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D'AURIA, J., with whom McDONALD, J., joins, concurring in part and dissenting in part. As the majority recounts, the question that the United States District Court for the District of Connecticut has asked this court to answer is “whether the plaintiff, Allstate Insurance Company (Allstate), can use a plea of *nolo contendere* entered by the named defendant, Donte Tenn, to trigger a criminal acts exclusion in a homeowners insurance policy governed by Connecticut law.” The majority holds that the defendant’s “plea of *nolo contendere* is *inadmissible* to prove the occurrence of a criminal act and, therefore, cannot be used to trigger the policy’s criminal acts exclusion.” (Emphasis added.) To the extent the District Court’s use of the term “trigger” in the certified question suggests that the issue presented is whether the defendant’s plea of *nolo contendere* is dispositive of whether the policy’s criminal acts exclusion applies, I agree with the majority that it is not. I disagree, however, with the majority that this conclusion is compelled by the fact that the defendant’s plea of *nolo contendere* is inadmissible under § 4-8A (a) of the Connecticut Code of Evidence.<sup>1</sup> Because I believe that the policy underpinning the question of a *nolo* plea’s admissibility—encouraging plea bargaining—is attenuated under the circumstances presented, and that the policy of not defending or indemnifying an insured’s criminal conduct is squarely implicated, I would answer that, under the current state of our law, the defendant’s *nolo* plea is admissible, although not necessarily dispositive, evidence. Thus, I respectfully dissent in part.

In a lawsuit between an insurance company and an insured regarding whether a criminal acts exclusion applies,<sup>2</sup> and, therefore, whether the insurer owes the insured a duty (either to defend or indemnify), when an injured party has sued the insured, the insured’s criminal conviction for the acts leading to the injury is obviously relevant evidence. This includes a conviction based on a plea of *nolo contendere*, which, after a trial court’s finding of a factual basis for and acceptance of the plea, is no less a criminal conviction than the conviction that follows from either a straight guilty plea or a verdict of guilty after trial. See, e.g., *State v. Faraday*, 268 Conn. 174, 205 n.17, 842 A.2d 567 (2004) (plea of *nolo contendere* “has the same legal effect as a plea of guilty” (internal quotation marks omitted)).<sup>3</sup>

As a general matter, a court should admit relevant evidence. See Conn. Code Evid. § 4-2. To keep relevant evidence from the fact finder is to inhibit the court’s truth seeking function. See *State v. Montgomery*, 254 Conn. 694, 724, 759 A.2d 995 (2000) (courts must apply privileges with circumspection, as withholding relevant evidence impedes truth seeking function of adjudicative

process). Of course, not all relevant evidence is admissible. See Conn. Code Evid. § 4-2. Our Code of Evidence recites a number of rules that this court has recognized as bearing on whether a trial court should not admit otherwise relevant evidence to advance another judicial or public policy. See, e.g., *Hicks v. State*, 287 Conn. 421, 440, 948 A.2d 982 (2008) (“[T]he rule barring evidence of subsequent repairs in negligence actions is based on narrow public policy grounds, not on an evidentiary infirmity. . . . This policy fosters the public good by allowing tortfeasors to repair hazards without fear of having the repair used as proof of negligence . . . .” (Internal quotation marks omitted.)); *Tomasso Bros., Inc. v. October Twenty-Four, Inc.*, 221 Conn. 194, 198, 602 A.2d 1011 (1992) (“[t]he general rule that evidence of settlement negotiations is not admissible at trial is based [on] the public policy of promoting the settlement of disputes” (internal quotation marks omitted)).

The inadmissibility of a plea of *nolo contendere* under certain circumstances is one example. See Conn. Code Evid. § 4-8A (a) (plea of *nolo contendere* “shall not be admissible in a civil or criminal case against a person who has entered a plea of . . . *nolo contendere* in a criminal case”). The majority accurately describes the limited “pragmatic and practical considerations” underlying the criminal justice system’s permitting of a *nolo* plea at all. The majority states: “A plea of *nolo contendere* allows a defendant to accept a punishment, often lighter, as if he or she were guilty, and yet still maintain his or her innocence.” The *nolo* plea may afford the accused the psychological advantage of not having to admit guilt—to himself or to others—or the very real fiscal advantage of resolving a criminal charge while still denying civil liability. A victim must still prove his civil case in court against a defendant who has pleaded *nolo contendere* and, as the majority puts it, has preserved or “consolidate[d]” his resources in defense of his property. Certain goals of the criminal justice system—including restitution to victims or the admission of guilt as a step toward rehabilitation—are thereby compromised to some extent in each case in which a *nolo* plea is accepted. See *State v. Fowlkes*, 283 Conn. 735, 744, 930 A.2d 644 (2007) (restitution serves state’s rehabilitative interest in having defendant take responsibility for his conduct by making victim whole);<sup>4</sup> see also *State v. McCleese*, 333 Conn. 378, 408, 215 A.3d 1154 (2019) (acknowledging that legitimate penal goals include deterrence, retribution, incapacitation, and rehabilitation). These goals are sacrificed for the salutary purpose of the “efficient disposition of criminal cases by encouraging plea bargaining.” The majority tells us that “[a]llowing the use of *nolo contendere* pleas as proof of underlying criminal conduct in subsequent civil litigation would, thus, undermine the very essence of the *nolo contendere* plea itself.” (Emphasis added.), citing J. Kuss, Comment, “Endangered Species: A Plea

for the Preservation of *Nolo Contendere* in Alaska,” 41 Gonz. L. Rev. 539, 562 (2006).<sup>5</sup> Thus has developed the evidentiary rule that now has been codified at § 4-8A (a) of the Connecticut Code of Evidence.

