

**Culture before law? Comparing bail decision-making in
England and Canada**

Diana Catherine Grech

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Abstract

This thesis examines the factors that contribute to the bail decision-making process in English and Canadian courts. Despite the fact that bail contributes to rising prison remand populations, influences the lives of legally innocent defendants, and is central to assessments of human rights, very little is known about this process. England and Canada were ideal jurisdictions with which to explore this issue as that their similar bail laws and divergent practices related to pre-trial custody reflected different patterns of bail decision-making. This research took place when Canada's prison remand rates had been increasing over several decades and England had one of the lowest prison remand rates in the Western world.

The objectives of the study were to identify the factors that contribute to bail decision-making, investigate how they converged and diverged between jurisdictions, understand the impact of the decision-making at the local level, and explore how the findings contribute to an understanding of the bail decision-making process in a wider context.

It is argued that court culture is central to understanding bail decision-making but that it is shaped by broader views that are specific to the criminal justice processes in England and Canada. These views relate to values that developed in each jurisdiction as a result of the evolution of criminal justice ideology and guiding philosophies over time. The influence of these informal factors on the bail decision-making process were facilitated by the discretion afforded to court actors in their application of formal laws and policies, which enabled them to balance multiple competing principles whilst, in the main, remaining within the prescribed legal framework. This suggests that the factors contributing to bail decision-making are nuanced, varied, and interdependent and, as such, should not be examined individually but rather in terms of their interactive effects.

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List of Abbreviations

Charter of Rights and Freedoms **(the Charter)**

Crown Prosecution Service **(CPS)**

European Convention on Human Rights **(the Convention)**

Her Majesty's Courts and Tribunal Service **(HMCTS)**

Human Rights Act 1998 **(HRA)**

International Covenant on Civil and Political Rights **(ICCPR)**

International Covenant on Economic, Social and Cultural Rights **(ICESCR)**

Justice of the peace **(JP)**

Legal Aid, Sentencing and Punishment of Offenders Act 2012 **(LASPO)**

Ministry of the Attorney General **(MAG)**

Penalty Notices for Disorder **(PNDs)**

Police and Criminal Evidence Act 1984 **(PACE)**

Pre-sentence reports **(PSRs)**

Introduction

Bail has been called the ‘Cinderella’ of the criminal justice system (Hucklesby & Sarre, 2009). Despite the fact that it contributes to rising prison remand populations, has a considerable impact on the lives of legally innocent defendants, and is central to assessments of human rights and the presumption of innocence, it has received minimal academic and political attention worldwide. There has been a recent surge of interest, however, as a result of increases in many jurisdictions’ prison remand populations (Walmsley, 2017). The bail decision-making process, which dictates whether defendants are held in custody or released on bail into the community, has a major influence on the number of remand prisoners. These individuals make up the portion of the prison population that has not been released and are instead detained in custody awaiting the conclusion of their criminal proceedings. Outside of England and Wales,¹ where the size of this group has remained relatively stable (Ministry of Justice, 2017c), most common law jurisdictions have seen significant increases in their remand populations in recent years (Walmsley, 2017). In Canada, the remand prison population rate has tripled in the last four decades (Statistics Canada, 2017a). Given the repercussions associated with these trends, it is crucial to develop a better understanding of how they came to be.

This thesis examines the factors that contribute to the bail decision-making process in English and Canadian courts. The research took place between 2015 and 2016, a time when increases in Canada’s remand population had contributed to what was largely considered a ‘broken bail system’ (Webster, 2015), and England had maintained one of the lowest remand rates of all common law jurisdictions (Walmsley, 2017). By comparing two jurisdictions with different remand population trends, additional light can be shed on the factors underlying the use of bail that may contribute to divergent patterns of bail

¹ For ease hereafter, the jurisdiction of ‘England and Wales’ will be referred to exclusively as England. This is because the research undertaken in this study took place in this part of the jurisdiction.

decision-making. The objectives of this study were twofold. First, the research sought to identify the factors that contribute to the bail decision-making process and to examine how these factors converged and diverged in English and Canadian courts. Second, it aimed to understand the implications of these contributing factors in terms of their influence in England and Canada, specifically, as well as explore how they furthered an understanding of the use of bail in a wider context.

The contribution of the thesis

It is critical to develop a better understanding of the bail decision-making process given its substantial consequences, many of which relate to its impact on the size of a jurisdiction's prison remand population. While decisions made in bail court cannot completely explain increases in this population,² they provide considerable insight into potential contributing factors at one stage of the process. The individual and institutional costs of housing large numbers of remand prisoners are significant. Prisoners held in remand experience high levels of stress (Player, Roberts, Jacobson, Hough, & Robottom, 2010), risk the loss of employment (Trotter, 2010), and often endure harsher prison conditions relative to sentenced prisoners (Canadian Civil Liberties Association, 2014; HM Inspectorate of Prisons, 2012). Furthermore, they are more likely to be convicted of an offence and sentenced to imprisonment (Bottomley, 1970; Friedland, 1965), face problems defending themselves (Bottomley, 1970; Friedland, 1965; Trotter, 2010) and experience increased pressure to plead guilty despite having potentially valid defences (Bottomley, 1970; Manns, 2005). A large prison remand population also puts pressure on criminal justice institutions which must devote considerable resources to house these prisoners and deal with the increased complexities associated with their management (Office of Auditor General of Ontario, 2008).

Bail decisions also have important human rights implications given that defendants are considered innocent until proven guilty in both the Canadian and

² Decisions made outside of the bail process can also be expected to influence the size of the remand population. For example, the police decision to detain defendants in custody and the length of time accused persons spend in custody following a decision on bail would also have an impact.

English legal systems (Bottomley, 1970; Friedland, 2012; Player et al., 2010). Determinations of bail that restrict defendants' freedom can raise concerns related to the right to liberty and procedural fairness. Human rights law prescribes that unconvicted individuals should only be detained with good cause and in limited circumstances (see, for example, the European Convention on Human Rights, the Canadian Charter of Rights and Freedoms, and the International Covenant on Civil and Political Rights). When restraint in the use of remand custody is not exercised, the extent to which human rights standards are being adhered to becomes questionable and the central principle of the presumption of innocence can become strained (Webster, 2007).

Given the consequences associated with bail decision-making, it is perhaps unsurprising that significant concerns have been raised about this process. In Canada, Prime Minister Justin Trudeau outlined in his 2015 Mandate Letter to the Minister of Justice and Attorney General of Canada, Jodie Wilson-Raybould, that she and her colleagues should conduct a full justice review, in which bail was expected to be a central focus (Trudeau, 2015). This directive was largely a result of mounting concerns surrounding the rising prison remand population and inadequate use of discretion in the bail decision-making process (*Re-inventing Criminal Justice*, 2012; Steering Committee on Justice Efficiencies, 2006; Webster, 2015). In England, the 2010 green paper *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* argued that the way that prison was used for remand had to be rethought given that custody was being used in too many cases in which defendants would ultimately never receive a custodial sentence (Ministry of Justice, 2010a). The paucity of recent and comprehensive research on how bail decisions are made is a major obstacle to the achievement of these objectives.

While there has been a growing number of studies seeking to explain bail practices in Canada in recent years, most of this research is restricted to observational data and does not include the perspective of the decision-makers (see Myers, 2009, 2015, 2017; Webster, 2011).³ Gaining an understanding of their perspectives is critical in order to understand the context in which they

³ Two notable exceptions are the Canadian Civil Liberties Association (2014) and John Howard Society (2013), which both use interviews and observations/file review.

make the decisions viewed during court observations. Although there is some research investigating explanations for bail practices in England, it is either outdated as a result of taking place prior to the introduction of several key pieces of legislation that have impacted the bail process, including the Criminal Justice Act 2003 and the Legal, Aid, Sentencing and Punishment Act 2012 (see, for example, Doherty & East, 1985; Hucklesby, 1996, 1997a, 1997b; Hucklesby & Marshall, 2000; Morgan & Henderson, 1998), or limited in scope in that it focuses on specific laws (Hucklesby, Eastwood, Seddon, & Spriggs, 2007) and programmes (Hucklesby, 2011b) or uses simulated case studies (Dhami, 2010).⁴ This demonstrates the need for additional research that is both comprehensive and that can offer insight into current practices surrounding bail in both these jurisdictions.

The value of a comparative approach

A comprehensive assessment could potentially be accomplished through research that uses legal systems in more than one country as a basis of comparison. While some research has compared bail decision-making in multiple legal and procedural contexts within the same country (see Canadian Civil Liberties Association, 2014; King, Bamford, & Sarre, 2009), these studies still examine the process within the same overarching national context. In fact, only one study to date is known to have compared bail decision-making in multiple legal jurisdictions on an international scale (see Fair Trials, 2016). Expanding upon this research is important given that comparative approaches could be key to developing a comprehensive understanding of the criminal process and its components. This is because they allow the findings to be freed from the context of their own systems, enabling a broader understanding of the process to take place (Zweigert & Kotz, 1998). By examining the operation of similar processes in different environments, the individual influence of each contributing factor becomes clearer as it is easier to view them separately from the contexts in which they developed. In addition, the comparison acts as a mechanism with which to identify taken for granted normative assumptions, widening the scope for increased understanding and potential reform. When

⁴ One notable exception is Cape and Smith (2016).

examining the attitudes and practices in more than one jurisdiction, we avoid taking for granted the subjectivity of values embedded in a specific legal culture that may have been assumed to be universal truths (Nelken, 2010). As such, developing a greater understanding of one system in relation to another enables a novel and more wide-ranging understanding of the bail decision-making process to take place.

England and Canada are ideal jurisdictions in which to conduct comparative analyses of bail decision-making given their shared legal historical foundations and adherence to similar international human rights instruments, but marked difference in their use of remand custody. This is useful from a comparative standpoint as Nelken (2010) has argued that the more relevant constants between the jurisdictions, the more surprising and instructive the finding of difference can be. In essence, this type of comparison makes it easier to tease out the differences that do exist between two similar locations that may be contributing to differing bail practices. Ultimately, England and Canada are expected to offer insight into considerably different models of bail decision-making. As such, this comparison between them enables a wide-ranging understanding of the process that could not be achieved through a single jurisdiction study.

The development of the thesis

The extent to which examining bail decision-making in England and Canada compares 'like with like' (Nelken, 2010) is made clear through an examination of their legislative and policy histories related to bail. The basis of both England and Canada's bail laws rests on a presumption in favour of bail in which defendants are to be released into the community unless the state can demonstrate that there is a legitimate reason to remove this right. Both the Bail Act 1976 in England and the Bail Reform Act 1972 in Canada were put in place when due process concerns that emphasized the rights of suspects and defendants were of primary importance in the criminal justice rhetoric (Hucklesby, 2009; Trotter, 2010). However, in both England and Canada this principle has been eroded by a number of amendments that restrict the right to bail (Hucklesby, 2009; Trotter, 2010). This is reflective of a broader shift in both

criminal justice systems away from due process values towards those of crime control. The overarching rhetoric related to criminal justice was also similar between jurisdictions in other capacities. Indeed, there was a movement towards 'tough on crime' approaches to crime that put public safety and the victim at the forefront (Newburn, 2007; Webster & Doob, 2015) and a growing preoccupation with managerialism that was exemplified by attempts to improve efficiency (De Lint, 1998; Raine & Willson, 1993, 1997) and manage risk (Ericson & Haggerty, 1997; Feeley & Simon, 1992; Garland, 2001; Hannah-Moffat, 1999).

Despite these similarities, there are substantially different trends in the use of remand across England and Canada. Over the last three decades, the remand population rate has nearly tripled in Canada, currently comprising 37% of the total adult prison population (Statistics Canada, 2017a, 2017b), while it has remained relatively stable in England, constituting 11% of the total prison population (Ministry of Justice, 2017c). When the similarities in the law, policy, and overarching rhetoric related to criminal justice are considered alongside the differences in the use of remand, it seems unlikely that these factors can be solely responsible for the bail decision-making processes. The existing research and national statistics substantiate this supposition, suggesting that, while factors related to the nature and volume of cases entering the courts and the law and policy surrounding them can offer some insight into the bail practices in each jurisdiction, they fail to present a complete picture (Hucklesby, 2009; Webster, Doob, & Myers, 2009).

It is perhaps unsurprising that research has begun to point to the importance of informal factors in explaining each jurisdiction's use of bail (Hucklesby, 1997a, 2009, Myers, 2009, 2015, 2017; Webster et al., 2009). Explanations for bail decision-making that centre on informal factors are based on broader literature that sees the organisation of the administration of criminal justice as a system of action in which individual actors make decisions based on cooperation, exchange, and adaptation (Blumberg, 1967a; Cole, 1970; Eisenstein & Jacob, 1977; Feeley, 1973; Skolnick, 1967). This research emphasises informal concerns over formal rules and defined roles when searching for explanations related to the behaviour of criminal justice actors (Feeley, 1973). It has been

argued that the adherence to informal 'rules of the game' has resulted in the formation of individual 'court cultures' in which norms develop in each court location and are mediated through the decision-making of the courtroom workgroup (Cammiss, 2007; Church, 1982; Eisenstein & Jacob, 1977; Hucklesby, 1997a; Lipetz, 1980; Myers, 2015; Webster et al., 2009; Young, 2013).

Court culture alone cannot explain bail practices, however, because it does not exist in a vacuum but rather emerges in relation to the overarching context (Church, 1985; Eisenstein & Jacob, 1977; Young, 2013). Examining it without taking this into account offers only a limited understanding of the bail decision-making process. Indeed, the courtroom workgroup can be expected to be influenced by contextual factors that shape the functioning of the criminal process in its entirety. For example, research has demonstrated that bail decision-making is, in part, shaped by a broader culture of risk aversion in Canada (Myers, 2017; Webster, 2015; Webster et al., 2009), and concerns surrounding prison overcrowding in England (Hucklesby, 2009). However, given these studies have only been conducted from single jurisdiction perspectives, and thus do not examine behaviour outside of this overarching context, the full impact of these types of broader factors is unclear.

Given that existing research suggests neither law, policy, and case factors nor informal factors related to court culture can independently account for the factors that contribute to the bail decision-making process, this study takes a more comprehensive examination of this process. Specifically, it takes a theoretical approach consistent with McConville and his colleagues (1991), who assert that developing an understanding of the criminal process (and in this case bail process) should consider formal rules, rhetoric, and the behaviour of criminal justice actors. As such, this thesis assesses the differences in two jurisdictions in terms of formal factors related to law and policy as well as informal factors related to both court culture and the views surrounding the broader criminal process that shapes it.

This study sought to examine the factors that impact bail decision-making through a multiple-case study of two lower courts, one of which was located in

Canada and the other in England. During the course of the study, 43 days of observation took place, resulting in 485 observations, and 28 interviews were conducted with criminal justice actors. The scope of the study was limited to two courts to ensure rich data was collected and the perspectives of court actors as well as the context in which they worked could be fully taken into account. This is consistent with other studies examining summary court procedures, many of which focused on both interview and observational data in seeking to understand court procedures (Cammiss, 2007; Canadian Civil Liberties Association, 2014; Hucklesby, 1996, 1997a, 1997b; Leverick & Duff, 2002). In addition, the study focuses on the adult court process only and examines the period from which the defendant enters the court process to the point at which the initial decision is made as to whether they are remanded in custody or on bail. While the other stages of the bail process (i.e. police custody decisions, bail reviews) were discussed for context when appropriate, they were not examined directly in order to focus the research.

Overview

This thesis argues that court culture is central to explaining the bail decision-making process but that this culture is, in part, shaped by views surrounding the broader criminal process in each jurisdiction. These views are not unique to the bail process, but rather relate to wider ideas about the values that should shape the criminal process and the means by which it should operate. The influence of these informal factors on bail decision-making is facilitated by the flexibility provided by formal laws and policies, which afford court actors broad scope for discretion in their application. This flexibility is a product of the competing principles contained in the overarching criminal justice rhetoric, which are used and balanced against one another by court actors when applying the law. Ultimately, this suggests that the factors contributing to the bail decision-making process are nuanced, varied and interdependent and, as such, should not be examined individually but rather in terms of their interactive effects.

Chapter One and Two provide the background for the study and set the scene for the research. In Chapter One, the similarities in the development of the laws and policies related to bail and the overarching criminal justice rhetoric in

England and Canada are outlined. It also sets out the theoretical framework for the research, asserting that rules, rhetoric, and the behaviour of criminal justice actors should be examined in order to understand the operation of the bail process. Chapter Two builds on this review by highlighting that, despite these similarities, the two jurisdictions have experienced divergent trends in their use of remand. Possible explanations for these trends are examined and ultimately arguments are put forward about the value of a comprehensive approach.

Chapter Three describes the methods employed in the study and justifies their application for the purposes of the current research. The aims and objectives of the research are detailed, the research design and methods explained, and the analysis process described.

Chapter Four analyses the role of court actors in terms of their influence on the bail outcomes in the courts at which the research was carried out. The decision-making of the defence, prosecution, and the court are examined in turn. It assesses the extent to which their decision-making was rooted in informal processes compared to adversarial attitudes and behaviours. It also considers whether the court actors tended to agree with one another and how this influenced the bail outcomes in each jurisdiction. This chapter highlights the impact of courtroom incentives and how they interplay with broader values surrounding managerialist conceptions of efficiency and risk in shaping the level of collegiality between court actors.

Chapter Five examines the defendant and case characteristics used to construct the cases in the English and Canadian courts. It considers which exceptions to bail are typically used to support the characteristics presented and how these characteristics are aggravated and mitigated by court actors. The chapter illustrates that information is presented according to routine procedures but that it is also shaped by concerns surrounding victims and public safety in both courts, as well as 'therapeutic justice' principles in Canada.

