Moral Self-Convictions: Uncontested Pleas and Canadian Criminal Law

by

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Abstract

An uncontested plea allows criminal defendants to self-convict without requiring the state to prove its case against them. Uncontested pleas may be inculpatory, exculpatory, or non-inculpatory. Guilty pleas are inculpatory uncontested pleas. When a defendant pleads guilty sincerely, they formally take responsibility for the offence and accept the consequences. Exculpatory and non-inculpatory uncontested pleas include best-interest pleas like *Alford* and *nolo contendere* pleas, respectively. When a defendant enters one of these pleas, they agree to self-convict without formally taking responsibility for the offence. Statutory language formally forbids exculpatory and non-inculpatory uncontested pleas like *nolo contendere* pleas in Canada.

I argue that the legal and ethical objections to these pleas and plea bargaining generally in Canada are largely misplaced. *Nolo contendere* pleas open new avenues of plea bargaining for defendants and prosecutors to explore, creating new opportunities for certainty, factual accuracy, agency, and mutual advantage in otherwise highly adversarial proceedings. Although formally forbidden, defendants may still enter *nolo contendere* informally and surreptitiously. I conclude by arguing that these pleas be formalized and proposing ways to do so.

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Contents

Chapter 1

Introduction

1.1 Overview

Criminal defendants[1] in Canada are presumed innocent until a prosecutor[2] proves they are guilty beyond a reasonable doubt. But defendants may also concede the state's evidence against themselves and invite a conviction.[3] I refer to these self-convictions collectively as *uncontested pleas*.[4] By default, the state must prove its allegations against defendants at trial. Defendants are presumed innocent,[5] have the right to remain silent

[1] Here and throughout this thesis, I use the term "defendants" to refer to persons charged with criminal offences rather than the term "accused. This decision was entirely phonaesthetic. Although there is an argument to be made in favour of sticking with the governing statutory parlance, the clumsiness of the word "accused" — especially apparent when dealing with phrases like "multiple co-accuseds" — is justification enough.

[2] I also use the term "prosecutor" to refer to prosecutors, rather than "the Crown." Although this is common parlance both in Canadian courts and throughout the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], the term "Crown" is a broad term applied to anyone appearing on the government's behalf in court. Using the term "prosecutor" makes for more precise usage.

[3] In Canadian criminal law, a "conviction" does not inevitably result after a defendant has pleaded guilty or been found guilty after trial. Instead, a judge may discharge a defendant, with or without conditions. Discharges are statutorily distinct from convictions and are not registered as convictions on a person's criminal record: see *ibid* s 730. Despite technical non-compliance, I prefer the term "conviction" throughout, largely for the sake of brevity and conceptual simplicity.

[4] Classifying guilty pleas as *uncontested* situates them on a spectrum with other pleas that defendants may enter to respond to criminal charges. Doing so provides a way to meaningfully compare and contrast these various pleas. I outline and examine several of these pleas in detail in Chapter 2 below.

[5] See *Canadian Charter of Rights and Freedoms*, s 11(d), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]

and are secure against self-incrimination,[6] but may waive these rights by entering an uncontested plea.[7] Since defendants are under no obligation to do so, and because uncontested pleas preclude an acquittal, Canadian courts require such defendants to self-convict *knowingly*, *voluntarily*, and *unequivocally*.[8]

Self-convictions began as common-law confessions and evolved into codified criminal procedures.[9] As they did, plea bargaining emerged and evolved alongside them. Plea bargaining occurs when a defendant enters an uncontested plea for a reduced sentence, a plea to a lesser charge, or some other consideration. These deals assume that prosecutors and defendants each risk losing something by going to trial but are guaranteed to gain something by agreeing to a conviction.

Today, plea bargains are both blamed and praised for the fact that far more criminal cases resolve without a trial than with one.[10] The practice has been heralded as a necessary component of a functioning modern justice system[11] and derided as an efficiency-obsessed mechanism responsible for wrongful convictions and involuntary pleas.[12] Pro-

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6 See *ibid*, s 11(c) & 13. The right to silence and the right against self-incrimination flow from this provision.

7 The same holds true for the pleas I refer to as "non-contested". See §§ 2.3.3 and 3.2 below, where I examine the effects that these pleas have been found to have in both American and Canadian common law.

8 See *R v Wong*, 2018 SCC 25, [2018] 1 SCR 696 [*Wong*].

9 See Albert W. Alschuler, "Plea Bargaining and Its History" (1979) 79:1 Colum L Rev 1 at 7 ["Plea Bargaining History"].

10 Some estimates place the percentage of guilty pleas as high as 97%. See Innocence Project, "Report: Guilty Pleas on the Rise, Criminal Trials on the Decline" (7 August 2018), online: <innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/>. Reported statistics in Canada confirm that the majority of criminal charges that prosecutors proceed on resolve through guilty pleas: see e.g. Ontario Court of Justice, "Criminal Statistics 2021", online: <ontariocourts.ca/ocj/files/stats/crim/2021/2021-Offence-Based-Criminal.xlsx> [*Ontario Court of Justice Criminal Statistics 2021*]. Although the numbers in Ontario are nowhere near the 97% that the National Association of Criminal Defense Lawyers reports, it is clear that there are far fewer contested trials than guilty pleas in the Ontario provincial courts.

11 See e.g. *R v Anthony-Cook*, 2016 SCC 43, [2016] 2 SCR 204 at paras 25, 46 [*Anthony-Cook*]. Before the recent Supreme Court of Canada decision in *R v Nahanee*, 2022 SCC 37 [*Nahanee*], *Anthony-Cook* was the sole leading authority on judicial discretion for accepting jointly-recommended sentences. But *Anthony-Cook* also grounded the rationale for its guidelines in the premise that plea bargaining is an essential feature of modern criminal procedure. *Nahanee*, on the other hand, provides some limits on where and how *Anthony-Cook* may be applied but passes over the question of *why* sentencing ranges and joint-recommendations ought to restrict judicial discretion.

12 See David Ireland, "Bargaining for Expedience: The Overuse of Joint Recommendations on Sentence" (2015) 38:1 Man LJ 273 at 275f.

ponents of plea bargaining often note the immense time and resources that modern criminal trials require and the opportunities plea bargaining affords for defendants to minimax their risks and benefits.[13] On the other hand, critics of plea bargaining argue that this stick-and-carrot-style practice improperly pressures defendants to forego trials and increases the likelihood of wrongful convictions.[14]

Despite widespread criticism and controversy, plea bargaining quickly gained traction in early 20th century North American criminal procedure.[15] As it did so, an obscure common-law plea known as *nolo contendere* experienced a revival in the United States. *Nolo contendere* is a Latin phrase meaning "I do not wish to contest." A defendant entering a *nolo contendere* plea invites the criminal conviction's consequences without admitting responsibility for the offence. Like guilty pleas, *nolo contendere* pleas are self-convictions and may play a part in resolving criminal charges. But *nolo contendere* pleas also provide defendants with advantages that outright guilty and not guilty pleas do not. Most prominently, at common law and in all but a few states, *nolo contendere* pleas are inadmissible in subsequent actions stemming from the same allegations. Most states that recognize these pleas allow defendants to enter them for all offences, authorizing the plea as an enticing bargaining chip to convince defendants to disavow responsibility without a trial.

1.2 Academic History

American academics have extensively discussed the history, use, and characteristics of *nolo contendere* pleas for over a century.[16] However, in Canada, the academic conversa-

[13] See e.g. Jenny Elayne Ronis, "The Pragmatic Plea: Expanding Use of the Alford Plea to Promote Traditionally Conflicting Interests of the Criminal Justice System" (2010) 82:5 Temp L Rev 1389.

[14] See e.g. Joan Brockman, "An Offer You Can't Refuse: Pleading Guilty When Innocent" (2010) 56:Issues 1 and 2 Crim LQ 116; Ireland, *supra* note 12 at 294; Albert W Alschuler, "The Changing Plea Bargaining Debate" (1981) 69: 3 Cal L Rev 652 (HL) at 715 ["Changing Debate"].

[15] See Alschuler, "Plea Bargaining History," *supra* note 9 at 6. See also Ireland, *supra* note 7 at 280f.

[16] See e.g. Paul E. Hadlick, *Criminal Prosecutions under the Sherman Anti-Trust Act* (Washington, D.C.: Ransdell, 1939) at 131 — 138; Nathan B. Lenvin & Ernest S. Meyers, "Nolo Contendere: Its Nature and Implications" (1942) 51:8 Yale L J 1255; Patrick W. Healey, "The Nature and

tion around plea bargaining rarely touches on *nolo contendere*.[17] This discursive dearth in Canada most likely results from our distinct common law traditions. The *nolo contendere* plea emerged in 15th century England but was last reported being used there in 1702.[18] When English courts last employed the *nolo contendere* plea, "Canada" was still more than a century and a half away. By the time *nolo contendere* pleas re-emerged in force in the early 20th century, Canadian criminal law had developed without it, and *nolo contendere*'s American re-emergence did not initially generate academic or judicial interest in Canada.

1.3 Importance of the Current Research

Until recently, Frederick L. Forsyth's 1997 "A Plea for Nolo Contendere in the Canadian Criminal Justice System" was a notable but seemingly lone exception to this silence.[19] But since then, Ontario courts have authorized a "*nolo contendere* procedure" that allows defendants to enter these pleas informally. Canadian courts or legal scholars have yet to examine whether these informal pleas *should* be allowed. As Forsyth's article's title alludes, Canadian criminal law does not *formally* recognize *nolo contendere* pleas. The *Criminal Code of Canada* only allows defendants to plead guilty, not guilty, or one of the special "double jeopardy" pleas listed in section 607.[20] But the *nolo contendere* procedure's emergence in Canada suggests that it fulfills needs that formulaic applications

Consequences of the Plea of Nolo Contendere" (1954) 33:3 Neb L Rev 428; Norman S. Oberstein, "Nolo Contendere–Its Use and Effect" (1964) 52:2 Calif L Rev 408; Neil H. Cogan, "Entering Judgment on a Plea of Nolo Contendere: A Reexamination of North Carolina v. Alford and Some Thoughts on the Relationship between Proof and Punishment" (1975) 17:4 Ariz L Rev 992; William C. Athanas, "Criminal Law - Lack of Knowlege Concerning Deporation Consequences Does Not Invalidate Nolo Contendere Plea" (1995) 29:2 Suffolk U L Rev 607; Ramy Simpson, "Nolo Contendere Convictions: The Effect of No Confession in Future Criminal Proceedings" (2019) 4:6 Crim L Prac 25.

17 But see e.g. Brockman, *supra* note 14 at 118.

18 See *R v Templeman*, 1 Salk 55 (QB 1702) [*Templeman*].

19 Frederick L Forsyth, "A Plea for Nolo Contendere in the Canadian Criminal Justice System" (1997) 40:2 Crim LQ 243.

20 *Criminal Code* s 607 outlines the double jeopardy pleas. Each applies to defendants already punished for a crime who should not have to plead again. Since then, *Charter*, *supra* note 2, s 11(h) has provided the same guarantee at a constitutional level.

of the statutory framework cannot. However, the procedure is unrefined and unregulated, such that it causes problems that current legislation cannot resolve. As a result, a closer analysis is warranted.

1.4 Research Questions, Methodology, and Road Map

1.4.1 Research Questions

The broad question I answer is whether Canadian criminal law should formalize *nolo contendere* pleas. I argue that plea bargaining generally and *nolo contendere* pleas specifically benefit the criminal justice system when implemented judiciously and regulated carefully. To support this position, I examine plea bargaining's morality, as all uncontested pleas are practically and ethically entwined in the controversial practice of plea bargaining.[21] Defendants frequently enter them due to plea-bargained deals they make with prosecutors, and it is reasonable to suppose that formalizing these pleas will result in more such agreements. Plea bargaining critics argue that these arrangements unfairly induce defendants to plead guilty, result in wrongful convictions, and improperly shift focus away from the criminal law's moral core. If true, these concerns should be considered when asking whether Canadian criminal law should expand plea bargaining's scope.

1.4.2 Methodology

My professional experience as a criminal lawyer and academic training in philosophy inform my intuitions, normative propositions and conclusions. Since working as a summer student with Legal Aid Manitoba in 2015, I have practiced almost exclusively as a criminal defence lawyer. My legal career has allowed me to represent clients at show-

[21] See Stephanos Bibas, "Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas" (2003) 88:5 Cornell L Rev 1361 ["Harmonizing Substantive Values"]. I discuss Bibas's uniquely caustic view of *nolo contendere* pleas at length in § 4 below.

cause hearings, peace bond applications, sentencings, judge-alone and jury trials, *voir dires*, and appeals, dealing with charges ranging from negligible mischiefs and *de minimis* assaults to first-degree murders and terrorism offences. This experience has taught me about the specific needs, concerns, and challenges that criminally-charged defendants face and shaped my ethical views on how the moral dilemmas that defendants face within the criminal justice system should be addressed.

The unique methodological contours that legal reasoning entails have also impacted my argument's structure and substance. Professional legal writing in criminal law involves concurrently surveying large volumes of information and microscopically engaging with limited sources. Briefs, memos, and resolution offers dealing with sentencing ranges, competing appellate authorities on undecided issues, interpretive canons that impact how a court ought to interpret a statute, and novel *Charter* arguments often require lawyers to condense dozens of lengthy reported cases into a concise set of points and principles. At the same time, appellate lawyers must narrowly focus their analysis on the record, trial lawyers must limit their arguments to admissible and available evidence, lawyers asking courts to exclude evidence must understand and apply specific legal principles derived from the leading case or cases, and lawyers challenging the constitutionality of a statutory provision should be familiar with the nuances of that legislation and the *Charter* principles underlying the action. Accordingly, I simultaneously use high- and low-level approaches when answering my research questions. Both philosophy and legal reasoning employ deductive and inductive reasoning where the situation demands it,[22] and I employ both throughout my analysis.

My philosophical training provides the foundation and tools for my approach to legal questions and analysis. Specifically, I utilize a version of the analytic "conceptual analysis" process adapted for legal reasoning.[23] Conceptual analysis consists of reasonable

[22] See Maria Termini, "Proving the Point: Connections between Legal and Mathematical Reasoning" (2019) 52:1 Suffolk U L Rev 5.

[23] In doing so, I owe much to the analytic methodology that Scott Shapiro proposes in his book "Legality": see Scott Shapiro, *Legality* (Cambridge: Harvard University Press, 2011) at ch 2 for

conclusions that one draws from truisms, generally-held intuitions, and readily-available inferences. Much like legal concepts such as judicial notice, *stare decisis*, common-law doctrines, and reasonable hypotheticals, conceptual analysis uses argumentative building blocks to create inferences, construct premises, and reach reasonable conclusions, with or without accompanying empirical evidence. Conceptual analysis is not universally accepted and not without controversy.[24] But when done conscientiously, carefully, and in good faith, conceptual analysis is a collaborative, logically-sound, and productive process. Its format encourages those who use it to think and write explicitly about their intuitions and biases. Once explicit, these competing intuitions and underlying biases can be identified, discussed, and explored further. I attempt to answer my research questions in this spirit of open conceptual exploration and cooperation.

The source material for my argument consists of legislation, case law, and academic literature in the United States and Canada, as well as my own personal experience, intuitions, and reasonable hypotheticals. The English and American *nolo contendere* plea began as an obscure common law creation, such that most early *nolo contendere* plea discussions took place in recorded court decisions. In subsequent years, codification dominated criminal rules and procedure across the United States, leading to state legislatures formally recognizing or precluding *nolo contendere* pleas through statute. This closely tracked Canadian criminal procedure, which had been statutorily regulated since Parliament introduced the first *Criminal Code* in 1892.[25] To locate these resources, I relied on WestLaw to find American case law, statutes, and court rules, as well as to gather early Canadian criminal reported decisions. I relied on CanLII for later Canadian decisions, statutes, and court rules. For academic articles and case commentaries, I primarily used HeinOnline. My intuitions and experiences ground the hypotheticals I create and base

a concise introduction to conceptual analysis and how it can be specifically tailored to examining foundational legal concepts.

[24] See e.g. Eric Margolis & Stephen Laurence, "Concepts" (17 June 2019) s 5.2, online: *Stanford Encyclopedia of Philosophy* <plato.stanford.edu/entries/concepts/>.

[25] See *The Criminal Code*, 1892 (55-56 Vict), c 29 [*Criminal Code, 1892*].

my arguments on throughout.

1.4.3 Road Map

I examine whether *nolo contendere* pleas should be statutorily authorized by first analyzing the nature of *nolo contendere* pleas and addressing the legitimate concerns these pleas and plea bargaining raise. Beginning in Chapter 2, I define contested and uncontested pleas and outline their role in plea bargaining. From here, I conduct a brief high-level survey of the history of guilty and *nolo contendere* pleas in England, the United States, and Canada to show how these pleas evolved and relate to one another. In Chapter 3, I examine whether and to what extent *nolo contendere* pleas are compatible with Canadian criminal law. I identify the relevant statutory provisions in the *Criminal Code*, examine *nolo contendere* pleas against them, and outline the contours of the recently-developed and developing Canadian *nolo contendere* procedure. I then go on in Chapter 4 to ask whether Canadian criminal law should formalize *nolo contendere* pleas. To answer this question, I first consider and respond to some of the common objections to plea bargaining through the lens of a few particularly compelling thinkers. I go on from there to examine how those objections impact *nolo contendere* pleas specifically and construct my own responses to the objections and problems that plea bargaining opponents raise. In Chapter 5, I conclude that *nolo contendere* pleas can provide normative goods for defendants and society and should be encouraged and carefully managed. I recommend that Parliament formally recognize and regulate these pleas through statute.

Chapter 2

What Are Uncontested Pleas?

I ask whether *nolo contendere* pleas, a type of uncontested plea, should be permitted in Canadian criminal law and encouraged in Canadian criminal procedure. To those ends, this chapter provides some background to guilty and *nolo contendere* pleas. I start by defining what pleas are and explaining their role in Canadian criminal law. I follow this by briefly surveying the history and current status of guilty and *nolo contendere* pleas. For guilty pleas, I examine the plea voluntariness and comprehension inquiries developed and the plea inquiry's current legal status. For *nolo contendere* pleas, I explain KA Drechsler's four-part *nolo contendere* classification system,[26] briefly introduce the Canadian *nolo contendere* procedure, and summarize the current status of *nolo contendere* pleas in the United States using these categories.

[26] See KA Drechsler, "Plea of nolo contendere or non vult contendere", Annotation, (1944) 152 ALR 253 — 254 [*Drechsler's Annotation*].

2.1 Types of Pleas

In criminal cases, a plea is a type of proposition whose primary purpose is to tell the court what evidence a defendant will require the prosecutor to prove. On this primary metric, pleas may be uncontested or contested. Any plea that admits the state's case without requiring it to prove allegations against a defendant is an *uncontested plea*. Conversely, any plea that does not admit the state's case against a defendant and requires proof of some or all of the allegations is a *contested plea*. I refer to the plea's contested/uncontested aspect as its *proof-content*. In Canada, a *guilty plea* is an example of an uncontested plea. Defendants in Canada who enter this plea advise the court that they admit all of the offence's essential elements as proven and that a trial is unnecessary. Conversely, a *not guilty plea* is an example of a Canadian contested plea. Defendants who enter this plea advise the court that all of the offence's essential elements must be proven unless otherwise agreed and that a trial is necessary.

Although the plea's primary purpose is to convey its proof-content, pleas also contain other propositional values. In normal parlance, when a person says they are either guilty or not guilty of something, they are understood to be conveying some subjective meaning about what they *believe to be true*, some objective meaning about what *is, in fact, true*, or both. I refer to these residual aspects as a plea's *belief-content* and *truth-content*, respectively. Broadly categorized, a criminal plea's belief/truth-content may be *inculpatory*, *exculpatory*, or *non-culpatory*, which may also be read as *not-inculpatory and not-exculpatory*.[27] While inculpatory pleas admit responsibility and exculpatory pleas deny responsibility, non-culpatory pleas do neither. Both contested and uncontested pleas may be inculpatory, exculpatory, or non-culpatory.

[27] Hawkins distinguished guilty and *nolo contendere* pleas by describing one as an "express confession" and the other as an "implied confession," respectively. See William Hawkins, *A Treatise of the Pleas of the Crown: Or, A System of the Principle Matters Relating to that Subject, Digested Under Proper Heads*, vol 2, 8th ed by John Curwood (London, UK: Sweet, 1824) at 466.

2.1.1 Contested pleas

Pleas that require the prosecutor to prove some or all elements of their allegations are *contested*. A defendant who admits responsibility for the offence charged but disagrees with some or all of the prosecutor's specific allegations enters an *inculpatory contested* plea. Where a defendant actively denies guilt and sets the matter for a hearing, they enter an *exculpatory contested* plea. Finally, defendants who neither admit nor deny their guilt or innocence but set their charges for a hearing enter *non-culpatory contested* pleas.

- **Inculpatory contested: *Gardiner* hearings.** A defendant entering a contested plea may wish to admit guilt but not agree to some or all of the prosecutor's specific allegations. For example, a defendant is charged with assaulting their domestic partner. The defendant may admit the assault, which is the offence, but deny that the complainant is their domestic partner, a statutorily aggravating factor.[28] This defendant and others similarly situated may enter guilty pleas to the formal charge and require the prosecutor to prove any contested allegations and aggravating factors.[29] In Canada, these procedures are often referred to as *Gardiner* hearings,[30] named after the Supreme Court of Canada decision in *Gardiner*.[31]

- **Inculpatory contested: Conditional pleas.** A defendant may want to argue that some evidence in their case should be ruled inadmissible but would plead guilty if the court disagreed. Conditional pleas are a means for defendants to do so. Several American states have codified these pleas, and although they are formally unavailable in Canada, defendants may constructively enter them through specially-designed plea agreements.[32] Conditional pleas are functionally equivalent

[28] See *Criminal Code*, *supra* note 2, s 718.2(a)(ii).
[29] See *ibid*, s 724(3).
[30] See Criminal Notebook, "Sentencing Evidence" (January 2020) online: <criminalnotebook.ca/index.php/Sentencing_Evidence>.
[31] *R v Gardiner*, [1982] 2 SCR 368, 140 DLR (3d) 612 [*Gardiner*].
[32] See *R v Fegan* (1993), 13 OR (3d) 88, 80 CCC (3d) 356 (ONCA) [*Fegan*].

to a guilty plea following an unsuccessful evidentiary ruling.[33]

- **Exculpatory & non-culpatory contested: Not guilty pleas.** Where defendants in Canada maintain their innocence or refuse to plead one way or the other, the court must enter not guilty pleas and set their charges down for trial.[34]

2.1.2 Uncontested Pleas

Defendants who self-convict without requiring the prosecutor to prove any part of their case enter *uncontested pleas*.[35] A defendant who admits responsibility for an offence and does not require the prosecutor to prove their allegations enters an *inculpatory uncontested* plea. Where a defendant self-convicts but maintains their innocence, they enter an *exculpatory uncontested* plea. Finally, defendants who self-convict without admitting or denying responsibility enter *non-culpatory uncontested* pleas.

- **Inculpatory uncontested: Guilty plea.** A defendant who enters a guilty plea formally admits that the allegations are proven and that they are responsible for the offences alleged inculpates themselves. This uncontested plea is *inculpatory* because the defendant subjectively conveys that they are objectively guilty of the offence. The inculpatory uncontested plea is the only type formally authorized by Canadian criminal law.

- **Exculpatory uncontested: best-interest/*Alford* pleas.** A defendant who enters a best-interest plea accepts the consequences of a conviction and acknowledges that the prosecutor would have proven the offence if taken to trial but formally maintains their innocence. These pleas are *exculpatory* as the defendants who

[33] See Michael Shortt, "Preserving Appeal Rights When Your Client's Only Defence Is a (Failed) Charter Motion" (2018) 65:3-4 Crim LQ 443.

[34] See *Criminal Code*, *supra* note 2, s 606(2).

[35] This definition only applies to the allegations that the prosecutor relies on to support the charge. It does not extend to sentencing submissions. A defendant who concedes all of the prosecutor's allegations but disagrees with their sentencing recommendation still enters an uncontested plea.

enter them actively protest their innocence despite inviting the court to convict them. There is no statutory mechanism enabling these pleas in Canada, and they are generally disparaged at common law.[36]

- **Non-culpatory uncontested: *Nolo contendere* plea.** A defendant who enters a *nolo contendere* plea accepts the consequences of the crime alleged but neither admits nor denies their actual involvement in the offence. This uncontested plea is *non-culpatory* because the defendant who enters it neither admits subjective belief nor discusses objective truth, and thus neither acknowledges nor repudiates responsibility. Although these pleas are formally excluded in Canada, they may be constructively entered at common law.

The overarching question I address is whether Canadian criminal law should formally adopt *nolo contendere* pleas. As a result, the main focus throughout will be on non-culpatory uncontested pleas. But to properly understand *nolo contendere* pleas, it is helpful first to consider the role, function, and conceptual basis of the more familiar guilty plea. By understanding the common law and statutory substructure undergirding the most common Canadian uncontested plea it will become apparent how *nolo contendere* pleas fit in this framework.

[36] See e.g. *R v SK* (1995), 99 CCC (3d) 376 at 382, 24 OR (3d) 199 (ONCA) [*SK*]. But also see *R v Hector* (2000), 146 CCC (3d) 81, 132 OAC 152 (ONCA).

2.2 Guilty: the Inculpatory Plea

Since the first *Criminal Code of Canada*, criminal defendants have been able to self-convict rather than take their charges to trial.[37] This early provision did not limit a defendant's ability to enter a guilty plea and did not give judges discretion to accept or reject it. Over time, Canadian common law delineated a defendant's ability to plead guilty and stipulated that judges may only accept knowing, voluntary, and unequivocal guilty pleas. Canadian Parliament eventually codified a form of this common law requirement as *Criminal Code* s 606(1.1) in 2002.[38] In Canada, the most frequently used uncontested plea is the guilty plea.[39]

2.2.1 The Guilty Plea Historically

The modern guilty plea evolved from a longstanding practice where courts allowed defendants to confess their crimes without requiring the state to prove them. Before the 11th century Norman conquest, the Anglo-Saxons of England established a procedure for confessions to criminal charges.[40] Confessions were rudimentary and risky, lacking the modern guilty plea's procedural protections and finality.[41] There is a question over whether the judiciary viewed these pleas favourably and how often they agreed to accept them.[42] However, toward the end of the 19th century, courts began regularly reporting cases involving guilty pleas.[43] By the 1920s, criminal justice surveys in America revealed that many more defendants preferred to plead guilty, and the guilty plea became fixed

37 See *Criminal Code, 1892*, *supra* note 25, s 657.

38 See the *Criminal Law Amendment Act*, 2001, SC 2002, c 13, s 49 [*CLAA*].

39 See *Ontario Court of Justice Criminal Statistics 2021*, *supra* note 10.

40 See Alschuler, "Plea Bargaining History," *supra* note 9 at 7 — 13.

41 See e.g. *R v Baird* (1908), 13 CCC 240 at 241 — 242, 8 WLR 65 [*Baird*].

42 See Alschuler, "Plea Bargaining History," *supra* note 9 at 5 — 6. Although Alschuler asserts that guilty pleas were "discouraged" and met with "general disapproval," none of my research into guilty pleas entered in Canada revealed similar concerns among Canadian judges. For his part, Alschuler does not cite any cases, historical studies, or sources to support this claim. This fact does not exclude the possibility that Canadian criminal law actively discouraged guilty pleas once upon a time. However, if it did, this attitude was not reflected in the reported decisions discussing guilty pleas.