I have no quarrel with the policy of permitting defendants who plead *nolo contendere* to prevent the admission of that plea from being used to establish civil liability against them in subsequent litigation brought by their alleged victims. This case, certified to us from the United States District Court, requires us to determine how far this policy extends, namely, to what lengths must the judiciary, through its rules of evidence, go to encourage plea bargaining and thereby deprive one or more forums of relevant evidence to resolve a subsequent controversy? Is it always true that admitting a *nolo* plea in any subsequent civil litigation as proof of criminal conduct will “undermine the very essence” of the *nolo* plea? I am skeptical.

In my view, by holding that the defendant’s plea of *nolo contendere*<sup>6</sup> is not admissible in the present controversy, today’s decision unnecessarily extends the rule of inadmissibility beyond the scope of its intended purpose—to encourage plea bargaining—to ensure victim compensation, which, although laudable, is not the purpose of this rule.<sup>7</sup> Despite its protestation to the contrary, the majority treats the rule codified at § 4-8A (a) (2) as akin to an absolute privilege that cannot be pierced. I do not believe that “the very essence” of the *nolo* plea itself will be undermined if the defendant’s plea is admitted into evidence in the insurance coverage dispute pending in District Court. Nor do I believe that our case law supports the majority’s holding.

Like many rules of evidence, the rule that evidence of a conviction based on a plea of *nolo contendere* is inadmissible is far from absolute. Connecticut courts, courts in other jurisdictions, and our legislature have recognized or created exceptions to § 4-8A (a) (2), or its equivalent, beyond those found in § 4-8A (b) of the Connecticut Code of Evidence.<sup>8</sup> In each of these contexts, it has been determined that the policy of encouraging plea bargaining should yield to a competing public policy, presumably either because the interest in encouraging plea bargaining has become more attenuated in a particular context or because the competing policy is more powerful.

For example, in *Groton v. United Steelworkers of America*, 254 Conn. 35, 757 A.2d 501 (2000), an arbitrator reinstated the employment of “an employee who [had] been terminated following his conviction [of larceny by embezzlement, on] the basis of . . . a plea [of *nolo contendere*], of embezzling the employer’s funds . . . .” *Id.*, 48. Notwithstanding this court’s recognition that it had “stated in the context of litigation and administrative rulings that a prior conviction based [on] a *nolo contendere* plea may have no currency beyond

the case in which it was rendered,” we held that the arbitration award violated public policy; *id.*, 49; and therefore upheld the trial court’s vacatur of the award because “the parties cannot expect an arbitration award approving conduct [that] is illegal or contrary to public policy to receive judicial endorsement . . . .” (Internal quotation marks omitted.) *Id.*, 45, quoting *Watertown Police Union Local 541 v. Watertown*, 210 Conn. 333, 339, 555 A.2d 406 (1989). We thereby recognized that the policy favoring nolo pleas as a means of encouraging plea bargaining may give way in some instances when another “strong public policy” is at issue, such as the public policy against embezzlement. (Internal quotation marks omitted.) *Groton v. United Steelworkers of America*, *supra*, 45. This included “the policy that an employer should not be compelled to reinstate an employee who has been convicted of embezzling the employer’s funds . . . .” *Id.*, 48.

Additionally, in *State v. Daniels*, 248 Conn. 64, 726 A.2d 520 (1999), overruled in part on other grounds by *State v. Singleton*, 274 Conn. 426, 876 A.2d 1 (2005), the defendant appealed from the trial court’s revocation of his probation pursuant to General Statutes (Rev. to 1995) § 53a-32, based on his arrest for burglary for breaking into an automobile. *State v. Daniels*, *supra*, 65, 67–68. The state claimed that the defendant’s appeal was moot because, after the revocation of his probation, he entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), to the underlying charge. *State v. Daniels*, *supra*, 69. According to the state, “the trial court [could] grant the defendant no practical relief . . . [because, even] if the court were to agree with the defendant’s claims on appeal, [and thus] the defendant [was] granted a new probation revocation hearing . . . the defendant’s plea of guilty under the *Alford* doctrine would estop him from asserting his innocence at the new hearing.” *Id.*, 70. This court held that the appeal was not moot because, if it reversed the judgment, it could afford the defendant practical relief. See *id.*, 73. Specifically, we concluded that, although the *Alford* plea would be admissible as evidence at a new probation hearing, the trial court would have broad discretion to determine whether to revoke probation, perhaps arriving at a different disposition. See *id.* (“the defendant’s conviction based on his *Alford* plea would establish a violation of the conditions of the defendant’s probation”). The trial court’s broad discretion necessarily would include consideration of the defendant’s *Alford* plea, which meant both that the defendant had been convicted and that he might be innocent of the charged crimes. Thus, although admissible, the defendant’s *Alford* plea was not dispositive evidence. This procedure balances two competing public policies—encouraging plea bargaining and providing the court with the discretion necessary to ensure that individuals on probation abide by the terms of their

release into the community.<sup>9</sup>

Similarly, in *Godin v. Godin*, Docket No. FA-93-53345-S, 1995 WL 491420 (Conn. Super. August 8, 1995), *aff'd*, 43 Conn. App. 918, 684 A.2d 1225 (1996), the trial court prioritized the best interest of the children in a postdis-solution matter over the public policy underlying pleas under the *Alford* doctrine. Specifically, after the trial court granted the parties shared custody of their chil-dren, the plaintiff entered an *Alford* plea to two counts of sexual assault based on his having had contact with the intimate areas of his two older children. *Id.*, \*1–2. The defendant then moved for sole custody premised on this change of circumstances. *Id.*, \*2. The trial court granted the motion based on the children’s best interest, notwithstanding the nature of the pleas: “The fact that [the plaintiff] entered ‘[A]lford’ pleas to these charges does not alter the fact of conviction. The conviction is a material change in circumstances since the divorce was granted and this [c]ourt cannot conclude that the best interest[s] of these children would be facilitated by their [abuser’s] being in a custodial position. It is acknowledged that the youngest child was not abused by the husband, but it is logical to assume she could be at risk.” *Id.*

