NOLO CONTENDERE—ITS USE AND EFFECT

In 1963, the California legislature enacted a statute permitting defendants in criminal actions to enter a plea of *nolo contendere* with the consent of the court and the prosecutor.[1] Although new to California criminal procedure, the plea of *nolo contendere* has a common law history dating back to the reign of Henry IV.[2] Prior to California's adoption of this plea, federal and state courts had recognized the plea as a legacy of the common law or, in rare instances, state legislatures had codified it.[3] The California statute, like its common law counterpart, treats the plea as one of guilty for purposes of the trial.[4] On the other hand, the *nolo* plea, unlike a plea of guilty, never constitutes an admission against interest in any civil suit growing out of the criminal prosecution.[5] If for example a defendant is convicted of battery upon a plea of guilty, the victim of the assault may use the defendant's plea as a conclusive admission of guilt in a civil suit for damages.[6] Use of a *nolo* plea would prevent such a result. It has been argued that even if a *nolo* plea is not recognized, a plea of not guilty can also prevent an admission. The defendant may enter his plea, refrain from contesting the prosecution's case, and proceed to a verdict of guilty without having made any damaging admissions.[7] The doctrine of collateral estoppel, however, might still prevent the de-

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[1] CAL. PEN. CODE § 1016(3): "There are six kinds of pleas to an indictment or information, or to a complain charging an offense triable in any inferior court:

. . . .

(3) Nolo contendere, subject to the consent of the district attorney and with the approval of the court. The legal effect of such a plea shall be the same as a plea of guilty, but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based."
The term *nolo contendere* is also known as "*nolle contendere*" and "*non vult*." See Annot., 152 A.L.R. 253, 254 & n.3 (1944).

[2] Hen. IV (1399–1413); the plea in its original common law form is described in 2 HAWKINS, PLEAS OF THE CROWN 466 (8th ed. 1824): "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 submission, and . . . without putting him to a direct confession . . . the defendant shall not be estopped to plead not guilty to an action for the same fact . . . ." See 1 CHITTY, CRIMINAL LAW 430 (1826 ed.), another early version of the common law plea.

[3] See, *e.g.*, in federal courts: Hudson v. United States, 272 U.S. 451 (1926); in state courts: State v. La Rose, 71 N.H. 435, 52 Atl. 943 (1902); *contra*, State v. Kiewel, 166 Minn. 302, 207 N.W. 646, 647 (1926); by statute: NEB. REV. STAT. ANN. 29-1819.01 (1956). FED. R. CRIM. P. 11, recognizing the federal adoption of *nolo contendere*, provides the procedure for its use. The California statute mirrors the common law plea used in other jurisdictions: (a) the plea is subject to the court's unfettered consent, (b) within the case itself it has the same effect as a plea of guilty, and (c) it may not be used as an admission in any civil suit based upon the criminal prosecution. See Tseung Chu v. Cornell, 247 F.2d 929, 937 (9th Cir.), *cert. denied*, 355 U.S. 892 (1957); State v. Burnett, 174 N.C. 796, 93 S.E. 473 (1917). In *Burnett* the court stated that the plea's only advantage was preventing estoppel in a civil action.

[4] See, *e.g.*, United States v. Norris, 281 U.S. 619 (1930); United States v. Cosentino, 191 F.2d 574 (7th Cir. 1951); State v. Herlihy, 102 Me. 310, 66 Atl. 643 (1906).

[5] See 4 WIGMORE, EVIDENCE § 1066 n.4 (3d ed. 1940), listing jurisdictions recognizing this proposition.

[6] See Engstrom v. Nelson, 41 N.D. 530, 171 N.W. 90 (1919); *cf.* Russ v. Good, 90 Vt. 236, 97 Atl. 987 (1916).

[7] It is argued by Lane-Reticker, *Nolo Contendere in North Carolina*, 34 N.C.L. REV. 280, 290–91 (1956), that for this very reason a plea of *nolo* is an unnecessary compliment to the law. He does concede, however, that the plea of *nolo* saves time and tends to expedite judicial business since otherwise the prosecutor must put into evidence a case against the de-

fendant from offering proof of his innocence in a subsequent civil suit even though his conviction followed a plea of not guilty. In a recent California Supreme Court decision,[8] the court applied this doctrine against a plaintiff who had been convicted of grand theft but who later sought to enforce an insurance claim in compensation for the stolen articles. Although the litigant had pleaded not guilty to the criminal charge, the court held that he was estopped to raise the issue of his innocence in the subsequent civil action. A finding of guilty had settled the issue. Thus it is possible that a party to a civil action might be precluded from denying his guilt once a judgment of conviction had been entered in any earlier criminal prosecution: either the plea of guilty will constitute an admission against interest or a finding of guilty will result in a collateral estoppel.[9]

It was apparently for this reason that the California legislature added the plea of *nolo contendere*. It is reported that at the legislative hearings on California Penal Code Section 1016(3), a general dissatisfaction was voiced against using criminal cases as a basis for civil actions.[10] By providing defendants with a *nolo* plea, the legislators hoped to curb the overlapping of criminal and civil cases. The plea enables the defendant both to save the time and expense of trial and guard himself against admisssions that could be used in a subsequent civil suit.

Historically, the problems most often raised in connection with the plea concern the proper use of the plea in the criminal proceeding and the effect of the plea on the defendant in a related civil suit. Since section 1016(3) is substantially a statement of the common law plea,[11] the treatment *nolo* has received in other jurisdictions is relevant to its interpretation and application. Generally, the problems raised by the use of the plea within the criminal case have been answered with some degree of uniformity. There is, however, violent disagreement over the collateral effect of the *nolo* plea. For example, if an automobile driver is convicted

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fendant. Courts have also recognized *nolo contendere* as a method by which the government can save the expense of prosecuting a case and save the defendant the cost and annoyance of defending it. See Caminetti v. Imperial Mut. Life Ins. Co., 59 Cal. App. 2d 476, 492, 139 P.2d 681, 689 (1943).

In actual practice, California judges often advise defendants in traffic cases that a plea of guilty can result in an admission in a later civil suit. Therefore the judge permits the defendant to plead not guilty and submit the case on the police report alone. This results in the defendant being found guilty but protects him against any damaging admissions.

[8] Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962). Contrast the result in *Teitelbaum* with Manning v. Watson, 108 Cal. App. 2d 705, 239 P.2d 688 (1952), where the judgment of conviction upon a not guilty plea was held inadmissible in a civil action. It is not clear whether *Teitelbaum* would change such a result.

[9] 58 Cal. 2d at 607, 375 P.2d at 441–42, 25 Cal. Rptr. at 562–63. The court states that under the circumstances any issue necessarily decided in a prior criminal proceeding is conclusively determined as to the parties if it is involved in a subsequent civil action. It is questionable, however, whether this decision would be applied across the board. It may well be limited only to plaintiffs who seek affirmative relief after having been convicted in criminal courts. See 20 WASH. & LEE L. REV. 111, 116 (1963).

