

**Remanding Justice for the Innocent:
Systemic Pressures in Pretrial Detention to Falsely Plead Guilty in Canada¹**

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The only way that I'm going to get out of here... is to do what they want me to do.
- Stefon Morant (US Exoneree)

Historically, the literature on wrongful convictions has focused on a relatively small number of high-profile exonerations of convictions for serious crimes. However, these cases represent only a small percentage of the total number of wrongful convictions. An emerging area of scholarship is expanding our understanding of their prevalence, by examining the role that systemic and structural pressures have had on the choice of factually innocent defendants to enter false guilty pleas (FGPs). Plea bargaining – particularly presenting defendants in low-level criminal cases with “offers that they cannot refuse” – needs to be understood as having the potential to increase the number of wrongful convictions. Within this context, this article argues that the increased use of pre-trial detention (PTD) represents a powerful source of FGPs. Part I discusses the potentially large number of cases affected by FGPs in Canada. Part II explores how the mechanisms of PTD likely influence defendants' decisions to give an FGP. Part III discusses how the prevalence of FGPs represents a trade-off of the value of a defendant's innocence in favour of other institutional or societal objectives rooted in the generalized culture of risk aversion and risk management in the Canadian criminal justice system. This emerging scholarship represents a particularly important area of inquiry because, by their very nature, FGPs represent one of the least correctable and answerable parts of the criminal justice system.

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I Introduction

DNA testing has been revolutionary in many fields. One need only think of its application to medicine (e.g., screening, diagnosis, treatment, or prevention of disease), genealogy (e.g., ancestry or paternity), agriculture (e.g., genetic modification of crops or livestock), or even archeology and history (e.g., genome evolution or population genetics). Within the criminal justice system, its impact has arguably been of equal magnitude. In particular, the forensic sciences have greatly benefited from increased certainty in the identification – and, by extension, conviction – of offenders. In fact, society may breathe a figurative sigh of relief, knowing that we are safer than ever before as an increasing number of unsolved criminal cases are finally cracked.

The irony – of course – is that DNA testing has also led to the consequent recognition of hundreds of wrongful convictions. In fact, this realization has shaken the criminal justice world in a number of different ways.² Most obviously, it has challenged the longstanding belief that the criminal justice system rarely fails in its assigned responsibility to accurately and consistently determine guilt. Contrary to past confidence that wrongful convictions are ‘extremely rare’³, criminal justice actors (as well as society more generally) have been forced to reassess their potential role in miscarriages of justice. On a more positive note, this recognition has led to a new scholarly line of research that has focused on the identification (and, ultimately, reform) of the principal causes of wrongful convictions.

In fact, we did not hesitate to usher in what has been called the second generation of wrongful convictions scholarship.⁴ Following the first generation – a study of exonerations by modern science such as DNA evidence⁵ – this new wave developed the ‘classic’ or canonical list of contributing factors to wrongful convictions – eyewitness errors, false confessions, the use of incentivized witnesses (including jailhouse informants), and police and prosecutorial misconduct.⁶ Importantly, the focus of this literature was on the ways in which these factors (alone or in conjunction) could result in a finding of guilt when actually innocent. The scholarly work has been extensive and well developed, albeit largely concentrated on very serious offences which pay higher dividends when wrongful convictions are proven. While resulting exonerations that

² Keith A Findley & Michael S Scott, “The Multiple Dimensions of Tunnel Vision in Criminal Cases” (2006) 2 Wis L Rev 291.

³ Justice Antonin Scalia (of the US Supreme Court) stated the error rate (in felony convictions) in 2006 to be 0.027 percent. See his concurring judgment, citing Joshua Marquis, in *Kansas v Marsh*, 548 US 163 (2006).

⁴ Andrew M Siegel, “Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy” (2005) 42 Am Crim L Rev 1219.

⁵ In particular, see Barry Schreck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted* (New York: Doubleday, 2000). Notably, many of the factors considered by these scholars to be ‘causes’ of wrongful convictions were also observed by Edwin Borchard & E Russell Lutz, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice* (Garden City: Garden City Publishing Company, 1932).

⁶ For a more detailed account, see Kathryn M Campbell, “Part One: Factors Contributing to Miscarriages of Justice,” in *Miscarriages of Justice in Canada: Causes, Responses, Remedies* (Toronto: University of Toronto Press, 2018) at 544.

‘rectify’ these most egregious errors are clearly cause for celebration, the remarkable consistency in the findings has led some legal academics to suggest that the wrongful convictions scholarship “has gotten into a rut by continually focusing on these causes and neglecting broader systemic issues”.⁷

Perhaps taking its cue from this recognition, a third generation of wrongful convictions scholarship has more recently begun to emerge.⁸ Importantly, there has been a fundamental shift in focus on multiple levels. First, we no longer look solely to the trial as a source of wrongful convictions. Rather, there is a growing awareness that decisions made earlier in the criminal court process may also encourage miscarriages of justice. In particular, one cannot forget that most guilt is not ‘discovered’. Rather, it is ‘negotiated’.⁹ Within this context, accused persons may be induced to plead guilty, irrespective of guilt or innocence. And, in fact, false guilty pleas (FGPs) have become an issue of growing concern amongst the Canadian¹⁰ and international communities,¹¹ in part because they dramatically increase the potential pool of wrongful convictions. Low level offences would not only be included but likely constitute the group most susceptible to wrongly pleading guilty.¹² Specifically, the often-enormous process costs of maintaining one’s innocence may quickly overwhelm any cost-benefit analysis, in that the predicted sanction – albeit unjust – would, in most cases, likely involve no more than a non-custodial sentence or a short prison stay. Described as one of the ‘dark secrets of the criminal justice system’,¹³ we have increasingly come

⁷ Kent Roach, “Wrongful Convictions: Adversarial and Inquisitorial Themes” (2010) 35:2 NCJ Intl L & Com Reg 387 at 393; see also Richard A Leo, “Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction” (2005) 21:3 J Contemp Crim Just 201.

⁸ Joan Brockman, “An Offer You Can’t Refuse: Pleading Guilty When Innocent” (2010) 56:1–2 Crim LQ 116.

⁹ Alexandra Natapoff, “Negotiating Accuracy: DNA in the Age of Plea Bargaining,” in Daniel S Medwed, ed, *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent* (Cambridge: Cambridge University Press, 2017).

¹⁰ Outside of scholarly attention, see, for instance, *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada*, Report of the Provincial and Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, (Ottawa: Public Prosecution Service of Canada, 2018) c 8, online (pdf): <<https://www.ppsc-sppc.gc.ca/eng/pub/is-ip/is-ip-eng.pdf>> [*Innocence at Stake*]. However, concern had already been raised by the Law Reform Commission of Canada as early as 1975.

¹¹ See, for instance, Natapoff, *supra* note 9; Caitlin Nash, Rachel Dioso-Villa & Louise Porter, “Factors Contributing to Guilty Plea Wrongful Convictions: A Quantitative Analysis of Australian Appellate Court Judgments” (2021) 0:00 Crim & Delinquency 1.

¹² See, especially, Alexandra Natapoff, “Innocence,” in *Punishment Without Crime* (New York: Basic Books, 2018). Although focused on US criminal justice, the excellence of the analysis as well as the parallels between Canada and the US merit particular attention. For a similar assertion, see also Marvin Zalman & Robert J Norris, “Measuring Innocence: How to Think about the Rate of Wrongful Conviction” (2021) 24:4 New Crim L Rev 601.

¹³ John H Blume & Rebecca K Helm, “The Unexonerated: Factually Innocent Defendants Who Plead Guilty” (2014) 100:1 Cornell L Rev 157. See also Makin’s reference to them as our “dirty little secret... the hidden underbelly of the justice system... [and] a plea of convenience in disguise”, taking place with “a whole bunch of nods and winks”. This ‘adaptation’ was taken from Brockman, *supra* note 8 at 117.

to recognize that innocent people plead guilty at much higher rates than what prior estimates (based almost exclusively on serious offences) would suggest.

Just as importantly though, this recent attention to FGPs also underlines a second – and arguably more profound – shift in the current scholarship on wrongful convictions. Guilty pleas are no longer taken at face value as simply rooted in human agency or isolated investigative or evidentiary failings.¹⁴ Rather, the sources of FGPs are now increasingly being located in the mechanics or systemic features of our criminal justice system. That is, the search for contributing factors now extends to structural pressures on innocent defendants to plead guilty.¹⁵ Within this context, the explanatory focus is on these ‘frictional costs’¹⁶ or forceful institutional levers that make FGPs not only predictable but also a rational product of the way in which the wider system is designed.¹⁷

The combination of these two shifts in scholarly attention has produced an entirely new literature. The classic notion of wrongful convictions as being limited to the most high-profile trial cases of serious offences, believed to be the almost exclusive result of individual error, has not only been dispelled. Rather, it has been replaced by an image of a sea of FGPs to mundane common offences largely encouraged by systemic factors that likely happen every day in Canadian criminal courts.¹⁸ If not revolutionary, this new third generation perspective certainly constitutes one of the historical ironies of miscarriages of justice and our initial understanding of them as rare events. And it was not long before a new list of contributing factors began to emerge for these ‘micro-miscarriages of justice’.¹⁹ Notably though, this catalogue of criminal justice practices or processes shares little with its predecessor as it attempts to locate the ‘causes’ of FGPs within the system itself and how it induces – if not coerces – innocent defendants to plead guilty.

Arguably the most developed of these more systemic factors is the practice of plea bargaining or what Sherrin refers to as the category of ‘minimizing penalty’.²⁰ In fact, an entire

¹⁴ Natapoff, *supra* note 9 at 86.

¹⁵ For a notable case in point within the Canadian context, see Kent Roach, “You Say You Want a Revolution? Understanding Guilty Plea Wrongful Convictions” in Kathryn M Campbell et al, eds, *Wrongful Convictions and the Criminalization of Innocence: International Perspectives on Contributing Factors, Models of Exoneration and Case Studies* (UK: Routledge, forthcoming).

¹⁶ Expression taken from David Feige, *Indefensible: One Lawyer’s Journey into the Inferno of American Justice*, 1st ed (New York: Little, Brown and Company, 2006), cited in Russell D Covey, “Reconsidering the Relationship between Cognitive Psychology and Plea Bargaining” (2007) 91:1 Marq L Rev 213 at 240–241.

¹⁷ Covey, *supra* note 16 at 223.

¹⁸ On this shift as applied to Ontario, see, for example, Sean Robichaud, “Disincentives Towards Innocence: Wrongful Convictions at a Micro-Level”, (2004), online: [Robichaud’s Criminal Defence Litigation](https://robichaudlaw.ca/disincentives-towards-innocence-wrongful-convictions/).

¹⁹ Expression of Robichaud to underline the everyday occurrence of defendants pleading guilty to lower-level crimes that they did not commit at a frequency and measure that far surpass anything previously identified as a cause of wrongful convictions.