43 See *ibid* at 7 — 8.

in American and Canadian criminal proceedings.[44]

2.2.2 Plea Voluntariness and Comprehension

As defendants entered guilty pleas more commonly, procedural protections around them solidified. One of the most significant advancements was the *plea voluntariness and comprehension inquiry*. Because defendants were presumed innocent and entitled to remain silent, courts examined defendants to ensure they only waived those procedural protections knowingly and voluntarily. This safeguard, referred to here and throughout as the *plea inquiry*, exists to ensure that defendants know their rights when required to plead to an offence and that they only waive those rights of their own free will. Not all jurisdictions require judges to review the same sets of factors or place the same importance on a judge's review of the same with defendants. But despite these differences, the broad factors that courts consider are generally similar and may include:

- **Voluntariness and knowledge.** Defendants entering pleas must do so voluntarily and know the nature and consequences of their plea. As early as the 16$^{\text{th}}$ century, English courts required that defendants enter guilty pleas voluntarily,[45] Whether defendants enter a plea voluntarily and knowingly impacts whether they were treated *fairly* in being asked to enter it.

- **Factual basis.** In addition to ensuring that defendants enter guilty pleas knowingly and voluntarily, local laws may also require judges to verify that there is some factual basis for the plea. This helps ensure there is enough evidence to sustain a conviction and reassure the court that it has rightfully convicted the defendant.[46]

[44] See *ibid* at 26. The percentages of guilty pleas Alschuler reports range between 76 — 90% in several major American cities at the time.

[45] See *ibid* at 12 — 15. Alschuler attributes this practice to the co-evolution of the plea alongside the common law confessions rule. As with confessions, guilty pleas allow defendants to self-convict. However, unlike confessions, guilty pleas are presumed valid and admissible as evidence.

[46] Contrast this requirement with the common-law rule that judges need not inquire into the factual circumstances of *nolo contendere* pleas. See George Edward Pickle, "Nolo Contendere Pleas in Criminal Tax Cases" (1975) 13:2 Am Crim L Rev 249 at 250 — 251.

A sentencing judge's obligation to confirm a factual foundation for the plea ensures that the allegations are reviewed,[47] which helps guarantee that uncontested pleas are *truthful* and accurate.

- **Collateral consequences.** "Collateral consequences" are consequences the court does not intentionally impose but directly result from criminal convictions. These consequences can be legal or extra-legal. Legal collateral consequences result from intersections between different legislative schemes, where a decision made under one legislative scheme has consequences under another.[48] Extra-legal collateral consequences refer to the non-legal consequences that flow from the defendant's offending behaviour.[49] Collateral consequences go to a plea's *fairness*. When defendants enter a plea and know the collateral consequences of doing so, their pleas are knowledgeable and voluntary. But when defendants enter pleas without knowing the consequences, the opposite is true.

2.2.3 Guilty pleas in Canada

Before Parliament codified Canadian criminal law in 1892, decisions reporting guilty pleas were rare.[50] However, following codification, reported cases dealing with guilty pleas abounded and Canadian guilty plea procedures adapted in turn. But even after Parliament codified Canadian criminal law, much remained unsettled about guilty pleas,

[47] Judges are not expected or allowed to operate as independent fact-finders. See *R v Woroniuk*, 2019 MBCA 77, where the Manitoba Court of Appeal reversed a "flagrant error in law" committed by sentencing judge Brian Corrin PCJ who took it upon himself to investigate the factors counsel laid out at sentencing. As a result, the scope of the judge's inquiry into the charge's factual foundation is limited, but the inquiry is nevertheless required.

[48] These consequences may include extended driving restrictions imposed by the provincial licensor (rather than the court), restrictions on purchasing certain medications or other substances, and cancelled foreign work permits and permanent resident designations, among others. For a comprehensive overview of American collateral consequences, see e.g. the National Inventory of Collateral Consequences of Conviction, online: <`niccc.nationalreentryresourcecenter.org/`>.

[49] These may include breakdowns in relationships, opportunity losses, or physical injuries, among others. See *R v Suter*, 2018 SCC 34, [2018] 2 SCR 496 [*Suter*] which I discuss immediately below.

[50] My research on the guilty plea's history in Canada only revealed two such decisions: namely, *R v Morrison* (1879), 1879 CarswellNB 35, 18 NBR 682 (NB SC (AD)) [*Morrison*] and *R v Morin* (1890), 1890 CarswellQue 17, 18 SCR 407 [*Morin*].

their nature, and what legal consequences stemmed from entering one. As more cases made their way through the justice system, courts settled on predictable rules and uniform procedures that helped defendants understand the consequences of waiving their right to trial.[51]

Voluntariness and Knowledge

Before codification, Canadian courts operated on the principle that a person pleading guilty must be presumed to know the law.[52] However, developments in the following decades moved towards ensuring that defendants better knew the implications of self-convicting before entering uncontested pleas. As the 20th century unfolded, Canadian courts began insisting that defendants only enter guilty pleas knowingly and voluntarily and refusing guilty pleas from defendants induced or threatened to self-convict.

Plea voluntariness ensures that defendants who enter guilty pleas do so of their own free will in an oppression-free environment. Failing to make sure these conditions obtain may warrant appellate intervention. For example, in *Baird*, the Saskatchewan District Court heard an appeal from a landowner convicted of allowing a fire to spread from his land to a neighbour's property. Baird, the landowner, pleaded guilty but argued on appeal that he had entered his guilty plea under oppression. The court reviewed the proceedings below, found no evidence that the justice who took Baird's plea had acted oppressively or had induced him to plead guilty, and dismissed his appeal.[53]

Around the same time, Canadian courts began requiring defendants entering guilty pleas to know the legal consequences of doing so. In *R v Tom*,[54] the defendant pleaded

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[51] Early on, questions such as whether a guilty plea waived a right to trial were still issues when Parliament codified Canadian criminal law. See *R v Davidson* (1992), 110 NSR (2d) 307, 299 APR 307 (NS SC (AD)); see also *R v Gillis* (1914), 18 DLR 461, 23 CCC 160 (YK Terr Ct), where the court treats the subject as a viable but generally settled question of law.

[52] See *Morrison*, *supra* note 50 at paras 9, 13; *Morin*, *supra* note 50 at para 145. The courts in both cases cite this principle. However, given that these were the only two Canadian pre-codification decisions I could find that covered guilty pleas, few conclusions should be drawn from this similarity.

[53] See *R v Baird*, *supra* note 41 at 242 — 243.

[54] *R v Tom* (1928), 49 CCC 204 at 204 — 206, 2 DLR 748 (NS SC). See also *R v Stone* (1932), 58 CCC 262 at 264, 1932 CarswellNS 21 (NS SC); *R v McGrath* (1944), 81 CCC 303 at 303 — 304,

guilty to possessing narcotics and was sentenced to six months of jail and a $500 fine. On appeal, Tom argued that he had not understood the consequences of pleading guilty. His predicament was compounded by the fact that the prosecuting police officer promised Tom he would only receive a small fine if he did so. A majority of the Nova Scotia Supreme Court allowed the appeal. The dissent agreed that there was a miscarriage of justice but held that the court had no jurisdiction to order a remedy.

Factual Basis

Canadian criminal courts have also long required a *factual foundation* as a prerequisite for accepting a guilty plea. This requirement reflects the common law's perennial concern for preventing wrongful convictions by ensuring that the crimes alleged can be made out on the allegations and that there are no allegations that the defendant wishes to contest. At the turn of the 20th century, the Ontario Supreme Court[55] had the opportunity to review an unusual set of facts that exemplified this principle. In *R v Herbert*,[56] the court reviewed a case where the defendant, Herbert, pleaded guilty to a murder nobody suspected he had committed. After pleading guilty, Herbert implicated a co-defendant, Sifton, who pleaded not guilty and was acquitted after a trial.

During this time, Herbert developed misgivings about his guilty plea and looked to withdraw it. In Canada at the time, the death penalty was the mandatory sentence for Herbert's crime. In its written decision, the Ontario Supreme Court did not review the allegations at Sifton's trial. Nonetheless, it concluded that Herbert's guilt was "absolutely inconsistent" with Sifton's acquittal and that there was, therefore, "no theory that can be suggested upon which [Sifton] could be innocent and [Herbert] guilty."[57] That is, the allegations did not logically support the charges. Absent any possible factual foundation

1944 CarswellNS 12 (NS SC).

55 The Ontario Supreme Court was the precursor to the Ontario Superior Court of Justice and the Ontario Court of Appeal. See Ontario Superior Court of Justice, "History of the Court", online: <ontariocourts.ca/scj/about/history/>.

56 See *R v Herbert* (1903), 6 CCC 214, 1903 CarswellOnt 829 (ON SC).

57 See *ibid* at 217 — 218.

for the plea, the court allowed Herbert to withdraw it.

Collateral Consequences

Canadian courts recognize *legal and extra-legal collateral consequences* as valid sentencing considerations. *Legal collateral consequences* arise when a legal outcome obtained under one statute or legislative scheme triggers a provision in another. Increased insurance premiums after an impaired driving conviction, losing the ability to purchase firearms after a violent offence conviction, or revoking a work visa after a theft from an employer conviction are all legal collateral consequences following criminal convictions. Although Canadian courts may consider these consequences when sentencing a defendant, they are not explicitly required to do so.

Collateral immigration consequences are an especially well-litigated example of this problem, with *Wong* providing a recent and authoritative example. In *Wong*,[58] the defendant pleaded guilty to a cocaine trafficking charge but did not know that doing so would affect his Canadian permanent residency status. He appealed to withdraw his guilty plea. The Supreme Court of Canada agreed that defendants must know the "legally relevant collateral consequences" of pleading guilty for the plea to be valid, but split on which legal test they should apply. The majority held that a defendant must be able to show subjective prejudice to withdraw an uninformed guilty plea of this variety. The dissent suggested accomplishing this through a modified objective test.

The test that the majority applied looked specifically at whether a defendant would have dealt with their charges differently if they had known that deportation would be a collateral consequence of self-conviction. To that end, they found that a defendant could establish this subjective prejudice if they filed an affidavit stating that they would have either opted for a trial or pleaded guilty with different conditions if they had known that they might be deported. In this sense, the majority established a *purely subjective*

[58] See *Wong*, *supra* note 8.

test. By contrast, the test suggested by the dissent would have looked at whether a reasonable person in the defendant's position would have acted differently with that information. Although both agreed that Wong entered his guilty plea without sufficient information, the dissent would have allowed his appeal while the majority dismissed it. While the dissent concluded that a reasonable person in Wong's situation would have acted differently if they had known that deportation was possible, the majority noted that Wong had not provided any affidavit evidence that he would have done so and dismissed his appeal.

Canadian courts also recognize extra-legal collateral consequences as a valid sentencing consideration, as seen in the *Suter* decision.[59] While arguing in a parking lot with his wife after dinner and a drink, Suter drove onto a restaurant patio, accidentally killing a two-year-old child. Although there was no other evidence that Suter was impaired, the police demanded a breath sample, given the circumstances surrounding the collision. Having spoken with a lawyer who unwisely advised him not to provide a sample, Suter refused to do so when required. As a result, the police charged him with refusing to provide a breath sample in a case involving death. While his case was still pending, a group of vigilantes who were angry about the offence attacked him and cut off one of his thumbs. Suter eventually pleaded guilty and asked the judge to impose a non-custodial sentence.

At sentencing, the judge relied on the fact that Suter was the victim of a violent attack when sentencing him and held that leniency was in order. However, the judge did not feel that a non-custodial sentence was appropriate and sentenced Suter to four months. Both he and the Crown appealed. The Alberta Court of Appeal ruled that the sentencing judge erred for several reasons, including relying on vigilante violence that did not "emanate from state misconduct" and re-sentenced Suter to 26 months of custody. Suter appealed to the Supreme Court of Canada, which found that the Alberta Court

[59] See *Suter*, *supra* note 49 at paras 45 — 59.

of Appeal incorrectly dismissed Suter's attack and injuries as irrelevant. The Supreme Court of Canada ruled that collateral consequences may include "any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender."[60] In Suter's case, this included the violent retributive attack he suffered for his role in the offence. The majority allowed the appeal and varied the sentence to time served. The lone dissenting judge would have upheld Suter's original four-month custodial sentence.[61]

Unequivocal

Canadian common law also requires that defendants who enter guilty pleas do so *unequivocally*. An unequivocal plea is one that the defendant intended to enter. In cases where a reviewing or first-instance court is left wondering whether a defendant intended to plead guilty, the plea is equivocal and should not be accepted or upheld. This requirement appears to trace back to a comment from the influential dissent in *Adgey v R.*[62] In that case, the defendant Adgey pleaded guilty to several offences with duty counsel's assistance but wanted to explain some of the charges. Some of Adgey's explanations were consistent with innocence. The judge nonetheless accepted his guilty pleas without conducting a plea inquiry. Adgey argued that the judge should not have done so, given that his explanation for the offences was consistent with innocence.

The majority dismissed the appeal, finding that the judge was not required to conduct a plea inquiry and that Adgey had formally pleaded guilty. The dissent disagreed and argued that the pleas at first instance were equivocal as it was difficult to tell whether Adgey wanted to self-convict on all the charges he did. To that end, it established that a valid guilty plea must "be made voluntarily and upon a full understanding of the nature of the charge and its consequences and that it be unequivocal."[63] That formula became

60 See *Suter*, *supra* note 49 at para 47.
61 See *ibid* at paras 105ff.
62 See *Adgey v R*, [1975] 2 SCR 426 at 433f, 13 CCC (2d) 177 [*Adgey*].
63 See *ibid* at 440.

entrenched in Canadian criminal law, despite being delivered by the dissent. Forty-five years later, the majority in *Wong* endorsed this requirement, solidifying its place in Canadian criminal procedure.[64]

Canadian courts have interpreted this requirement in two main ways. The first applies the unequivocal requirement to the *plea's content*. Under this approach, the defendant pleads unequivocally when they admit they were responsible for the offence.[65] The second applies the unequivocal requirement to the *defendant's subjective intent* to bring about the consequences of their plea. Under this approach, the defendant pleads unequivocally when they unreservedly acknowledge their intention to self-convict.[66] Although the former position is broadly supported, the latter is more cogent. It follows how *Adgey* originally used the term and avoids any definitional overlap with the factual foundation requirement. More importantly, it reflects that a guilty plea's proof-content is primary and that this meaning must be unequivocal. As will be seen throughout this thesis, keeping a plea's proof-content separate from its truth- and belief-content is key to classifying and understanding them.

64 See *Wong*, *supra* note 8 at para 43.

65 See e.g. *R v Smoke*, 2017 SKQB 345 at para 19.

66 See e.g. *R v Singh*, 2014 BCCA 373 at para 43, citing *R v T(R)*, [1992] OJ No 1914 at 521, 17 WCB (2d) 212 (ONCA). See also *R v Wiebe*, 2012 BCCA 519 at para 28.

2.3 *Nolo contendere*: the Non-culpatory Plea

Nolo contendere pleas began in medieval England as a way for defendants to accept the court's judgment and plead for its mercy without having to confess to their crimes. Like guilty pleas, they have evolved significantly since their earliest days and are nowadays primarily regulated by statute.[67] Although many aspects of the plea vary widely between the various jurisdictions that allow them, a defendant who enters a *nolo contendere* plea still invites the court to convict and punish them without taking responsibility for the allegations. At common law[68] and in most states,[69] defendants who enter a *nolo contendere* plea may not have evidence of their plea admitted at certain subsequent proceedings.

2.3.1 The Common Law Origin of *Nolo Contendere* Pleas

Although *nolo contendere* pleas were integrated into American criminal law through common-law usage, their roots are relatively obscure. Legal and academic commentators agree that the plea emerged in England in the early 15$^{\text{th}}$ century and disappeared from England in the early 18$^{\text{th}}$ century, but know little else about its use or origins. Historically and today, authorities frequently cite[70] a brief excerpt from William Hawkins' "A Treatise of Pleas of the Crown," unchanged since it first appeared in 1716, as their primary source of information about the plea's origins:

> An implied confession is when a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the King's mercy, and desiring to submit to a small fine: in which case, if the court think fit to accept of such submission, and make an entry that defendant *prosuit se in gratiam regis*, without putting him to a direct confession, or plea (which in

[67] See notes 83 & 84 below.

[68] See Jerome Doherty, "Plea Nolo Contendere" (1943) 31:3 Geo L J 324 at 325.

[69] See note 113 below.

[70] See e.g. Henry Clay Moore, "Conviction upon Plea of Nolo Contendere as Impeaching Evidence" (1967) 21:1 Ark L Rev 124 at 124; Timothy K. Garfield, "Use of the Nolo Contendere Plea in Subsequent Contexts" (1971) 44:3 S Cal L Rev 737 at 741; Simpson, *supra* note 16 at 27.

> such cases seems to be left to discretion), the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall if the entry is *quod cognovit indictamentum*.[71]

By the time Hawkins published the first edition of his Treatise of Pleas of the Crown, *nolo contendere* pleas had already fallen into disuse.[72] Thereafter, the *nolo contendere* plea lay dormant[73] until reappearing a century later in reported American decisions.

2.3.2 *Nolo Contendere* Pleas in America

One of the earliest reported American cases discussing *nolo contendere* pleas is the 1806 decision *Commonwealth v The Town of Northampton*.[74] The town of Northampton entered a *nolo contendere* plea to the charge of failing to provide a schoolmaster but sought to withdraw the plea at the next court sitting because the original indictment was defective. The town noted that the original indictment charged them with an offence against "the peace and dignity of the commonwealth" but not with any offence prescribed by statute. The court agreed and set the judgment aside.

Later decisions demonstrated that while *nolo contendere* pleas remained obscure, their legal foundations were nonetheless well-developed. These two phenomena were apparent in the case of *Commonwealth v James Horton*,[75] where the state charged the defendant with "a breach of the law relating to retailers." When arraigned, Horton said he would not contend with the Commonwealth. As a result, the court fined him $21 plus costs. On appeal, both parties argued that the plea was "irregular," "was no answer to the indictment," and amounted, at most, to an "implied confession."[76]

The court disagreed, finding that Horton had entered a *nolo contendere* plea. The court examined *nolo contendere* pleas in detail and agreed that they were implied con-

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71 See Hawkins, *supra* note 27 at 466.
72 See *Templeman*, *supra* note 18.
73 See *Hudson et al v The United States*, 272 US 451 at 453, 47 Sup Ct 127 (USSC 1926) [*Hudson*].
74 See *Commonwealth v The Town of Northampton*, 2 Mass 116, 1806 WL 756 (Mass Sup Jud Ct 1806).
75 See *Commonwealth v James Horton*, 26 Mass 206, 1829 WL 1997 (Mass Sup Jud Ct 1829).
76 See *ibid* at 210.

fessions but found that the pleas were valid. The court noted that defendants who plead *nolo contendere* may contest the same facts at subsequent proceedings.[77] The court cited Hawkins' notation in the Treatise of Pleas of the Crown and *Templeman* to help define the contours of *nolo contendere* pleas in their jurisdiction and dismissed the appeal. In this early decision, the centrality of *Templeman* and Hawkins' notation underscores the role they have played in the preservation and revival of *nolo contendere* pleas in the United States but also highlights the limited pool of common-law authority for these pleas. Nearly one hundred years after *Horton*, the US Supreme Court seized on this fact when it decided whether to read a lingering common-law limitation into *nolo contendere* pleas across the country in *Hudson*.

Hudson et al v United States

In *Hudson*,[78] the appellants entered *nolo contendere* pleas to mail fraud charges and were sentenced to a year plus a day. On appeal, they argued that the sentencing court could not impose a custodial sentence on a *nolo contendere* plea. The appellants cited a string of authorities from the Seventh Circuit Federal Court of Appeals that relied heavily upon Hawkins' reference to the "small fine" a defendant submitted themselves to and the "case not capital" limitation.[79] The Supreme Court in *Hudson* noted the dearth of authorities apart from Hawkins and therefore found little support for the inferences the appellants asked the court to draw.[80] The court remarked that *nolo contendere* pleas had a minimal reliable historical backdrop[81] and that it was not prepared to create a broad rule that was specifically based on an obscure citation. The court ruled that custodial sentences were available for *nolo contendere* pleas, affirming decisions already reached by most lower American jurisdictions at the time.[82]

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77 See *ibid*.
78 See *Hudson*, *supra* note 73.
79 See *ibid* at 453.
80 See *ibid* at 454, n 2, 457.
81 See *ibid* at 454.
82 See *ibid* at 457.

2.3.3 The Four *Nolo Contendere* Criteria

When the United States Supreme Court decided *Hudson*, the American *nolo contendere* plea was primarily available at common law. Nearly one hundred years later, the *nolo contendere* plea is available federally, and most American states have passed legislation authorizing it.[83] Those that have not do not allow them.[84] As the states codified their plea procedures, different jurisdictions implemented *nolo contendere* pleas differently and adopted various views about the plea's subsequent effects.

In the 1944 American Law Review annotation "Plea of *nolo contendere* or *non vult contendere*," KA Drechsler provided an early, comprehensive overview of *nolo contendere* pleas and the different ways that states were approaching and implementing them.[85] When Drechsler first proposed these four "aspects" in 1944, they were designed to explain the fundamental nature of a *nolo contendere* plea. At the time, *nolo contendere* pleas were still mostly common-law creations. Drechsler recognized that courts had heavily relied on Hawkins's sparse notation, and that this dearth of precedential information had led to myriad *nolo contendere* variations across different jurisdictions. By examining the *nolo contendere* plea's "exact nature," Drechsler hoped he could "clarify

[83] Namely, Alaska: Ala R Crim P rule 11; Arizona: Ariz R Crim P rule 17.1(c); Arkansas: Ark R Crim P rule 24.3; California: Cal Ann Penal Code § 1016 (West 2022); Delaware: Del Ct Com Pl rule 11(b), Del Super Ct rule 11(b); Florida: Fla R Crim P rule 3.170; Georgia: Ga Ann Code § 17-7-95 (West 2022); Hawai'i: Hawaii R Penal P rule 11(b); Kansas: Kan Stat Ann ch 22 art 3208 (West 2022); Louisiana: La C Crim P art 552(4); Maine: Me R Crim P rule 11(a); Maryland: Md R rule 4-242; Massachusetts: Mass R Crim P rule 12(a); Michigan: Mich Comp Law Ann § 767.37; Mississippi: Miss R Crim P rule 15.3; Montana: Mont Code Ann 46-16-105 (West 2022); Nebraska: Neb Rev Stat § 29-1819 (West 2022); Nevada: Nev Rev Stat Ann 174.035; New Hampshire: NH Rev Stat § 605:6; New Mexico: N Mex Stat Ann § 30-1-11; North Carolina: NC Gen Stat Ann § 15A-1022; Ohio: Ohio R Crim P 11(A); Oklahoma: Okla Stat Ann § 513; Oregon: Or Rev Stat Ann § 135.355; Pennsylvania: Pa R Crim P rule 590; Rhode Island: RI Dist Ct R Crim P rule 11, RI Super Ct R Crim P rule 11; South Carolina: SC Code (1976) § 17-23-40; South Dakota: S Dak C Law § 23A-7-2; Tennessee: Tenn R Crim P rule 11(a); Texas: Tex Ann C Crim P art 27.02; Utah: R Crim P rule 11(b); Vermont: Vt R Crim P rule 11(b); Virginia: Va C Ann § 19.2-254; West Virginia: W Va R Crim P rule 11(a); Wisconsin: Wis Stat Ann 971.06; and Wyoming: Wyo R Crim P rule 11(a).

[84] Namely, Alabama: Ala R Crim P rule 14.2(c); Idaho: Idaho Crim R rule 11(a); Illinois: Ill C Crim P art 113; Indiana: Ind Crim P 35-35-1-1; Iowa: Iowa R Crim P rule 2.8(2); Kentucky: Ky R Crim P rule 8.08; Minnesota: Minn R Crim P rule 14.01; Missouri: Mo R Crim P rule 24.02(a); New Jersey: NJ Stat Ann rule 7:6-2; New York: NY Crim P ch 11-a part 2 tit J § 220.10; North Dakota: N Dak R Crim P rule 11(a); and Washington: Wash Super Ct Crim R rule 4.2(a).

[85] See Drechsler's Annotation, *supra* note 26.

certain misunderstandings concerning its use and its consequences which are responsible for many of the conflicting decisions."[86] Nearly twenty years later, CT Drechsler[87] published an extensive updated annotation but left the underlying "four-aspect" analysis largely undisturbed, noting that the authorities thus far had added very little to that understanding.[88]

KA Drechsler's essentialist view of *nolo contendere* pleas is problematic. There is good reason to suspect that the plea does not have an "exact nature," per se, and that what Drechsler normatively refers to as the plea's "aspects" are better understood as descriptive categories that distinguish one *nolo contendere* variant from another. Some categories, like the "procedural effects" category, seem to have very limited utility, while other categories, like the "subsequent effects" category, should be developed more than they have been. But as with other arguably deficient and outdated legal artefacts that become entrenched through habitual quoting, such as the "WD analysis"[89] and the "Lifchus test,"[90] KA Drechsler's foundational *nolo contendere* analysis remains popular some 80 years after he first introduced it.[91] My goal is not to develop a new or improved classification system for *nolo contendere* pleas but rather to situate my analysis within the existing discourse about them. As these categories remain used and useful, I include and discuss them here, notwithstanding their limitations.

KA Drechsler's proposed model defined *nolo contendere* pleas through four aspects, which I read as *criteria*:

- **Applicability.** A jurisdiction may allow a defendant to plead *nolo contendere* to some, all, or no offences. Where defendants may only plead *nolo contendere* to

[86] See *ibid* at § I(c)

[87] Despite repeated attempts to investigate, I have not been able to confirm any relation between the two.

[88] See CT Drechsler, "Plea of nolo contendere or non vult," Annotation, (1963) 89 ALR 2d 540 at § 2.

[89] See *R v W(D)*, [1991] 1 SCR 742 at 749 — 750, 63 CCC (3d) 397 [*W(D)*].

[90] See *R v Lifchus*, [1997] 3 SCR 320 at para 36 [*Lifchus*].

[91] See e.g. J. R. O'Brien, "Trade Practices and Consumers: The Plea Non Vult Contendere Cum Domina Regina et Posuit Se in Gratiam Curiae" (1972) 5:1 Fed L Rev 125; *State v Olsen*, 848 NW (2d) 363 (Iowa Sup Ct 2014); *In re People v Darlington*, 105 P 3d 230 at 233 (Colo Sup Ct 2005); *Scott v State*, 928 P 2d 1234 at 1237 (Alaska Ct App 1996).

some offences, the offences they may enter the plea to may vary from state to state. The applicability criterion tracks these differences.

- **Acceptability.** Where a defendant may enter a *nolo contendere* plea, certain conditions may need to obtain for the court to accept the plea. The acceptability criterion identifies those conditions and where they are required.

- **Procedural effects.**[92] *Nolo contendere* pleas require the court to follow certain procedures. The procedural effects criterion covers the immediate implications that entering a *nolo contendere* plea has on a defendant's case.

- **Subsequent effects.**[93] The implications for defendants who enter *nolo contendere* pleas may extend beyond their conviction. These implications may even arise in jurisdictions that disallow the plea. The subsequent effects criterion considers these implications.

Analyzing *nolo contendere* pleas using these categories clarifies how different *nolo contendere* plea variations relate to one another more generally. Later, I will use these criteria to categorize the informal *nolo contendere* procedure used in Canada and compare it with its formal American counterparts.

Applicability

The first component, applicability, addresses the question of which offences may sustain a *nolo contendere* plea. A *nolo contendere* plea's applicability is further reducible to one of four distinct types: namely, (1) *all offences*; (2) only *non-capital* offences; (3) *some offences*; or (4) *no offences*.