Connecticut is not unique in balancing competing policy considerations in determining the admissibility of a plea of *nolo contendere*. Other jurisdictions like-wise have held such pleas admissible when balanced against competing public policies, noting that the policy in favor of pleas of *nolo contendere* remains intact because the defendant still may assert his or her inno-cence, as the plea is not dispositive evidence of criminal conduct. See, e.g., *State v. Ruby*, 650 P.2d 412, 414 (Alaska App. 1982) (plea of *nolo contendere* was admis-sible in revocation of probation proceedings but, consis-tent with purpose of pleading *nolo*, admission does not collaterally estop defendant from asserting his inno-cence); *State ex rel. Oklahoma Bar Assn. v. Bradley*, 746 P.2d 1130, 1134 (Okla. 1987) (because of important purpose of regulating attorneys, “the fact that the plea entered was *nolo contendere*, and not admissible in a civil action would not preclude it from being admitted as evidence in a proceeding in a disciplinary matter against a member of the bar”); *Turton v. State Bar*, 775 S.W.2d 712, 715 (Tex. App. 1989, writ denied) (despite rule prohibiting admission of plea of *nolo contendere* in civil cases against individual who entered plea, rule requiring suspension of attorney’s law license for com-mitting serious crime applied regardless of type of plea).

In these cases, our courts and other courts have bal-anced the competing public policies to determine the admissibility of a plea of *nolo contendere*. Once admit-ted, the *nolo* plea constituted evidence of a conviction, although not an admission to the underlying facts. See, e.g., *Groton v. United Steelworkers of America*, *supra*,

254 Conn. 52 (in holding that nolo plea was admissible, this court concluded that nolo plea “may be viewed, as in the present case, as a conviction for embezzlement of the employer’s funds”); *State v. Daniels*, supra, 248 Conn. 73 (“the defendant’s conviction based on his *Alford* plea would establish a violation of the conditions of [his] probation, thereby significantly lightening the state’s burden under the first component, the evidentiary phase, of a new probation revocation hearing”); see also *Sokoloff v. Saxbe*, 501 F.2d 571, 574–75 (2d Cir. 1974) (plea used as admission of guilt); *State v. Ruby*, supra, 650 P.2d 414 (“allowing use of a no contest plea to establish a violation of law”).

Such evidence, however, was not necessarily dispositive of whether the insured committed an intentional or criminal act; rather, the insured had the opportunity to rebut this evidence with competing evidence. See *State v. Daniels*, supra, 248 Conn. 73; see also *State v. Ruby*, supra, 650 P.2d 414. But if the insured offered no competing evidence, the plea of nolo contendere was sufficient to establish the insured’s commission of the crime. See, e.g., *State v. Daniels*, supra, 73; see also *State v. Ruby*, supra, 414. As a result, courts have applied a burden shifting approach when determining what weight to afford admissible pleas of nolo contendere.

Our legislature has enacted other exceptions to the general rule barring the admission of pleas of nolo contendere. See, e.g., General Statutes § 1-110a (a) (permitting attorney general to apply to Superior Court to revoke or reduce pension of public officials or state or municipal employees who plead nolo contendere to any crime related to state office); General Statutes § 38a-720m (b) (5) (D) (allowing for suspension or revocation of license of third-party administrator after hearing when its agent has plead nolo contendere); General Statutes § 54-1q (“[t]he court shall not accept a plea of guilty or nolo contendere from a person in a proceeding with respect to a violation of section 14-110, subsection (b) or (c) of section 14-147, section 14-215, subsection (a) of section 14-222, subsection (a) or (b) of section 14-224 or section 53a-119b unless the court advises such person that conviction of the offense for which such person has been charged may have the consequence of the Commissioner of Motor Vehicles suspending such person’s motor vehicle operator’s license”); see also *Sokoloff v. Saxbe*, supra, 501 F.2d 574–75. The majority lumps many of these legislative exceptions together into a category that it labels “collateral consequences” of a criminal conviction based on a nolo plea. The majority assures us it recognizes that a criminal defendant cannot fully be protected against every such eventuality. And that is my point. Whether called “collateral” or by some other descriptor, these evidentiary consequences are permitted only because it has been determined in that particular circumstance—by a court, leg-

islature or other body—that a more compelling policy outweighs the judicial policy favoring nolo pleas as a way to encourage plea bargaining.

The case before the United States District Court involves an insurer's duty to defend the defendant pursuant to an insurance policy with a criminal acts exclusion; see footnote 2 of this opinion; when the defendant was sued civilly for the same conduct that led to his plea of nolo contendere to an assault charge. Under these circumstances, I find the link between the present dispute in the District Court and the judicial policy of encouraging plea bargaining significantly weaker than the direct link between the criminal forum, in which the defendant pleaded nolo, and the civil forum in which Tailan Moscaritolo, the alleged victim in the underlying incident, sued the defendant. At the same time, recognizing an exception to the general rule of inadmissibility of nolo pleas under the circumstances of this case ensures the vindication of a public policy that competes with—and, in my view, overtakes—the policy of encouraging plea bargaining, namely, the policy of not indemnifying insureds for criminal acts.