²⁰ Christopher Sherrin, “Guilty Pleas from the Innocent” (2011) 30 Windsor Rev Legal Soc Issues 1 at 7–8.

wrongful convictions literature has emerged on the various ways in which innocent defendants are presented with ‘offers that they cannot refuse’.²¹ Obviously any (significant) reduction in the type or quantum of sanction is itself a powerful inducement to plead guilty. However, this umbrella term often hides more than it reveals. Specifically, it ignores (or at least fails to highlight) other structural mechanisms within the criminal justice system that are working ‘behind the scenes’ to render plea bargains even more attractive, precisely by further increasing the costs to the defendant of maintaining their innocence.

Nowhere is this more true than with pretrial detention (PTD). Indeed, it is not difficult to imagine how the mere deprivation of liberty before trial constitutes a powerful incentive to plead guilty for reasons wholly ancillary to a defendant’s guilt or innocence. To borrow an apt analogy from Robichaud, factual guilt or innocence are small pebbles on the scales of influence or justice when in remand custody.²² Not surprisingly, this systemic factor has not gone largely unnoticed by the academic²³ – or, for that matter, legal²⁴ – community. Having said this, PTD – as well as its wider procedural/institutional context rooted in the bail process – have historically not been explored as a major player in the wrongful convictions process. Rather, it has generally sufficed to merely affirm – either theoretically or empirically – that PTD is related to a higher likelihood to plead guilty.²⁵ While several scholars²⁶ have connected this association to an increased probability of wrongful convictions through FGPs, there has been little analysis or broader investigation into the various ways in which the criminal justice system itself may be producing them.

Yet this lack of scholarly consideration (and development) of the contribution of PTD within the context of FGPs (and wrongful convictions more broadly) is perhaps understandable.

²¹ In Canada, see, in particular, *ibid*; Christopher Sherrin, “Excessive Pre-Trial Incarceration” (2012) 75 Sask L Rev 55; Roach, *supra* note 15.

²² Robichaud, *supra* note 18.

²³ See, for instance, Roach, *supra* note 15; Sherrin, *supra* note 20; Sherrin, “Excessive Pre-Trial Incarceration” *supra* note 21; Amanda Carling, “A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions” (2017) 64:3–4 Crim LQ 415; Martin L Friedland, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates Courts* (Toronto: University of Toronto Press, 1965).

²⁴ See, for instance, Robichaud, *supra* note 18; Marc Rosenberg, “The Attorney General and the Administration of Justice” (2009) 34:2 Queen’s LJ 813.

²⁵ See, for instance, *Guilty pleas among Indigenous people in Canada*, by Angela Bressan & Kyle Coady (Ottawa: Department of Justice Canada, Research and Statistics Division, 2017), online (pdf): <<https://www.justice.gc.ca/eng/rp-pr/jr/gp-pc/gp-pc.pdf>>.

²⁶ Carling, *supra* note 23; *Government Misconduct and Convicting the Innocent, The Role of Prosecutors, Police and Other Law Enforcement*, by Samuel R Gross et al (National Registry of Exonerations, 2020); Gail Kellough & Scot Wortley, “Remand for Plea. Bail Decisions and Plea Bargaining as Commensurate Decisions” (2002) 42:1 Brit J Crim 186; Joseph Di Luca, “Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada” (2005) 50:1 Crim LQ 14; *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*, by Abby Deshman & Nicole M Myers (Toronto: Canadian Civil Liberties Association and Education Trust, 2014), online (pdf): <<https://ccla.org/wp-content/uploads/2021/07/Set-up-to-fail-FINAL.pdf>>.

Despite occasional calls for reform over the last several decades,²⁷ the phenomenon of FGPs arising from PTD is virtually invisible. There are few high-profile cases.²⁸ Further, they largely go undetected. Indeed, defendants have no interest in declaring that they have pleaded guilty despite being innocent, particularly before the courts which are not legally permitted to accept a plea in the case that the accused continues to affirm their innocence.²⁹ They are also not easy to corroborate and it is very likely that they are predominantly found with low level offences that do not typically attract the same concerns as wrongful convictions.

But things may be changing such that FGPs related to PTD are gradually receiving more attention. On the one hand, we have witnessed mounting concern with the dramatic increase in the number of accused persons who are being processed through the Canadian bail system and, as such, at risk of PTD. Indeed, police are increasingly more likely to hold accused persons for a bail hearing, despite long-term, continuing declines in the overall as well as violent crime rates.³⁰ On the other hand, there has been a growing awareness that the actual use of PTD has also been rising over the last 3-4 decades. In fact, the recent numbers of accused persons in remand are shockingly high.³¹ In combination, we have the perfect breeding ground for FGPs – a growing number of accused persons housed in overcrowded remand facilities with increasingly more onerous conditions that dramatically raise the ‘cost’ of maintaining one’s innocence. As Paciocco reminds us, we are currently living in a culture of preventative detention, irrespective of innocence or guilt or the presumption of innocence.³²

While these practical concerns are already disconcerting, other – more principled or legal – arguments have also been increasingly raised against the current state of affairs in the Canadian bail system *sensu latu*. Specifically, the increased use of PTD – and its direct as well as indirect impact on FGPs - risk undermining the integrity of the wider system as a whole. Such recourse to PTD, with all of its accompanying powerful incentives for innocent defendants to plead guilty to crimes that they did not commit, can easily deny any realistic right to trial. In fact, such systemic pressures can lead accused persons to bargain away all relevant (lofty) guarantees such that there is no opportunity to exercise their constitutional rights in practice.³³ Compounding the problem, the bail process – and its corresponding decision to detain an accused until trial – are left to the

²⁷ See, for instance, Friedland, *supra* note 23; Sherrin, *supra* note 20; Sherrin, “Excessive Pre-Trial Incarceration” *supra* note 21.

²⁸ Although exceptions to this rule exist. One case that immediately comes to mind is *R v Hanemaayer*, 2008 ONCA 580 [*Hanemaayer*].

²⁹ See the difficult issues surrounding defence counsel’s ethical responsibilities as well as the obligations of judges to inquire into guilty pleas before accepting them in *Innocence at Stake*, *supra* note 10; Roach, *supra* note 15.

³⁰ See, for instance, Cheryl Marie Webster, Anthony N Doob & Nicole M Myers, “The Parable of Ms Baker: Understanding Pre-Trial Detention in Canada” (2009) 21:1 *Current Issues Crim Just* 79. The data for this assertion are discussed in Part II of this paper.

³¹ Deshman & Myers, *supra* note 26.

³² Cited in Robichaud, *supra* note 18.

³³ Rudolph J Gerber, “A Judicial View of Plea Bargaining” (1998) 34 *Crim L Bull* 16 at 23–25.

least experienced (and legally trained)³⁴ justice actors in Ontario (Canada's largest jurisdiction), in that bail courts are still largely presided over by Justices of the Peace.³⁵ Further, the discussions surrounding an innocent defendant's decision to plead guilty are almost completely hidden and, as such, not part of the official record. Thus, they are largely immune to detailed review³⁶ and retraction. Indeed, FGPs are one of the least correctable and answerable parts of the criminal justice system.³⁷

The call to arms has been declared. This paper proposes to take it up, if only as a small contribution to the broader discussion of FGPs in the Canadian legal system. While PTD and its wider role within the bail process have already been extensively examined by a number of scholars over the last several decades,³⁸ it is its impact on FGPs that has escaped serious consideration to date. This paper proposes to bring this wider literature to bear on an innocent defendant's decision to plead guilty. In essence, it is argued that PTD needs to be seen as a (very powerful) source of wrongful convictions in its own right (rather than a simple cog in the plea-bargaining process). To this end, Part I attempts to shed some light on the number of cases that may be affected by FGPs in Canada. Simply put, if there is little reason to believe that FGPs are anything more than a mere trivial occurrence, serious scholarly attention to the impact of PTD may be better directed to more frequent sources of wrongful convictions. Part II explores – from multiple vantage points – the various mechanisms of PTD that likely play an important role in a defendant's decision to give an FGP. The focus will be on understanding and assessing the strength/power of the disincentives to maintain one's innocence that are created by the system itself that have yet to receive serious dissection. Part III concludes by returning to the point of departure – that is, the contribution of FGPs from the perspective of an (intentional or unintentional) trade-off of innocence for other institutional or societal values/objectives as a new avenue of inquiry within the wider literature on wrongful convictions.

³⁴ In Ontario, there is no requirement that justices of the peace have a law degree. While the trend is toward appointing more people with law degrees, the vast majority of sitting justices of the peace (at least in 2016) were not legally trained. See *Bail and Remand in Ontario*, by Raymond E Wyant (Toronto: Ministry of the Attorney General, 2016), online (pdf): <<http://hsjcc.on.ca/wp-content/uploads/Bail-and-Remand-in-Ontario-Ministry-of-the-Attorney-General-2016-12.pdf>>. In contrast, Provincial Court Judges preside over bail court during regular business hours in virtually all other Canadian jurisdictions, such that JPs would only have this responsibility in the evening and on weekends.

³⁵ See, in particular, the concerns with this practice in Robichaud, *supra* note 18.

³⁶ Obviously, judges play a role in determining whether to accept a guilty plea. However, this process is not without concerns. See, for example, Sherrin, *supra* note 20, for calls for greater scrutiny by the judiciary.

³⁷ For a parallel criticism of plea bargaining more generally with the innocent, see Gerber, *supra* note 33 at 23–25.

³⁸ See, for instance, Nicoles Marie Myers, “Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail” (2017) 57:3 *Brit J Crim* 664; Jillian Rogin, “Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada” (2017) 95:2 *Can Bar Rev* 325; Deshman & Myers, *supra* note 26.

II The Numbers Dilemma: Counting What We Cannot See³⁹

It seems like a simple enough question: how many FGPs occur in Canada? Indeed, there is virtually unanimous agreement across academics and criminal justice professionals that not only do FGPs happen, but they are not a rare occurrence. Many go even further, explicitly asserting that they almost certainly happen more frequently than we might think, especially because the majority of FGPs are presumed to occur at the lower end of the offence severity scale – precisely where the bulk of criminal activity occurs. The problem emerges when one moves from the realm of impressions, logic, or professional experience – however well informed – to actual, verifiable numbers or empirical research. This is particularly true in this area in which the phenomenon under study is essentially hidden and, as such, undetected by the courts and, even more problematically, largely undetectable. As Gross and O’Brien playfully remind us, “There are no answers in the back of the book”.⁴⁰ Hence, any description of its frequency is, by necessity, only educated estimates.

