# No Contest Pleas as a Response to False Guilty Pleas in Canada

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*False guilty pleas are a major source of wrongful convictions. They are also probably inevitable; innocent accused have powerful reasons for resolving their cases short of trial. Given this, it might be wise to add the plea of no contest to the Canadian criminal justice system. A no contest plea could offer advantages for innocent accused, including the opportunity to obtain a reduced sentence without having to publicly (but falsely) admit guilt. It could also bring benefits to the system itself. It could come with some social costs, but those costs might not outweigh the benefits. This paper seeks to encourage discussion of the idea of a no contest plea by analyzing its pros and cons.*



## I Introduction

In recent years, increasing attention has been paid to the role of false guilty pleas in wrongful convictions. Numerous research articles have been published,[2] websites have been created,[3] and prosecutors have acknowledged their existence and significance.[4] Though not included in the traditional list of contributing factors,[5] some scholars now hypothesize that false

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[2] E.g., Kent Roach, "Canada's False Guilty Pleas: Lessons from the Canadian Registry of Wrongful Convictions" (2023) 4:1 Wrongful Conv L Rev 16, online: https://wclawr.org/index.php/wclr/article/view/92 [Roach, "False Guilty Pleas"]; Cheryl Webster, "Remanding Justice for the Innocent: Systemic Pressures in Pretrial Detention to Falsely Plead Guilty in Canada" (2022) 3:2 Wrongful Conv L Rev 128, online: https://wclawr.org/index.php/wclr/article/view/74; David Côté, "The Lost Art of the Plea Inquiry: Learning from the Past to Prevent Wrongful Convictions in the Future" (2023) 60 Alta L Rev 1017, online: https://albertalawreview.com/index.php/ALR/article/view/2745; Alison Redlich et al, "Commonalities in false guilty pleas cases" (2023) Psych, Crime & Law, online: https://www.tandfonline.com/doi/full/10.1080/1068316X.2023.2213381.

[3] E.g., "Why Do Innocent People Plead Guilty to Crimes They Didn't Commit?", online: https://www.guiltypleaproblem.org/.

[4] FPT Heads of Prosecution Committee, *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada* (2018) 169, online: <https://www.ppsc-sppc.gc.ca/eng/pub/is-ip/is-ip-eng.pdf> [FPT Report].

[5] The list has generally included eyewitness misidentification, perjury or false accusation, false confession, false or misleading forensic evidence, official misconduct, and inadequate legal defense.

guilty pleas may be the largest source of wrongful convictions.[6] This suggestion has been driven in part by a slew of documented cases in which an innocent accused, fearful of being unsuccessful at trial, has pled guilty, usually motivated primarily by a desire to obtain the accompanying sentence discount (i.e., the reduction in sentence relative to what would be given on conviction after trial).[7]

For the most part, the study of false guilty pleas has focused on why they occur and how to prevent them.[8] It has, however, also led some to ask an intriguing question: are false guilty pleas inevitable? Kent Roach, for example, poses this question in his recent book on Canadian wrongful convictions.[9] In the book and in a related article, he opines that they are.[10]

Regretfully, I concur; as discussed further below, the incentives for false guilty pleas are too powerful and the prospects for eliminating them too remote.[11] This leads me to ask whether we need to face up to this reality and adjust the system to accommodate it – for the benefit of innocent accused and the system itself. One way to do that might to be expand the range of pleas available in criminal proceedings to include the plea of no contest.[12]

In this paper, I explore the idea of a no contest plea in Canada, explaining what it is and analyzing some of its potential benefits and costs. The analysis is deliberately tentative and less than exhaustive. This is a big subject and my objective is to stimulate discussion, not specifically to advocate for the addition of a no contest plea. I am inclined to think it would be beneficial, but until there is some real debate about the idea in and for Canada (and not just elsewhere) it is too early to be sure.

## II No Contest Plea

No contest (a.k.a. *nolo contendere*) is a common law plea in which the accused does not admit guilt but also does not contest the case for the Crown, effectively consenting to a

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See Ryanne Berube et al, "Identifying Patterns Across the Six Canonical Factors Underlying Wrongful Convictions" (2022) 3:3 Wrongful Conv L Rev 166 at 167, online: https://wclawr.org/index.php/wclr/article/view/82.

[6] See, e.g., Marvin Zalman and Robert Norris, "Measuring Innocence: How to Think About the Rate of Wrongful Conviction" (2021) 24 New Crim L Rev 601 at 641-652, online: https://www.ssrn.com/abstract=3901974.

[7] More detail about this is included below.

[8] E.g., Roach, "False Guilty Pleas", *supra* note 1; Webster, *supra* note 2; Christopher Sherrin, "Guilty Pleas from the Innocent" (2011) 30 Wind Rev Leg Soc Issues 1 [Sherrin].

[9] Kent Roach, *Wrongfully Convicted: Guilty Pleas, Imagined Crimes, and What Canada Must Do to Safeguard Justice*, (Toronto: Simon & Schuster, 2023) ch 3 [Roach, "Wrongfully Convicted"].

[10] *Ibid* at 43 and 50; Roach, "False Guilty Pleas", *supra* note 2 at 19.

[11] The assertion that false guilty pleas are inevitable may seem surprising to some, but it is hardly radical. See, e.g., Albert Alschuler, "Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas" (2003) 88 Cornel L Rev 1412 at 1413-14, online: <https://scholarship.law.cornell.edu/clr/vol88/iss5/4> [Alschuler, "Straining at Gnats"]: "The plea bargaining system … is marvelously designed to secure conviction of the innocent."

