THE BEST OFFENSE IS A GOOD DEFENSE: WHY CRIMINAL DEFENDANTS' NOLO CONTENDERE PLEAS SHOULD BE INADMISSIBLE AGAINST THEM WHEN THEY BECOME CIVIL PLAINTIFFS

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> [N]o court to my knowledge has ever held a plea of nolo contendere to be preclusive, at least in the absence of an explicit statutory provision.[1]
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> We do not consider our decision to be barred by Fed. R. Evid. 410, which provides that evidence of "a plea of nolo contendere" is not, "in any civil or criminal proceeding, admissible against the defendant who made the plea." This case does not present the kind of situation contemplated by Rule 410: the use of a nolo contendere plea against the pleader in a subsequent civil or criminal action in which he is the *defendant* . . . . In this case, on the other hand, the persons who entered prior no-contest pleas are now plaintiffs in a civil action. Accordingly, use of the no-contest plea for estoppel purposes is not "against the defendant" within the meaning of Fed. R. Evid. 410. This use would be more accurately characterized as "for" the benefit of the "new" civil defendant. . . .[2]

Waitress:	What do you want in your omelette, sir?
Martin Blank:	Nothing in the omelette, nothing at all.
Waitress:	Well, that's not technically an omelette.
Martin Blank:	Look, I don't want to get into a semantic argument; I just want the protein.[3]

When a defendant pleads nolo contendere or no contest, he does not admit his guilt; instead, the plea is merely an indication that he will not contest the charges brought against him. A principal purpose behind this plea is to dampen the harsh repercussions of a guilty plea. When a defendant pleads guilty in a criminal case, his plea can be used against him in a subsequent civil or criminal proceeding. However, under Federal Rule of Evidence 410, Federal Rule of Criminal Procedure 11(f), and most state codes, a defendant's nolo contendere plea in a criminal case cannot be used against him in a subsequent proceeding because the plea is not an explicit admission of guilt. Most frequently, the defendant pleading nolo contendere in the original criminal trial

1. David L. Shapiro, *Should a Guilty Plea Have a Preclusive Effect?*, 70 IOWA L. REV. 27, 32 (1984).

2. Walker v. Schaeffer, 854 F.2d 138, 143 (6th Cir. 1988).

3. GROSSE POINTE BLANK (Hollywood Pictures 1997).

remains the defendant in the subsequent proceeding, where the other party seeks to introduce his plea, but there are exceptions. A relevant example that will be highlighted in this article is a defendant pleading nolo contendere to an arson-related crime who then becomes the plaintiff in a civil suit against his insurance company, which refuses to pay on his insurance policy covering the burned property.

All federal courts (and most state courts) agree that when the defendant pleading nolo contendere at the original criminal trial remains the defendant at a subsequent proceeding, his plea is inadmissible against him. Conversely, courts are sharply divided over whether this same criminal defendant would be entitled to the protection of the Federal Rules (and corresponding state codes) if he became the plaintiff in a subsequent civil proceeding. This split in authority is especially relevant because some courts have held that nolo contendere pleas are not only admissible in this scenario, but that they also have a preclusive effect, estopping the (now) plaintiff from asserting his claim and thus foreclosing the possibility of recovery.

Admittedly, the Federal Rules contain some ambiguity that lend credence to either interpretation, assuming, that is, that one ignored the 1979 amendments to the Federal Rules.[4] However, those considering these amendments would find the conundrum resolved.[5] The advisory committee's notes to those amendments explain that the Federal Rules, as then phrased, were being amended precisely because they could support the incorrect conclusion that a criminal defendant pleading nolo contendere could have his plea used against him in a subsequent proceeding in which he became the plaintiff. This being the case, how do we find ourselves in a situation where several federal courts as well as state courts with evidence codes modeled after the Federal Rules continue to support an interpretation of the Rules diametrically opposed to the interpretation proffered in the advisory committee's notes?

This Article argues that courts holding that Federal Rule of Evidence 410, Federal Rule of Criminal Procedure 11(f), and corresponding state codes do not protect civil plaintiffs who previously pleaded nolo contendere are doing so based on blatant disregard for the 1979 amendments to the Federal Rules. Worse, as indicated by the second quote opening this Article, even after ignoring these amendments, these courts still arrive at this conclusion only by contorting the Rules until their substantive protections are lost amid semantic gymnastics

4. *See* Olsen v. Correiro, No. 92-10961-PBS, 1994 WL 548111, at *7 (D. Mass. Sept. 26, 1994) (noting Massachusetts' version of the Federal Rules contains some ambiguity but also stating that the advisory committee's notes to the 1979 amendments conclusively resolve this ambiguity).

5. *Id*.

employed for the specious argument that evidence introduced for the benefit of one party is somehow not introduced *against* the other party. Further, in creating this dichotomy, these courts create potentially anomalous results such that attempts by non-pleading parties to admit prior nolo contendere pleas for the same purpose are either covered or not covered by the Rules based upon arbitrary reasons.

This Article thus argues that the status of the pleading party in a subsequent proceeding should be irrelevant in determining the admissibility of his nolo contendere plea. Part I provides a brief introduction to nolo contendere pleas. Part II discusses why Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) were amended in 1979. Part III analyses how the decision of the United States Court of Appeals for the Sixth Circuit in *Walker v. Schaeffer* was the first to hold that a nolo contendere plea could have a preclusive effect on a subsequent civil proceeding brought by the pleading party. It then proceeds to consider how a significant number of courts have rubber stamped *Schaeffer*'s holding regarding the potential preclusive effect of nolo contendere pleas and applied it in a variety of factual contexts. Finally, Part IV explains why *Schaeffer*'s holding is inherently inconsistent with the 1979 amendments to the Federal Rules and how the attempts of *Schaeffer* and its progeny to explain away these inconsistencies have been fallacious.

I. A BRIEF INTRODUCTION TO NOLO CONTENDERE PLEAS

The Supreme Court has noted that "a guilty plea is an admission of all the elements of a formal criminal charge . . . ."[6] Federal courts have thus long held that, pursuant to Federal Rule of Criminal Procedure 11, they "'shall not enter a judgment upon a plea of guilty unless [they are] satisfied that there is a factual basis for the plea.'"[7] Several courts hold that a guilty plea in a criminal case has a preclusive effect, collaterally estopping criminal defendants from relitigating in a subsequent case any issues necessarily determined by that plea.[8] Collateral estoppel precludes parties from relitigating issues they previously had a "'full and

6. McCarthy v. United States, 394 U.S. 459, 466 (1969).

7. *Id*. at 462 n.4 (quoting FED. R. CRIM. P. 11).

8. *See, e.g.*, McCann v. Mangialardi, 337 F.3d 782, 788 (7th Cir. 2003) ("The district court erred by not analyzing this admission and giving it preclusive effect."); Marinaccio v. Boardman, No. 1:02 CV 00831 NPM, 2005 WL 928631, at *11 (N.D.N.Y. Apr. 19, 2005) (internal citations omitted) ("[I]n New York, 'a guilty plea precludes relitigation in a subsequent civil action of all issues necessarily determined by the conviction'. . . . Thus, for collateral estoppel purposes, 'a guilty plea is equivalent to a conviction after trial[.]'").

fair' opportunity to litigate,"[9] and some courts hold that a party pleading guilty had such a 'full and fair' opportunity to litigate his guilt.[10] Alternatively, several courts hold that a defendant's guilty plea in a criminal case can be introduced as substantive evidence against him in a subsequent case but also note that the plea does not have a preclusive effect.[11]

Conversely, the nolo contendere plea allows a criminal defendant "to avoid the collateral effect of a guilty plea . . . ."[12] A nolo contendere plea is not an express admission of guilt by a defendant, but instead serves "as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency."[13] Because a nolo contendere plea is not an admission of guilt, Federal Rule of Criminal Procedure 11 does not require courts to determine whether an adequate factual basis supports a criminal defendant's nolo contendere plea.[14] For the same reason, a nolo contendere plea is generally not admissible in a subsequent proceeding involving the criminal defendant who made the plea.[15] Furthermore, under the Federal Rules of Evidence, while felony convictions resulting from guilty pleas are admissible as substantive evidence as an exception to the rule against hearsay,[16] felony convictions resulting from nolo contendere pleas are admissible only to

9. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 332–33 (1979).

10. *See, e.g.*, State Farm Fire & Cas. Co. v. Fullerton, 118 F.3d 374, 378 (5th Cir. 1997) ("[W]e have concluded that Texas would most likely follow the rule that a valid guilty plea serves as a full and fair litigation of the facts . . . and thus that a Texas court would preclude Fullerton from contesting State Farm's assertion that he acted intentionally.").

11. *See id*. at 380–81 (citing numerous court decisions from different states holding that guilty pleas are admissible but not preclusive).

12. Refined Sugars, Inc. v. S. Commodity Corp., 709 F.Supp. 1117, 1120 (S.D. Fla. 1988); *see* Lichon v. Am. Universal Ins. Co., 459 N.W.2d 288, 293 (Mich. 1990) ("The primary purpose of a plea of nolo contendere is to avoid future repercussions which would be caused by the admission of liability, particularly the repercussions in potential future civil litigation.").

13. North Carolina v. Alford, 400 U.S. 25, 35 n.8 (1970).

14. *Id*. (construing FED. R. CRIM. P. 11, advisory committee's notes to the 1979 amendments); *see* FED. R. CRIM. P. 11, advisory committee's notes to the 1966 amendments ("For a variety of reasons it is desirable in some cases to permit entry of judgment upon a plea of nolo contendere without inquiry into the factual basis for the plea."). Some state codes do, however, require a factual basis for a nolo contendere plea. *See, e.g.*, Oman v. Davis Sch. Dist, No. 1:03CV57DAK, 2004 WL 724447, at *3 (D. Utah March 5, 2004) (noting that the Utah Rules of Criminal Procedure require a court to find a factual basis before accepting a nolo contendere plea).

15. *See* Olsen v. Correiro, 189 F.3d 52, 59 (1st Cir. 1999) ("The reasons behind . . . making the nolo plea inadmissible are readily apparent.").