[10] Interview with Edwin Meese, Jr., Deputy District Attorney for Alameda County, Dec. 10, 15, 1963. According to Mr. Meese, it was discontent with *Teitelbaum* which prompted the legislature to act against using criminal cases as a basis for civil actions. *Compare* CAL. PEN. CODE 1016(3) *with* CAL. VEH. CODE § 40834. During the same session in which section 1016(3) was enacted, the legislature specifically provided in section 40834 that any conviction under the CAL. VEH. CODE shall not be res judicata or constitute collateral estoppel of any issue determined therein for any subsequent civil action. Thus, rather than just provide *nolo* as an alternative in *Teitelbaum*, the legislature in traffic cases has eliminated the possibility of admissions or collateral estoppel regardless of the plea.

[11] See notes 2–4 *supra* and accompanying text.

in traffic court of recklessness upon a plea of *nolo*,[12] is the Department of Motor Vehicles, in a civil administrative action, authorized to revoke the defendant's license solely on the basis of the "conviction"?[13]

California litigants must remain in doubt about the statute's application until the courts resolve the same problems that plague other jurisdictions. This Comment will examine the use and effect of the *nolo* plea in federal and state courts to determine the proper and likely application of section 1016(3). It will consist of two broad divisions: the use and effect of the *nolo* plea within the criminal case, and the collateral effect of *nolo contendere*.

I

THE USE AND EFFECT OF THE NOLO PLEA IN THE CRIMINAL CASE

An early interpretation of the *nolo* plea[14] restricted its use to the less serious criminal offenses. At one time most federal and state courts would not accept the plea if a prison sentence were either optional or mandatory.[15] Since historically the defendant was described as one who submitted himself to only a small fine, it was believed that a *nolo* plea, once accepted, precluded the imposition of a prison sentence. The Supreme Court[16] overruled the federal decisions, reasoning that an interpretation of the plea's common law history did not necessarily warrant such a conclusion. The state courts, however, have remained divided with the majority leaning toward the federal view.[17] Since the California statute does not specify any special limitation, it is probable that the federal view will prevail by statutory interpretation. There is, however, one restriction that all jurisdictions have honored. In the absence of statute, the plea is never acceptable in capital cases.[18] Although the California statute makes acceptance of the plea dis-

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[12] See notes 77–81 *infra* and accompanying text for full discussion of the relevsant statutes in the California Civil, Probate, Penal, Corporation, Vehicle, and Business and Professions Codes.

[13] See, *e.g.*, Fox v. Scheidt, 241 N.C. 31, 84 S.E.2d 259 (1954). *But cf.* Neibling v. Terry, 352 Mo. 396, 177 S.W.2d 502 (1944).

[14] See note 2 *supra*.

[15] See, *e.g.*, Tucker v. United States, 196 Fed. 260 (7th Cir. 1912); *but see* United States v. Lair, 195 Fed. 47 (8th Cir. 1912) (showing that not all federal courts followed the same rule). For state courts see, *e.g.*, State v. Kiewel, 166 Minn. 302, 304, 207 N.W. 646, 647 (1926) (refused to recognize the plea as part of common law).

[16] Hudson v. United States, 272 U.S. 451, 453 (1926). The rule is now firmly fixed in the federal courts. See United States v. Cosentino, 191 F.2d 574 (7th Cir. 1951); Dillon v. United States, 113 F.2d 334 (8th Cir. 1940).

[17] *Compare* cases cited in Annot., 152 A.L.R. 253 n.65 (1944), *with* Roach v. Commonwealth, 157 Va. 954, 162 S.E. 50 (1932) (acceptable only in misdemeanor cases punishable exclusively by fine), and Brozaosky v. State, 197 Wis. 446, 222 N.W. 311 (1928) (acceptable in all cases except felonies and misdemeanors punishable by mandatory imprisonment).

[18] Hudson v. United States, 272 U.S. 451 (1926). The reason for such a limitation was spelled out in Commonwealth v. Shrope, 264 Pa. 246, 250, 107 Atl. 729, 730 (1919), where it was stated that since *nolo contendere* is only an implied confession of guilt, the defendant's guilt in a capital case could never be established beyond reasonable doubt by the use of *nolo* alone. *Contra*, State v. Martin, 92 N.J.L. 436, 106 Atl. 385 (Ct. Err. & App. 1919) (acceptance of the plea in a capital case automatically reduces the charge to second degree murder).

Nolo contendere may also not be acceptable in magistrate courts since the legislature failed to amend CAL. PEN. CODE § 859(a) so as to include such a plea. This omission, however, may not have been unintentional and the exclusion of *nolo* from this court may prove desirable. See Scranton v. Evans, 5 Pa. D. & C. 219 (1923).

cretionary in every case, it is likely that the courts will feel disposed to follow this traditional limitation.[19]

Although the defendant may be otherwise qnalified to enter a *nolo* plea, the court is not bound to accept the plea.[20] Since in California both the court and the district attorney may apparently accept or reject the plea upon any basis, the disappointed defendant may have no remedy by arguing abuse of discretion. Where the district attorney has failed, however, formally to consent and the court has nevertheless accepted the plea, it has been held that the subsequent judgment is subject to attack by the defendant and a new trial must be granted.[21]

The important question, however, is on what basis the judge or the district attorney is likely to exercise his discretion. In federal courts there appears to be no uniform standard. Although the judge is vested with the sole power to exercise this discretion, there is authority for believing that he is heavily influenced by the attitude of the district attorney.[22] Evidently, the experience of the United States Attorney General's Office has led to the policy of discouraging courts from accepting *nolo* pleas.[23] Should California's district attorneys adopt a similar policy, the statute would be effectively eliminated; however, there is no indication that such a policy will be followed initially on the local level.[24] Presumably the ultimate policy of the district attorneys will depend upon how the California courts interpret the plea's use and effects.

Generally, once the plea has been entered the defendant may only withdraw it with the court's permission.[25] While the defendant has no absolute right to

[19] In one early California case, the court, without comment, denied the defendant's request for a plea of *nolo contendere* to a murder charge but accepted a plea of guilty. It was not indicated whether the plea was denied because the court would not recognize *nolo* in California or would not rcognize it in a capital case. People v. Lennox, 67 Cal. 113, 7 Pac. 260 (1885). See Comment, 33 NEB. L. REV. 428, 434 (1954), urging such a restriction for a Nebraska statute which is similar to California's PEN. CODE § 1016(3).

[20] See, *e.g.*, Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. Minn. 1939); Caminetti v. Imperial Mut. Life. Ins. Co., 59 Cal. App. 2d 476, 139 P.2d 681 (1943); Doughty v. De Amoreel, 22 R.I. 158, 46 Atl. 838 (1900).

[21] Commonwealth v. Adams, 72 Mass. (6 Gray) 359 (1856) (statute required the prosecutor's consent and the record did not show it).

[22] See Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412, 415 (7th Cir. 1963) (rarely accepted by courts without approval of the government after compromise); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 372 (D. Minn. 1939); Young v. People, 53 Colo. 251, 125 Pac. 117 (1912) (generally entered with express or tacit consent of district attorney). *But see* United States v. Jones, 119 F. Supp. 288 (S.D. Cal. 1954).