Although scholars and jurists historically confined *nolo contendere* pleas to minor criminal infractions, *Hudson* confirmed defendants could enter them at common law for

[92] Drechsler refers to these as "effects in the case."
[93] Drechsler refers to these as "consequences outside the case."

indictable felonies punishable by prison terms. This ruling opened the door for courts to accept *nolo contendere* pleas for all offences at common law. A review of the plea today reveals that the legislatures followed suit, such that *nolo contendere* is usually universally applicable where allowed. Of the 38 states that allow *nolo contendere* pleas in criminal cases, all but four permit defendants to enter them for all criminal offences.[94] In some states, such as Alaska, *nolo contendere* pleas have become so prominent that defendants rarely, if ever, enter guilty pleas to self-convict.[95]

Even the "non-capital" requirement, once thought to be an integral component of *nolo contendere* pleas,[96] is mainly absent from the statutory plea. At the time of writing, capital punishment is legal and enforced in 21 states,[97] legal but subject to an official moratorium in three states,[98] legal but subject to a *de facto* moratorium in three others,[99] and illegal in the remaining 23 states.[100] Sixteen states that allow *nolo contendere* pleas have and implement the death penalty.[101] Of these states, all but four allow defendants to enter *nolo contendere* pleas in capital cases.[102] All states with death penalty moratoriums, official or otherwise, also allow *nolo contendere* pleas for all offences. The *nolo contendere* plea is broadly applicable in the United States today. Since *Hudson* and widespread codification, where the plea is allowed, defendants may generally enter it for

94 Namely, Georgia: Ga Ann Code § 17-7-95(a); Louisiana: La C Crim P art 552, Mississippi: Miss R Crim P rule 15.3(b); and South Carolina: SC Code (1976) § 17-23-40.

95 See Jana L Kuss, "Endangered Species: A Plea for the Preservation of Nolo Contendere in Alaska" (2005) 41:3 Gonz L Rev 539. In Alaska, defendants do not require consent from the prosecutor or the court to enter *nolo contendere* pleas. As a result, the *nolo contendere* plea has effectively supplanted the guilty plea and is now used almost exclusively by defendants wanting to self-convict.

96 See Drechsler's Annotation, *supra* note 26 at § II(b)(3).

97 Namely, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Nevada, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming. *Nolo contendere* is also available in response to federal charges.

98 Namely, California, Oregon, and Pennsylvania.

99 Namely, Montana, North Carolina, and Ohio.

100 Namely, Alaska, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, Virginia, Washington, West Virginia, and Wisconsin

101 Namely, Arizona, Arkansas, Florida, Georgia, Kansas, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming.

102 Namely, Georgia, Louisiana, South Carolina, and Mississippi. Both Georgia and Louisiana expressly prohibit *nolo contendere* in death penalty cases, while South Carolina and Mississippi only allow *nolo contendere* pleas in misdemeanour cases, where the death penalty is presumably unavailable.

any offence.[103]

Acceptability

The second criterion, acceptability, addresses whether the court may accept the plea. A *nolo contendere* plea's acceptability correlates to judicial discretion to accept or reject it, and can also be broken down into four types: namely, (1) *no discretion to accept* the plea; (2) *some discretion to accept or reject* the plea; (3) *full discretion to accept or reject* the plea; and (4) *no discretion to reject* the plea.

Unless legislation provides explicitly for a *nolo contendere* plea, they are typically not allowed.[104] Judges in those states have *no discretion to accept* the plea. Jurisdictions that allow defendants to enter *nolo contendere* pleas subject to meeting certain conditions give the court *some discretion to accept or reject nolo contendere* pleas.[105] Others impose no apparent limits on *nolo contendere* pleas beyond those already imposed on guilty pleas. Judges in these states may be said to have *full discretion to accept or reject* a *nolo contendere* plea. Finally, where judges must accept *nolo contendere* pleas, they have *no discretion to reject* the plea.

Procedural Effects

Nolo contendere pleas generally have the same legal effect as a guilty plea within the proceedings, including the constitutional right against double jeopardy and a trial waiver. For the most part, where states allow defendants to plead *nolo contendere*, the effect of that plea is the same as if the defendant had pleaded guilty. The defendant waives their

[103] See *May v Lingo*, 167 So (2d) 267 (Ala Sup Ct 1964) at 270.

[104] See e.g. *Corbin v State*, 713 NE (2d) 906 (Ind Ct App 1999).

[105] The "public interest and effective administration of justice" test required by the federal rule, for example, has been mirrored in several states' legislation and serves as a high-level limit on a judge's discretion to accept the plea. Arizona, Arkansas, Delaware, Hawai'i, South Dakota, Utah, West Virginia, Wyoming, and the federal rule require courts to apply this test. Several states also require that the courts obtain the explicit consent of the prosecutor before accepting *nolo contendere* pleas. These include Arkansas, Hawai'i, Maine, Montana, North Carolina, and the federal rule.

right to a trial, is convicted, and is sentenced.[106]

However, some procedural differences do exist. In Massachusetts, defendants pleading *nolo contendere* may not enter formal plea agreements with the prosecutors.[107] In Mississippi, judges must conduct a plea voluntariness and comprehension inquiry with defendants who enter guilty pleas to any offence that carries a possible jail sentence. However, no such requirement appears to be in place for defendants who enter *nolo contendere* pleas to the same offences.[108] By contrast, California requires judges to conduct a particular plea inquiry with defendants who enter a *nolo contendere* plea that is not required with defendants who plead guilty.[109] Meanwhile, in Oregon, judges are statutorily required to accept joint recommendations put forward by counsel on a guilty plea but not similarly required to do the same for *nolo contendere* pleas.[110]

Subsequent Effects

Historically, the main difference between *nolo contendere* and guilty pleas has been that the former are usually inadmissible in subsequent proceedings. Even in jurisdictions that do not permit them, evidence that a defendant pleaded *nolo contendere* in another jurisdiction is often inadmissible in subsequent civil and even criminal proceedings. While twelve states do not allow criminal defendants to enter *nolo contendere* pleas, only seven states allow evidence of *nolo contendere* pleas in subsequent proceedings.[111] Two of these states, Alaska and Arizona, allow defendants to enter *nolo contendere* pleas but

[106] Some states make this explicit. See e.g. Oregon: Or Rev Stat Ann tit 14 § 135.345; Rhode Island: RI State Ct rule 609; New Mexico: N Mex Stat Ann § 30-1-11, and La: LA C Cr P tit 16 art 552(4). Some exceptions exist. Ohio, for example, explicitly states *nolo contendere* pleas are not admissions of guilt and distinguish them from guilty pleas accordingly. See Ohio Rev Ann Crim R rule 11(B)(2).

[107] See Mass R Crim P rule 12(b)(1).

[108] See Miss R Crim P rule 15.3.

[109] See Cal Ann Penal Code § 1016(3) (West 2022).

[110] See Or Rev Stat Ann tit 14 § 135.385(2)(e). Although Or Rev Stat Ann tit 14 § 135.432 states that plea deals do not bind judges, § 135.385(2)(e) states that judges are to tell defendants that sentencing recommendations reached through formal disposition recommendations *will be accepted* by the courts.

[111] Namely, Alaska, Arizona, Illinois, Indiana, Missouri, New Jersey, and New York.

also allow admitting evidence of those pleas at subsequent proceedings.[112] Only Illinois, Indiana, Missouri, New Jersey and New York neither allow defendants to plead *nolo contendere* nor recognize *nolo contendere* pleas entered in other jurisdictions. All other states provide *nolo contendere* defendants with some degree of collateral estoppel.[113]

Although a *nolo contendere* plea is usually inadmissible in subsequent proceedings, this inadmissibility can take several forms. In Pennsylvania, evidence of *nolo contendere* is generally inadmissible. However, the court must admit evidence of that offence when a defendant enters a *nolo contendere* plea to a crime of dishonesty.[114] In California, defendants who enter *nolo contendere* pleas to misdemeanour offences are protected from having evidence of that admitted in a later court proceeding but have no such protections for felonies.[115] Other states, such as Alabama, Kansas and Georgia, allow defendants to contest their *nolo contendere* convictions at virtually any subsequent proceeding.[116]

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[112] Because the *nolo contendere* has effectively supplanted guilty pleas in Alaska, it is perhaps unsurprising that it is admissible in subsequent proceedings. Meanwhile, Arizona allows *nolo contendere* pleas only sparingly. See *Duran v Maricopa*, 782 P (2d) 324 (Ariz Ct App 1994).

[113] Namely, Alabama: Ala R Evid 410; Arkansas: Ark R Evid rule 410; California: Cal Ann Penal Code § 1016(3); Colorado: Colo R Evid rule 410; Connecticut: Conn R Super Ct s 39-25; Delaware: Del Ct Com Pl rule 11(e)(4); Florida: Fla Stat Ann 772.14; Georgia: Ga C Ann § 17-7-95(c); Hawai'i: Hawaii R Evid rule 410; Idaho: Idaho R Evid rule 410, Iowa: Iowa R Evid rule 5.410; Kansas: Kan Stat Ann ch 22 art 3209 (West 2022); Kentucky: Ky R Evid rule 410; Louisiana: La C Crim P art 552(4); Maine: Me R Evid rule 410; Maryland: Md R rule 5-410; Massachusetts: Mass R Evid § 410; Michigan: Mich R Evid rule 410; Minnesota: Minn R Evid rule 410; Mississippi: Miss R Evid rule 410; Montana: Mont Code Ann tit 26 ch 10 art 4 rule 410 (West 2022); Nebraska: Neb Rev Stat § 27-410 (West 2022); Nevada: Nev Rev Stat Ann 48.125; New Hampshire: NH R Evid rule 410; New Mexico: N Mex Stat Ann rule 11-410; North Carolina: NC Gen Stat Ann § 8C-1 rule 410; North Dakota: N Dak R Evid rule 410; Ohio: Ohio R Evid rule 410; Oklahoma: Okla Stat Ann § 2410; Oregon: Or Evid C § 40.200 rule 410; Pennsylvania: Pa R Evid rule 410; Rhode Island: RI R Evid rule 410; South Carolina: SC R Evid rule 410; South Dakota: S Dak C Law § 19-19-410; Tennessee: Tenn R Evid rule 410; Texas: Tex R Evid rule 410; Utah: Utah R Evid rule 410; Vermont: Vt R Crim P rule 11(b), Virginia: Va C Ann § 19.2-254; Washington: Wash R Evid rule 410; West Virginia: W Va R Evid rule 410; Wisconsin: Wis Stat Ann 904.10; and Wyoming: Wyo R Evid rule 410.

[114] See Pa R Evid rule 609(a).

[115] See Cal Ann Penal Code § 1016 (West 2022).

[116] See *McNair v State*, 653 So 2d 320 (Ala Crim App 1992); Kan Stat Ann ch 22 art 3209; Ga C Ann § 17-7-95(c).

2.3.4 *Nolo Contendere* Pleas in Canada

Because Canada codified its criminal law early into its history and only allowed defendants to enter guilty or not guilty pleas, *nolo contendere* pleas have not attracted much attention or generated much discussion in Canada. In recent years, however, Canadian courts have recognized an informal *nolo contendere* plea procedure that allows defendants to avoid pleading guilty while ensuring self-conviction. I analyze these informal pleas and examine their eccentricities in §§ 3.2.3 and 4.3.5 below.

2.4 Summary

An uncontested plea is any plea to a criminal charge where the defendant self-convicts without the prosecutor needing to call evidence against them. Two uncontested pleas, guilty and *nolo contendere*, have been formally authorized and legislated in various jurisdictions throughout America, while Canada only formally recognizes guilty pleas. *Nolo contendere* pleas were developed in Britain and imported to North America alongside British rule. Only America appears to have used it between the 17$^{\text{th}}$ and 21$^{\text{st}}$ centuries. But since the 21$^{\text{st}}$ century, Canada has begun to implement *nolo contendere* pleas informally. The following section explores this forked development and examines whether it would be *possible* to formally merge *nolo contendere* pleas into Canadian criminal law.

Chapter 3

Are *Nolo Contendere* Pleas Compatible With Canadian Criminal Law?

Having defined pleas generally, outlined the fundamental features of uncontested pleas specifically, and reviewed both guilty and *nolo contendere* pleas, I next ask whether the latter is compatible with Canadian criminal law. I first identify the relevant sections in the *Criminal Code* and then analyze each plea against that framework.

The first part of my analysis focuses on the statutes authorizing criminal pleas in Canada. Substantive criminal law in Canada has been primarily statutory since the *Criminal Code of Canada 1892* and entirely statutory since Parliament abolished all common-law offences in 1955.[117] Although Canadian criminal procedure is still heavily influenced by the common law, jurisdictional rules, local customs, and the *Charter*, the *Criminal Code* governs it for the most part. The *Criminal Code* thus is central to understanding what pleas and procedures Canadian criminal law permits and prohibits. Therefore, my compatibility analysis begins by identifying and understanding the

[117] See Public Prosecution Service of Canada, "Chapter 1 - FPS Deskbook" (24 December 2008), online: <ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/ch01.html>.

legislation's relevant parts.

With the statutory framework outlined, the second part of this chapter examines whether *nolo contendere* pleas are compatible with Canadian criminal law. To answer this question, I examine how *Criminal Code* sections 606 and 655 allow defendants to self-convict without formally pleading guilty. I argue that the intersection between these two sections demonstrates that while Canadian criminal law formally forbids *nolo contendere* pleas, they are nonetheless informally and functionally compatible.

3.1 Statutory Framework

Criminal Code sections 606 and 655 are central to determining whether *nolo contendere* pleas are compatible with Canadian criminal law. Section 606 governs which pleas defendants may enter and how, while section 655 governs admissions a defendant may make. As I demonstrate in the following sections, defendants may use these two provisions in tandem to enter an array of uncontested pleas.

3.1.1 *Criminal Code* s 606: Pleas Permitted and Plea Procedures

Criminal Code section 606 identifies which pleas defendants may enter to criminal allegations and the procedures that courts must follow when hearing them:

> **Pleas permitted**
>
> **606 (1)** An accused who is called on to plead may plead guilty or not guilty, or the special pleas authorized by this Part and no others.
>
> **Refusal to plead**
>
> **(2)** Where an accused refuses to plead or does not answer directly, the court shall order the clerk of the court to enter a plea of not guilty.

The statutory guilty plea changed in 2002[118] when Parliament added *Criminal Code* sections 606(1.1) & (1.2). These sections codified the plea inquiry discussed in §§ 2.2.2 and 2.2.3 above. Courts developed plea inquiries to ensure courts met this requirement. Sentencing judges were not strictly required to conduct these inquiries. However, failure to do so could be considered on an application to withdraw the plea.[119] Sections 606(1.1) & (1.2) codified these principles:

[118] See *CLAA*, *supra* note 38.
[119] See *Adgey*, *supra* note 62.

> **Conditions for accepting guilty plea**
>
> **606 (1.1)** A court may accept a plea of guilty only if it is satisfied that
>
> > **(a)** the accused is making the plea voluntarily;
> > **(b)** the accused understands
> >
> > > **(i)** that the plea is an admission of the essential elements of the offence,
> > > **(ii)** the nature and consequences of the plea, and
> > > **(iii)** that the court is not bound by any agreement made between the accused and the prosecutor; and
> >
> > **(c)** the facts support the charge.

To help ensure defendants enter guilty pleas knowingly and voluntarily, *Criminal Code* s 606(1.1) outlines the subjective and objective requirements that must be met before a judge may accept a plea. Subjectively, a defendant must enter the plea voluntarily, know the consequences of doing so, know that they are formally admitting the offence, and know that the judge does not have to honour plea deals reached between counsel. Objectively, the allegations must support the charge. Despite these expectations, the *Criminal Code* does not provide guidelines to ensure that judges meet them.[120] Subsection 606(1.2) further complicates matters by disconnecting the validity of the plea from the judicial inquiry:

> **Validity of plea**
>
> **606 (1.2)** The failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea.

It is important to note that this section only implies that an *otherwise valid* plea will not be *invalidated* by failing to comply with this section, just as an *otherwise invalid* plea will not be *validated* by complying with this section.[121] This section does not relieve

[120] In some jurisdictions, judges regularly conduct this inquiry with every defendant who enters a guilty plea or asks their counsel to do so on the record. See *R v Malaggay*, 2015 BCSC 1250 at para 21. Others may be satisfied with a signed declaration or trust that counsel has undertaken to go through the inquiry with their clients. See e.g. *R v Fiske*, 2014 SKQB 152 at para 2.

[121] This reflects the common law approach to the plea inquiry. See e.g. *Adgey*, *supra* note 62 at 428 — 429.

judges of their obligation to conduct the inquiry, nor does it prevent a defendant from seeking a remedy on appeal if the judge fails to do so.

3.1.2 *Criminal Code* s 655: Admissions After a Not Guilty Plea

Before Parliament codified s 655, Canadian common law prohibited defendants from making formal admissions in felony cases.[122] This custom required prosecutors to prove allegations that defendants were prepared to admit. *Criminal Code* s 655 overrides that convention by allowing defendants to admit some or all of the prosecutor's allegations against them:

> **Admissions at trial**
>
> **655** Where an accused is on trial for an indictable offence, he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.

There is a debate amongst Canadian courts over whether judges may depart from agreed facts. Some courts have found that *mutually agreed-upon* allegations submitted under this section cannot be disturbed by a trial court, while others have found that judges retain discretion and may reject agreed facts in certain situations. As I discuss in § 3.2.6 below, how courts interpret their scope under this section impacts whether they may allow or prevent defendants from using the *nolo contendere* procedure and may require more scrupulous judicial attention in jurisdictions where criminal litigants make use of it. But before doing so, I examine several key cases that led to the procedure and outline how the informal Canadian plea procedure stacks against its formal American counterparts.

[122] See *R v Herritt*, 2019 NSCA 92 at para 74 [*Herritt*]. In Canadian criminal law, the term "felony" has since been supplanted by the phrase "indictable offence."

3.2 Compatibility With *nolo Contendere* Pleas

3.2.1 *Nolo Contendere* Pleas are Formally Excluded

Criminal Code s 606(1) explicitly states that the court may only accept guilty, not guilty, and the special double jeopardy pleas. This section formally excludes all other pleas from Canadian criminal law, including *nolo contendere*.

3.2.2 *Nolo Contendere* Pleas May Be Constructively Entered Through *Criminal Code* s 655

Although *Criminal Code* s 606(1) formally forbids *nolo contendere* pleas, defendants may self-convict without admitting guilt through an informal "*nolo contendere* procedure" by (1) pleading not guilty and admitting the offence's elements at trial; or (2) refusing to enter a plea and admitting the offence's elements at the trial. Criminal pleas are authorized and guided by *Criminal Code* s 606 and admissions by *Criminal Code* s 655. Although both these sections have existed in some form or another since the first *Criminal Code, 1892*[123] and functioned much the same as they do today, courts were slow to explore how these sections operated and to recognize how they interact.

[123] *Criminal Code*, *supra* note 2, s 606(1) originally existed as *Criminal Code, 1892*, *supra* note 25, s 657:

> **657. Plea; refusal to plead.** When the accused is called upon to plead, he may to plead, plead either guilty or not guilty, or such special plea as is hereinbefore provided for.
>
> **2.** If the accused wilfully refuses to plead, or will not answer directly, the court may order the proper officer to enter a plea of not guilty.

Similarly, *Criminal Code* s 655 has existed in largely the same form since Parliament codified it as *Criminal Code, 1892* s 690:

> **Admission may be taken on trial**
>
> **690.** Any accused person on his trial for an indictable offence, or his counselor or solicitor, may admit any fact alleged against the accused so as to dispense with proof thereof.

Castellani v R

Until relatively recently, Canadian courts had not settled *Criminal Code* section 655's most basic operating principles. The *R v Castellani*[124] decision was a significant development in this area. In *Castellani*, the appellant sought to make admissions at his trial through *Criminal Code* s 562 (now s 655). The prosecutor disagreed with one of his propositions, and the trial judge ruled that the appellant could not admit it as proven. He was convicted and appealed. The British Columbia Court of Appeal ruled that the trial judge erred by disallowing the admission but dismissed his appeal. The Supreme Court of Canada found that a defendant may not unilaterally admit a fact the Crown does not allege. This holding coincides with the vital principle that the Crown must, by default, prove every proposition it alleges. It established that defendants may only formally admit to the prosecutor's allegations against them.

R v Cooper

Once the Supreme Court of Canada delimited *Criminal Code* section 655's scope, prosecutors and defendants quickly began to explore the outer limits of its potential applications. In *R v Cooper*,[125] the Supreme Court of Canada heard an appeal from a conviction obtained entirely from an agreed statement of facts between the appellant and the prosecutor. The trial hinged on whether these agreed facts made out the elements of the offence. The main issue on appeal was whether the rule in *Hodge's Case*[126] applied to those agreed-upon facts, but the court parenthetically remarked on the fact that there were no contested allegations at trial. The majority and dissent both remarked that it was unusual for a trial to proceed this way, but neither found this approach erroneous. This tacit approval proved significant nearly 30 years later when the Ontario Court of

[124] *Castellani v R*, [1970] SCR 310.

[125] *R v Cooper*, [1978] 1 SCR 860.

[126] *R v Hodge*, 1838 CanLII 1 (FOREP). The rule in *Hodge's Case* governs cases where the prosecutors rely on circumstantial evidence. The rule states that a judge may only convict defendants in these cases if no other rational conclusion can be drawn from the evidence. This same principle is now generally cited to *R v Villaroman*, 2016 SCC 33, [2016] 1 SCR 1000.

Appeal adapted this procedure to create the Canadian *nolo contendere* procedure in *R v DMG*.[127]

R v Fegan

Before Canadian courts created an *ad hoc* substitute for *nolo contendere* pleas, they crafted a similar replacement for conditional pleas. In *R v Fegan*,[128] the appellant made an unsuccessful motion to exclude evidence at trial. After losing that motion, Fegan pleaded guilty to making harassing and threatening telephone calls, as his lawyer mistakenly believed that Fegan would preserve his right to appeal if he did so. The Ontario Court of Appeal rightly concluded that Fegan could not and dismissed his appeal. However, they noted that Fegan could have entered a conditional plea's equivalent by not calling any evidence after the prosecutor put in its case. Similarly, because *Criminal Code* s 655 allows defendants to admit facts against them, the court suggested that future defendants willing to plead guilty may agree to facts capable of sustaining a conviction. This suggestion advanced *Criminal Code* s 655's utility and was critical to the *nolo contendere* procedure's development in the subsequent years.

3.2.3 *Criminal Code* s 655 and the *Nolo Contendere* Procedure

Nearly two decades after *Fegan*, the Ontario Court of Appeal decided *DMG*, an appeal from an unusual conviction where the defendant pleaded not guilty but called no evidence and admitted all the elements of the offences charged. On appeal, DMG, the appellant, argued that his counsel was ineffective, his plea was involuntary, and the procedure used at trial was flawed. Writing for the court, Justice Watt agreed with DMG in all respects, likening the procedure to a *nolo contendere* plea.[129] For a time following, practitioners

[127] *R v DMG*, 2011 ONCA 343 [*DMG*].
[128] See *Fegan*, *supra* note 32.
[129] See *DMG*, *supra* note 127 at paras 43 — 46.

and lower courts interpreted this as the court reproaching the *nolo contendere* procedure showcased in *DMG*.

A few years later, the Ontario Court of Appeal, again led by Justice Watt, clarified this issue in *R v RP*. There, the court specified that the *nolo contendere* plea procedure used in *DMG* was compliant with the *Criminal Code* and that nothing prevented the defendants from using it properly. When entered knowingly and voluntarily, such pleas are lawful. Since *RP*, the *nolo contendere* procedure has become a recognized practice in Ontario and has been acknowledged by appellate courts in at least two other provinces.

R v DMG

In *R v DMG*,[130] the appellant faced several sexual assault and interference charges involving the same underaged complainant. He denied the allegations and pleaded not guilty but did not want to force the complainant to testify. The complainant had made a statement, and the prosecutors told DMG's lawyer they wanted to admit it. DMG also made a statement, which his lawyer admitted was voluntary. On appeal, the Ontario Court of Appeal learned that DMG's lawyer did not review either statement before the trial. Five weeks before trial, DMG's lawyer offered to resolve for a six-month CSO and 18 months probation. A week later, the prosecutor countered with a 15 — 18 month jail sentence, not contingent on a joint submission.

At trial, DMG's lawyer gave him the prosecutor's resolution offer, and DMG agreed to resolve on those terms. During this meeting, DMG told trial counsel that he was not guilty and wanted to testify. When the court convened, trial counsel told the court that the appellant would plead not guilty but also would not dispute the allegations. The Crown read the allegations into the record, and the trial judge convicted DMG. He did not testify, and the judge did not conduct a plea voluntariness or comprehension inquiry. On appeal, DMG asserted that he had not been informed about the procedure that his

[130] See *DMG*, *supra* note 127.

trial counsel embarked on, and had never wavered in claiming he was innocent.

The Ontario Court of Appeal likened the procedure adopted at trial to a *nolo contendere* plea.[131] It noted that the Federal Rules of Criminal Procedure in the United States required plea inquiries for guilty and *nolo contendere* pleas alike.[132] The court concluded that the procedure was legal and complied with the *Criminal Code*,[133] but suffered in its execution in two key ways. First, the Ontario Court of Appeal found that the prosecutor could not adduce evidence simply by reading allegations in open court. Doing so did not constitute a formal admission under *Criminal Code* s 655 and was not otherwise admissible evidence.[134] Second, the court found that because DMG self-convicted, the trial judge should have conducted a plea inquiry to ensure the defendant knew what the procedure entailed.[135] Although the court disbelieved his evidence in many key respects,[136] it nonetheless accepted that DMG did not know the consequences of embarking on the *nolo contendere* procedure,[137] hesitantly held that the procedure adopted at trial caused a miscarriage of justice due to these irregularities, and granted the appeal. Although trial counsel's conduct fell short, the court emphasized that "[n]o statutory provision or common law principle prohibits a procedure similar to what was followed here after an accused has entered a plea of not guilty."[138] The flaw was not in the plea procedure but in how trial counsel employed it. Although this finding effectively authorized defendants to plead not guilty but formally admit the prosecutor's case against them, subsequent confusion on this point became the subject of the *RP* decision a year and a half later.

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131 See *ibid* at para 60.

132 See *ibid* at para 45.

133 See *ibid* at paras 51 — 56. The court found that although *Criminal Code* s 655 allowed defendants to admit some or all of the prosecutor's case against them, the prosecutor failed to enter their case correctly. Because the prosecutor simply read in its case without calling admissible evidence, and because the defendant did not formally admit the prosecutor's case, none of the evidence called at trial was admissible.

134 See *ibid* at paras 55 — 70.

135 See *ibid* at paras 59 — 61.

136 See *ibid* at para 66.

137 See *ibid* at para 67.

138 See *ibid* at para 51.

R v RP

Following *DMG*, the *nolo contendere* procedure's legality and propriety were uncertain.[139] *RP*[140] clarified many of these uncertainties. In *RP*, the appellant faced 19 historical sexual offence allegations involving four family members. The first complainant testified on the first day of the trial. Trial counsel believed that she testified well and told RP as much. RP normally suffered from several health problems. After the first day of trial, RP's counsel noted that he looked unwell and feared RP might not make it through the trial. Although he maintained his innocence when speaking with his lawyer, RP signed written instructions the next day outlining the allegations he expected the remaining witnesses would confirm and acknowledged he had no reasonable response to their evidence. RP agreed he would not contest the allegations and acknowledged he would be convicted. RP pleaded not guilty but formally admitted the offence through *Criminal Code* s 655, and both he and the prosecutor invited the court to convict him.

Before his sentencing, RP completed a pre-sentence report. While doing so, he told the pre-sentence report writer that the complainants invented the allegations and that he could not understand why they had done so.[141] However, when cross-examined on his affidavit at the fresh evidence motion made at the appeal, RP confirmed that he did not want to continue with the trial, did not want to take the stand, and knew he would be found guilty by participating in the procedure he, his counsel, and the prosecutor had all agreed upon.