16. *See* FED. R. EVID. 803(22) (holding that "[e]vidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year" is admissible as an exception to the rule against hearsay).

impeach the pleader in a subsequent proceeding.[17]

The exact origin of the nolo contendere plea is uncertain, but the Supreme Court in *North Carolina v. Alford* noted that "[t]he plea may have originated in the early medieval practice by which defendants wishing to avoid imprisonment would seek to make an end of the matter (*finem facere*) by offering to pay a sum of money to the king."[18] The partial basis for this conclusion was "[a]n early 15th-century case [which] indicated that a defendant did not admit his guilt when he sought such a compromise, but merely . . .'put himself on the grace of our Lord, the King, and asked that he might be allowed to pay a fine (*petit se admittit per finem*).'"[19] The nolo contendere plea has always been recognized in federal courts in the United States.[20] These pleas have often been criticized on logical and practical bases,[21] but they remain somewhat prevalent, with a 1997 study indicating that 11% of state and 2% of federal defendants entered such pleas.[22]

In a recent article summarizing his interviews with "thirty-four veteran prosecutors, judges, and public, and private defense lawyers," Professor Stephanos Bibas determined that the primary reason defendants enter nolo contendere or *Alford*[23] pleas is the fear of embarrassment and shame associated with a classic guilty plea.[24] While defendants pleading nolo contendere are usually "guilty," "innocent defendants [do] use these pleas infrequently"; Bibas provides the example of a public defender estimating that he had seen between five to ten innocent defendants using the plea in the preceding sixteen years.[25]

17. *See id.*; FED. R. EVID. 609.

18. 400 U.S. at 35 n.8 (citing 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 517 (2d ed. 1909)).

19. *Id*. (quoting Anon., Y.B. Hil., 9 Hen. 6, f. 59, pl. 8 (1431)).

20. FED. R. CRIM. P. 11 advisory committee's notes to the 1944 adoption (construing United States v. Norris, 281 U.S. 619 (1930) and Hudson v. United States, 272 U.S. 451 (1926)).

21. *See, e.g.*, *id*. ("While at times criticized as theoretically lacking in logical basis, experience has shown that it performs a useful function from a practical standpoint."); FED. R. CRIM. P. 11 advisory committee's notes to the 1974 amendments ("[T]he desirability of the plea has been a subject of disagreement.").

22. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1375 & nn.68–70 (2003) (citing CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 8 tbl.17 (2000), *at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc/pdf). "[M]ost cases . . . are handled primarily at the state level." *Id*. at 1376.

23. "Frequently analogized to a plea of nolo contendere, an *Alford* plea often asserts innocence whereas a nolo contendere plea refuses to admit guilt." Burrell v. United States, 384 F.3d 22, 24 n.1 (2d Cir. 2004).

24. Bibas, *supra* note 22 at 1377. The second most prevalent reason is psychological denial. *Id*. at 1378.

25. *Id*.

Furthermore, a few of the defense lawyers Bibas interviewed indicated that some defendants plead nolo contendere to charges for crimes more serious than the ones they committed.[26] The defense lawyers Bibas interviewed categorically approved of the nolo contendere plea while the "prosecutors and judges [we]re more ambivalent."[27]

II. THE ORIGINAL FEDERAL RULES AND THE 1979 AMENDMENTS

A. The Original Enactment of Federal Rule of Evidence 410 and Federal Rule of Evidence 11(e)(6)

As noted, the nolo contendere plea has always been recognized in federal courts in the United States,[28] but the Federal Rules of Criminal Procedure had no explicit provision rendering such pleas inadmissible in subsequent actions when Congress enacted the Rules in 1946.[29] Congress eventually added such a provision, but not until after it enacted the Federal Rules of Evidence in 1975.[30] Rule 410 of the Federal Rules of Evidence codified common law precedent, which held that withdrawn guilty pleas, pleas of nolo contendere, and offers to plead guilty and nolo contendere were inadmissible against an accused.[31] "Rule 410 has easily the most convoluted legislative history . . ." of any Federal Rule,[32] but most of the Congressional battles over the Rule's content occurred over impeachment and perjury-related issues and the issue of whether statements made in connection with pleas and offers to plead should be inadmissible,[33] and thus they do not need to be addressed here. What is important is that Congress eventually enacted Federal Rule of Evidence 410 and then Federal Rule Criminal Procedure 11(e)(6) (which is now

26. *Id*.

27. *Id*. at 1379. Interestingly, Bibas himself strongly advocates against nolo contendere (and *Alford*) pleas in his article. *See id*. at 1367 ("[L]egislatures should abolish . . . nolo contendere pleas. Until they do so, prosecutors should oppose them, and judges should exercise their discretion to reject them.").

28. *See supra* note 20 and accompanying text.

29. *See* United States v. Cockrell, 353 F.Supp.2d 762, 767 (N.D. Tex. 2005) (indicating that the Federal Rules of Criminal Procedure took effect in 1946); FED. R. CRIM. P. 11(f) advisory committee's notes to the 1974 amendments (adding a provision making nolo contendere pleas inadmissible in subsequent trials based on the proposed Federal Rules of Evidence).

30. *See* Complaint of Nautilus Motor Tanker Co., Ltd., 85 F.3d 105, 112 (3d Cir. 1996).

31. FED. R. EVID. 410 advisory committee's notes to the 1979 amendments (construing cases such as General Electric Co. v. City of San Antonio, 334 F.2d 480 (5th Cir. 1964) and Kercheval v. United States, 274 U.S. 220 (1927)).

32. 23 CHARLES A LAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5341 (1980).

33. *Id*.

Rule 11(f)), which contained similar language and covered identical ground.[34] As enacted, Rule 11(e)(6) stated in relevant part that:

> [E]vidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.[35]

Importantly, however, the Rules merely protect the defendant from the admission of his nolo contendere plea. Conversely, the resulting conviction is frequently admissible against the pleading party, typically for impeachment purposes under Federal Rule of Evidence 609 and corresponding state codes.[36] State courts with evidence codes that differ from the Federal Rules are split, with some allowing such convictions to be used for impeachment purposes[37] and others holding that such convictions are inadmissible to impeach.[38]

B. The 1979 Amendments to Federal Rule of Evidence 410 and Federal Rule of Evidence 11(e)(6)

Congress amended the Federal Rules in 1979, primarily to clarify exactly what evidence relating to the plea bargaining process is

34. Indeed, the current Rule 11(f) now simply refers to Rule 410. *See* FED. R. CRIM. P. 11(f). The Supreme Court never explained "[w]hy it was thought necessary to have two identical rules dealing with the same subject . . . ." Wright & Graham, *supra* note 32.

35. United States v. Brooks, 536 F.2d 1137, 1138 (6th Cir. 1976) (quoting FED. R. CRIM. P. 11(e)(6)).

36. *See* Brewer v. City of Napa, 210 F.3d 1093, 1096 (9th Cir. 2000) (citing precedent from the Fifth and D.C. Circuits). "Rule 410, by its terms prohibits only evidence of *pleas* (including no contest pleas) insofar as pleas constitute statements or admissions. Rule 609, by contrast, permits admission for impeachment purposes of evidence of *convictions*." *Id*. This conclusion accords with the legislative intent behind the Rules. A preliminary draft of "Rule 609 permitted the district court to admit 'evidence that [a witness] has been convicted of a crime, except on a plea of *nolo contendere*.'" United States v. Lipscomb, 702 F.2d 1049, 1070 (1983) (quoting Proposed Rule 609(a), 51 F.R.D. 315, 391 (rev. draft 1971)). However, "[t]he exception for nolo [contendere] pleas was deleted from the Advisory Committee's final draft and did not reappear." *Id*.

In some federal cases, a conviction resulting from a nolo contendere plea is admissible as substantive evidence in a subsequent action. These cases "primarily involve statutes that attach some consequence to the fact of a 'conviction.'" Olson v. Correiro, 189 F.3d 52, 61 (1st Cir. 1999).

37. *See, e.g.*, United States v. Poellnitz, 372 F.3d 562, 568 (3d Cir. 2004) (quoting Pa. R. E. 410 cmt.) (noting how the Pennsylvania Rules of Evidence contain a specific comment indicating that its rule 410 "does not prohibit the use of a conviction that results from a plea of *nolo contendere*, as distinct from the plea itself, to impeach in a later proceeding (subject to Pa. R. E. 609) . . . .").

38. *See, e.g.*, People v. Hawkins, 611 N.E.2d 1069, 1078 (Ill. App. Ct. 1993) (construing People v. Montgomery, 268 N.E.2d 695 (Ill. 1971)). Interestingly enough, the Illinois Supreme Court reached this decision based upon the Proposed Rule 609 that was never adopted by Congress. *Id*.

inadmissible.[39] The purpose of these amendments was to clarify the term "against" in Federal Rule of Criminal Procedure11(e)(6) and Federal Rule of Evidence 410.[40] The advisory committee described this amendment as follows:

> The phrase "in any civil or criminal proceeding" has been moved from its present position, following the word "against," for purposes of clarity. An ambiguity presently exists because the word "against" may be read as referring either to the kind of proceeding in which the evidence is offered or the purpose for which it is offered. The change makes it clear that the latter construction is correct.[41]

As amended, Federal Rule of Evidence 410—the current Rule 11(f) now simply refers to Rule 410—now states in relevant part that evidence of a nolo contendere plea, an offer to plead nolo contendere, and related statements are "not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions . . . ."[42] Ostensibly, this amendment is a model of clarity. It lays out a potential conflict in the pre-amendment Federal Rules and then plainly states that the Federal Rules are being amended so that it is clear which construction is correct.

Construction one is that the pre-amendment Federal Rules referred to the kind of proceeding in which a party attempts to admit the plea or offer.[43] Under this reading, then, "in any civil or criminal proceeding against the person who made the plea or offer," that plea or offer is inadmissible.[44] So, if a defendant pleads nolo contendere to arson, his plea would then be inadmissible against him if: 1) the flames burned a neighbor's property, and the neighbor sued the defendant for money damages, or 2) after the arson trial, an individual burned by the flames succumbs to his injuries and dies, and the defendant is sued by the state for murder or manslaughter. Example one is a "civil . . . proceeding against the person who made the plea," and example two is a "criminal

39. *See* FED. R. CRIM. P. 11(e)(6) advisory committee's notes to 1979 amendment ("The major objective of the amendment to rule 11(e)(6) is to describe more precisely, consistent with the original purpose of the provision, what evidence relating to pleas or plea discussions is inadmissible.").

40. *See id*. (discussing how the Rule was being amended "for purposes of clarity").

41. *Id*. The advisory committee's notes also state that "[n]o change is intended with respect to provisions making evidence rules inapplicable in certain situations. *See, e.g.*, FED. R. EVID. 104(a) and 1101(d)." These Rules address the fact that in deciding certain preliminary evidentiary questions, most Federal Rules do not apply, and thus this portion of the amendment is irrelevant to this Article.

42. FED. R. EVID. 410. As noted previously, Rule 11(f) now simply refers to Rule 410. *See* note 34 and accompanying text.

43. *See id*.