[12] This idea was briefly discussed in the latest FPT Report, *supra* note 4 at 200-203.

finding of guilt. It is the functional equivalent of a guilty plea.[13] The accused is held to have admitted the allegations of the Crown – albeit, for purposes of the case only.[14] No assessment of the prosecution's evidence occurs beyond that which is required for a plea of guilty.[15] Practically speaking, after the plea is entered, all that is left to adjudicate is sentence.

The plea is an ancient common law one, dating back to the fifteenth century.[16] Although it has long fallen into disuse in the United Kingdom,[17] it is an available plea in most American jurisdictions.[18] It is not currently an available plea in Canada.[19]

Making the plea available could bring several benefits to innocent accused who for one reason or another are disinclined to go to trial. Perhaps most significantly, it could allow them to reap sentencing benefits of an early case resolution without having to suffer the agonizing experience of publicly (but falsely) admitting culpability. Innocent accused do not normally declare guilt eagerly.[20] They can resist until they lose faith in the system and feel defeated[21] or trapped;[22] making the choice to plead guilty can be an incredibly difficult decision.[23] Innocent people usually plead guilty in order to cut the losses they suffer or may suffer from the criminal accusation: imprisonment, extended and unpleasant pre-trial detention, separation from family, loss of children, immigration problems, etc. A no contest plea could allow them to cut their losses without having to lie to the world – and even while asserting their innocence everywhere but in the criminal courtroom. The plea should normally entitle the accused to a sentencing discount. A guilty plea is a mitigating factor on sentence when it spares witnesses from having

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[13] Stephanos Bibas, "Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas" (2003) 88 Cornell L Rev 1361 at 1370, online: https://scholarship.law.cornell.edu/clr/vol88/iss5/3 [Bibas]; Wayne LaFave et al, *Criminal Procedure*, 4th ed (St Paul, Minn: Thomson West, 2004) at 1006.

[14] Bibas, *ibid* at 1371; Nathan Lenvin and Ernest Meyers, "Nolo Contendere: Its Nature and Implications" (1942) 51 Yale LJ 1255 at 1258, online: <http://hdl.handle.net/20.500.13051/13171> [Lenvin and Meyers].

[15] Pursuant to s 606(1.1)(c) of the *Criminal Code*, RSC 1985, c C-46, before a court may accept a guilty plea it must be satisfied that "the facts support the charge". In the context of a no contest plea, this would presumably be satisfied by the prosecution's summary of the alleged facts and the accused's (deemed) admission.

[16] Lenvin and Meyers, *supra* note 14 at 1255.

[17] Lenvin and Meyers, *supra* note 14 at 1256.

[18] Bibas, *supra* note 13 at 1375.

[19] *Criminal Code*, *supra* note 15 at s 606(1); *R v R.P.*, 2013 ONCA 53 at para 38.

[20] Some might, including those who are entering one false guilty plea along with other true guilty pleas where the former will not materially affect the sentence, and those who are seeking to take the blame in order to protect the actual perpetrator.

[21] Anthony Hanemaayer, falsely accused of breaking into a house and assaulting a 15-year old girl, twice rejected plea deals. He pled guilty only part way through trial, explaining he felt "defeat. Like I had no more fight left in me. There was no way they were going to believe me … I lost all faith in the justice system": Roach, "Wrongfully Convicted", *supra* note 9 at 46-48.

[22] In the words of O'Neill Blackett, wrongly charged with murder, "I felt trapped by my situation. I decided to plead guilty": Roach, "Wrongfully Convicted", *supra* note 9 at 35.

[23] For Richard Brant, wrongly accused of manslaughter, the "decision to plead guilty was the hardest decision of [his] life": Roach, "Wrongfully Convicted", *supra* note 9 at 30. See also *R v Kumar*, 2011 ONCA 120 at para 37.

to testify, saves the system time and resources, and/or demonstrates remorse by the accused.[24] The last reason would not apply to no contest pleas but the first two could. To the extent that they do, the accused should receive a lower sentence than would be imposed on conviction after trial (even if it might be higher than would be imposed on a guilty plea).[25]

A no contest plea could also come with other benefits for the innocent accused. It could lessen the shame and self-blame that the wrongly convicted often feel.[26] It could reduce the damage to relationships that can occur when someone admits to committing a crime, especially one against a family member or loved one.[27] Depending on how the public reacts to a no contest plea, it could lessen the social stigma suffered by the wrongly convicted.[28] If understood as it is at common law, where the accused is not estopped from denying in a subsequent non-penal proceeding the facts supporting the criminal charge,[29] it could allow the accused to maintain innocence in related civil and family proceedings. If new exculpatory evidence comes to light, it could improve the accused's chances on appeal or ministerial review, avoiding the skepticism of a claim of innocence that can follow a guilty plea.[30]

It is difficult to say whether innocent accused would actually prefer a no contest plea to a guilty plea. A no contest plea could result in a higher sentence due to the absence of contrition and consequent concerns about recidivism.[31] For the same reasons, it could also have an adverse effect on any post-conviction application for parole.[32] Whether any particular innocent accused would conclude that the benefits outweigh these costs would be a personal decision. Of course, not all innocent accused would need to prefer a no contest plea to a guilty plea; the new plea would probably be worthwhile if a significant number of innocent accused did. The plea might be especially attractive to innocent accused who had already suffered as much punishment as they would receive on a no contest plea; that could happen, for example, if an accused decided to resolve a renewed prosecution after successfully appealing an initial conviction at trial or if an accused was denied bail and would have to serve more time awaiting trial in pre-trial detention than would be merited on a plea. Concerns about parole might also be of little relevance to accused facing a reformatory sentence short enough that parole is not

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[24] *R v Fuller*, 2020 ONCA 115 at para 26.