[23] The reason for such a policy was set out in a letter from Attorney General Herbert Brownell, Jr. addressed to all United States Attorneys (set forth in *id.* at 289–90 n.1). It stated that uncontrolled use of the plea has led to shockingly low sentences and insignificant fines which prove to be no deterrent to crime, particularly since the public regards such a plea as an admission by the government that at most it has only a technical case. Branding such proceedings as a "fiasco," all United States Attorneys were instructed to object to the acceptance of the plea. In this case, however, the California federal district court chose to disregard this objection by stating that the instruction was binding upon counsel but not upon the court, thus reasserting the common law tradition which permitted the court to exercise unfettered discretion in accepting or rejecting the plea. *Id.* at 290.

[24] In an interview with Edwin Meese, Jr., Deputy District Attorney of Alameda County, Dec. 10, 15, 1963, he stated that the policy, at least in Alameda County, would be to consent to every *nolo* plea except in circumstances where an administrative agency wished to have a guilty plea for purposes of admissions for contemplated civil suits. The willingness of California district attorneys to cooperate with administrative agencies may be of particular importance in cases where the agency or board wishes to prevent the defendant from possibly escaping some civil administrative sanction or penalty.

[25] See, *e.g.*, United States v. Norris, 281 U.S. 619 (1930); Mosley v. United States, 207 F.2d 908 (5th Cir. 1953), *cert. denied*, 347 U.S. 933 (1954).

insist upon a withdrawal, he can attack a court's refusal as an abuse of discretion. In one state court,[26] the defendant was without the aid of counsel and pleaded *nolo* without understanding the nature of the plea. In view of the defendant's ignorance, it was held that the court's refusal to accept his motion of withdrawal was clearly an abuse.[27] There is reason to believe that California would take a similar position. California Penal Code Section 1018 permits a guilty plea to be withdrawn if good cause is shown and if the motion is made before imposition of sentence. Since *nolo* is made equivalent to a plea of guilty, good cause could be demonstrated by contending that the defendant was ignorant of the plea's meaning or effect.[28] However, defendant's failure to understand the plea due to inept counsel apparently would not be grounds for reversing a refusal to withdraw.[29]

Because the *nolo* plea is equivalent to a plea of guilty for purposes of the case, a defendant who has entered a *nolo* plea is deemed to have waived all formal defects in the pleading[30] and any rights to a jury trial.[31] The only objection that may be interposed is one which challenges a defective complaint for failure to charge an offense.[32]

Since guilt is impliedly admitted, any evidence submitted to the court tending to prove guilt or innocence is irrelevant; should the court accept such evidence, it may constitute reversible error requiring a resentencing.[33] Evidence may be submitted, however, for the purpose of determining the character and extent of the appropriate punishment.[34] In taking such evidence, no stipulation agreed to by the prosecution strictly for the purpose of determining punishment can raise the issue of innocence;[35] nevertheless the defendant might be encouraged to withdraw his plea and enter one of not guilty. In one case,[36] the court itself suggested that the plea be withdrawn if the defendant believed himself innocent. Yet the evidence which could lead a court to such a suggestion is never ostensibly submitted for that purpose. Finally, if a crime is one which is divided into degrees and the pleading does not specify the degree of the crime, the court may hear evidence to determine the degree.[37]

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[26] Fox v. State, 112 Fla. 104, 150 So. 228 (1933).

[27] *Ibid.* Withdrawal of the plea in federal courts after imposition of sentence is governed by FED. R. CIV. P. 32(d) which enables the defendant to withdraw the *nolo* plea in the case of a manifest injustice. *Compare* United States v. Vidaver, 73 F. Supp. 382 (E.D. Va. 1947), *with* United States v. Shapiro, 22 F.2d 836 (7th Cir. 1955); see generally Comment, 8 DE PAUL L. REV. 68 (1958).

[28] *Cf.* People v. Griggs, 17 Cal. 2d 621, 624, 110 P.2d 1031, 1033 (1941).

[29] *Cf.* People v. Burkett, 118 Cal. App. 2d 204, 206, 257 P.2d 745, 748 (1953).

[30] Commonwealth v. Bienkowski, 137 Pa. Super. 474, 9 A.2d 169 (1939) (substantive defect in complaint note cured by *nolo* plea).

[31] See, *e.g.*, Dillon v. United States, 113 F.2d 334 (8th Cir. 1940); Farnsworth v. Zerbst, 97 F.2d 255 (5th Cir. 1938); *In re* Lanni, 47 R.I. 158, 161, 131 Atl. 52, 53 (1925).

[32] Dillon v. United States, *supra* note 31; State v. Herlihy, 102 Me. 310, 66 Atl. 643 (1906); Ferguson v. Reimhart, 125 Pa. Super. 154, 190 Atl. 153 (1937).

[33] *Cf.* Dillon v. United States, 113 F.2d 334 (8th Cir. 1940). Although the court held that there was no reversible error by giving the defendant full opportunity to give his version of the matters relating to the charges against him, it implied that it was error for the court to turn its proceeding relative to the imposition of sentence into a trial of the case.

[34] Commonwealth v. Rousch, 113 Pa. Super. 182, 172 Atl. 484 (1934).

[35] United States v. Norris, 281 U.S. 619 (1930).

[36] *Ibid.*

[37] *Cf.* People v. Bellon, 180 Cal. 706, 182 Pac. 420 (1919); People v. Verdier, 96 Cal. App. 2d 29, 214 P.2d 433 (1950); see generally, Annot., 34 A.L.R.2d 919 (1954).

Once the plea is entered, conviction and sentence follows as a matter of course.[38] As stated earlier, the Supreme Court[39] stated that acceptance of the plea did not preclude a prison sentence. Nevertheless, the characterization of the plea as a device to obtain mercy from the court[40] was not disregarded. The Court stated that although the maximum punishment might be imposed, a judge in his discretion may mitigate the punishment and in some cases might feel constrained to do so.[41] Even though the maximum sentence can be imposed, the psychological effect of the plea has often had a moderating influence on the court.[42] The belief that a *nolo* plea alters normal sentencing patterns led one court to declare that the defendant submits to such punishment as the court may inflict but usually less than would have been imposed after a plea of guilty.[43] This position is questionable since the purpose of the plea is not to lighten the punishment but to lighten the burden of damaging admissions brought about by a plea of guilty. While the popular belief that *nolo* is a face-saving device tending to mitigate punishment may be of some practical value to the defendant, the plea does not assure that the punishment will be lighter.[44] On the contrary, some courts appear to resent use of the *nolo* plea and draw an unfavorable inference from its use.[45] In any event, the primary inducement for using the plea is not the hope of obtaining a lighter sentence but rather the desire to take advantage of *nolo*'s collateral benefits in a subsequent civil action.

II

THE COLLATERAL EFFECT OF NOLO CONTENDERE

A. The Plea and the Conviction

The law is clear that a plea of *nolo contendere* may not be used in a civil action as an admission against interest. For example, in a civil custody fight, the husband's earlier conviction of adultery following a *nolo* plea was not admissible as evidence of the father's unfitness.[46] By admitting the plea or conviction, the

[38] Bell v. Commissioner, 320 F.2d 953, 956 (8th Cir. 1963); Masters v. Commissioner, 243 F.2d 335 (3d Cir. 1957); State v. Suick, 195 Wis. 175, 217 N.W. 743 (1928) (judgment of conviction follows plea as matter of course).

[39] Hudson v. United States, 272 U.S. 451, 455 (1926).