Chapter Six examines the influence of attitudes towards case processing times in both jurisdictions. It compares and contrasts the extent to which the bail process was viewed as a summary procedure and discusses how this impacts

the informal practices in each court. Practices related to case processing time are considered alongside broader attitudes towards efficiency in both jurisdictions. Finally, the implications of the study are discussed in the Conclusions and recommendations based on the findings presented.

Chapter One:

The Rules and Rhetoric Surrounding Bail in England and Canada: A Historical Analysis

Introduction

Given that the Canadian law of bail has its roots in the English legal tradition, it is perhaps unsurprising that the two bail systems share similar characteristics. These similarities are not, however, exclusive to the origins of the legislation. Rather, the bail laws in each jurisdiction have developed in a strikingly similar fashion over time (Hucklesby & Sarre, 2009). In both England and Canada, individuals charged with criminal offences have enjoyed a presumption in favour of bail since the 1970s. This principle asserts that, subject to certain exceptions, defendants should generally be released into the community while they await future court appearances. The foundations of the bail laws are thus heavily focused on due process values, prioritising the rights of defendants and their liberty. However, this right has been eroded by changes to the law in both jurisdictions which has progressively placed restrictions on accused persons' right to bail in an effort to repress potential future offending (Hucklesby, 2009; Player et al., 2010; Trotter, 2010; Webster et al., 2009). As such, crime control values have become increasingly important in shaping the law on bail.

These developments occurred within a wider context of shifting criminal justice rhetoric in both jurisdictions. Specifically, 'tough on crime' approaches began to dominate the prevailing ideology surrounding criminal justice in the 1970s, accelerating in the early 1990s in England (Newburn, 2007) and the mid 2000s in Canada (Webster & Doob, 2015). Central to this approach was the idea that the rights of defendants must be set against those of the public and victims (Sanders, Young, & Burton, 2010; Webster, 2015). In addition, the rise of managerialism resulted in an increased focus on efficiency and a preoccupation with risk

management (Bottoms, 1995; Feeley & Simon, 1992; Raine & Willson, 1997). These themes came to shape broader criminal laws and policies as well as those related to bail in both jurisdictions. It is argued that, while these factors are important to understanding bail decision-making, in line with McConville and his colleagues (1991), they can only offer a partial explanation of the process.

This chapter examines the role of the law, policy, and overarching rhetoric as a first step in understanding the factors contributing to the bail decision-making process. It performs this task by situating the research in the legislative and policy developments related to bail and the prevailing criminal justice ideology over the last half-century. It will trace the legal and policy history related to bail since the implementation of the legislation that forms the basis of each jurisdiction's current bail laws in the 1970s, demonstrating a shift from due process values to those centred on crime control. It will then outline wider developments in the rhetoric shaping criminal justice during this period, namely the rise of 'tough on crime' and managerialist ideologies. This discussion will ultimately highlight the substantial similarities in these developments across both jurisdictions. Finally, the theoretical framework of the study will be outlined, asserting that in line with McConville and his colleagues (1991), the behaviour of criminal justice actors must also be taken into account in an examination of the bail decision-making process. Before this discussion commences, however, the function of bail within the wider criminal process will be addressed.

Situating bail within the wider criminal process

The bail process determines whether defendants will be held in custody or released into the community pending trial. According to Trotter (2010):

...[bail is] generally understood worldwide to refer to the mechanism by which individuals are released pending the determination of criminal proceedings in trial and appellate courts (p. 1).

Bail can be understood as one sub-process (among multiple others) making up the larger criminal justice process. Developing an understanding of the bail process thus necessitates an examination of how it fits into the wider criminal justice process as well as the criminal justice system as a whole.

The criminal process forms part of the criminal justice system, which includes a number of agencies and institutions (e.g. police, prosecutors, defence, judges, probation, etc.), the criminal law, and the sentencing system (Ashworth & Redmayne, 2010). The criminal process, specifically, determines how individuals are dealt with in the criminal justice system. Packer (1964) describes the criminal process as:

...a compendious term that stands for all the complexes of activity that operate to bring the substantive law of crime to bear (or to avoid bringing it to bear) on persons who are suspected of having committed crime (p. 2).

It therefore describes the decisions and procedures whereby the system deals with potential suspects and defendants as well as encompasses the relationships between other components of the criminal justice system, such as actors, institutions, and substantive laws (Ashworth & Redmayne, 2010). The criminal process covers a range of decisions, from the initial investigation of suspects to the challenge of convictions or acquittals through appeal (Ashworth & Redmayne, 2010).

While some of the components of the criminal process can be long, drawn out and subject to numerous checks and balances (e.g. serious trials), there are also a number of summary procedures that take effect faster than other methods. These summary procedures make up what has traditionally been referred to as 'summary justice', encompassing court proceedings that are carried out rapidly and with the omission of certain formalities as required by the common law (Morgan, 2008).⁵

⁵ Morgan (2008) explained that this was a traditional way of understanding the meaning of 'summary justice' and that it has also been used more recently, in England, to discuss the processes that occur within the magistrates' court. For the sake of a meaningful comparison with Canada, the traditional understanding of the concept it employed here.

The bail process has historically been included within the ambit of summary justice in both England and Canada (Ashworth & Redmayne, 2010; Webster, 2015) as it is employed to quickly determine the pre-trial status of defendants (Webster et al., 2009).

Like other components of the criminal process, bail is framed by both bail legislation and, in England and Canada, the common law, and operates on the basis of decisions by actors working in the criminal justice system such as the police, prosecution, defence, and judicial officials. Although, compared to other processes bail operates on a relatively informal basis, it is nonetheless significant as it impacts individual liberty, a principle that is fundamental to free and democratic societies.

While the bail process represents only a portion of the criminal process, it should not be analysed without regard for the other components. This is because, as McConville and his colleagues (1991) argue, the criminal process is not a set of discrete stages but a process that overlaps in important ways. Indeed, the criminal process has an overall effect that is larger than the sum of its parts. The values underpinning one component often (but not always) influence the others. This means that attempts to explain one aspect of the process (in this case bail) should not be undertaken in a vacuum, but rather in the context of a much broader criminal process. As such, the following sections provide a history of the law and policy related to bail in England and Canada and then place it in the context of the broader, evolving rhetoric shaping criminal justice.

A history of bail in England and Canada

In order to explain the bail decision-making process, it is first necessary to examine the laws and policies that frame these decisions. Bail laws and policies in England and Canada have undergone considerable changes in the last half-century. Specifically, there has been a shift from the prioritisation of defendants' rights and the protection of their liberty to the idea that these rights should be restricted in a

growing number of circumstances. This section will demonstrate that these movements developed in a remarkably similar fashion across both jurisdictions and outline the values that shape bail law and policy as a result of these changes.

The foundation of the contemporary bail process

Prior to the introduction of the Bail Act 1976 in England and the Bail Reform Act 1972 in Canada, the granting of bail was almost entirely left to the discretion of the judiciary (Bottomley, 1968; Trotter, 2010). These Acts both provided a legislative framework for bail decision-making that was previously absent from the law. Although they have evolved as a result of various amendments, these Acts generally continue to form the basis of English and Canadian bail legislation.

Human rights foundation

Both Acts were introduced at a time when the human rights of suspects and defendants (Hucklesby, 2009; Trotter, 2010) were given primary importance in the criminal justice rhetoric. They were preceded by research in the 1960s and early 1970s that questioned the fairness of each respective bail system (see, for example, Bottomley, 1968; Canadian Committee on Corrections, 1969; Friedland, 1965). For instance, in Canada, Friedland (1965) conducted an influential study that focused on bail procedures in the Toronto magistrates' courts. He asserted that many detained accused persons' attendance in court could be secured using less intrusive means, that requiring security in advance as a condition of release raised serious concerns surrounding the fairness of the criminal justice system, and that pre-trial custody should be used less often given the harmful impact it had on accused persons. In addition, the Canadian Committee on Corrections (1969; commonly referred to as the 'Ouimet report') recommended sweeping changes to the bail system which included expanding the powers of the police to permit the release of more accused persons and requiring the state to justify the detention of individuals rather than having accused persons bear the burden. In England, Bottomley (1968) argued that principles for granting bail in England should be

clarified. He found that decisions to grant or deny bail as well as the justifications for such decisions were inconsistent across courts. Many of the recommendations contained in these reports were reflected in the Bail Act 1976 and the Bail Reform Act 1972, forming the basis of a new 'enlightened' era in the history of bail law (Trotter, 2010)

The guiding philosophies of both the Bail Reform Act 1972 and the Bail Act 1976 are underscored by themes related to the presumption of innocence. In Canada, the amendments to the Criminal Code that were introduced by the Bail Reform Act 1972 shift the former presumption of detention to a presumption of release (Myers, 2009). The new legislation specifies that bail decisions are to be governed by the underlying presumption that, unless the Crown can justify otherwise, accused persons should be released into the community pending their next court appearance (Criminal Code, 1985, s. 515(1)).⁶ In England, Section 4 of the Bail Act 1976 declares a general right to bail, usually referred to as 'the presumption in favour of bail', to most categories of defendants⁷ who are brought before the court. This principle suggests that, unless specific exceptions apply, accused persons should be granted bail.

The rights enshrined in the Bail Act 1976 and the Bail Reform Act 1972 are intended to protect legally innocent individuals from being remanded in custody unless there are exceptional circumstances that suggest their detention is warranted. In other words, accused persons are, in the main, entitled to their liberty. Both England and Canada have demonstrated their commitment to this principle by promising to comply with the standards set out in the International Covenant on Civil and Political Rights (ICCPR). This international human rights treaty was established by the United Nations and commits its parties to respect the civil and political rights of individuals. Together, the ICCPR, the International

⁶ Section 515(1) does not apply to those serious offences listed in s. 469 (e.g. treason, piracy, murder), which must be heard by a Superior Court Judge. In these cases the accused must prove why he or she should be released.

⁷ Section 4(2) and Section 4(7) of the Bail Act 1976 specify that the general right to bail does not apply to convicted persons (unless they are awaiting a report), fugitive offenders, or persons charged with treason (who must appear before a judge of the High Court or a Secretary of State).

Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights make up the International Bill of Human Rights (Rodley & Pollard, 2009). Canada acceded to the ICCPR on May 19, 1976, while the United Kingdom signed the treaty on September 16, 1968 and ratified it on May 20, 1976. Under Article 9, Paragraph One of the ICCPR, “everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” In order to uphold this basic human right, both countries must ensure that accused persons are only remanded in custody when their detention can be justified for lawful reasons.

Although the individual right to liberty is protected by the ICCPR in both England and Canada, it is generally the national and regional systems for human rights that are referred to if a violation is suspected. Specifically, the Charter of Rights and Freedoms (hereafter called ‘the Charter’) in Canada and the European Convention on Human Rights (hereafter called ‘the Convention’) in England. In Canada, the rights and freedoms guaranteed by the Charter are entrenched within the country’s constitution. Prior to the implementation of the Charter in 1982, Canada’s constitutional system was similar to that in England, which is based on common law. In comparison, the current individual-rights-based model depends on a system of checks and balances in which the judiciary has the authority to verify whether laws and state conduct are in accordance with the Charter (Manikis, 2012). The right to bail is guaranteed under s. 11(e) of the Charter, which promises that ‘any person charged with an offence has the right ... not to be denied reasonable bail without just cause.’ If a law is found to be unconstitutional under the Charter, the courts have the power to strike down the law at the Supreme Court level (Manikis, 2012). However, s. 33 of the Charter, the ‘notwithstanding clause’, allows Parliament to maintain a law despite its incompatibility with the Charter. In this situation the overridden rule must be reviewed after five years.

Rights and freedoms are administered slightly differently in England. The Convention is an international treaty intended to protect human rights and freedoms in Europe. It was ratified by the United Kingdom in March 1951 and

came into force in September 1953 (Emmerson et al., 2012). The Convention broke new ground in international law in the sense that it adopted a principle of collective enforcement. This requires states to submit to a form of external scrutiny that encroaches on national sovereignty. Upon the introduction of the Convention, the protection of human rights was made a shared responsibility of all Council of Europe member states (Emmerson et al., 2012).

The right to apply for bail in England is governed by Articles 5(3) and 5(4) of the Convention and is also related to the article addressing the presumption of innocence in Article 6(2). Article 5(3) states:

Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

After exhausting domestic remedies, individuals who believe their rights have been violated under the Convention are entitled to seek remedy from the European Court of Human Rights in Strasbourg, France. The decisions handed down by the Court have historically had a substantial impact on England's bail laws (see, for example, *Caballero v. United Kingdom (2000)*) and also influence individual court decisions (Emmerson et al., 2012).

The rights and freedoms articulated in the Convention have been given further effect in the United Kingdom through the implementation of the Human Rights Act 1998 (HRA). This legislation enables individuals to enforce their rights directly in UK courts instead of taking a case to the European Court of Human Rights (Emmerson, Ashworth, & Macdonald, 2012). Section 6 of the HRA specifies that it is unlawful for a public authority (including the courts) to act in a manner that is incompatible with the Convention unless they are required to do so by the terms of primary legislation. This means that Convention rights take priority over the rules of common law or equity and most subordinate legislation (Emmerson et al., 2012). In circumstances in which it is impossible to resolve a Convention right and a provision of primary legislation, a higher court may grant a 'formal declaration of

incompatibility.’ At this point, Parliament may amend the legislation if there are ‘compelling reasons to do so’ (Emmerson et al., 2012).

In sum, the bail legislation in England and Canada is grounded in empirical research and human rights laws. While human rights are administered slightly differently across jurisdictions, the bail laws are nonetheless framed by similar principles related to the presumption of innocence, liberty, and procedural fairness. Furthermore, these rights are ensured by mechanisms at both the domestic and international level.

Exceptions to the right to bail

It is generally accepted in both England and Canada that there are certain situations in which the right to bail is inapplicable. Both jurisdictions outline circumstances in which bail can be denied. In Canada, specific criteria exist that allow a defendant to be detained pending trial. Section 515(10) of the Criminal Code provides:

(10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

(a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;

(b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and

(c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

(i) the apparent strength of the prosecution’s case,

(ii) the gravity of the offence,

(iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and

(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves,

or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

In England, the circumstances in which bail can be denied are slightly different for imprisonable indictable offences, imprisonable summary offences, and non-imprisonable offences (Bail Act 1976, Schedule 1, Part 1, 1A, and 2). Specifically, the grounds for refusing bail are wider for defendants charged with imprisonable indictable offences than summary imprisonable offences and non-imprisonable offences. Paragraphs 2 to 6 of Part 1, Schedule 1 of the Bail Act 1976 list a number of exceptions to the right to bail,⁸ but the main provisions are located in Paragraph 2 (Ashworth & Redmayne, 2010). This provision provides:

2 The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would—

(a) fail to surrender to custody, or

(b) commit an offence while on bail, or

(c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

In the case of summary imprisonable offences and non-imprisonable offences, the grounds for refusing bail are more limited (Bail Act 1976, Schedule 1, Part 1A and 2). In the case of summary imprisonable offences (and criminal damage below £5,000), in the main, bail cannot be denied unless the defendant previously exhibited similar behaviour (i.e. previous fail to surrender, on bail at the time of the alleged offence, the court is satisfied of a breach of bail or fail to surrender).⁹ In the

⁸ The additional exceptions to bail are as follows: The defendant is likely to cause physical or mental injury to an associated person (or fear of the same), the defendant was on bail on the date of the offence, for the defendant's own protection, the defendant is already in custody, because there is insufficient information for the court to make a remand decision, the defendant has failed to surrender or breached bail in connection with the present proceedings, the defendant tested positive for Class A drugs and refused assessment, or because it would be impracticable to complete a report or inquiry if the defendant is not in custody (Bail Act 1976, Schedule 1, Part 1, Paragraphs 3 to 7).

⁹ Defendants charged with imprisonable summary offences may also be detained if the defendant is likely to cause physical or mental injury to an associated person (or fear of the same), for the defendant's own protection, due to the fact that the defendant is already in custody, because there

case of non-imprisonable offences, only convicted offenders can be remanded in custody if they previously exhibited similar behaviour (i.e. previous fail to surrender or the court is satisfied of a breach of bail or fail to surrender).¹⁰

Given that these criteria substantiate the detention of legally innocent accused persons, it is perhaps unsurprising that they are commonly addressed in cases involving the Charter and the Convention. For example, in *R. v. Hall* (2002), the Supreme Court of Canada held that granting the broad discretion to deny bail for 'any just cause' in relation to the (former) s. 515(10)(c) criteria - which authorized detention when it was necessary to maintain confidence in the administration of justice - violated the presumption of innocence and s. 11(e) of the Charter. Following this decision, this phrase was removed from the law and the criterion was revised. In England, the European Court of Human Rights has advised that, in considering whether an accused person might commit a further offence on bail under Schedule 1, Paragraph 1, s. 2(b), it cannot be automatically assumed there is a risk of alleged re-offence based solely on an accused person's record. Rather, the court should consider whether the previous convictions are comparable, either in nature or seriousness, to the relevant charges against the accused (See *Clooth v. Belgium* (1992), para. 40; *Lyubimenko v. Russia* (2009), para. 74).

While the exceptions to the right to bail in England differ from those in Canada in terms of their breadth and application to different offences, the main exceptions still permit the detention of the defendant under similar circumstances. Central to this assessment is considering the risk of the defendant failing to attend court, committing an offence, or interfering with the proceedings. The most notable differences between the main exceptions lie in the explicit reference to public safety in terms of future offending and the consideration of public confidence in Canada.

is insufficient information for the court to make a remand decision, or the defendant tested positive for Class A drugs and refused assessment (Bail Act 1976, Schedule 1, Part 1A, Paragraphs 4 to 9).

