should be discarded altogether,\textsuperscript{204} practical considerations
demand retention of the \textit{nolo contendere} plea in Alaska.\textsuperscript{205} Paramount among these

\begin{itemize}
\item \textsuperscript{195} See \textit{generally id.}
\item \textsuperscript{196} See \textit{generally id.}
\item \textsuperscript{197} See \textit{County of Los Angeles v. Civil Serv. Comm’n of the County of Los Angeles}, 46 Cal. Rptr.2d 256, 263 (Cal. Ct. App. 1996).
\item \textsuperscript{198} \textit{County of Los Angeles}, 46 Cal. Rptr.2d at 263 n.8 (emphasis added).
\item \textsuperscript{199} See \textit{generally id.}
\item \textsuperscript{200} Hossler v. Barry, 403 A.2d 762, 769 (Me. 1979).
\item \textsuperscript{201} See \textit{id.}
\item \textsuperscript{202} See \textit{Lamb v. Anderson}, 126 P.3d 132, 133 (Alaska 2005).
\item \textsuperscript{203} Id.
\item \textsuperscript{204} See, e.g., \textit{Pletnikoff v. Johnson}, 765 P.2d 973, 981 n.3 (Alaska 1988) (Matthews, C.J., dissenting) (“So far as logic and clearness is concerned, the complete abolition of the plea could not be considered as a great loss to our legal system.”).
\item \textsuperscript{205} See \textit{Pletnikoff}, 765 P.2d at 981 n.3 (Matthews, C.J., dissenting) (“There are... practical considerations which allegedly speak for a retention of the \textit{[nolo]} plea.”); \textit{Lenvin & Meyers, supra} note 5, at 1268 (“The plea of \textit{nolo} serves a practical function in the administration of justice.”).
\end{itemize}
considerations is the fact that the *nolo* plea facilitates the expeditious administration of criminal justice.\textsuperscript{206} The inherent utility of the plea lies in the fact that it encourages plea bargaining and "dispenses with lengthy and expensive trials."\textsuperscript{207}

Specifically, the *nolo* plea "speed[es] up the legal process by clearing the court dockets of a large number of cases without costly and time-consuming trials."\textsuperscript{208} By "removing the threat of collateral civil consequences," the *nolo* plea "encourages criminal defendants to capitulate and accept punishment" and thus conserves judicial and systemic resources.\textsuperscript{209} Indeed, without *nolo contendere* pleas, a large portion of charges normally disposed of by compromise would go to trial and "[e]ffective criminal law administration in many localities would hardly be possible."\textsuperscript{210}

In America, "[p]lea bargaining has come to dominate the administration of justice."\textsuperscript{211} Since the 1960's, plea bargaining has disposed of criminal cases in America at a rate of approximately 90%.\textsuperscript{212} During a typical workday, a criminal case is disposed of every two seconds in an American courtroom by way of a guilty or *nolo contendere* plea.\textsuperscript{213} It is therefore not surprising that, in *Santobello v. New York*, the United States Supreme Court identified plea bargaining as "an essential component of the administration of justice" that should be encouraged.\textsuperscript{214} According

\textsuperscript{206} See *Pletnikoff*, 765 P.2d at 981 n.3 (Matthews, C.J., dissenting); Edward Lane-Reticker, *Nolo Contendere in North Carolina*, 34 N.C. L. REV. 280, 291 (1956) ([T]he plea of *nolo contendere* saves time and has some tendency to expedite judicial business.").

\textsuperscript{207} *Pletnikoff*, 765 P.2d at 981 n.3 (Matthews, C.J., dissenting); Lichon v. Am. Universal Ins. Co., 435 Mich. 408, 420, 459 N.W.2d 288, 294 (1990) (a *nolo* plea "facilitate[s] plea bargaining and the concomitant speedy resolution of cases" by insulating a criminal defendant from future civil liability); Lenvin & Meyers, *supra* note 5, at 1268 (commenting that the *nolo* plea "dispenses with lengthy and expensive trials").


\textsuperscript{209} Gurevich, *supra* note 166, at ¶2 (citing Lane-Reticker, *supra* note 206, at 291); Healey, *supra* note 175, at 433.

\textsuperscript{210} See FED. R. EVID. 410 advisory committee's note.

\textsuperscript{211} Lynch, *supra* note 149, at 24.