[40] Note 2 *supra* ("yielding to the King's mercy").

[41] Hudson v. United Stateas, 272 U.S. 451, 457 (1926). In United States v. Food and Grocery Bureau of So. Calif., 43 F. Supp. 974, 979 (S.D. Cal. 1942), *aff'd*, 139 F.2d 973 (9th Cir. 1943), the court stated that as a result of the *Hudson* decision it was definitely settled that the maximum sentence may be imposed following a plea of *nolo*.

[42] See, *e.g.*, Schwarz v. Gen. Aniline & Film Corp., 102 N.Y.S.2d 325, 198 Misc. 1046 (1951), citing People v. Daiboch, 265 N.Y. 125, 191 N.E. 859 (1934). Such an attitude also seems to be prevelant in federal courts. See note 23 *supra*, where the Attorney General voiced strenuous objections to the practice of accepting the *nolo* plea where lesser punishments were often the result.

[43] 265 N.Y. at 128, 191 N.E. at 860.

[44] See Masters v. Commissioner, 243 F.2d 335, 338 (3rd Cir. 1957). Many federal courts do not have a high regard for the *nolo* plea and it is quite probable that use of the plea would not in any way influence the severity of the sentence. This court described the *nolo* plea as an attempted face-saving device merely providing a "surface language cloak" which is completely removed by the judgment and sentence.

[45] *Ibid.*; United States v. Food and Grocery Bureau of So. Calif., 43 F. Supp. 947, 979 (S.D. Cal. 1942), *aff'd*, 139 F.2d 973 (9th Cir. 1943).

[46] Commonwealth *ex rel.* Warner v. Warner, 156 Pa. Super. 465, 40 A.2d 886 (1945).

issue of the husband's guilt would be before the court. Since the *nolo* plea never estops the defendant from denying his guilt,[47] the wife was unsuccessful in her attempt to use the plea or the conviction as evidence of adultery.

Although it is clear that the plea itself is not admissible as an admission against interest, it might be argued that the conviction conclusively establishes the fact of adultery, collaterally estopping the husband from raising the issue in another action. Any attempt to use the doctrine of collateral estoppel to frustrate the protection normally afforded a *nolo* plea would probably fail since the clear intention of the legislature in enacting Penal Code section 1016(3) was to avoid use of the criminal action as a basis for civil litigation. Moreover, an essential requirement for the application of estoppel is that the issue in question be actually litigated and determined in the original action.[48] This requirement may not be met where the judgment is based on a *nolo* plea.[49]

The scope of *nolo*'s collateral benefits assumes a more controversial aspect when a statute authorizes the use of a "conviction" as the basis for enforcing a statutory disability. The examples are legion. In one case a lawyer is convicted of a felony following a *nolo* plea and by the terms of a statute such a conviction is made grounds for disbarment.[50] In another instance, the defendant is convicted of reckless driving upon a plea of *nolo* and a statute makes the conviction grounds for revocation of his operator's license.[51] The crucial issue in each case is whether, if the government agency initiates an administrative action based solely upon judgment of conviction, the fact of conviction constitutes an admission against interest.

Two lines of authority provide alternative answers. The majority view, prevalent in all federal and in most state courts, was best expressed by the Missouri

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[47] *Ibid.*; *cf.* Krowka v. Colt Patent Fire Arm Mfg. Co., 125 Conn. 705, 8 A.2d 5 (1939) (assault and battery); Teslovich v. Fireman's Fund Ins. Co., 110 Pa. Super. 245, 168 Atl. 354 (1933). The plaintiff in *Teslovich,* like *Teitelbaum,* was attempting to collect insurance after having been convicted of defrauding the insurance company in a prior criminal action. See note 8 *supra* and accompanying text. In *Teslovich,* however, the plaintiff pleaded *nolo* to the earlier charge and was not estopped to sue the insurance company in the subsequent criminal action.

[48] See Todhunter v. Smith, 219 Cal. 690, 28 P.2d 916 (1934). CAL. CODE CIV. PROC. § 1911 defines an "item adjudged" in a former judgment as one which appears upon its face to have been adjudged or which was actually and necessarily included in or necessary to the judgment. As this code section might indicate, it is not clear precisely what constitutes a "litigated issue." *Compare* Servente v. Murray, 10 Cal. App. 2d 355, 52 P.2d 270 (1935), *with* Schumaker v. Industrial Acc. Comm'n, 46 Cal. App. 2d 95, 115 P.2d 571 (1941).

[49] It has been suggested that an admission in the pleadings does not constitute a litigation of the issue and therefore does not result in an estoppel. RESTATEMENT, JUDGMENTS § 68, Comments *f, g* (1942). The California cases, however, are in conflict on this point, See 3 WITKIN, CALIFORNIA PROCEDURE 1948 (1954). It may be, however, that in view of CAL. PEN. CODE § 1016(3), the plea of *nolo contendere* cannot qualify as an *admission in the pleadings* for purposes of collateral estoppel, thus rendering the "litigated issue" problem a moot point. On the other hand, it has often been said that *nolo contendere* is in the nature of a consent judgment. See, *e.g.,* Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412, 415 (7th Cir. 1963). This is particularly true in California where both the prosecutor and the defendant must agree upon the use of the plea. Although it is clear that consent judgments are conclusive as res judicata, 3 WITKIN, CALIFORNIA PROCEDURE 1937 (1954), this doctrine is not applicable to a stranger attempting to assert the *nolo* conviction as collateral estoppel.

[50] See, *e.g., In re* Hallinan, 43 Cal.2d 243, 247, 272 P.2d 768 (1954); People v. Edison, 100 Colo. 574, 69 P.2d 246 (1937); Neibling v. Terry, 352 Mo. 396, 177 S.W.2d 502 (1944).

[51] *Cf.* Fox v. Scheidt, 241 N.C. 31, 84 S.E.2d 259 (1954). Compare CAL. VEH. CODE § 13200.

Supreme Court in *Neibling v. Terry*.[52] That court explained that the confusion generated by the effect of the *nolo* plea stems from the erroneous judicial practice of clothing the judgment of conviction with the characteristics of the plea. The court held that the fact of conviction is distinct from the plea because only the plea carries the evidentiary force of an admission. The court therefore concluded that the scope of a statute prescribing disbarment for a lawyer convicted of a felony was not narrowed because of the *nolo* plea. The statute does not look to the defendant's admission of guilt but looks only to the judgment of conviction. Since the statute did not authorize the conviction to be used as an admission of guilt in any civil suit, the defendant cannot prevent the judgment of conviction from being used as a basis for applying the administrative penalty. By adopting the same analysis, the federal courts have considerably narrowed the advantage of the *nolo* plea to the accused. In *Tseung Chu v. Cornell*,[53] an alien faced deportation for having falsely stated that he had never been convicted of a crime. The defendant argued that since he had pleaded *nolo* to an earlier charge of fraudulent tax evasion, he was not estopped to deny his guilt in any proceeding outside the criminal case. Following the *Neibling* approach, the court held that the question did not require the defendant to admit his guilt but only to disclose whether any judgment of conviction had ever been entered against him.[54]

The minority position holds that *any* use of the plea or the conviction outside the criminal case constitutes an admission of guilt.[55] Hence except for the sentence following the conviction,[56] the defendant is protected against any adverse effects as if he had never been convicted of a crime. The crux of this argument turns on the assimilation of the conviction and the plea; any use of the conviction is the same as if the plea itself had been used as an admission.[57] Consequently a conviction following a *nolo* plea is not deemed a "conviction" within the meaning of any relevant statute. As a result, a lawyer convicted of a felony following a *nolo* plea cannot be disbarred on the basis of the conviction alone unless the statute specifies that a *nolo* conviction can be used for that purpose.[58]

The undesirability of this position is evidenced by the New Jersey experience

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[52] 352 Mo. 396, 177 S.W.2d 502 (1944).