¹⁰ Defendants charged with non-imprisonable offences (convicted or unconvicted) may also be detained if they are deemed likely to cause physical or mental injury to an associated person (or fear of the same), for the defendant's own protection, or due to the fact that the defendant is already in custody (Bail Act 1976, Schedule 1, Part 2, Paragraphs 3 to 6).

Bail Procedures

The English and Canadian criminal justice systems permit both the police and the courts to make bail decisions, albeit at different stages of the process. The administration of the Canadian bail system may vary between the provinces and territories as a result of the structure of the government. Specifically, criminal laws are created by the federal government but enforced by the provinces and territories (Manikis, 2012). As a result, the type of police force who is responsible for bail is dependent on the jurisdiction.¹¹ In the case that a specific jurisdiction has a municipal police force, bail would fall under their mandate. If there is no municipal police force, provincial policing services would have responsibility (Goff, 2017). If the police detain an accused in Canada, the case would proceed to provincial court, the first court most people encounter in the criminal justice system¹² (Goff, 2017). Provincial Crown attorneys represent the state in these proceedings whilst the accused is represented by private counsel, a state-funded duty counsel, or legal aid counsel (Trotter, 2010). The right to legal counsel at the bail stage is recognized in *R. v. Chan* (2000). Matters in provincial court are presided over by a justice of the peace or a provincial court judge. Unlike judges, justices of the peace are not legally trained. The determination of which type of justice makes the bail decision is dependent on local practices and resources (Trotter, 2010).

In England, the 'local police' forces are the agencies responsible for the majority of policing (Sanders et al., 2010). While additional 'special police forces' have particular responsibilities throughout the jurisdiction, they are not typically involved in the bail process. As of July 2017, there were 43 local police forces spread throughout England and Wales which fell under the authority of the Home Office (Hargreaves, Husband, & Linehan, 2017). While police forces are given some level of autonomy in executing their duties they are still subject to national requirements. The police make the initial decision as to whether to release or detain an accused

¹¹ In Canada, each province or territory is responsible for developing its own municipal and provincial policing services. For example, a provincial government might decide that all cities that reach a certain population size will maintain a police service and the remainder of the province will be under the jurisdiction of the provincial police (Goff, 2017).

¹² Offences listed under s. 469 and s. 522 of the Criminal Code are an exception to this rule as they must be heard by a Superior Court judge.

person. In the event that the police choose to detain an individual, the case would be passed onto the Crown Prosecution Service (CPS), whose responsibilities include making representations to the court about bail at magistrates' court (Ashworth & Redmayne, 2010). Accused persons are entitled to representation at this stage under the Convention, which mandates that individuals have the right to legal assistance before being deprived of liberty, especially before trial (Emmerson et al., 2012). Indeed, English law contains multiple provisions ensuring access to legal advice in the event of arrest, detention, and any custodial remand (Ashworth & Redmayne, 2010). The court is presided over by either part-time magistrates, sitting on a bench of two or three, or a District judge, who sits alone. Unlike District judges, magistrates do not require legal training. However, a legal advisor is available to assist the panel at all times. Although magistrates are traditionally the judicial officers who preside over bail proceedings, it has become increasingly common for District judges to sit in magistrates' court (Sanders et al., 2010).

The decision to detain a defendant in custody in both England and Canada therefore, in the main, begins with the police and then ultimately results in a decision by the court. Further, a prosecutor represents the state while the defendant is legally entitled to representation. The powers held by actors at each stage is, however, slightly different across jurisdictions. These differences will be outlined below.

Police Powers

Prior to the introduction of the Bail Reform Act 1972 in Canada, decisions regarding bail were largely the responsibility of the judiciary. A police officer could appear before a justice for the purpose of obtaining a warrant for an individual's arrest or a to have a summons issued, which compels the accused person to attend court at a specified time. Alternatively, the police could arrest accused persons without a warrant and could bring them before the court for the purposes of a bail decision shortly thereafter (Trotter, 2010). Although these options are still available to police officers under the Bail Reform Act 1972, their powers have been

expanded considerably to allow for the release of accused persons without prior judicial authorization.

Under s. 496 of the Canadian Criminal Code, an officer who encounters an accused person in the community has the option to issue an 'appearance notice' in lieu of arrest. This type of release requires the accused person to appear in court and, under some circumstances, to attend a police station for fingerprinting or photographs. In the event that a police officer wishes to maintain custody of the accused person, s. 498 provides that an "officer in charge or another peace officer"¹³ can subsequently release them on a 'promise to appear' or a 'recognizance'. Like an appearance notice, a promise to appear compels the accused person to attend court at a specific time. A 'recognizance' acknowledges an indebtedness to the Crown which is defeasible upon the fulfilment of certain conditions. Unlike the promise to appear, a recognizance is accompanied by the threat of financial loss.

In 1994, Parliament afforded police officers in Canada with the ability to attach conditions to promises to appear and recognizances (Trotter, 2010). When conditions are imposed, the accused is said to be 'entering into a undertaking'. These provisions, contained in s. 499(2) and 503(2.1) of the Canadian Criminal Code, permit specific terms. Specifically, police can order accused persons to remain within a specific jurisdiction, to notify the police of changes to address, employment or occupation, and to abstain from communication with a specific person. The Criminal Law Improvement Act 1997 added terms that direct accused persons to abstain from possessing a firearm and to abstain from the consumption of alcohol or drugs. This Act also permits police to order that an accused person "comply with any other condition specified in the undertaking that the peace officer or officer in charge considers necessary to ensure the safety and security of any victim of or witness to the offence" (Criminal Code, s. 503(2.1)(h)). If none of the

¹³ According to s. 493 of the Criminal Code, an 'officer in charge' means "the officer for the time being in command of the police force responsible for the lock-up or other place to which an accused is taken after arrest or a peace officer designated by him for the purposes of this Part who is in charge of that place at the time an accused is taken to that place to be detained in custody."

release mechanisms are deemed appropriate by the police, they must ensure the accused person is taken before a justice within 24 hours (or as soon as possible) to receive a determination of bail (Criminal Code, 1985, s. 503).

In England, police have the power to remand persons who have not yet been charged ('pre-charge bail') as well as persons whom have been charged and are awaiting their first court appearance ('post-charge bail'; Ashworth and Redmayne, 2010). Police generally use pre-charge bail in situations where there is not enough evidence to proceed or when additional guidance is required from the CPS. Under s. 38(a) of the Police and Criminal Evidence Act 1984 (PACE), individuals are to be released unless their detention can be justified under specific circumstances. Specifically, situations in which a name or address cannot be ascertained, there is a likelihood the accused person will fail to appear in court, there is a risk of interference with the administration of justice or the investigation, or if it is for their own protection. Further, in the case of imprisonable offences, bail may be denied by the police if the commission of an offence is likely, and in non-imprisonable offences, if there is a risk of injury to another or loss or damage to property.

The English police are afforded some of the same discretion that the courts are entitled to with regard to imposing conditions under s. 3 of the Bail Act 1976. However, they do not have the same powers and are still limited, to some extent, in the types of conditions they can impose. Section 3(a) of the Bail Act 1976 states that, unlike courts, police are unable to impose conditions of residence at bail hostels, electronic-monitoring, conditions necessary for the preparation for a report for sentencing purposes, a medical report in murder cases, or a requirement to attend an interview with an advocate or litigator. Although police have had the power to attach conditions to bails following a charge since 1994, the power to impose conditions prior to charge was not instated until the enactment of the Criminal Justice Act 2003 (Corre & Wolchover, 2004). The most common conditions imposed by the police are requirements not to contact victims or witnesses, requirements to keep away from named places, requirements to report to the police, requirements to reside at a specific place, and curfews (Bucke & Brown, 1997).

An examination of police powers has demonstrated that the police in England and Canada have been afforded an increasing amount of power to impose conditions on accused persons since the introduction of their respective bail Acts. In England, these powers have expanded further than in Canada as the police can impose conditions on 'pre-charge' bail in addition to 'post-charge' bail. While these changes have increased the control police have over accused persons in the community, they also enable them alternatives to custody at the arrest stage.

Court Powers

If the police detain a defendant in either England or Canada, they subsequently appear in court in order for the issue of bail to be addressed.

In Canada, the courts are directed to use a 'ladder' approach to the bail decision-making process. Specifically, each possible form of release should be considered and deemed inappropriate until the court reaches the least onerous form of release that would be suitable in the circumstances (Trotter, 2010). This approach is consistent with s. 11(e) of the Charter, which entitles accused persons in Canada to "reasonable bail."¹⁴ Section 515(1) of the Canadian Criminal Code states that defendants are to be released on an undertaking without conditions unless the Crown can show cause as to why a more restrictive form of release is necessary. This form of release simply obliges the accused to appear in court at a specific time and place.

A Canadian court is able to increase the restrictiveness of an undertaking through the imposition of conditions. This form of release requires terms to be attached to the bail in addition to the obligation to attend court (Criminal Code, 1985, s. 515(2)(a)). If an undertaking is deemed inappropriate, a court can also order that a defendant enter into a 'recognizance' (Criminal Code, 1985, s. 515(2)(b)). This order differs from an undertaking in that it is accompanied by a financial penalty if

¹⁴ The Supreme Court decision of *R. v. Pearson* (1992) clarified that "reasonable bail" relates to the terms of bail.

the terms are not followed. Recognizances can become more onerous through the imposition of conditions, the attachment of a surety, or the requirement to provide a deposit. In Canada, sureties guarantee that defendants will remain faithful to their bail conditions by agreeing to offer to pay a sum of money if the defendant does not comply (Trotter, 2010). Sureties - who are often family members or friends of the accused - effectively agree to police accused persons in the community by monitoring their actions, ensuring they abide by the conditions of their release, and making sure they attend court when they are required to do so (Myers, 2009).

The nature of the conditions that can be attached to an undertaking or a recognizance are outlined in s. 515(4) to (4.3) in the Canadian Criminal Code. These conditions are almost identical to the aforementioned conditions employed by the police, but include a provision under s. 515(4)(p) that states that an accused person must “comply with such other reasonable conditions specified in the order as the justice considers desirable.” Some examples of conditions imposed pursuant to this section include curfews, house arrest, control of drugs and/or alcohol consumption (e.g. a prohibition from entering premises licenced to sell alcohol), driving prohibitions, medical treatment, a requirement to possess bail papers, and a requirement to ‘keep the peace and be of good behaviour’ (Trotter, 2010).

Failure to comply with the conditions imposed upon release in Canada may result in arrest and detention (Criminal Code, 1985, s. 524) or a failure to comply charge under s. 145(3) or 145(5.1) of the Criminal Code. In the event that a new charge is laid, the Crown attorney may choose to have all previous bail orders cancelled and either oppose release on the new charges or tailor the conditions to address the new alleged offence(s). Under these circumstances, the onus is on the accused to show cause why detention is not justified. Failure to comply with bail conditions may also result in the accused person and, if applicable, his or her surety, being at risk of forfeiture proceedings.

In England, there are several alternatives to consider at the court stage: a release on unconditional bail, a release on conditional bail, or a remand in custody

(Ashworth & Redmayne, 2010). The Bail Act 1976 specifies that the courts should have regard for several considerations when deciding whether or not to refuse bail. Specifically, the nature and seriousness of the offence; the character, antecedents and associations of the defendant; the defendant's record in relation to bail; and except in the case of a defendant whose case has been adjourned pending inquiries or a report, the strength of the evidence of his or her having committed the offence. In addition, the court is afforded the ability to consider any other factor which appears to be relevant (Bail Act 1976, Schedule 1, Part 1, Paragraph 9).¹⁵

The European Court of Human Rights has offered some assistance in the interpretation of these considerations in England. For example, the court has warned against the generalized assumption that the seriousness of a charge increases the risk of non-appearance. Although this consideration is deemed important, the Court has continuously asserted that it cannot be viewed as an independent ground for the refusal of bail (Emmerson et al., 2012; see, for example, *Lyubimenko v. Russia* (2009); *Yagci and Sargin v. Turkey* (1995)).

The English court is also afforded a significant amount of discretion in relation to bail conditions. The power to attach conditions to release orders was introduced by s. 21 of the Criminal Justice Act 1967. The aim was to reduce the number of defendants in custody by allowing the court the option to restrict their liberty without resorting to detention (Corre & Wolchover, 2004). Section 3(6) of the Bail Act currently empowers courts to impose requirements as it appears necessary: a) to secure that defendant surrenders to custody, b) to secure that defendants do not commit an offence on bail, c) to secure that defendants do not interfere with witnesses or otherwise obstruct the course of justice, and d) for the defendant's own protection.

The statute does not define categories of bail conditions in England, allowing the court flexibility to individualize their decisions according to the case (Corre & Wolchover, 2004). Some conditions which are commonly imposed under s. 3(6)

¹⁵ These considerations relate specifically to imprisonable offences.

include reporting to a police station, surrendering a passport and not leaving the country, residing at a particular address, keeping a certain distance away from a specific address, abstaining from interfering with witnesses, and abiding by a curfew (Corre & Wolchover, 2004). In some cases, curfews may be accompanied by electronic monitoring. This option was introduced on a permanent basis in September 2005 (Hucklesby, 2011a). The imposition of electronic monitoring allows the court to verify whether accused persons are abiding by their curfews through an electronic tagging system.

The English courts are able to impose further restrictions on a bailed accused person through the use of sureties and securities. Both of these conditions involve financial promises which are made to the court in order to secure a defendant's attendance at future appearances. In England, a security (Bail Act, 1976, s. 3(5)) is a sum of money or money's worth that must be deposited as a pre-condition to an accused person's release, while a surety (Bail Act 1976, s. 3(4)) is an individual responsible for surrendering an accused person to custody, being liable to forfeit a sum of money if he or she does not comply. Sureties do not have to offer the money upfront, but must prove that they have it available should the accused person abscond. The responsibility of sureties is much narrower in England than in Canada, where they are also responsible for ensuring accused persons comply with their conditions. Despite the fact that sureties and securities are still available to be imposed under the Bail Act 1976, there is evidence to suggest they are rarely applied in practice (Hucklesby, 2011a).

If an accused person fails to comply with the conditions of their bail in England, they may be arrested by the police (Bail Act, 1976, Section 7(3)). However, unlike in Canada breaching a bail condition is not regarded as an offence in this jurisdiction. As such, no further charges are laid under these circumstances. However, the court does have the authority to change the conditions of bail or remand the defendant in custody. In contrast, failing to surrender is considered an offence and may result in the prosecution of the accused person under s. 6 of the Bail Act 1976.

The courts in England and Canada can thus only remand an accused person in custody if they follow a series of checks and balances prior to doing so. In addition, they are offered considerable discretion as to the nature of the conditions they may impose if they choose to release them. Their powers extend beyond those of the police, enabling them to impose more onerous restrictions on accused persons.

The preceding discussion has demonstrated that the foundations of the English and Canadian bail processes have multiple similarities. They are founded in international and domestic human rights principles, follow similar procedures, and afford police and courts comparable powers. While the legislation has manifested itself slightly differently between jurisdictions, both systems contain safeguards at multiple levels to prevent the arbitrary detention of accused persons thus protecting their right to liberty.

The eroding right to bail

In both the Canadian and English bail systems, the emphasis placed on the presumption of bail clearly demonstrates that defendants are to be released into the community unless the state can demonstrate that there is a reason to remove this right. However, in both jurisdictions this principle has been eroded by a number of amendments that have restricted the right to bail. In the years since the introduction of the Bail Act 1976 and the Bail Reform Act 1972, amendments have increasingly been introduced under the auspices of public safety as opposed to the protection of defendants' rights.

Changes to the bail legislation in Canada indicate an increasing tendency to restrict defendants' right to bail. In this jurisdiction, there has been a growing trend towards the use of 'reverse onus' provisions that place the responsibility on the defendant, rather than the Crown, to justify why he or she should be released on bail (Webster et al., 2009). Provisions like this are 'slowly eroding years of legislative and jurisprudential change sparked by the Bail Reform Act in the 1970s' (Trotter, 2010, p. 14).

The stream of provisions in Canada began in the mid 1970s, when the Criminal Amendment Act 1975 reversed the onus in cases when an indictable offence was alleged to have been committed while the accused was at large awaiting trial for another indictable offence, when the accused was charged with an indictable offence and was not a resident of Canada, and when the accused was charged with drug trafficking (importing or exporting). It was also in the 1970s that a reverse onus provision was put in place for defendants who are charged with failing to comply with a court order (Webster et al., 2009).

Several decades later, in 1997 and 2001, two acts¹⁶ created reverse onus provisions for several offences associated with organized crime. These amendments were closely followed by reverse onus provisions related to criminal gang activity and terrorism in 2001, under the Anti-Terrorism Act. Finally, in 2008 a package of reverse onus provisions related to firearm offences came into force under the Tackling Violent Crime Act. These amendments more than doubled the number of reverse onus provisions in the Criminal Code. Although it is arguable to what extent these provisions changed the practical application of the laws in the courts (see Webster et al., 2009), they clearly represent a gradual shift in the attitudes towards bail in Canada.

In England, 'the use of bail was causing increasing disquiet' by the late 1980s 'which has continued and arguably increased ever since' (Hucklesby, 2009, p. 3). These negative attitudes were often associated with complaints from the media and political spheres following an occasion in which a defendant committed an offence while on bail (see, for example, Hickley, 2009). At the same time, the climate of the criminal justice system was shifting to a reduced emphasis on the rights of defendants and a greater focus on the protection of the public and the rights of victims. This ultimately resulted in a shift in attitudes away from granting bail (Hucklesby, 2009). It is perhaps unsurprising that the change in climate

¹⁶ These acts include an Act to amend the Criminal Code (criminal organizations) and to amend other Acts in consequence 1997 and an Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts 2001.

precipitated a number of amendments to the law that reflected crime control values.