[25] This is what generally happens now when an accused pleads guilty but the evidence of remorse is equivocal or absent. See, e.g., *R v MV*, 2023 ONCA 724 at para 70; *R v DM*, 2023 ONCA 599 at para 19.

[26] Samantha Brooks and Neil Greenberg, "Psychological impact of being wrongfully accused of criminal offences: A systemic literature review" (2021) 61:1 Med, Sci & L at 47, online: <https://journals.sagepub.com/doi/10.1177/0025802420949069> [Brooks and Greenberg].

[27] Studies have found that "[c]ommonly, social networks, friendships and relationships appeared to break down after individuals were wrongfully accused": *ibid* at 48. It stands to reason that the same or worse would occur when the accused admits to the crime.

[28] Brooks and Greenberg, *supra* note 26 at 47.

[29] Lenvin and Meyers, *supra* note 14 at 1263.

[30] Sydney Schneider, "When Innocent Defendants Falsely Confess: Analyzing the Ramifications of Entering Alford Pleas in the Context of the Burgeoning Innocence Movement" (2013) 103 J Crim L & Crim 279 at 301 [Schneider].

[31] Josh Bowers, "Punishing the Innocent" (2008) 156 U Penn L Rev 1117 at 1168, online: <https://scholarship.law.upenn.edu/penn_law_review/vol156/iss5/1> [Bowers].

[32] See Schneider, *supra* note 30 at 305.

a live issue[33] or in a jurisdiction where parole is not commonly granted.[34] The plea seems to be of some interest to innocent accused in the United States: over fifty individuals included in the National Registry of Exonerations opted to plead no contest.[35] In a sense, one innocent Canadian has already made the same choice: Sherry Sherret-Robinson accepted a deal in which the Crown would drop the murder charge she was facing in exchange for her agreeing not to contest a statement that the Crown would read out in court at trial in support of a charge of infanticide.[36]

The justice system itself could also benefit from a no contest plea. The plea could reduce the frequency with which accused persons lie and thereby mislead the court in pre-trial resolutions. It could enhance solicitor-client relationships to the extent that defense lawyers, spotting a formidable Crown case, no longer felt bound to convey doubt about the client's claim of innocence or, worse, to encourage the client to lie about guilt.[37] It would imbue the system as a whole with some humility and allow it to recognize its own imperfection.

Normally, one would respond to an imperfection, not just by acknowledging it, but by fixing it. Obviously, we must work diligently towards reducing the incidence of wrongful conviction. But my concern is that the problem of false guilty pleas seems so intractable. There is no realistic prospect that people will stop being wrongly accused; perfection in our very human investigatory process is not practically attainable. There is also no reason to believe that the wrongly accused will stop wanting to plead guilty. People who enter false guilty pleas are often acting entirely rationally.[38] Anthony Hanemaayer, for example, was told at trial that he would almost certainly be convicted and sentenced to at least six years' imprisonment, whereas

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[33] As noted by the Auditor General of Ontario, "the lengthy and onerous process in place for inmates to apply for a parole hearing" can make "it not worthwhile for most inmates because they receive short sentences": *Annual Report 2014* (Queen's Printer for Ontario, 2014) at 69, available online at https://www.auditor.on.ca/en/content/annualreports/arreports/en14/2014AR_en_web.pdf.

[34] In Ontario, for example, the parole approval rate by the provincial parole board as of 2014 was 32%: *ibid* at 69.

[35] See the case summaries of the following individuals online at: https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last accessed January 22, 2024): Anthony Adams, Jesse Alvarez, Jorge Alvarez, Brian Banks, Larry Booker, Knolly Brown, Jr., Terrance Calhoun, John Cape, Derek Clark, Luis Davalos, Jermaine Dickerson, Dale Duke, Edward Easley, Carlos Flores, Adrian Garcia, Willie Gavin, Kathleen Gonzalez, Michael Googe, Anthony Hart, Reginald Hayes, Carlton Heard, Donald Heistand, Edward Johnson, Paul Kolhoff, Ronnie Marshall, Kevin Martin, Ernest Matthews, Andre Mazur, Raymond McCann II, Ceaser Menendez, Tony Moreno, Jr., Anthony Nguyen, Karen O'Dell, John Palmer, John Peel, Kevin Peterson, Christopher Prince, Guy Randolph, Shakara Robertson, Davonn Robinson, Stuart Rodrigues, Danielle Rodriguez, Mandel Rogers, Aubrey Shomo, Marcus Smith, John Sosnovske, Clyde Spencer, Ronald Stewart, Michael Trevino, Gilbert Valdez, Michael Washington, Johnny Lee Wilson, Thomas Winslow, and Louis Wright.

[36] The Ontario Court of Appeal later declared that she was "wrongfully convicted". See *R v Sherret-Robinson*, 2009 ONCA 886 at paras 3 and 9 [*Sherret-Robinson*]; Roach, "Wrongfully Convicted", *supra* note 9 at 21-22.

[37] Schneider, *supra* note 30 at 297-99; Alschuler, "Straining at Gnats", *supra* note 11 at 1423; Albert Alschuler, "The Defense Attorney's Role in Plea Bargaining" (1975) 84 Yale LJ 1179 at 1287-89 and 1297.