[53] 247 F.2d 929 (9th Cir.), *cert. denied*, 355 U.S. 892 (1957).

[54] *Id.* at 938. The court did point out, however, that the plea would be of great benefit to the defendant if the government in a subsequent tax deficiency suit attempted to submit the plea as evidence of fraud.

[55] See, *e.g.*, Schireson v. State Bd. of Med. Examiners, 130 N.J.L. 570, 33 A.2d 911 (Ct. Err. & App. 1943) (revocation of doctor's license); White v. Creamer, 175 Mass. 567, 56 N.E. 832 (1900); Daughty v. De Amoreel, 22 R.I. 158, 46 Atl. 838 (1900).

[56] White v. Creamer, 175 Mass. 567, 568, 56 N.E. 832, 833 (1900). The court did not doubt that a sentence imposed after a plea of *nolo contendere* amounts to a conviction in the case in which the plea is entered but that conviction was not admissible in another proceeding to show that the defendant was guilty of the crime charged. In other words, the conviction denoted a finding of guilt. See note 57 *infra* and accompanying text.

[57] See, *e.g.*, Bruce v. Holesworth, 129 Colo. 129, 267 P.2d 1014, 1017 (1954), where the court reasoned that if the plea itself could not be used in any collateral matter, it follows that anything growing out of that plea, such as the fact of sentence, could not be used as a conviction in some other proceeding; Daughty v. De Amoreel, 22 R.I. 158, 46 Atl. 838 (1900). In *Daughty*, the court stated that the term "conviction" denoted the finding of fact that the accused was guilty so that any use of the conviction in another proceeding would be admission of guilt.

[58] See, *e.g.*, CAL. BUS. & PROF. CODE § 6101 (plea of *nolo contendere* deemed a conviction within the meaning of the statutes governing revocation of lawyer's license).

in *Schireson v. State Board of Medical Examiners*.[59] The court held that the conviction for a felony upon a *nolo* plea was not such a "conviction" as authorized the medical board under statute to revoke the defendant's license on the record of the conviction alone. This result was found so undesirable that the same court overruled *Schireson* four years later, adopting the *Neibling* analysis.[60] The court's abrupt reversal demonstrated an acute awareness of the unwanted collateral effects brought about by the minority position. The court felt that the intention of the legislature should take precedence over any previous technical interpretation of the *nolo* plea.[61]

B. The California Position

Aside from granting protection against admissions in subsequent civil suits, the courts have never articulated any reasons why a defendant should be able to insulate himself from all adverse effects of his conviction following a plea of *nolo contendere*. Nor is any reason apparent in California where the objective of the legislature was only to prevent private parties from using admissions in criminal cases as a basis for civil suits. When Califoruia Assemblyman Gordon Winton, Chairman of the Assembly Criminal Procedure Committee and author of section 1016(3) was asked during the hearings whether the bill would in any way affect convictions or criminal procedure, he replied that it would not.[62] Most legal commentators seem to take the same approach and dismiss the opposite conclusion.[63] Unfortunately, the question is not so easily disposed of, since California, in two cases, apparently adopted the minority view before California Penal Code Section 1016(3) was ever enacted.

1. The Judicial Decisions

In *Caminetti v. Imperial Mut. L. Ins. Co.*,[64] officers of defendant insurance company, after entering a plea of *nolo*, were convicted in federal court of defrauding the United States. The California Insurance Code[65] authorizes a conservator to seize any insurance company found to be in a condition hazardous to the investing public or creditors. The Insurance Commissioner endeavored to introduce the federal conviction as conclusive evidence of fraud warranting the imposition of the state administrative seizure. The California district court of appeals refused

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[59] *Compare In re* Hallinan, 43 Cal. 2d 243, 272 P.2d 768 (1954), *with* Schireson v. State Board of Med. Examiners, 130 N.J.L. 570, 33 A.2d 911 (Ct. Err. & App. 1943).

[60] Kravis v. Hock, 136 N.J.L. 259, 54 A.2d 778, 781 (Ct. Err. & App. 1947).

[61] *Ibid.* "If the Schireson case in this court is not overruled it would merely increase the great difficulty found by the legislature in attaining desired results in legislation because of the many fine spun niceties woven by the courts into words which seem clear and understandable to the legislature when the statutes are enacted."

[62] Interview with Edwin Meese, Jr., Deputy District Attorney for Alameda County, Dec. 10, 15, 1963.

[63] See, *e.g.*, Mack, *Nolo Contendere: Its Uses in Michigan*, 37 MICH. S.B.J. 20 (1958). Mack takes the view that the cases supporting the minority opinion can be distinguished in light of modern decisions such as Neibling v. Terry, 352 Mo. 396, 177 S.W.2d 502 (1944). His position turns on the argument that in early minority decisions there was no statute which specifically authorized the use of a conviction for a further penalty in the same way as the Missouri statute. Thus he argues that the minority position has come about only through an erroneous interpretation of cases such as White v. Creamer, 175 Mass. 567, 56 N.E. 832 (1900). Such an argument bas merit and perhaps provides another ground upon which to embrace the majority view.

[64] 59 Cal. App. 2d 476, 139 P.2d 681 (1943).

[65] CAL. INS. CODE § 1011(d).

to permit the conviction to be used as an admission of fraud since it was based upon a *nolo* plea.[66]

Because the state statute regarding seizures by the Insurance Commissioner did not authorize the use of "conviction" as a basis for administrative action, the court did not have an opportunity to meet squarely the issue of whether statutory "convictions" cover convictions following a *nolo* plea. It is clear that in this case the result of excluding the conviction was not out of harmony with the majority view, but its language suggests that the court adopted the minority analysis. The *nolo* plea was characterized as an agreement between the defendant and the court that "solely and alone for purposes of that case and no other purpose" may the court assume the defendant is guilty.[67] The court stressed the inadmissibility of a conviction based upon the *nolo* plea by concluding that in all fairness the effect of the plea must be limited exclusively to the criminal case.[68] The leading cases of the minority view are cited in support of this conclusion. For example, through reference to *State v. Suick*,[69] the court demonstrated an awareness of the question it was deciding. In that case, the majority and dissenting opinions sharply contrasted the two opposing viewpoints.[70]

If, however, the dicta of *Caminetti* was ambiguous, the California Supreme Court settled the question in *In Re Hallinan*.[71] The issue was squarely presented when the court was faced with interpreting a California statute making a felony "conviction" of moral turpitude grounds for disbarment.[72] On the basis of *Caminetti*, the court approved a State Bar ruling that disbarment proceedings could not be instituted against lawyers convicted of a felony upon a *nolo* plea in federal court. Without attempting to distinguish between the plea and the judgment of conviction, the court held that the California disbarment statute did not include any conviction based upon a plea of *nolo contendere*. Penal Code Section 1016(3) adds nothing to the definition of the plea as it is found in *Caminetti*. Presumably, therefore, the effect of the plea in a subsequent civil action is still governed by *Hallinan*.