The Criminal Justice and Public Order Act 1994 introduced a change in legislation that substantially restricts the right to bail for defendants accused of serious offences (e.g. murder, manslaughter, and rape) who have previous convictions for similar offences. Initially, these individuals were to be excluded from being granted bail completely. However, following some discussion surrounding the compatibility of the law with the right to liberty enshrined in the Convention, the legislation was amended by the Crime and Disorder Act 1998 to require the court to grant reasons in such cases if 'there are exceptional circumstances which justify it'. Several years later, the Criminal Justice Act 2003 reversed the presumption of bail for defendants who are before the court for committing an indictable offence or offence triable either way and were on bail in criminal proceedings on the date of the alleged offence, unless the court believes there is no significant risk of an offence being committed on bail in the future. The Criminal Justice Act 2003 also amended the bail legislation as it pertains to defendants accused of Class A drug use. Under the new legislation, defendants who test positive for these types of drugs need not be granted bail if the offence is drug related and he or she does not agree to undergo assessment and/or treatment for drug dependency.

There have, however, been more recent changes to the legislation in England that did not conform with the trend of restricting defendants' right to bail. Specifically, the changes under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) instruct magistrates to conduct a 'no real prospect' test, ensuring defendants are released on bail if they would be unlikely to receive a custodial sentence (Ministry of Justice, 2014b). While these amendments prioritise the liberty of defendants in that they suggest they should not be unnecessarily remanded in custody, they were also implemented at a time when prison overcrowding was a major concern and cuts to funding were being made across the criminal justice system (Garside & Silvestri, 2013). Indeed, the Green Paper preceding the Act - *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* – explicitly states that the reforms proposed in the paper were intended

to reduce spending (Ministry of Justice, 2010a). As such, this amendment is likely to signal the importance of values related to cost savings and efficiency as opposed to signal a reform exclusively rooted in concerns for the rights of defendants.

Both England and Canada have introduced reforms that are clearly intended to curtail defendants' right to liberty by increasing the number of restrictions that can be placed on their right to bail. This suggests that, irrespective of geographical and political separation, the two jurisdictions are both moving away from the 'enlightened' approach that prioritised the rights of defendants and which formed the foundation of their bail laws.

From due process to crime control

The aforementioned changes that took place in relation to the bail law and policy in England and Canada were reflective of a broader shift in rhetoric in many western criminal justice systems from the prioritisation of 'due process' values to those of 'crime control' (Packer, 1968; Sanders et al., 2010). Specifically, this shift represents a movement away from the prioritisation of the rights of suspects towards the repression of criminal activity. However, the previous discussion demonstrated that, rather than displacing the initial due process laws, these crime control laws have resulted in the emergence of multiple, sometimes competing values, within the same legal and policy framework.

Packer (1968) developed the due process and crime control models of the criminal process as a way to identify the value choices that underlie the operation of the process. Although he has since been widely criticised for his approach (see Ashworth & Redmayne, 2010; Feeley, 1992; Macdonald, 2003; McBarnet, 1981; Roach, 1999; Smith, 1997), there is no doubt that he set the stage for much of the resulting debate as to which models best reflect the reality of the criminal justice process. These models describe two extremes on opposite ends of a spectrum. As such, they can be understood as 'ideal types' that are to be used as explanatory

tools rather than representations of reality. Each model is comprised of specific values that are intended to apply to various portions (or the entirety) of the criminal justice process.

Crime Control

The most important function to be performed by the crime control model is the repression of criminal conduct. In this way, the criminal process is used a guarantor of social freedom through the maintenance of order. There is also an important emphasis on the efficiency with which suspects move through the process. The nature of this efficiency is rooted in the resource to case management ratio. Specifically, the model would be operating successfully if it produced a high rate of apprehensions and convictions in the context of heavy caseloads and limited resources. Given that there is a premium on case processing speed and finality, informal procedures and uniform processes are essential to its success. 'Ceremonious rituals' (i.e. formal procedures) that clutter the process and do not advance the case are thus highly undesirable. In this way it is likened to an assembly line in which cases move through the process quickly and in a uniform manner.

Ideally cases will conclude at an early stage by removing suspects that are unlikely to be offenders and convicting the rest. Guilty pleas are the ideal mechanism for truncating procedures. This assumes that the 'probably innocent' are screened out early and the 'probably guilty' can pass quickly through the remaining stages of the process. For this reason, the crime control model involves the 'presumption of guilt'. Once it is determined that there is enough evidence of guilt all subsequent activity directed towards the defendants is based on the idea they are guilty. It follows that there is a high level of confidence in the police and prosecution in terms of the informal fact-finding that takes place in the early stages of the process. The assumption of guilt inherent to this model assures the dominant goal of repressing crime through highly summary processes without any great loss of efficiency.

Due Process

While the crime control model is compared to an assembly line, Packer (1968) likens the due process model to an obstacle course. Each stage is designed to present impediments to carrying the defendant further along the process. This is because the due process model rejects the reliability of informal fact finding processes as they are not indicative of factual guilt. It insists instead on formal, adjudicative, adversarial fact finding processes in which the public guilt of the accused is determined by an impartial tribunal in a transparent fashion. Reliability is valued over efficiency since the model insists on the prevention and elimination of mistakes to the greatest extent possible. Since the process must be subjected to controls and safeguards, it is prevented from operating at maximum efficiency.

The values underpinning the due process model are centred on the primacy of the individual and the complimentary concept of the limitation of official power. As such, the aim of the process is as much to protect the factually innocent as it is to convict the factually guilty. It also values equality and asserts that there is no equal justice when individuals are disadvantaged on the basis of the volume of money they possess.

Despite the wide use of Packer's models, they have also been the subject of much criticism (Ashworth & Redmayne, 2010; Feeley, 1992; Macdonald, 2003; McBarnet, 1981; Roach, 1999; Smith, 1997). Generally speaking, these criticisms concern the meaning or purpose of the models, the purportedly dichotomous nature they present, or the suggestion that they are overly selective and omit important values inherent to the criminal justice process.

First, commentators have expressed concerns about the meaning or aims of Packer's models. For instance, Smith (1997) has suggested that due process is not a goal in of itself. He argues that 'the crime control model is concerned with the fundamental goal of the criminal justice system, whereas the due process model is concerned with setting limits to the pursuit of that goal' (p. 335). Ashworth and Redmayne (2010) made a similar argument related to the purpose of the models,

suggesting that the relationship between them is unclear. They suggest that reconstructing crime control as the central purpose with the pursuit of due process being qualified or assigning due process and crime control to be two main objectives would solve the problem of the aim of the due process model.

Feeley (1992) has proposed additional concerns surrounding the dichotomous nature of Packer's models, claiming that the criminal process itself often amounts to 'punishment' for unconvicted defendants and as such the due process model compromises the very rights it attempts to protect. McBarnet (1981) has similarly rejected this dichotomy, arguing that 'due process is for crime control' (p. 31), referring to the tendency of the government to use due process rhetoric to camouflage crime control oriented practice.

Finally, some commentators have suggested that Packer's models are overly selective and do not account for important (more contemporary) values (Ashworth & Redmayne, 2010; Roach, 1999). Roach (1999) has argued that they do not adequately account for the role of the victim and Ashworth and Redmayne (2010) argue that Packer does not address the importance of resource management and overlooks issues such as targets, performance, and other bureaucratic goals.

Despite some of the issues surrounding Packer's models, they continue to be largely influential in criminal justice process research (see Hucklesby, 2013; King, 1981; Macdonald, 2003; Sanders et al., 2010). In addition, many of the criticisms can be understood to be mischaracterizations of the models. For instance, Sanders and his colleagues (2010) argue that many of the criticisms derive from a misunderstanding of the difference between values and goals and that when the models are understood to encompass values rather than aims, issues surrounding their meaning become irrelevant. Since both models see law enforcement to be desirable because of its crime prevention effects and agree that there should be some limits on the power of the government, they simply represent different points of view as to what those limits should be. As such, when the models are understood as values and the limits of their scope acknowledged, they remain a

useful tool for understanding the operation of the criminal justice process (Hucklesby, 2013; Sanders et al., 2010).

Taking into account the limitations of Packer's model, this thesis will conceptualise due process and crime control as values with which to examine the operation of the bail process rather than employ them as normative models. This is because it is not the intention of this research to test the validity of these process models, but rather to construct a comprehensive picture of the bail process and to use these values - in part - to frame this picture. It is argued that normative models which seek to explain the operation of the criminal justice process using one overarching goal (see, for example, Ashworth & Redmayne, 2010; Sanders et al., 2010) are unlikely to capture the complex, competing, and often intersecting values that are inherent to the process. As such, the thesis will not seek to understand the extent to which each jurisdiction's bail process 'fits' each model, but rather will assess how they frame different aspects of the process and the ways in which they interact and overlap with other values in doing so.

This research takes a similar approach to King (1981), who has argued that approaching the explanation of the operation of the criminal justice process from one viewpoint cannot offer a complete understanding of the phenomenon in question. He suggests that the mere fact that one theory is able to account for some aspects of a specific phenomenon does not bring the researcher any closer to the truth in any absolute sense (King, 1981). When it is looked at from different viewpoints, however, a more realistic account is possible. Accepting the presence of multiple aims and values allows for the incorporation of other perspectives that may not fit neatly within the proposed framework. This type of approach is thus likely to have both theoretical and practical implications in terms of policy and law reform.

Summary

This section has highlighted the similarities in the evolution of the English and Canadian bail legislation by outlining a movement from due process values to those centred on crime control. Specifically, two systems one founded in human principles related to the right to liberty and the presumption of innocence have been eroded by numerous reforms that have restricted the right to bail in an effort to repress crime. This provides the beginning of a useful framework with which to conceptualise an understanding of the bail process. However, an analysis of the due process and crime control models suggests that they should be conceptualised as values rather than aims and, as such, the two bail systems should not be thought to embody one model or the other. Rather, additional underlying values should be taken into account in order to provide a more realistic framework for analysis. Given that bail is not an insular process, it must be framed in the context of wider ideologies shaping the criminal process. As such, the following section evaluates wider criminal justice rhetoric in order to further illustrate the perspectives shaping the evolution of the bail process.

Criminal justice rhetoric in a wider context

The shift in attitudes in the bail law and policy in England and Canada took place at the same time as a wider change in the rhetoric shaping the broader criminal process. This change has been argued to be rooted in social transformations brought about by the advent of 'late modernity' (Garland, 2001) or 'neoliberalism' (Bell, 2011). This period is characterised by economic, technological, and social changes beginning in the 1950s that led to widespread insecurity, fuelling demands for increased protection against multiple forms of risk, including crime (Garland, 2001). Further, under neoliberal principles, the role of the state shifted from a provider of public services to that of a facilitator of market solutions, resulting in the adoption of multiple private sector principles (Bell, 2011). This section will outline the dominant themes in criminal justice that have emerged from these social and economic changes, namely 'tough on crime' rhetoric and the rise of managerialism. It will demonstrate that, although they manifested themselves slightly differently,

they resulted in the emergence of broadly similar criminal justice rhetoric across both jurisdictions.

'Tough on crime' rhetoric and the rise of the victim

There has been a rise in 'tough on crime' rhetoric that many have argued culminated in a 'punitive turn' in many western nations (Garland, 2001; Newburn, 2007; Pratt, 2000, 2002; Tonry, 2006; Webster & Doob, 2007). This refers to a hardening in the response towards criminal behaviour and an increased use of punishment and, in particular, imprisonment. Underpinning this trend is intolerance for crime and criminals and demands for 'emotive and ostentatious' forms of punishment (Pratt, 2000, 2002). Importantly, this trend has persisted despite widespread decreases in crime rates since about the 1990s (Newburn, 2007; Webster & Doob, 2007). While the extent to which this has been applied in practice has been debated (Matthews, 2005; Webster & Doob, 2007), it has widely been argued to have influenced the rhetoric surrounding criminal justice on an international scale (Garland, 2001; Newburn, 2007; Pratt, 2000; Tonry, 2006). As such, it has perhaps unsurprising that attitudes associated with this trend have impacted elements of criminal justice rules and rhetoric beyond punishment.¹⁷ Indeed, this approach also involves restricting the rights of suspects and potential suspects through reforms such as the widening of police powers and the criminalisation of visible forms of 'deviant' behaviour (Bell, 2011). Although this has been experienced in Canada and England differently in terms of extent and timing (Garland, 2001; Newburn, 2007; O'Malley & Meyer, 2005; Webster & Doob, 2007), the subsequent discussion suggests that both jurisdictions have experienced its effects.

In both Canada and England, the punitive turn was preceded by a period in the 1960s and 1970s that was predominantly marked by a liberal reformist agenda in which academic lawyers and sociologists liaised with civil liberties groups and

¹⁷ Punitive attitudes have also been linked to other aspects of criminal justice including, but not limited to, policing and out of court disposals (see, for example, Bell, 2011; Garland, 2001).

lawyers to press for changes in the criminal justice process (King, 1981; Trotter, 2010). These reforms centred on making the system fairer, protecting individual rights, and restraining police power (King, 1981). Although repressive attitudes towards criminal justice were still present to some extent (O'Malley & Meyer, 2005), a defining feature of this period was the idea that there should be 'balance' between effectiveness and humanity and order and liberty, so that crime was approached in a way that was 'civilised'. Policy-makers were thus expected to 'manage' populist concerns surrounding crime rather than to accede to them and a high value was placed on information provided by 'experts' (Loader & Sparks, 2011).

In both jurisdictions, this period directly preceded the introduction of the 'enlightened' bail legislation discussed in the previous section in addition to broader criminal justice reforms targeted at the rights of suspects and offenders. For instance, it preceded the introduction of the Charter of Rights and Freedoms, the first part of the Constitution Act, 1982, in Canada. This entrenched the rights of Canadian citizens into the constitution, guaranteeing the rights and freedoms for suspects and offenders that were deemed necessary in a free and democratic society. In England, the Royal Commission on Criminal Procedure (the Philips Commission) was set up as a result of wrongful convictions in the murder of Maxwell Confait, recommending a better balance between the rights of suspects and the powers of the police (Philips Commission, 1981). This eventually led to PACE 1984, providing a framework for the operation of police powers and suspects' rights, and the Prosecution of Offences Act 1985, which removed the prosecutorial function of the police in an attempt to alleviate bias in the court process.

Following the developments in the 1960s and 1970s, a 'law and order' approach to crime increasingly became the prevailing ideology (Gelsthorpe, 2013; Newburn, 2007; Webster & Doob, 2007). Rather than leaving criminal justice in the hands of experts, civil servants, and professional practitioners, the issue became increasingly high profile, making up political platforms during elections, policy statements, and legislative programmes (Gelsthorpe, 2013). Politicians put forward

'tough on crime' reforms, attempting to win votes by competing to determine which party was strictest on law and order (Newburn, 2007; Webster & Doob, 2007). This represents 'penal populism', referring to the tendency to tap into public opinions to strengthen the moral consensus against crime in order to satisfy the electorate (Bottoms, 1995). The movement from the liberal era to that of one characterised by punitiveness occurred alongside the evolution of more crime control oriented bail legislation discussed in the previous section.

While some punitive attitudes emerged in Canada during this time period, a more 'balanced' approach to criminal justice remained the guiding mentality until relatively recently (O'Malley & Meyer, 2005; Webster & Doob, 2015). For instance, a package of mandatory minimum penalties were introduced in the mid 1990s that removed the discretion from the judiciary and put minimum penalties in place for offenders convicted of serious violent crimes and those that involved firearms (Webster & Doob, 2007). Shortly thereafter, a procedure was put in place that reduced the period of parole ineligibility for offenders convicted of murder after public outcry at the potential release of one of Canada's most notorious serial killers (Webster & Doob, 2007). However, these trends were mediated to some extent by an overarching liberal philosophy that valued rehabilitation and focused on the social causes of offending (O'Malley & Meyer, 2005; Webster & Doob, 2007). It was not until 2006, when the Conservative government came into power, that a more dramatic shift towards punitiveness was witnessed. At this point, the government reduced their reliance on research and experts and undertook a less balanced approach to 'tough on crime' rhetoric (Webster & Doob, 2015). The former liberal approach was labelled an 'out of touch ideology that makes apologies for criminals' (Conservative Party of Canada, 2011). In the 2006 and 2008 elections all three major national political parties adopted 'tough on crime' platforms. In the late 2000s a series of legislation was introduced that took a 'law and order' approach. For instance, the Safe Streets and Communities Act in 2012 restricted the availability of pardons and implemented additional mandatory minimum penalties for drug offences (Barnett et al., 2012).

In England, punitive trends were visible from about the mid 1970s, but a decisive shift occurred in the early 1990s when both the Conservatives and the Labour took 'tough on crime' approaches in their election manifestos (Newburn, 2007). The appointment of home secretary Michael Howard in 1993 marked an explicit rejection of any notion that imprisonment should be limited and the embrace of the idea that the use of custodial sentencing should be increased (Newburn, 2007). 'Tough on crime' approaches were also visible in relation to the criminal process. For instance, in 1993, the Royal Commission on Criminal Justice (the Runciman Commission) put forward recommendations that were largely viewed to favour the interests of police and prosecution more than suspects (Young & Sanders, 1994). Following this, similar trends were observed in legislation such as the Criminal Justice and Public Order Act 1994, Crime and Disorder Act 1998, Criminal Justice Act 2003, and the Criminal Justice and Immigration Act 2008. Many of these acts bestowed new powers upon the police and limited safeguards that had been put in place on behalf of suspects (Sanders et al., 2010).