[38] See Roach, "Wrongfully Convicted", *supra* note 9 at 42 and 98.

he could avoid the penitentiary if he changed his plea.[39] Is it any wonder that he pled guilty? In some cases, it would almost be irrational *not* to enter a false guilty plea. Someone held in pre-trial detention who can, on a guilty plea, secure release before their trial date will in a very significant way only make their situation *worse* by waiting for trial, even if they are ultimately acquitted.[40]

The most commonly discussed option for addressing false pleas is limiting the sentence discount given to those who plead guilty.[41] The idea is to narrow the disparity between sentences that are given on guilty vs. not guilty pleas to the point where the former are no longer so attractive to the innocent. The problem (as I have explained elsewhere)[42] is that the limitation can be so easily avoided. The extent of a sentencing discount can only be controlled if in any given case there is a fixed baseline sentence from which the discount would be calculated. Presumably that baseline sentence would be based on the initial charges and factual allegations faced by the accused. But the charges and fact allegations faced by an accused are not immutable. A prosecutor has wide discretion to change them, and as a result to change the baseline (downward). This sort of charge and fact bargaining happens all the time.[43] A court could insist upon seeing the initial charge and allegations in order to supervise the plea bargaining process,[44] but a court could never know whether the prosecutorial decision was entirely appropriate. In some cases, the true facts will prove to be much less serious than initially thought and thus what on the surface might appear to be a substantial plea discount is actually not much of a discount at all. The most that a court could do, therefore, is ensure that an accused received a sentence no less than what is warranted on a guilty plea to the final version of the charges and facts accepted by the parties. Presumably, prosecutors would not often agree to facts that are complete distortions of reality, but prosecutors prior to trial will

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[39] See Roach, "Wrongfully Convicted", *supra* note 9 at 45-47.

[40] This is not a fanciful scenario. Consider the case of Clayton Boucher. He was charged with possession for the purpose of trafficking of what was suspected to be cocaine but was actually not an illegal drug. He was denied bail and detained in the unpleasant and sometimes violent Edmonton Remand Centre. After spending four months in jail, and with his trial date still months away, he elected to plead guilty in order to secure his immediate release: Roach, "Wrongfully Convicted", *supra* note 9 at 96-98. See also the case of Richard Catcheway online at https://www.wrongfulconvictions.ca/cases/richard-catcheway, discussed in Roach, "Wrongfully Convicted", *supra* note 9 at 9-10.

[41] See, e.g., Oren Bar-Gill and Oren Gazal Ayal, "Plea Bargains Only For The Guilty" (2006) 49 J. L. & Econ. 353; Roach, "False Guilty Pleas", *supra* note 2 at 36, online: http://www.ssrn.com/abstract=560401.

[42] Sherrin, *supra* note 8 at 16-18. See also Russell Covey, "Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings" (2008) 82:4 Tulane L Rev 1237 at 1258-1268 [Covey].

[43] See Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Ministry of Supply and Services, 1987) at 404-405, online: https://johnhoward.ca/wp-content/uploads/2016/12/1987-KE-9355-A73-C33-1987-J.R.-Omer-Archambault.pdf; Peter Solomon, *Criminal Justice Policy: From Research to Reform* (Toronto: Butterworths, 1983) at ch.3.

[44] Judges may not be anxious to do this. See Covey, *supra* note 42 at 1267 (footnotes omitted): "With crowded dockets and little personal or institutional investment in the resolution of particular cases, judges lack incentives to probe the recesses of plea agreements. If an agreement is good enough for the parties, it will almost always be good enough for the judge. As a result, the requirement that judges approve plea bargains before they take effect imposes little actual constraint on the plea-bargaining process."

not always know what the ground truth of an allegation is. Sometimes the true facts are ambiguous or open to doubt. Given that it is in those sorts of cases that innocent accused are probably most likely to be ensnared, the innocent are probably most likely to be able to successfully engage in fact bargaining. As a result, it would be especially hard to enforce limited plea discounts to an extent that they would effectively discourage false guilty pleas.

If we cannot prevent innocent people from being charged and incentivized to falsely plead guilty, the only hope for preventing such pleas seems to lie in scrutinizing pleas for truthfulness (and accuracy) when they are entered. This, however, seems unlikely to succeed. The *Criminal Code* currently stipulates that a judge can accept a guilty plea only if it is satisfied that "the facts support the charge".[45] Kent Roach recently observed that "[r]eported cases on this … provision do not so far reveal that judges are engaging in substantial inquiries into the factual basis of a plea."[46] This is not surprising. A guilty plea is meant offer a truncated process for resolving a criminal accusation that relies fundamentally on the accused waiving procedural protections. It would be curious to turn this process into an extended inquiry into the accused's acknowledgment of factual guilt. Judges could probe more deeply than they do now into the reasons and basis for a plea, but it is doubtful that they would be anxious to do so in the face of today's crowded criminal court dockets.[47] Even if they were willing (or, by statutory amendment, required), an accused bent on receiving the benefits of a guilty plea could simply provide the answers necessary to ensure acceptance of the plea. More substantial plea inquiries would probably catch some false pleas, but it is unlikely that they would catch many and virtually certain that they would not catch them all.[48]

Even if we could devise a way to catch all attempts to enter a false guilty plea, I am not certain that we should. Innocent accused would suffer greatly if they did not have the chance to resolve charges short of trial. Anthony Hanemaayer would probably have lost four years of his life to the horrors of the penitentiary.[49] Clayton Boucher would definitely have spent three

[45] *Supra* note 15 at 606(1.1)(c). Section 606(1.2), however, stipulates that the failure to fully inquire whether this and other conditions in subsection (1.1) are met does not affect the validity of the plea.

[46] Roach, "False Guilty Pleas", *supra* note 2 at 37.

[47] See Bowers, *supra* note 31 at 1147-48, arguing that, especially in minor cases, judges prioritize expeditious case processing, usually by plea.