44. FED. R. CRIM. P. 11, advisory committee notes to the 1975 amendments.

proceeding against the person who made the plea . . . ."[45] Conversely, under this construction, if a defendant pleaded nolo contendere to arson, the Federal Rules would not prohibit admission of his nolo contendere plea if he subsequently sued his insurance company for failing to pay on his insurance policy covering the burned property because this subsequent case would not be a "proceeding against the person who made the plea. . . ."[46] Instead, it would be a proceeding for the benefit of the person who made the plea (and against the insurance company).

Construction two is that the pre-amendment Federal Rules referred to the purpose for which the plea or offer was used. Under this construction, the nolo contendere plea would be inadmissible against the person making the plea in all three of the above examples. While the case in the third example would not be a "proceeding against the person making the plea," the defendant—the insurance company—would be seeking to use the plea against the pleading party to prove that he maliciously set the fire, preventing him from recovering on his insurance policy. Because the plea would thus be used against the pleading party, it would be inadmissible. Conversely, if a prosecutor made some statements favorable to the defendant during plea discussions, the defendant could potentially introduce these statements in his favor at a subsequent proceeding as evidence of his innocence because these statements would be used "'in favor of' the defendant," not against him.[47]

As noted, the advisory committee plainly stated that this "latter construction is correct."[48] According to the advisory committee, the word "against" in the pre-amendment Federal Rules referred to the party's purpose in attempting to introduce the plea or offer to plead and not to the type of proceeding in which the party sought to introduce it.[49]

45. *Id*.

46. *See id*.

47. As the advisory committee noted, however, such favorable statements by prosecutors are not "inevitably . . . admissible in the defendant's favor." FED. R. CRIM. P. 11(e)(6), advisory committee's notes to 1979 amendment. Specifically, the advisory committee stated that it was not overruling decisions such as *United States v. Verdoon*, where the Eighth Circuit essentially applied Federal Rule of Evidence 408 to plea bargaining and held that "[m]eaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence." 528 F.2d 103, 107 (8th Cir. 1976). However, while the Eighth Circuit has continued to apply and even extend *Verdoon*'s holding, most other circuits have declined to apply Rule 408 to the plea bargaining process. *Compare* United States v. Greene, 995 F.2d 793, 798–799 (8th Cir. 1993) (applying *Verdoon* to bargaining over immunity agreements), *with* United States v. Baker, 926 F.2d 179, 180 (2nd Cir.1991) ("The very existence of Rule 11(e)(6) strongly supports the conclusion that Rule 408 applies only to civil matters.").

48. FED. R. CRIM. P. 11(E)(6), advisory committee's notes to 1979 amendment.

49. *See id*.

In essence, the advisory committee was stating that the pre-amendment Rules should have indicated that a nolo contendere plea "is not admissible, in any civil or criminal proceeding, against the person who made the plea or offer." Without separating the clause "in any civil or criminal proceeding" with commas, a court could interpret the Rule as only applying in any *civil or criminal proceeding against the person* who made the plea or offer (*i.e.*, a proceeding where that person is the defendant). Thus, the advisory committee separated this clause, and not by merely employing commas, but by moving the entire clause so that it came before the word "admissible."

Congress also implemented another amendment that is relevant to this article. As noted, the Federal Rules only prevent the admission of pleas and plea-related statements against the pleading party, so the pleading party could admit favorable statements made by the prosecutor during plea discussions.[50] Congress thus added language to the Rules indicating that statements made during plea discussions are "admissible 'in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.'"[51] The advisory committee noted that this amendment was necessary so that when a party is able to admit certain plea related statements, "other statements relating to the same plea or plea discussions may also be admitted when relevant to the matter at issue."[52] Thus, "if a defendant upon a motion to dismiss a prosecution on some ground were able to admit certain statements made in aborted plea discussions in his favor, then other relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue."[53]

The advisory committee noted that the rationale behind this amendment was similar to the considerations involved in the "rule of completeness" contained in Federal Rule of Evidence 106 and corresponding state rules.[54] Federal Rule of Evidence 106 states that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."[55] The purpose

50. *See supra* note 47 and accompanying text.

51. FED. R. CRIM. P. 11(e)(6), advisory committee's notes to 1979 amendment.

52. *Id*.

53. *Id*.

54. *Id*.

55. FED. R. EVID. 106.

behind Federal Rule of Evidence 106 and corresponding state codes is to prevent a party from transforming a legal protection "from a shield to a sword."[56]

For instance, a defendant can frequently prevent the introduction of an admission made by an alleged co-conspirator because its admission would violate his Constitutional rights under the Confrontation Clause.[57] If, however, the alleged co-conspirator made certain statements favorable to the defendant in addition to the statements implicating the defendant and himself, the defendant could potentially exclude these latter statements while simultaneously introducing these former statements as, *inter alia*, statements against interest.[58] Under the rule of completeness, however, the defendant is prevented from first using the Confrontation Clause as a shield, to prevent the admission of certain statements, and then as a sword, to introduce related statements without a complete factual context.[59] Thus, when a defendant uses plea related statements as a sword, he forfeits any right to claim that the Confrontation Clause serves as a shield to prohibit the introduction of plea-related statements.[60] Similarly, under the 1979 amendments, the pleading party cannot subsequently use the Federal Rules as a sword, to introduce plea-related statements that are favorable to him, and then as a shield, to prevent the admission of other plea-related statements.

III. THE SPLIT AMONG COURTS OVER WHETHER NOLO CONTENDERE PLEAS ARE ADMISSIBLE AGAINST CIVIL PLAINTIFFS

A. Walker v. Schaeffer *and the Preclusice Effect of Nolo Contendere Pleas on Civil Plaintiffs*

In 1984, Professor David L. Shapiro noted that "no court to [his] knowledge ha[d] ever held a plea of nolo contendere to be preclusive, at least in the absence of an explicit statutory provision."[61] A review of the case law through 1984 reveals that Shapiro's belief was likely correct as this author was unable to uncover any cases to that point in which a court found that a defendant's nolo contendere plea was preclusive to a claim made in a subsequent action. This would all change, however, in 1988, when the United States Court of Appeals for the Sixth Circuit

56. State v Prasertphong, 114 P.3d 828, 835 (Ariz. 2005).

57. *See id*. at 834.

58. *See id*.

59. *See id*. at 834–35.

60. *Id*.

61. Shapiro, *supra* note 1, at 32.

became the first federal appellate court to address the issue.[62] In *Walker v. Schaeffer*, two individuals had been arrested for reckless driving and disorderly conduct, and they pleaded nolo contendere.[63] They eventually appealed their convictions, but the Sixth Circuit was "not advised whether the alleged appeal was pursued or of its outcome."[64] They also brought claims as plaintiffs against their arresting officers "under 42 U.S.C. § 1983 for false arrest, detention, and imprisonment in violation of their constitutional rights."[65]

The Sixth Circuit noted that the plaintiffs had entered nolo contendere pleas when they were defendants and offered the following question: "Having voluntarily entered these pleas in state court and having been found guilty of the charges against them, are plaintiffs now estopped from seeking damages resting upon claims based upon alleged false arrest and false imprisonment?"[66] The court discussed the doctrine of collateral estoppel, under which a party with a "'full and fair opportunity to litigate'" an issue at an initial trial is precluded from relitigating that issue at a subsequent trial.[67] The court noted that the plaintiffs had a full and fair opportunity to litigate the issue of their guilt when they were defendants at their initial trial and concluded that their prior convictions thus precluded them from relitigating the issue of whether they were "falsely arrested and/or falsely imprisoned . . . ."[68]

Before concluding its opinion, however, the Sixth Circuit analyzed whether the plaintiffs' previous nolo contendere pleas were inadmissible based upon Federal Rule of Evidence 410. The court, however,

> d[id] not consider [its] conclusion to be barred by Fed. R. Evid. 410, which provides that evidence of "a plea of nolo contendere" is not, "in any civil or criminal proceeding, admissible against the defendant who made the plea." This case does not present the kind of situation contemplated by Rule 410: the use of a nolo contendere plea against the pleader in a subsequent civil or criminal action in which he is the *defendant* . . . . In this case, on the other hand, the persons who entered prior no-contest pleas are now plaintiffs in a civil action.[69]

62. *See* Lichon v. Am. Universal Ins. Co., 459 N.W.2d 288, 302 (Mich. 1990) (Griffin, J., dissenting) (noting that the Sixth Circuit in *Schaeffer* was "the only federal appellate court to confront this issue . . . .").

63. 854 F.2d 138, 139–40 (6th Cir. 1988).

64. *Id*. at 140.

65. *Id*. at 139.

66. *Id*. at 142.

67. *Id*.

68. *Id*.

69. *Id*. at 143. The Sixth Circuit cited to *United States v. Manzella*, 782 F.2d 533 (5th Cir. 1986), as a case where Federal Rule of Evidence 410 applied when the person pleading nolo contendere

The Sixth Circuit asserted that "Rule 410 was intended to protect a criminal defendant's use of the nolo contendere plea to defend himself from future civil *liability*."[70] The court noted that when the pleading party becomes the plaintiff in a subsequent civil trial, he is attempting to recover from a civil defendant and thus held that the plaintiff's prior nolo contendere plea could be "interpreted to be an admission which would preclude liability" on the part of the civil defendant.[71] In doing so, the Sixth Circuit "decline[d] to interpret the rule so as to allow the former defendants to use the plea offensively, in order to obtain damages, after having admitted facts which would indicate no civil liability on the part of the arresting police."[72]

The court found that "use of the no-contest plea for estoppel purposes is not 'against the defendant' within the meaning of Fed. R. Evid. 410. This use would be more accurately characterized as 'for' the benefit of the 'new' civil defendants . . . ."[73] Under the court's analysis, there is thus a dichotomy: when the pleading party remains the defendant in a subsequent civil proceeding, and the civil plaintiff attempts to admit his prior plea, the civil plaintiff is offering the plea *against* the pleading party, rendering the plea inadmissible under the Rules. Conversely, when the pleading party becomes the plaintiff in a subsequent civil proceeding, and the civil defendant attempts to admit his prior plea, the civil defendant is offering the plea *for his own benefit*, and is *not* offering it *against* the pleading party, rendering the Federal Rules inapplicable.

As should be evident from the Shapiro quotation opening this section, *Schaeffer* was a landmark case, the first to hold that a defendant's nolo contendere plea could be admitted against him as substantive evidence in a subsequent civil case, precluding him from recovering damages.[74] And yet, while the case certainly had an impact in subsequent federal and state precedent,[75] it has received scant attention in legal scholarship. Beginning in 1991, the case has been consistently cited in the

remained the defendant in a subsequent criminal trial. The court, however, cited no precedent as support for its position that Rule 410 was inapplicable when the person pleading nolo contendere became the plaintiff in a subsequent trial. This makes sense, of course, because, as noted, *Schaeffer* was likely the first case to so hold. *See supra* note 62 and accompanying text.