On appeal, RP argued that the procedure the trial court followed was a fatally flawed miscarriage of justice that the Ontario Court of Appeal should denounce, just as it did in *DMG*. The court reviewed *Criminal Code* sections 606(1) and 655 and affirmed that defendants may admit any or all elements of an offence as proven through *Criminal Code*

139 See e.g. *Law Society of Upper Canada v Besant*, 2014 ONLSTA 50 [*Besant*], discussed below.

140 *R v RP*, 2013 ONCA 53, leave to appeal to SCC refused, 35287 (13 June 2013) [*RP*].

141 See *ibid* at para 24. The sentencing judge inquired about the comments, but "[n]either counsel suggested that the proceedings were procedurally flawed due to the appellant's subsequent rejection of the complainants' accounts."

s 655. The court acknowledged that the procedure in the case at bar was similar to the one undertaken in *DMG*. However, it distinguished the two based on the relative levels of procedural protections each trial court employed.[142] Unlike the appellant in *DMG*, RP had

> voluntarily participated in a procedure without statutory warrant (or prohibition, except against entry of a formal plea of *nolo contendere*), well aware of the consequences (a finding of guilt and conviction), in the hope of gaining a desired sentencing disposition without having to utter an express admission of guilt of sexual offences.[143]

Having found that the *nolo contendere* procedure used was legal and complied with the *Criminal Code*, and that RP knew his rights, the Ontario Court of Appeal dismissed his appeal. Leave to appeal to the Supreme Court of Canada was subsequently denied.

3.2.4 Subsequent Developments in Ontario

Law Society of Upper Canada v Besant

Following *DMG*, the Law Society of Upper Canada (now the Law Society of Ontario) held misconduct hearings for Charles Besant, DMG's trial lawyer.[144] The tribunal found that Besant failed to prepare for trial adequately but also found that he committed misconduct by participating in the *nolo contendere* procedure, calling it unsuitable and misleading.[145] Besant appealed on five grounds, the last of which dealt with the propriety of the *nolo contendere* procedure.

On appeal,[146] the Law Society of Upper Canada's Appeal Division heard and dismissed Besant's appeal, having found that he failed to prepare for trial adequately and

[142] Notably, the court in RP noted that the appellant was college-educated, spoke English as a first language, provided detailed written instructions to his lawyer, and knew the consequences of undergoing the procedure. See *ibid* at para 29.

[143] See *ibid* at para 65.

[144] See *Law Society of Upper Canada v David Charles Besant*, 2013 ONLSHP 76.

[145] See *ibid* at paras 127 — 138.

[146] See *Besant*, *supra* note 139.

thus prejudiced his client's interests. Despite this, the Appeal Division agreed with Besant that the *nolo contendere* procedure used at trial was legally *available*. However, as a postscript to their decision, the Appeal Division addressed the *nolo contendere* procedure's *propriety*. Although lawful, the Appeal Division warned that lawyers should be "extremely reluctant to assist" clients who wish to use the procedure.[147] Citing wrongful convictions and the risk that such pleas could mislead the court, the Law Society of Upper Canada sent a strong signal that lawyers who engaged in this procedure did so at their own risk.[148]

R v Lo

Despite the stark warning Ontario's Law Society issued in *Besant*, the *nolo contendere* plea procedures proliferated there in the years following. By the time the Ontario Court of Appeal decided *Lo*,[149] the *nolo contendere* plea procedure had become entrenched in Ontario's criminal procedure.[150] The *Lo* decision allowed the Ontario Court of Appeal to parenthetically outline the informal plea and note its place in Ontario's criminal procedure. Lo, the appellant, was a practicing psychologist who pleaded guilty and no contest to disgraceful conduct and sexual abuse allegations in proceedings before the College of Psychologists in Ontario. The Crown used the convictions as evidence against Lo at a subsequent criminal proceeding, leading to the appeal.

On appeal, the court, again led by Justice Watt, briefly discussed the *nolo contendere* procedure used in Ontario to contrast it with the formal "no contest" plea that Lo entered at first instance in his disciplinary proceedings.[151] The court in *Lo* identified four components that together comprise the *nolo contendere* procedure: (1) a not guilty plea; (2) an agreed statement of facts establishing the elements of the offences charged; (3) no

147 See *ibid* at para 130.
148 See *ibid* at para 131.
149 See *Lo*, 2020 ONCA 622 [*Lo*].
150 See *ibid* at para 75.
151 See *ibid* at para 61.

evidence called by the defence; and (4) a conviction.[152] These procedural steps are broad enough to encompass both the conditional plea procedure that *Fegan* outlined and the *nolo contendere* procedures used in *DMG* and *RP*. Although *Lo* is a recent decision, subsequent decisions from the Ontario Court of Appeal have continued to provide additional special use cases for the procedure.

R v Anderson

Following *Lo*, the Ontario Court of Appeal clarified in *Anderson* that plea inquiries are neither required nor authorized by statute when a defendant pleads not guilty.[153] In *Anderson*, the appellant elected for a trial with a preliminary inquiry on arson, forcible confinement, and assault with a weapon charges. Following the preliminary inquiry, a psychologist assessed Anderson as not criminally responsible. The parties agreed to re-elect to a judge-alone trial, enter not guilty pleas, and have the evidence from the preliminary inquiry applied to the trial. The trial judge acquitted Anderson on two charges and found him not criminally responsible on the remainder. Anderson appealed, arguing that he had not understood the procedure and its consequences. The Ontario Court of Appeal found ample evidence that Anderson understood the proceedings, knew the consequences of being found not criminally responsible and dismissed his appeal.

Although judges should conduct plea inquiries in such cases, their failure to do so, absent more, does not entitle an appellant to a reversal.[154] *Anderson* did not elaborate on why the appellant sought to self-convict after the expert concluded he was not criminally responsible. However, there is no suggestion that he was motivated by an adverse pre-trial evidentiary ruling. This decision also confirmed that although courts and litigants frequently used the *nolo contendere* procedure in Ontario for the contested pre-trial motions contemplated by *Fegan*, its application is not limited to such cases.

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[152] See *ibid* at para 75.
[153] See *R v Anderson*, 2021 ONCA 333 at paras 40 — 54 [*Anderson*].
[154] See *ibid* at para 50; see also § 3.1.1 above.

R v Simpson-Fry

The recent Ontario Court of Appeal decision in *R v Simpson-Fry*[155] provides another example of a special use case for the *nolo contendere procedure*: namely, for those defendants who are *hesitant to plead guilty* because they cannot remember an offence but are *willing to self-convict*. In *Simpson-Fry*, the appellant attempted to plead guilty to serious violent and sexual offences but told the judge that he was too intoxicated to recall the offence. The trial judge refused to accept a guilty plea but suggested that the Simpson-Fry plead not guilty and not contest the evidence. Simpson-Fry did so. Following his conviction, the Crown made a dangerous offender application, which the judge granted. On appeal, Simpson-Fry argued that he had received ineffective assistance of counsel and that the judge misapprehended the evidence by "rubberstamping" the Crown's uncontested evidence.[156] But the Ontario Court of Appeal found that all parties made significant efforts to make sure Simpson-Fry understood the consequences of the *nolo contendere* process used at first instance. The court affirmed that the procedure used in the first instance was appropriate and dismissed Simpson-Fry's appeal.[157]

3.2.5 Developments Outside Ontario

Coderre c R

In *Coderre*,[158] the appellant was charged with several *Income Tax Act* violations, and sought to resolve the allegations through a plea deal. Coderre's counsel and the prosecutor agreed that he would plead not guilty but admit that the prosecutor could prove its case beyond a reasonable doubt. The agreement exempted the prosecutor from calling witnesses and acknowledged that the appellant would call no evidence. Coderre repudiated the agreement on the trial date and asked for a trial on all counts. The trial

[155] *R v Simpson-Fry*, 2022 ONCA 108.
[156] See *ibid* at para 5.
[157] See *ibid* at para 12.
[158] See *Coderre c R*, 2013 QCCA 1434.

judge rejected his request and convicted him. The Quebec Court of Appeal found defence counsel's nascent agreement was not an admission under *Criminal Code* s 655 and allowed the appeal. Both criminal defendants and prosecutors enjoy a broad right to repudiate agreements before the court finalizes them. Because Coderre had not yet formally pleaded, the agreement was not final.[159] Quoting *RP*, the court added that, had the initially-envisaged *nolo contendere* procedure gone forward, they would have found that Coderre knowingly and voluntarily participated in a legal procedure.[160]

R c Silva

In *Silva*,[161] the defendant was charged with multiple murders and had set the charges down for a lengthy multi-month trial. Two months into the trial, Silva opted to concede the prosecutor's case against him through the *nolo contendere* procedure after losing motions to stay proceedings and exclude key evidence. Silva maintained his not guilty plea but formally agreed that the prosecution had discharged its burden. Citing *Coderre*, *DMG*, and *RP*, and relying on the procedure outlined in *Lo*, the court conducted a plea inquiry.[162] It allowed Silva to self-convict while preserving his right to appeal his unsuccessful pre-trial motions.[163]

R v Herritt

In *Herritt*,[164] the appellant appealed a ruling requiring his lawyer to review cell phone evidence to determine whether it included privileged information. Trial counsel was adamantly opposed to complying with this order. In response, Herritt entered an agreed statement of facts to self-convict while preserving his right to appeal this interlocutory ruling. The Nova Scotia Court of Appeal was reluctant to hear the matter. The court

159 See *ibid* at para 41 — 47.
160 See *ibid* at para 36.
161 *R c Silva*, 2022 QCCS 359.
162 See *ibid* at para 40.
163 See *ibid* at para 38.
164 See *Herritt*, *supra* note 122.

noted that the *nolo contendere* procedure was used at trial but only expressed misgivings for the appeal's broader lack of merit. The court ultimately dismissed the appeal, finding no merit to trial counsel's underlying objection to the first-instance court's procedural ruling.[165]

3.2.6 Classifying Informal *Nolo Contendere* Pleas

The Canadian *nolo contendere* procedure is functionally equivalent to a *nolo contendere* plea in many ways but unique in others. Analyzing the plea using the classification system outlined in § 2.3 above highlights these similarities and differences.

Applicability

The first criterion, applicability, addresses which offences a defendant may plead *nolo contendere*. By virtue of *Criminal Code* s 795, *Criminal Code* s 655 applies to all offences.[166] Because the *Criminal Code* allows defendants charged with any offence to admit any allegation the prosecutors make against them, the *nolo contendere* procedure thus applies to all criminal offences.

Acceptability

The second criterion, acceptability, addresses whether and when the court may accept a *nolo contendere*. Because the *nolo contendere* procedure admits allegations through *Criminal Code* s 655, and because admissions under this section require prosecutorial consent, it follows that the Canadian *nolo contendere* procedure requires prosecutorial consent. However, case law is ambiguous about whether trial judges may reject allegations admitted under *Criminal Code* s 655. This interpretive difference impacts the acceptability criterion, as judges *must* accept informal *nolo contendere* pleas where courts

[165] See *ibid* at paras 6, 86f.

[166] *Criminal Code*, *supra* note 2 Part XXVII covers the special rules for summary conviction offences. *Criminal Code* s 795 applies all of the rules from Part XX, where s 655 is found, to Part XXVII.

acknowledge that these agreements bind them.

The dominant view is that allegations admitted by prosecutors and defendants bind the court.[167] This position follows from the rule that formally admitted allegations dispense with any need to call evidence on those issues,[168] cannot be disturbed by evidence called on those issues at trial, and that these admissions, once entered, may only be withdrawn in exceptional circumstances.[169] Where judges retain some discretion to reject jointly-submitted facts at trial, they may exercise that discretion to reject a *nolo contendere* procedure. But a nonstandard approach suggests that trial judges may have some residual discretion to depart from formal admissions provided they allow counsel to make submissions on the issue before doing so.[170] Under this view, trial judges retain discretion to reject admissions under *Criminal Code* s 655 if they notify counsel and provide reasons for their decision. As a result, defendants appearing in courts that take this view require permission from both the prosecutor and the court to engage the *nolo contendere* procedure.

Procedural Effects

The third criterion, procedural effects, considers the plea's effects in the case before the court. Defendants utilizing the *nolo contendere* procedure formally plead not guilty but admit sufficient facts to self-convict, per the procedure outlined in *Lo*.[171] Formally, this results in a conviction after a trial. Because the *nolo contendere* procedure results in a conviction after a trial, the statutory plea inquiry requirements outlined in *Criminal Code* s 606(1.1) do not apply.[172] The Ontario Court of Appeal has held that these pleas are substantially similar enough to guilty pleas that the common law plea voluntariness and

[167] See e.g. Ontario: *RP*, *supra* note 140 at para 42; Manitoba: *R v Korski (CT)*, 2009 MBCA 37 at paras 121 — 122 [*Korski*]; Quebec: *R v Michael*, 2019 QCCQ 7061 at para 162; Prince Edward Island: *R v Brookfield Gardens Inc*, 2018 PECA 2.

[168] See e.g. *R v Handy*, 2002 SCC 56 at para 74 [*Handy*]; *Lo*, *supra* note 136 at para 69.

[169] See *R v Fertal*, 1993 ABCA 277 at paras 7 — 9.

[170] See e.g. *R v Duong* 2019 BCCA 299 at para 52.

[171] See *Lo*, *supra* note 136 at para 75.

[172] See *Anderson*, *supra* note 153 at para 51.

comprehension inquiries are still required,[173] but has also declined to overturn convictions entered through the *nolo contendere* procedure simply because a judge did not conduct this inquiry.[174] Because the plea is otherwise unregulated, its procedural effects are indistinguishable from a conviction after trial.

Subsequent Effects

The final criterion, subsequent effects, examines what impact the plea has on the defendant after they have entered it. Although one of the defining characteristics of the American *nolo contendere* plea is its subsequent inadmissibility, no such rule exists in Canada. However, the unusual statutory interactions that allow this plea procedure give rise to their unique quirks and potential benefits. Chief amongst these is the automatic right to appeal that defendants have when entering these pleas. I discuss this windfall and its implications at the end of the next chapter, where I assess whether Canada should formally recognize and allow *nolo contendere* pleas.

[173] See *RP*, *supra* note 140 at 57 — 66.
[174] See *Anderson*, *supra* note 153.

3.3 Summary

The *Criminal Code* exclusively accommodates guilty and not guilty pleas. Alternative uncontested pleas like *nolo contendere* are formally excluded. Defendants must set a trial if they cannot or will not plead guilty but may formally admit any of the prosecutor's allegations once they have entered not guilty pleas. Therefore, defendants may effectively enter an informal *nolo contendere* plea through this procedure. Since being identified as such, the *nolo contendere* procedure has become a recognized part of Ontario criminal procedure, and defendants may use it there without apparent limitations. Because the *Criminal Code* is nationally binding, nothing prevents this procedure from taking root in other jurisdictions, as it has apparently begun to do in Nova Scotia and Quebec. However, these pleas are unregulated and risky and have the potential to produce unusual and unexpected results. Having thus determined that a *nolo contendere* near-equivalent is *possible* in Canada, despite statutory language to the contrary, I go on to answer whether having a *nolo contendere* plea in any form is a *good idea*. In the following section, I consider whether this unlegislated and seemingly unintended procedure should be encouraged or discouraged, formalized or left alone, and propose what should be done to address the issues it introduces.

Chapter 4

Should Canada's *Nolo Contendere* Plea be Formalized?

Nolo contendere pleas are predominantly the product of plea bargains. Federally, *nolo contendere* pleas in the United States require prosecutors to consent before the judge may accept the plea,[175] as does the informal *nolo contendere* procedure used in Canada. Where defendants and prosecutors must agree for the court to accept a plea, that plea is likely the result of a plea bargain, as prosecutors must have some incentive to allow a defendant to enter an ambiguous *nolo contendere* plea rather than admit that they are guilty. Because victims, police, and prosecutors reasonably prefer a contrite defendant pleading guilty over a reticent defendant self-convicting, a prosecutorial agreement is only likely where some *quid pro quo* is available.

Therefore, to determine whether Parliament should formally incorporate these pleas into Canadian criminal law, it is first necessary to examine the propriety of plea bargaining more generally. If plea bargaining is an implicitly suspect enterprise that lawyers and defendants should avoid where possible, this fact should caution against using uncontested pleas more often or expanding the catalogue of such pleas that a defendant may enter. Plea bargaining's disadvantages may be so significant that further enabling

[175] Several states also follow this model. See note 105 above.

the practice with *nolo contendere* pleas is manifestly irresponsible. However, if plea bargaining is an implicitly worthwhile and valuable process or even an ethically neutral one, it may be worthwhile to consider formalizing *nolo contendere* pleas.

The first part of my analysis investigates plea bargaining to identify and answer these concerns. I consider the problems with truth, fairness, and moral values that plea bargaining's critics argue are inherent to the practice. Although plea bargaining is imperfect and susceptible to abuse, I argue that its benefits far exceed its pitfalls. But even assuming that plea bargaining is either generally salvageable as a practice or commendable as an institution, reasonable concerns may remain about allowing *nolo contendere* pleas to form part of the plea bargaining matrix. *Nolo contendere* pleas bring their own ethical concerns, such that they warrant independent consideration. The second part of my analysis thus examines *nolo contendere* pleas specifically to determine what ethical issues these pleas entail. I conclude that these issues can be addressed, and offer several potential solutions. The final portion of my analysis adopts insights from both preceding portions to determine whether *formalizing* these pleas in Canada may help address the issues raised.

4.1 Plea Bargaining

Plea bargaining occurs when a prosecutor offers a defendant an additional incentive to self-convict, ostensibly to ensure efficient case resolution on a broader scale. Some defendants who self-convict do so for selfless or pro-social reasons, such as a desire to spare a complainant from having to testify at trial or because they are genuinely remorseful for their actions. Other guilty defendants may have no such inclinations but may be convinced to self-convict in exchange for some consideration. Plea bargaining relies on the fact that there is potential for some *quid pro quo* in every criminal prosecution.[176] Prosecutors have the power to lay new charges or withdraw existing ones, while defendants control whether to contest the charges and force a trial. Prosecutors and defendants each face specific pressures to resolve cases quickly and efficiently. Defendants detained in custody or released on conditions may be motivated to resolve their matters efficiently by a desire to end their pre-trial restrictions. At the same time, prosecutors may be motivated to resolve their matters efficiently by the constant threat of a successful delay motion and a judicial stay of proceedings.[177]

Both the Supreme Courts in Canada and the United States have endorsed plea bargaining and highlighted its essential function in the justice system. In *Santobello*,[178] the Supreme Court of the United States affirmed that the plea bargaining process is a crucial part of the criminal justice process whose agreements courts should uphold. In that case, the state charged Santobello with two gambling felonies. Santobello initially pleaded not guilty but later pleaded guilty to a lesser included offence with the prosecutor's promise that he would not recommend a sentence to the judge. There was a delay between the guilty plea and sentencing, and when Santobello appeared to resolve his charges, he and

[176] See e.g. Ireland, *supra* note 12 at 277.

[177] See *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631. The "presumptive ceilings" that *Jordan* imposed on all criminal cases place considerable societal pressure on the courts and prosecutors alike to have criminal matters dealt with as soon as possible, as cases outside these ceilings run the real risk of being summarily dismissed.

[178] *Santobello v New York*, 404 US 257, 92 S Ct 495 (1971).

the state had different lawyers representing them. The new prosecutor was unaware of any prior deal and recommended the maximum sentence. Santobello protested, but the presiding judge sentenced him to the maximum nonetheless. On appeal, the majority of the United States Supreme Court ordered a new trial because the deal between the defendant and the prosecutor had not been honoured. The majority and the concurring opinions emphasized plea bargaining's importance and underscored its centrality in American criminal justice.

In Canada, 25 years later, the Supreme Court of Canada followed suit in *Burlingham*,[179] identifying plea bargaining as "an integral element of the Canadian criminal process."[180] Although it had disparaged the practice just a few years earlier as amounting to justice "purchased at the bargaining table,"[181] the Supreme Court of Canada soon after recognized plea bargaining's critical role. In *Burlingham*, the appellant was charged and convicted of two first-degree murders with similar *modi operandi*. Before the trial, the police interviewed Burlingham for four days. After Burlingham had spoken with counsel, the police offered to reduce the charge to second-degree murder in exchange for information. Burlingham repeatedly told the police he would not take any such deal without first speaking with his lawyer but eventually capitulated after the police interrogated him for four days. Burlingham fulfilled his end of the bargain, pointed the police to the crime scene, and told them where he had stashed the murder weapon. Later that day, the police told Burlingham that the prosecutors had not authorized the deal. As a result, Burlingham was free to plead guilty to second-degree murder but would face trial for first-degree if he pleaded not guilty.

The trial judge excluded his confession, having found that the police had violated Burlingham's *Charter* s 10(b) rights by offering him a deal without giving him the chance to speak with counsel. However, the judge allowed some evidence derived from the con-

[179] *R v Burlingham*, [1995] 2 SCR 206, 124 DLR (4th) 7 [*Burlingham*].
[180] See *ibid* at para 23.
[181] See *R v Lyons*, [1987] 2 SCR 309 at para 103, 44 DLR (4th) 193.

fession. This evidence included the gun the police found and an inculpatory statement that Burlingham made to his girlfriend the next day. Burlingham was ultimately convicted, and his appeals made their way to the Supreme Court, where the majority and dissenting opinions agreed that a new trial was warranted. In reaching this conclusion, the majority discussed the impact such practices had on plea bargaining. They identified plea bargaining as an integral element of the justice system but cautioned that the process required prosecutors and police to act uprightly to function correctly.[182] Subsequent Supreme Court of Canada decisions have solidified plea bargaining's central role in the criminal justice system, binding judges to comply with these agreements unless doing so would be manifestly unjust.[183]

Although plea bargaining is ubiquitous and judicially authorized across North America, it remains controversial. Plea bargaining proponents point out that the practice is efficient. They argue that these efficiencies are needed to maintain the day-to-day operation of the justice system.[184] Plea bargaining's opponents, on the other hand, argue that these efficiencies come at too high a price, if in fact plea bargaining does anything to increase efficiency at all. They argue that plea bargaining creates an unfair environment for defendants that encourages hasty resolutions over true and just results.[185] I broadly categorize these objections as follows:

- **Plea bargains are unfair to defendants.** Plea bargains penalize those who plead not guilty by creating a sentencing gap between otherwise equally situated defendants and coercing them through high-stakes offers that are too good to refuse.

182 See *Burlingham*, *supra* note 179 at para 23.

183 Although *Criminal Code*, *supra* note 2, s 606(1.1) ensures that Canadian judges are not required to uphold plea agreements, the Supreme Court of Canada has made it clear that judges must defer to jointly recommended sentences. See *R v Anthony-Cook*, *supra* note 11 at paras 2, 29.

184 See *R v Butt* (1987), 62 Nfld & PEIR 227, 190 APR 227 at para 48 (NL SC (TD)).

185 See Ireland, *supra* note 12 at 287; Brockman, *supra* note 14 at 128. Generally, trials require more time and effort out of judges, lawyers, and court staff than negotiated self-convictions do. To the extent that these "judicial resources" are finite, it reasonably follows that replacing more negotiated self-convictions with contested trials will consume more judicial resources. This necessary inference does not exclude the possibility that some plea bargains may also (or instead) be improperly motivated by other factors, such as trial aversion, pecuniary interest, or professional inertia.

These deals improperly and unfairly induced defendants to self-convict as a result.

- **Plea bargains result in wrongful convictions and inaccurate pleas.** Even if plea bargains do not improperly induce defendants, they increase the risk that factually innocent defendants will self-convict instead of setting their matters for trial. These self-convictions are inaccurate and unjust.

- **Plea bargains undermine the law's moral core.** Plea bargaining transforms the criminal justice process into an economic system that encourages deal-making and the "gamification" of punishment while discouraging confessions, remorse, and a sense of responsibility. Encouraging plea bargaining comportments undermines the substantive moral values undergirding the criminal justice system.

Among these different ethical positions, several approaches raise interesting new questions and warrant closer examination and engagement. In each subsection, I explore three approaches to help determine whether plea bargaining is a good that criminal justice should pursue, an evil it should avoid, or another option.

First I consider the *fairness problem* with help from Michael Young's article "In Defense of Plea-Bargaining's Possible Morality."[186] Young's underlying premise is that plea bargaining produces normative goods, making it possible for plea bargaining to be a moral enterprise. I agree with this position but argue that Young pursues it too conservatively.

Next, I consider the *truth problem* alongside Joshua Bowers' "Punishing the Innocent."[187] Bowers forcefully advocates *for* wrongful convictions, arguing that they allow an avenue for wrongfully *punished* defendants to short-circuit their unjust penalties. I adopt many of Bowers' insights concerning the truth problem and attempt to synthesize his "legal fiction" proposal into the truth-, belief-, and proof-function plea model.

[186] See Michael Young III, "In Defense of Plea-Bargaining's Possible Morality" (2013) 40:1 Ohio NU L Rev 251.

[187] See Josh Bowers, "Punishing the Innocent" (2008) 156:5 U Pa L Rev 1117.

Finally, I address the *substance problem* by considering Stephanos Bibas' "Harmonizing substantive-criminal-law values and criminal procedure: The case of Alford and nolo contendere pleas."[188] While Bibas and I agree that substantive criminal legal principles should be a critical part of our discussions about plea bargaining, I otherwise disagree with his assessment of how plea bargaining impacts those values. Specifically, while Bibas views plea bargaining and non-culpatory uncontested pleas as ethical compromises made in the name of criminal procedure, I argue that both are ethically viable and fully capable of delivering normative goods to all justice system participants.

4.1.1 Fairness

Plea bargaining opponents worry that the process improperly induces or threatens defendants into self-convicting. Although it is true that the criminal justice system is oppressive and that those caught up in it are uniquely vulnerable to inducements and threats, not all inducements and threats override the will. Unlike threats and inducements in police interviews, where the suspect is most vulnerable and unilaterally disadvantaged, inducements and threats in plea bargaining occur in an environment where both parties have something to gain, something to lose, and ample time to consider their options. Most defendants will have an opportunity to consult with a lawyer about a prosecutor's offer, and many will be represented by one to assist them regardless of whether they accept or reject that offer. Nonetheless, some critics argue that plea bargaining leads to unfair results. Following Michael Young and his article "In Defense of Plea-Bargaining's Possible Morality," I examine one specific and one general fairness criticism that Young highlights:

- **The trial penalty.** Plea bargaining allows defendants to be sentenced differently depending on whether they set their matters for a trial. Defendants who set trials are typically sentenced more harshly than those who plea bargain. A trial penalty

[188] See Bibas, "Harmonizing Substantive Values," *supra* note 21.

results where these defendants are otherwise identically situated.

- **The coercion worry.** Plea bargaining is coercive by nature. It creates situations for defendants where their only rational choice is to self-convict, and in some situations, amplifies this problem through high-stakes plea deals. Alternatively, coercion may be understood in the context of the relationship between the parties and the fairness the dominant party owes to the other.

The Trial Penalty

Where courts convict two otherwise equally situated defendants of the same crime, but one of them accepts an early plea deal instead of a trial, the one who accepted the plea deal will likely receive a more lenient sentence than the one who did not.[189] The apparently uneven and intuitively unfair treatment these two defendants receive constitutes the trial penalty criticism.[190] Young considers three responses to this critique:

- **Recasting the *trial penalty* as a *plea bargain benefit.*** The disparity between defendants who plea bargain and defendants who do not is not a "penalty." Rather, it is a benefit afforded to those who plea bargain.

- **Reducing penalties in exchange for prosecutorial resources, the common good, or both.** Defendants who plead guilty free up resources that the justice system would have otherwise expended on their trials. Doing so is a moral good, and rewarding them with reduced punishments is appropriate.