[48] David Côté, who is in favour of enhancing the inquiries, acknowledges this: *supra* note 2 at 1047. Interestingly, more substantial plea inquiries might be more successful if the alternative of a no contest plea was available. If advised that such a plea would likely come with a sentencing discount, even if it was a smaller discount, the accused who entered a false guilty plea might be less inclined to maintain the pretense of guilt.

[49] Hanemaayer pled guilty part-way through trial. He thought the Crown's identification witness was convincing, his only alibi witness was uncooperative, and his lawyer's advice was that he would almost certainly be convicted. His lawyer also told him he would get a sentence of at least six years upon conviction after trial, versus two years less a day on a plea. The Ontario Court of Appeal stated that the "estimate of six years was not unrealistic given the seriousness of the offence." It also declared that "fresh evidence proves beyond doubt that the appellant did not commit the offences to which he pleaded guilty." See *R v Hanemaayer*, 2008 ONCA 580; Roach, "Wrongfully Convicted", *supra* note 9 at 46-47.

to four more months in a miserable pre-trial detention centre.[50] C.M. faced the realistic prospect of life imprisonment rather than no further jail time.[51] Sherry Sherret-Robinson, who had already lost two children, might never have been able to be a mother again.[52] Richard Brant, who had already lost a child, could have missed the chance to be part of his next child's life.[53] Dinesh Kumar could have lost custody of his child, been taken away from his wife who had no income and was recovering from brain surgery, sentenced to years in prison, and deported from Canada upon release.[54] These are just a few examples. Across Canada, the United States, and the United Kingdon, almost a thousand false guilty pleas have been documented[55] – even

[50] The details of Boucher's case are outlined, *supra,* in note 40. He pled guilty and was released on May 30, 2017. His trial date was scheduled for September 2017: Roach, "Wrongfully Convicted", *supra* note 9 at 98.

[51] The accused's name is the subject of a publication ban. She was charged with second degree murder and ultimately pled guilty to manslaughter for a sentence of probation and community service. The charge stemmed from the death of her new-born baby. The Crown's case relied on the expert opinion of forensic pathologist Charles Smith. At the time, "Dr. Smith had an outstanding reputation. He was considered the leading authority in Canada in the field of paediatric forensic pathology. The experts that the defence eventually retained had less impressive credentials, and the appellant's counsel strongly believed their opinions could not convincingly challenge that of Dr. Smith, given his preeminent position." C.M.'s conviction was later set aside as a miscarriage of justice. See *R v CM*, 2010 ONCA 690; Roach, "Wrongfully Convicted", *supra* note 9 at 19-20.

[52]Sherret-Robinson was facing trial for the second degree murder of her infant second son. Child protection officials had taken custody of her older son. The Crown's case was based on the seemingly powerful evidence of Charles Smith. She agreed to a procedure that would result in her being convicted of infanticide. She was ultimately sentenced to imprisonment for one year. She explained: "I was scared that I would never be allowed to be a mother again. I was scared of being convicted of murder and receiving a life sentence." Evidence later established that her child likely died accidentally. See Roach, "Wrongfully Convicted", *supra* note 9 at 20-22; *Sherret-Robinson*, *supra* note 36.

[53] Brant was charged with manslaughter of his infant son based on the evidence of Charles Smith. He ultimately pled guilty to aggravated assault and was sentenced to six months in prison. He had a criminal record and his lawyer told him that a guilty plea was in his best interests. His partner was expecting a baby "and having just lost his first child, he couldn't bear the thought of not being a part of his second baby's life." Based on fresh evidence, his conviction was ultimately held to be unreasonable. See Roach, "Wrongfully Convicted", *supra* note 9 at 28-29; *R v Brant*, 2011 ONCA 362.

[54] Kumar was charged with the second degree murder of his one-month old son. The terms of his bail prevented him from being alone with his older son, who had been apprehended by the Children's Aid Society. He faced a minimum of ten years' imprisonment on conviction. Because he was not a citizen, he was liable to deportation. The Crown's main witness was Charles Smith. The expert witness retained by Kumar's lawyer agreed with Smith. The Crown offered to withdraw the murder charge in exchange for a plea to criminal negligence causing death and a joint submission for a 90-day intermittent sentence plus probation. Based on fresh evidence, his conviction was ultimately held to be unreasonable. See *Kumar*, *supra* note 23; Roach, "Wrongfully Convicted", *supra* note 9 at 30-32.

[55] As of January 19, 2024, there were 16 false guilty plea cases included in the Canadian Registry of Wrongful Convictions, 85 in the U.K. Miscarriages of Justice Registry, and 838 in the U.S. National Registry of Exonerations, online: https://www.wrongfulconvictions.ca/data/all-case-data (filtered by guilty plea);
https://evidencebasedjustice.exeter.ac.uk/miscarriages-of-justice-registry/the-cases/overview-graph/ (filtered by guilty plea);

though guilty plea wrongful convictions are probably the least likely to be uncovered.[56] Criminological research suggests that, in Canada alone, hundreds of people every year plead guilty to offences they did not commit.[57] Presumably, the large majority of them would suffer some loss if they had no choice but to go to trial. The scale of the combined prospective losses by going to trial is incalculable but almost certainly monumental. In these circumstances, I have to wonder whether our focus should be on minimizing the pain suffered by innocents, not on ensuring that it is felt by as many of them as possible.

Perhaps I am being overly pessimistic. Proposals for addressing the problem of false guilty pleas are being offered all the time.[58] A solution *that stops putting innocent accused in a position where they can improve their situation by not going to trial* may present itself eventually.[59] But the unfortunate reality is that we do not have that solution now, and until we do I think we need to consider the idea of a no contest plea. The plea can always be scrapped when a better response becomes available.