70. *Schaeffer*, 854 F.2d at 143.

71. *Id*.

72. *Id*.

73. *Id.*

74. *See* Lichon v. Am. Universal Ins. Co., 459 N.W.2d 288, 302 (Mich. 1990) (Griffin, J., dissenting) (noting how the Sixth Circuit was "the only federal appellate court to confront this issue . . .").

75. *See infra* Part III.C–E.

Georgetown Law Journal's *Annual Review of Criminal Procedure*, but solely in a footnote as one of several cases holding that "the doctrines of res judicata and collateral estoppel may also bar a section 1983 action."[76] In 1990, the case was briefly cited in an Indiana Law Journal article at the end of a long footnote.[77] Finally, the case was discussed in a 1993 Connecticut Law Review article, but for reasons unrelated to nolo contendere pleas and collateral estoppel.[78]

B. The MacGuffin of § 1983: Why Legal Scholarship Has Ignored Schaeffer's *Effect*

The principal reason for the dearth of scholarship on *Schaeffer* as it relates to the potential preclusive effects of nolo contendere pleas can likely be found in how the case has been cited in the *Annual Review of Criminal Procedure*. There, as noted, *Schaeffer* has been cited as merely one of several cases standing for the proposition that some § 1983 claims can be precluded by res judicata or collateral estoppel. Indeed, in this sense, *Schaeffer* was not a novel case. Eight years before *Schaeffer* was decided, the Supreme Court in *Allen v. McCurry* noted that "every Court of Appeals that has squarely decided the question has held that collateral estoppel applies when § 1983 plaintiffs attempt to relitigate in federal court issues decided against them in state criminal proceedings."[79] In fact, this is the same reasoning initially employed by the Sixth Circuit in *Schaeffer* in holding that the plaintiffs in that case were collaterally estopped from bringing their § 1983 claims based upon their prior *convictions*.[80]

The Sixth Circuit in *Schaeffer* proceeded to deviate from this precedent, however, when it subsequently attempted to consider whether the plaintiffs' previous *nolo contendere pleas* were inadmissible based upon Federal Rule of Evidence 410.[81] Why the Sixth Circuit decided to resolve this issue is unclear. All courts previously facing § 1983 claims by convicted defendants merely held that their claims were precluded by virtue of their prior convictions, not on the basis of their nolo contendere

76. *See, e.g.*, 91 GEO. L.J. ANNUAL REVIEW OF CRIMINAL PROCEDURE 929, 954 & n.2922 (2003).

77. *See* Marjorie A. Silver, *In Lieu of Preclusion: Reconciling Administrative Decisionmaking and Federal Civil Rights Claims*, 65 IND. L.J. 367, 381 n.77 (1990).

78. Linda R. Crane, *Family Values and the Supreme Court*, 25 CONN. L. REV. 427, 455–458 (1993).

79. 449 U.S. 90, 102 (1980).

80. Walker v. Schaeffer, 854 F.2d 138, 142 (6th Cir. 1988).

81. *Id.* at 143.

(or guilty) pleas.[82] Thus, the language in *Schaeffer* regarding the admissibility of the plaintiffs' prior nolo contendere pleas was dicta, which perhaps explains why legal scholarship has ignored this portion of the decision and merely focused on the non-novel aspects of the decision.[83] Yet, while legal scholarship has ignored this aspect of the *Schaeffer* decision, this Sixth Circuit opinion has had a wide ranging impact outside the § 1983 context. And while, for the most part, *Scaheffer*'s holding remains irrelevant in the § 1983 context because it is dicta,[84] it is enormously important outside the § 1983 context, where a criminal conviction does not have a preclusive effect upon a subsequent civil proceeding.

C. Schaeffer's *Impact Within the Sixth Circuit*

The *Schaeffer* case had an almost immediate impact on cases both at the state and federal levels in the Sixth Circuit. Decided three months after *Schaeffer*, *Lichon v. American Universal Insurance Company* involved an insurance company refusing to allow its insured to recover under his insurance policy after he was convicted of attempted burning of insured premises after his nolo contendere plea.[85] The state trial court granted the insurance company's motion for summary disposition, and the insured appealed to the Court of Appeals of Michigan on the ground that his plea was inadmissible under Michigan Rule of Evidence 410,[86] which mirrored pre-amendment Federal Rule of Evidence 410.[87] The court then noted that "[t]his provision could be interpreted to make evidence of a nolo contendere plea inadmissible against the person who made the plea in any proceeding by or against the person."[88] The court found, however, that

> this interpretation goes too far by allowing the use of the nolo contendere plea not only as a shield, but as a sword. We favor an interpretation of

82. *See, e.g.,* Martin v. Delcambre, 578 F.2d 1164, 1165 (5th Cir. 1978) (holding that § 1983 plaintiff was collaterally estopped based on his prior state court conviction).

83. *See supra* notes 74–80 and accompanying text. Additionally, some courts in § 1983 cases have noted the Sixth Circuit's holding regarding nolo contendere pleas, but simply disregarded it as dicta. For instance, in *Olson v. Correiro*, 189 F.3d 52, 62 n.12 (1st Cir. 1999), the United States Court of Appeals for the First Circuit found a § 1983 plaintiff's prior manslaughter conviction and sentence precluded his claims and noted that its conclusion did "not rest on the analysis set forth in *Walker v. Schaeffer*."

84. *But see infra* Part III.E.

85. 433 N.W.2d 394 (Mich. Ct. App. 1988).

86. *See id*. at 394–95.

87. Levin v. State Farm Fire & Cas. Co., 735 F.Supp. 236, 238 (E.D. Mich. 1990).

88. *Lichon*, 433 N.W.2d at 395.

> MRE 410 which would preclude the admission of evidence of a nolo contendere plea in proceedings which are brought against the person who made the plea, but not in proceedings which are brought by that person.[89]

While the court thus primarily focused on the preclusive effect of the insured's prior plea, it did also briefly state at the end of its opinion that the insured's "conviction established [his] violation of his insurance policy's exclusionary clause and bar[red] his recovery for the damage which he caused."[90] Judge Sawyer dissented form the majority's opinion, holding that "to allow a trial judge to use a plea of nolo contendere in deciding a motion for summary disposition would, in fact, make the use of a nolo contendere plea in a criminal case meaningless."[91] Sawyer took

> specific exception to the majority's observation that disallowing the use of the nolo contendere plea in the case at bar would go "too far by allowing the use of a nolo contendere plea not only as a shield, but as a sword." The fact that plaintiff's nolo contendere plea may not be used to establish the fact the he burned the property in question would not, as the majority seems to imply, mandate plaintiff's recovery. Disallowing the use of the nolo plea would not serve as a sword for plaintiff to enforce the insurance contract. Rather, it is the majority's interpretation which would turn the nolo contendere plea into a sword—a sword for defendant to use to run through plaintiff.[92]

Sawyer also took offense to the majority's conclusion that Michigan Rule of Evidence 410 applied only in "proceedings against the person making the plea," instead concluding that it "applie[d] to any proceeding, civil or criminal."[93] He finally noted that his reading of Rule 410 did not bar the defendant from presenting evidence to establish that the plaintiff attempted to burn his property; it merely precluded the defendant from establishing this fact through the plaintiff's prior nolo contendere plea.[94] Sawyer even acknowledged that it appeared likely that the insurance company had a valid defense and noted that, unlike in a criminal action, the company did not have to prove the insured's guilt beyond a reasonable doubt.[95]

89. *Id*.

90. *Id*.

91. *Id*. at 396 (Sawyer, J., dissenting).

92. *Id*.

93. *Id*. n.1. Justice Sawyer did not, however, cite to the 1979 amendments to the Federal Rules or the advisory committee's notes accompanying them.

94. *Id.*

95. *Id*.

Two years later, different judges of the Court of Appeals of Michigan were presented with a similar factual scenario in *Ramon v. Farm Bureau Insurance Company*.[96] In *Ramon*, Steven Ramon put in a claim to his insurance company for property that was burned in a fire, the company denied his claim, and he sued it for breach of contract.[97] While that case was pending, a prosecutor charged Steven Ramon with setting fire to property with intent to burn and setting fire to property not a dwelling with intent to defraud an insurance company.[98] During trial, Ramon accepted the prosecutor's offer "to dismiss the pending charges and allow [him] to plead nolo contendere to a misdemeanor charge of attempting to obtain money under false pretenses less than $100."[99] In the breach of contract action against the insurance company, the trial court subsequently granted summary disposition in favor of the company because Ramon's nolo contendere plea voided his insurance contract.[100]

The Court of Appeals reversed, "reject[ing] the rule set forth in the majority opinion in *Lichon*," and specifically adopting Judge Sawyer's "well-reasoned dissent."[101] The court essentially repeated the arguments in Sawyer's dissent, noting that the insurance company could still prove the plaintiff's culpability through other means, but holding that the trial court's ruling was "tantamount to giving defendant a sword that defeats the very purpose of a nolo contendere plea."[102]

Later that year, the United States District Court for the Eastern District of Michigan was also presented with a similar factual scenario in *Levin v. State Farm Fire & Casualty Company*.[103] In *Levin*, Howard Levin put in a claim to his insurance company for fire damage to his home, the company denied his claim, and he sued it for breach of contract.[104] In a related criminal action, Levin pleaded nolo contendere to arson, and in the breach of contract action, the insurance company sought to introduce his plea as part of its defense while the defendant claimed that its admission was prohibited by Federal Rule of Evidence 410.[105] The court mentioned the decision of the Court of Appeals of Michigan in *Lichon*, but it found that it was not controlling because the

96. 457 N.W.2d 90 (Mich. Ct. App. 1990).
97. *Id*. at 91.
98. *Id*.
99. *Id*.
100. *Id*.
101. *Id*. at 92.
102. *Id*. at 93.
103. 735 F.Supp. 236 (E.D. Mich. 1990).
104. *Id*. at 237.
105. *Id*.

language in Michigan Rule of Evidence 410 was slightly different from the language in the post-amendment version of Federal Rule of Evidence 410.[106]

The court, however, proceeded to cite to the 1979 amendments to the Federal Rules and the accompanying advisory committee's notes.[107] Based upon this citation, the court found that "the nature of the subsequent proceeding (here, a civil action) and, impliedly, the status in such subsequent proceeding, of the person offering the plea (*i.e.* defendant or plaintiff) is immaterial" in determining whether a party's prior nolo contendere plea can be used against him.[108] Nonetheless, although the court found that Levin's prior nolo contendere plea should not be admissible against him solely because he was a civil plaintiff, the court, as a federal district court in the Sixth Circuit, was "constrained to follow [the] contrary interpretation by the Sixth Circuit" in *Walker v. Schaeffer*.[109] Therefore, despite disagreeing with the Sixth Circuit's ruling, the court found that Levin's prior nolo contendere plea was admissible against him.[110]