To my first point, it is not at all evident that, in an insurance coverage dispute, admitting a defendant's plea of nolo contendere as evidence that he committed a criminal act would necessarily “undermine the very essence of the nolo contendere plea itself” and result in less plea bargaining. To just say it would does not make it so. The principal advantage to a defendant of being allowed to plead nolo contendere is that his conviction may not be used as evidence against him in his alleged victim's civil lawsuit for damages. That benefit of his plea bargain would not be upset in the present case by entering the defendant's conviction into the record in the District Court controversy. To prove his case against the defendant in Superior Court, Moscaritolo will still have to prove that the defendant's actions—negligent or intentional—were both actionable and caused his injury and damages.

It is only by chance that the crime the defendant was convicted of committing took place under circumstances that even arguably could be covered by insurance, in this case, under his mother's homeowners insurance policy. Innumerable criminal defendants plead nolo contendere without any hope of insurance coverage. I am not convinced that admitting a defendant's conviction into evidence in a coverage dispute will result in so many fewer plea bargains that it merits excluding relevant evidence from this collateral controversy.

Balanced against what, under these circumstances, is a more attenuated interest in encouraging plea bargains is the shared interest of the public, insurers, and policyholders who pay premiums in not permitting those who commit criminal acts to be indemnified

against liability for damages caused by those acts. See, e.g., *Auto Club Group Ins. Co. v. Daniel*, 254 Mich. App. 1, 5, 658 N.W.2d 193 (2002) (“as a matter of public policy, an insurance policy that excludes coverage for a person’s criminal acts serves to deter crime, while a policy that provides benefits to those who commit crimes would encourage it” (emphasis omitted)); *State Farm Fire & Casualty Co. v. Schwich*, 749 N.W.2d 108, 114 (Minn. App. 2008) (“[I]t is against public policy to licens[e] intentional and unlawful harmful act[s]. . . . Minnesota courts have repeatedly declined to find liability coverage for unlawful conduct and serious criminal acts.” (Citation omitted; internal quotation marks omitted.)); *Litrenta v. Republic Ins.*, 245 App. Div. 2d 344, 345, 665 N.Y.S.2d 679 (1997) (“it is contrary to public policy to insure against liability arising directly against an insured from his violation of a criminal statute”); *State Farm Mutual Automobile Ins. Co. v. Martin*, 442 Pa. Super. 442, 445, 660 A.2d 66 (1995) (“a person should not be indemnified by insurance against the consequences of his [wilful], criminal assault” (internal quotation marks omitted)), appeal denied, 544 Pa. 676, 678 A.2d 366 (1996). A minority of jurisdictions have not followed the general rule barring coverage for criminal or intentional acts. “The more lenient view . . . finds that the public interest in having victims recover for their injuries outweighs the public interest in forcing the [wilful] wrongdoer to pay the consequences of the wrongdoing.” (Internal quotation marks omitted.) *Grinnell Mutual Reinsurance Co. v. Jungling*, 654 N.W.2d 530, 538–39 (Iowa 2002); see *id.* (discussing minority approach). Other jurisdictions have adopted a multifactor balancing test to determine which of the competing public policies should prevail. See, e.g., *id.*, 539 (“[c]ourts in Florida, Pennsylvania, and Oregon engage in a specific analysis to determine whether coverage of a particular act is against public policy [when] the policy has no intentional-acts exclusion”). Although this court has not expressly adopted either the majority or minority rule, the analysis evident in our case law, at the very least, would prefer a balancing approach. See *Groton v. United Steelworkers of America*, *supra*, 254 Conn. 51–52 (acknowledging general rule at issue but holding that public policy concerns unique to case justified admission of plea of *nolo contendere*).

In my view, a proper balance of competing public policies supports the admissibility of an insured’s conviction based on a plea of *nolo contendere* in a case such as the one certified to us—a declaratory judgment action brought by an insurer to determine the applicability of a criminal acts exclusion in an insurance policy.<sup>10</sup> That is not to say, however, that evidence of the conviction is dispositive of the question of whether the criminal acts exclusion prevails in the case before the District Court. See, e.g., *State v. Daniels*, *supra*, 248 Conn. 73 and n.11 (recognizing admissibility of *Alford* plea in

violation of probation proceeding but not determining whether plea constituted conclusive proof of violation of probation); *id.*, 84–86 (*McDonald, J.*, concurring) (agreeing that *Alford* plea, which is equivalent to *nolo* plea, is admissible in violation of probation proceeding but not conclusive of guilt given public policy underlying plea). In other words, the insured could seek to present admissible evidence to contest his or her guilt and, thus, may raise the possibility of coverage, which, in a dispute over the duty to defend, might arguably trigger an insurer’s broad duty. See *Nash Street, LLC v. Main Street America Assurance Co.*, 337 Conn. 1, 9–10, 251 A.3d 600 (2020).<sup>11</sup> In this way, the rule I suggest would vindicate the public policy that disfavors insuring against criminal conduct by requiring the insured to establish at least a possibility of coverage; see *St. Paul Fire & Marine Ins. Co. v. Shernow*, 222 Conn. 823, 832, 610 A.2d 1281 (1992) (“[w]here [as here] no finding of an intent to injure has been made, nothing in the public policy of this [s]tate precludes indemnity for compensatory damages flowing from [the] defendant’s volitional act” (emphasis omitted; internal quotation marks omitted)); while preserving the defendant’s ability to maintain his innocence. See *State v. Bridgett*, 3 Conn. Cir. 206, 208–209, 210 A.2d 182 (1965) (“[t]he only basic characteristic of the plea of *nolo contendere* [that] differentiates it from a guilty plea is that the defendant is not estopped from denying the facts to which he pleaded *nolo contendere* in a subsequent judicial civil proceeding”).