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[66] Caminetti v. Imperial Mut. Life Ins. Co., 59 Cal. App. 2d 476, 492, 139 P.2d 681, 690 (1943).

[67] *Id.* at 491, 139 P.2d 681, 690.

[68] *Ibid.* The court cited White v. Creamer, 175 Mass. 567, 56 N.E. 832 (1900) and State v. LaRose, 71 N.H. 435, 52 Atl. 943 (1902). This in itself, however, is not conclusive of the court's position since many courts taking the majority view often cite these same authorities in support of generally accepted statements of the law. It is only the opinion as a whole that conveys the impression of the minority view.

[69] State v. Suick, 195 Wis. 175, 217 N.W. 743 (1928).

[70] *Id.* at 178, 217 N.W. at 745 (dissenting opinion), citing White v. Creamer, *supra* note 68, and State v. La Rose, *supra* note 68, as authority for distinguishing between a "conviction" following a trial or plea of guilty and a "conviction" following a plea of *nolo*. The majority opinion made no such distinction. The dissent, however, took the position that any statute authorizing use of a conviction to impeach the credibility of a witness should be interpreted as not including any conviction based upon a *nolo* plea. The *Caminetti* court came to an identical conclusion concerning the impeachment of a witness convicted upon a *nolo* plea, a conclusion that only a minority view could sustain. See notes 87–98 *infra* and accompanying text.

[71] 43 Cal. 2d 243, 272 P.2d 768 (1954).

[72] *Id.* at 247, 272 P.2d at 770. Hallinan had been convicted of a felony upon a plea of guilty in federal court while three other lawyers had been convicted following a *nolo* plea. In this case the issue of *nolo* convictions was presented when Hallinan argued that he was being denied equal protection of the laws. The State Bar had revoked his license but had taken no action against the other three lawyers. This argument was dismissed with the holding that Cal. Stat. 1939 ch. 34, p. 357, § 1 (now CAL. BUS. & PROF. CODE § 6101) did not provide for revocation when the conviction was based upon a *nolo* plea.

2. The Legislative Response

Following the State Bar ruling and the *Hallinan* decision,[73] the legislature sought to amend a number of statutes in the Business and Professions Code to insure that *nolo* convictions could provide the basis for an administrative penalty.[74]. The first of these amendments[75] set the pattern for those which followed. Rather than redefine "conviction" throughout the entire code to accommodate the federal *nolo contendere* plea, the legislature was content to amend only a select number of statutes. Until the adoption of section 1016(3) this *ad hoc* remedy was sufficient to prevent doctors, lawyers, and other professional persons from escaping California sanctions through the use of *nolo contendere* in federal courts.[76] With the *nolo* plea now recognized in California, all statutes which remain unamended assume a new importance. It is arguable, however, that this legislative response can be interpreted as a rejection of the court's position in *Caminetti* and *Hallinan* so that any application of Penal Code Section 1016(3) should reflect this intention.

Sections 13200 and 13350 of the California Vehicle Code provide for the optional or mandatory revocation of persons' licenses who are convicted of speeding, recklessness, or a combination of violations during a twelve month period. Since the *Caminetti-Hallinan* definition of "conviction" applies to these statutes, apparently the Department of Motor Vehicles cannot take action against drivers who plead *nolo contendere*. North Carolina, a jurisdiction adopting the minority view,[77] has had some experience with applying a Vehicle Code to defendants convicted upon a *nolo* plea. In one case,[78] the defendant's record of conviction for driving while intoxicated was not sufficient to warrant a revocation by the department. In another case,[79] however, where the defendant, as a multiple offender, had his license revoked, the plea of *nolo* entered in the second offense did not prevent the department from using the record of that conviction. The court reasoned that a plea of *nolo* does not permit the defendant to escape the punishment of the criminal case itself. Where the statute prescribes the mandatory revocation of a license as part of the punishment for the second criminal offense, the court may count the earlier conviction as one violation, and for purposes of this case only, the *nolo* conviction counts as the second violation.[80] Presumably, however, if the defendant pleads *nolo* in the first case and pleads guilty in the second, the mandatory multiple offender penalty could not be applied. The *nolo* convic-

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[73] The *Hallinan* decision was rendered in 1954 and the amendment to CAL. BUS. & PROF. CODE § 6101, Cal. Stat. ch. 44, § 1, p. 680 (1953), was passed in 1953. Presumably the State Bar ruling, later upheld in *Hallinan*, initially drew the legislature's attention to the statute's failure to include convictions following a *nolo* plea.

[74] See, *e.g.*, the following statutes in CAL. BUS. & PROF. CODE which now define "conviction" as including *nolo contendere* pleas: § 1320 (clinical lab technician), § 2688 (physical therapist), § 2683 (physicians), § 2765 (nurses), § 5106 (accountants), § 4361 (pharmacist), § 4883 (veterinarian), § 10177 (real estate brokers).

[75] CAL. BUS. & PROF. CODE § 6101, as amended, Cal. Stat. ch. 44, § 1, p. 680 (1953).

[76] Furnish v. Board of Med. Examiners, 257 F.2d 520 (9th Cir. 1958); Furnish v. Board of Med. Examiners, 149 Cal. App. 2d 326, 308 P.2d 924, *cert. denied*, 355 U.S. 827 (1957), *rehearing denied*, 355 U.S. 879 (1957).

[77] *In re* Stiers, 204 N.C. 48, 167 S.E. 382 (1933) (attorney avoided disbarment statute by pleading *nolo* to felony charge). See generally Lane-Reticker, *supra* note 7.

[78] Winesett v. Scheidt, 239 N.C. 190, 79 S.E.2d 501 (1954). On the basis of *In re* Stiers, *supra* note 77, the court held that the use of the conviction would be an admission of guilt. *Winesett* was followed in State v. Stone, 245 N.C. 42, 95 S.E.2d 77 (1956).

[79] Fox v. Scheidt, 241 N.C. 31, 84 S.E.2d 259 (1954).

[80] *Ibid.*

tion is independent of the second case and therefore cannot be counted as an earlier conviction.[81] There are numerous other California code sections which deal in one way or another with "convictions." If the California courts follow the minority view each of these code sections will be affected.[82]

C. The Effect of the Plea in a Subsequent Criminal Case

Although the question of the beneficial effects of a *nolo* plea is generally framed in terms of the subsequent civil action, these collateral effects may also be enjoyed in a later criminal case. For example, a defendant convicted twice for the same crime may not be eligible for probation.[83] If the defendant has pleaded *nolo* in the first case, the minority contends[84] that the defendant is not estopped to deny his guilt from the earlier conviction and therefore is not subject to the multiple offender disability.