Later that same year, the Supreme Court of Michigan reversed the decision of the Court of Appeals of Michigan in *Lichon v. American Universal Insurance Company*.[111] Relying upon Judge Sawyer's dissent at the Court of Appeals level and the decision in *Ramon* specifically adopting Sawyer's reasoning, the court reversed and held that Lichon's nolo contendere plea was inadmissible against him in the breach of contract action against his insurance company.[112] As in *Levin*, the court cited to the 1979 amendments to the Federal Rules and the accompanying advisory committee's notes as support for its position.[113] Conversely, in a dissenting opinion, Justice Griffin noted that Michigan Rule of Evidence 410 was modeled after the pre-amendment version of Federal Rule of Evidence 410, making this subsequent legislative history irrelevant.[114]

In his dissent, Justice Griffin also noted that the public policy behind the nolo contendere plea is to promote plea bargaining.[115] He found, however, that "the promotion of plea bargaining is not a public interest

106. *Id*. at 238.
107. *Id*.
108. *Id*.
109. *Id*. at 239.
110. *Id*.
111. 459 N.W.2d 288 (Mich. 1990).
112. *Id*. at 295–97.
113. *Id*. at 296–97.
114. *Id*. at 301–02 (Griffin, J., dissenting).
115. *Id*. at 303.

so overriding and paramount as to compel . . . a construction [of Rule 410] which actually aids the criminal defendant if he seeks to profit from his crime."[116] Justice Griffin thus argued for an affirmance of the decision of the Court of Appeals because he felt that the majority's opinion would "make it easier for an arsonist to collect on his fire insurance after he burns down his house or place of business."[117] He instead favored an interpretation of Michigan Rule of Evidence 410 which prevented admission of a party's prior nolo contendere plea only if that party remained the defendant in the subsequent civil proceeding.[118]

In his majority opinion, Justice Archer countered that the dissent's reading of Michigan Rule of Evidence 410 would "lead to nonsensical results."[119] By *per se* concluding that a civil plaintiff is not protected by Rule 410, not only nolo contendere pleas but also withdrawn guilty pleas (and offered guilty pleas that were rejected) would be admissible.[120] Assuming slightly different facts, this interpretation could create the paradoxical scenario: "For instance, if, instead of pleading nolo contendere, Lichon made an offer to plead guilty that the prosecutor rejected and Lichon was acquitted after a trial, his plea offer would be admissible under the dissent's interpretation."[121]

Archer also posited a situation where an insured suffers fire damage to his property, puts in a claim to his insurance company, and the company, unmindful of any bad faith on the part of the insured, pays him policy proceeds.[122] A prosecutor subsequently charges the insured with arson, and the insured pleads nolo contendere.[123] As a result, the insurance company brings a civil claim for restitution against the insured.[124] Under the reasoning employed by the dissent (and the Sixth Circuit in *Schaeffer*), the insured's prior nolo contendere plea would be inadmissible in this civil action because it would be a proceeding against the pleading party, who would remain the defendant.[125] This would be an anomalous result because "the use to which the insurer wishes to put the plea is indistinguishable from the use the trial court made of

116. *Id*.
117. *Id*. at 300.
118. *Id*. at 302–303.
119. *Id*. at 296.
120. *Id*.
121. *Id*. at 296–97.
122. *Id*. at 296.
123. *Id*.
124. *Id*.
125. *Id*.

Lichon's plea."[126] The only difference would be that the insurance company in this hypothetical scenario was not initially aware of the insured's arson, resulting in its awarding him policy proceeds.

The court noted that the Michigan Court of Appeals also determined that Lichon's claim was precluded as a result of his conviction, as opposed to his plea;[127] however, the court held that this determination was fallacious as Michigan Rule of Evidence 803(22) (like its federal counterpart) provides that convictions resulting from guilty pleas, but not nolo contendere pleas, are admissible as exceptions to the rule against hearsay.[128] Justice Archer did note that "[t]he public interest might be served better by a rule that prevents an individual who pled nolo contendere to criminal charges from excluding evidence of that plea in an action in which the pleader seeks to establish some entitlement arising out of the crime of which the pleader was convicted."[129] The court refused, however, to amend Michigan Rules of Evidence 410 and 803(22) as written, instead finding that "[s]uch a change in the law would be more properly accomplished through our administrative powers to amend the Rules of Evidence, because the administrative process gives us greater opportunity to deliberate the effects of such a change and to gather input from the public, the bench, and the bar."[130]

This is in fact what transpired only one year later, as Michigan Rules of Evidence 410 and 803(22) were both amended.[131] Initially, Rule 410 was amended so that it conformed "to the current version of its federal counterpart."[132] Now, as with Federal Rule of Evidence 410, Michigan Rule of Evidence 410 reads in relevant part that nolo contendere pleas, offers to plead nolo contendere, and related statements are "not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions."[133] According to the notes accompanying the amendment, this change "clarified the rule's original intent as explained in *Lichon v. American Universal Ins. Co.*, 435 Mich 408 (1990)."[134]

126. *Id*.
127. *See supra* note 89 and accompanying text.
128. *Lichon*, 459 N.W.2d at 297.
129. *Id*.
130. *Id*.
131. *See* MICH. R. EVID. 410 (note to 1991 amendment).
132. *Id*.
133. MICH. R. EVID. 410.
134. MICH. R. EVID. 410 (note to 1991 amendment).

It was also determined, however, that the public policy reasons cited in *Lichon* were valid, resulting in a new exception to Michigan Rule of Evidence 410 with "no federal counterpart."[135] As a result of this exception, a nolo contendere plea is inadmissible in a subsequent proceeding, "except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea."[136] Mich. R. Evid. 803(22) was also amended so that a felony conviction resulting from a guilty plea "*(or upon a plea of nolo contendere if evidence of the plea is not excluded by MRE 410*)" is admissible as substantive evidence as an exception to the rule against hearsay.[137] The practical effect of this amendment was to overrule the holding in *Lichon* (and the advisory committee's notes to the 1979 amendments to the Federal Rules) so that, for all intents and purposes, in a proceeding brought by a party who previously pleaded nolo contendere, that party's plea and, if applicable, the resulting felony conviction, are admissible to the same extent as if the party pleaded guilty.[138]

D. Schaeffer's *Effect Outside the Sixth Circuit*

While Michigan thus amended its rules to deviate from the Federal Rules to achieve its public policy goals, courts outside the Sixth Circuit generally have rubber stamped *Schaeffer*'s unprecedented interpretation of Federal Rule of Evidence 410 to reach similar results in a variety of contexts. A few examples are representative.

In *Brown v. Theos*, Curtis Brown was convicted, upon a jury verdict, of drug related offenses and, inter alia, sentenced to twenty-five years imprisonment.[139] Three attorneys represented Brown on direct appeal, where the court upheld his conviction.[140] Brown then filed an application for post-conviction relief based on the ineffective assistance of his counsel, and the court granted his motion and ordered a new trial.[141] At the new trial, Brown pleaded nolo contendere to the charges

135. *Id*.

136. MICH. R. EVID. 410.

137. MICH. R. EVID. 803(22) (emphasis added); *see* MICH. R. EVID. 803(22) (note to 1991 amendment).

138. *See* MICH. R. EVID. 410 (note to 1991 amendment) (noting how the change "altered one of the holdings in *Lichon*"); MICH. R. EVID. 803(22) (note to 1991 amendment) (same); Neshewat v. Salem, 173 F.3d 357, 362 n.4 (6th Cir. 1999).

139. 550 S.E.2d 304 (S.C. 2001).

140. *Id*. at 305.

141. *Id*.

and was sentenced to eight years imprisonment.[142] Subsequently, "Brown brought a legal malpractice action against [two of his attorneys] alleging that but for their grossly negligent representation, he would have fared better at trial and would not have been convicted through a plea of [nolo contendere] or otherwise."[143] In relevant part, South Carolina Rule of Evidence 410 mirrors post-amendment Federal Rule of Evidence 410 in holding that a nolo contendere plea is "not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea."[144]

The Supreme Court of South Carolina affirmed the determination of the Court of Appeals that Brown did not have a cause of action against his attorneys because it found that "public policy [wa]s not offended by forbidding a client from bringing a legal malpractice action against his criminal attorney after the client ha[d] pled no contest to the charges."[145] The court interpreted South Carolina Rule of Evidence 410 as "not contemplat[ing] the type of proceeding at issue in this case . . . ."[146] The court noted that Brown, as the civil plaintiff, was attempting "to use his no contest plea offensively for his own benefit."[147] The court concluded that South Carolina Rule of Evidence 410 "was never intended to cover this type of case" and cited only *Schaeffer* as support for the argument that "federal courts have found Rule 410 of the Federal Rules of Evidence does not bar use of pleas against a defendant who becomes plaintiff with respect to events in plea."[148]

In *Rose v. Uniroyal Goodrich Tire Company*, Arlen Rose was employed at the defendant's tire plant, which had a "zero tolerance policy toward illegal drug use."[149] Rose was arrested and pleaded nolo contendere to possession of marijuana.[150] The defendant then fired Rose, who subsequently "sought and received an Order of Expungement of the record of his no contest plea."[151] Upon Rose's request, the defendant granted him a Fair Treatment Panel, which determined that his firing was justified.[152]

142. *Id*.
143. *Id*.
144. S.C. R. OF EVID. 410; *see* FED. R. EVID. 410.
145. *Theos*, 550 S.E.2d at 306–07.
146. *Id*. at 307 n.2.
147. *Id*.
148. *Id*.
149. 219 F.3d 1216, 1218 (10th Cir. 2000).
150. *Id*.
151. *Id*. at 1219.
152. *Id*.