For at least two reasons, this rule would not undermine the “very essence” of the public policy underpinning pleas of *nolo contendere*: encouraging plea bargaining. First, Moscaritolo still cannot use the defendant’s *nolo* plea in the lawsuit he has brought against him, alleging civil liability premised on the same facts as those underlying the defendant’s conviction. See, e.g., *Elevators Mutual Ins. Co. v. J. Patrick O’Flaherty’s, Inc.*, 125 Ohio St. 3d 362, 365, 928 N.E.2d 685 (2010) (“[t]he prohibition against admitting evidence of [no] contest pleas was intended generally to apply to a civil suit by the victim of the crime against the defendant for injuries resulting from the criminal acts underlying the plea”).

Second, I do not believe that the District Court, by entering the plea of *nolo contendere* into evidence in a declaratory judgment action, would be admitting the plea “against” the defendant in the way § 4-8A (a) (2) contemplates. The majority does not appreciate how the “mere procedural device” of a declaratory judgment action has skewed its reasoning. (Internal quotation marks omitted.) *Wilson v. Kelley*, 224 Conn. 110, 115–16, 617 A.2d 433 (1992); see *id.* (“[d]eclaratory relief is a mere procedural device by which various types of substantive claims may be vindicated” (internal quotation marks omitted)).

This failure is revealed most prominently in the majority's statement that it sees "no principled reason to rigorously enforce the restrictions imposed by § 4-8A (a) of the Connecticut Code of Evidence on the victim of a crime in a tort case [i.e., Moscaritolo] while simultaneously ignoring that rule for a corporation [i.e., an insurance company] in a declaratory judgment action arising out of the very same set of facts." The principled reason for the distinction, of course, lies in the admitted purpose of the rule itself: to encourage plea bargaining. Not surprisingly, this goal is impacted differently by the two different litigation postures the majority compares. The purpose of the rule is not implicated directly (or by its terms, at all) in a declaratory judgment action to resolve an insurance coverage dispute in the same way as in an action by the victim against the defendant. Unlike the victim of the crime, who seeks to establish the defendant's liability in tort, an insurance company in a declaratory judgment action seeks a very different remedy: an adjudication of the parties' contractual rights. See, e.g., *Walker v. Schaeffer*, 854 F.2d 138, 143 (6th Cir. 1988) ("We find a material difference between using the nolo contendere plea to subject a former criminal defendant to subsequent civil or criminal liability and using the plea as a defense against those submitting a plea interpreted to be an admission [that] would preclude liability. Rule 410 [of the Federal Rules of Evidence] was intended to protect a criminal defendant's use of the nolo contendere plea to defend himself from future civil liability. We decline 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 [that] would indicate no civil liability . . . ." (Emphasis omitted.)).

To illustrate this point, consider the sequence of events that would lead to a subrogation action by Moscaritolo against the plaintiff insurer under these facts. When the defendant agreed to plead nolo contendere to a charge of assault in the first degree, Moscaritolo already had sued him in Superior Court. Assume that, after the defendant's plea, Moscaritolo pursued and obtained a judgment against him. If the plaintiff refused to indemnify the defendant for the judgment rendered against him, Moscaritolo would have the right to bring a subrogation action against the plaintiff insurer under General Statutes § 38a-321, standing in the shoes of the insured, the defendant, who would not be a party to that action. Section 4-8A (a) (2) of the Connecticut Code of Evidence prohibits the admission of a plea of nolo contendere only if it is sought to be used "against a person who has entered" the plea. By its terms, the rule would therefore not be implicated in Moscaritolo's subrogation action, and there would be no obstacle to admitting the defendant's nolo plea as evidence in support of the plaintiff insurer's defense that the criminal acts exclusion of the insurance policy applies.

The fact that, in the subrogation action, Moscaritolo would stand in the defendant's shoes does not alter the outcome because § 38a-321 grants only a subrogation plaintiff the same rights as the insured under the policy—that is, the right to assert “any claim or defense that [the insured] himself could have raised had [the insured] brought suit against [the insurer].” *Home Ins. Co. v. Aetna Life & Casualty Co.*, 235 Conn. 185, 198, 663 A.2d 1001 (1995). A subrogation plaintiff steps into the insured's shoes as to any right of the insured that arises out of the insurance policy but not as to any right that arises *outside of* the insurance policy. See, e.g., *id.* (“Because [the insured's] right to maintain the confidentiality of communications with his psychiatrist arises under [General Statutes] § 52-146e and not under his contract of insurance with [the defendant], § 38a-321 does not empower [the plaintiff] to waive [the insured's] privilege”).

In the present controversy, the defendant's “right” not to have a nolo plea admitted “against” him is not a right contained in the insurance policy at issue in the declaratory judgment action but is a common-law evidentiary rule that is codified in our Code of Evidence. As a result, in a subrogation action under § 38a-321 brought by Moscaritolo against the plaintiff insurer, Moscaritolo could not object to the admission of the defendant's plea of nolo contendere. It is plainly relevant to whether the criminal acts exclusion applies in this case.

The insurer, however, has cut to the chase—responsibly and reasonably—by filing a declaratory judgment action to resolve all parties' rights and obligations, which remain the same regardless of the procedural posture. See *Wilson v. Kelley*, *supra*, 224 Conn. 115–16 (“[d]eclaratory relief is a mere procedural device by which various types of substantive claims may be vindicated” (internal quotation marks omitted)). If we prohibit insurers from admitting nolo pleas in declaratory judgment actions such as this case, insurers may decide to deny coverage and to wait for any potential subrogation action under § 38a-321, in which the insured's plea of nolo contendere would, in my view, clearly be admissible. This would defeat the purpose of a declaratory judgment action.