\textsuperscript{214} See *Santobello v. New York*, 404 U.S. 257, 260 (1971). The Supreme Court cited many reasons in support of its contention that plea bargaining is an essential and highly desirable part of the criminal justice process:

[Plea bargaining] leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for
to the Court, the criminal justice system would be overwhelmed without plea bargaining and would be entirely incapable of dealing with the tremendous caseload currently resolved by pleas.\textsuperscript{215} Although critics of the \textit{nolo} plea argue that "[c]riminal law should not be simply about locking up offenders cheaply" and quickly,\textsuperscript{216} both policy and pragmatism counsel otherwise.\textsuperscript{217} Even though the \textit{nolo contendere} plea has "at times [been] criticized as theoretically lacking in logical basis, experience has shown that [it] performs a useful function from a practical standpoint."\textsuperscript{218}

Plea bargaining plays an important role in the efficient administration of justice at both the state and federal level\textsuperscript{219} and the \textit{nolo contendere} plea, in particular, "substantially saves the Government a tremendous expense—[\textit{i.e.}] a tremendous expenditure in proceeding to trial."\textsuperscript{220} In light of this fact, one would assume that Alaska courts would be wary to adopt a policy that would discourage plea bargaining and invite defendants to take their chances at trial.\textsuperscript{221} This, however, is precisely what the court has done.\textsuperscript{222} By broadening the collateral civil consequences of a \textit{nolo} plea, the Alaska Supreme Court has effectively undermined the desirability of the \textit{nolo} plea and the probability that a criminal defendant will resort to such a plea rather than submit to a full-blown trial.\textsuperscript{223} Because pragmatism demands that collateral estoppel \textit{not} be applied to \textit{nolo contendere} pleas,\textsuperscript{224} the court's decision is fatally flawed and cannot be sustained.\textsuperscript{225}

\textit{Id.} at 261.

\textsuperscript{215} \textit{Id.} at 260 (mentioning that, "if every criminal charge were subjected to a full-scale trial," the number of judges and court facilities would need to be multiplied many times over). \textit{See also} Lynch, \textit{supra} note 149, at 24 ("Plea bargaining unquestionably alleviates the workload of judges, prosecutors, and defense lawyers.").


\textsuperscript{217} For instance, consider Alaska's failed attempt at passing a plea bargaining ban. \textit{See generally} Teresa W. Carns & John A. Kruse, \textit{Alaska's Ban on Plea Bargaining Reevaluated,} \textit{75} \textit{Judicature} \textit{310, 310} (1992) ("Although Alaska banned plea bargaining in 1975, a recent study shows that limited forms of the practice have returned to most areas of the state."); \textit{id.} at 317 ("[T]he persistence of plea bargaining . . . may be grounded in the needs of defendants and attorneys for certainty, consensus, and a sense of control over the outcome of each individual case.").


\textsuperscript{219} \textit{See Santobello,} 404 U.S. at 264.

\textsuperscript{220} \textit{Safeway Stores,} 20 \textit{F.R.D.} at 459.

\textsuperscript{221} \textit{See Lamb v. Anderson,} 126 P.3d 132, 133 (Alaska 2005).

\textsuperscript{222} \textit{See id.}

\textsuperscript{223} \textit{See id.}

\textsuperscript{224} \textit{See H. Richard Uviller, Pleading Guilty: A Critique of Four Models,} \textit{41} \textit{Law \&
The policies underlying the recognition of the \textit{nolo contendere} plea provide persuasive reasons as to why collateral estoppel should not be applied to the \textit{nolo} plea and preclude a party from denying culpability in later civil litigation.\textsuperscript{226} Indeed, "[c]onsiderations of fairness . . . and a regard for the expeditious administration of criminal justice" require that a civil defendant who has pled \textit{nolo contendere} to a criminal charge and who is seeking to defend herself in a civil action for the first time not be subject to collateral estoppel.\textsuperscript{227} Although these vital pragmatic and legal principles counsel in favor of the preservation of the \textit{nolo contendere} plea in Alaska, the Alaska Supreme Court has disregarded them and extended collateral estoppel to apply to all civil litigants.\textsuperscript{228} The practical effect of this decision is that it has reduced the plea of \textit{nolo contendere} to an endangered species in Alaska.\textsuperscript{229} Indeed, the future of the \textit{nolo} plea is uncertain and only time will tell whether Alaska's \textit{nolo} plea will endure or whether \textit{Lamb} has sounded the death knell for the \textit{nolo} plea.

\textsuperscript{225} \textit{Contemp. Probs.} 102, 105 (1977) (arguing that a plea disposition rate of 90\% or more is required as a matter of economic necessity); \textit{Bibas Calls for End to Nolo Contendere, Alford Pleas}, Sept. 26, 2003, http://www.uiowa.edu/_~oumews/2003/_september/092603bibas-pleas.html (acknowledging the value of the \textit{nolo} plea from a "pragmatic standpoint").

\textsuperscript{226} \textit{See Lamb}, 126 P.3d at 133.


\textsuperscript{228} \textit{Teitelbaum Furs, Inc. v. Dominion Ins. Co.}, 25 Cal. Rptr. 559, 561, 375 P.2d 439, 441 (1962) (citation omitted).

\textsuperscript{229} \textit{Lamb}, 126 P.3d at 133.