Rose then brought wrongful discharge suit in federal district court accompanied by a motion in limine seeking to exclude all evidence relating to his nolo contendere plea.[153] The court denied his motion and accordingly granted summary judgment to the defendant.[154] Upon his subsequent appeal, the United States Court of Appeals for the Tenth Circuit found that Rose could not "affirmatively use the general rule against admission of nolo contendere pleas to prevent [the defendant] from introducing the very evidence it relied upon in making the termination decision."[155]

The court noted that neither of the two primary reasons behind excluding nolo contendere pleas in subsequent civil actions was advanced by excluding Rose's nolo contendere plea.[156] The first reason behind excluding nolo contendere pleas is to allow a criminal defendant who would otherwise plead guilty to make such a plea, thereby "prevent[ing] the plea from being used as an admission in a subsequent civil action."[157] The second reason "'is a desire to encourage compromise resolution of criminal cases.'"[158] The court determined that "[b]oth of these reasons assume a situation in which the criminal defendant is being sued in a later civil action, and the plea is offered as proof of guilt."[159] Citing *Schaeffer*, the court held that the defendant's use of Rose's plea was not "against" Rose.[160] Instead, it was a "defensive" use of the plea by a civil defendant as opposed to an "offensive" use of the plea by a civil plaintiff.[161]

In *Oman v. Davis School District*,[162] the United States District Court for the District of Utah was presented with a similar factual scenario. In *Oman*, the defendant school district contacted the county attorney after it discovered that Oman, an employee in its maintenance division, may have been working for his own company "during his hours of employment with the [d]istrict."[163] The results of the subsequent criminal investigation caused the district to suspend Oman, and he was eventually charged with communications fraud.[164] Subsequently, upon

153. *Id*.
154. *Id*.
155. *Id*. at 1220.
156. *See id*.
157. *Id*.
158. *Id*. (quoting Olson v. Correiro, 189 F.3d 52, 59 (1st Cir. 1999)).
159. *Id*.
160. *See id*. (citing Walker v. Schaeffer, 854 F.2d 138, 143 (6th Cir. 1988)).
161. *See id*.
162. No. 1:03CV57DAK, 2004 WL 724447 (D. Utah Mar. 5, 2004).
163. *Id*. at *1.
164. *See id*.

Oman's no contest plea and the results of the district's own investigation, the district terminated his employment.[165] Oman then brought an action seeking to recover for, inter alia, breach of contract, and the district brought a counterclaim for restitution.[166] Relying extensively upon the Tenth Circuit's decision in *Rose*, the court found that Oman's no contest plea was admissible against him to controvert his "offensive" claims because he was a civil plaintiff.[167]

Conversely, however, the court determined that the district could not admit Oman's plea against him to prove its counterclaim for restitution.[168] The court found that "the use of the plea itself in order to prove the restitution counterclaim is asserting the plea 'against' the defendant," and observed that the district could prove its counterclaim without the use of the plea.[169] The court did note, however, that the district could use Oman's plea to prove its counterclaim "for impeachment purposes, if necessary."[170]

Finally, in *Pinney Dock & Transport Co. v. Penn Cent. Corp.*,[171] the Bessemer and Lake Erie Railroad (hereinafter "B & LE") and other railroads, including Penn Central, were charged with a criminal violation of the Sherman Act for their participation in a conspiracy. B & LE pleaded nolo contendere and was subsequently convicted and fined.[172] Pinney, a private dock, and Litton a manufacturer or operator of self-loading vessels, claimed to be injured by the conspiracy and brought a civil action against B & LE that was settled before trial.[173] B & LE then sought "contribution from Penn Central toward the amount of these settlement payments."[174]

Upon Penn Central's motion for summary judgment, the District Court for the Northern District of Ohio dismissed the action, holding that B & LE could not recover for contribution under Ohio law because it was an intentional tortfeaser.[175] Relying upon *Schaeffer*, the court held that there was not a genuine issue of material fact as to whether B & LE intentionally injured Pinney and Litton because its nolo contendere plea "admitted the allegations in the indictment, at least to

165. *See id*. at *1–2.
166. *See id*. at *1.
167. *See id*. (construing Rose v. Uniroyal Goodrich Tire Co., 219 F.3d 1216 (10th Cir. 2000)).
168. *See id*. at *3.
169. *Id*.
170. *Id*.
171. 991 F. Supp. 908, 910 (N.D. Ohio 1998).
172. *Id*.
173. *See id*.
174. *Id*.
175. *Id*.

the extent that it could not thereafter assert contrary civil claims."[176]

These cases indicate how *Schaeffer*'s novel holding has been applied beyond the § 1983 context to a variety of new contexts such as actions for insurance proceeds, malpractice, wrongful termination, and contribution. While *Schaeffer*'s holding regarding nolo contendere pleas was merely dicta, courts are nevertheless relying upon *Schaeffer*'s holding as the sole basis for their decisions in non-§ 1983 cases, where criminal convictions are not preclusive with regard to subsequent civil proceedings. Notably, however, even in the § 1983 context, a significant subset of cases remains in which *Schaeffer*'s holding regarding nolo contendere pleas is not dicta.

E. Heck v. Humphrey *and* Schaeffer's *Continuing Effect in § 1983 Jurisprudence*

As noted previously, well before *Schaeffer*, consensus existed among courts that "collateral estoppel applies when § 1983 plaintiffs attempt to relitigate in federal court issues decided against them in state criminal proceedings."[177] In this sense, § 1983 actions by plaintiffs previously convicted upon nolo contendere pleas are precluded on the basis of their prior *convictions*, so *Schaeffer*'s holding regarding the admissibility of their *pleas* is irrelevant because collateral estoppel applies regardless of whether their pleas are admissible.[178] In *Heck v. Humphrey*,[179] however, the Supreme Court clarified § 1983 jurisprudence in a way that made the issue of the admissibility of nolo contendere pleas relevant in a significant subset of § 1983 cases.

The Court in *Heck* tweaked prior precedent by noting that a valid conviction precludes a § 1983 plaintiff from recovering "damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid . . . ."[180] Thus, for instance, a defendant convicted of resisting arrest—defined as "intentionally preventing a peace officer from effecting a *lawful* arrest"—could not subsequently bring a § 1983 claim seeking "damages for violation of his Fourth Amendment right to be free from unreasonable seizures."[181] The criminal defendant could

176. *Id*. at 911 (construing Walker v. Schaeffer, 854 F.2d 138 (6th Cir. 1988)). The court went on to note that under *Schaeffer*, "B & LE's felony conviction is admissible in this action, and establishes that B & LE criminally violated the antitrust laws by engaging in the Iron Ore Conspiracy." *Id*. at 912.

177. Allen v. McCurry, 449 U.S. 90, 102 (1980).

178. *See supra* note 83 and accompanying text.

179. 512 U.S. 477 (1994).

180. *Id*. at 486.

181. *Id*. at 486 n.6.

not bring this claim because resisting arrest is "defined as intentionally preventing a peace officer from effecting a *lawful* arrest," and were the § 1983 claim successful, the conviction would be invalid because the defendant would not have been *lawfully* arrested.[182]

The Court, however, was quick to note that when a "court determines that the plaintiff's action even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed . . . ."[183] The Court provided the example of a convicted defendant subsequently bringing a § 1983 claim seeking compensatory damages for an unreasonable search.[184] Were the § 1983 plaintiff to recover on such a claim it "would not *necessarily* imply that the plaintiff's conviction was unlawful . . . [b]ecause of doctrines like independent source and inevitable discovery . . . , and especially harmless error."[185]

One result of this example employed by the Court in *Heck* has been that courts have considered the issue of whether a § 1983 claim based upon excessive force by arresting officers is precluded when the § 1983 plaintiff was previously convicted of resisting arrest.[186] In *Douglas v.*

182. *See id*.

183. *Id*. at 487.

184. *Id*. at 487 n.7.

185. *Id*. (internal citations omitted). The *Heck* decision is thus somewhat enigmatic. A § 1983 plaintiff can recover compensatory damages for constitutional violations, but only if these violations would not invalidate his conviction. Thus, if the prosecution presents overwhelming evidence of a defendant's guilt at trial, that defendant could subsequently recover as a § 1983 plaintiff by proving that he suffered injuries during an illegal search because the court's failure to exclude evidence from that search would be harmless error. However, if the primary or sole evidence introduced against a defendant against trial comes from an allegedly illegal search, that defendant could subsequently recover as a § 1983 plaintiff for injuries suffered during that search because his success would not render his conviction invalid.

This somewhat paradoxical holding by the Supreme Court understandably has led to some interesting circuit splits. One circuit split directly addresses the unreasonable search example raised by the Court. As noted in a few law review articles, some circuits construe *Heck* as holding that a convicted defendant can bring a § 1983 claim based upon an unreasonable search without the prior reversal of his conviction or the ruling admitting evidence obtained from that search while others require such reversal. *See* Paul D. Vink, Note, *The Emergence of Divergence: The Federal Court's Struggle to Apply* Heck v. Humphrey *to § 1983 Claims for Illegal Searches*, 35 IND. L. REV. 1085, 1087 (2002) (contrasting the approaches of the Second, Fifth, Sixth, and Ninth Circuits with the approaches of the Seventh, Eighth, Tenth, and Eleventh Circuits); John Stanfield Buford, *When the* Heck *Does This Claim Accrue?* Heck v. Humphrey*'s Footnote Seven and § 1983 Damages Suits for Illegal Search and Seizure*, 58 WASH & LEE L. REV. 1493, 1510–1532 (2001) (same).

186. As in the unreasonable search context discussed in the previous footnote, courts have sharply divided over this issue. *See* Benjamin Vetter, Comment, *Habeas, Section 1983, and Post-Conviction Access to DNA Evidence*, 71 U. CHI. L. REV. 587, 605 n.98 (2004) (discussing *Smithart* and excessive force claims); Vink, *supra* note 185 at 1089(arguing that excessive force claims are prohibited under *Heck*); Buford, *supra* note 185 at 1519–20 & n.158 (discussing excessive force claims).

Public Safety Comm'n,[187] the United States District Court for the District of Delaware was presented with a § 1983 excessive force claim by a prior criminal defendant (Douglas) who had pleaded nolo contendere to resisting arrest in a state criminal court proceeding. The defendants subsequently moved for summary judgment dismissing the claim against them.[188] Before addressing the substance of Douglas's claims, the court construed *Schaeffer* as holding that Federal Rule of Evidence 410 "contemplates a situation where the nolo contendere plea is being used against the pleader in a subsequent civil or criminal action in which he is the *defendant*."[189] The court adopted this view and thus found that Douglas' prior nolo contendere plea was admissible.[190] The court went on to state, however, that regardless of *Schaeffer*, under *Heck*, to the extent that Douglas' recovery on his § 1983 claim would necessarily imply the invalidity of his state court conviction, he was precluded from bringing his claim.[191]

Before dismissing the § 1983 claim, however, the court noted that Douglas did not indicate whether he was challenging the fact that he resisted arrest or whether he was arguing "that he was, in fact, resisting arrest, but that [the police officer's] use of force was nevertheless excessive . . . ."[192] Assuming that the plaintiff intended to make the latter argument, it found that his claim was not precluded based under *Heck* because his recovery on his § 1983 claim would not invalidate his conviction for resisting arrest.[193]

Douglas thus illustrates why *Schaeffer*'s holding is relevant and not merely dicta in a significant subset of § 1983 cases. In any case where a plaintiff who previously pleaded nolo contendere brings a § 1983 claim which, if successful, would not invalidate his state criminal court conviction, *Heck* is inapplicable; the § 1983 plaintiff's prior conviction is not preclusive; and the court must decide whether his prior nolo contendere plea is admissible. Courts such as the United States District Court for the District of Delaware, which rely upon *Schaeffer*, will hold that such pleas are admissible. The question thus becomes whether these courts and courts in the non-§ 1983 context are correct in their analysis.