A. Proven False Guilty Pleas

Having said this, the confidence that we may have in these estimates can be augmented by relying on a number of different sources. Convergence or agreement builds confidence in their validity. As such, our first stop is to consider those cases in which an FGP has, in fact, been discovered or ‘proven’. Internationally, the US National Registry of Exonerations reported – as of July, 2021 – that 21% of their exonerees had been convicted by a guilty plea.⁴¹ In the UK, the proportion is even higher at roughly 39%. Using a different methodology, Nash, Dioso-Villa and Porter identified 139 Australian appellate court judgments in which a guilty plea conviction was overturned.⁴² Closer to home, Innocence Canada has reported 6⁴³ out of 23 exonerated cases or 26%.⁴⁴ Two observations are relevant for our current purposes. First, FGPs clearly occur and not

³⁹ For a parallel examination within the context of the US, see, in particular, Zalman & Norris, *supra* note 12. This article is described by its authors as the “first comprehensive review of wrongful conviction rate estimates” (at 616) in that it includes virtually all of the studies that have explored US wrongful convictions rates (at 618). Beyond finding support for the thesis advanced in this section of the current paper (albeit focusing on the American reality), Zalman and Norris cite additional supporting research as well as provide further explanation for the ‘how’ and ‘why’ FGPs arise within the plea-bargaining system, yet represent relatively few cases among known exonerations.

⁴⁰ Samuel R Gross & Barbara O’Brien, “Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases” (2008) 5:4 J Empirical Leg Stud 927.

⁴¹ Two years earlier, the New York based Innocence Project had identified nearly 11% of the 349 exonerations as involving false guilty pleas. See, Glinda Cooper, Vanessa Meterko & Pradelika Gadtaula, “Innocents Who Plead Guilty: An Analysis of Patterns in DNA Exoneration Cases” 31:4–5 Fed Sent’g Rep 234.

⁴² Nash, Dioso-Villa & Porter, *supra* note 11.

⁴³ Interestingly, Roach, *supra* note 7, listed 7 cases of FGPs – *R v Marshall*, 2005 QCCA 852; *Hanemaayer*, *supra* note 28; *R v Sharatt Robinson*, 2009 ONCA 886; *R v CF*, 2010 ONCA 691; *R v CM*, 2010 ONCA 690; *R v Kumar*, 2011 ONCA 120; *R v Brant*, 2011 ONCA 362.

⁴⁴ All numbers/percentages are reported by Nash, Dioso-Villa & Porter, *supra* note 11. Importantly, preliminary work on a Canadian National Registry of Exonerations reported at least 18 recognized wrongful convictions involving guilty pleas, see Roach, *supra* note 15 at 9. Given an estimated 70 wrongful

in small numbers. Second, the cases at the base of these numbers almost certainly represent serious offences in which DNA (or other virtually irrefutable evidence)⁴⁵ subsequently demonstrated that the offender was factually innocent. As with estimates of wrongful convictions more broadly, these numbers may only describe the (confirmed) FGPs within a very small pool of potential guilty findings, telling us very little about the extent of its occurrence across a broader sweep of (less serious) cases.

With this limitation in mind, the question becomes one of how many FGPs we might find within a wider pool of lower end crimes. Most importantly, the denominator (or pool of potential FGPs) increases dramatically. Using the most recent available crime statistics (from 2019-2020), the most conservative estimate of the number of all convictions across Canada for non-serious offences is 149,464 cases.⁴⁶ Even if we were to assume a very low wrongful conviction rate of 0.5%⁴⁷, it still suggests 746 miscarriages of justice during this year. However, not all of these convictions would have been on the basis of a guilty plea. While one can find a number of different sources which unequivocally state that the vast majority of accused persons dealt with in the Canadian criminal justice system plead guilty,⁴⁸ Statistics Canada does not provide a breakdown

convictions recognized in Canada at the time, these more recent data support the 26% estimate proposed by Nash, Dioso-Villa & Porter.

⁴⁵ Note that the National Registry of Exonerations does not restrict itself to only exonerations in which DNA evidence eliminates the accused as the offender. See *Innocence at Stake*, *supra* note 10, c 8. Equally notable, most exonerations in Canada did not involve DNA. See, for instance, Kathryn Campbell, “DNA Evidence: Raising the Bar” in *Miscarriages of Justice in Canada: Causes, Responses, Remedies* (Toronto: University of Toronto Press, 2018), especially pages 151-152 for examples of cases in which DNA did, in fact, play a significant role.

⁴⁶ This number is derived from the total number of all convicted cases minus all of those identified as including serious offences. The latter figure included all cases in which the most serious offence falls within the offence category defined by Statistics Canada as ‘Crimes Against the Person’. As such, it comprises those ‘very serious’ offences most often associated with exonerations (i.e. homicide, attempted murder, and sexual assaults) but also includes robbery, major assault, common assault, uttering threats and harassment. If one were to only consider the first 3, the denominator of the potential pool increases to 187,882 cases in which a conviction was entered.

⁴⁷ A rate proposed by Kent Roach, “Wrongful Convictions in Canada” (2012) 80 U Cin L Rev 1465 when estimating possible wrong convictions generally. In support, see also Marvin Zalman, Brad Smith & Angie Kiger, “Officials’ Estimates of the Incidence of ‘Actual Innocence’ Convictions” (2008) 25:1 Jus Quarterly 72; Marvin Zalman, “Qualitatively Estimating the Incidence of Wrongful Convictions” (2012) 48:2 Crim L Bull 221. Importantly though, more recent reviews consider rates of <1% to be exceedingly low and almost certainly underestimates of wrongful convictions. Arguing that these low estimates are the product of studies containing “serious methodological flaws, ungrounded assumptions, and logical fallacies,” Zalman & Norris, *supra* note 12 at 652, argue that at least relative to certain types of felonies, a rate between 3-6% is more reasonable.

⁴⁸ See, for instance, *Innocence at Stake*, *supra* note 10, c 8. Similarly, while Roach, *supra* note 47 at 1475 states that two-thirds of cases in adult criminal court result in convictions on the basis of guilty pleas, Sherrin, *supra* note 20 at 6 cites *R v Gardiner* (1982), 68 CCC (2d) 477 at para 514 in which the SCC makes clear that “the vast majority of offenders plead guilty”. In addition, testimony referred to in the 2017 Senate

of its ‘total guilty cases’ in order to be able to separate those found guilty from those who pled guilty.

As a (very) rough estimate, the Ontario Court of Justice (Canada’s largest trial court) provides data on the number of guilty pleas as well as the number of trials.⁴⁹ Using data from October 2020 to September 2021, the trial rate was 3.1% of all cases disposed, representing 6,067 cases of the 196,226 cases during this period. Consistent with other research, these data confirm, yet again, that trials are a very rare criminal procedure. Although we cannot, obviously, assume that all trials ended in a finding of guilt, we can compare the number of trials with the number of cases in which a guilty plea was entered as a window into their respective frequencies. Combining guilty pleas given either before trial or at trial (without a trial), there were 71,423 – completely dwarfing the number of trials. A rough estimate would suggest that the guilty plea rate is approximately 90%⁵⁰ (of those cases which either ended in a guilty plea or trial).⁵¹

It is difficult to know how to interpret these data. Given significant jurisdictional differences across Canada in criminal case processing and outcomes, one would be hesitant to use the Ontario data as synonymous with what we would find for the country as a whole. Nonetheless, Ontario represents roughly 40% of all criminal cases. Taking the 2020-2021 Ontario data at face-value and assuming, again, a 0.5% error rate, the most conservative estimate of FGPs would still be 357 cases. Having said this, there are certainly compelling reasons to believe that this figure constitutes a (gross) underestimate of FGPs relative to less serious offences. Given that the penalty is likely to be also minor in nature, innocent defendants may be less motivated to seek redress for this type of wrongful conviction.⁵² Equally important, the mere fact that the sanction is likely to

Report on delays in Canada’s criminal justice system indicated that 90% of criminal cases do not go to trial and are resolved mainly through plea bargains. See, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada*, Final Report of the Standing Senate Committee on Legal and Constitutional Affairs (Ottawa: Senate of Canada, 2017) at 44, online (pdf):

https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf

[*Delaying Justice*].

⁴⁹ Importantly, the case definition used by the Ontario Court of Justice differs from that used by Statistics Canada. As such, the Ontario numbers are not directly comparable to the national data.

⁵⁰ This percentage is within the range given in the 1992 Martin Committee Report which placed the guilty plea rate anywhere between 70%-95%. See Ontario, *Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*, by Arthur G Martin, (Toronto: Ministry of the Attorney General, 1993). More notably, it is identical to that reported by the Canadian Sentencing Commission (referring to a 1974 Law Reform Commissions of Canada report). See *Sentencing Reform: A Canadian Approach*, Report of the Canadian Sentencing Commission, (Ottawa: Government of Canada, 1987).

⁵¹ Importantly, 57% of all disposed cases in Ontario for this period were through withdrawals or stays.

⁵² For a similar appraisal, see, for instance, *Innocence at Stake*, *supra* note 10, c 8. Sherrin, *supra* note 20 at 6–7 also reminds us that particularly with minor offences, the chances of *actual* redress are remote. Not only is the defendant less credible as well as less sympathetic in their claim of innocence (precisely because of the plea), but they may also appear less deserving of assistance, given that the sanction is typically less

be relatively minor would presumably weigh heavily in any cost-benefit analysis, particularly when contrasted with the immediate benefits of a quick resolution of their criminal matter. Not surprisingly, many scholars have argued that the rate of FGPs for relatively minor offences is likely higher than that for more serious offences in which the costs of being found guilty are much greater.⁵³

B. Alleged False Guilty Pleas

The second step in our attempt to shed light on the extent of our ‘dirty little secret’ would be to consider those cases in which FGPs have been alleged (but not proven). This data source comes almost exclusively from interviews with accused persons who pled guilty but claim to be innocent. A 1982 study by Ericson and Baranek (1982) found that 23% of the 101 interviewees admitted to having given an FGP.⁵⁴ More recently, Euvrard and Leclerc interviewed 22 convicted individuals who had pled guilty to the charges against them. Despite their guilty plea, 11 of them maintained that they were innocent of the crime(s) of which they had been charged.⁵⁵ Similar findings can be found in the US.⁵⁶ Interestingly, this latter research demonstrates comparable FGPs for those facing felonies.

While one obviously needs to be cautious in interpreting the exact figures of the FGP rate from this type of self-declared finding, Sherrin underlines that they have a certain plausibility given the multiple aspects of the criminal justice system that may induce innocent defendants to plead guilty irrespective of their guilt. Further, he reminds us that our assessment of their accuracy should not be undermined by the lack of proven FGPs. Indeed, this latter category of FGPs is exceedingly rare, although not necessarily because there are, in fact, few of them. Rather, their tiny numbers are because they typically only come to light because of the “extraordinary efforts by individuals who expend enormous resources in an effort to uncover the truth”.⁵⁷

severe. Further, given that the allegedly inculpatory evidence frequently will not have been detailed or tested in court, the likelihood of proving innocence is very low.