The move towards 'law and order' resulted in a mentality centred on the idea that public safety and the interests of victims should be given greater weight relative to civil liberties and the rights of suspects and offenders (Sanders et al., 2010; Webster, 2015). In this way, punitive trends based on crime control approaches are justified through claims that they increase the rights of victims (Garland, 2001; Roach, 1999). As such, the rhetoric increasingly suggests that due process rights must be tempered to ensure the safety of victims and the public. For instance, in a review of PACE undertaken in 1997, the Minister for Police and Security in England, Tony McNulty, stated the following in reference to safeguards put in place for individuals who encounter the criminal justice system:

...there are bureaucratic processes and over-complicated procedures in the application of these safeguards which do not serve the best interests of the police, or the criminal justice system or, importantly, those of the victim (Home Office, 2007, p. 2).

The idea the rights of victims and those of defendants and offenders must be pitted against each other also gained traction in Canada under the Conservative

government. For example, in 2013 the Increasing Offenders' Accountability for Victims Act increased the surcharge that offenders must pay to victims' services and removed judges' ability to waive these fees (Dupuis, 2013). When asked how indigent offenders might pay these fines, the Minister of Justice, Peter MacKay, provided the following response:

Two or three hundred dollars? Really? Disproportionate? Out of step? Cruel and unusual punishment? What about the victim that in some cases has to pay hundreds if not thousands of dollars as a result of being an innocent in the system who becomes a victim. ... [S]ometimes [offenders] might even have to, God forbid, sell a bit of property to pay and make compensation to their victims (Seymour, 2013).

In both England and Canada, the proliferation of this dichotomy created an 'us versus them' mentality and provided a basis for the punitive rhetoric and rules enacted by the respective governments. This relates to the application of bail in both England and Canada, where legislation aimed at curbing the rights of defendants – such as the reverse onus provisions and increasing restrictions on the right to bail discussed in the previous section - are often invoked using rhetoric surrounding public safety and victims' rights (Hucklesby & Marshall, 2000; Webster, 2015).

The rise of managerialism

Another growing conceptual development that occurred during the aforementioned evolution of the current bail laws was the rise of what many refer to as 'managerialism' or 'new public management' (Bottoms, 1995; Feeley & Simon, 1992; Gelsthorpe, 2013; Hucklesby, 2013; Raine & Willson, 1997; Sanders et al., 2010). Emerging in the 1980s, this is a guiding principle of the criminal process that borrows techniques from the private sector and espouses a culture of cost efficiency and service effectiveness. It is underpinned by the idea that the criminal process (and other public services) should provide 'value for money' in the same way as the private sector (Raine & Willson, 1993). As such, the three principles of managerialism – economy, efficiency and effectiveness – became critical in public

sector officials' consideration of criminal justice policy (Hucklesby, 2013; Sanders et al., 2010). Managerialist ideology has been argued to be a reaction to the criminal justice system in the 1970s, which was thought to be spend thrift, idiosyncratic, and unaccountable (Raine & Willson, 1997). Although there has been much more research tying managerialism to criminal justice rhetoric in England (see Gelsthorpe, 2013; Hucklesby, 2013; Raine & Willson, 1993, 1997; Sanders et al., 2010) than in Canada (see De Lint, 1998), principles underlying this concept can be found, to some extent, in both jurisdictions.

There have been managerialist initiatives in both England and Canada over the last few decades that have sought to improve the efficiency of the criminal process through a variety of means. In Canada, representatives from the federal, provincial and territorial government meet with academics, practitioners, and other experts annually at the 'National Criminal Justice Symposium' to discuss systemic issues facing the criminal justice system, much of which focuses on efficiency, and performance measurements (Criminal Justice in Canada, 2009; Re-inventing Criminal Justice, 2012). This includes presentations by various committees, including the 'FPT (federal, provincial, territorial) Working Group on Criminal Procedure', who were organised to examine ways to expedite the criminal process, and discussions of national initiatives, such as the 'Justice Effectiveness' initiative, in which all the provinces and territories looked at ways to reduce unproductive court appearances and delays (Criminal Justice in Canada, 2009). Provincial programmes have also been established, such as the Ministry of the Attorney General's (MAG) 'Justice on Target' initiative in Ontario, in which an expert panel of criminal justice practitioners was created to determine how to increase court efficiency in the criminal justice system (Ministry of the Attorney General, 2010). MAG also set up the 'Up Front Justice Project', which sought to make the early stages of court more effective (Criminal Justice in Canada, 2009).

In England, a consistent stream of reports and initiatives reflecting managerialist ideals has been introduced in the last few decades. These include, but are not limited to, first, the Narey Report (1997), which recommended changes aimed at speeding up case processing and increasing early case resolutions. While not all

recommendations were implemented, it did result in the introduction of several changes, such as early administrative hearings (see Chapter Two) and the allocation of CPS staff to police stations. In addition, the 'Simple, Speedy, Summary Justice' initiative resulted in reforms aimed at increasing efficiency (Department for Constitutional Affairs, 2006), including additional use of out of court disposals. Following this, the 'Swift and Sure Justice' White Paper, published in 2012, aimed to ensure low-level, straightforward cases are dealt with promptly and efficiently (Ministry of Justice, 2012). Finally, the Leveson Report (2015) suggested reforms aimed at streamlining the disposal of criminal cases in order to reduce cost and to evaluate proposed cuts to legal aid.

Part of the attempts to improve efficiency in both England and Canada has involved proposals that would increase the scope of the lower courts and preserve only the most serious cases for the higher courts (Cammiss, 2007; Delbigio, 2006). In Canada, this involved the 'hybridisation' of several serious offences, enabling the less serious cases involving these offences to be heard in provincial rather than superior courts (Delbigio, 2006). In England, a number of proposed reforms (e.g. Criminal Justice Act 2003, Narey Report (1997), the Mode of Trial Bills of 1999 and 2000) demonstrated a desire to remove the defence's right to elect to trial by jury, thus reducing the use of the Crown Court and increasing the scope of the magistrates' courts (Cammiss, 2007).

Managerialist attempts to increase the efficiency of the criminal justice system can be found in relation to bail in both England and Canada. In Canada, the aforementioned 'Justice on Target' initiative targets bail, in particular, attempting to reduce the number of appearances required to obtain a bail decision (Bail Experts Table, 2014). In addition, as was mentioned in the previous section, LASPO was introduced in England, in part, to reduce overcrowding in prisons and cut costs (Ministry of Justice, 2010a)

Another development in England and Canada that has been tied to managerialist principles is the rise of risk based strategies to control and prevent crime (Braithwaite, 2000; Feeley & Simon, 1992; Garland, 2001). This relates to what

Bottoms (1995) argues is the 'aggregative' tendency of modern managerialism. In explaining this tendency, he turns to Feeley and Simon (1992), who have argued that there is a paradigm shift taking place in the criminal process. Specifically, they assert that the 'New Penology' is actuarial in nature and is concerned with techniques for identifying, classifying, and managing groups according to their level of dangerousness. Offenders are thus 'aggregates' and individuals become a unit within a framework of policy in which the aim is to control rather than eliminate crime (Feeley & Simon, 1992). This is associated with a broader and growing tendency within our society to become preoccupied with the future and also with safety (Giddens, 1999). This 'Risk Society' anticipates problems that are threatening but have not yet happened. The elusive yet menacing nature of risk creates uncertainty, anxiety, and fear which we attempt to reduce through 'risk management.' This involves trying to control the future, or more specifically, unwanted outcomes (Beck, 1992).

This trend has translated into the promotion of a wide range of programmes in England and Canada that aim to prevent crime and manage risk. In Canada, Hannah-Moffat (1999) has argued that actuarial techniques are used to assess prisoner's risks, redefining needs as risk factors. In addition, Ericson and Haggerty (1997) suggest that the police have shifted their focus from order maintenance, defined in terms of moral deviance, to risk management, which defines problems in utilitarian terms of danger. Similar trends have been found in England, where the Crime and Disorder Act 1998 created a long list of civil behaviour orders, aimed at controlling behaviour through non-criminal mechanisms. Further, there has been a growing emphasis on deterring and preventing crime through the monitoring and manipulation of situations and populations deemed, in the aggregate, criminogenic (Sanders et al., 2010). This includes the use of CCTV, improved home security devices, and street lighting.

Feeley and Simon (1992) argue that this 'actuarial justice' has had an impact on the function of pre-trial detention, in particular, as rather than predicting the appearance of the defendant at trial, decision makers are now concerned with predicting dangerousness. What was once a process directed at protecting the

rights of defendants has given way to an administrative strategy. In England, attempts to predict dangerousness during the bail process are reflected in the aforementioned preoccupation with 'bail bandits' and the changes to legislation focused on preventing potential offences committed on bail (Hucklesby & Marshall, 2000). In Canada, similar legislative attempts were made to tackle dangerousness through the implementation of reverse onus provisions in cases involving particularly 'risky' offences, such as those involving a firearm (Webster et al., 2009).

Summary

This section has demonstrated that, in addition to a shift from due process to crime control values, there were also similarities in the rhetoric shaping the wider criminal justice system in both England and Canada. Indeed, 'tough on crime' approaches to crime and managerialist principles related to efficiency and risk have impacted both the prevailing ideologies as well as the laws and policies shaping both criminal justice systems. Furthermore, there is evidence to suggest that these wider ideologies have, at least to some extent, impacted the formal rules framing both bail processes. As such, the laws and policies related to bail in England and Canada were developed in, and shaped by, similar criminal justice rhetoric.

Rules, rhetoric, or reality?

Given the parallels in the legislative and policy developments and overarching rhetoric shaping the bail process in England and Canada, one might assume that the actual practice of bail is similar across the jurisdictions. This projection would rest on the assumption that aforementioned rules and rhetoric offer a sufficient explanation for the operation of the criminal process and its components. This assumption would, however, fail to take into account the well-documented gap between the 'law in books' and the 'law in action'. Indeed, a considerable amount of research has been devoted to exploring this difference, ultimately finding that there is a gap between the law as it is written and the way in which it is applied in

practice (see Packer, 1968; King, 1981; McBarnet, 1981; McConville, Sanders and Leng, 1991).

While it is generally acknowledged that a gap between the law and practice *does* exist (Ashworth & Redmayne, 2010; Hucklesby, 1996; King, 1981; McConville et al., 1991; Packer, 1968; Sanders et al., 2010), there is some debate as to *why* it exists, and consequently, how to best understand the operation of the criminal process and its sub-processes (McBarnet, 1981; McConville et al., 1991; McConville, Sanders, & Leng, 1997; Smith, 1997). Part of this debate centres on the relationship between 'rules, rhetoric and reality' and which of these factors best explains how the process functions (McBarnet, 1981; McConville et al., 1991). The research examines to what extent the government rhetoric related to criminal justice is consistent with both the law itself as well as the behaviour of the actors in practice. As such, it offers guidance as to how the current research should be framed.

Most researchers have advised against interactionist approaches which dismiss the role of the law and focus exclusively on the behaviour of the actors (King, 1981; McBarnet, 1981; McConville et al., 1991). McBarnet (1981) argues that these approaches falsely assume the laws are sufficient and that the problem is simply that the actors subvert, negate or abuse them. As such, the 'law in books' are taken as read and remain unexplored. In the case of this research, this would be akin to exclusively focusing on cultural explanations without taking into account the legal context underlying them. In contrast, it is advised that the main focus of analysis should be on the law and the way it is drafted. McBarnet (1981) argues that this is because the government elite supports a liberal rhetoric but does not incorporate this rhetoric into the drafting of the law. Police and prosecutors can thus use their wide discretionary powers to apply the law in a manner that is contrary to the liberal government rhetoric and more in line with a law and order approach.

While this position effectively captures the misleading way in which government rhetoric can disguise the actual content of the law (King, 1981; McConville et al.,

1997; Sanders et al., 2010) its analysis of the law itself is simplistic and it does not fully account for the multiple values found within the rhetoric and the law or the role of criminal justice actors during the process.¹⁸ In contrast, while McConville and his colleagues (1991) agree that the role of the law is an important component of the analysis of the criminal process, they take a more nuanced, and it is argued comprehensive, approach to the debate. Rather than suggesting that the disjuncture between rhetoric and reality reflects somewhat of a conspiracy on the part of the government, they argue that government rhetoric and the laws they draft contain conflicting principles. In the case of bail, this was demonstrated in the previous discussion, which suggested that defendants' right to bail was furthered by the presumption in favour of bail but at the same time limited in specific circumstances as a result of concerns over public safety. Consequently, the law does not set the standard of legality from which criminal justice actors deviate, but instead, according to McConville and his colleagues (1991), they act autonomously and simply use the appropriate principle to justify their behaviour or, in some cases, simply act illegally. Further, they suggest that even if the actors were exploiting intentionally vague laws as McBarnet (1981) argues, the fact that they were motivated to act against liberal government rhetoric is a valid enough justification to examine both their behaviour as well as the law that shapes it.

McConville and his colleagues (1991) address the importance of the law and the overarching rhetoric without neglecting the role of criminal justice actors in explaining the operation of the criminal process. In line with this approach, it is argued that the theoretical framework used to explain the operation of the bail process should encompass the decisions-making of the criminal justice actors involved in the process as well the laws and rhetoric that may or may not shape their behaviour.

¹⁸ Elsewhere, McBarnet's (1981) analysis has been referred to as 'crude' (see Sanders et al., 2010).

Conclusion

Through an examination of the development of bail laws and policies and the wider criminal justice rhetoric that has shaped it, this chapter has demonstrated the remarkable similarities between the two jurisdictions. Specifically, the bail laws in England and Canada are based on due process values and the presumption of innocence, yet legislation is consistently introduced that is centred on crime control, ultimately intending to curtail this right. Further, rhetoric associated with 'tough on crime' approaches to crime and the rise of managerialism - in particular, a greater focus on efficiency and risk - also shape the overarching climate in which these laws and policies have developed. If the law, policy, and rhetoric discussed in this chapter could in of themselves explain the bail decision-making process, one might limit their examination to the preceding factors. However, in line with McConville and his colleagues (1991), it is argued that the 'reality' of the process must also be examined. As such, the following chapter turns to the decision-making of court actors in establishing a framework for the current research.

Chapter Two:

The ‘Remand Problem’: An Investigation of the ‘Reality’ of the use of Remand in England and Canada

Introduction

Despite the similarities in law, policy, and rhetoric discussed in the previous chapter, bail practices are considerably different in England and Canada. This can be broadly determined through an examination of trends in each jurisdiction’s prison remand population – the portion of the prison population who have not been released and are, instead, detained in custody awaiting either a bail decision or the conclusion of their criminal proceedings. While Canada’s remand population rate has more than tripled in the last four decades (Statistics Canada, 2017a), England’s has remained relatively stable (Home Office, 1984; Ministry of Justice, 2016b). The trend in England is particularly striking when one considers that many other common law jurisdictions, such as New Zealand, Scotland, and Australia, have also seen increases in their remand populations in recent years (Player et al., 2010).

This chapter will explore the drivers that contribute to these trends and illustrate that no laws, policies, or case factors can fully account for the diversions in rates. This demonstrates that one must turn to informal factors related to the behaviour of court actors in an effort to explain bail decision-making. Indeed, previous research suggests that ‘court culture’, as mediated through the decisions of the courtroom workgroup, has a considerable impact on the bail decision-making process in England and Canada (Hucklesby, 1997a; Myers, 2009, 2015; Webster, 2009). It is argued, however, that explanations related to court culture cannot alone explain bail practices given they cannot be entirely separated from views about the broader criminal process in which they emerged (see Church, 1985; Young, 2013).

The aim of this chapter is to examine the use of remand custody in England and Canada and to assess potential explanations for the bail decision-making that

has contributed to their respective remand population trends. First, the use of remand custody in England and Canada will be described through a detailed examination of their remand population trends. Second, explanations related to the volume of cases entering remand custody and the length of time they spend in custody will be examined in an effort to better understand the trends in each jurisdiction. Finally, the extent to which informal factors can offer an explanation will be explored through an examination of 'court culture' and its influence on the bail decision-making process.

The use of remand custody in England and Canada

The following review of the prison statistics outlines the use of remand custody in England and Canada with a view of shedding light on the bail practices in each jurisdiction. The nature of the bail practices in each jurisdiction can be broadly assessed through an examination of their remand trends. Although changes to the remand population are not entirely caused by decisions made during the bail process,¹⁹ they provide considerable insight into the broad trends shaping the use of bail in each jurisdiction (see, for example, Hucklesby, 2009; Player et al., 2010; Webster et al., 2009).

In order to understand the use of remand custody in England and Canada, one must first be aware of differences in their prison systems. Indeed, the jurisdictions manage their prison populations differently. In Canada, prisons are a shared responsibility between the federal and provincial territorial governments. The provincial and territorial governments administer non-custodial sentences, remand custody, and sentences less than two years while the federal government is responsible for penitentiaries – housing prisoners with custodial sentences of two years or more – and parole decisions for federal prisoners. It is therefore the provincial and territorial institutions that take responsibility for all remand prisoners. In England, while the vast majority of prisons and prisoners are managed by the central government, a growing

¹⁹ Decisions made outside of the bail process can also be expected to influence the size of the remand population. For example, the length of time accused persons spend in custody following a decision on bail would also have an impact.

number of private prisons have been established since the early 1990s. Remand prisoners are housed in both types of institutions.