## III Objections

Several objections can be levelled against the idea of a no contest plea. Perhaps the most fundamental is a normative one. More than 30 years ago, the Supreme Court of Canada said that "[t]he precept that the innocent must not be convicted is basic to our concept of justice … [N]o just society can tolerate the conviction and punishment of the innocent."[60] While said in a very different context,[61] the words suggest that it is simply wrong to endorse a process by

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https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P. These numbers do not include false guilty pleas included solely in the Groups Registry maintained by the National Registry of Exonerations (a collection of wrongful convictions resulting from police misconduct for which the Registry does not always have enough individualized information to include in the main database): see Samuel Gross et al, *Race and Wrongful Conviction in the United States* (National Registry of Wrongful Convictions, 2022) at 40-42, online: <https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf.>.

[56] See Samuel Gross, "What We Think, What We Know and What We Think We Know about False Convictions" (2017) 14 Ohio St L J 753 at 777: "An innocent defendant who pleads guilty is far less likely to be exonerated than one who goes to trial. It's much harder to convince anybody that you're innocent when you told a court that you're guilty; you have fewer avenues for review; and, most important, if you take a plea bargain you will get a shorter sentence, usually a much shorter sentence—that's why defendants accept plea bargains—and the scarce resources it takes to reopen a case and achieve an exoneration are usually reserved for defendants with more severe punishments."

[57] This research is outlined in Sherrin, *supra* note 8 at 5-6.

[58] See, e.g., Roach, "False Guilty Pleas", *supra* note 2 at 36-46.

[59] I have offered what I believe is a partial solution: mandating the release of (almost all) accused who are detained pending trial after they had served the equivalent of the sentence merited on an early guilty plea: see Sherrin, *supra* note 8.

[60] *R v Seaboyer; R v Gayme*, 1991 CanLII 76 (SCC) at 606-07.

[61] The Court was explaining why a statutory provision that limited an accused's use of a certain kind of potentially exculpatory evidence was unconstitutional.

which penal consequences – up to and including the deprivation of basic liberty – can be inflicted on those who have done nothing to deserve them.[62]

As an ideal, this is indisputable, but the whole point about false guilty pleas is that they force us to confront and contend with the messiness of our system as it actually operates. We run a system that currently does and for the foreseeable future will punish innocent people, sometimes quite substantially, for not resolving their charges short of full trial – not officially, but effectively.[63] Knowing this, are we entitled to take an absolutist moral stance on convicting the innocent? I am not sure we have the luxury of being so pristine *when and to the extent* that some flexibility might assist the very people the principle seeks to protect. The moral purist might resort to the notion that, normatively, knowingly facilitating an injustice is different than inadvertently allowing it to happen.[64] I suspect this would be of small comfort to the innocent accused forced to rot in jail or lose their family while awaiting the uncertain outcome of trial. It is also a difficult claim on which to rest in a system that permits an accused to enter the functional equivalent of a no contest plea. Currently, an accused is entitled to plead not guilty, not contest the factual allegations of the Crown, and invite the presiding judge to make a finding of guilt and proceed to sentencing.[65] Effectively, are we not already knowingly facilitating the so-called injustice of a no contest plea?

Some claim that a no contest plea unacceptably undermine the moral force and legitimacy of the criminal law. In the words of Stephanos Bibas, no contest pleas (what he terms "guilty-but-not-guilty pleas"),[66]

> … send mixed messages, breeding public doubt, uncertainty, and lack of respect for the criminal justice system … The perception of [adjudicative] accuracy is needed 'to command the respect and confidence of the community' … Public confidence and faith in the justice system are essential to the law's democratic legitimacy, moral force, and popular obedience.[67]

Bibas claims that this social cost outweighs any benefits that a no contest plea brings.[68] Other commentators have expressed similar sentiments.[69]

Bibas and others are right to be concerned about protecting the moral force and legitimacy of the criminal law, but presumably the exact same concern arises with false guilty

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[62] See Bibas, *supra* note 13 at 1382 and 1384.

[63] Whether any particular innocent accused will suffer by going to trial is usually impossible to discern, since we cannot know what will happen at trial. However, it is fair to say innocent accused as a group will (and not just might) suffer since it is unrealistic to expect that all or even almost all of them will be acquitted.

[64] See Bibas, *supra* note 13 at 1384: "There is something profoundly troubling about knowingly facilitating injustice, more so than inadvertently allowing it to happen. No promise of good consequences can erase the repugnance of promoting an evil in the hope of averting a worse evil."

[65] *R v R.P.*, *supra* note 19.

[66] Bibas, *supra* note 13 at 1363-64.

[67] Bibas, *supra* note 13 at 1386-87, quoting in part *In re Winship*, 397 US 358 at 364.

[68] Bibas, *supra* note 13 at 1382-88.

[69] See, e.g., Stephen Schulhofer, "Plea Bargaining as Disaster" (1992) 101 Yale LJ 1979 at 1985-86 and 1996, online: https://openyls.law.yale.edu/handle/20.500.13051/8708.

pleas, premised as they are on a misleading public fabrication. Indeed, if anything, such pleas must be even more damaging to the moral force and legitimacy of the criminal law: they represent instances of outright mendacity rather than just equivocation, definite cases of adjudicative inaccuracy and not just possible ones. Given the apparent inevitability of false guilty pleas, one would think that no contest pleas are an attractive way to reduce the social costs that we are already incurring.[70]