⁵³ See, for instance, Sherrin, *supra* note 20 in which he argues that especially for relatively minor matters, the costs of going to trial (particularly when in PTD) may quite simply be perceived as too high when weighed against the likely sanction for a guilty plea. A similar rationale is offered by Blume & Helm, *supra* note 13, as well as Brockman, *supra* note 8, and Josh Bowers, “Punishing the Innocent” (2008) 156 U PA L Rev 117. In the latter case though, this recognition is used for largely different argumentative purposes.

⁵⁴ Richard V Ericson & Patricia M Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process*, Heritage, (Toronto: University of Toronto Press, 1982). For similar studies from the UK and the USA conducted in the 1960-1970s in which interviewees protested their innocence in one form or another despite having entered guilty pleas, see Sherrin, *supra* note 20 at 5. The error rate extended from 18%-51%.

⁵⁵ Elsa Euvrard & Chloe Leclerc, “Pre-trial Detention and Guilty Pleas: Inducement or Coercion?” (2017) 19:5 Punishment & Society 525.

⁵⁶ See, for instance, Tina M Zottoli et al, “Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City” (2016) 22:3 Psychol Pub Pol’y & L 250.

⁵⁷ Sherrin, *supra* note 20 at 6. For a similar argument, see Samuel R Gross et al, “Exonerations in the United States 1989 through 2003” (2005) 95:2 J Crim L & Criminology 523.

C. Suspected False Guilty Pleas

Next on the data parade are those sources of suspected FGPs. This information generally comes directly from interviews with criminal defence lawyers. These criminal justice players will often talk about FGPs within the context of the cost-benefit analysis that innocent defendants conduct when deciding whether to plead guilty. As Andras Shreck (former Toronto defence lawyer and now a Superior Court judge) commented, the likelihood is especially strong when the accused is denied bail and detained until trial. When given the option – through an FGP – to end proceedings, Shreck asserted that it “probably happens hundreds of times a day”.⁵⁸ An almost identical statement is made by Robichaud.⁵⁹

More systematically, Erntzem, Schuller and Clow (2021) surveyed 158 Canadian criminal defence lawyers and found that almost ¾ of them reported having represented at least one client who was convicted despite credible claims of innocence. When asked to estimate the rate of FGPs, the most commonly selected response category was ‘25% or higher’ of all guilty pleas – chosen by more than 20% of the sample. As the authors note, these findings suggest that defence counsel believe that FGPs occur on a regular and frequent basis.⁶⁰ In fact, one respondent concluded – albeit anecdotally – that the vast majority of wrongful convictions appear to occur at the guilty plea stage (before a trial date has even been set).⁶¹ A similar study was conducted by Doob in 1997.⁶² Although defence lawyers were asked about wrongful convictions more generally, nearly half of them believed that they had personally experienced at least one miscarriage of justice in their career.

D. Hypothetical False Guilty Pleas

And finally, one can also look to hypothetically derived data on FGPs. These studies are primarily conducted by psychologists under laboratory-like conditions. The advantage is that it is much easier to control for other extraneous factors that may impact one’s decision to give an FGP, permitting a better sense of the conditions under which a (hypothetical) defendant may be more likely to plead guilty, despite being innocent. The disadvantage, of course, is the degree to which the findings can be generalized to real-life scenarios. The types of subjects used in these laboratory experiments (often students) and the actual pressures (or lack thereof) under which they are being asked to make decisions about pleading guilty render this source of data more suspect in terms of actual in vivo decision-making.

⁵⁸ Reported by Kirk Makin, “Case puts focus on justice system’s ‘dirty little secret,’” *The Globe and Mail* (14 January 2009), online: <<https://www.theglobeandmail.com/news/national/case-puts-focus-on-justice-systems-dirty-little-secret/article1205567/>>.

⁵⁹ Robichaud, *supra* note 18.

⁶⁰ Caroline Erentzen, Regina Schuller & Kimberley Clow, “Advocacy and the Innocent Client: Defence Counsel Experiences with Wrongful Convictions and False Guilty Pleas” (2021) 2:1 WCLR 1 at 11.

⁶¹ *Ibid.*

⁶² Anthony N Doob, *An Examination of the Views of Defence Counsel of Wrongful Convictions* (Toronto: University of Toronto, Centre of Criminology, 1997).

Nonetheless, their strength – at least for our current purposes – is the degree to which the findings support (or contradict) other sources of information about the frequency with which defendants may wrongly plead guilty. Overall, it would seem that even under hypothetical conditions, those assigned to the ‘guilty’ category were more likely than those asked to assume that they were innocent, to plead guilty. In fact, actual guilt has repeatedly been shown to be related to the decision to plead guilty.⁶³ Equally pertinent though, participants asked to assume they are innocent were clearly not immune to pleading guilty. In a 2018 study by Edkins and Dervan, FGPs were given by 24.4% and 48.7% of study participants, depending on the particular scenario presented. These findings are very similar to those found in 2016 by Redlich and Shteynberg, although there were some differences noted between juveniles and young adults (with juveniles being more than twice as likely to plead guilty while innocent).⁶⁴

So where do these various data sources leave us in terms of the confidence that we might have in the existence – and, by extension, prevalence – of FGPs? First, all types of data demonstrate, with varying degrees of confidence, that innocent people do, in fact, plead guilty. Further, the prevalence certainly seems to exclude the notion that they only occur in rare or trivial numbers. This assessment is also consistent with the bulk of research both within and outside of Canada. For better or for worse, it would appear that FGPs are a phenomenon that is real and, as many have already affirmed,⁶⁵ likely occurring at a higher incidence than previously appreciated. Said differently, despite the fact that the wrongful convictions scholarship has, at least until recently, mostly ignored this phenomenon, its significance should not be under-estimated (even while its true estimation is difficult, if not largely impossible).

III Systemic Pressures to Plead Guilty: The Role of PTD

The numbers would seem to justify FGPs as a legitimate – if not urgent – topic of inquiry. And the thesis statement is clear. PTD should be examined as a potentially powerful structural factor in encouraging – if not coercing – FGPs. What is less clear is the most appropriate methodology to evaluate this proposition. Intuitively, one is tempted to adopt a systems approach in which all of the moving parts are integrated into one narrative. The trick – as they say – is figuring out how to present (or even construct) the story. Like all good tales, it should be told in three parts. But rather than adopt the traditional structure of a beginning, middle and end, it may be more instructive – in this particular case - to look at the same issue through three different levels of analysis: micro, meso and macro. That is, the role of PTD in an innocent defendant’s decision to plead guilty can be understood or explained from three unique perspectives. While only the third – macro – level will focus on structural issues, the other two are included for historical context as

⁶³ See, for instance, Vanessa A Edkins & Lucian E Dervan, “Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions to Plead Guilty” (2018) 24:2 Psychol Pub Pol’y & L 204; Allison D Redlich & Reveka V Shteynberg, “To plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions” (2016) 40:6 L & Human Behavior 611.

⁶⁴ Redlich & Shteynberg, *supra* note 63.

⁶⁵ See, for instance, Roach, *supra* note 15; Sherrin, *supra* note 20; Roach, *supra* note 7 or *Innocence at Stake*, *supra* note 10, c 8.

well as for contrast. Indeed, it is precisely through the ‘evolution’ in our thinking about PTD (and its impact on FGPs) that the systemic foundation becomes both more clear and arguably more persuasive.

A. Micro Level Analysis: I am My Own Keeper

Drawing largely from the fields of psychology and economics, this conceptualization of FGPs – and the impact of PTD on them - is firmly rooted in an individualistic approach. That is, innocent defendants conduct a type of cost-benefit analysis of their decision to plead guilty. This decision-making process has traditionally been conceptualized as a purely economic strategy – a model in which the benefits and harms/losses are strictly weighed in an attempt to secure the optimal outcome within the given circumstances. However, this assumption has not generally held up well under empirical examination within the context of FGPs.⁶⁶ As such, this cost-benefit analysis has moved toward a conceptualization of the accused person as a non-rational actor who is more psychologically oriented. In this model, a decision to plead guilty despite being innocent places greater emphasis on ‘losses’ versus ‘gains’ relative to one’s current standing, as well as shows a distinct preference for certain or guaranteed outcomes rather than those that ‘may or may not’ occur.⁶⁷

Within either of these conceptual models, what is important is the decision-maker’s unique situation and the evaluation of their own particular perceived costs and benefits of an FGP. Clearly, PTD can be a very powerful factor in this individual decision, as the deprivation of one’s freedom can have multiple and devastating effects on the defendant, even over short periods. And the (long) list is already well known and well rehearsed (e.g., separation from loved ones; loss of job or children; eviction and subsequent loss of housing; emotional and economic hardships experienced by family members, etc.). Further, these painful consequences are only intensified by the length of time in which the individual accused is in pretrial detention. Unfortunately though, this factor is often unknown such that the stress and anxiety of this uncertainty can be crushing for anyone who is not already a seasoned or ‘frequent flyer’.⁶⁸

From a cost-benefit analysis, the scales seem particularly tipped when PTD is involved. Specifically, the costs of maintaining one’s innocence (and remaining in PTD) would seem to be quickly – and overwhelmingly – outweighed by the benefits of falsely pleading guilty. Indeed, the price of innocence can be exceptionally high when one is in PTD. As Edkins and Dervin empirically demonstrate, FGPs are generally seen as a ‘loss’ or cost by study participants. That is, until they are asked to imagine themselves in PTD. At that point, FGPs are perceived as a ‘gain’.

⁶⁶ See, for instance, Shawn D Bushway & Allison D Redlich, “Is Plea Bargaining in the ‘Shadow of the Trial’ a Mirage?” (2012) 28:3 J Quant Criminol 437; Lucien Dervin, “The Surprising Lessons from Plea Bargaining in the Shadow of Terror” (2011) 27:2 Ga St U L Rev 239.

⁶⁷ On these 2 models, see, for example, Edkins & Dervin, *supra* note 63. See also Sherrin, *supra* note 20 at 4–5.

⁶⁸ See, for instance, Holly Pelvin, “Remand as a Cross-Institutional System: Examining the Process of Punishment before Conviction” (2019) 61:2 Can J Corr 66.