- **Re-examining the assumptions underlying equal treatment and the defendant's role in the discrepancy.** When looking for coercion, the most crucial consideration is whether equally situated defendants had equal opportunities to

[189] To the extent that no two offences or offenders are ever exactly alike, "similar offences" and "similarly situated offenders" will always be distinguishable. The incredible array of subtle distinctions between offences and offenders can either be overlooked or microscopically examined, depending on the offence, the offender's history, the court's jurisdiction, and other comparable factors.

[190] See Young, *supra* note 186 at 269.

plea bargain. Defendants who voluntarily opt not to plea bargain are accountable for the impact this may have on their future bargaining positions.

Faced with the trial penalty criticism, plea bargaining proponents who hold to the first view may counter that defendants are not *penalized* for *setting a trial*, but rather *rewarded* for *resolving their charges* without insisting on a trial. Under this view, the trial penalty criticism fundamentally misunderstands plea bargaining. But as Young points out, the trial penalty criticism is aimed at the *inequality* that plea bargaining creates. It is not merely a sophistic definitional problem, such that recasting the inequality in more favourable terms is enough to address the true cause for concern. Regardless of whether the disparity is called a *trial penalty* or a *plea bargaining incentive*, the fundamental concern is that plea bargaining treats equally situated defendants unequally.

Young next considers the possibility that "equally situated defendants" may not be equally situated at all. Where the state charges two such defendants with the same offence and only one opts to plea bargain, the defendant who resolves their charges saves "public resources on an expensive prosecution"[191] while the other does not. To the extent that saving the state the expense of a trial contributes to the public good, and to the extent that contributing to the public good is morally praiseworthy, defendants who plea bargain are more morally praiseworthy *in this respect* than those who insist on a trial.[192] The courts should therefore treat them as such.

Young rejects this argument on the grounds that prosecutorial resources and punishment are incommensurate commodities. Prosecutorial resources are, in effect, monetary resources,[193] and Young argues that allowing prosecutors and defendants to exchange one for another invites unjust results:

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191 See *ibid* at 270.

192 This principle only holds where the defendant is factually guilty. Innocent defendants who plead not guilty are not more morally blameworthy than any defendant who self-convicts.

193 Prosecuting a case requires police to investigate crimes, lawyers to review the evidence and handle court proceedings, judges to adjudicate trials and sentencing, and in many cases, publicly funded defence counsel. To the extent that public spending supplies these goods, they are public monetary resources.

> [T]here seems to be something fundamentally objectionable about strongly tying the idea of deserved punishment to the idea of contributing to the common good, whether by saving public resources on a prosecution or in any other way. Simply stated, the one should not have anything to do with the other. It would be perverse, for example, to think that a rich criminal who donated money to the prosecutor's office — thus advancing the common good by providing resources for prosecutions — would even presumptively deserve a sentencing reduction for that reason alone.[194]

Absent a more direct correlation between the common good and moral praiseworthiness, Young argues that merely saving the public some expense is not enough to make a person morally praiseworthy. This example, however, is a hasty generalization and a straw man. While some financial arrangements between defendants and the prosecutor's office would be objectively inappropriate, separating criminals from their money remains a time-honoured and occasionally effective punishment. Furthermore, by dismissing this argument as he does, Young fails to consider other, more compelling reasons why a defendant who foregoes their right to a trial may be more morally praiseworthy than one who does not.

Judges who fine defendants signal that money and punishment are commensurate resources. Other aspects of Canadian criminal law evince this equivalency. For example, Parliament has recognized that there can and ought to be a monetary value placed on time spent in custody[195] and a custodial value placed on misappropriated funds.[196] Additionally, statutory victim fine surcharges,[197] restitution orders,[198] forfeiture orders,[199] and court-ordered donations are all ways the court correlates moral blameworthiness with the very same resource used by the Attorney General to bring cases to trial. There is a strong correlation between financial resources and punishment, such that a defendant who has paid a fine or restitution is no longer equally situated with one who has not.[200]

194 See Young, *supra* note 186 at 271.
195 See *Criminal Code*, *supra* note 2, s 734(5).
196 See *ibid*, s 462.37(4).
197 See *ibid*, s 737(1).
198 See *ibid*, s 738.
199 See *ibid*, s 734(1).
200 See e.g. *R v Saucier*, 2019 ONSC 3611 at para 44.

But sparing the state the *financial expense* of a trial is not a defendant's only bargaining chip or even the most valuable consideration they can offer. Defendants who opt to self-convict rather than take their matters to trial *relieve the state of its burden to prove the offence*. As a result, witnesses who would have had to have testified are no longer required to do so. Where those witnesses are vulnerable individuals, the defendant spares them the potential trauma of having to revisit the offence. Where those witnesses are unreliable, the defendant spares the state the difficulty of eliciting evidence from hostile or unpredictable parties. Defendants spare all witnesses the pressure of being subpoenaed, coming to court under threat of arrest, and testifying. And perhaps most importantly, *self-convicting defendants guarantee convictions*. Trials are inherently volatile processes, and convictions after contested hearings are never guaranteed, even in cases where the evidence appears overwhelmingly strong. A self-convicting defendant spares the state the risk of a potentially expensive *and unsuccessful* prosecution.

Young criticizes a naive view of inequality that he describes as *distributional*. The distributional view proposes that courts should not sentence two identically situated defendants differently solely because one opts for trial while the other self-convicts. In its place, Young proposes substituting a *relational* view. Where distributional equality judges equal treatment based on how evenly courts distribute punishment across similarly situated defendants, relational equality asks whether "someone or some group [is being] subordinated or dominated, or in some similar way treated without proper respect or concern."[201] Here, equal treatment lies in the relationships between parties when compared. Courts treat defendants equally when they have *equal opportunity* to plea bargain. By contrast, where one defendant is given an opportunity to plea bargain, but another similarly-situated defendant is not, courts treat them unequally. But where one defendant opts to accept a deal for a lighter penalty and another does not, *their refusal to do so is the cause of their distributive inequality*. Assuming that similarly-situated defen-

[201] See Young, *supra* note 186 at 272.

dants have equal access to equivalent plea bargain offers, those who turn them down can and should be held responsible for the consequences of that choice.

Young correctly argues that the trial penalty and its primary underlying concern of equal treatment under the law are fatally flawed. But *contra* Young, defendants who opt to self-convict rather than contest their matters make a morally praiseworthy decision that should be recognized. Finally, where distributive inequalities exist between otherwise similarly-situated defendants who set their charges down for trial and defendants who plea bargain, these differences will only meaningfully impact the question of equal treatment where defendants have unequal access to plea bargaining. Where defendants have equal opportunity to self-convict on equitable terms, they receive equal treatment.

The Coercion Worry

Even if the plea bargaining critic is convinced that the trial penalty is a non-issue, they may still argue that plea bargaining is otherwise *coercive*. As an institution, plea bargaining incentivizes criminal defendants to give up their right to trial. When prosecutors offer defendants plea deals that are too good to refuse, it is reasonable to ask whether the defendant can make a genuinely free choice and turn the deal down. Plea bargaining opponents argue that these deals are coercive and inappropriate. Young disagrees and responds that these understandings of coercion are too simplistic. He instead identifies three distinct coercion concepts that commonly emerge in plea bargaining literature, the latter of which he ultimately endorses:

- **Restricting a defendant's rational choice.** Coercion depends on whether a person can make meaningful choices in a given situation. Where plea bargain offers are such that defendants have no rational choice but to accept them, they become coercive.

- **Requiring a defendant to choose with high stakes.** Coercion also depends on the type of choice in question. When plea resolution offers require defendants

to make a high-stakes choice involving their liberty, they become coercive.

- **Overriding a defendant's will by wrongfully influencing them.** Prosecutors and defendants each have special roles to play in criminal prosecutions. Because of these roles, some minor inducements may be coercive, while some major inducements may not. Whether they are coercive depends on whether the prosecutor improperly interfered with the defendant's rights or position through a plea bargaining inducement.

The first position argues that prosecutors, defence lawyers, courts, and the justice system generally coerce defendants into accepting plea bargains when the *only rational choice* is to accept a plea-bargained offer. For example, an armed robber who demands a wallet at gunpoint coerces their victim into parting with their belongings by denying them any other rational choice.[202] Similarly, the argument goes that defendants may be coerced into deciding to self-convict when that is the only rational choice. The "bare restriction on rational, utility-maximizing choice"[203] is itself coercive.

But correlating coercion with a lack of rational alternatives to choose from fails to account for situations where a person has no rational choice but to accept a clear advantage or a windfall. A person in financial trouble who gets a lucrative job offer from a former business associate may have no rational choice but to accept the job, even if it meant having to move to a different city or work longer hours. However, it would be unreasonable to claim that their old associate coerced them into deciding to do so. *Restricting rational choices* cannot be the sole measure of coercion, even where one may only make a single rational choice. Instead, the *type of choice* that a person has to make must also be considered.

The next position examines the nature of the choice by shifting focus to *the stakes involved* in making the decision. Whereas the job hunter merely faces a single and specific

[202] See *ibid* at 264.
[203] See *ibid* at 262.

lost opportunity if they do not accept the new position, a criminal defendant may face an infinite array of life-altering consequences if they fail to make the only available rational decision. The robust version of this criticism argues that high-stakes decisions *necessarily* impose coercive pressures on defendants. In contrast, the weak version of this criticism argues that the pressure from high-stakes decisions, *combined with a lack of any other rational choice*, is coercive.

Both versions miss the mark. Neither the stakes involved nor the lack of any other rational choice determines the coercion issue. For example, a parent who sees their young child wandering near a busy road will have no other rational choice but to step in and try to stop them. However, despite the high stakes and lack of reasonable alternatives, calling that decision coerced would be inaccurate and unreasonable. Similarly, a defendant caught red-handed committing a moderately serious offence may be offered a highly reduced sentence in exchange for information they can safely and secretly provide about an unrelated but much more serious offence. Despite the high stakes and lack of rational alternatives, this is also not appropriately understood as coercion.

Where a prosecutor offers a meagre sentence on a guilty plea, as opposed to a comparatively very high sentence upon conviction after trial, they may be said to be engaging in hard dealing.[204] To the extent that this tactic is likely to result in the defendant accepting the very low sentence offer, critics may suggest that the prosecutor coerces the defendant into making that choice. But not all such offers are coercive. In cases where both rehabilitation and deterrence are equally important sentencing factors, a wide range of sentences may be reasonable. In such cases, there may be nothing implicitly coercive about a large sentencing gap. In other cases, an excessively lenient prosecutor may create a sentencing gap sufficient to qualify as *hard dealing*, but where the prosecutor offers a more favourable choice than the defendant might generally be entitled to, such a deal is more reasonably described as *generous*, not *coercive*. Whether a prosecutorial position

[204] See *ibid* at 267 — 269.

is coercive or not will always depend upon myriad factors, including the strength of the state's case, the substantive offence's severity, where the offer lands in the juridsiction's sentecing range for the index offence, whether the defendant is adequately represented by counsel or sufficiently capable of representing themselves, and the conditions attached to the offer, if any. A wide sentencing gap is simply one of these factors to consider when evaluating an offer for coercion.

The last position Young considers and ultimately endorses evaluates coercion on whether an agent interfered with rights or freedoms to which a person was entitled. Under this view, coercion requires more than mere circumstances. It also requires an agent in a position of power to act improperly. Young's preferred view of coercion requires understanding the relational dynamic between the parties involved. However, he does not elaborate further on how a prosecutor might use their position to induce criminal defendants coercively. His position is nonetheless salvageable and defensible. It accounts for deficiencies in the other two views and lays a constructive foundation for properly framing coercion in plea bargaining.

In the above examples, the parent running into traffic to save their child does not exemplify coercion. Assuming nobody is intentionally putting the child in danger, and assuming the parent's motivation for running into traffic is not motivated by a diligent desire to comply with the positive duty *Criminal Code* 215 imposes on them to provide the "necessaries of life" to the children they care for, no agent is forcing their decision. The issue is more nuanced than this in the example of the criminal defendant receiving a bargain-basement plea deal. Assuming the prosecutor acts with appropriate motives, does not rely on excessively tight deadlines, and does not attach abusive caveats or conditions to their offers, the defendant is not coerced by an inordinately generous deal. However, the fact remains that prosecutors have a great deal of power compared to criminal defendants. This power imbalance is susceptible to coercion if left unchecked

and unconsidered, as the *Burlingham* decision exemplified.[205]

In Canada, prosecutors are responsible for authorizing the criminal charges that private citizens, the police and other peace officers submit and have the power to withdraw or stay proceedings.[206] Where there is a reasonable prospect of securing a conviction, and it is in the public's interest, prosecutors may pursue charges. Likewise, prosecutions should discontinue if one or both of those conditions do not obtain. When criminal defendants are charged with an offence, the police, prosecutors, or both may decide to apply to detain them pending the outcome of their cases. Where courts agree, they may remand defendants into custody pending the outcome of their case. In other cases, the police, prosecutors, or courts may release defendants on conditions pending the outcome of their case. Although these conditions must be the least restrictive form of release possible,[207] they may nonetheless be very stringent for defendants with lengthy criminal records or charged with serious offences.

Because defendants decide whether to set their criminal charges down for trial, there is *some* ostensible balance to the power between prosecutors and defendants. Notwithstanding that fact, prosecutors are generally at a clear advantage. Unlike defendants, they are not personally liable and face no comparable jeopardy if the case does not go their way. Prosecutors have no pre-trial conditions or detention orders to comply with and are under comparatively less pressure than defendants to resolve their cases quickly. Within this context, it is easy for high-stakes decisions with no rational alternatives to become coercive. This power dynamic should be explicit when evaluating individual in-

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[205] See *Burlingham*, *supra* note 179.

[206] Although rare, private citizens may initiate private prosecutions where the police have not done so, and for whatever reason either cannot or will not proceed with charges: see *Criminal Code*, *supra* note 2, s 507.1. Where private citizens can establish sufficient cause for a prosecution, the matter is referred to either the provincial or federal public prosecutor with jurisdiction over the offence. Once referred, the prosecutor may continue or discontinue the prosecution. See e.g. Ontario Court of Justice, "Guide For Applying For a Private Prosecution," online (pdf): <ontariocourts.ca/ocj/files/guides/guide-private-prosecution-EN.pdf>; Deskbook, *supra* note 117, "5.9 Private Prosecutions" (1 March 2014), online: <ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch09.html>.

[207] See *R v Zora*, 2020 SCC 14 at paras 6 — 7.

teractions between prosecutors and defendants for coercion concerns. Where prosecutors and police do, in fact, "act honourably and forthrightly"[208] in these dealings, plea bargaining's coercive potential is curtailed. Where prosecutors and police do not, the entire system suffers, with or without plea bargaining.

4.1.2 Truth

Courts should not convict factually innocent people of crimes they did not commit. Wrongful convictions are unfair and rightfully undermine the public's confidence in the justice system. They leave the factually guilty unpunished and undeterred, and where the crimes involve victims, those victims do not receive justice. Where plea bargaining is allowed, some factually innocent defendants will be inclined to self-convict in exchange for a favourable resolution to their case, wrongfully convicting themselves while leaving the factually guilty unpunished. Such results are not truthful because they inaccurately assign criminal responsibility to the wrong person.

Some plea bargaining opponents believe that plea bargains meaningfully or even dramatically increase the rate of wrongful convictions. *Assuming this is true for the argument's sake*, plea bargaining proponents must demonstrate that plea bargaining somehow offsets this adverse effect. In this section, I undertake this task by looking at how wrongful convictions may be quantified and how their inevitability may be qualified. I next examine trials as a truth-finding process and note their limitations. Finally, I consider Josh Bowers' argument in "Punishing the Innocent" that endorses wrongful convictions as "legal fictions" and advocate for my position:

- **Quantifying wrongful convictions and qualifying their inevitability.** Wrongful convictions are inevitable. The true issue is not whether society can tolerate a dispositive forensic *procedure that causes wrongful convictions* but whether society can tolerate *the rate at which it does so.*

[208] See *Burlingham*, *supra* note 179 at para 25.

- **The apocryphal truth-finding function of trials.** Trials involve many compromises between prosecutors, defendants, and the decision-makers hearing their cases. Many of these compromises limit what may or may not be adduced as evidence, constraining the trial's utility as a truth-finding process. To properly judge plea bargaining's efficacy and accuracy, the relative merits and demerits of contested trials must be considered.

- **The moral case for wrongful convictions.** The process costs for many innocent defendants who set trials are often much higher than for similarly situated innocent defendants who self-convict. Wrongful convictions can help end wrongful pre-trial punishments and should be encouraged.

Quantifying Wrongful Convictions and Qualifying Their Inevitability

It is reasonable to assume that a system that allows plea bargaining will permit more wrongful convictions than an identical system would without it.[209] Wrongful convictions do not, of course, result exclusively from negotiated plea agreements. Many documented wrongful convictions occurred following a trial, notwithstanding the commonly-held notion that trials reliably arrive at truthful conclusions.[210] But to the extent that negotiated plea agreements are responsible for *at least some* wrongful convictions, this reasonable assumption necessarily follows. Therefore, it is imperative to consider whether plea bargaining is defensible. Judging by the commentary surrounding wrongful convictions, just asking this question appears to miss a greater ethical point. Wrongful convictions have been called a "scourge,"[211] a "disaster," [212] "a blight to the criminal justice system,"[213]

[209] See e.g. Ireland, *supra* note 12 at 293 — 296.

[210] See Bruce MacFarlane, "Convicting the Innocent: A Triple Failure of the Justice System," (2006) 31 Man LJ 403. at 408 — 431, 444 - 445. MacFarlane lists eight "principal causes" of wrongful convictions, as well as five additional "less prevalent" causes. None of the causes he lists include plea bargaining as an institution.

[211] See H. Mitchell Caldwell, "Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System" (2011) 61:1 Cath U L Rev 63.

[212] See Stephen J. Schulhofer, "Plea Bargaining as Disaster" (1992) 101:8 Yale LJ 1979.

[213] See Anoushka Dey, "Wrongful Conviction: A Blight to the Criminal Justice System" (2021) 24 Supremo Amicus [314].

and "one of the worst nightmares imaginable."[214] Even strong plea bargaining proponents recognize that wrongful convictions are a "failure" of our justice system.[215] If true, it would seem to follow that plea bargaining should be curtailed to the extent that it encourages wrongful convictions.[216] But although wrongful convictions are a problem to avoid where possible, I argue that plea bargaining critics who connect the practice to wrongful convictions misapprehend the link between them.

The mere fact that plea bargaining causes *some additional* wrongful convictions is not enough to render it indefensible, regardless of how seriously one views wrongful convictions. For example, a plea bargaining system that only resulted in one more wrongful conviction in every 1,000,000,000 criminal cases than an identical one that did not allow plea bargaining would likely be *tolerable* for most. Conversely, another system that resulted in one more wrongful conviction in every five cases with plea bargaining than without would likely be *intolerable* for most. The mere fact that using a procedure results in *some number* of additional wrongful convictions is not enough to render that procedure indefensible. To make this claim, both the *actual* increase in wrongful convictions and the *proportion* of wrongful convictions that can reasonably be said to result from plea bargaining must be accounted for.[217]

Additionally, the *type of offence* underlying a wrongful conviction bears upon whether that injustice is tolerable in the grander scheme. A defendant who is wrongfully convicted of first-degree murder and sentenced to life in prison is tragic, while a defendant who is wrongfully convicted of a curfew breach and sentenced to a three-month conditional discharge is largely just inconvenienced. Both scenarios are unjust, but while critics may fairly categorize the former scenario as a nightmare, categorizing the other as such is a much more problematic pitch to deliver. There are qualitative differences between

[214] See C Ronald Huff, "Wrongful Conviction: Causes and Public Policy Issues" (2003) 18:1 Crim Just 15. at 15.
[215] See Bowers, *supra* note 187 at 1119.
[216] See Bibas, "Harmonizing Substantive Values," *supra* note 21 at 1381.
[217] See e.g. MacFarlane, *supra* note 210 at 476.

different types of wrongful convictions.

Wrongful convictions are an inevitable part of the Canadian justice system, a reality that underscores the fact that they are not inherently intolerable.[218] Parliament premised the Canadian justice system on the foundation of proof beyond a reasonable doubt. Judges must remind juries at every criminal trial that proof beyond a reasonable doubt is not the same as proof to a moral certainty.[219] Trials are time-limited showcases where the judge or jury hears each party's best interpretation of the evidence admitted. The criminal conviction appeal system operates on the understanding that judges and juries sometimes make mistakes. Similarly, the summary conviction appeal courts and the Supreme Court of Canada both operate on the understanding that appellate courts do the same.

Requiring judges and juries to be *sure* that a defendant was guilty may drastically reduce the number of wrongful convictions and the number of all convictions alongside it. Blackstone's frequently-cited ratio reminds us that it is better for ten guilty people to walk free than for the system to punish one innocent person wrongly.[220] But it tells us nothing about whether it is better for a thousand, a hundred, or even eleven people to walk free than for our system to punish one innocent person wrongly. Even this presumption-of-innocence shibboleth must be qualified, as the criminal justice system

[218] See especially *ibid* at 405, 433. See also Lynne Weathered, "Does Australia Need a Specific Institution to Correct Wrongful Convictions?" (2007) 40:2 Aust & NZ J Criminology 179 at 195; Robert J. Norris et al., "Thirty Years of Innocence: Wrongful Convictions and Exonerations in the United States, 1989-2018" (2020) 1:1 Wrongful Conv L Rev 2 at 3; Marvin Zalman & Matthew Larson, "Elephants in the Station House: Serial Crimes, Wrongful Convictions, and Expanding Wrongful Conviction Analysis to Include Police Investigation" (2015) 79:3 Alb L Rev 941 at 1031; Arye Rattner, "Convicted but Innocent: Wrongful Conviction and the Criminal Justice System" (1988) 12:3 Law & Hum Behav 283 at 291. But see Dianne L. Martin, "Lessons about Justice from the Laboratory of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence" (2002) 70:4 UMKC L Rev 847 at 848.

[219] See especially the byzantine formula from *Lifchus*, *supra* note 90 at para 36. Despite deftly dodging any functional definition of what "beyond a reasonable doubt" actually means, the *Lifchus* liturgy remains a staple of Canadian jury instructions on the subject.

[220] See e.g. Marvin Zalman, "The Anti-Blackstonians" (2018) 48:4 Seton Hall L Rev 1319 at 1321; Fritz Allhoff, "Wrongful Convictions, Wrongful Acquittals, and Blackstone's Ratio" (2018) 43 Austl J Leg Phil 39 at 44; Jan W. de Keijser, Evianne G. M. de Lange & Johan A. van Wilsem, "Wrongful Convictions and the Blackstone Ratio: An Empirical Analysis of Public Attitudes" (2014) 16:1 Punishment & Soc'y 32 at 34.

must tolerate *some* wrongful convictions to function at all.

Where a forensic procedure causes wrongful convictions, it should be evaluated on how many it causes and at what rate, not merely on the fact that it does so. Young argues a similar point when he suggests comparing wrongful convictions resulting from plea bargained deals to wrongful convictions resulting from jury trials to determine whether there is a meaningful difference between the two. Although Young neither supplies the data nor does the math, he argues that plea bargaining can only be meaningfully said to result in *too many wrongful convictions* if it results in *more wrongful convictions* than a contested trial in front of a jury.[221] I do not definitively answer how many wrongful convictions plea bargains cause, nor do I undertake to answer that question through empirical data. Instead, I argue that the trial process is implicitly suspect as a truth-revealing mechanism and that plea bargaining's critics too often overlook the truth-revealing processes that plea negotiations so often entail.

The Apocryphal Truth-finding Function of Trials

While both plea bargaining opponents and proponents generally view criminal jury trials as the gold standard for delivering due process and ensuring that the truth wins out, trials are, in fact, a series of intricate compromises between prosecutors, defendants, and decision-makers.[222] In trials, truth is only one of many critical competing interests that must be balanced against many other considerations. Trials are an adequate failsafe for when good faith discussions and negotiations between prosecutors and defendants are unsuccessful or otherwise impossible. However, they should not be idealized as quests for the truth, as "the judge at a criminal trial is not attempting to resolve the broad factual question of what happened."[223]

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[221] Because jury trials are often cast as the gold standard for substantive and procedural rights, Young uses this as a benchmark for assessing plea bargaining's efficacy. See Young, *supra* note 186 at 258.

[222] See e.g. MacFarlane, *supra* note 210 at 435.

[223] See *R v Quintin*, 2015 SKQB 16 at para 41, citing *R v Mah*, 2002 NSCA 99, re *W(D)*, *supra* note 89.

The idealized understanding of trials sees them as an opportunity for each side of a dispute to present its best evidence and interpretation of the evidence. Adequately prepared counsel cross-examine witnesses on their testimony, ably identifying the strengths and weaknesses of their evidence. A neutral and dispassionate trier hears the facts, listens to both sides argue, and decides between them. By contrast, *nolo contendere* pleas appear untrustworthy because they appear to obfuscate or misrepresent the truth to push hastily negotiated agreements through the courts. Negotiations between prosecutors and defence lawyers are privileged, such that there are no judges or juries to provide neutral adjudication[224] and the public may never know what considerations went into a negotiated plea deal.[225]

Notwithstanding its image problem, plea negotiations between prosecutors, defendants, and lawyers are vital to the criminal justice system's truth-seeking function. Both parties study the same allegations with substantially similar information, find an interpretation of those allegations congruent with their position, and form arguments from those findings to help negotiate admissions, concessions, and other agreements. Both parties can examine their cases in detail, speak with witnesses, forecast likely results should the matter go to trial, and try to reach a mutually acceptable compromise. In some cases, defendants will self-convict, while the prosecutors may discontinue charges in others. Where successful, plea negotiations reach a resolution that both parties are satisfied with, or at the very least are both prepared to tolerate. Even where plea negotiations are unsuccessful, lawyers who actively review the evidence and negotiate in good faith may clarify and streamline trial issues in advance amongst themselves rather than in front of a judge or jury. Plea bargaining is an integral part of the dispute resolution process.

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[224] This is not necessarily true in all cases. In many jurisdictions, contested matters may go through case management with a judge to discuss pre-trial issues, canvass resolution, and offer advice on how to best proceed.

[225] See Debra Parkes, "Plea Deals Shrouded in Mystery," *Winnipeg Free Press* (22 November 2013) online: <winnipegfreepress.com/opinion/analysis/plea-dealsshrouded-in-mystery-232964851.html>.

Unlike resolution discussions, trials require the fact finder to consider a less complete and accurate version of the evidence than the prosecution and defence have during negotiations. At trial, fairness, efficiency, relevance, a panoply of legal privileges and the prejudicial effect that factual evidence might have all offset the truth, as do the trial strategies, probability considerations, and the game theories that go into deciding what evidence to adduce and how to adduce it. Judges may exclude unfairly gathered evidence, juries will not hear testimony from uncalled or missing witnesses, hearsay rules will stop witnesses from repeating what they heard, and opinion evidence rules will prevent most witnesses from telling the court what they think, *all regardless of whether the underlying evidence is true or reliable.*[226] The evidence ultimately admitted may be subject to special instructions directing judges and juries on how to interpret it correctly.[227] Where cases are heard by a jury, the decision maker does not give any reasons for their decision, and may legally reach otherwise illegal results through jury nullification.[228]

Judges and juries possess no special analytical powers to decide cases, and have no way to guarantee that the witnesses who attend court will be reliable, credible, or both. As a result, lawyers must manage their witnesses, curate their questions, and account for human frailties and weaknesses to effectively present their case theory, not to ensure a balanced presentation of the truth. For this reason, I argue that the primary function of a trial is not to ensure that *the truth is heard* but rather to ensure that the judge or jury can make a *fair decision* in a case. Where the parties cannot otherwise resolve the matter, trials are a reasonably effective means of adjudicating disputes, ensuring all sides have their best explanation of the evidence heard and deferring to an ostensibly neutral third party to decide between competing narratives. However, trials are not primarily a search for the truth. Instead, they are an adequate truth-finding substitution

[226] See e.g. *R v Taylor*, 2014 SCC 50 at para 38, [2014] 2 SCR 495. Although the DNA evidence seized in that case was wholly reliable, the Supreme Court of Canada excluded it, having found that allowing it in would bring the administration of justice into disrepute.