The majority definition of "conviction" effectively eliminates the multiple offender question.[85] Submitting a record of conviction based upon a *nolo* plea is

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[81] Lane-Reticker, *supra* note 7, offered this conjecture after analyzing *nolo contendere* in North Carolina. *Compare In re* Steirs, 204 N.C. 48, 167 S.E. 382 (1933), *with In re* Hallinan, 43 Cal.2d 243, 272 P.2d 768 (1954). California is very likely to end up with decisions similar to North Carolina if the minority view is carried to its logical extreme.

[82] Every license granted under the Business and Professions Code may be revoked in the event of a felony conviction. Included among the statutes not amended to provide for the *nolo* conviction are CAL. BUS. & PROF. CODE §§ 87801 (land surveyors), 7691 (funeral directors), 6775 (engineers), and 8955 (broker or salesman). Under CAL. BUS. & PROF. CODE § 24200 revocation of a license for the sale of alcoholic beverages may be based upon a plea, verdict, or judgment of guilty. According to the minority view, if the judgment of guilty were preceded by a *nolo* plea, any use of that judgment in a revocation proceeding would be the equivalent of an admission against interest. See Bruce v. Holesworth, 129 Colo. 129, 267 P.2d 1014 (1954) (liquor law violation under *nolo* plea did not constitute conviction under statute). CAL. BUS. & PROF. CODE § 23952 requires a liquor license applicant to state whether he has ever been convicted of a felony. Under federal precedent, a defendant convicted upon any plea must reveal the fact of conviction if questioned, while California would apparently come to an opposite conclusion. See Tseung Chu v. Cornell, 247 F.2d 929 (9th Cir.), *cert. denied,* 355 U.S. 892 (1957). A similar problem can also arise under CAL. PEN. CODE § 1024, which requires the defendant to disclose whether he has ever been convicted of a prior violation.

By authorization of CAL. CORP. CODE § 807, a corporate board of directors may declare a directorship vacant if the officer is finally convicted of a felony. CAL. CORP. CODE § 830 permits directors to receive indemnity for costs incurred in successfully defending suits brought against them. A conviction might preclude indemnity; would a conviction upon a plea of *nolo*? See, *e.g.,* Schwarz v. General Aniline & Film Corp., 102 N.Y.S.2d 325, 198 Misc. 1046 (1951) (a majority jurisdiction that denied indemnity). CAL. CIV. CODE § 92 provides that a divorce may be granted on the ground that a spouse was convicted of a felony while CAL. PROB. CODE § 258 denies to any person convicted of murder or voluntary manslaughter the right to inherit from the person he has slain. Under the minority view the *nolo* conviction would not be a conviction within the meaning of any of these statutes.

Under the minority view even an innocent defendant might be willing to submit to the immediate punishment providing the conviction is not a conviction within the meaning of any other statute. See, *e.g.,* Bell v. Commissioner, 320 F.2d 953, 956 (8th Cir. 1963), where the defendant thought that by pleading *nolo contendere* to tax fraud he might escape revocation of his accounants license. He was not correct in that assumption and his license was revoked. Yet a few years later, in a civil suit for a tax deficiency, the defendant litigated on the merits and was cleared of any fraudulent intent.

[83] See, *e.g.,* CAL. PEN. CODE § 1203.

[84] State v. LaRosa, 71 N.H. 435, 52 Atl. 943 (1902).

[85] See Bell v. Commissioner, 320 F.2d 953, 957 (8th Cir. 1963) (conviction following *nolo* no different from one under any other plea); United States v. Dasher, 51 F. Supp. 805 (E.D. Pa. 1943); State v. Moss, 108 W.Va. 692, 152 S.E. 749 (1930) (record of conviction admissible to prove second conviction); State v. Suick, 195 Wis. 175, 217 N.W. 743 (1928) (*nolo* conviction can constitute prior conviction as with any other conviction).

not an admission of guilt and the conviction is therefore admissible regardless of the plea entered during the earlier proceeding.[86] The issue in California, therefore, perhaps is not whether Penal Code Section 1016(3) precludes collateral effects from operating in subsequent criminal cases, but whether a conviction following a *nolo* plea will have the same force and effect as a conviction following any other plea. The *Caminetti-Hallinan* interpretation would require the statute to specify whether a "conviction" includes those based upon a *nolo* plea. The Penal Code makes no such provision with the result that a *nolo* convicion cannot be counted toward a multiple offender penalty except in those cases where the *nolo* conviction is counted as the last conviction and as a part of the punishment of that crime. To avoid such a consequence, the California courts will either have to overturn the current conception of "conviction" or interpret the *nolo* statute narrowly by restricting its application to subsequent civil suits.

D. Special Problem Areas

1. Credibility of Witnesses

Can a defendant testifying on his own behalf, or any other witness, be impeached by the record of a prior *nolo* conviction? The federal courts makes short shrift of this question by applying their usual analysis: the conviction is distinct from the plea and may be used for impeachment.[87] The state courts, however, have given the issue a more detailed analysis and have come to a variety of conclusions. In New Jersey, during the time it adhered to the minority view, conviction following a *nolo* plea was nevertheless admissible as evidence to impeach the credibility of any witness.[88] While it was therefore possible for a husband in a divorce action to prevent his wife from introducing evidence of adultery based upon a *nolo* conviction,[89] he could not prevent his own credibility as a witness from being questioned on the basis of that same conviction.[90] Even a minority jurisdiction could rationally reach this result since impeachment of a witness never in theory involves an admission against interest.[91]

While the legal reasoning behind such a decision may be sound, the California

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[86] Some of the statutes which would be affected by excluding *nolo* convictions include CAL. PEN. CODE §§ 666 (increased punishment for multiple offenders), 668 (persons "convicted" in foreign jurisdictions of earlier offense counts toward multiple conviction), 644 (habitual criminals defined as those convicted three times).

[87] Masters v. Commissioner, 243 F.2d 335 (3rd Cir. 1957); Fisher v. United States, 8 F.2d 978 (1st Cir. 1925). In *Masters* the court held that a tax regulation authorizing use of convictions to impeach credibility included any conviction following a plea of *nolo*. 243 F.2d at 338. Some state courts, interpreting a statute authorizing the use of convictions for impeachment purposes, have independently used the same terse analysis. See, *e.g.*, State v. Herliby, 102 Me. 310, 66 Atl. 643, 646 (1906). CAL. CODE CIV. PROC. § 2051 also permits a witness to be impeached by evidence of a prior felony conviction. See notes 93–94 *infra* and accompanying text, for the probable application of § 2051 upon the issue of *nolo* convictions and impeachment.

[88] *Compare* Schireson v. State Board of Med. Examiners, 130 N.J.L. 570, 33 A.2d 911 (1943), *with* Johnson v. Johnson, 78 N.J. Eq. 507, 80 Atl. 119 (1911).

[89] Commonwealth *ex rel.* Warner v. Warner, 156 Pa. Super. 465, 40 A.2d 886 (1945).

[90] Johnson v. Johnson, 78 N.J. Eq. 707, 80 Atl. 119 (1911). *Contra*, Krowka v. Colt Patent Fire Arm Mfg. Co., 125 Conn. 705, 8 A.2d 5 (1939). In *Krowka*, the court followed a strict application of the minority viewpoint by excluding all evidence of the prior conviction for any purpose including credibility impeachment.