As expected, these researchers found that PTD increased the likelihood to falsely plead guilty.⁶⁹ Similarly, Bowers proposes that FGPs should not be perceived as a source of wrongful punishment but rather as a normative good that cuts (enormous) punishment short.⁷⁰

This would be especially true for low level offenders who may be released with a sentence of ‘time served’ or, at most, a non-custodial sanction. This argument is only exacerbated for those who were never in jeopardy of a custodial sanction or who would spend more time in remand awaiting trial than the length of any custodial sentence that might ultimately be handed down for the alleged offence(s).⁷¹ In these latter cases, time spent in PTD can never be directly compensated. Indeed, punishment does not necessarily begin with the sentence. For those in remand custody, the actual punishment is often served before there has even been a conviction.⁷² A similar argument can be made for those accused who already have a criminal record as most of the collateral consequences associated with prior convictions are minimized. And the combination is particularly powerful. As Erntzem et al. quote from one of their defence counsel study participants, it is “patently irrational to expect an innocent person to wait for trial when they have a relatively minor offence, criminal record and [are] likely to spend more time in custody than the sentence the Crown is seeking”.⁷³

Of course, an FGP has its own costs. Most obviously, a defendant pleads to a crime that they did not commit. Further, they will now have a criminal record (or a longer one), with all of the collateral consequences that this criminal history may impose. In addition, they are also more apt to accept a ‘bad deal’. Many remand detainees describe a loss of faith in the system, a sense of hopelessness or a sentiment of having simply given up following a stay in remand custody. As such, they are less willing to wait for a better offer in exchange for a guilty plea. Recent research has shown that while collateral consequences of a guilty plea matter, freedom matters more. That is, the ‘immediate’ generally outweighs the ‘longer term’ for those in PTD, particularly when the ‘benefits’ are certain and proximate.⁷⁴

In the end, it all comes down to the particular defendant’s own calculus of the costs and benefits of a decision to plead guilty despite being innocent. From the perspective of this micro-level analysis, FGPs are conceived strictly as an individual decision that represents the most favourable (economical or psychological) outcome. For those who believe that such a decision

⁶⁹ Edkins & Dervan, *supra* note 63 at 213. For similar findings, see Paul Heaton, Sandra Mayson & Megan Stevenson, “The Downstream Consequences of Misdemeanor Pretrial Detention” (2017) 69 *Stan L Rev* 711.

⁷⁰ Bowers, *supra* note 53. It is difficult not to see the irony in this position. While traditional plea bargaining is based on the notion that a guilty plea is exchanged for a reduction in the pains of a *future* punishment (typically a shorter or less harsh sentence), an FGP while in PTD is largely a decision to reduce or avoid the pains of the *present* (punishment).

⁷¹ On this latter phenomenon, see, in particular, Sherrin, *supra* note 21.

⁷² See, in particular, Malcolm Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russell Sage Foundation, 1979).

⁷³ *Ibid* at 15.

⁷⁴ Megan Stevenson, “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes” (2018) 34:4 *JL Econ & Organization* 511.

should be considered an ‘accident’ or ‘error’ – and, as such, regrettable – its ‘cause’ or responsibility is laid solely at the feet of the accused. But the same conclusion would be drawn by those who argue that FGPs should be promoted and encouraged when they are perceived – by the defendant – to be in their best interests.⁷⁵ While both sides would undoubtedly agree that PTD has a direct and powerful impact on this calculus, neither would feel a need, nor a desire to ‘look behind’ this explanation in search of any underlying or systemic factors. PTD gives innocent defendants personal or individual reasons to perceive FGPs as the best outcome. Nothing more is needed in order to understand the outcome or, more pointedly, who is responsible for it.

B. Meso Level Analysis: I am Being Kept

Drawing largely from the fields of political science and law, this second conceptualization of FGPs – and the impact of PTD on it – moves away from a purely individualistic approach to adopt a more institutional and/or procedural focus. While the innocent defendant is still conceived as having free will, this ability to ‘choose’ whether to plead guilty or not is conditioned or restrained by other external factors. That is, FGPs are the result of an interaction between the individual and their wider circumstances. In the current case, the ‘external context’ of PTD can hold considerable power to limit or restrict the accused person’s options such that a decision to plead guilty irrespective of innocence is not so much a rational choice as the ‘only’ choice. Within this conceptual framework, the focus of analysis shifts from the individual calculus to concentrate on the wider institutional and procedural mechanisms governing PTD. Specifically, the inquiry is rooted in identifying or teasing out the various ways in which these more structural components – that are largely beyond the control of the individual defendant – often induce FGPs through the enormous pressure that they can exert.

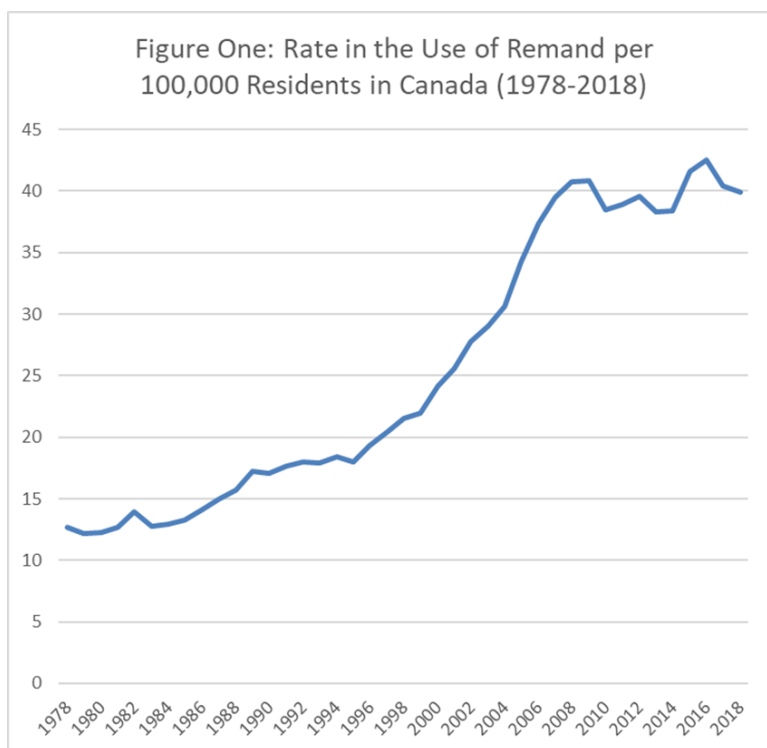
When thinking about PTD as a set of institutional and procedural mechanisms, those concerned with its (forceful) impact on FGPs have tended to highlight two broad areas: remand conditions and isolation from the outside world. Both are clearly worthy topics of inquiry. However, the analysis surrounding them has predominantly been cursory and merely descriptive in nature. To more fully capture their power in bringing about FGPs, a more detailed analytic examination would seem to be in order. Further, the framework might be broadened to include not only the institutional components (incorporating a much broader conceptualization of conditions in PTD to include key institutional pressures surrounding overcrowding and lockdowns) but also procedural issues (such as the number and type of accused persons being funneled into PTD, as well as the length of time in which they stay).

Procedurally, the composition and rate of the remand population are determined by the policies and practices of the police, as well as the decisions made in bail court. The difficulty involved in any attempt to describe and analyse these ‘procedural’ elements is that there are very few available data sources. Statistics Canada does not (yet) collect/publish data on case processing in bail court, nor report those accused persons who are detained by the police for a bail hearing.

⁷⁵ For a particularly radical position, see Bowers, *supra* note 53. This scholar defends the notion that accused persons are punished through the process of PTD and released by an FGP.

As such, most available data come from case studies or, at best, provincial-level analyses.⁷⁶ In contrast, Statistics Canada provides relatively complete data on certain aspects of the provincial/territorial remand populations.

Let's start with the big picture (no pun intended – see Figure 1).⁷⁷



Note: Data for some provinces/territories are estimated for some years.

Source: Canadian Socio-Economic Information Management System (Statistics Canada)

To say that this increase in the use of remand in Canada over the past 4 decades has been dramatic might be considered an under-statement. While we have largely been able to contain further growth over the last decade, remand rates have increased by more than 200% since 1978. Perhaps even more striking, there were 14,788 accused persons in remand custody on any given day in provincial/territorial correctional facilities in 2018 while ‘only’ 8,708 in sentenced custody. Said differently, a greater number of legally innocent (or at least unsentenced) people are being held in remand than there are offenders actually serving custodial sentences post-conviction in Canada since 2004/5. The most recent figure (from 2018) indicates that 62% of all adults in provincial/territorial institutions on an average night were in pretrial detention. Notably, Canada’s remand rate is higher than almost all comparable Western European nations (with the exception of

⁷⁶ See, for instance, Michael Weinrath, “Inmate Perspectives on the Remand Crisis in Canada” (2009) 51:3 Can J Corr 355; Wyant, *supra* note 34; Carolyn Yule & Rachel Schumann, “Negotiating Release? Analysing Decision Making in Bail Court” (2019) 61:3 Can J Corr 45.

⁷⁷ All national remand data were downloaded from the Canadian Socio-Economic Information Management System (CANSIM), online: <<https://www150.statcan.gc.ca/n1/en/type/data>>.

Luxembourg) as well as several English-speaking countries (England/Wales, Scotland, Ireland, Northern Ireland).⁷⁸ It would seem trite to say that Canada has a remand problem.

By extension, a large and growing remand population significantly increases the pool of defendants in PTD who might be pressured into pleading guilty despite being innocent. Recognizing that those with non-serious offences (and, as such, presumably eligible for more lenient sanctions) may be more tempted to enter an FGP, it would be equally relevant to identify their numbers. While there are no national data that speak to this issue, detailed Ontario data from 2015-2016 make the point.⁷⁹ While just over half of all cases that spent at least 1 day in a remand facility had what would be considered serious offences (i.e. all violence and weapons charges; criminal harassment, threats, etc.; obstruction of justice; trafficking/importing drugs and child pornography, indecent exposure, child luring, etc.), there were still almost half (48%) whose charges were of a more minor nature (i.e. fraud and related; property offences, including break and enter as well as arson; moral offences, administration of justice offences and those of public order; drug possession; Criminal Code traffic offences).

A similar argument might be made regarding the time in which an accused person spends in remand custody. Particularly for those with relatively minor charges, it would not seem incorrect to assume that innocent defendants may be more likely to plead guilty as the length of time in remand increases (thereby risking greater PTD than would be presumably handed down as part of a sentence). While those with serious offences were clearly more likely than those with less serious offences to spend more than 3 months in PTD, it is significant that just over ¼ of those with more minor charges also spent 91 days or more in remand. This relatively long stay would certainly appear to constitute a significant inducement to FGPs. Just as importantly, this phenomenon does not show any signs of abating. On the contrary, the length of time spent in remand has been increasing over time (at least in Ontario).

Looking in more detail at time spent in remand, it is useful to think about two different types of remand prisoners (with arguably different pressures to give FGPs). On the one hand, there are the short stays (up to 1 week) that almost certainly reflect those accused persons who are still in the bail process, awaiting a determination.⁸⁰ In Ontario in 2016, this group constituted just under 50% of all remand prisoners. One might assume that these detainees – given their relatively short period in PTD – may be less likely to be compelled to give an FGP. However, it is less clear how to categorize the 25% who spend 8-30 days in PTD. Given that 35% of all bail cases completed in 2013/14 took at least 3 bail appearances to complete the bail process, it is possible that those

⁷⁸ *World Prison Population List*, by Roy Walmsley, 12th ed (London: Institute for Criminal Policy Research, 2018), online (pdf):

<https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf>.

⁷⁹ *Looking Behind (Prison) Walls: Understanding Ontario's Remand Population*, by Anthony N Doob, Jane B Sprott & Cheryl Marie Webster (Toronto: Ministry of the Attorney General, 2017). Within this report, a number of different (national and provincial) data sources were used. All subsequent data presented relative to the remand population are drawn from this source.