Further, under the regime the majority prescribes, without the benefit of the nolo plea to prove the defendant's criminal actions and the application of the exclusion, the insurance company will be left to parse police reports and to seek cooperation from witnesses to an incident to which it was not a party and that it did not investigate in the first instance.<sup>12</sup> Police officers and detectives will be subpoenaed, not to a criminal trial or even to the ensuing civil trial brought by the victim, but to an insurance coverage trial at which the insurer stands in the shoes of the prosecutor trying to prove a

crime was committed. Even less than the defendant himself, the victim likely would no longer have any interest in proving a crime was committed, which would ensure the application of the exclusion. The truth seeking function will have been turned upside down.<sup>13</sup>

Finally, the majority's insistence on evidentiary equivalency between a tort action brought by a victim and a declaratory judgment action brought by an insurer reveals a determination to advance a very different policy (compensating victims of criminal activity) than that which the rule purports to advance (favoring plea bargaining). A policy that favors compensating victims of crime may be a laudable one, and our state has enacted a number of provisions to advance this policy, including the victim's rights amendment to the state constitution and subsequent enforcement legislation. See Conn. Const., amend. XXIX (b) (9) ("the right to restitution"); General Statutes § 54-215 ("Office of Victim Services shall establish a Criminal Injuries Compensation Fund for the purpose of funding the compensation services provided for by sections 54-201 to 54-218, inclusive"). Annexing this policy to § 4-8A of the Connecticut Code of Evidence, which was intended to facilitate plea bargaining, and enforcing it in an insurance contract dispute, requires us to import far more in the way of policy into this rule than a mere evidentiary rule should—or in my view, was intended to—bear. "Connecticut law has long upheld policy exclusions that have the effect of depriving an innocent victim of the benefit of the tortfeasor's liability insurance." *Allstate Ins. Co. v. Simansky*, 45 Conn. Supp. 623, 627, 738 A.2d 231 (1998). I would leave the balancing of any further implications and impacts—to victims, insureds, insurers and policyholders whose premiums are affected—to the legislature.

As a result, I believe that, under our current case law, the defendant's plea of *nolo contendere* is admissible in the present case to prove his conviction and as an opposing party statement that he did not contest the criminal complaint charging him with first degree assault. See footnote 6 of this opinion. Although the policy exclusion at issue does not require that the defendant be "charged with, or convicted of a crime"; see footnote 2 of this opinion; the fact of the conviction and his admission that he did not contest the criminal charges against him are at least relevant to whether he committed an "intentional or criminal [act] . . ." See *id.* It is for the fact finder to determine the weight of this evidence. The defendant, however, may offer competing evidence to establish his innocence. Thus, in the present case, depending on that competing evidence, he may be able to establish that there is at least a material issue of fact as to whether he has established a possibility of coverage, thereby triggering the plaintiff's duty to defend.

Because I disagree with the majority's balancing of these competing public policy concerns, I therefore respectfully dissent from the majority's holding that the defendant's plea of *nolo contendere* is inadmissible but concur insofar as the majority concludes that his plea does not necessarily trigger the policy's criminal acts exclusion.

<sup>1</sup> Pursuant to General Statutes § 51-199b (k) and the District Court's order, this court "may reformulate a question certified to it." Because I believe that, before determining whether a *nolo* plea is dispositive of whether the policy's criminal acts exclusion applies, we must first address the preliminary question of whether a plea of *nolo contendere* is admissible as *evidence* of the occurrence of a criminal act in an insurance coverage dispute, we should divide the certified question into two reformulated questions: (1) is the defendant's plea of *nolo contendere* admissible, and (2) if so, is it dispositive of whether the policy's criminal acts exclusion applies.

<sup>2</sup> The exclusion in this case provides in relevant part: "[Allstate does] not cover bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts of the insured person. This exclusion applies even if:

"(a) such bodily injury or property damage is of a different kind or degree than that intended or reasonably expected; or

"(b) such bodily injury or property damage is sustained by a different person than intended or reasonably expected.

"This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime. . . ." (Emphasis omitted.)

<sup>3</sup> Under our state law, a *nolo* plea and an *Alford* plea are "functional equivalent[s] . . ." *State v. Faraday*, supra, 268 Conn. 205 n.17. "Under *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt, but consents to being punished as if he were guilty to avoid the risk of proceeding to trial." *Commissioner of Correction v. Gordon*, 228 Conn. 384, 385 n.1, 636 A.2d 799 (1994).

Although a plea of *nolo contendere* and an *Alford* plea are functionally equivalent, I recognize that the precise language of the pleas may differ, and, thus, to the extent the plea is admissible and offered as an opposing party's statement, the content of the statement may differ. See footnote 6 of this opinion.

<sup>4</sup> The majority notes that a trial court, in accepting a *nolo* plea, is not prevented from ordering restitution to the victim. The accuracy of this point is obvious, but its materiality to the majority's logic is not. General Statutes § 53a-28 (c) limits the scope of financial restitution to victims of criminal conduct. The court may decline to award financial restitution if the defendant is unable to pay. Additionally, the court may order financial restitution only for "easily ascertainable damages for injury or loss of property, actual expenses incurred for treatment for injury to persons and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering or other intangible losses . . ." General Statutes § 53a-28 (c). As a result, even if the court orders financial restitution, the victim may still bring a civil suit for these excluded damages.