187. No. Civ.A. 01-149 GMS, 2002 WL 31050863 (D. Del. Sept. 13, 2002).

188. *Id*. at *1.

189. *Id*. at *8 (construing Walker v. Schaeffer, 854 F.2d 138, 143 (6th Cir. 1988)).

190. *See id*.

191. *See id*.

192. *Id*. at *8

193. *Id*.

IV. RESOLVING THE SPLIT

A. Why the Type of Proceeding is Irrelevant Under the Federal Rules

In *Walker v. Schaeffer*, the Sixth Circuit essentially engaged in a two prong analysis to explain why, in its view, Federal Rule of Evidence 410 does not apply when a criminal defendant who pleaded nolo contendere subsequently becomes a civil plaintiff. Its first line of attack was to argue that a case in which the pleading party becomes a civil plaintiff "does not present the kind of situation contemplated by Rule 410: the use of a nolo contendere plea against the pleader in a subsequent civil or criminal action in which he is the *defendant*."[194] Several courts have followed *Schaeffer*'s lead in holding that such a case is not the kind of proceeding contemplated by Federal Rule of Evidence 410 and its state counterparts.[195]

As noted, however, when the Federal Rules were amended in 1979, the advisory committee noted that they were being reworded precisely to avoid the exact conclusion drawn by *Schaeffer* and its progeny.[196] According to the advisory committee, the word "against" in the pre-amendment Federal Rules was ambiguous because it could have been "read as referring either to the kind of proceeding in which the [plea-related] evidence is offered or the purpose for which it is offered."[197] In amending the Federal Rules, the advisory committee "ma[de] it clear that the latter construction [wa]s correct."[198] The Sixth Circuit in *Schaffer* held that a case where a criminal defendant becomes a civil plaintiff is not "the kind of situation contemplated by Rule 410," but the advisory committee's notes clearly indicate that such a situation was in fact contemplated and to such an extent that the Federal Rules were amended so that there could be no ambiguity about the issue.[199] It is thus clear that *Schaeffer*'s ruling that Federal Rule of Evidence 410 is *per se* inapplicable unless there is a "subsequent civil or criminal action in which [the pleader] is the *defendant*" contradicts the advisory committee's plainly stated intent behind the 1979 amendments that the word "against" does not refer to the kind of proceeding.[200] The second

194. Walker v. Schaeffer, 854 F.2d 138, 143 (6th Cir. 1988).

195. *See*, *e.g.*, Brown v. Theos, 550 S.E.2d 304, 307 n.2 (S.C. 2001) (holding that S.C. R. EVID. 410 did "not contemplate the type of proceeding at issue in this case").

196. *See supra* note 41 and accompanying text.

197. FED. R. CRIM. P. 11(e)(6), advisory committee's notes to 1979 amendment.

198. *Id*.

199. *Id.* Schaeffer, 854 F2d at 143

200. *Id*.

prong of the Sixth Circuit's analysis, however, requires further discussion.

B. An Admission By Any Other Name: The Semantic Gymnastics of Walker v. Schaeffer

As noted previously, although the Sixth Circuit in *Schaeffer* held that Federal Rule of Evidence 410 is *per se* inapplicable unless there is a "subsequent civil or criminal action in which [the pleader] is the *defendant*," it also proceeded to consider the purpose for which a nolo contendere plea is offered in a case where the pleading party becomes a civil plaintiff.[201] According to the court, when a criminal defendant becomes a civil defendant and the civil plaintiff attempts to introduce the defendant's prior nolo contendere plea, the civil plaintiff is using the plea *against* the civil defendant, rendering the plea inadmissible under the Federal Rules.[202] Conversely, when a criminal defendant becomes a civil plaintiff and the civil defendant attempts to introduce the civil plaintiff's prior nolo contendere plea, the civil defendant is using the plea *for his own benefit*, and not *against* the civil plaintiff, rendering the Federal Rules inapplicable and making the plea "an admission which would preclude liability."[203]

Initially, this reading of the Federal Rules improperly renders the advisory committee's notes to the 1979 amendments a nullity. Those notes clearly indicate the Federal Rules were being amended to resolve an existing ambiguity and make clear that the word "against" did not refer to the kind of proceeding at issue but instead the purpose for which the plea was offered. While the Sixth Circuit ostensibly focused part of its decision in *Schaeffer* on the purpose for which a nolo contendere plea is offered in determining admissibility, under its holding, unless the kind of proceeding involved is a proceeding in which the pleading party becomes the civil defendant—a proceeding "against" the pleading party—the protections of the Federal Rules do not apply. Furthermore, even were one to take a leap of faith and acquiesce to the Sixth Circuit's semantic gymnastics, a larger problem precludes the court's conclusion.

According to the Sixth Circuit, a nolo contendere plea cannot be offered *against* a civil plaintiff, so a civil defendant can introduce a civil plaintiff's prior nolo contendere plea into evidence as an admission.[204] Under Federal Rule of Evidence 801(d)(2) and most corresponding state

201. *Id.*
202. *See id*.
203. *Id.*
204. *Id.*

codes,[205] however, an admission is defined as a statement fulfilling two requirements.[206] One requirement is that the statement must be, *inter alia*, made or adopted by a party-opponent.[207] The other requirement is that "[t]he statement is offered *against a party* . . . ."[208]

This definition illustrates the fallacy in the Sixth Circuit's reasoning. According to the Sixth Circuit, a nolo contendere plea is not offered *against* the pleader when he becomes a civil plaintiff, and the plea is thus not covered by the Federal Rules.[209] Because the plea thus constitutes an admission under Federal Rule of Evidence 801(d)(2), the civil defendant can introduce it into evidence.[210] However, under that same Federal Rule, an admission must be offered against a party, and thus to the extent that the Sixth Circuit and courts following its lead hold that a nolo contendere plea is not offered *against* the civil plaintiff, it cannot constitute an admission.[211] If a nolo contendere plea is not an admission under these circumstances, the question then becomes whether any other grounds permit it to be admitted.

C. Why Civil Plaintiffs Seeking to Exclude Prior Nolo Contendere Pleas Are Not Using the Federal Rules as a Shield and a Sword

While neither of *Schaeffer*'s two prongs was sufficient to defeat the clear legislative intent contained in the advisory committee's notes to the 1979 amendments to the Federal Rules, the Sixth Circuit also advanced a public policy argument. Simply put, the court stated that regardless of the language of the Federal Rules, it "decline[d] to interpret the rule so as to allow the former defendants to use the plea offensively, in order to obtain damages, after having admitted facts which would indicate no civil liability on the part of the [civil defendant(s)]."[212] Courts citing to *Schaeffer* in subsequent cases have interpreted this language in two ways.

In *Lichon v. American Universal Insurance Company*, the Court of Appeals of Michigan held that reading Michigan Rule of Evidence 410 "to make evidence of a nolo contendere plea inadmissible against the person who made the plea in any proceeding by or against the

205. *See*, *e.g.*, S.C. R. EVID. 801(d)(2).
206. FED. R. EVID. 801(d)(2).
207. *See id*.
208. *Id*. (emphasis added).
209. *See Schaeffer*, 854 F.2d at 143.
210. *See id.*
211. *See* FED. R. EVID. 801(d)(2).
212. *See Schaeffer*, 854 F.2d at143.

person . . . allow[ed] the use of the nolo contendere plea not only as a shield, but as a sword."[213] The courts in both *Schaeffer* and *Lichon* seem to be missing the point, however, that a civil plaintiff attempting to have evidence of his nolo contendere plea excluded in no way uses his plea either offensively or as a sword, a point made evident by reconsidering "shield and sword" jurisprudence.

When courts refer to a party attempting to use safeguards as both a shield and a sword, they are referring to one factual scenario: a party attempting to admit certain evidence while using safeguards to prevent the admission of other evidence that puts the admitted evidence into context. For this reason, the rule in such cases is sometimes referred to as the "rule of completeness": the court holds that the partial evidence submitted by the party cannot be understood without viewing the complete factual scenario surrounding it.[214] As noted previously, the 1979 amendments to the Federal Rules created a separate rule for just such a situation in the plea bargaining context.[215] Thus, when there are aborted plea discussions and the criminal defendant is subsequently able to admit certain statements made during those discussions (because they are not statements made "against" him), "then other relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue."[216]

This situation presents the classic "shield and sword" case as a party attempts to use the Federal Rules (or accompanying state codes) as a sword—to admit plea related statements favorable to him and as a shield—to prevent the admission of plea related statements against him. Conversely, in the case where a civil plaintiff seeks to exclude the admission of his prior nolo contendere plea, he is using the Federal Rules solely as a shield. He seeks only to have the plea excluded and does not attempt to selectively introduce certain statements relating to that plea. The "rule of completeness" cannot apply because there is nothing to complete. The criminal defendant in this scenario may now be making an offensive claim against a civil defendant, but he in no way uses his plea offensively in order to recover.

In fact, as a few courts have noted after *Schaeffer*, in this scenario, it is the civil defendant attempting to use the plea as a sword in a way that defeats the very purpose of nolo contendere pleas: preventing their

213. 433 N.W.2d 394, 395 (Mich. Ct. App. 1988).

214. *See* FED. R. CRIM. P. 11(e)(6), advisory committee's notes to 1979 amendment.