⁸⁰ Indeed, we know that most accused persons require 7 days to receive a determination of bail. See Webster, Doob & Myers, *supra* note 30. However, there is significant variability in this measure across accused persons. For a more detailed breakdown, see Doob, Sprott & Webster, *supra* note 79.

spending up to a month in remand may still be awaiting a determination of bail. Given the continued uncertainty surrounding the outcome, the significant stress involving in being transported to and from the courthouse for multiple bail appearances and the almost complete lack of programs or activities to pass the time, innocent defendants in this group may, in fact, feel greater pressure to plead guilty.

On the other hand, there are the long-stay prisoners who are in remand custody for more than a month. Although they represent ‘only’ 25% of the remand population, their actual numbers are non-trivial (12,034 prisoners of the 47,404 people who spent at least one day in remand in 2016). It is likely that this group constitutes those who have been formally – or informally⁸¹ – detained until trial. For this group, the uncertainty of knowing when their criminal case will be completed could also represent a significant source of stress and anxiety, potentially making them more prone to FGPs. This would seem especially true for the 2,035 of them who are in remand for greater than 6 months, particularly given that many of them may be in jeopardy of excessive pretrial incarceration.

Of course, the other significant implication of this dramatic increase in the number of people being held in PTD is institutional in nature. That is, remand facilities are being forced to contend with a constantly expanding number of detainees over time. With limited resources – particularly when it involves the allocation of public tax dollars for potential criminals – it is unsurprising that the conditions experienced by inmates in detention centres are particularly harsh. However, the difficulty in any analysis of remand living conditions is twofold. First, it is very difficult for the average citizen to fully appreciate them – largely because they have never seen them nor know anyone who has witnessed them. For the vast majority of us, PTD is something theoretical and even then, distant from our minds and imagination. By extension, the strength of this factor in encouraging FGPs remains far too abstract to promote any real concern. Second, descriptions of remand conditions by actual inmates are always considered suspect to exaggeration.

As one possible remedy, case law can be used as an additional – and arguably more compelling (if not also more credible) – voice. Indeed, judges’ descriptions come from evidence and testimony presented and tested in court. Within Ontario alone, detailed descriptions of remand conditions are not difficult to locate (perhaps suggesting, in itself, the extent of the problem). Schreck J. quotes his colleagues when describing the conditions in Toronto South Detention Centre as “unacceptable, shocking, deplorable, harsh, oppressive, degrading, disheartening, appalling, Dickensian, regressive and inexcusable”.⁸² Similar judicial scorn is used to describe numerous

⁸¹ There is a sizable number of detainees who remain in PTD without having had a formal determination of bail. They are presumably accused persons who have either waived their right to a bail hearing or are simply maintaining the possibility at a later date (for some strategic reason). On this group of detainees, see, for instance, Ontario, *Remanding the Problem: An Evaluation of the Ottawa Bail Court*, by Cheryl Marie Webster (Ottawa: Ministry of the Attorney General, 2007). More recently, see Doob, Sprott & Webster, *supra* note 79.

⁸² *R v Persad*, 2020 ONSC 188 at para 31 [*Persad*].

other Ontario remand facilities.⁸³ It would seem that Goudin's expression of US jails as the 'shadowlands of justice' find their own relevance in Canada.⁸⁴

More analytically, Ontario judges have seemingly singled out two predominant sources of the particularly harsh conditions experienced by detainees: overcrowding and lockdowns. Overcrowding is a repeated theme in the case law, frequently rebuked as violations of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the so-called Mandela Rules) to which Canada is a signatory. But words are one thing; images are another. In a particularly elucidating example, Kenkel J. describes the situation of a defendant sharing a 6x9 ft. cell with 2 other men, in which one of them is forced to sleep on a mattress on the floor, requiring a decision about whether to sleep with his head "beside the toilet to be closer to the open grill ... or... with [his] head under the desk".⁸⁵ Either speaks volumes. Moreover, the poor sanitation of older jails was highlighted in *R v Lowe* in which the cell floors are "often wet from backed-up plumbing".⁸⁶ Improvements are apparently not found outside of the cell either. As *R v Poirier* noted, the jail "is full of tuberculosis and hepatitis B... it's like the middle ages."⁸⁷ Further, overcrowding has meant that space is at a premium such that many correctional programs/services for the accused have either been eliminated or severely overstretched.⁸⁸ Left with little, if any, meaningful activity over extended periods of time, inmates often suffer deleterious psychological effects.⁸⁹ But physical health is also comprised as medical personnel can no longer keep pace with overcrowding. In *R v Fermah*,⁹⁰ staff frequently failed to provide the accused with his daily anxiety and seizure medications, while in *R v Fuentes*, the Ontario Court of Appeal reduced the offender's sentence to time served because he was denied surgery to treat a very serious eyesight condition.⁹¹

⁸³ See, for instance, expressions such as "an embarrassment" (*R v Smith*, [2003] OJ No 1782 (QL) at para 8) or "brutal and medieval", "inhumane" and "horrific" (*R v Lowe*, [2003] OJ No 2980 (QL) at para 4 [Lowe].) For other equally biting descriptions, see *R v Edwards-Lafleur*, 2016 ONCJ 97; *R v Robinson*, [2001] OJ No 5235 (QL); *R v Fermah*, 2019 ONSC 3597 [Fermah]; *R v Searay*, 2018 ONCJ 645.

⁸⁴ Lauryn P Goudin, "Reforming Pretrial Decision-Making" (2020) 55 Wake Forest L Rev 857 at 871.

⁸⁵ *R v Kravchov*, [2002] OJ No 2172 (QL) at para 5 [Kravchov]. Described in the same case, overcrowding also translated into insufficient tables in the refectory such that some had to eat their meals either standing or sitting on the floor. In extreme cases, 'surplus' accused were housed in segregation cells or holding 'bullpens' and unjustifiably subjected to their onerous regimes.

⁸⁶ *Lowe*, *supra* note 83. In extreme cases, remand prisoners have had to sleep amongst feces. See e.g., *R v Dorian*, [2003] OJ No 1415 (QL) at para 8.

⁸⁷ *R v Poirier*, [2001] OJ No 2320 (QL) at para 6.

⁸⁸ *Ibid.* Similarly, see Sylvia Jones, "Letter to Solicitor General Jones - Elgin Middlesex Detention Centre", (17 May 2019), online: *Ontario Human Rights Commission* <https://www.ohrc.on.ca/en/news_centre/letter-solicitor-general-jones-elgin-middlesex-detention-centre>.

⁸⁹ See e.g., *R v Capay*, 2019 ONSC 535.

⁹⁰ *Fermah*, *supra* note 83.

⁹¹ *R v Fuentes*, [2003] OJ No 2545 (QL) at para 1. More alarming yet, the accused in *R v Ugbaja* did not receive appropriate medical attention, leaving him with a serious foot deformity that would likely necessitate major reconstructive surgery - a consequence found in breach of s.7 of the *Charter of Rights and Freedoms* that ultimately resulted in a stay of proceedings. See *R v Ugbaja*, 2019 ONSC 96.

But these remand conditions are only exacerbated by routine lockdowns that increasingly occur due to staff shortages – described by Hill, J. as “unnecessarily oppressive and challeng[ing] adherence to humane and civilized treatment of the presumptively innocent”.⁹² And one does not need to look far for examples of the onerous deprivations that result from them. As Green, J. describes in *R v Nguyen*, it is not simply that the accused is “physically caged – in a small, windowless cell 24-hour-a-day”, frequently with 2 other cellmates. Rather, “his access to mobility, exercise, human communication, fresh air, showers, family visits and educational/recreational facilities [are] severely restricted if not entirely denied.”⁹³ But it is not only that contact with the outside world is lost. Rather, essential services within the prison are disrupted. As recounted in *R v Persad*, laundry provisions, clothing, bedding, and towels provided during the lockdown were frequently stained with urine, feces or blood that led to rashes.⁹⁴ As meals are now eaten in the cell, one person inevitably eats on the floor⁹⁵ and bodily functions must be done in front of the others.⁹⁶ As they say, a picture is worth a thousand words (or, in this case, a thousand FGPs).

More broadly, lockdowns almost inevitably create widespread tension with the guards and a constant risk of conflict amongst cellmates. For some, the heightened stress/anxiety causes frequent breakdowns⁹⁷ while for others, the “state of hyper-vigilance” leads to a deterioration of their mental health.⁹⁸ For yet others, they are victimized. In *R v Selinevich*,⁹⁹ the accused was not only assaulted in remand, but subsequently forced to enter Protective Custody for her continued safety (severely restricting her movement through no fault of her own). In the extreme, violence can take over an institution.¹⁰⁰ And all of these factors are only multiplied by the length of the lockdowns. It is difficult to comprehend lockdowns of 488 days reported in *R v Ward-Jackson*¹⁰¹, 410 days described in *R v Nguyen*¹⁰² or 285 days in *R v Barnes*.¹⁰³

As they say, the proof is in the pudding (or, in this case, the prison slop).¹⁰⁴ These real-life cases paint a very compelling picture of the powerful impact that PTD can have on innocent

⁹² *R v Tulloch*, 2014 ONSC 6120 at para 8.

⁹³ *R v Nguyen*, 2017 ONCJ 442 at para 38 [*Nguyen*].

⁹⁴ *Persad*, *supra* note 82 at para 12. Equally notable, with no products to clean the cells, bedbug infestations were rampant, and the nail clippers shared across inmates were not cleaned, causing an untreatable fungal infection.

⁹⁵ *Kravchov*, *supra* note 85 at para 7.

⁹⁶ See e.g., *R v Ward-Jackson*, 2018 ONSC 178 at para 47 [*Ward-Jackson*].

⁹⁷ See e.g., *R v Oksem*, 2019 ONSC 6283 at para 29.

⁹⁸ See e.g., *Persad*, *supra* note 82 at paras 11–13.

⁹⁹ *R v Selinevich*, 2017 ONCJ 42 at para 47.

¹⁰⁰ See, for instance, *Henebry v Her Majesty the Queen*, 2018 ONSC 6584 in which an accused won a large civil lawsuit for serious physical and psychological violence experienced in the Elgin Middlesex Detention Centre.

¹⁰¹ *Ward-Jackson*, *supra* note 96 at paras 42–46.

¹⁰² *Nguyen*, *supra* note 93 at para 23.

¹⁰³ *R v Barnes* (9 December 2019), [unreported] (Ont SCJ) at 9, cited in *Persad* at para 29.