Both countries measure the flow of prisoners within prisons in two ways. First, the prison population is measured with 'count' data, referring to the number of individuals that are housed in custody on any given day. Second, 'reception' data²⁰ accounts for the number of prisoners entering custody in a specific period of time. While count data will only account for each prisoner once, reception data may count the same prisoner multiple times if her or she is moving in and out of prison in the selected time period (e.g. for multiple court appearances or to change the institution in which they are housed). In England, however, there is also 'first reception' data in which only the first entry to the institution is counted. Imprisonment rates represent jurisdictions' prison populations (in counts), taking into account their national populations. This section will examine trends in the English and Canadian prison populations in order to better understand how the use of remand differs in each jurisdiction.

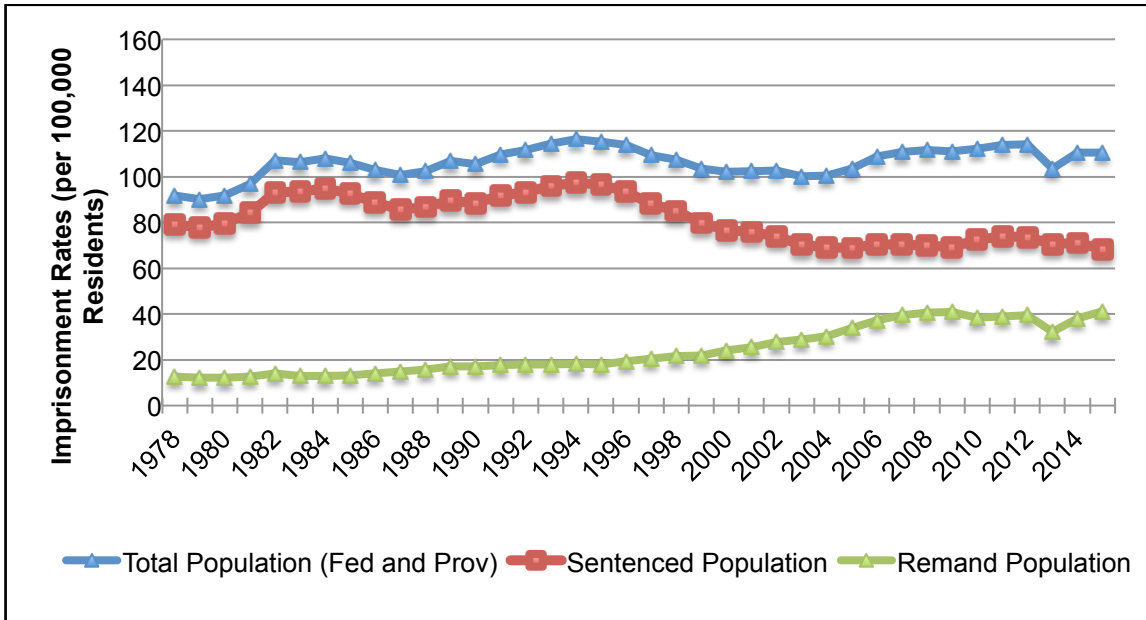
In the preceding two to three decades, England and Canada have exhibited much different trends in their use of imprisonment (Newburn, 2007; Webster et al., 2009). Figures 2.1 and 2.2 provide an overview of these trends, presenting the total prison population rates, sentenced population rates, and remand population rates for both jurisdictions from the 1970s to the present.

Figure 2.1 shows that Canada's imprisonment rate has remained relatively stable over the last four decades. According to Webster and Doob (2007), this is largely due to their ability to counter punitive laws and policies with other moderating forces related to their history, culture, and structure of their government. Although there has been some fluctuation, the adult²¹ imprisonment rate in Canada in 2016 is fairly similar to that in the late 1970s.

²⁰ In England, this measure is referred to as 'receptions' compared to 'admissions' in Canada. For the sake of consistency, the English terminology will be used.

²¹ The youth prison population is not included in the imprisonment rate because data was not available prior to the late 1990s.

Figure 2.1 - Components of total (federal and provincial) adult prison population in Canada (rates* per 100,000 population)

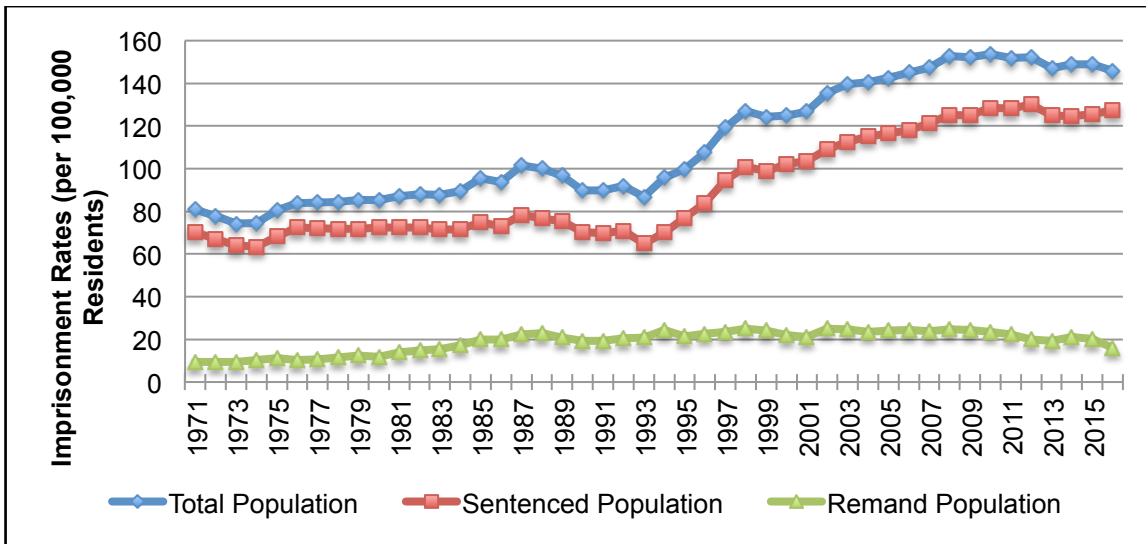


Source: (Statistics Canada, 2017a, 2017b)

*Rates calculated using Statistic Canada’s CANSIM table 051-0001: Estimates of Population by age group.

**Note that no prison data was available in Alberta in 2013. The sharp decline that year is thus most likely a result of statistical unavailability as opposed to actual trends.

Figure 2.2 - Components of the prison population* in England and Wales (rates per 100,000 population)**



**Due to the availability of data, rates from 1971 to 1984 and 2010 to 2016 do not include police cells. Further, 1971 to 1984 represents annual averages while 1985 to 2016 is represented by June 30th counts.

**Rates were calculated with population estimates from Office for National Statistics, National Records of Scotland, Northern Ireland Statistics and Research Agency.

Source: (Home Office, 1982, 1985, 1988, 1992, 1995, 2004, Ministry of Justice, 2017c, 2010b, 2011, 2013, 2014c)

The adult imprisonment rate in Canada remained stable, only moving from 112 per 100,000 population in 1992/1993²² to 111 per 100,000 in 2015/2016 (Statistics Canada, 2017a, 2017b). However, it is important to note that the adult imprisonment rate in Canada has risen slightly in recent years, which is potentially related to the ‘tough on crime’ agenda put forward by the Conservative government which came into power in 2006 (see Chapter One).

In contrast, England is currently one of the highest incarcerators in Western Europe (Walmsley, 2017). This is largely explained by the impact of the ‘punitive turn’ in the 1990s, discussed in the previous chapter (Newburn, 2007). As Figure 2.2 demonstrates, prior to this point, the imprisonment rate fluctuated but stayed relatively stable. Following the introduction of the Criminal Justice Act 1993, however, the imprisonment rate increased significantly, rising from 87 per 100,000 population in 1993 (Home Office, 2004) to 146 per 100,000 population in 2016 (Ministry of Justice, 2016b).

Both Figure 2.1 and Figure 2.2 illustrate that when the components of each jurisdiction’s prison population are examined separately, a different picture is presented. In Canada, although the overall imprisonment rate has remained stable, the profile of adults entering custody has changed considerably. Figure 2.1 demonstrates that the remand population has been increasing at the same time that the sentenced population has been decreasing. Indeed, the sentenced population fluctuated from the late 1970s to the early 1990s, at which point it began to decline, decreasing from 93 per 100,000 adult population in 1992/1993 to 68 per 100,000 adult population in 2015/2016 (Statistics Canada, 2017a, 2017b). In comparison, the remand population rose from the late 1970s to the early 1990s, increasing steadily from 13 per 100,000 in 1978/1979, to 19 per 100,000 population in 1996/1997, then rising more markedly to reach to 41 per 100,000 population in 2015/2016 (Statistics Canada, 2017a).

Canada has seen a substantial rise in the percentage of its total prison population that is constituted by remand prisoners. Table 2.1 shows the number of prisoners in federal and provincial/territorial institutions, disaggregated into

²² Statistics Canada reports crime data by the fiscal year, providing two years for its annual figure.

Table 2.1 - Canada: Adult population in custody, federal, provincial and territorial institutions, 2000-2016

	Total Custody (Fed. Prov.)	in And	Total Sentenced Custody	in	Total Remand Custody	in	% in Custody on Remand
1992/1993	31,709		26,477		5,111		16%
1993/1994	32,804		27,574		5,130		16%
1994/1995	33,760		28,265		5,327		16%
1995/1996	33,806		28,317		5,266		16%
1996/1997	33,722		27,720		5,734		17%
1997/1998	32,715		26,333		6,109		19%
1998/1999	32,391		25,647		6,491		20%
1999/2000	31,451		24,277		6,661		21%
2000/2001	31,374		23,557		7,401		24%
2001/2002	31,802		23,540		7,944		25%
2002/2003	32,197		23,157		8,704		27%
2003/2004	31,733		22,231		9,174		29%
2004/2005	32,111		22,124		9,656		30%
2005/2006	33,391		22,191		10,908		33%
2006/2007	35,435		22,966		12,169		34%
2007/2008	36,411		23,103		12,973		36%
2008/2009	37,153		23,274		13,548		36%
2009/2010	37,316		23,254		13,739		37%
2010/2011	38,202		24,680		13,086		34%
2011/2012	39,087		25,403		13,369		34%
2012/2013	39,678		25,621		13,739		35%
2013/2014	36,845		25,029		11,494		31%
2014/2015	39,623		25,531		13,650		34%
2015/2016	40,147		24,833		14,899		37%

*The sentenced and remand figures do not add up to the total in custody figures because some provincial prisoners do not meet either criteria. Other statuses include, but are not limited to, offenders who are being held in provincial/territorial correctional institutions for lock-ups, parole violations or suspensions, immigration holds, and those who are temporarily detained without warrants of any type.

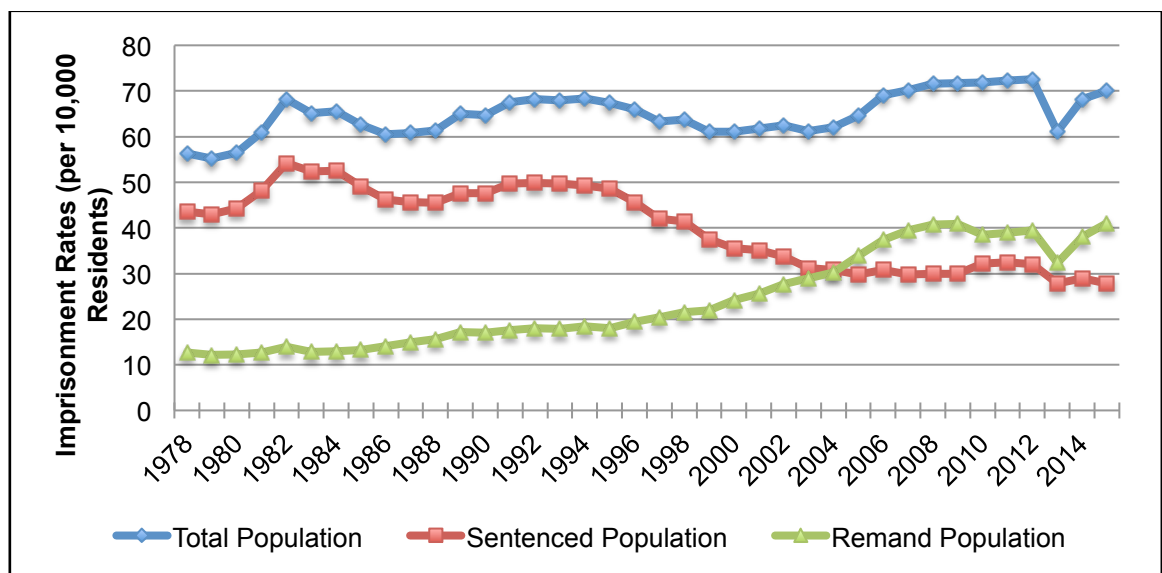
**All prisoners in federal custody were considered sentenced for the purposes of the calculations.

***Note that no prison data was available in Alberta in 2013. The decline that year is thus most likely a result of statistical unavailability as opposed to actual trends.

Source: (Statistics Canada, 2017a, 2017b).

sentenced and remand prisoners, from 1992/1993 to the present. It demonstrates that remand prisoners made up only 16% of the provincial/territorial and federal prison population in 1992/1993 compared to 37% in 2015/2016 (Statistics Canada, 2017a, 2017b). Since all remand prisoners are held in provincial/territorial custody in Canada, it is these institutions that must face the institutional burden associated with their rising numbers. When the total number of provincial/territorial institutions are examined separately from the federal institutions, for instance, the full impact of the current trend is highlighted. Figure 2.3 illustrates changes to the prison population in provincial/territorial institutions only. It shows that the remand population surpassed the sentenced population during the early part of the 21st century. By 2016, the remand population continued to outnumber the sentenced population, comprising 59% of the provincial/territorial prison population (Statistics Canada, 2017a).

Figure 2.3 - Components of adult provincial and territorial prison populations in Canada (rates* per 100, 000 population)



*Rates calculated using Statistics Canada's CANSIM table 051-0001 (Estimates of Population by age group).

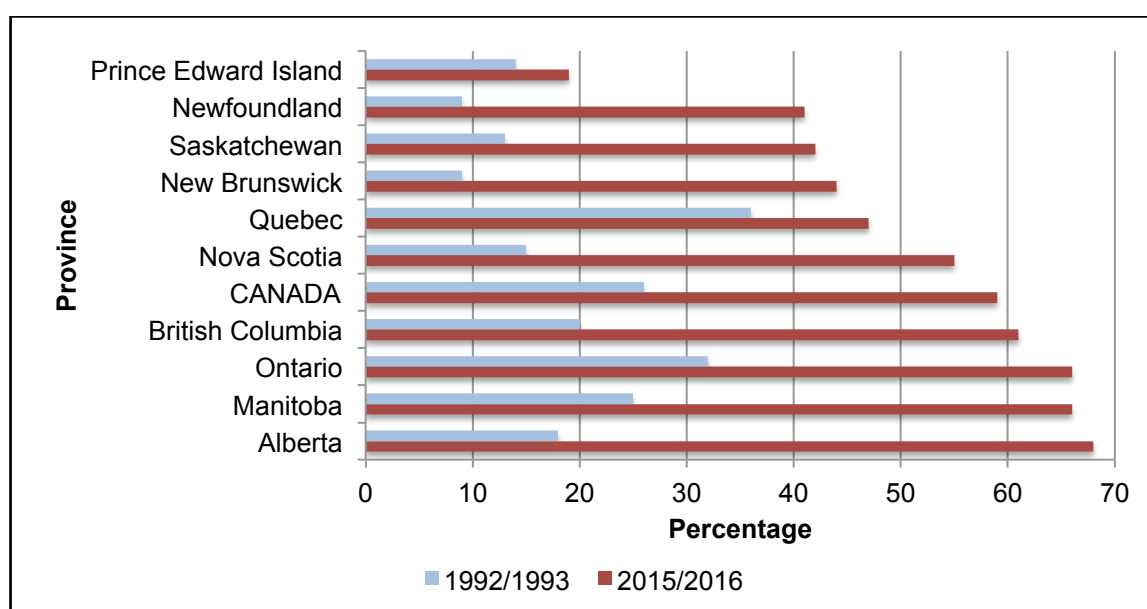
**Note that no prison data was available in Alberta in 2013. The decline that year is thus most likely a result of statistical unavailability as opposed to actual trends.

Source: (Statistics Canada, 2017a).

When one examines each province separately, however, it is clear that the size of the 'remand problem' is not evenly distributed across the 10 provinces.

Figure 2.4 illustrates the percentage of each province's²² prison population that is occupied by remand prisoners. This ranges from as low as 19% in Prince Edward Island to as high as 68% in Alberta (Statistics Canada, 2017a). The provinces are listed in ascending order, with the national total inserted accordingly, to illustrate which provinces fall above and below the national total. While there is variability in the percentage of the prison population that remand prisoners occupied in 2016, it is clear that all of the provinces have experienced an increase in this percentage since 1992.

Figure 2.4 - Percentage of total provincial prison population constituted by remand prisoners in each province (1992/1993 and 2015/2016)



Source: (Statistics Canada, 2017a).

Although England is regarded to be more 'punitive' in terms of its use of prison generally (Newburn, 2007; Webster & Doob, 2007), this jurisdiction has maintained a relatively stable remand population rate (see Figure 2.2). In fact, the rise in its prison population can almost entirely be accounted for by increases in the sentenced population, which doubled in size from a rate of 65 per 100,000 population in 1993 to 127 per 100,000 population in 2016 (Home Office, 2004; Ministry of Justice, 2016b).

²² The Canadian territories – Nunavut, Northwest Territories, and Yukon – were not included in the provincial comparisons as they occupy a very small proportion of the total population and exhibit much different crime patterns than the rest of the country (Webster et al., 2009). As such, they are only included when data is presented for the entire country.