The availability of a no contest plea could come with a different kind of social cost: an increase in the incidence of wrongful conviction. Some innocent accused who otherwise would go to trial might opt instead to plead no contest, given its potential benefits. To the extent that those accused would have been acquitted at trial, more innocents will be convicted. Systemically, this would be a very unfortunate result of no contest pleas, but it might not be an unacceptable one. One would have to weigh the costs and benefits. In opposition to no contest pleas, we would take into account the number and nature of wrongful convictions avoided plus the costs avoided by the innocent who are acquitted. In favour of no contest pleas, we would consider the costs incurred by the innocent who are convicted at trial and/or who suffer simply by going to trial (due to bail conditions, process costs, because time spent in pre-trial detention exceeds the sentence warranted on conviction after trial, etc.). It is difficult to imagine how to weigh those factors, not in the least because avoiding wrongful convictions is an intangible social good and we cannot know in advance which and how many innocent accused would be acquitted rather than convicted at trial. In these circumstances, maybe it makes sense to maximize the options for, and give greater control to, the innocent accused, who are being victimized by the criminal justice process and who are best positioned to assess and weigh the personal risks and benefits of trial. At the same time, we can work to improve fact finding at trial so as to make it more accurate and thus more attractive to the innocent.

This conclusion might not follow if the availability of a no contest plea would compromise public safety. One way in which it might is through the increase in the incidence of wrongful conviction discussed in the preceding paragraph. By convicting an innocent person, we could be allowing the actual perpetrator to go unpunished and free to commit further crimes. There is a growing literature analyzing the crimes committed by actual perpetrators in wrongful conviction cases in the United States;[71] the number and seriousness of offences committed is saddening.[72] But there are reasons to doubt that many crimes would be attributable to the existence of a no contest plea – which would affect only how a case is resolved, not who is prosecuted. Given that about one-third of documented wrongful convictions in Canada and the United States involve crimes that never happened,[73] it stands to reason that a no contest plea could not possibly leave the actual perpetrator free to commit crimes about 33% of the time (because there is no actual perpetrator). In the other two-thirds

[70] Pretending that all guilty pleas are truthful, of course, would rest the integrity of the system on wilful blindness.

[71] See, e.g., Robert Norris et al, "The Criminal Costs of Wrongful Convictions: Can We Reduce Crime by Protecting the Innocent?" (2020) 19 Crimin & Pub Pol 367, online: <https://doi.org/10.1111/1745-9133.12463>; Frank Baumgartner et al, "The Mayhem of Wrongful Liberty: Documenting the Crimes of True Perpetrators in Cases of Wrongful Incarceration" (2017) 81 Alb L Rev 1263, online: https://fbaum.unc.edu/papers/WrongfulLiberty2014.pdf.

[72] In the Norris et al study, for example, more than 60% of the offenses were felonies and/or crimes of violence against other persons: *ibid* at 373.

[73] Roach, "Wrongfully Convicted", *supra* note 9 at 96; Jessica Henry, *Smoke But No Fire* (Oakland: University of California Press, 2020) at 4.

of the cases, a no contest plea could risk public safety only to the extent that: 1) the innocent accused would have been acquitted at trial or had their charges dismissed before trial (after the date of the no contest plea), 2) the authorities would have responded to this by reviving the investigation to search for the true perpetrator, 3) the true perpetrator would have been identified and charged, and 4) the true perpetrator would have been prevented or inhibited from committing crimes by pre-trial bail conditions, the sentence imposed on conviction, or both. The extent to which the innocent accused would have been absolved of responsibility is impossible to know, but it is unlikely to be anything close to 100%; Canada has a history of convicting innocent accused at trial as well before it. Furthermore, a no contest plea would at least sometimes occur far enough into the prosecution process that the pre-trial case review, defense investigation, and potentially exonerating police investigation would have already been completed, making pre-trial dismissal unlikely. The authorities very rarely respond to a dismissal or acquittal by reviving their investigation.[74] The reason is simple: they conclude that the accused got away with it, not that someone else must have done it.[75] Even when the authorities are open to the idea of an alternative perpetrator, one will not always be identified; in less than 45% the first 375 DNA exoneration cases in the U.S. was the true perpetrator identified.[76] Even when one is, he or she will not always be prosecuted; "[a]ccording to data provided by the Innocence Project, only half of identified true perpetrators in DNA exoneration cases have been charged with the wrongful conviction crime."[77] When charged and prosecuted, the true perpetrators will not always be prevented from committing further crimes. They could be released on bail terms that are permissive or ignored, acquitted at trial, or sentenced leniently.[78] It is certainly possible that some crimes committed by true perpetrators could be attributed to an increase in wrongful convictions from no contest pleas, but the question will once again come down to this: does that incalculable cost outweigh the cost to the innocent who would prefer to plead no contest than guilty or not guilty?

It has been claimed that a no contest plea could adversely affect public safety for another reason. Bibas argues that, unlike a guilty plea, a no contest plea allows a guilty accused to deny guilt (internally and outside the criminal courtroom), interfering with their contrition, treatment and reform, and thereby increasing the chances of reoffending.[79] I am not sure how many guilty accused would prefer to plead no contest rather than guilty, given that the former would probably come with a higher sentence. Some would, of course, and those would probably be the offenders most in denial, psychologically unable to accept responsibility. But with such offenders any admission of guilt and vocalization of remorse is likely to be feigned and meaningless.[80] Bibas suggests that confession in court may begin to breach an offender's

[74] Bowers, *supra* note 31 at 1161.

[75] Bowers, *supra* note 31 at 1161.

[76] Innocence Project, "DNA Exonerations in the United States (1989 – 2020)", online: <https://innocenceproject.org/dna-exonerations-in-the-united-states/>.