¹⁰⁴ See, for instance, the repulsive description of the food prepared in the kitchen of one of Ontario’s remand facilities by a Toronto Star reporter and reproduced, in part, in Robichaud, *supra* note 18.

defendants to plead guilty.¹⁰⁵ While one might hope that the remand conditions described are anomalous and, as such, exceptional in frequency and severity, the repeated variations on the same theme, across multiple remand facilities and across time would seemingly undermine any conclusion other than their normalcy. By extension, the decision to either endure these conditions for an indefinite period of time or plead guilty to a crime that the accused didn't commit and be sentenced to 'time served' or transferred to sentenced custody in a more humane setting, certainly emerges as a straightforward choice. And it goes without saying that this ability to induce FGPs likely increases exponentially when combined with a lengthy stay in PTD (which is becoming increasingly more common as case processing times continue to worsen¹⁰⁶) and especially with detainees with only minor charges – as more low-level cases are apparently being sucked into the bail vortex.

C. Macro Level Analysis: I am My Brother's Keeper

Drawing largely from the fields of sociology and criminology, this final conceptualization of FGPs – and the impact of PTD on them – extends the meso level analysis. While all of the institutional and procedural mechanisms remain, a macro level perspective attempts to look behind them in search of their root cause(s). In contrast with a meso-level analysis that attempts to answer the question of 'how' – that is, the mechanics of PTD that lay behind a defendant's inducement to give an FGP – a macro-level analysis is interested in the question of 'why'. There is no question that these institutional and procedural components place (often tremendous) pressure on innocent defendants to plead guilty. What this latter level of analysis attempts to identify is the motor that operates these lower-level mechanisms. In other words, this is the proverbial 'big picture' perspective as our attention shifts to the much deeper systemic contributing factors of PTD that encourage - or coerce – FGPs.

As the prior analysis has attempted to demonstrate, PTD can impose potentially tremendous suffering on a defendant. As Rosenberg aptly criticizes, PTD translates into a state-sanctioned mechanism by which people – who still enjoy the presumption of innocence and the right to fundamental justice – are frequently housed in "overcrowded medieval conditions... subjected to treatment that some would argue is inhumane and degrading".¹⁰⁷ It would be easy (if not logical) to deduce from this recognition that PTD generally – and particularly for those defendants who are factually innocent – reflects a systemic 'culture of punishment' rooted in the so-called 'punitiveness theory'.¹⁰⁸ Alternatively, the powerful ability of PTD to encourage guilty pleas might also be understood as a necessary – if not fundamental - part of a wider system driven fundamentally by concerns of efficiency or functionality. As the argument goes, the criminal

¹⁰⁵ For similar conclusions and deductive strategy, see Laura Appleman, "Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment" (2012) 69:3 Wash & Lee L Rev 1297.

¹⁰⁶ See, most recently, *R v Jordan*, 2016 SCC 27; *Delaying Justice*, *supra* note 48.

¹⁰⁷ Cited in Robichaud, *supra* note 18.

¹⁰⁸ See, for instance, David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2002); James Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (New York: Oxford University Press, 2003).

justice system would likely grind to a halt under its own weight without a significant reliance on guilty pleas.¹⁰⁹

Either of these more structural theories goes some distance in explaining the ways in which our current criminal justice system operates on both procedural and institutional levels. The problem is that both of them ultimately leave us unsatisfied. In the first case, while ‘increased punitiveness’ is certainly consistent with many of the deleterious effects of the current institutional and procedural mechanisms, this systemic explanation ignores contrary evidence. Most notably, Canada has been internationally recognized for its unique ability within much of the Western world to have been able to largely resist wider pressures toward increased punitiveness vis-à-vis crime and criminals over the past half century (if not longer).¹¹⁰ In the second case, this structural explanation appears suspect - almost too simplistic or utilitarian in nature. Indeed, its elevation of efficiency as the primary goal directly challenges other fundamental legal and moral principles at the core of our criminal justice system.

While there are almost certainly elements of both reflected in PTD as it currently operates in Canada, this paper proposed to focus on an alternative macro-level model found in the notion of risk aversion.¹¹¹ The current use of PTD generally – as well as its use in inducing guilty pleas – may be seen as part of the rise of a much wider cultural climate of risk avoidance and risk management. In fact, the entire criminal justice system in Canada has witnessed a significant change in mentality in the past 3-4 decades. The gradual substitution of the welfare state ideology with a neo-liberal mentality has introduced heightened concern with potential dangers in society that cause unease/fear in citizens. Within the criminal justice sphere, the state’s role has become one of limiting – to the greatest extent possible – the risks to public safety that offenders represent.¹¹² Importantly for our current purposes, this risk-averse mentality has permeated the

¹⁰⁹ See, for example, Meghan Sacks & Alissa Ackerman, “Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?” (2014) 25:1 *Crim Jus Policy Rev* 59.

¹¹⁰ See, for instance, Cheryl Marie Webster & Anthony N Doob, “Punitive Trends and Stable Imprisonment Rates in Canada” in Michael Tonry, ed, *Crime and Justice* (Chicago: University of Chicago Press, 2007) at 297.

¹¹¹ See, for instance, Ulrich Beck, *Risk Society: Towards a New Modernity*, 1st ed, (London: Sage Publications, 1992) or Jonathan Simon, “The Emergence of a Risk Society: Insurance Law and the State” (1987) 95 *Socialist Rev* 61. This latter scholar argues that the concept of risk has emerged as part of the ‘new penology’ – that is, we have abandoned the 19th century disciplinary society (à la Foucault) and adopted a risk society of the postmodern world. Specifically addressing risk aversion as a systemic factor within the bail process, see, for instance, Diana Catherine Grech, *Culture Before Law: Comparing Bail Decision-Making in England and Canada* (Ph.D. Dissertation, University of Leeds (United Kingdom), 2017) [unpublished].

¹¹² One can easily see the links between this theory of risk aversion and other systemic explanations rooted in increased punitiveness (as a response to crime). For instance, the rise in a risk-averse mentality (and the corresponding increase in PTD) dovetails nicely with Jonathan Simon’s *Governing through Crime* thesis (New York: Oxford University Press, 2007) or that of Michael Tonry’s changing sensibilities to penal culture, see *Thinking About Crime: Sense and Sensibility in American Penal Culture* (New York: Oxford University Press, 2004). However, while Canada has clearly not been immune to wider pressures toward greater punitiveness in its response to crime and criminals, we have largely lacked the corresponding

entire bail process (including PTD) and translates into a generalized incentive among justice players to avoid – as long as possible – releasing anyone with more than a non-trivial likelihood of committing a criminal offence.¹¹³

The implications for our broader understanding of the driving forces behind PTD are twofold. On the one hand, the substantial rise in the remand population takes on wider meaning. As we have yet to perfect a method of distinguishing – with complete reliability – those who will, in fact, offend while on bail, the (increasing) use of PTD virtually guarantees that a significant proportion of those held for a bail hearing will be unable to commit any crimes (at least in the community) before their case is resolved. Its additional power to induce guilty pleas – whether false or otherwise – further ensures the safety of the community and, for better or worse, incidences of FGPs may be seen as a small price to pay. Indeed, there is an unfortunate tendency – as Goudin reminds us – to conceptualize the “balancing of the interests of the community and the defendant’s liberty interests as a zero-sum binary choice” – that is, individual freedom (at any point in the criminal court process) or community safety. Not surprisingly, one accused person’s “intangible liberty injuries frequently pale in comparison to the potential harms that whole communities might suffer” on this simple judicial scale.¹¹⁴

On the other hand, a risk-averse mentality goes a long way in explaining why we are increasingly finding defendants in PTD who instinctually should not be there, as well as why they might be there for extended periods of time. As a frontline decision-maker, police are increasingly less likely to release any accused person, even for more minor offences. This is particularly true

appetite as well as the necessary structural and cultural factors that would permit – as well as perpetuate – a systemic commitment to mass incarceration (of which PTD would be included). Although Canadians have been periodically encouraged by our political masters to fear crime and support harsher responses, the growth in PTD in Canada has not – at least directly and sustainedly – constituted a systemic response to a wider ‘punitive turn’. If that were the case, we would have seen an increase in our total imprisonment rate (which we have not). But to be clear, this is not to say that macro-level explanations rooted in increased punitiveness have no relevance to Canada; only that their impact has been considerably muted or less direct. See, for instance, Anthony N Doob & Cheryl Marie Webster, “Back to the Future? Policy Development in Pre-trial Detention in Canada”, in Karim Ismaili, Jane B Sprott & Kim Varma, eds, *Canadian Criminal Justice Policy: Contemporary Perspectives* (Toronto: Oxford University Press, 2012) at 30-57 or Cheryl Marie Webster & Anthony N Doob, “Maintaining Our Balance: Trends in Imprisonment Policies in Canada”, in the same text.

¹¹³ See, for instance, Nicole M Myers, “Shifting Risk: Bail and the Use of Sureties” (2009) 21:1 *Current Issues Crim Just* 127; Myers, “Eroding the Presumption of Innocence”, *supra* note 38. For a similar interpretation, see Nathan Jon Shubael Gorham, *Wrongful Pre-Trial Detention in the Toronto Bail System* (Thesis, University of Toronto, 2015) [unpublished] at 139, in which he also affirms that to ‘qualify’ for release on bail, all but the most speculative risk must be eliminated.

¹¹⁴ Goudin, *supra* note 84 at 869. See also Garland, *supra* note 108 in which this scholar argues that defendants fair poorly in this calculation precisely because judges typically exclude them from their conception of the ‘community’ whose safety (and interests) must be protected. Specifically in relation to FGPs, the harms caused to the accused through PTD have traditionally been ignored.

for administration of justice charges that have increased significantly over the past 2-3 decades.¹¹⁵ Further, they are laying a greater number of charges generally per case (often argued to reflect over-charging practices as a more effective incentive for guilty pleas)¹¹⁶ that ultimately renders release on bail less likely.¹¹⁷ Not surprisingly, a greater number of cases begin their criminal court lives in bail court (and, by extension, a greater number of accused persons are finding themselves in remand).¹¹⁸

Once in bail court, a risk-averse model continues to find its translation. Cases are taking longer to be processed such that a generalized expectation now exists that a substantial number of cases will be adjourned on any given day in bail court.¹¹⁹ Further, one cannot exclude legislative amendments that have also acted as additional impediments to obtaining bail (e.g., reverse onus provisions¹²⁰; legislative expansion of the criteria for release, rendering bail more difficult to obtain¹²¹). And to this growing list, one must also add an increased use of more stringent release orders (e.g., the use of sureties becoming the norm rather than the exception in some jurisdictions; the imposition of multiple, often unrealistic or unnecessary, conditions) and the accompanying rise in breaches.¹²² This process virtually ensures an even longer subsequent bail process with even greater numbers of release restrictions and, ultimately, a vicious cycle of recontact, re-arrest, (lengthier) criminal record and eventually denial of bail.