Although the remand rate in England increased steadily from the early 1970s to the late 1980s, it has fluctuated, but remained mostly stable since that point. There has been some evidence of a downwards trend in the last few years, as the remand rate decreased from 25 per 100,000 population in 2008 to 16 per 100,000 population in 2016 (Ministry of Justice, 2010b, 2016b). Until the most

Table 2.2 - England: Population in custody as of 30th of June, 2000-2016

	Total Prison Pop.	Sentenced Population	Remand Population			% of Prison Pop. in Remand
			Untried	Convicted Unsentenced	Total	
1993	44,246	33,046	7,857	2,775	10,632	24%
1994	48,929	35,773	9,256	3,277	12,533	26%
1995	51,084	39,379	7,950	3,106	11,056	22%
1996	55,256	43,055	8,432	3,136	11,568	21%
1997	61,467	48,805	8,563	3,542	12,105	20%
1998	65,727	52,269	8,358	4,545	12,903	20%
1999	64,529	51,392	7,932	4,657	12,589	20%
2000	65,194	53,180	7,219	4,214	11,433	18%
2001	66,403	54,212	6,801	4,260	11,061	17%
2002	71,218	57,306	7,877	5,204	13,081	18%
2003	73,657	59,439	7,896	5,177	13,073	18%
2004	74,488	60,976	7,716	4,779	12,495	17%
2005	76,190	62,257	8,084	4,780	12,864	17%
2006	77,982	63,493	8,064	5,003	13,067	17%
2007	79,734	65,601	8,387	4,457	12,844	16%
2008	83,194	68,234	8,750	4,690	13,440	16%
2009	83,454	68,488	8,933	4,523	13,456	16%
2010	85,002	71,000	8,487	4,517	13,004	15%
2011	85,374	71,964	8,299	4,165	12,464	15%
2012	86,048	73,562	7,671	3,653	11,324	13%
2013	83,842	71,233	7,755	3,231	10,986	13%
2014	85,509	71,481	8,618	3,579	12,197	14%
2015	86,193	72,659	8,271	3,514	11,785	14%
2016	85,134	74,316	6,278	3,010	9,288	11%

*Includes those held in police cells.

Sources: (Home Office, 1995, 2004, Ministry of Justice, 2010b, 2011, 2013, 2014c, 2017c)

recent year, this decline is largely a result of a decrease in the number of convicted unsentenced remand prisoners (see Table 2.2).

The combination of an increasing sentenced population and a stable remand population has resulted in an English prison population constituted by a decreasing percentage of remand prisoners over time. Table 2.2 demonstrates this gradual shift, presenting the actual number of prisoners in custody, disaggregated into types of prisoners, from 1993 to the present. It shows that 24% of the total prison population was made up of remand prisoners in 1993, compared to only 11% in 2016 (Home Office, 2004; Ministry of Justice, 2016b).

Summary

This section demonstrated that there are considerable differences in the use of remand across England and Canada. Despite similarities in their legislative and policy developments and overarching rhetoric (see Chapter One), England's remand population has remained relatively stable at the same time that Canada's has been rising. Given that remand rates are, to a large extent, dictated by bail decision-making practices in each jurisdiction, the disparity in these trends indicates that these practices are considerably different across the two jurisdictions. An explanation as to why their remand population trends have taken such different directions could therefore shed light on the factors that contribute to the bail decision-making process more broadly. As such, potential explanations for this discrepancy will be further explored in the subsequent section.

Explaining remand population trends in England and Canada

There are several potential explanations for the disparity in the remand populations outlined above. These explanations can be expected to relate to the two main drivers of the remand population: the volume of cases entering remand custody and the length of time they spend there (Hucklesby, 2009; Webster et al., 2009). This section draws on the existing research and statistical data related to courts in England and Canada in order to examine whether changes in laws, policies, or case factors (i.e. nature of charges) surrounding

these drivers can sufficiently explain the use of remand in each jurisdiction. Ultimately it will illustrate that, while none of these factors can fully explain the use of remand, they are nonetheless important in presenting a complete picture of the bail decision-making process.

The number of defendants entering remand custody

The number of defendants entering remand custody is impacted by the number of cases being processed through the court system, the number defendants detained by the police²³, and the number of defendants remanded in custody by the courts. These contributing factors will be examined in both jurisdictions in order to gain a better understand of their influence on the use of remand in England and Canada.

Canada

An examination of the number of defendants entering remand custody in Canada is complex for two reasons. First, there is a considerable amount of variability in the trends across provinces and territories given that each jurisdiction manages its own prison population. Second, the official statistics in relation to court decision-making is limited at best. Although national data will be presented when possible, much of this analysis will be focused on Ontario. This is because this province has experienced the ‘remand problem’ to a greater extent than most of the other provinces (see Figure 2.4) and thus presents a contrast to England’s remand population. There is also a rich source of data in this province as a result of a number of empirical studies conducted with province wide data over the last decade. Finally, Ontario will be the site of data collection for this study.

Unlike in England, changes in the number of defendants entering the court has not been linked to changes in law or policy in Canadian research (see Doob,

²³ As discussed in the previous chapter, this decision must sometimes be approved by the CPS in England and the Crown attorney in selected provinces in Canada.

Sprott, & Webster, 2017; Webster, 2009; Webster, Sprott, Doob, & Mitchell, 2016). Rather, the (limited) existing research has examined the nature of the cases entering the system and its impact on caseload, the police, and the court.

Compared to England, the number of defendants entering remand custody in Canada is difficult to determine. Canada does not record 'first reception' data and thus double counts prisoners who re-enter custody following their initial reception. For this reason, it is not a true measure of how many individuals have been remanded in custody. Despite its shortcomings, however, it does provide a general idea of potential trends in the number of defendants entering remand custody over time.

It would seem there might have been a rise and then a fall in defendants entering remand custody in Canada since 2000. In 2000/2001, a total of 110,387 defendants were admitted to remand custody, peaking at 155,808 in 2007/2008, and then declining again to 119,625 in 2015/2016. This represents a decline of 23% in the last eight years. The same trend is observed in Ontario, where there were 52,179 receptions to remand in 2000/2001, climbing to 66,558 in 2007/2008 and then decreasing to 46,874 in 2015/2016, a decline of 30% in the last eight years (Statistics Canada, 2017c).

Caseload. The number of adult criminal cases entering the court system has increased steadily and then decreased suddenly in Canada as well as in Ontario in the last decade. In Canada, the number of cases rose from 382,322 in 2005/2006²⁴ to hit a peak of 410,051 in 2009/2010, and finally fell to 328,028 in 2014/2015 (Statistics Canada, 2017d). In Ontario, the number of adult criminal cases increased over approximately the same period as the rest of the country, beginning at 147,807 in 2005/2006, peaking at 161,355 in 2010/2011 and declining to falling to 123,072 in 2014/2015 (Statistics Canada, 2017d). This fluctuation in the number of cases entering the courts is likely to impact the number of defendants entering remand custody as the volume of bail decisions that must be made will mirror the flow of cases.

²⁴ Data was not available for caseload before this point.

Importantly, these changes occurred alongside a consistent fall in crime generally, as well as violent crime, in particular (Webster et al., 2016). This suggests that caseload changes independently from crime rates and that the volume of defendants entering the courts (and thus remand custody) is unlikely to be influenced significantly by crime surges or drops.

Police. The total number of cases entering the court system in Canada is less influential on the remand population than the number of cases that begin the court process in bail court. The volume of these cases is largely dictated by police decision-making. Unlike in England, the Canadian Criminal Code dictates that any form of release, including those imposed by police, remain in effect (unless they are reviewed or revoked) until the end of trial or sentencing. For this reason, defendants who receive bail from police prior to the court process enter a different 'stream' and their bail status is not readdressed unless there is an explicit reason to do so. As such, the police decision has a more direct impact in Canada, particularly when the police choose to release them. Those who are detained, however, still begin the court process in bail court in order for a justice of the peace to determine whether they should be remanded in custody or released on bail.

Doob (2012) has investigated court statistics in Ontario to determine the number of cases that enter the court system by way of the bail process. Using province-wide court data, he found that the percentage of cases that began the court process in bail court rose from just fewer than 40% in 2001 to about 50% in 2007. However, as of 2017, this proportion declined again as 41% of adult criminal cases started the court process in bail court (Doob et al., 2017). While this proportion has fluctuated, and appears to currently be on a downward trend, this still indicates that police were detaining almost half of defendants in custody prior to the commencement of the court process as opposed to releasing them on bail or diverting them in some other manner. This is especially striking when considering that, in England, only 10% of defendants were detained by the police who started their proceedings in magistrates' court (see Table 2.3).

It has been argued that the nature of the cases entering the adult criminal court system could be expected to have some impact on the police decision to detain a defendant. For instance, defendants have been shown to be more likely to start their court lives in bail court when they have charges involving violence or administration of justice violations (Doob, 2013; Webster, 2009). This has been demonstrated in the prison statistics, which suggest that defendants charged with these two types of offences occupied the largest proportion of remand receptions. Indeed, in 2008/2009²⁵ 26% of receptions to remand in Canada were for administration of justice offences and 24% were for violent offences (Porter & Calverley, 2011). Indeed, police appear to be more likely to detain defendants who have committed a violent crime or have violated a court order.

It has been suggested that the previous increase in the proportion of defendants detained by the police cannot be attributed to a surge in violent crime, given that the level of violent crime was decreasing during this time period, but that it might be explained by a rise in administration of justice offences (Webster, 2009). There has been an increase in the number of cases containing at least one administration of justice offence in recent years (Webster et al., 2016). Among all adults charged in Canada, administration of justice offences accounted for 11% of adults charged (as the most serious charge) in 1998 and by 2014 they accounted for 22%. Doob (2012) showed that this has been an on-going trend since the 1980s, since when the rate at which people have been charged with 'bail violation/failure to comply' and 'failure to comply with court orders' started to increase dramatically.

The rise in administration of justice offences may be expected to have an impact on the proportion of defendants detained by police since they could signal defendants' inability to comply with bail conditions. In addition, once defendants are charged with an administration of justice offence, they are put in a reverse onus position in which they must demonstrate why they should be released to the court and might have a more difficult time being granted bail. However, the recent drop in the number of defendants detained in custody by the police occurred alongside a continued rise in the number of administration

²⁵ This was the last data available as these statistics are not provided regularly.

of justice offences. This suggests that, while these charges may be contributing to the large number of defendants detained by the police generally, they are not driving changes in this trend to such an extent that they directly mirror fluctuations in police use of custody. As such, while it may be that the criminalisation of failure to comply partially contributes to the police decision to detain, this factor cannot be said to be the only contributing factor behind their use of remand custody.

Courts. Despite the significant percentage of defendants starting the court process in bail court, courts do not appear to be remanding a large percentage of defendants in custody. Webster and her colleagues (2009) found that the percentage of cases in which defendants were remanded in custody by justices of the peace in Ontario showed little change between 2001 and 2007, reducing from 13% to 12.3% during this time period. Similarly, in an observational study of bail decision-making, the Canadian Civil Liberties Association (2014) found that 10% of the cases across their Ontario sample resulted in a remand in custody.

In sum, this research suggests that the number of defendants entering remand custody is not the primary driver of Canada's remand population growth. Indeed, the number of defendants entering remand custody has fluctuated but has been (roughly) decreasing in recent years. This is potentially a reflection of a drop in caseload and, in Ontario, a (slight) drop in the number of defendants detained by the police. It is unlikely that the court has impacted Ontario's fall in receptions, as they have remanded defendants in custody at a low and stable level over the last few decades. It is unclear what is influencing the decision-making underlying these trends as there were had been no recent notable laws or policies targeting this driver when the research was conducted and neither the crime rate nor the nature of cases entering the system mirrors the trends.

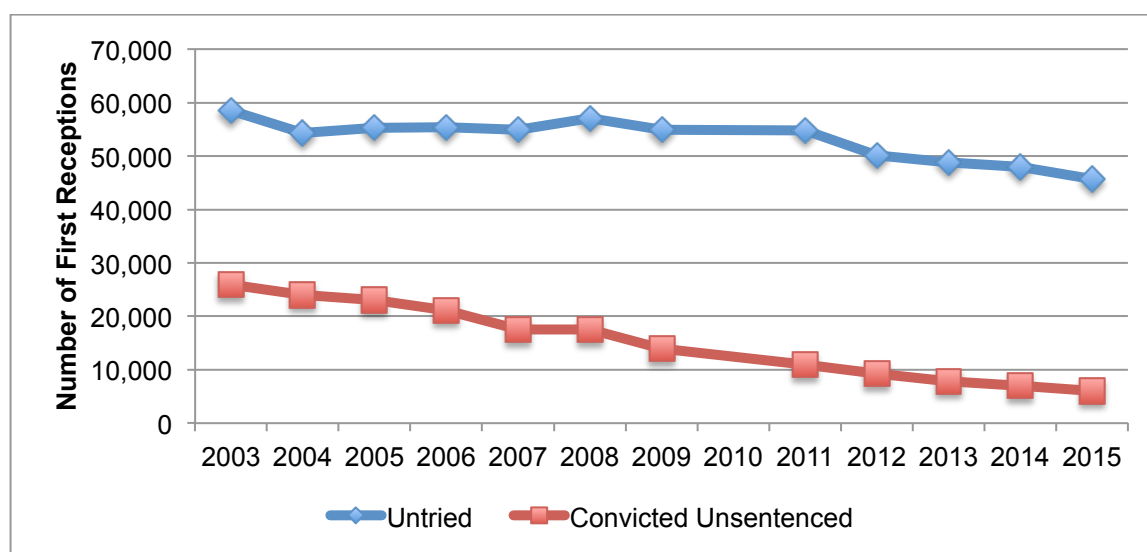
England

Unlike in Canada, there have been a number of changes to the law and policy in recent years in England that have directly targeted the number of cases entering the court system generally, as well as the number of cases that start

the court process in custody, specifically. As such, research has examined the volume of defendants entering the court system in relation to these initiatives (see Hucklesby, 2009). The number of defendants who are entering remand custody is reflected in trends surrounding first receptions to prison in England. Unlike 'regular' reception data, first reception data gives an indication of the number of *new* prisoners who enter remand custody. Since those who move in and out of prison multiple times in the same time period are not double counted, this is a better reflection of the volume of defendants entering remand custody.

An examination of first receptions in England over time suggests that the number of defendants entering remand custody is declining, but that the primary driver for this decline are reductions in the convicted unsentenced population. Figure 2.5 shows that the number of first receptions into custody for untried prisoners fell 22% from 2003²⁶ to 2015 (n = 58,459 to 45,677) while the number of first receptions for convicted unsentenced prisoners fell 77% in the same time period (n = 25,899 to 6,031). The decline in convicted unsentenced prisoners occurred steadily while the decline in untried prisoners occurred most significantly in the last four years (see Figure 2.5; Ministry of Justice, 2016c).

Figure 2.5 - First receptions for untried and convicted unsentenced remand prisoners, 2003 to 2015*



Source: (Ministry of Justice, 2016c)

*Data was unavailable for 2010. Further, 2015 was the most recently available figures due to a change in statistical calculations, rendering 2016 incomparable to previous years.

²⁶ First reception data was not available for the untried and convicted unsentenced population separately prior to 2003.

Caseload. The decline in the number of defendants entering remand custody may be partially explained by a fall in the number of cases being processed in the court system (i.e. 'caseload'). Indeed, fewer individuals appearing in court provides fewer opportunities to use remand custody. The number of defendants proceeded against in magistrates' courts was relatively stable from the mid 1990s to the mid 2000s, but has been decreasing steadily ever since. Between 2004 and 2016, this number fell from slightly more than 2 million to slightly less than 1.5 million (Ministry of Justice, 2007, 2017b). There has been a more recent, but similar decrease in caseload in the Crown Court, where the number of defendants tried fell from 105,000 in 2010 to 80,000 in 2016 (Ministry of Justice, 2017b). It is notable that, throughout this period, crime, including violent crime, has been steadily declining (Office for National Statistics, 2017).

The decline in caseload might be partially explained by the government's initiative to increase the number of offences 'brought to justice' (Ministry of Justice, 2014a) as well as a recent trend to use informal resolutions as opposed to formal charges.

The introduction or reform of several out of court disposals offer police alternatives to the court process when they are dealing with some cases. For example, the Criminal Justice Act 2003 enabled police officers to attach conditions to cautions (i.e. formal warnings given by police). In addition, Penalty Notices for Disorder (PNDs), introduced by the Criminal Justice & Police Act 2001, allow on-the-spot fines for minor offences (North Yorkshire Police, 2013). Finally, cannabis warnings, introduced in 2005, are formal warnings that police may issue for the possession of cannabis (Ministry of Justice, 2016a).

The use of out of court disposals increased considerably in the mid 2000s, but has been in decline since 2007 (Ministry of Justice, 2016a). However, their use has largely been displaced by the use of informal resolutions (i.e. street level restorative justice and community resolutions), which were used increasingly by

police starting in 2008 (Criminal Justice Joint Inspection, 2012).²⁷ Although out of court disposals and informal resolutions may have contributed to the decline in caseload, it is unlikely they have had more than a marginal impact on the remand population. This is because police would generally use these strategies in relation to minor offenders, who would be unlikely to be remanded in custody if they were to appear in court. As such, it is unlikely they had a major impact on the remand population.

Police. The police may impact the number of defendants entering remand custody through their decision to detain²⁸ or release defendants prior to their first court appearance. Following this decision, police make recommendations to the CPS as to whether they believe defendants should be released on bail. Although the CPS theoretically reviews the file independently, research has revealed a high concordance rate between police and CPS decisions (Phillips & Brown, 1998). Further, police suggestions have an indirect impact on the court, as there is also a high concordance rate between CPS recommendations and court decisions (Morgan & Henderson, 1998).