[227] See James Fitzjames Stephen, *The Indian Evidence Act (of 1872): With an Introduction on the Principles of Judicial Evidence* (Indianapolis: Alpha Editions, 2019) at 33.

[228] See *R v Latimer*, 2001 SCC 1 at paras 57 — 71, [2001] 1 SCR 3.

when other methods, like bargaining, have failed. Negotiations between counsel, both of whom have legal training, are duty-bound to advocate for their positions, have access to the most information, and have the opportunity to spend extensive time and resources investigating the nuances thereof, are a much greater truth-seeking device than a criminal trial.

The Moral Case For Wrongful Convictions

In his article "Punishing the Innocent," Josh Bowers acknowledges that wrongful convictions are a "failure" of the justice system, and that self-convictions cause at least some.[229] But rather than blame voluntary wrongful convictions on the uncontested pleas these defendants enter, Bowers traces the source of this failure further back to the wrongful arrest, charge, pre-trial process costs and prosecution of the allegation. Doing so allows him to argue that voluntary wrongful convictions prompted by a favourable plea deal may be a *categorical good* for correcting the harms caused by wrongful incarceration and other oppressive pre-trial penalties and that these self-convictions should be made more readily available to such defendants. Bowers acknowledges that innocent defendants get caught up in the criminal justice system but argues that most people misunderstand what sort of defendants find themselves wrongfully charged with a crime, what kinds of crimes they are wrongfully charged with, and the degree to which due process will resolve their wrongful punishments.[230] By addressing these misperceptions, Bowers makes an ethical case for actively encouraging a particular class of innocent defendants to plead guilty.

High-profile wrongful conviction cases are a part of the public's imagination, so it becomes easy to imagine that our system could wrongfully convict anyone. But Bowers argues that most innocent criminal defendants are recidivists charged with minor offences and that systemic biases, pressures, and tendencies place them at a higher risk of being

[229] See Bowers, *supra* note 187 at 1119.
[230] See *ibid* at 1121.

wrongfully arrested.[231] Once arrested, recidivist defendants are more likely than first-time defendants to be charged than released without charges, less likely to have even weak charges dismissed and more likely to be denied bail and remanded into custody. Should they wish to testify at trial, they will open themselves up to their prior criminal convictions, thus potentially eroding their credibility in front of the judge or jury.

Innocent defendants are more likely to be recidivists than first-time "offenders" because defendants, in general, are more likely to be recidivists than first-timers. In the same way, an innocent defendant is more likely to be charged with a minor offence because defendants generally are more likely to be charged with minor offences. Other pressures, such as the increased frequency of minor incidents over major ones and the comparative lack of police time and investigative resources spent on such complaints, make it more likely that an innocent defendant will be wrongfully accused of a minor crime than a major one. Because these offences are more likely to be minor than major, prosecutorial plea deals are similarly more likely to be favourable than punitive.

Finally, Bowers draws attention to the overwhelmingly negative impact the pre-trial process has on defendants. Although Canadian courts deny that pre-trial detention is a punishment,[232] Bowers correctly characterizes the pre-trial criminal process as such. The pre-trial process can be lengthy and tedious for defendants released on conditions and detained in custody. It may require multiple court appearances, arranging for and meeting with lawyers when represented by one, and researching and preparing a defence when self-represented, all with the threat of an additional punishment looming at the end of it all. For defendants remanded or denied bail, the pre-trial detention period serves as a starker method of pre-trial punishment.[233] Where these process costs outweigh

[231] See *ibid* at 1125f. These inferences follow if recidivists are *wrongfully* arrested no less frequently than first-time defendants and are *generally* arrested at a much higher rate than first-time offenders. See also MacFarlane, *supra* note 210 at 413.

[232] See *R v Morales*, [1992] 3 SCR 711, [1992] ACS no 98.

[233] To the extent that recidivists raise more concerns that they will re-offend or fail to appear for court, they are more likely to be detained pre-trial. Where defendants face more time in pre-trial detention than they would likely receive as a sentence after an unsuccessful trial, they become much more likely to be motivated to resolve their charges. See Bowers, *supra* note 187 at 1137 — 1139.

the penalty that the prosecutor is willing to settle for, innocent and guilty defendants may reasonably wish to stop their punishment by self-convicting as soon as possible and moving forward unencumbered. As Bowers aptly summarizes, "plea bargaining works best for innocent defendants for whom the process is the punishment."[234]

Underlying Bowers' position is the notion that truth and accuracy must sometimes come at a criminal defendant's expense and the argument that innocent defendants should not be expected to bear these burdens unnecessarily. While some factually innocent defendants want to pay that price, others will not. Whether they wish to do so will depend on the relative value of clearing their names versus the expense of the punishment they must endure while doing so. Recidivists are generally less concerned about a criminal conviction than first-time defendants, while all defendants are less concerned about convictions for minor infractions than for major offences. Bowers concludes that innocent defendants charged with minor offences benefit most from having a plea bargaining stop-gap available to them and suffer most when forced to take these cases to trial. Defendants charged with serious offences are least likely to receive lowball plea offers, such that a plea deal's incentives quite appropriately "matter least where due process and trial rights matter most."[235]

It is unjust to subject a wrongfully accused defendant to a greater pre-trial punishment than they would receive if convicted after a trial. Allowing self-convictions when there is no other legal recourse to end wrongful punishment provides defendants with a functional stop-gap solution. It is a functional resolution for those who do not expect extensive due process, are highly motivated to resolve and are likely to receive generous offers that they otherwise would not receive after a trial.

None of these observations or concessions diminish the fact that wrongful convictions are miscarriages of justice. Even where the defendant is a recidivist who receives a favourable deal, a wrongful conviction can severely disrupt their lives and undermine

[234] See *ibid* at 1158.
[235] See *ibid* at 1153.

the public's confidence in the administration of justice. But a narrow focus on wrongful *convictions* risks overlooking the fact that they are the aggregate results of wrongful *accusations*, *arrests*, *prosecutions*, *pre-trial restrictions*, and occasional *pre-trial detentions* that precede them. Not all wrongful accusations end in wrongful convictions, but all wrongful convictions necessarily begin with wrongful accusations and arrests. Similarly, not all wrongful prosecutions end in wrongful convictions, but all wrongful convictions necessarily entail a wrongful prosecution. Furthermore, and as discussed above, wrongful convictions are not exclusively or even primarily the result of self-convictions, with many documented wrongful convictions occurring after a trial. By citing wrongful convictions as a reason to be wary of plea bargaining or certain forms of self-conviction, plea bargaining opponents overlook these more fundamental and foundational miscarriages of justice.

This oversight is especially problematic in cases where the effects of the proceedings leading up to a wrongful conviction are functionally identical to the wrongful conviction itself. A wrongfully-charged defendant who is arrested for an offence and denied bail but ultimately acquitted at trial is in functionally the same position as another wrongfully-charged defendant who is arrested for that same offence, denied bail, but ultimately convicted on that trial date, either through self-conviction or through the trial process itself. The only meaningful distinction between these two hypothetical defendants is the conviction itself. Where that conviction does not involve further punishment or restrictions, it is arguably a negligible factor to be considered when evaluating the situation for miscarriages of justice.

For example, the police find two functionally identical defendants inside a vehicle and wrongfully arrest them for stealing it a week earlier. Both claim to have not known the vehicle was stolen and tell the police that an acquaintance who lent them the vehicle is the most likely suspect, but are nonetheless remanded into custody. Both apply for bail but are denied, as they live outside of the jurisdiction normally, cannot access a cash

deposit, have limited criminal records comprised of minor property and administration of justice offences, and cannot otherwise satisfy the bail judge that they will attend the trial. Neither is prepared to admit that they stole the vehicle, so a trial date is set.

A week before trial, the prosecutor learns from an out-of-province colleague that the mutual acquaintance confessed to several vehicle thefts with similar facts to this one in their home jurisdiction several months ago. The prosecutor discloses this fact to the defendants but still believes that the recent possession doctrine[236] gives the state a reasonable prospect of a conviction as parties to the offence. Because there is now an alternate suspect, and both have spent a considerable amount of time in custody, the prosecutor offers them the option to plead guilty to a lesser-included offence of possessing property obtained by crime in exchange for a small fine noted in default. Should they opt for trial, the prosecutor indicates they'll proceed on the charged offence and recommend a time-served custodial sentence followed by probation. Defendant #1 accepts this deal on the trial date by agreeing they should have known the vehicle was stolen and is released after the judge authorizes the sentence. Defendant #2 refuses the deal, runs the trial on an alternate suspect defence, and is acquitted.

Because neither defendant was subjected to court-imposed restrictions past their trial date, the only meaningful distinction between them is that one was formally convicted and received an addition to their record while the other was not and did not. But in this scenario, the conviction itself is the factor that arguably contributes the least to the overall miscarriage of justice. Rather, the pre-trial detention in a different jurisdiction, coupled with the attendant opportunity loss, separation from one's family or social group, public repudiation, lack of viable bail programs, investigative inertia, low and vague prosecutorial thresholds for proceeding and similar social and legal deficiencies contribute the lion's share to the injustice each faced. Framed negatively, the defendant who was acquitted after risking a trial is functionally no less the victim of a miscar-

[236] See *R v Terrence*, [1983] 1 SCR 357, 4 CCC (3d) 193.

riage of justice than the one who attenuated their potential jeopardy by self-convicting and accepting a nominal formal punishment. Both defendants would have benefitted from more thorough inter-jurisdictional investigation and information-sharing, ongoing plea negotiations throughout the pre-trial period, and the ability to self-convict without admitting the offence.

Not all voluntary wrongful convictions are the same, and many factors can mitigate or aggravate the degree to which they might reasonably amount to miscarriages of justice. Questions about the offence's severity, whether the defendant had a criminal record before the wrongful conviction, whether the defendant received a criminal entry on their record or was discharged, the amount of time spent in custody, if any, and the circumstances of their pre-trial restrictions or detention are all factors that can make a wrongful conviction more or less unjust. By comparison, whether a defendant formally self-convicts as a result of a plea bargain or is convicted by a judge or jury is arguably inconsequential and assists very little in addressing the factors that make wrongful convictions miscarriages of justice. Instead, focusing on the composite stages preceding a wrongful conviction is likely a more profitable avenue to address the end problem.

Requiring arrest warrants as a rule, rather than an exception, or requiring the police to establish something akin to a *prima facie* case before arresting a defendant without one may help rein in wrongful accusations and arrests. Requiring prosecutors to have a clear and demonstrable likelihood of conviction, rather than a merely reasonable prospect of conviction, standardizing and expanding inter-jurisdictional information sharing, and funding legal aid programs to allow defendants to meaningfully investigate their cases and develop positive defences may curtail more wrongful prosecutions. Similarly, mandating and enforcing continuous internal peer review throughout the prosecution or requiring judicially-supervised case management between counsel in more criminal cases may do the same. Establishing adequate bail programs and accommodations in provinces that lack them and expanding the range of community support and supervision throughout

the country may make it possible for more defendants to be safely and securely released into the community pending trial and thus may curtail the perceived need to self-convict to end wrongful pre-trial detention.

Plea bargaining opponents who point to wrongful convictions as a reason to repudiate the practice miss the point that simply preventing or limiting a defendant's ability to bargain for their freedom accomplishes none of these objectives. Plea bargaining is not a proximate cause of most wrongful convictions, and eliminating or curtailing it does little to address the wrongful accusations, arrests, prosecutions, pre-trial conditions and pre-trial detentions that underlie and aggravate voluntary wrongful convictions. Where a wrongful self-conviction is capable of redressing some or all of these injustices in a way that is expedient, mutually beneficial, or both, I argue they should be encouraged. Realistically, the justice system's task is to minimize the miscarriages of justice that culminate in wrongful convictions, not to rally around fantastical calls to eliminate them altogether.[237]

Rather than embrace a seemingly duplicitous and entirely unnecessary "legal fiction," I argue that the best way to allow wrongfully punished defendants is for Parliament to formally codify a non-culpatory uncontested plea. A non-culpatory uncontested plea like *nolo contendere* allows defendants to self-convict without having to admit the allegations against them. Under American common law, they are inadmissible in subsequent proceedings. To the extent that *nolo contendere* pleas are available in this format, they are the ideal legal instrument for enabling an innocent defendant to end their wrongful punishment. They allow defendants to waive formal proof requirements while claiming nothing about what the defendant believes and may be inadmissible in subsequent proceedings. Although critics view these pleas as dishonest, defendants stuck in a wrongful punishment holding pattern may enter them honestly to draw their unjust circumstances to an end.

[237] See MacFarlane, *supra* note 210 at 405.

4.1.3 Substance

Although allowing defendants to end wrongful incarcerations with as little fallout as possible is laudable, some plea bargaining critics argue that this individual good comes at too great a collective price. In his article "Harmonizing substantive-criminal-law values and criminal procedure: The case of Alford and nolo contendere pleas," Stephanos Bibas argues that *nolo contendere* and *Alford* pleas detract from substantive legal values by taking the focus off denouncing crimes and reforming criminals and shifting the focus onto economic bargaining for sentence mitigation. Substantive criminal values are the moral underpinnings of the criminal justice system. Denouncing and deterring criminal behaviour, reintegrating offenders into society, and giving them a personal sense of accountability are substantive criminal values, as are the other sentencing principles codified in *Criminal Code* sections 718 — 718.2. Per Bibas, procedural values include choice, autonomy, accuracy, and efficiency.

It is important to note that Bibas is not opposed to plea bargaining *per se*. His exact concerns are with *nolo contendere* and *Alford* pleas, and he recognizes that plea bargaining has some value as a means to "induce guilty defendants to confess and start repenting."[238] But most of the substantive problems he raises with *nolo contendere* and *Alford* pleas specifically apply to plea bargaining generally, insofar as plea bargaining prizes procedural values like efficiency and certainty over substantive values like denunciation and deterrence.[239] Bibas addresses these concerns under three broad categories:

- **Justifications for punishment and the law's moral norms.** Punishing defendants is the ethical business of the criminal justice system. The criminal justice system centres on the belief that the courts should denounce offences and offenders should be educated and reformed. Plea bargaining disregards these norms in the

[238] See Bibas, "Harmonizing Substantive Values," *supra* note 21 at 1400. A former academic, Bibas was appointed by former US President Donald Trump to the United States Court of Appeals for the Third Circuit in 2017.

[239] See *ibid* at 1367.

name of procedural efficiencies and economic autonomy.

- **Reluctance to confess and the value of confession.** Plea bargaining defendants may be motivated by a reluctance to confess their misdeeds. Confession is good for defendants, victims, and society and should therefore be encouraged. Conversely, insofar as plea bargaining allows defendants to avoid confession, they should be discouraged.

- **The substantive value of trials.** Trials are not merely a way to determine a defendant's guilt or innocence. Instead, they are "morality plays" that denounce unlawful conduct and place society's values on display. On the other hand, shadowy plea-bargained deals try to keep this process out of the public's eye.

These substantive harms Bibas associates with *nolo contendere* and *Alford* pleas are inductively applicable to plea bargaining generally. Merely disallowing *nolo contendere* and *Alford* pleas is insufficient to reverse the erosion of substantive legal values, halt it, or even meaningfully slow it down. In Canada, where plea bargains are encouraged but *nolo contendere* and *Alford* pleas are formally unrecognized, Bibas's critiques of *nolo contendere* and *Alford* pleas are nonetheless applicable to plea bargaining. However, Bibas's praises for plea bargaining are confined to its ability to coerce guilty defendants into confessing their crimes.[240] This limited view both fails to touch upon the real *substantive benefits* that plea bargains entail and ignores the *substantive harms* that trials cause. To the extent that plea bargaining encourages and develops different substantive law benefits, the substantive law objection is less an objection in principle and more an objection rooted in a preference for competing substantive values.

[240] See also Stephanos Bibas, "Bringing Moral Values into a Flawed Plea-Bargaining System" (2003) 88:5 Cornell L Rev 1425 [Bibas, "Bringing Moral Values"].

Justifications for Punishment and the Law's Moral Norms

Bibas argues that criminal law is not simply a means for meting out punishments to counteract crimes. It is also a way to achieve retributive, denunciatory, and rehabilitative ends. Bibas proposes a "theory of punishment as moral education"[241] where he argues that properly constructed criminal sanctions can develop an offender's atrophied conscience and foster a sense of responsibility in them. By doing so, the justice system increases the offender's chance to rehabilitate and decreases their risk to society. Values like retribution and rehabilitation are considered alongside harm reduction principles, such that victims are vindicated by seeing their perpetrators take responsibility for their actions and receive their due punishment. More generally, the courts deter all members of society from committing such crimes by reminding them that they will be similarly corrected if they choose to similarly offend.

Plea bargaining, on the other hand, gamifies the justice system by prompting its various participants to focus on cost-benefit analyses rather than on the substantive values Bibas champions. Plea bargaining critics argue that the practice encourages defendants, prosecutors, and courts to focus on cost efficiencies rather than the fittest and most appropriate sentence.[242] Values like retribution and rehabilitation take a back seat to defendants and prosecutors minimizing and maximizing sentences, respectively, and courts encourage resolutions that keep process costs at a premium. The focus shifts to individual autonomy and procedural efficiency rather than on society and the system's underlying values.

Bibas correctly notes that plea bargaining's proponents advocate for the process because it dramatically boosts procedural efficiency and astutely notes that these efficiencies come at the cost of substantive legal values. He rightly categorizes these efficiencies as *procedural* benefits but incorrectly casts them as coming at the expense of substantive values generally and necessarily. Although procedural efficiencies have a substantive

[241] See Bibas, "Harmonizing Substantive Values," *supra* note 21 at 1390.
[242] See Alschuler, *supra* note 4; Bibas, "Bringing Moral Values," *supra* note 240.

cost, Bibas fails to consider the *substantive benefits* that procedural efficiencies concomitantly bring with them. Instead, I argue that procedural efficiencies *qua* efficiencies are normative goods necessary for the law to realize its underlying substantive aims. Plea bargaining opponents generally believe that defendants who receive a trial receive superior due process compared to defendants who negotiate an early plea deal. This belief's problems begin with the misperception that trials are effective truth-finding devices.

A trial must be held in cases where negotiations have failed or are otherwise impossible. The time and expense required to schedule and run trials are prohibitive and scale poorly alongside due process. While a single judge in a single courtroom can accommodate dozens of resolved cases in a day, that same judge is only likely able to hear one or two very brief trials in the same amount of time. Trials with more witnesses or complicated legal issues may require additional days and weeks for a judge or jury to hear the entire case. Any significant increase in the number of trials set, as would be reasonably expected in a system with plea bargaining removed, results in a significant backlog and increases the likelihood of errors at first instance. Relieving this backlog and protecting against these errors would require increasing "court resources," such as judges, lawyers, court staff, correctional staff, facilities and logistics. Failing to relieve this backlog would severely interfere with a defendant's procedural right to be tried in a reasonable time and with the substantive values of having a trial heard while recollections are fresh and the community still feels the offence's impact. Conversely, the reverse is true when more unnecessary trials stop and only the issues that need adjudication receive judicial attention.

The second branch of this criticism argues that the cost-benefit analysis inherent to plea bargaining necessarily prioritizes deal-making at the expense of a thoughtful analysis of the fittest and most appropriate sentence.[243] This criticism too quickly ignores deal-making's role *as a form of thoughtful sentencing analysis*. Plea negotiations allow

[243] See Bibas, "Harmonizing Substantive Values," *supra* note 21 at 1404.

prosecutors and defendants to discuss the most mitigating and aggravating aspects of the case, weigh these values against one another, and determine whether a middle ground can adequately account for both. Even where an agreement is not ultimately reached, the process narrows the range of possible issues where trials are required or the range of appropriate sentencing recommendations where a defendant still wishes to self-convict.

Plea bargaining is a streamlining process where the parties with the most access to the best information review, discuss and analyze the evidence amongst themselves. Hastily negotiated plea deals are a hazard to be avoided, not an inevitable consequence of this process. Where effective, plea bargaining helps ensure accurate and fair pleas. Accuracy, fairness, and efficient functions that lower process costs for all parties involved give the system the time and resources it needs to address substantive justice concerns. Although these values differ from the confessional principles that Bibas prizes, they are no less substantive or essential.

Reluctance to Confess and the Value of Confession

Bibas next discusses the substantive value of defendants publicly confessing their crimes. He draws upon examples of defendants whose personal epiphanies in the face of their guilt brought them to confess their guilty honestly,[244] contrasting them with defendants who avoid these self-confrontations. Although this criticism primarily targets ambivalent *nolo contendere* and defiant *Alford* pleas, as defendants who enter such pleas do not attempt to confess at all, it applies with some force to plea bargaining more generally.

To the extent that plea bargaining may induce defendants to enter insincere guilty pleas just as readily as it may induce them to enter *nolo contendere* pleas, the relative value of the guilty plea as a *confession* is minimal. For a confession to have any substantive value, it must be sincere. An insincere confession does little to rehabilitate a defendant, make society more secure, or provide victims with any satisfaction. Bibas

[244] See e.g. *ibid* at 1364. It is unknown whether this particular confession assisted the defendant's rehabilitation.

discusses such confessions against the presupposition that police and prosecutors should pursue them over certain convictions.[245] I disagree with this presumption.

I agree with Bibas when he argues that a sincere guilty plea is preferable to a non-committal *nolo contendere* plea or a false guilty plea. Defendants who genuinely see the error of their ways, commit to turning their lives around, and have the means and support to do so are prime candidates for rehabilitation and poster children for the system's ability to return just results. But for many reasons, such offenders are not the norm, and the justice system has no method to produce more of them reliably. Instead, justice system participants must grapple with a tide of sub-optimal rehabilitation candidates, many of whom are likely to be more ambivalent about their culpability and less remorseful for the consequences of their actions. Given this reality, those advocating for confessions as rehabilitative tools should consider the relative value of a sincere confession that may never materialize versus a disingenuous acceptance of responsibility.

To support his position, Bibas relies on a series of informal surveys and limited-scale studies as evidence that he believes supports his approach to moral criminal punishment. These include anecdotal accounts from judges and lawyers he knows and a study of recidivism rates among eight offenders in one state who entered *Alford* pleas.[246] While these sources are not without value, they are neither clear nor convincing. Unlike the *value of confessions*, which are difficult to quantify without hard empirical data and diligent study, the *value of self-convictions* are readily inferrable. When defendants self-convict, they excuse all witnesses from the trial, admit all the elements of the offences alleged against them, and submit to the state for punishment. Victims can confront the one who wronged them without the added pressure of having to help convict them, perceived or otherwise.

Without dependable data explaining the efficacy of confessions and a way to reliably increase the percentage of sincere confessions amongst self-convicting defendants, sacri-

[245] See *ibid* at 1399 — 1400.
[246] See *ibid* at 1395 — 1398.

ficing certain conviction and resolution to a case in exchange for a merely possible and similarly remorseless conviction after a trial is a dubious prosecutorial position. Requiring vulnerable or unwilling witnesses to testify at such trials and forcing defendants willing to resolve to continue on punitive pre-trial conditions further problematizes this already dicey proposition. Although it would be preferable for defendants to repent sincerely, this is never a guaranteed outcome in any case, nor is it necessary for justice to be done. Absent evidence that defendants who plea bargain are less likely to be rehabilitated than defendants convicted after unwanted trials, plea bargains should be encouraged.

The Substantive Value of Trials

Bibas sees the jury trial as the law's ideal solution for defendants who cannot or will not plead guilty or for factually innocent defendants.[247] He envisions trials as "morality plays" that "dramatically present the conflicting moral values of a community in a way that could not be done by logical formalization."[248] Through them, the court confronts defendants with "solemn pronouncements of guilt" and condemns them in the hopes of "break[ing] through the defendant's denial mechanisms, driving home in undeniable detail the wrongfulness of the crime."[249] Allowing defendants to enter *nolo contendere* or insincere guilty pleas sends the message that justice does not require defendants to take a clear stance and should therefore be discouraged. Instead, Bibas believes defence lawyers should challenge their clients when they deny they are guilty and encourage them to consider the long-term advantages of sincerely pleading guilty.[250]

Although reimagining defence counsel's role in this manner would undoubtedly encourage more confessions, this approach is immensely problematic. Beyond the fact that it would require reconceiving the entire adversarial trial system to execute, this proposition ignores that criminal defendants hire lawyers because they wish to contest their

[247] See *ibid* at 1400.
[248] See *ibid* at 1401.
[249] See *ibid*.
[250] See *ibid* at 1404f.

charges or negotiate for the most favourable outcome.[251] They do not hire lawyers because confession is good for the soul. Expecting defence lawyers to roleplay as grand inquisitors creates an unnecessary and unhelpful "prisoner's dilemma." In this dilemma, all defence lawyers are encouraged to try to convince defendants to confess, knowing that the first one to tell the defendant that they have a case to fight ultimately walks away with a client. Enforcing this expectation would be a herculean effort without a fully publicly funded system for criminal defence attorneys.

Even if this confessional expectation were enforceable, there is good reason to doubt that it would be a wise idea. Bibas is alive to the problem of wrongful convictions,[252] but does not consider how this proposal will certainly and dramatically increase them. Though imperfect, the adversarial system ensures that innocent criminal defendants have an advocate to advance their position against the state's allegations. By transforming that advocate into another person whose job is to convince them to confess, even recalcitrant innocent defendants may come to believe there is little point in contesting the allegations against them.[253] Bibas does not account for how the "morality play" model of justice will handle the swath of wrongful convictions that are sure to result. Nor does he address how society will go about reconciling the wrongfully convicted after presuming them guilty, gaslighting them into thinking that they *were* guilty, and publicly denouncing them for their unrepentance.

Bibas correctly draws attention to the impact of efficiency-driven plea bargains on substantive criminal values. The principles he defends are worth defending and should not be uncritically put to the side in exchange for procedural efficiencies and fairness. But the line that he draws between substantive and procedural values is less clear than he alludes, such that the values he classifies as procedural impact the values he classifies

[251] See Bowers, *supra* note 187 at 1122 — 1123.

[252] See Bibas, "Harmonizing Substantive Values," *supra* note 21 at 1382 — 1386.

[253] It is interesting to consider the similarities between this proposal and the events that occurred at trial in *Alford*. Alford's trial lawyer actively and successfully convinced their client to plead guilty after reviewing the seemingly overwhelming evidence against him, giving rise to the plea procedure Bibas believes so profoundly flawed.

as substantive, and vice versa. The substantive confessional shift Bibas suggests is a disaster but is generally directed at *nolo contendere* and *Alford* pleas specifically, rather than plea bargaining generally. After considering both the truth and fairness problems in the next section, I conclude by examining Bibas's critiques of *nolo contendere* pleas specifically to determine whether they should be formalized in Canada.

4.2 *Nolo Contendere*

The problems that plea bargaining critics have with the practice amplify with the *nolo contendere* plea.[254] Even plea bargaining advocates are wont to disdain *nolo contendere* pleas as ineffective, unreliable, and unjust.[255] The criticisms levelled against *nolo contendere* pleas, in particular, may be tracked using the same problem criteria used to track plea bargains generally:

- **The truth problem.** Defendants who self-convict while refusing to admit guilt or while actively maintaining their innocence say one thing while meaning another. Doing so is untruthful, and lawyers who assist clients with such pleas risk misleading the court by allowing defendants to deceive it openly.

- **The fairness problem.** People charged with crimes are presumed innocent until proven guilty. The presumption should still stand when defendants protest their innocence or refuse to acknowledge their guilt openly. Where a defendant self-convicts but does not acknowledge their guilt, their motives are suspect. Such pleas thus appear unfair.