<sup>5</sup> As I note subsequently in this opinion, I believe that the majority's admonition, quoted in the text, is an overstatement. Even the authority it relies on is overstated. See footnote 10 of this opinion. In particular, the footnotes associated with the particular pages of the law review article the majority cites make clear that the main purpose of the rule prohibiting the admission of a plea of *nolo contendere* in later proceedings is to permit the defendant to avoid making an admission of guilt and to retain the ability to present evidence of his innocence in subsequent litigation. See J. Kuss, supra, 41 Gonz. L. Rev. 561-62 and nn.181-82. As I discuss in this opinion, admission of a defendant's plea of *nolo contendere* under the present circumstances would not undermine this purpose because the plea would not be dispositive evidence of liability, and the defendant would retain the ability to offer competing evidence of his or her innocence.

<sup>6</sup> I note that, to plead *nolo contendere*, a defendant must submit a standard form, available on the Judicial Branch website, which provides in relevant part: "I do not want to contest the claims of the [s]tate of Connecticut that are in the complaint; and, I will not contend with the [s]tate of Connecticut about the complaint." Additionally, at the defendant's underlying plea pro-

ceedings, when asked how he plead to “the charge of assault in the first degree, on or about October [10] . . . 2016, in violation of General Statutes § 53a-59,” the defendant responded, “[n]o contest.” See footnote 8 of this opinion.

<sup>7</sup> It is not debatable that today’s decision, rather than applying or interpreting existing law, extends the scope of this evidentiary rule at issue. The majority candidly admits as much in footnote 12 of its opinion when it acknowledges that “we have not yet addressed” the issue at hand. The majority resolves a split of authority among our trial courts and finds itself compelled to overrule the older of the two trial court precedents making up that split of authority. Compare *Allstate Ins. Co. v. Simansky*, 45 Conn. Supp. 623, 630, 738 A.2d 231 (1998), with *Allstate Ins. Co. v. Linarte*, Superior Court, judicial district of New Britain, Docket No. CV-05-4005150-S (May 24, 2007) (43 Conn. L. Rptr. 664, 669). Nor is this a situation in which we are construing the terms of our Code of Evidence to apply to the issue presented. We are not bound by the wording of the rule, as contained either in our Code of Evidence or in our prior case law. As this court has explained, the Code of Evidence “was not intended to displace, supplant or supersede common-law evidentiary rules or their development via common-law adjudication, but, rather, simply was intended to function as a comprehensive and authoritative restatement of evidentiary law for the ease and convenience of the legal community.” *State v. DeJesus*, 288 Conn. 418, 455, 953 A.2d 45 (2008). This court retains “the authority to modify the common-law rules of evidence codified in the code . . . .” *Id.*, 462.

<sup>8</sup> I note that the rule barring the admission of pleas of nolo contendere has been inconsistently phrased, adding to the confusion regarding its scope. For example, under the current state of our law, it is unclear whether this rule applies only when a party seeks to admit a nolo plea “against a person who has entered” into the plea agreement, in this case, the defendant. Conn. Code Evid. § 4-8A (a). By its very terms, § 4-8A (a) bars admission only under those circumstances. See *State v. Martin*, 197 Conn. 17, 21 n.7, 495 A.2d 1028 (1985) (“the plea of nolo contendere may not be used *against the defendant* as an admission in a subsequent criminal or civil case” (emphasis added)), overruled in part on other grounds by *State v. Das*, 291 Conn. 356, 968 A.2d 367 (2009). This strongly suggests that the plea would be admissible if the individual who entered into the plea agreement was not a party to the subsequent litigation. By contrast, our courts at times have stated the rule more broadly: “[A] prior plea of nolo contendere and a conviction based thereon may not be admitted into evidence in a subsequent civil action or administrative proceeding to establish either an admission of guilt or the fact of criminal conduct.” *Groton v. United Steelworkers of America*, 254 Conn. 35, 51, 757 A.2d 501 (2000); see also E. Prescott, Tait’s Handbook of Connecticut Evidence (6th Ed. 2019) § 8.13.5 (c) (2), p. 532 (“A plea of nolo contendere is not a confession of guilt, but just a plea that the accused will not contest the issue of guilt and will be sentenced as a guilty person. . . . [It] is not an admission of guilt and cannot be used as an admission in a later proceeding.” (Internal quotation marks omitted.)).

It is also unclear whether this rule applies only when the opposing party seeks to establish the defendant’s civil liability, which is not the case here. See *Elevators Mutual Ins. Co. v. J. Patrick O’Flaherty’s, Inc.*, 125 Ohio St. 3d 362, 365, 928 N.E.2d 685 (2010) (“[t]he prohibition against admitting evidence of [no] contest pleas was intended generally to apply to a civil suit by the victim of the crime against the defendant for injuries resulting from the criminal acts underlying the plea”), citing *Allstate Ins. Co. v. Simansky*, 45 Conn. Supp. 623, 628, 738 A.2d 231 (1998); see also J. Kuss, *supra*, 41 Gonz. L. Rev. 565 (prospect of civil liability does not control course of related criminal proceedings).

<sup>9</sup> Although the majority is correct that the rules of evidence do not apply in revocation of probation proceedings, the court in *Daniels* nonetheless had to consider the policy implications of admitting pleas of nolo contendere under those circumstances. See *State v. Daniels*, *supra*, 248 Conn. 64. Moreover, the majority fails to acknowledge, let alone respond to, this court’s application of a policy balancing test in other circumstances in which the Code of Evidence undoubtedly does apply.