[77] Jennifer Weintraub and Kimberley Bernstein, "Identifying and charging true perpetrators in cases of wrongful convictions" (2020) 1 Wrongful Conv L Rev 181 at 183, online: https://wclawr.org/index.php/wclr/article/view/22.

[78] The true perpetrator in Donald Marshall, Jr.'s murder case, for example, received but one year in prison on a conviction for manslaughter (after three trials): *R. v. Ebsary*, 1986 CanLII 4648 (NS CA) at 490 and 508.

[79] Bibas *supra* note 13 at 1389, 1394-97.

[80] Bibas acknowledges that most guilty pleas are not the fruit of genuine repentance: Bibas *supra* note 13 at 1399.

denial,[81] but that seems like wishful thinking. The punishment imposed on an offender may begin to break down denial, but as much or even more punishment would be imposed on a no contest plea as on a guilty plea. Victim impact statements could break down denial, but they would be admissible on a no contest plea. The bottom line is that the system would treat obstinate offenders who plead no contest much the way it currently treats offenders who do not indicate remorse after guilty plea or conviction at trial: with less emphasis on rehabilitation and more emphasis on specific deterrence and possibly incapacitation.[82]

Some crime victims might not like the idea of a no contest plea, at least when entered by a guilty accused. Unlike a guilty plea, it would deprive the victim of any acknowledgment of wrongdoing and the vindication and possibly closure that comes with it.[83] But victims do not have a right to an acknowledgement of wrongdoing now. A no contest plea would just mimic the situation a victim currently experiences when an accused does not admit guilt following conviction after trial. Some victims may bristle at the sentencing discount granted on a no contest plea without any *mea culpa* by the accused, but the discount would not be attributable to any assumed remorse or admission of liability and it would presumably be smaller than that given on a guilty plea accompanied by a possibly fake expression of remorse; indeed, to the extent that the sentence on a no contest plea would be higher than on a guilty plea, some victims might prefer the former. Bibas expresses concern that victims could be frustrated at sentencing if the accused and his or her supporters deny guilt and, at least implicitly, blame the victim,[84] but this seems to overlook the fact that sentencing will proceed on the basis that the accused committed the offence and that the victim is in the right, not in the wrong. Given that the plea could not serve as proof in a subsequent civil action that the accused committed the offence, victims would sometimes be impeded in their efforts to obtain compensation for the criminal wrong. But not many victims seek redress through the civil courts,[85] and victims would presumably still be able to benefit from restitution orders in criminal proceedings[86] and compensation orders through the provincial criminal injuries compensation schemes.[87]

## IV Conclusion

In this paper, I have discussed arguments for and against a no contest plea in Canada. On the one hand, it might provide an appealing alternative to a guilty plea, enabling an innocent accused to obtain benefits of early case resolution without having to admit culpability or suffer some of the consequences that can follow therefrom. On the other hand, it might not be

[81] Bibas *supra* note 13 at 1397-1400.

[82] See, e.g., *R. v Shah*, 2017 ONCA 872 at para 8.

[83] See Bibas, *supra* note 13 at 1392-93, 1402-03 and 1406-07.

[84] Bibas, *supra* note 13 at 1398.

[85] Richard Murphy, "Compensation for Victims of Crime: Trends and Outlooks" (1984) 8 Dalhousie LJ 530 at 541; Craig Brown & Melanie Randall, "Compensating the Harms of Sexual and Domestic Violence: Tort Law, Insurance and the Role of the State" (2004) 30 Queen's LJ 311 at 313.

[86] See *Criminal Code*, *supra* note 15 at ss 738-739.

[87] Since the controlling statutes do not make compensation contingent on an offender having been convicted or even prosecuted, it is reasonable to assume that compensation would not be denied if a prosecution ended with a no contest plea. See, e.g., *Compensation for Victims of Crime Act*, RSO 1990, c C.24, s 16(1); *Criminal Injury Compensation Act*, RSBC 1996, c 85, s 8(1).

attractive to enough innocent accused and could come with unacceptable social costs. I am inclined to think that the prospective benefits outweigh the prospective costs, but I cannot be definitive about this. Additional perspectives are needed from those with knowledge of or experience in the Canadian criminal justice system. I raise the idea of a no contest plea to provoke discussion in Canada, not to come to a final conclusion.

I am reluctant to advocate forcefully for a no contest plea. It feels uncomfortable to propose anything that might facilitate wrongful convictions; indeed, I have previously taken a different position on some of the issues discussed above.[88] But I have been worn down by the sheer number of documented false guilty pleas and the powerfully sympathetic reasons for them.

An alternative (or supplement) to a no contest plea could be a Canadian version of the *Alford* plea in the United States, in which an accused pleads guilty while explicitly maintaining their innocence.[89] I have not discussed the idea here because a plea of 'guilty-even-though-I-am-innocent' has been rejected by Canadian courts[90] and could alter the overall cost-benefit analysis discussed in this paper; crime victims, for example, might have greater concerns about a plea in which the accused can not only decline to admit guilt but openly repudiate the complainant's victimhood without giving the complainant the chance to be vindicated through trial.[91] Nonetheless, the idea is probably worth considering. The bottom line is that we need to come up with new ways to help the innocent accused. Maybe a new plea, be it no contest and/or something else, could offer some relief.

[88] Sherrin, *supra* note 8 at 14-16 and 25-34.

[89] *North Carolina v Alford*, 400 US 25 (1970).

[90] See, e.g., *R. v. S.K.*, 1995 CanLII 8926 (ONCA); *R. v. M.(G.O.)*, 1989 CanLII 7201 (SK CA)

[91] An *Alford* plea does not necessarily entail a repudiation of a complainant's claim – the accused could simply assert that the police charged the wrong person – but it sometimes would.