- **The substantive problem.** *Nolo contendere* pleas are evasive. Where guilty and not guilty pleas can signify both the truth or falsehood of the underlying allegations and a defendant's belief about the charges, *nolo contendere* pleas cannot. Allowing defendants access to ambivalent pleas sends the message that actual guilt and innocence are secondary concerns, thus undermining criminal law's moral core.

[254] Critics like Bibas are a prime example. Bibas is not staunchly opposed to plea bargaining and believes the practice may have legitimate uses. But he is adamantly opposed to *nolo contendere* and *Alford* pleas, believing that these pleas amplify the worst aspects of plea bargaining through their quirks and unusual features. See Bibas, "Bringing Moral Values," *supra* note 240 at 1432.

[255] See Bowers, *supra* note 187 at 1165 — 1170.

4.2.1 The Truth Problem

One impediment to allowing defendants to enter *nolo contendere* pleas is cognitive dissonance. Cognitive dissonance occurs when a person holds or feels they must simultaneously hold two or more contradictory viewpoints. A person who self-convicts but refuses to admit guilt appears to do just that. Convictions naturally follow when defendants plead guilty or when fact finders have found them guilty after hearing enough evidence to convict them beyond a reasonable doubt. However, where defendants enter guilty pleas but appear to be maintaining that they are not guilty, or even innocent, those pleas raise a *prima facie* problem of truthfulness. Although seemingly contradictory, I argue that this problem is superficial and fundamentally misunderstands formal pleas and admissions. When pleas and admissions are defined and understood more carefully and precisely, these apparent difficulties become unproblematic. I approach this definitional problem as follows:

- **Propositions.** *Propositions* are statements about the world that can be true or false. In criminal legal proceedings, facts generally appear as allegations that may be proven, admitted, disproven, or remain unproven.

- **Facts, belief and proof.** *Facts* are true statements about the world. To be a fact, a proposition must be objectively true. A person *believes* a proposition when they subjectively accept that it is true. A person *proves* a proposition when they convince another to believe it. In this sense, belief and proof are subjective, while facts are objective.

- **Pleas and admissions.** In criminal proceedings, *pleas* are propositions that primarily convey general information about what, if anything, prosecutors will be required to prove at trial. Similarly, *admissions* are propositions that a court must accept as having been proven. Pleas and admissions make statements about the

world but are primarily used to advise the court what allegations, if any, the prosecutor must prove.

Propositions and Facts

I define *propositions* as statements about the world that can be objectively true or false. "The sun rises in the east and sets in the west," "Labour Day is his favourite holiday," and "the earth orbits the moon" are all propositions. The first proposition is true, the last proposition is false, and the middle proposition may be true or false, depending on its referent. In the criminal legal context, propositions commonly appear as *allegations* that may be proven, admitted, or disproven. "The victim consented to the fight," "the defendant took reasonable steps to verify the complainant's age," and "the prosecutor has demonstrated guilt beyond a reasonable doubt" are all propositions that can be objectively true or false, can be proven or disproven, and that depend on the opinion of the person assigning those truth-values. Propositions may perform any number of functions, but I focus on three that are particularly important in the criminal legal context: a proposition's ability to convey *truth*, *belief*, and *proof*.

Facts, Belief and Proof

Some propositions are true or false, independent of whether any particular person subjectively knows or understands that is the case. For example, although someone may believe the world is flat or refuse to believe that four is two-thirds of six, the first proposition is false, and the second is true. Although legal professionals make a bad habit of referring to trial allegations as "facts," I only refer to true propositions as facts. Unlike facts and truth, *beliefs* describe propositions that a person takes to be true, regardless of whether they are, in fact, true. Beliefs are true when they correspond to objective reality and false when they do not. *Proof* refers to the process where subjective beliefs are grounded in independent criteria.

A proposition is proven when a person has justifiable reasons to believe it is true. Obversely, a proposition is disproven once a person is satisfied that there are justifiable reasons to believe it is false or that there are no justifiable reasons to believe it is true. What one person considers a justifiable reason to believe a proposition may differ from what another person may consider a justifiable reason to believe the same proposition. For example, while some people may be satisfied that a creature called Bigfoot exists based on eyewitness evidence and a handful of blurry photographs, others may demand more proof before coming to that same conclusion. To ensure consistency and predictability, many fields of inquiry, such as law, have established common standards of proof. In law, proofs are generally founded on objective or external criteria to satisfy a judge or jury that their beliefs about a proposition are reasonable.[256]

True propositions may be proven false, while false propositions may be proven true. Similarly, a proposition, once proven, may be disproven. For example, at various stages in history, it was considered *proven* that women had fewer teeth than men,[257] that the sun revolved around the earth, and that Thomas Sophonow murdered Barbara Stoppel.[258] These propositions have since been disproven, so none of these beliefs may be reasonably held today. But because these untrue propositions were once proven, it follows that *there is no necessary correlation between proof and fact.* Therefore, to properly understand how pleas and admissions function as proof-conveying devices, these concepts of truth, belief, and proof must be kept distinct from one another.

Pleas and Admissions

Pleas are answers to criminal allegations that a prosecutor must prove. A defendant who says they are or are not guilty of a crime makes a statement about the world that may be

[256] See John Wigmore, *The Principles of Judicial Proof* (Boston: Little, Brown, and Company, 1913) at 13 — 14.

[257] See Bertrand Russell, *The Basic Writings of Bertrand Russell* (New York: Routledge, 2009) at 66.

[258] See *R v Sophonow (No 2)*, [1985] 25 CCC (3d) 415, MJ No 10 (QL). See also MacFarlane, *supra* note 210 at 427.

true or false. However, pleas do not necessarily reflect a defendant's belief. A defendant may believe that they are guilty of an offence and may, in fact, *be* guilty of an offence but still plead not guilty. Such defendants do not provide information about their beliefs or whether the plea is factually accurate. Instead, they notify the prosecutor and the court that the offence's essential elements must be proven. Similarly, a defendant who enters a guilty or *nolo contendere* plea notifies the prosecutor and the court that the offence's essential elements need not be proven. However, that defendant does not necessarily provide any additional information about whether they believe they are guilty or if they are, in fact, guilty.

Even where a defendant believes what they are saying through their plea, those subjective beliefs do not necessarily reflect the objective truth.[259] However, in every case, a plea outlines what must and must not be proven. I argue that conveying this information is a plea's most crucial function.

Defendants who make admissions also do so through propositions that do not need to be proven. In Canada, defendants may admit any "facts alleged [by the prosecutor] for the purpose of dispensing with proof thereof."[260] Although admissions generally cover elements of an offence, any mutually agreed-upon proposition can be admitted under this section. Just as an uncontested plea obviates the need for the prosecutor to prove an offence, admissions remove any need for either side to prove the specific proposition in question.[261] Once a defendant admits an allegation, otherwise admissible evidence may not be called or considered to contradict that admission.[262]

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[259] In the timeless words of Judge Maya Gamble to defendant Alex Jones, "Your beliefs do not make something true." See Tom Chatford, "The fate of Alex Jones is a small battle won in the war against alternative facts," *The Guardian* (7 August 2022), online: <theguardian.com/commentisfree/2022/aug/07/fate-alex-jones-small-battle-war-against-alternative-fact-sandy-hook>.

[260] See *Criminal Code*, *supra* note 2, s 655. If *facts* signify only true propositions, the phrase "facts alleged" is nonsensical, as *allegations* may be true or false, but facts must be true. I read the phrase "facts alleged" as referring to a *proposition*, and I refer to it as such throughout.

[261] See *Korski*, *supra* note 167 at paras 119 — 128 for a discussion of the distinction between formal and informal admissions.

[262] See *Handy*, *supra* note 168 at para 74.

Pleas and admissions deal primarily with proof, not truth or belief. Consequently, the *truth problem* is a definition problem. By entering a plea or making an admission, defendants advise the prosecutor and the court which propositions will require proof, if any. Pleas are not evidence, and defendants neither swear nor affirm that the propositional content of their pleas is true when they enter them. As a result, guilty defendants may plead not guilty, set a trial, and not worry about being liable for perjury. Where a defendant is unwilling or unable to enter a plea, the court must enter a not guilty plea on their behalf, regardless of whether the defendant *believes* they are not guilty and whether the defendant *is* not guilty. When a defendant resiles their guilty plea, Canadian courts focus on whether the defendant entered it voluntarily, knowingly, and unequivocally, not on whether the plea was factually true.[263] Therefore, I argue that a plea's primary purpose is to signal to the court whether evidence will be called or contested, notwithstanding a defendant's subjective beliefs or whether those beliefs are objectively true.

4.2.2 The Fairness Problem

Although *nolo contendere* pleas are not implicitly untruthful, there is still an intuitive sense that they are unfair. Defendants may enter a guilty plea because they sincerely believe the allegations or wish to take responsibility and suffer a deserved consequence. Pleas that a defendant enters in these or similar circumstances seem fair on their face. By contrast, a defendant who enters a *nolo contendere* plea does not take responsibility for the offence. This fact makes it less likely that defendants will self-convict because

[263] See e.g. *R v Behr*, 1966 CanLII 252 (ON SC). In that case, the Ontario Superior Court upheld a guilty plea despite the defendant's lawyer telling him that his guilty plea was not an admission of guilt, as it was nonetheless satisfied that the plea was voluntary. But there are exceptions to this. See *R v Catcheway*, 2018 MBCA 54, where the defendant pleaded guilty to being unlawfully in a dwelling house despite having been incarcerated at the time. The Manitoba Court of Appeal allowed him to withdraw his guilty plea because there were "valid grounds for doing so." Absent evidence that his pleas were uninformed or involuntary, it erred in doing so. To its credit, the court simultaneously arrived at the a more defensible solution by allowing the appeal against conviction based on a miscarriage of justice, as there was compelling evidence that the defendant was innocent.

they believe they are guilty or deserve the consequences. Pleas that a defendant enters in these or similar circumstances seem unfair.

As discussed above, Canadian criminal law has a lengthy history of allowing defendants to plead guilty only when they do so knowingly, voluntarily, and unequivocally. These principles are so deeply ingrained in Canadian criminal law that they found their way into the informal *nolo contendere* plea procedure. As a result, any time a defendant invites a conviction, the court receiving their plea must ensure that the defendant is not self-convicting due to undue pressure, short-sightedness, or confusion. But despite these protections, some concerns remain. Answering these worries requires looking at both the *factual foundation* requirement and the residual *judicial discretion* to refuse to accept a self-conviction.

- **Factual foundation.** Canadian judges may only allow a defendant to plead guilty if there is a factual foundation for the charges. This judicial oversight helps ensure that defendants do not convict themselves when faced with unfounded or unlawful accusations. Insisting on this requirement for *nolo contendere* pleas helps ensure that defendants are not held liable for unfair or untruthful allegations.

- **Judicial discretion.** Defendants cannot self-convict as a matter of right. As a result, even where Canadian judges are satisfied that allegations are factual, they may still reject a defendant's guilty plea. Giving judges final discretion over whether to accept a plea allows them to fulfill their judicial mandate to treat defendants fairly.

Factual Foundation

Notwithstanding that defendants can legally admit facts against their interests and invite the court to convict them, there are situations where it would be unjust for the court to do so. To help ensure that defendants do not invite baseless convictions, the *Criminal*

Code requires that judges ensure that "the facts support the charge."[264] Although the common law does not require judges to ensure that there is a factual foundation for *nolo contendere* pleas,[265] many American jurisdictions have codified the requirement into law.[266]

Where a defendant either refuses to accept responsibility for an offence overtly or actively protests their innocence, reviewing the allegations and the supporting evidence lets the court evaluate any apparent equivocations. In cases where the allegations are straightforward, the evidence supporting the allegations is strong, or both, defendants who vacillate after self-convicting may be safely ignored. In cases where the allegations are complex, or the evidence supporting the allegations is equivocal, judges may consider these factors when deciding whether to allow the defendant to convict themselves or exercise their discretion and set a trial date. In other cases where the propositions the prosecution relies upon do not make out the offence charged, the factual foundation requirement may help stop these false pleas.

Requiring a factual foundation for both guilty and *nolo contendere* pleas reflects an appropriate concern for fairness. Defendants who enter explicit guilty pleas may reassure the court that they understand and admit the allegations they face. Where defendants cannot or will not plead guilty but wish to self-convict, the court may ensure that the allegations are accurate and that the charges stemming from those allegations are fair by reviewing them before accepting a plea.[267] But even where the allegations support the charge, judicial oversight allows courts to stop self-convictions they deem unfair.

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[264] See *Criminal Code*, *supra* note 2, s 606(1.1)(c).

[265] See Pickle, *supra* note 46 at 250 — 251.

[266] States that have legislated this requirement include Arizona, Arkansas, California, Colorado, Delaware, Florida, Kansas, Maine, Massachusetts, Michigan, New Hampshire, North Carolina, Ohio, Oklahoma, Rhode Island, Utah, and Wisconsin: cf notes 83 & 84 above for a list of the enabling acts and sections. Similarly, defendants may only enter best-interest pleas like *Alford* when judges are satisfied that a factual foundation exists.

[267] See *North Carolina v Alford*, 400 US 25 at 32, 91 S Ct 160 (1970).

Judicial Discretion

In Canada and the United States, judges have immense discretion when deciding whether to accept or reject uncontested pleas.[268] This broad discretion is a final safeguard for a defendant's presumption of innocence. Even where a court is satisfied that a defendant is knowingly and willingly inviting a conviction and that there is sufficient evidence to support convicting them, a judge may still refuse to authorize the plea. Because criminal defendants cannot self-convict by right,[269] the presiding judge is under no obligation to give reasons for doing so. However, the judge should direct this role and their power to preventing pleas that they suspect should not result in convictions. Neither defendants nor prosecutors have eminent domain over the presumption of innocence. Instead, defendants are presumed innocent until a judge is satisfied that they are guilty beyond a reasonable doubt.

Like any other person, criminal defendants are susceptible to "buyer's remorse," minimizing or denying their behaviour and misunderstanding polysemic legal concepts.[270] Where a defendant has told the court that the prosecution does not need to prove its case against them, and where there is an adequate allegational matrix to support the prosecution's case, the presumption of innocence no longer stands. It is difficult to convincingly argue that proceedings are unfair when defendants are both presumed innocent and where judges must ensure that defendants only self-convict on demonstrable facts that support the charge.

4.2.3 The Substantive Problem

As discussed above, critics like Bibas fear that the modern common law criminal justice system has developed a hyper-inflated procedural focus that has eroded its ability to

[268] But see § 5.2 below.

[269] See e.g. *R v Goodheart*, 2005 ABCA 126 at para 2; *R v Turnbull*, 2016 NLCA 25 at para 4; *R v Podolski*, 2018 SKPC 13 at para 1.

[270] Correctly understanding abstract legal concepts may be an unsolvable problem. See Frederick Schauer, "Formalism" (1988) 97:4 Yale LJ 509 at 514.

achieve its underlying moral aims.[271] Although this argument applies to expediently-entered and insincere guilty pleas by extension, Bibas's criticisms primarily focus on the ambivalent *nolo contendere* and defiant *Alford* pleas.[272] Bibas's *nolo contendere* and *Alford* plea criticism tracks his broader rebuke of efficiency-driven plea bargaining. He argues that courts and legislatures should scrap these pleas as they encourage defendants to avoid confessions, undermine the law's moral authority by allowing defendants to cling to their dissonant values, and bypass the curative trial process to a universal detriment. I argue that although this concern for substantive criminal law is compelling, it is ultimately misdirected. I answer these substantive criticisms under three general headings:

- **Accepting valuable compromises instead of questionable confessions.** Sincere confessions may be preferable to ambiguous admissions, but that does not mean the latter have no value. *Nolo contendere* pleas help secure otherwise unobtainable convictions, mete out punishments to defendants willing to accept them, and allow more defendants to self-convict with a clear conscience.

- **Exposing ideological divides and explicating educational opportunities.** When defendants are allowed to accept the benefits of plea bargaining while refusing to admit guilt outright, they expose an ideological divide between themselves and the state convicting them. Once this divide is explicit, courts have a unique opportunity to investigate its causes and educate those whose private morality is at odds with public standards.

- **Avoiding the harms unwanted trials cause.** Defendants who cannot or will not plead guilty must set a trial. This requirement exposes defendants and all justice system participants to the potentially harmful effects of trials and opens

[271] See Bibas, "Harmonizing Substantive Values," *supra* note 21 at 1362.
[272] See *ibid* at 1403.

the proceedings up to wrongful acquittals. Expanding the scope of self-convictions reduces these unwanted harms and limits these unjust results.

Avoiding Confessions Through Ambivalent Pleas

As I discussed in § 4.1.3 above, Bibas places immense value on confessions. I argued that he overvalues confessions by pointing to the apparent value of obtaining unobtainable convictions, the justice system's inability to ensure that confessions are sincere, and the lack of data quantifying the rehabilitative value of any confession. Rehabilitation will always reasonably favour a receptive offender. But without any logical reason or compelling evidence demonstrating that restricting *nolo contendere* or other ambivalent pleas correlates to an increase in sincere guilty pleas, they should not be limited.

Nevertheless, even if Bibas overvalues confessions, this does not necessarily mean that his concerns about ambivalent *nolo contendere* pleas are misplaced. Sincere confessions are valuable, even if they are not as valuable as Bibas believes, and cynically-entered *nolo contendere* pleas can undermine substantive values, even if they are not the moral landslide he fears. While plea bargains may convince some guilty defendants to admit culpability, pleas like *nolo contendere* arguably allow defendants to shirk responsibility for their offending behaviour. It is reasonable to assume that such defendants are less likely to rehabilitate than those whose consciences drive their confessions.

As a result, critics like Bibas may remain open to plea bargains while condemning non-culpatory self-convictions. This position allows Bibas to occupy a reasonable middle ground where plea bargaining is encouraged as long as defendants enter unambiguous pleas. From this vantage, he argues that the harms caused by plea negotiations come from defendants being allowed to avoid taking responsibility. *Nolo contendere* pleas allow defendants to avoid confessions, thereby avoiding the rehabilitation that confronting hard truths about themselves and their actions would achieve. Bibas specifically high-

lights cases where defendants are ordinarily reluctant to confess[273] as prime examples of cases where courts, prosecutors, and defence lawyers *should* compel them to plead guilty rather than encouraging plea deals or permitting them to plead *nolo contendere*.[274] This sharply contrasts with the conventional wisdom that encourages these pleas as reasonable compromises to resolve complex cases.

Bibas recognizes that punishment can play a part in reforming and deterring by educating them and society.[275] But the fact that *nolo contendere* pleas specifically invite punishment, and may thus play a part in reforming and deterring offenders under this definition, is at odds with Bibas's view that *nolo contendere* pleas undermine society's moral authority. Enabling more defendants to self-convict and safeguarding the means for them to do so provides defendants with more opportunities to receive punishment, thereby increasing the number of defendants who can be reformed, deterred, and educated through corrective discipline.

It is reasonable to infer that the results will be less optimal than those obtained through sincere guilty pleas. But it is also reasonable to infer that the results will be no less optimal than those obtained through insincere guilty pleas and much more optimal than if a judge or jury acquits the defendant after a trial. Absent a reliable way to ensure sincere guilty pleas, defendants willing to self-convict should be allowed to do so regardless of whether they feel they deserve punishment.

More importantly, these pleas may be truthful in ways that a guilty or not guilty plea would not be. One of the law's intractable difficulties is that it relies on equivocal concepts and assumes that judges and juries use them reasonably. In criminal law, *excuse* and *justification* are two particularly difficult examples, as the justifications people provide for their potentially criminal actions do not always line up with legally valid excuses. For example, what Parliament and the courts define as a reasonable amount of force in an

[273] Sexual offences generally, sexual offences against relatives or children specifically, and other socially heinous crimes fall into this offence class. See *ibid* at 1393 — 1395.

[274] Bibas does not discuss the rehabilitative prospects of defendants convicted after trial.

[275] See Bibas, "Harmonizing Substantive Values," *supra* note 21 at 1390.

assault or all reasonable steps to determine a sexual partner's age will invariably differ from how individual defendants define those concepts. Justifications that individual defendants invoke to explain their actions may or may not coincide with legally valid excuses and defences. Once confronted by this reality, remorseless defendants who accept convictions accept the law's authority to punish them for their actions. This concession allows defendants to enter truthful pleas and exposes the ideological divide between these defendants and the state's broadly held values.

Ideological Divides

Defendants willing to self-convict may hesitate to enter a guilty plea for many reasons. One reason stems from the moral divide between individual defendants who commit offences and the state that prosecutes them. Bibas identifies this phenomenon but hastily treats it as a fundamental problem. I argue that these pleas can helpfully identify defendants whose morality is out of sync with society's broader values, thereby providing prosecutors, judges, community corrections officers, and other actors in the justice system with information that may assist with their rehabilitation.

Where defendants enter ambivalent pleas like *nolo contendere*, Bibas contends that "society loses the authoritative vindication of its norms and the repudiation of the wrong."[276] While it is problematic for the state and its citizens to have competing or oppositional values, ambivalent uncontested pleas do not *create* those differences, but merely *expose* them. Rather than undermine the state's moral authority, as Bibas suggests, these pleas give defendants a forum where they can acknowledge the state's authority, *notwithstanding* their differences. These pleas allow the state to gauge a defendant's rehabilitation prospects using more accurate, albeit potentially less encouraging, information. Forcing a defendant to plead guilty as their only route to self-conviction may offer some empty assurances that the defendant *might come to accept their guilty pleas as*

[276] See *ibid* at 1407.

true,[277] but all but ensures that the court will receive no useful or accurate information about *what the defendant believes to be true*. Instead, the interests of justice are better advanced by showing the public that the rule of law prevails over private opinion and morality. A defendant's prospects for rehabilitation can be better understood when these belief differences are explicated, thus advancing the substantive values of reconciliation, mutual responsibility, and accuracy.

Defendants who enter these pleas notify the court that a divide exists between their moral norms and society's. To the extent that the court ought to pursue substantive criminal values on sentencing, they are better positioned to deal effectively with a defendant if they know this divide exists. Defendants who enter insincere guilty pleas or plead not guilty send conflicting or no signals to the court about their beliefs or the truth. *Nolo contendere* pleas, on the other hand, notify the court that the defendant is willing to accept punishment but unwilling to admit that they are guilty, even though pleading guilty unequivocally would very likely mitigate their sentence. This equivocation can and should prompt the substantively-inclined court to ask why, allowing the court to investigate and try to bridge that divide.

Permitting defendants who neither feel guilty nor remorseful to accept their legal culpability allows them to use uncontested pleas honestly, convey their beliefs effectively, and identify their rehabilitative prospects to the court more accurately. Once the courts and others tasked with rehabilitating offenders understand what defendants think is true, they can better understand the circumstances of offences and offenders. Accurately identifying defendants who are not ideal rehabilitation candidates can help judges tailor fit and appropriate sentences, help probation officers identify clients who require extra or particular focus and alert law enforcement officers to potential community risks. Forcing such defendants to enter insincere guilty pleas or run trials negates these benefits and invites the other ill effects accompanying these unwanted contested hearings.

[277] See *ibid* at 1399.

The Harms Unwanted Trials Cause

In § 4.1.3 above, I argued that Bibas's portrayal of trials as morality plays is at odds with the adversarial justice system and inevitably leads to unjust results. Modifying the criminal justice system in the manner he suggests would curtail the defence lawyer's role as an advocate, discourage resolution discussions between counsel, and inevitably result in wrongful convictions. Here, I argue that Bibas uncritically glorifies contested hearings as unqualified goods and ignores the harms that unwanted trials cause. To the extent that expanding permissible self-convictions to include *nolo contendere* allows more defendants, victims, witnesses, court staff, jurors and other justice system participants to avoid these harms, they should be encouraged.

Bibas correctly points out that pleas like *Alford* and *nolo contendere* are likely to be less satisfying for victims and less conducive for rehabilitating offenders than a truly remorseful guilty plea. Unless defendants willingly admit guilt, Bibas proposes that courts should require them to set a trial. He views this outcome favourable as defendants either must confront their wrongdoing, thus availing themselves of the curative properties of confession and punishment, or be taught a lesson through the evidence presented at their morality play of a trial.[278] But he ignores the genuine possibility that some defendants who must set trials instead of self-convicting will be acquitted, possibly without having to testify or have their version of events tested in court. Trials can be complex affairs, and criminal charges must be proven beyond a reasonable doubt. Problems with securing witnesses or ensuring that all the necessary evidence is admissible are not uncommon. Even strong prosecutorial cases can collapse unexpectedly, resulting in last-minute plea dealings and fire-sale sentencing discounts.

As Bibas fails to consider the costs of wrongful acquittals and frantic eleventh-hour resolution discussions, he fails to properly evaluate the benefits of sincere confessions and satisfying convictions. It is reasonable to assume that victims will be less satisfied

[278] See *ibid* at 1403 — 1404.

with a non-commital *nolo contendere* plea than a sincere guilty plea. However, it is equally reasonable to assume that they will be less satisfied with a wrongful acquittal than they would have been with a non-committal conviction. Similarly, a lackadaisical *nolo contendere* plea to a substantive offence with a victim is likely to be more satisfying for victims of that crime than a sincere guilty plea to an administration of justice offence a defendant picked up while awaiting trial.

Wrongfully acquitted defendants who would otherwise accept a conviction may not generate the same outrage that wrongful convictions do, and rightfully so. However, for victims who see their perpetrators escape justice, wrongful acquittals still undermine confidence in the justice system and subvert its substantive goals. Although much less harmful than wrongful convictions, wrongful acquittals are untruthful results and miscarriages of justice that leave the guilty unpunished, absent further civil or criminal court proceedings.[279] Meanwhile, factually guilty defendants willing to resolve are required to set their matters down for trial. They may spend more time on release conditions or confined to pre-trial detention than if they had been able to enter *nolo contendere* pleas. It is dubious whether the defendant will be more prepared to sincerely admit guilt or participate in rehabilitative measures after hearing the matter tried than when they would have agreed to self-convict before accumulating these process costs. And likely, the unnecessary expense of the trial and the burdens that the hearing imposed on the victim or any other witnesses will be on the sentencing judge's mind.

Requiring defendants to set trials when none of the parties involved want one ensures that there is one less trial date available for a truly contested matter. Society does not have a legitimate interest in requiring unwilling and otherwise cooperative defendants, victims, and professional justice system participants to engage in actual show trials. Defendants who must have their allegations adjudicated, even where they lack viable defences, are forced to spend unnecessary time in pre-trial detention or constrained by

[279] See MacFarlane, *supra* note 210 at 483.

pre-trial release conditions. At the same time, defendants with a viable defence are similarly delayed and imposed upon. Those willing to accept a final judgment to end these restrictions should be permitted to do so. Victims should be allowed to see punishment meted out, restitution made, and the process concluded, even if that sentencing package does not include a believably repentant defendant.

4.3 Formalization

If plea bargaining is or is capable of being a substantive and normative good, a presumptive case exists for expanding its scope. For defendants who cannot or will not plead guilty but are nevertheless willing to self-convict, expanding the list of permitted pleas to include *nolo contendere* accomplishes this task. Delineating the haphazard, informal plea procedure and expanding *Criminal Code* s 606's scope to include these defendants would entail numerous advantages, including:

- **Ensuring certainty in outcomes for all.** Trials are inherently unpredictable, while negotiated plea agreements are routinely unsurprising. Expanding the class of defendants who can access these plea arrangements increases certainty for all involved.

- **Delegating more control over the evidence admitted and proven to prosecutors and defendants.** Defendants who set their matters down for trial relinquish control over the evidence they know inside and out to a third-party decision maker hearing the case for the first time. Plea agreements ensure that the parties who know the case best have some control over its presentation.