<sup>10</sup> Although the majority is correct that courts in some jurisdictions have held that pleas of nolo contendere are not admissible in insurance policy disputes; see *Safeco Ins. Co. of Illinois v. Gasiorowski*, Docket No. 20-3877, 2021 WL 2853255, \*3 (E.D. Pa. July 7, 2021); *Elevators Mutual Ins. Co. v. J. Patrick O’Flaherty’s, Inc.*, 125 Ohio St. 3d 362, 365, 928 N.E.2d 685 (2010); *Korsak v. Prudential Property & Casualty Ins. Co.*, 441 A.2d 832, 834 (R.I.

1982); some of the cases the majority cites did not involve the issue presented here—the admissibility of the nolo plea in the subsequent action—but, instead, concerned whether the nolo plea estopped individuals who entered the pleas from challenging their liability in a subsequent civil action. See *Lichon v. American Universal Ins. Co.*, 435 Mich. 408, 431, 459 N.W.2d 288 (1990); *Safeco Ins. Co. of America v. Liss*, 303 Mont. 519, 533, 16 P.3d 399 (2000); *Hopps v. Utica Mutual Ins. Co.*, 127 N.H. 508, 511, 506 A.2d 294 (1985).

<sup>11</sup> “[T]he duty to defend is triggered whenever a complaint alleges facts that potentially could fall within the scope of coverage, whereas the duty to indemnify arises only if the evidence adduced at trial establishes that the conduct actually was covered by the policy. Because the duty to defend is significantly broader than the duty to indemnify, [when] there is no duty to defend, there is no duty to indemnify . . .” (Emphasis omitted; internal quotation marks omitted.) *DaCruz v. State Farm Fire & Casualty Co.*, 268 Conn. 675, 688, 846 A.2d 849 (2004). I note that, although the certified question involves only the duty to defend, my same reasoning would apply in the duty to indemnify context. The plea of nolo contendere would be admissible but not dispositive. Notably, the rule I suggest would not depart from authority presently available on this question. In fact, the last time a federal court certified this question to this court; see *Northfield Ins. Co. v. Derma Clinic, Inc.*, 440 F.3d 86, 93 (2d Cir. 2006); the only Connecticut case to address the question held that a conviction based on a plea of nolo contendere is admissible to “trigger” a similar policy exclusion and defeat a duty to indemnify the insured. See *Allstate Ins. Co. v. Simansky*, 45 Conn. Supp. 623, 629, 738 A.2d 231 (1998) (“For purposes of the exclusion, the conviction cannot be disregarded as if it did not happen. It did happen, and in so happening triggered the exclusion.”). But see *Allstate Ins. Co. v. Linarte*, Superior Court, judicial district of New Britain, Docket No. CV-05-4005150-S (May 24, 2007) (43 Conn. L. Rptr. 664, 669).

<sup>12</sup> The majority states that the language of the policy—that the exclusion “applies regardless of whether or not such insured person is actually charged with, or convicted of a crime”—makes “either the existence or absence of a criminal conviction contractually irrelevant.” (Emphasis omitted.) Text accompanying footnote 11 of the majority opinion. Contractually irrelevant, maybe. But it does not make the existence of the criminal conviction irrelevant as an evidentiary matter. Surely, the defendant’s conviction of first degree assault makes it “more probable” that he in fact committed a criminal assault, which is clearly “material to the determination of the proceeding”: whether the criminal acts exclusion applies. Conn. Code Evid. § 4-1 (defining “relevant evidence”). If the majority means to suggest that insurance companies can solve the admissibility question by using different contract language, such as a criminal acts exclusion that turns explicitly on the existence of a criminal conviction, regardless of how that conviction was obtained, I am not convinced. As long as the majority is sticking to an interpretation of § 4-8A of the Connecticut Code of Evidence that strictly prohibits the admissibility of nolo pleas in subsequent civil proceedings, I do not see how different contract language affects the admissibility of the defendant’s plea. Rather, such a change in the policy language might affect whether the plea of nolo contendere was dispositive, even if it were ruled admissible. The defendant conceded as much at oral argument before this court when his counsel agreed that the nolo plea still would be inadmissible even if the policy language were more specific about the criminal acts exclusion applying when there has been a conviction, including a conviction pursuant to a nolo plea.

To the extent the majority is suggesting that, by entering into an insurance policy agreement that explicitly excludes coverage when the insured pleads nolo contendere, the insured waives his or her evidentiary right to bar the admissibility of the nolo plea, I do not believe case law is clear on this issue. See C. Paulson, “Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure,” 45 Ariz. St. L.J. 471, 515–22 (2013) (noting that some courts have been hesitant to uphold contractual provisions that waive evidentiary rules or alter evidentiary presumptions).

<sup>13</sup> Indeed, the majority candidly alludes to exactly such inverted motivations, with the state at least tacitly complicit: “During the [trial court’s] canvass [of the defendant], the prosecutor informed the court that there was a pending civil case filed by the victim, Moscaritolo, against [the defendant] and his mother’s insurance company. He further advised the court that [the defendant] was cooperating in that civil lawsuit, and, for that reason, the victim was ‘not necessarily seeking much jail time’ and that he may be monetarily indemnified for the injuries he suffered.” The defendant

received a sentence of twelve years of imprisonment, execution suspended after two years, and three years of probation. Inasmuch as the defendant lived with his mother, whose homeowners insurance policy is the policy implicated, it appears clear that it was not the defendant who was going to “monetarily indemnif[y]” Moscaritolo. Moreover, given that the trial court has granted the parties an indefinite continuance in Moscaritolo’s civil action during the pendency of the federal declaratory judgment action, it appears clear that part of the resolution of the criminal case, and part of the defendant’s cooperation, hinged on seeking restitution through insurance proceeds, thereby in fact costing the insurer and its policyholders, and thereby furthering what public policy disfavors: the indemnification of criminal acts.

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