Simply put, the entire bail system (*sensu latu*) is currently hard-wired to promote risk-averse behaviour at every turn. By extension, more defendants find themselves in PTD for often extended periods of time. Given the conditions within PTD, guilty pleas generally – and FGPs specifically – are a likely result.¹²³ Two conclusions can be drawn. First, PTD is not just a cog in a risk averse system. Rather, it is the culmination of a series of decisions and practices occurring in prior stages of the bail process. While scholars have often identified PTD as the most proximate cause of FGPs,¹²⁴ such statements need to be understood within a much wider or systemic process

¹¹⁵ Doob, Sprott & Webster, *supra* note 79.

¹¹⁶ Kellough & Wortley, *supra* note 26 at 205. These scholars refer to this process as ‘structural coercion’ whereby circumstances are arranged such that accused persons will ‘choose’ officially predetermined options.

¹¹⁷ See, for example, Doob, Sprott & Webster, *supra* note 79.

¹¹⁸ See Webster, Doob & Myers, *supra* note 30. For a more recent confirmation, see *Trends in Bail Court Across Canada*, (Ottawa: Department of Justice Canada, Research and Statistics Division, 2018), online (pdf): <<https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2018/docs/dec01-eng.pdf>> [*Trends in Bail Court*].

¹¹⁹ This practice has now come to be commonly known as a ‘culture of adjournments.’ On this phenomenon, see, for instance, Webster, *supra* note 81. More recently, see *Trends in Bail Court*, *supra* note 118.

¹²⁰ See, for instance, the multiple examples provided that directly link reverse onus provisions with the accused’s detention in PTD and a subsequent finding of not guilty at trial in Gorham, *supra* note 113 at 65.

¹²¹ See, for example, Doob & Webster, “Back to the Future? Policy Development in Pre-trial Detention in Canada,” *supra* note 112 at 30.

¹²² See, in particular, Myers, “Shifting Risk: Bail and the Use of Sureties”, *supra* note 113; Myers, *supra* note 38. See also *Trends in Bail Court*, *supra* note 118.

¹²³ See, for instance, Heaton, Mayson & Stevenson, *supra* note 69.

¹²⁴ See, for example, James R Acker, “Taking Stock of Innocence: Movements, Mountains, and Wrongful Convictions” (2017) 33:1 J Contemp Crim Jus 8.

that is set in motion by an underlying culture of risk aversion and risk management. Second, the bail system (including PTD) does not target innocent accused. That is, the process is not intentionally discriminatory. Rather, it is structural in nature. Having said this, the effect is the same whereby the entire bail system is set up to encourage guilty pleas. The fact that some of these accused will be factually innocent is an unfortunate – but foreseeable – by-product. But importantly, this end result of FGPs is not rooted in individual failures (e.g., corrupt police investigatory practices). Nor is it a design flaw. On the contrary, it is all part of a system purposefully designed to minimize risk at potentially great cost to those who pass through it. And we are its creators.

IV Moving Forward

This paper is a story about shifts. Just as the wrongful convictions scholarship has begun to move away from a sole focus on individual error whereby criminal justice players deliberately or unintentionally provide false evidence at trial, this current contribution extends the traditional explanation for FGPs. Specifically, it moves away from the notion of FGPs as rooted in an individual cost-benefit analysis to a consideration of wider institutional/procedural factors – and their underlying drivers - that encourage innocent defendants to plead guilty, precisely because it is perceived to be in their best interest. While perhaps not revolutionary, this notion of FGPs as a predictable cost of a highly risk-averse justice system in which PTD can exert tremendous pressure on all accused – including the innocent – to plead guilty opens up the proverbial door to a new scholarly line of research.

First, it dramatically expands the potential pool of wrongfully convicted defendants, largely targeting those on the lower end of the offence severity spectrum who have traditionally not been on the radar of the wrongful convictions scholarship. With it, an arguably more accurate or fulsome picture of miscarriages of justice will emerge as a new piece of a much wider puzzle is discovered. Second, it extends our critical gaze from trials to earlier stages of the criminal justice process, forcing us to recognize that miscarriages of justice are not an isolated problem. Similarly, it challenges traditional beliefs surrounding guilt, obligating us to confront the reality that innocent people do - knowingly, voluntarily and intelligently - accede to their own wrongful conviction.¹²⁵ Indeed, this recognition might be aptly referred to as the ‘dark side’ of wrongful convictions, as we move away from the notion of the resilient victim of a wrongful conviction fighting to clear their name and attempt to integrate the (likely much greater number of) others who have simply lost hope or faith in the justice system, been beaten down and have given up. Third, it has compelled us to develop different analytic tools to begin to understand a whole new set of pressures or contributing factors to wrongful convictions that call out for further analysis. PTD is only one of them.

And finally, it has introduced a new target for innocence reform. Notably, the possibilities have exploded as multiple remedial levels have emerged. From a micro perspective, new research has begun to determine the most significant factors that go into an individual defendant’s costs-benefit analysis when determining whether to give an FGP while in remand custody. By identifying them, as well as their respective weight in the final decision, we have the opportunity

¹²⁵ Natapoff, *supra* note 9 at 89.

to alter the individual assessment and, by extension, produce a different outcome. While the decision to give an FGP while in PTD continues to be conceived as a discrete and unique choice, this level of research also allows us to search for patterns across accused persons as well as test individual-level theories about human behaviour that may shed additional light on the internal decision-making processes (e.g., risk-taking preferences).

Extending this exercise at the meso-level, remedial attention shifts to more institutional and/or procedural changes that may alter a defendant's decision to plead guilty in PTD despite being innocent. The most intuitive types of modifications may be in the form of better conditions in remand custody (e.g., expanding institutional capacity and amenities). However, remedial intervention may be better focused on reducing the number of accused people in PTD – a solution that will simultaneously improve remand conditions by reducing the strain on institutional resources. In particular, greater selectivity by police of who they detain for a bail hearing or how they respond to administration of justice offences (particularly when the violations do not, in themselves, constitute criminal behaviour) would be well advised such that fewer low-level offenses are being brought into the bail system. In bail court, Crown prosecutors could insist less on onerous release plans or the use of sureties except when absolutely necessary as ways to reduce the vicious cycle that such practices encourage. Parallel remedial efforts in reducing the length of time in remand would also be of considerable value.¹²⁶

However, long-term and widespread remedial change will only come at the macro level. While meso-level changes in individual courthouses or remand facilities certainly have value and can bring about significant localized – if not necessarily permanent - change, structural modifications dramatically increase the scope and expanse of remedial action. Indeed, the difference is one between merely tinkering with the current criminal justice system and actually bringing about long-term systemic change. Many Canadian jurisdictions have experimented with all sorts of institutional/procedural changes. One need only think of Ontario's Upfront Justice program in the early 2000s¹²⁷ or the more recent Justice on Target project.¹²⁸ Both have seen some success in curbing the rise in the number of accused persons spending time in remand custody. However, neither has been successful in turning the tide. Until the underlying risk averse mentality is addressed and curbed, the likelihood of reducing the number of FGPs in PTD is unlikely to change in any significant way.

But all is not bleak. There is clearly a greater recognition of the underlying or systemic causes and the battle against our current risk-averse mentality is already well underway. First, the Supreme Court of Canada has joined the fight through decisions surrounding greater use of bail.¹²⁹ Second, recent federal legislation has been passed with similar intent.¹³⁰ Third, multiple NGOs

¹²⁶ As one strategy, see Terry L Baumer, "Reducing Lockup Crowding with Expedited Initial Processing of Minor Offenders" (2007) 35 J Crim Jus 273.

¹²⁷ See, for example, Webster, *supra* note 81.

¹²⁸ See, for instance, Doob, Sprott & Webster, *supra* note 79.

¹²⁹ See, in particular, *R v Antic*, 2017 SCC 27; *R v Myers*, 2019 SCC 18; *R v Zora*, 2020 SCC 14.

¹³⁰ Most obviously, see Bill C-75 and its modifications to the sections of the Criminal Code relative to the bail process: Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, (SC 2019, c 25). In particular, this legislation was

have been very active in promoting change that might lead to fewer people in PTD.¹³¹ And there is also the wrongful convictions scholarship that has shown indications of taking up the torch. While the conversation surrounding PTD as an important source of FGPs is still more of a whisper than a battle cry, it is beginning. Equally significant are broader calls for a ‘Criminology of Wrongful Convictions’.¹³² Sadly, criminologists have largely been missing from the table. While the wrongful convictions scholarship has timidly recognized the significant pressure that PTD can have in encouraging FGPs,¹³³ this area of study requires greater breadth and depth. Indeed, the stakes are too high for anything less. As Robichaud eloquently reminds us, “[t]hings like the Charter, rules of evidence, factual determination by a competent court of law, the adversary system, hundreds of years of legal tradition to what we attribute the term ‘Law’ and ‘Justice’ are all ivory towers far off in the distance when sitting in a medieval dungeon”.¹³⁴ As we are all our brother’s keeper, systemic change in PTD should be an urgent reform on the criminal justice agenda, if only to ensure that justice is not usurped by the limits of human suffering.¹³⁵

intended to modernize bail practices and procedures such that all bail decisions must give primary consideration to release at the earliest reasonable opportunity and with the least onerous conditions possible. For even more recent legislative activity, see Bill C-5 which is currently before the Senate. This bill proposes to repeal mandatory minimum sanctions for 14 offences in the *Criminal Code* as well as all offences in the *Controlled Drugs and Substances Act*. This sentencing option has been identified as an effective mechanism to pressure accused persons into falsely pleading guilty to lesser charges. On this phenomenon, see, for instance, *Injustices and Miscarriages of Justice Experienced by 12 Indigenous Women: A Case for Group Conviction Review and Exoneration by the Department of Justice via the Law Commission of Canada and/or the Miscarriages of Justice Commissioner* (Ottawa: Office of The Honourable Kim Pate, CM, 2022) at 14-15, online (pdf): *Senate of Canada*

<https://sencanada.ca/media/joph51a2/en_report_injustices-and-miscarriages-of-justice-experienced-by-12-indigenous-women_may-16-2022.pdf> or Roach, *supra* note 15. Importantly though, the latter scholar reminds us that the pressure for this legislative reform has come largely from the courts. As of December 2021, 217 constitutional challenges of mandatory minimum sanctions were before our courts, accounting for 34% of all challenges under the *Charter*. Over the last decade, 69% of challenges to drug offences and 48% of those to firearms offences were successful at various court levels. See “Legislative Summary of Bill C-5: An Act to amend the Criminal Code and the Controlled Drugs and Substances Act”, online: *Library of Parliament*

<https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/441C5E#:~:text=Bill%20C%2D5%20removes%20several,%2D%20and%20firearm%2Drelated%20offences>.

¹³¹ See, for instance, *Reasonable Bail*, by John Howard Society of Ontario (Toronto: The Centre of Research, Policy & Program Development, 2013); Deshman & Myers, *supra* note 26.

¹³² See, in particular, Leo, *supra* note 7. For a similar call within the Canadian context, see Roach, *supra* note 15.

¹³³ Sacks & Ackerman, *supra* note 109.

¹³⁴ Robichaud, *supra* note 18.

¹³⁵ *Ibid.*