- **Increasing agency and self-determination for defendants.** Justice system participants, including defendants, witnesses, and victims, have their agency eroded when they are required to participate in procedures they would each otherwise agree to forego. Allowing more defendants to opt out of trials increases their self-determination and strengthens their confidence in the justice system.

- **Transforming zero-sum prosecutions into mutually beneficial outcomes.** Whereas non-criminal litigants often have ample access to dispute resolution outside of a trial court, criminal defendants do not. Increasing access to plea bargaining increases a criminal defendant's access to mutually beneficial outcomes.

- **Sealing loopholes and tying loose ends.** The Canadian *nolo contendere* plea procedure is the result of a seemingly unintentional interaction between two *Criminal Code* procedures with potentially undesirable side effects. Formalizing and regulating these non-inculpatory self-convictions addresses these issues.

4.3.1 Increased Certainty in the Outcome

Plea Bargained Cases Generally

Because prosecutions can be fraught with uncertainty for all parties involved, certainty about how a case will resolve motivates all plea bargains. This rule holds even for those defendants who intend to plead guilty from the outset, as certainty in a case's outcome is critically important to virtually all defendants. Such defendants may wish to plead guilty to some offence charged but may only agree to plead to a lesser included offence or less aggravating allegations. Similarly, prosecutors and defendants may hotly dispute a sentence's nature and quantum, even where defendants agree to admit all allegations against them. Defendants and prosecutors who pre-negotiate pleas and sentences greatly increase their certainty of the outcome.[280]

Nolo Contendere Cases Specifically

Under the current Canadian legislative scheme, defendants who cannot or will not admit guilt must set their matters down for trial. Prosecutors always bear the burden of proving criminal charges beyond a reasonable doubt, and even defendants without a positive defence or cohesive response to the allegations against them may prevail at trial. By allowing the matter to go to trial, prosecutors risk a judge or jury wrongfully

[280] See *R v Anthony-Cook*, *supra* note 11. While jointly-recommended sentencing proposals are subject to judicial discretion and review, judges generally may not reject them. Even in cases where prosecutors and defendants cannot come up with a joint proposal or do not meet the requisite *quid pro quo* for a joint proposal, judges remain similarly constrained by the parties' sentences. See *Nahanee*, *supra* note 11 at paras 43 — 50. The importance of certainty in the outcome of a proceeding is underscored by how severely appellate authorities curtail judicial discretion in sentencing defendants who come to the court with true plea bargains.

acquitting guilty defendants who are otherwise willing to accept conviction. Defendants charged with multiple offences may be allowed to self-convict on some in exchange for the prosecutor dropping others. However, when those same defendants must contest all or nothing, they risk being convicted of more than they could have otherwise bargained for. Allowing these defendants to effectively plea bargain further extends the practice's benefits.

4.3.2 Increased Control Over the Evidence Admitted and Proven

Plea Bargained Cases Generally

In addition to giving defendants and prosecutors a high degree of certainty in the outcome of a case, negotiated pleas give all parties to a prosecution an increased level of control over the evidence. By default on sentencing, the prosecutor must prove every disputed fact on a balance of probabilities and prove every disputed aggravating fact beyond a reasonable doubt.[281] This requirement gives defendants a considerable bargaining advantage, as they can spare prosecutors the trouble of proving their case generally and any particular allegation specifically. In turn, prosecutors can agree to exclude certain embarrassing or otherwise prejudicial aspects of an allegation in exchange for concessions on the plea entered or the sentence agreed to. Rather than leaving these considerations with a judge or jury hearing the admissible portions of a case for the first time, plea bargaining allows the parties most familiar with the underlying facts to navigate these complex decisions together.

Nolo Contendere Cases Specifically

Prosecutors arguably benefit the most when defendants are allowed to plea *nolo contendere*, as these pleas give them significantly more leeway with the allegations they put before the court. Defendants who plead guilty to an offence may balk at having to ad-

[281] See *Criminal Code*, *supra* note 2, s 724(3)(d) & (e).

mit allegations they believe are incomplete, misleading, or false. If defendants disagree with these allegations, they may put the prosecution to its burden of proof at a trial or *Gardiner* hearing. However, when a defendant is allowed to plead *nolo contendere*, it reasonably follows that the prosecutor may put forward more and otherwise controversial details before the court, as defendants who enter those pleas overtly do not admit to the underlying allegations. In exchange for this leeway, the defendant can continue to deny their factual guilt in good conscience, contest the allegations in subsequent proceedings where available, or take advantage of other comparable concessions.

4.3.3 Increased Agency and Self-determination

Plea Bargained Cases Generally

Defendants increase their self-determination by having some control over the outcome and the allegations. Plea bargaining is one of the primary means defendants have to control an immensely impactful process otherwise out of their hands. Similarly, because plea bargains guarantee convictions, victims of crime who work with prosecutors and victim services agencies can prepare impact statements and request protective conditions where appropriate. Since 2015, the *Victims Bill of Rights*[282] has required that every victim of crime has the right to have the "appropriate authorities" consider their views when making a decision.[283] This right extends to resolution discussions, and helps ensure that victims have input into the plea-bargaining process. Increasing a defendant's ability to determine their cases and guaranteeing a conviction for victims of crime gives all affected parties greater agency. It stands to reason that when these justice system participants have more agency in proceedings that are otherwise outside their control, they will regard the justice system more highly.

[282] *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.
[283] See *ibid*, s 14

Nolo Contendere Cases Specifically

Defendants who self-convict without admitting responsibility may repudiate their charges, either formally in subsequent proceedings where available or privately following a non-inculpatory *nolo contendere* plea. By doing so, defendants can remain authentic to a particular moral or ideological standpoint while accepting the inevitable. Pleas are not propositions that can or should be understood for the truth of their contents. However, allowing defendants to enter pleas whose truth-content accurately reflects their beliefs and dispenses with the need for a formal hearing may reasonably lead them to conclude that the proceedings were truthful and fair. Defendants who can self-convict without committing themselves to the state's version of events are more empowered than those who must give up plea bargaining and set unwanted trials. To the extent that *nolo contendere* pleas require prosecutorial or judicial approval, victims would retain their right to provide non-binding input into *nolo contendere* proceedings.

4.3.4 The Elusive Mutually Beneficial Scenario in Criminal Law

Plea Bargained Cases Generally

Canadian criminal procedure uses an adversarial system where disputing parties present opposing positions to an impartial decision-maker. The adversarial system is zero-sum, as one party's position must fail for the other's to prevail. Zero-sum scenarios tend to preclude mutually favourable outcomes. In non-criminal cases, such as family law disputes or civil actions, it is common for matters to resolve through alternative means such as mediation, dispute resolution, or other negotiated settlements. Although these trial alternatives do not always produce outcomes that both parties are satisfied with, such outcomes are at least *possible*. Furthermore, the parties who attempt these trial alternatives may actively and intentionally work towards a mutually beneficial outcome, presumably increasing their likelihood of successfully reaching a deal that both sides can

live with.

In most criminal cases, plea bargaining is the only means for parties to achieve a comparable mutually beneficial scenario. Defendants rarely wish to plead guilty and accept full responsibility for their charges from the outset of the proceedings, and even those who do rarely agree with every detail of every initial untested allegation. While the *Criminal Code* authorizes prosecutors to employ alternative measures for any offence, these alternatives to prosecutions are only available to defendants who agree they were involved with or participated in the offence charged[284] and are therefore able to plea bargain. Plea bargaining opponents must therefore commit to denying criminal defendants the ability to bargain for mutual benefit that any other litigant would be entitled to for substantially less impactful matters. A system that would deny criminal defendants the means to negotiate their second-degree murder charge down to manslaughter while actively encouraging civil litigants to settle small claims outside of court through mediation and negotiation is incompatible with justice and incorrect in principle.

Conversely, prosecutors, law enforcement, victims, trial witnesses, and society generally benefit from effective case resolution without a trial. Confidential informants are a prime example of the socially beneficial outcomes that plea negotiations can achieve. While most of the crimes that courts deal with are "unsophisticated," allegations involving drug trafficking and organized crime are often complex and variegated. The intricacies of the drug trade make obtaining sufficient information to find and convict drug traffickers and their suppliers difficult, and confidential informants often make these tasks possible.

However, the pool of viable informants is generally small and typically composed of criminals. Few are "ordinary citizens" motivated by civic duty. While some may be willing to give information in exchange for financial compensation or some other extra-legal consideration, informing on others can be dangerous. As a result, confidential infor-

[284] See *Criminal Code*, *supra* note 2, s 717.

mants frequently expect and well-deserve significant consideration for their information. For co-defendants in a drug or organized crime prosecution, or those criminally charged with unrelated matters, a favourable plea deal may be the only way to secure the needed cooperation. Many unsophisticated crimes preoccupying criminal courts are causally connected to illicit drug addictions. As a result, high-level blows to the illicit drug trade are socially beneficial objectives that plea bargaining is often uniquely able to achieve.

Nolo Contendere Cases Specifically

For defendants unable or unwilling to plead guilty but willing or able to self-convict, expanding the scope of permissible uncontested pleas expands the range of potentially mutually beneficial resolutions to include these defendants. Presently, defendants who will not formally admit culpability must proceed to trial. Where both the defendant and the prosecutor would otherwise prefer a confirmed conviction on agreed-upon terms, it creates the potential for a mutually destructive scenario instead.

Parochial fantasies notwithstanding, the criminal justice system is not a morality play, and none of its participants are entitled to wholesome or edifying results: prosecutors are not entitled to a perfect conviction, complainants are not entitled to a remorseful defendant, and defendants are not entitled to rehabilitation.[285] The net gains from allowing recalcitrant defendants to self-convict when they are willing to do so far exceeds any perceived losses from not having the defendant acknowledge their moral culpability or genuinely repent for their misdeeds.

4.3.5 Sealing Loopholes and Tying Up Loose Ends

Because Canadian criminal law technically accommodates a *nolo contendere* procedure, it is reasonable to ask whether a formal plea is necessary. If the *nolo contendere* plea procedure currently authorized was sufficient to its task and otherwise unproblematic, it

[285] See Forsyth, *supra* note 19 at 250 — 251.

may not be. But the *nolo contendere* plea procedure is grossly deficient. These deficits stem from the lack of legislative oversight and may be addressed by increasing the same.

Plea Voluntariness and Comprehension Inquiry

The Canadian *nolo contendere* plea procedure is risky for defendants. Defendants may engage in this procedure without fully realizing its implications as *DMG* and *RP* demonstrate. Like guilty pleas, the *nolo contendere* procedure guarantees a conviction. However, because these pleas are formally *not guilty pleas*, and because the codified plea inquiry only applies to formal *guilty pleas*, a plea inquiry is not statutorily required. Although *RP* recommended a plea voluntariness and comprehension inquiry for *nolo contendere* plea procedures, it was silent about what this inquiry should entail. Furthermore, while *RP* binds courts in Ontario, it has neither been explicitly adopted nor applied by most Canadian appellate courts nor approved by the Supreme Court of Canada. Because judges are generally not required to inquire about defendants who admit *some* allegations via *Criminal Code* s 655, other appellate courts may reasonably conclude that no inquiry is required to admit *all* of the allegations.

Defendants who use the *nolo contendere* procedure do not plead guilty or overtly express any remorse, both of which are mitigating factors the court must consider on sentencing following a guilty plea. While their American counterparts generally benefit from having their pleas excluded at subsequent proceedings, Canadian defendants do not. As a result, Canadian defendants using the *nolo contendere* procedure accept more risk on sentencing than those who plead guilty and receive no additional benefits. To the extent that all of the considerations underlying the common law and statutory plea inquiry for defendants pleading guilty apply as much to Canadian *nolo contendere* pleas, they should be required. To the extent that defendants who utilize the procedure accept the same risk for less consideration, the plea inquiry should be more comprehensive than the one required for inculpatory uncontested pleas.

Judicial Discretion

Judges are not obliged to conduct a plea inquiry for admitted facts because they are generally not allowed to reject them. Although some jurisdictions allow judges to do so, there is no statutory support for this allowance. Without discretion to reject facts agreed to under *Criminal Code* s 655, judges cannot reject *nolo contendere* pleas. Codifying these pleas and giving judges discretion to reject them would enable the courts to review them for propriety, placing them on equal footing with guilty pleas in this respect.

Automatic Right to Appeal

Self-convictions entered through the *nolo contendere* procedure qualify as convictions "by a trial court." Appeals in Canada are limited to trial court convictions and sentencing appeals. Because guilty pleas formally waive a defendant's right to be tried, they are not convictions by a trial court. However, because the informal *nolo contendere* plea procedure is a conviction entered by a trial court, it may be appealed by right.

Canadian defendants do not have a common law right to appeal their sentence or conviction. The right to do so is created entirely by the *Criminal Code*, and limiting this right to defendants convicted after contested proceedings should be addressed through the *Criminal Code*. Per *Criminal Code* s 675, criminal defendants may only appeal convictions entered by a trial court, which *Criminal Code* s 673 helpfully defines as "the court by which an accused was tried." Canadian case law has reinforced that defendants who plead guilty are not "convicted by a trial court" and, therefore, may not appeal their convictions. However, because defendants who self-convict through the *nolo contendere* procedure plead not guilty and initiate the trial process, they may appeal their self-inflicted convictions by right.[286] By formalizing these pleas, Parliament may identify them and control whether defendants who enter them may continue to do so.

[286] See *Fegan*, *supra* note 32.

Protecting the Lawyers who Assist With These Pleas

Defendants who wish to plead *nolo contendere* may find themselves doing so without a lawyer. As the footnote to the *Besant* case underscores, a lawyer's professional body may not be there to protect them if anything goes awry with the procedure. Moreover, while other administrative decision-makers may disagree with this lone Ontario decision, others may agree. By formally authorizing a *nolo contendere* plea, Parliament would legitimize the procedure and empower lawyers to assist their clients with entering these pleas, allowing defendants greater and more informed access to them.

4.4 Summary

Plea bargaining is an imperfect enterprise with the potential to be co-opted by game theories, economically-based reasoning, work-avoidance, and shrewd negotiations. These attitudes, in turn, undermine the law's substantive moral aims. But the fact that bad actors may coopt plea bargaining this way does not mean that plea bargaining must somehow be sardonic. Instead, when conducted in good faith, plea negotiations give all named parties to a criminal prosecution the chance to candidly assess the evidence, explore and develop mutually beneficial outcomes, avoid unpredictable contested hearings, and curtail wrongful pre-trial punishments.

Similarly, while *nolo contendere* critics view the plea as a manifestation of plea bargaining's cynicism, those who hold these views ignore the plea's nature and effects. *Nolo contendere* pleas are, first and foremost, a means for defendants to self-convict and voluntarily accept punishment. They admit an offence as proven without admitting that it is true. Where a defendant's morality conflicts with society's broadly-held principles or their beliefs about the evidence conflict with what the prosecutors will likely or inevitably prove at a trial, these pleas allow defendants to self-convict in good conscience. Defendants do not need to set unwanted trials, and prosecutors do not risk wrongful acquittals. In turn, the state can identify opportunities to morally educate dissident defendants and make good on those opportunities when sentencing them.

Both plea bargaining and *nolo contendere* pleas have substantive value and promote fairness. When used with suitable safeguards, *nolo contendere* pleas need not come at the expense of other substantive values. Given the unappealing prospects of insincere guilty pleas, unregulated *nolo contendere* procedures, and wrongful acquittals, formalized *nolo contendere* pleas are a reasonable and appropriate compromise. They should be legislated, provided that Parliament can implement them without undermining criminal law's moral core. In the next and final chapter, I conclude my analysis by suggesting how to accomplish this task.

Chapter 5

Conclusion

Nolo contendere pleas provide criminal defendants with advantages that guilty pleas do not. They allow defendants to resolve prosecutions by accepting the consequences of a criminal conviction without having to admit actual responsibility. In many jurisdictions, they may not be used in subsequent proceedings, shielding defendants from certain legal liabilities. For those defendants who cannot or will not admit actual responsibility, or for those who wish to limit subsequent jeopardy in particular ways, the *nolo contendere* plea offers an avenue to self-conviction that may not otherwise be reasonably available to them.

But the *nolo contendere* plea will not likely replace the guilty plea entirely, even if both were made equally available to defendants. To the extent that guilty pleas formally acknowledge responsibility for an offence, the plea itself is generally judicially presumed to be an automatic sign of remorse and a mitigating factor in and of itself.[287] But because defendants who enter *nolo contendere* pleas do not take formal responsibility for an offence, they are unlikely to benefit from this same presumption. Furthermore, those defendants who continue to protest their innocence after entering a plea may be unable to access certain programs or qualify for early parole for for federally-supervised

[287] See *R v James*, 2015 ONSC 5365 at paras 31 — 33.

custodial sentences.[288] Defendants who are willing or able to express remorse through a guilty plea will reasonably wish to continue to accrue these benefits and avoid these potential pitfalls, while those who cannot or will not may still limit their legal jeopardy through self-conviction.

To conclude my argument, I outline several ways that Parliament may implement *nolo contendere* pleas to solve different criminal justice problems or provide the system and its participants with different ways to punish, reform, and rehabilitate offenders. To do so, I use Drechsler's criteria to outline how a newly-legislated *nolo contendere* plea may look or how Parliament might implement it. Unlike the United States, where *nolo contendere* pleas have existed for centuries, Canada had no discernable common law contact with *nolo contendere* until the Ontario Court of Appeal decided *DMG* just over a decade ago. As a result, a formal Canadian *nolo contendere* plea may be designed from the ground up to incorporate the best and discard the worst without worrying about retroactive consistency. Because Canadian criminal law is uniform cross-country, Parliament may evenly implement these pleas nationwide. Regulating and codifying *nolo contendere* would allow Parliament to specify when and how defendants may enter pleas and whether they should be admissible in future legal proceedings.

5.1 Applicability

Nolo contendere pleas encourage resolution discussions and plea negotiations and allow otherwise recalcitrant defendants to spare their victims the burden of going to trial. Although I argue that this alone is a sufficient basis for permitting these pleas, I also recognize that Parliament may use the applicability criterion to accomplish specific societal goals and criminal justice objectives.

In the United States, courts long held to Hawkins' citation as their guiding common

[288] See e.g. Government of Canada, "Parole Decision-Making: Myths and Realities" (16 March 2021), online: <canada.ca/en/parole-board/corporate/publications-and-forms/parole-decision-making-myths-and-realities.html>; *SK*, *supra* note 36.

law authority for how *nolo contendere* pleas were to be entered and accepted. Nowadays, following *Hudson*, where *nolo contendere* pleas are permitted, defendants may generally enter them in response to any offence or offence type. Canadian *nolo contendere* pleas do not have such traditional grounding. As a result, they are neither beholden to Hawkins's rule that limits them to misdemeanour offences nor *Hudson*'s rule extending them to any offence punishable by any penalty. Absent this spectre of *stare decisis*, Parliament is free to allow or preclude any defendant it wishes from entering a *nolo contendere* plea and may do so in several ways: it may stick with ancient tradition and limit these pleas to non-serious cases, customize which offences or offence types it wishes to allow the pleas for or open them up to all.

Under the first approach, *nolo contendere* pleas would only be allowed for summary criminal offences. A strict application of this approach could limit the plea to so-called *pure summary offences*.[289] In contrast, a looser approach would allow the plea for *hybrid offences* where the prosecutors *proceeded summarily*. Where other features commonly associated with *nolo contendere* pleas are present, such as the lack of a need for a factual foundation or a maximum penalty of a small fine, these restrictions are sensible. However, this limitation's utility disappears when judges must ensure sufficient facts to support a conviction and where the plea may result in the same penalties as a guilty plea.

A second approach would limit the plea's applicability not by how the Crown prosecutes the charge but rather by the alleged offence or type of offence. Canadian law currently prohibits defendants convicted of certain charges from obtaining specific sentences. For example, Canadian judges may generally allow defendants to serve a jail sentence in the community through a Community Supervision Order, or CSO. However, *Criminal Code* s 742.1(f) lists several offences and offence types that are not eligible for a CSO. Adopting a similar approach would allow Parliament to target specific offences or offence types where a *nolo contendere* plea would be inappropriate and prevent the

[289] See Criminal Notebook, "List of Summary Conviction Offences" (January 2021) online: <criminal-notebook.ca/index.php/List_of_Summary_Conviction_Offences>.

plea from being entered for those offences.

The final approach would open the pleas up to all offences, per the United States Supreme Court in *Hudson*. Doing so would significantly increase the number of defendants able to self-convict. But more importantly, formalizing a *nolo contendere* plea that defendants may enter for all offences is most likely to successfully supplant the haphazard, informal *nolo contendere* plea procedure. One of the primary goals of formalization must be ensuring that these pleas are entered safely and lead to predictable results. These goals are unachievable as long as the dangerous and unpredictable informal plea persists. In order to truly overtake the informal plea procedure, the formal plea must apply to all offences and offence types, thereby helping to ensure that defendants no longer need to enter these uncontested pleas informally.

5.2 Acceptability

Once it has been settled which offences defendants may enter *nolo contendere* pleas for, it must be determined what preconditions must obtain for a court to accept them. In American states where *nolo contendere* pleas are allowed, most defendants require permission from the court to enter them. Several states also require permission from the prosecutor, while only Virginia allows defendants to enter *nolo contedere* pleas by right.[290] As implemented, the Canadian *nolo contendere* plea procedure requires permission from the prosecutor to enter but does not generally require permission from the court. I argue that this is a problem that Parliament should use formalization to correct.

Allowing Canadian defendants to enter these pleas without judicial discretion or oversight is problematic. Because defendants who enter these pleas do not acknowledge their guilt or culpability, there is a risk that some will opt to convict themselves of charges they are not factually or legally culpable for or in circumstances that a judicial observer would

[290] Unusually, Virginia gives judges no discretion to reject a *nolo contendere* plea, despite seemingly giving them discretion to reject a guilty plea. It is the only state that appears to explicitly remove all judicial discretion over *nolo contendere* pleas. See Va Code Ann tit 19.2 § 19.2-254.

deem unfair. If defendants may enter *nolo contendere* pleas to any criminal charge punishable by any potential punishment, judicial oversight is essential to maintain fairness, accuracy, and confidence in the system. Furthermore, because *nolo contendere* pleas do not necessarily clearly reflect a defendant's beliefs, and because they must invariably result in a conviction, additional prerequisites should be put in place to ensure these pleas pass muster. Requiring prosecutors, defendants, or both to jointly show cause for why the court should accept a defendant's *nolo contendere* plea,[291] evaluating the plea's merits against a set statutory standard, or simply requiring the prosecutor's written consent may each accomplish this task.

5.3 Procedural Effects

The third criterion considers what effects the plea has on the immediate proceedings before the court. As self-convictions, *nolo contendere* pleas should procedurally result in criminal convictions, just as guilty pleas do, and not in a "conviction by a trial court" as they currently do. Parliament should in turn regulate them as it would regulate a criminal conviction and require that courts provide procedural rights that meet or exceed those provided to defendants pleading guilty. Once validly entered, appellate courts should regard these pleas as secure. Defendants who wish to withdraw their *nolo contendere* pleas should be held to the same stringent burden that defendants who wish to withdraw guilty pleas must meet.[292]

Similarly, just as Parliament statutorily requires judges to conduct a plea inquiry for defendants entering guilty pleas, it should implement a similar requirement for defendants entering *nolo contendere* pleas. Because defendants entering *nolo contendere* pleas do not admit culpability, judges should be doubly careful to ensure that they know the legal consequences of entering their pleas and that a conviction will inevitably result. To

[291] See e.g. *Criminal Code*, *supra* note 2, s 730(1), where Parliament legislated the statutory requirements that must be met for a court to grant a conditional discharge.

[292] See *R v Taillefer*; *R v Duguay*, 2003 SCC 70, [2003] 3 SCR 307.

make sure that judges take this requirement seriously, Parliament should consider hinging the plea's validity on whether the court conducted the inquiry. This requirement would distinguish a formal *nolo contendere* plea from a guilty plea, reinforcing the importance of this inquiry for *nolo contendere* pleas. Furthermore, this requirement would significantly improve the informal *nolo contendere* plea procedure, where no such inquiry is strictly required.

5.4 Subsequent Effects

The *nolo contendere* pleas' subsequent inadmissibility distinguishes it from guilty pleas, giving it utility it would otherwise lack. Absent the historical common law foundation for this feature, however, it is sensible to ask whether Parliament should implement subsequent inadmissibility and, if so, how they should do so. Presently, the informal *nolo contendere* plea procedure presents very few beneficial subsequent effects, the most notable of which is a technical right to appeal the plea. *Nolo contendere* pleas are useful for defendants who cannot or will not admit guilt but are nonetheless willing to self-convict. However, I argue that adding additional incentives to the plea, as many jurisdictions do in the United States, will further expand the pleas reach and utility.

Although some defendants enter *nolo contendere* pleas as a matter of personal integrity, rendering evidence of these pleas inadmissible at subsequent proceedings will likely persuade many others to do so. Specific cases will likely be more susceptible to these persuasive improvements than others. Defendants charged with major fraud may be convinced to resolve if evidence of their plea was inadmissible at a subsequent civil proceeding. In contrast, prosecutors may convince defendants charged with domestic violence offences to resolve if evidence was inadmissible at subsequent family proceedings. Defendants of all varieties who risk deportation if convicted might be persuaded to resolve their matters if evidence of that plea was inadmissible for immigration pur-

poses. In cases where these convictions come with real advantages to victims and society, such as courts requiring defendants to repay money for misappropriation or damages, subjecting them to rehabilitative probation orders or warehousing risky offenders for a time, self-convictions can be generally beneficial to society. Where defendants have been wrongfully arrested and must suffer wrongful pre-trial punishments, excluding these convictions from subsequent proceedings may function as a way to limit the damage these wrongful punishments may cause going forward.

However, there may be situations where it is in the interests of justice to allow a defendant to enter a *nolo contendere* plea but not in the interests of justice to exclude evidence of this plea at future proceedings. A defendant charged with sexual interference may be convinced to enter a *nolo contendere* plea to allow them to maintain their innocence privately. However, the interests of justice may require that courts admit evidence of this plea at subsequent family law proceedings. Similarly, prosecutors may induce a foreign national defendant charged with workplace fraud to enter a *nolo contendere* plea to avoid admitting evidence in a costly *civil* suit. However, the interests of justice may require that a court admit evidence of this plea at a subsequent deportation hearing.

One way to adjudicate these nuances is to implement an application system that requires defendants to apply to the court to have evidence of their pleas excluded.[293] Similarly, requiring defendants to complete a probationary period successfully may provide a reasonable precondition to excluding evidence at future proceedings and an incentive for pro-social behaviour and rehabilitation.[294] Adopting approaches such as these, either individually or in tandem with one another, would give Parliament granular control over how and when it may implement these pleas, providing both procedural and substantive advantages.

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[293] New Jersey, a state that does not allow defendants to enter *nolo contendere* pleas, uses a system like this for defendants wishing to apply to have their convictions deemed inadmissible in subsequent proceedings. See NJ R Evid rule 410.

[294] Rhode Island allows defendants to enter *nolo contendere* pleas, but only excludes evidence of these pleas at subsequent proceedings where the sentence included a probation order and where the defendant completed the probation period without violations. See RI Gen Laws Ann § 12-18-3(a).

5.5 Summary

Having reviewed *nolo contendere*'s history and historical ties with plea bargaining, legality and informal application in Canada, and numerous ethical issues with both *nolo contendere* pleas and plea negotiations, I conclude that Parliament should formalize these pleas. Both plea bargaining and *nolo contendere* pleas may be misused to cut corners and conduct cynical negotiations. However, prosecutors and defendants may also use both appropriately to increase access to justice, improve the quality of justice accessed, and allow more defendants to more truthfully and fairly resolve more criminal charges without the uncertainty of a trial.