215. *See id.*

216. *See id; see also supra* note 53 and accompanying text.

admission in subsequent civil proceedings.[217] It also should be noted that taking this "sword" away from the civil defendant does not prevent it from rebutting the civil plaintiff's claims; it merely forces the civil defendant to use evidence other than the nolo contendere plea to prove the civil plaintiff's guilt as it would have to do if there were no criminal trial. In his dissent in *Lichon v. American Universal Insurance Company*, for instance, Justice Archer acknowledged that even if the court excluded the civil plaintiff's nolo contendere plea, the insurance company could likely mount a valid defense and noted that, unlike in a criminal action, the company would not need to prove the insured's guilt beyond a reasonable doubt.[218]

Other courts have interpreted *Schaeffer*'s language as holding that allowing civil plaintiffs to prevent the admission of their prior nolo contendere pleas defeats the purposes behind excluding nolo contendere pleas in subsequent civil proceedings.[219] Thus, for instance, in *Rose v. Uniroyal Goodrich Tire Company*, the United States Court of Appeals for the Tenth Circuit indicated that Federal Rule of Evidence 410 is in place, first, to allow a criminal defendant who would otherwise plead guilty to make such a plea and "to prevent the plea from being used as an admission in a subsequent civil action," and second, "'to encourage compromise resolution of criminal cases.'"[220] The court then concluded that "[b]oth of these reasons assume a situation in which the criminal defendant is being sued in a later civil action, and the plea is offered as proof of guilt."[221]

The Tenth Circuit's belief about the type of situation assumed by the Federal Rules is plainly contradicted by the advisory committee's notes to the 1979 amendments, which indicate, that the Rules do not apply solely to the "kind of proceeding" in which the pleading party is now a civil defendant.[222] Regardless of these notes, however, the Tenth Circuit's proffered analysis is specious. Under an interpretation of Federal Rule of Evidence 410 that allows this defendant to exclude his plea from any subsequent civil proceeding as an admission, the two purposes behind the Rule are broadly achieved. The criminal defendant knows that in any subsequent civil proceeding, his plea cannot be used against him, and he is thus more likely to reach a compromise resolution of his case.

217. *See*, *e.g.*, Ramon v. Farm Bureau Ins. Co., 457 N.W.2d 90, 91 (Mich. Ct. App. 1990).

218. *See Lichon,* 433 N.W.2d at 395.

219. *See* Rose v. Uniroyal Goodrich Tire Co., 219 F.3d 1216, 1220 (10th Cir. 2000).

220. *Id.*

221. *Id.*

222. *See* FED. R. CRIM. P. 11(e)(6) advisory committee's notes to 1979 amendment.

Conversely, under *Schaeffer*'s interpretation of Federal Rule of Evidence 410, in which the Rule is inapplicable in cases where the pleading party becomes a civil plaintiff, the two purposes behind the Rule are more narrowly achieved. The criminal defendant knows that in any subsequent civil action in which he is the plaintiff, his plea can be used against him, and he is thus less likely to reach a compromise resolution of his case if there is a possibility he might bring a subsequent civil action.

D. Why Other Public Policy Concerns Do Not Justify Amending the Rules

Perhaps, one might argue, there is some other public interest that outweighs the public interest in promoting plea bargaining. For instance, in his dissent in *Lichon v. American Universal Insurance Company*, Justice Griffin noted that "the promotion of plea bargaining is not a public interest so overriding and paramount as to compel . . . a construction [of Rule 410] which actually aids the criminal defendant if he seeks to profit from his crime."[223] As the majority in that case noted, however, the Sixth Circuit's construction of Federal Rule of Evidence 410 in *Schaeffer* does not always hinder a criminal defendant from profiting and can lead to anomalous results.[224]

In *Lichon*, a civil plaintiff who had previously pleaded nolo contendere to attempted burning brought an action against his insurance company, which refused to pay on his policy covering the burned property. The majority cited the counter-example of an insured suffering fire damage to his property, recovering from his insurance company, and only then being charged with arson and pleading nolo contendere.[225] In such a case the pleading party would be the civil defendant if the insurance company brought an action for restitution, and his plea would be inadmissible under *Schaeffer* even though the insurance company would be using the plea for the same purpose as was the insurance company in *Lichon*.[226]

Several similar factual scenarios exist in which similarly anomalous results could occur, including almost any case involving a settlement. Thus, in any breach of contract action, the parties might consider settling their dispute. In scenario one, the allegedly non-breaching party brings an action for breach of contract against the allegedly breaching party, the

223. 459 N.W.2d 288, 303 (Mich. 1990).

224. *See id* at 296.

225. *See id.*

226. *See id.*

parties fail to settle, the allegedly non-breaching party is then charged with a crime such as criminal fraud for activities relating to the contract, and he pleads nolo contendere before the civil action is resolved. Under *Schaeffer*, his plea could be used against him in the subsequent breach of contract action because he would be the civil plaintiff.

In scenario two, the parties do settle the breach of contract action, or the court finds that there was a breach of contract. Subsequently, the allegedly non-breaching party is charged with criminal fraud and pleads nolo contendere, and the allegedly breaching party brings an action to invalidate the settlement. Under *Schaeffer*, however, because the pleading party would be the civil defendant in this case, his plea would be inadmissible even though the allegedly breaching party would be using it for the same purpose. The only difference would be whether the parties initially settled or otherwise resolved the breach of contract action.

This scenario and the counter-example cited by the *Lichon* majority both assume a case where the allegedly breaching party is the non-pleading party. Conversely, in a case where the allegedly breaching party is the pleading party, he will almost always be able to exclude his prior nolo contendere plea from a subsequent civil proceeding, even under the construction offered in *Schaeffer*. Assume a situation where one party prepays on a contract for the other party to deliver goods or perform services, and the only party fails to deliver the goods or perform the services. In this scenario, the non-breaching party would bring a civil proceeding against the breaching party for breach of contract. If, prior to the proceeding, the breaching party is charged with a crime such as criminal fraud for activities relating to the contract, the non-breaching party would not be able to introduce the plea into evidence because the breaching party would be the civil defendant.

The *Lichon* dissent argued that it did not favor a construction of Rule 410 which aided the criminal defendant if he sought to profit from his crime. These counter-examples prove, however, that the construction offered in *Schaeffer* does little to further this public policy while creating anomalous results. In a case where the pleading party is allegedly not the party at fault and he brings a civil proceeding that is not resolved before he pleads, *Schaeffer*'s construction of Rule 410 does ensure that his nolo contendere plea will be treated as an admission, making it admissible against him. Conversely, in almost any other factual scenario, the criminal defendant might be able to 'profit from his crime' because he will be able to prevent the admission of his plea against him in a civil proceeding.

This begs the additional question of whether the apparent dichotomy created by the *Lichon* dissent makes any logical sense. The *Lichon* dissent argued that the public interest in preventing a criminal defendant from being assisted in profiting from his crime through his nolo contendere plea outweighs the public interest in the promotion of plea bargaining. The other side of the coin would thus seem to be that the public interest in the promotion of plea bargaining is not outweighed when a criminal defendant does not seek to profit from his crime but instead merely seeks to protect himself from future civil liability. But what about the civil plaintiff in this scenario who cannot use the civil defendant's prior nolo contendere plea?

Assume the factual scenario where an individual maliciously sets a fire to his property, which leads to both his neighbor and his property being severely burned. The criminal defendant, cognizant that a guilty plea during his criminal trial for arson could be admitted against him in a subsequent civil proceeding, pleads nolo contendere. The criminal defendant's nolo contendere plea in this scenario would not assist him in profiting from his crime, but would instead assist him in protecting himself from future civil liability. Concurrently, however, the civil plaintiff in this scenario would be handicapped in recovering for his injuries based upon the civil defendant's crime. The *Lichon* dissent's argument thus makes sense only if the public interest in preventing a criminal defendant from profiting from his crimes is greater than the public interest in assisting civil plaintiffs who seek to recover for their injuries. If this dichotomy does not exist, then the *Lichon* dissent would essentially be saying that other public interests always outweigh the public interest in promoting plea bargaining that is promoted by allowing nolo contendere pleas, which would be an argument against the very existence of the nolo contendere plea.

Of course, this argument assumes that the pleading party actually committed a crime or the crime to which he pleaded. While the previously cited interviews conducted by Professor Stephanos Bibas indicated that those is frequently the case, the interviewees also claimed that some innocent defendants plead nolo contendere while others defendants plead nolo contendere to charges for crimes more serious than the ones they committed.[227] The *Lichon* dissent's public policy reasoning makes sense only if we assume that all criminal defendants pleading nolo contendere are, in fact, guilty, because otherwise they would have committed no crime from which they are seeking to

227. *See* Bibas, *supra* note 22, at 1377.

profit.[228]

Further, even if a court believes that the application of the Federal Rules or corresponding state codes would lead to a result that violates other public interests, the court's role is not to weigh these relative interests from the bench.[229] Instead, such a result should be achieved by making a formal amendment clearly establishing those situations in which a party's prior nolo contendere plea can be used against him in a subsequent civil proceeding.[230]

V. CONCLUSION

In 1988, the United States Court of Appeals for the Sixth Circuit in *Walker v. Schaeffer* reached the unprecedented decision that a civil plaintiff is not entitled to the protections of Federal Rule of Evidence 410 and thus cannot prevent the admission of his prior nolo contendere plea. Because the holding in *Schaeffer* regarding nolo contendere pleas was technically dicta, however, legal scholarship has largely ignored this novel holding. Conversely, courts at both the federal and state levels have largely rubber stamped *Schaeffer*'s holding and applied it in a variety of factual contexts.

The Sixth Circuit's interpretation Federal Rule of Evidence 410, however, was antithetical to the advisory committee's notes to its 1979 amendments, which plainly stated that the Rule was intended to protect the pleading party in a subsequent proceeding, regardless of the type of proceeding. The Sixth Circuit's claim that a prior nolo contendere plea can be offered into evidence by a civil defendant for his own benefit and that it is not offered *against* the civil plaintiff who previously made the plea is similarly illogical given that the Federal Evidence require that an admission be offered against a party-opponent. Furthermore, while the Sixth Circuit's intent was to construe the Rule so that criminal defendants are not aided in seeking to profit form their crimes, it instead

228. One could also imagine a scenario where a criminal defendant pleads nolo contendere to a crime more serious than the one he committed, and yet he does not seek to profit from his crime through a nolo contendere plea. For instance, under New York law, a criminal defendant could be guilty of arson in the fourth degree because he recklessly damaged his house after intentionally starting a fire. *See* N.Y. PENAL LAW § 150.05(1) (McKinney 2006). Pursuant to a plea bargain, he might plead nolo contendere to arson in the third degree, which requires that a defendant "intentionally damage[] a building or motor vehicle by starting a fire or causing an explosion. *See* N.Y. PENAL LAW § 150.10(1) (McKinney 2006). Assume that under his insurance policy covering his house, he is only prohibited from recovering for fire damage if he intentionally damaged his property. By pleading nolo contendere, the plaintiff would not be seeking to profit from his crime because his conduct would not prohibit him from recovering under the insurance policy.

229. *See* Lichon, 459 N.W.2d at 297.

230. *See id*.

created a strained interpretation that creates potentially anomalous results. Consequently, courts should discontinue their unquestioning adherence to *Schaeffer* and instead adhere to an interpretation of the Federal Rules and corresponding state codes that coheres with the advisory committee's notes to the 1979 amendments.