[91] See People v. Renchie, 201 Cal. App. 2d 1, 6, 19 Cal. Rptr. 734, 738 (1962); People v. Williams, 27 Cal. 2d 220, 228, 163 P.2d 692, 696 (1945); State v. Radoff, 140 Wash. 202, 248 Pac. 405, 406 (1926). Establishing the fact of conviction for impeachment purposes does not

courts are faced with dicta in *Caminetti* which reached an opposite conclusion. On the basis of *Tucker v. United States*,[92] *Caminetti* added that a conviction following a *nolo* plea can never be used in another proceeding to discredit a witness.[93] Although some minority jurisdictions have taken such a position,[94] the *Tucker* court made no reference to the credibility issue. In fact, the federal courts have come to precisely the opposite conclusion.[95] Nevertheless, should California decide to follow the *Caminetti* dicta the decision would not be out of harmony with the general treatment accorded a *nolo* plea in a minority jurisdiction. A statute in Massachusetts,[96] authorizing the use of convictions to impeach a witness, is very similar to the one in California.[97] The Massachusetts court merged the plea and the conviction and excluded the impeachment evidence on the ground that the plea admits the facts which are charged for the purpose of the criminal case and no other.[98]

2. Antitrust Cases

Perhaps the *nolo* plea has been best popularized through federal antitrust suits in which company officials have pleaded *nolo contendere* to avoid damaging admissions.[99] The Clayton Act[100] authorizes the use of final decrees in litigated cases as prima facie evidence in any civil case arising out of the same acts. Consent judgments are not considered litigated because no issue has been determined by the submission of evidence.[101] Since the courts have held a *nolo* plea to be in the nature of a consent judgment,[102] a defendant is protected from estoppel in a subsequent civil case.[103]

On the other hand, California antitrust legislation[104] makes no provision for the use of final decrees in subsequent civil damage suits. Although the Cartwright

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provide any evidence that the crime itself was committed. The evidence of conviction raises the issue of credibility but cannot prove guilt. See WIGMORE, § 980 (3rd ed. 1940); WHARTON, CRIMINAL EVIDENCE § 359(6)(a) (10th ed. 1912).

92 196 Fed. 260 (7th Cir. 1912).

93 Caminetti v. Imperial Mut. Life Ins. Co., 59 Cal. App. 2d 476, 491, 139 P.2d 681, 689 (1943).

94 See Krowka v. Colt Patent Fire Arm Mfg. Co., 125 Conn. 705, 8 A.2d 5 (1939); Olszweski v. Goldberg, 223 Mass. 27, 111 N.E. 404 (1916).

95 See note 87 *supra*.

96 MASS. GEN. LAWS ANN. ch. 233, § 21 (1959).

97 CAL. CODE CIV. PROC. § 2051.

98 See Karasek v. Bockus, 293 Mass. 371, 199 N.E. 726 (1936); Olszewski v. Goldberg, 223 Mass. 27, 111 N.E. 404 (1916).

99 For a fuller treatment of antitrust see generally, Lenvin & Meyers, *Nolo Contendere: Its Nature and Implications*, 51 YALE L.J. 1255, 1267 (1942); Comment, 8 DE PAUL L. REV. 68 (1958).

100 38 Stat. 731 (1914), 15 U.S.C. § 16 (1958).

101 See Commonwealth Edison Co. v. Allis-Chamlers Mfg. Co., 323 F.2d 412, 414–15 (7th Cir. 1963); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 372 (D. Minn. 1939).

102 Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., *supra* note 101. In *Edison*, the court did, however, distinguish the *nolo* plea from a plea of guilty by holding that it was not the intent of Congress to include guilty pleas within the category of consent judgments. Althongh previously both a plea of guilty and *nolo contendere* protected the defendant against estoppel in a subsequent civil suit, *Edison* appears to have limited that protection to a plea of *nolo contendere*.

103 See United States v. Safeway Stores, 20 F.R.D. 451 (N.D. Tex. 1957).

104 See, *e.g.*, CAL. BUS. & PROF. CODE §§ 16700–58 (the Cartwright Act); CAL. BUS. & PROF. CODE §§ 17000–101 (Unfair Practices Act). See generally Kalmowski & Hanson, *The California Antitrust Laws: A Comparison With Federal Antitrust Laws*, 6 U.C.L.A.L. REV. 533 (1959).

Act and the Unfair Practices Act contain both criminal and civil sanctions,[105] there is no provision which allows a plaintiff in any civil action to use an earlier criminal conviction as prima facie evidence of statutory violation. Nevertheless, nothing in these acts protects the defendant from making an admission against interest by entering a plea of guilty; nor is there any protection against possible collateral estoppel. The plea of *nolo contendere* will make it possible for defendants in such an action to avoid these undesirable results.

CONCLUSION

In both federal and California state courts a defendant may avail himself of the plea of *nolo contendere*. Except for some minor differences, use of the plea in the federal and state criminal case is largely the same. It remains to be seen, however, what policy California courts and prosecutors will take toward accepting the plea—a policy never clarified by the federal courts. The real dilemma lies in the collateral effect of the plea. The federal courts have found their solution by distinguishing the plea from the conviction following it, thus giving the defendant no greater collateral benefits than those normally obtainable through a plea of not guilty. There is every indication that the California legislature believed it was adopting a similar policy by enacting Penal Code Section 1016(3). There seems no reason why a defendant should be provided with a method to avoid civil administrative punishment, multiple conviction penalties, non-deductible legal fees,[106] and a host of other disabilities normally attached to a person labeled "convicted." A plea of not guilty or guilty does not afford such luxuries; neither should a plea of *nolo contendere*. Yet California may, by precedent, provide these undeserved rewards. The *Caminetti-Hallinan* decisions can be deplored as unfortunate but cannot be convincingly distinguished. Perhaps the courts can overrule these cases by following New Jersey's example of searching for legislative intent. The legislature's statutory redefinition of "conviction" and the legislative history of Penal Code Section 1016(3) might provide an excellent starting point for such a decision. On the other hand, the California courts could simply rule that *Hallinan* was incorrectly decided and that *Caminetti* was dicta. Failing that, it is likely that the district attorneys will refuse to accept the plea if any of these unwanted collateral effects are potentially involved. In the meantime, the California lawyer should carefully consider in every criminal case the numerous benefits a client might obtain by entering a plea of *nolo contendere*.

Norman S. Oberstein

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[105] CAL. BUS. & PROF. CODE §§ 16750, 16755, 17082, 17100.

[106] It is well settled that the Internal Revenue Service may rightfully disallow any deductions made for expenses incurred in the defense of state or federal criminal prosecutions or for civil suits growing out of those prosecutions if the defendant is convicted of the crime charged. See Tracey v. United States, 284 F.2d 379 (Ct. Cl. 1960). In Bell v. Commissioner, 320 F.2d 953, 958 (8th Cir. 1963), the federal court had little trouble in holding that the *nolo* conviction did not affect the disallowance for legal fees expended in either the criminal case or the civil administrative hearings which grew out of the prosecution. If California, however, chooses to treat a *nolo* conviction as one having no effect outside the criminal case, it is arguable that legal fees incurred in civil suits growing out of a state criminal action should be deductible. The *Bell* case might be distinguished by arguing that the federal courts give a different effect to the *nolo* plea than do the California courts.