It is therefore perhaps unsurprising that defendants who are released on bail by the police are unlikely to be remanded in custody by the courts and defendants who appear in court from police custody are at a greater risk of receiving a remand in custody (Morgan & Henderson, 1998). This may be because when defendants appear in court from custody it is likely to signal to the other court practitioners that the police felt as though they should be detained, potentially resulting in them agreeing with this decision. Further, their relatively recent power to attach conditions to bail orders may dissuade the magistrate and CPS

²⁷ The use of community resolutions was not available in the national statistics until 2015. While there was a decline between 2015 and 2016, it is not clear whether this was indicative of a longstanding trend.

²⁸ Although 'remand' refers to the portion of the prison population who is either untried or convicted and unsentenced in both jurisdictions, it is used slightly differently when it is used to discuss the action of compelling defendants to enter custody. In England, a defendant can only be 'remanded in custody' or 'remanded on bail' by the courts. Police would be said to 'detain' defendants prior to their court appearance or 'release' them on bail. In Canada, the expression 'remanded in custody' is not typically used to describe the action of holding someone in custody or releasing them on bail. Rather, both the police and the courts are usually said to 'detain' defendants in remand custody, custodial remand or either 'pre-sentence' or 'pre-trial' detention – all of which refer to the same concept. For the purposes of consistency, the English terminology will be employed.

from remanding defendants in custody as it would necessitate a change of such an order in court.

Table 2.3 presents the number and percentage of defendants appearing in magistrates' court from 1996 to 2016 according to how they were directed to appear by the police. It demonstrates that the number of defendants who were arrested and held in custody by police increased sharply in the late 2000s and then decreased in the last few years. Indeed, the number of defendants detained by police increased from 110,000 in 2007 to 201,000 in 2011, then fell back to 154,000 by 2016. These two opposing trends occurred despite a consistent fall in the overall number of defendants appearing in court (Ministry of Justice, 2007, 2017b). This also occurred alongside a consistent decrease in the number of defendants who were arrested and bailed, resulting in an increase in the percentage of defendants who were detained in custody by police and a decrease in the percentage who were released on bail (See Table 2.3).

After 2011, however, the percentage of defendants detained in custody stabilised, the percentage released on bail declined, and the percentage of defendants who received summons started rising. In 2016, 10% (n = 154,000) of defendants appearing in magistrates' court were detained by police, 22% (n = 340,000) received bail, and 68% (n = 1,027,000) were summonsed. The changes in the proportionate use of police detention, bail and summons that began in the late 2000s occurred after more than a decade of relative stability. Indeed, in 1996, only 5% (n = 105,000) of defendants were detained by police, 36% (n = 765,000) received bail, and 59% (n = 1,231) received summons (Ministry of Justice, 2007, 2017b).

The increased use of detention by police beginning in 2007 seems inconsistent with the general downward trend in the use of remand in England. It is especially surprising given some changes in police powers in recent years. For instance, the Criminal Justice Act 2003 introduced 'statutory charging' which shifted charging decisions from the police to the CPS in all but the most minor cases. This was expected to reduce the number of suspects charged as well as

the use of police detention since the CPS would, in theory, ensure weak cases were not charged and that the charges matched the seriousness of the offence (Hucklesby, 2009). Although its implementation between 2004 and 2006 was followed by a brief fall in the use of police detention, the number of defendants detained by police subsequently rose sharply (see Table 2.3), suggesting its long-term impact on detention decisions was minimal.

Table 2.3 - England: Number and percentage of defendants appearing in magistrates' courts by how police directed them to appear, 1996* to 2016

	Defendants Summoned		Defendants Arrested and Bailed		Defendants Arrested and Held in Custody		Total Defendants	
	'000	%	'000	%	'000	%	'000	%
1996	1,231	59	765	36	107	5	2,102	100
1997	1,124	55	786	39	122	6	2,031	100
1998	1,183	55	808	38	143	7	2,134	100
1999	1,113	54	810	39	143	7	2,066	100
2000	1,167	56	774	37	142	7	2,082	100
2001	1,101	54	803	40	128	6	2,032	100
2002	1,154	54	846	40	141	7	2,141	100
2003	1,215	55	851	38	153	7	2,219	100
2004	1,313	59	768	35	135	6	2,215	100
2005	1,205	59	719	35	135	7	2,060	100
2006	1,102	57	698	36	123	6	1,923	100
2007	1,049	56	705	38	110	6	1,864	100
2008	971	56	633	36	131	8	1,736	100
2009	1,020	57	586	33	179	10	1,784	100
2010	961	55	579	33	194	11	1,734	100
2011	948	55	583	34	201	12	1,732	100
2012	923	57	500	31	184	12	1,607	100
2013	895	60	432	29	175	12	1,503	100
2014	948	62	411	27	170	11	1,529	100
2015	1,010	65	386	25	159	10	1,555	100
2016	1,027	68	340	22	154	10	1,520	100

Source: (Ministry of Justice, 2007, 2017b)

*The date was limited to 1996 due to data unavailability.

The Criminal Justice Act 2003 also expanded police powers by enabling them to impose bail conditions prior to charge, conceivably in cases where the CPS was reviewing the file to determine if a charge was appropriate and in order for police to make further inquiries. This responsibility might have been expected to increase police use of bail and reduce their use of detention as it would increase their control over defendants should they be released into the community. Indeed, (Hucklesby, 2011a) found this to be consequence of giving police the power to attach conditions to post-charge bail in 1994. However, like with statutory charging, the impact of this provision appears negligible when one considers the increase in the use of detention that followed.

It is possible this increased use of police detention occurred as a result of newly introduced alternatives to custody in the mid 2000s, such as electronic monitoring and the resurgence of bail support schemes, which only the court have the power to impose (see 'Courts' section that follows). Indeed, it is conceivable that police detained more defendants following their implementation of these new bail options with the aim of increasing the chances that individuals who they perceive to be high-risk receive these conditions if they are remanded on bail by the courts. However, if this the case, this tendency has since come to an end as following the rise in detention from 2007 to 2011, there appears to be a shift generally from the use of bail and detention to the use of summons. This may be a result of the budget cuts that have been taking place since the coalition government came into power in 2010 (Garside & Ford, 2016). As issuing a summons involves compelling the attendance of the defendant in court through post rather than going through an arrest, it requires fewer resources and is potentially a more attractive option for police operating under restricted budgets.

Courts. The courts impact the number of people entering remand custody through their decision to remand a defendant on bail or in custody while they await the remainder of their court proceedings. Although the police and CPS can influence this decision through recommendations, it is ultimately the court that has the final say in relation to bail. Table 2.4 illustrates the number and percentage of remanded defendants appearing in magistrates' court by the

type of remand imposed by the court. The number of defendants remanded on bail and the number of defendants remanded in custody fluctuated from the late 1990s to the early 2000s and then fell beginning in the mid 2000s. The decline in both groups is indicative of an overall drop in the number of cases entering the courts over this same time period. The proportionate use of bail compared to remand custody, however, remained largely stable from the late 1990s until 2011. Indeed, 12% (n = 67,000) of defendants were remanded in custody in both 1996 and 2012 (n = 56,000; (Ministry of Justice, 2007, 2017b). While it appears as though this proportion has increased since then, in reality, a different method of calculating these figures began in 2012 that reduced the number of unknown cases and thus potentially contributed to the changing figures. While these proportions should not be compared to previous years as a result of this issue, it is still clear that they have maintained relative stability in recent years (see Table 2.4).

The court's decision to remand a defendant on bail or in custody may be impacted by pre-trial initiatives. These have been established in the recent past, providing magistrates with options other than custody at the bail stage. One of these initiatives includes electronically monitored curfew conditions. This involves fitting defendants with an electronic tag in order to monitor their curfew while they are on bail. They were introduced on a permanent basis in 2005, enabling defendants to be released on bail under stricter supervision than was previously available. Their implementation was intended to increase the courts' confidence in curfew orders and alleviate previous concerns related to enforceability and the impact that physical curfew checks had on police workloads (Hucklesby, 2011a). The use of electronically monitored curfews has increased substantially since their inception and they are now used extensively in the remand process (Hucklesby, 2011a).

Several years after the implementation of electronic monitoring the government introduced a time served credit for defendants who received a custodial sentence following being subjected to these curfew conditions (Ministry of Justice, 2008a). Hucklesby (2009) suggests that this legislative change indicates the government's intention for this practice to be used as an alternative to remand custody. However, it is unclear whether electronic

monitoring has been used for this purpose or whether its use has simply increased the number of defendants subjected to this condition that would otherwise not have been remanded in custody (i.e. 'net widening').

Table 2.4 - England: Number and percentage of remanded defendants appearing in magistrates' courts by type of remand, 1996* to 2016

	Remanded on Bail		Remanded in Custody		Total Remanded	
	'000	%	'000	%	'000	%
1996	509	88	67	12	576	100
1997	510	86	82	14	592	100
1998	552	85	98	15	650	100
1999	541	85	98	15	639	100
2000	505	86	84	14	589	100
2001	523	87	78	13	601	100
2002	510	86	82	14	592	100
2003	521	87	76	13	597	100
2004	546	89	67	11	613	100
2005	505	90	59	10	564	100
2006	480	90	55	10	535	100
2007	467	90	52	10	519	100
2008	479	87	70	13	549	100
2009	..	..	..	..	..	100
2010	..	..	..	..	..	100
2011	404	88	56	12	460	100
2012**	353	84	66	16	419	100
2013	334	82	71	18	405	100
2014	330	83	68	17	399	100
2015	310	83	63	17	374	100
2016	265	82	57	18	322	100

Source: (Ministry of Justice, 2007, 2017b).

*The data was limited to 1996 due to data unavailability.

**After 2012 a new estimation method was used by the Ministry of Justice that reduced the number of unknown cases. This may explain the change from 2011 onward in the proportion of remands.

An evaluation of a pilot project in 2000 suggests that electronic monitoring was used as an alternative to remand custody in about half of the cases studied, whereas the other half would have received bail in any event (Airs, Elliot, & Conrad, 2000). As such, it is likely that electronic monitoring curfew conditions have had some impact on court decision-making with respect to bail decisions.

Another pre-trial initiative introduced in recent years is Restriction on Bail. This initiative was introduced by the Criminal Justice Act 2003 and was later amended by the Drugs Act 2005. It seeks to tackle the problem of drug related offending by requiring defendants to attend drug assessments and treatment instead of being remanded in custody (Hucklesby, 2011a). However, Hucklesby (2009) advises that the targeted defendants would be unlikely to be remanded in custody even if they were committing crimes persistently or on bail. Since these defendants would most likely not have been remanded in custody prior to the initiative, it is unlikely Restriction on Bail has had a significant impact on the number of defendants entering remand custody.

Finally, bail support schemes have existed since the late 1980s but there was no national requirement for such services to be provided until recently (Hucklesby, 2011a). Although they vary according to region, they generally include elements such as reporting requirements, contact with bail support workers, residence requirements and/or accommodation provisions, and social support in relation to issues such as employment, finance, education, and family issues (Cavadino & Gibson, 1993). Whereas in the past some support schemes were used on a voluntary basis, more recently they have been used as an explicit condition of bail.

In 2007, the introduction of the Bail Accommodation and Support Scheme (BASS) marked the first time in which there was national coverage of a bail support provision for adults. This program subsumed the former Effective Bail Scheme (EBS) in 2010, which had been operating in one region for a few years prior (Hucklesby, 2011a). Although there is no information regarding the effectiveness of the BASS, Hucklesby (2011a) found evidence to support that some defendants supervised on EBS were likely to have been remanded in custody had they not become involved with the scheme. However, she also

found evidence that EBS was sometimes used for defendants who would not otherwise have been remanded in custody. As with electronic monitoring, it is likely that bail support schemes have had some success in diverting defendants from remand custody but that their use may have resulted in some net-widening in the process.

Given that the most significant decline in the remand population comes from the convicted unsentenced population, it is unlikely that the aforementioned pre-trial initiatives have been the primary drivers of reducing the number of defendants entering remand custody. Indeed, pre-trial initiatives would only be expected to be expected that the decline in the convicted unsentenced population can be attributed to the rising use of 'fast delivery pre-sentence reports' (PSRs), which are more likely to be delivered the same day, alleviating the need to delay the sentencing decision. However, although the use of these reports has been rising steadily (Ministry of Justice, 2017c) the most recently available statistics suggest that standard delivery PSRs were still more likely to be used for remand prisoners, specifically (Ministry of Justice, 2010b). Consequently, it is unclear whether they were instrumental in decreasing the convicted unsentenced population.

One might also have expected the change brought about by LASPO to have made an impact over magistrates' bail decisions. As was discussed in the previous chapter, this legislation instructs magistrates to conduct a 'no real prospect' test, ensuring defendants are released on bail if they would be unlikely to receive a custodial sentence (Ministry of Justice, 2014b). Although this legislative change corresponds with a fall in the number of defendants remanded in custody by the courts from 2012 to 2016, the proportion of defendants who were remanded in custody compared to bailed remained relatively stable. This suggests the courts were no more likely to release defendants on bail following the legislative changes. As such, the decline likely reflects a drop in caseload as opposed to a change brought about by the law. This may be because courts already took the likelihood that a defendant would receive a custodial sentence into consideration prior to its implementation.

This discussion suggests that there has been a decline in the volume of defendants entering remand custody in England and Wales in recent years and that this is likely to have contributed to the fall in the remand population. This has been driven by a fall in caseload as well as facilitated by stability in the proportion of defendants detained by the police in recent years and those remanded in custody by the courts across a longer period of time. However, the legislation and policy changes that accompanied these trends do not appear to have had a major impact on any of these contributing factors. While they offer some insight into potential reasons for this change, they cannot alone explain the remand population trends.

Time spent on remand

The length of time that defendants spend in remand custody awaiting a determination of bail,²⁹ a trial, or sentencing, can be expected to have a significant impact on the remand population. Indeed, prisoners spending lengthy periods of time in remand custody consistently appear in the prison population count. While neither jurisdiction consistently reports data concerning the length of time defendants spend in remand custody, examining the length of the time required to complete cases generally produces a rough estimate as to how long they might spend in custody and thus to what extent this driving factor contributes to remand population trends.

Canada.

Given that the remand population (in counts) has been increasing (see Figure 2.1) at the same time that the receptions to remand have been decreasing (see 'The Number of Defendants Entering Remand Custody'), this suggests that it is not the volume of remand prisoners that has been driving changes to the remand population in Canada but rather the time they spend in custody awaiting trial or sentencing (Webster et al., 2009). Relative to England, Canada is

²⁹ In some cases, particularly in Canada, the bail decision is not made on the first court appearance. In these situations defendants would be remanded in custody until they are (potentially) released on bail.

experiencing major difficulties in relation to their criminal court case processing times. The statistics suggest that the greatest change is clearly observed in the shortest and longest categories of case processing times. Indeed, the percentage of cases completed in one day has decreased from 16% to 10% from 2000/2001 to 2014/2015 while those that take longer than a year have increased by from 12% to 17% (Statistics Canada, 2017e).

The median time with which it takes cases to be processed through the courts varies according to province and territory. Table 2.5 demonstrates that Ontario, for instance, had one of the highest case processing times in 2005, but has since reduced its median number by 16 days. In comparison, the median number of days required to complete cases in Quebec has increased by 57 days in the same time period. Across all the provinces and territories there has been a three day decline in the median number of days from first appearance to last appearance from 2005/2006 to 2014/2015. This decline, however, should be considered relative to England. The recent decrease does not appear to be as substantial when one considers that the median number of days from first appearance to last appearance is 121 days in Canada (Statistics Canada, 2017f) compared to a mean of 29 days in England (Ministry of Justice, 2017a).

Not only are case processing times an area of concern in Canada, but also the number of court appearances required to complete a case. Indeed, the number of court appearances in a case is consistently argued to impact case processing times (Doob, 2013; Webster et al., 2009). Although national data are not available, the most recent data available suggests that the average number of court appearances required to complete a case in Ontario increased from 4.3 in 1992 to 9.2 in 2007, and then declined to stand at 8.5 in 2012 (Doob, 2012; Webster et al., 2009). In addition, there is evidence to suggest that the bail process itself is taking longer than it did in the past in Ontario. The determination of bail was established, on average, in just over four court appearances in 2001 compared to almost six in 2007 (Webster et al., 2009). In 2013/14, 37% of cases required three or more appearances to complete the bail process (Doob et al., 2017).

Table 2.5 - Canada: Median number of days from first court appearance to last court appearance in adult criminal court cases in each province, 2005 -2015

	2005/ 2006	2006/ 2007	2007/ 2008	2008/ 2009	2009/ 2010	2010/ 2011	2011/ 2012	2012/ 2013	2013/ 2014	2014/ 2015	Change in Days (2005 – 2015)
Ontario	120	120	120	119	113	106	94	93	99	104	-16
Saskatchewan	91	92	98	98	71	77	72	78	73	77	-14
Alberta	120	120	128	121	126	122	117	121	127	107	-13
British Columbia	111	109	109	104	99	113	127	120	113	105	-6
CANADA	124	125	125	125	120	119	117	120	127	121	-3
Prince Edward Island	33	30	32	34	29	29	29	35	40	47	+14
Newfoundland	113	120	120	118	113	129	118	113	148	143	+30
Manitoba	121	132	140	154	142	141	158	160	162	151	+30
New Brunswick	74	79	78	85	78	75	78	94	105	106	+32
Nova Scotia	125	122	120	127	136	141	150	158	155	163	+38
Quebec	182	183	175	183	184	190	205	215	237	239	+57

Source: (Statistics Canada, 2017f)

These lengthy case processing times persist despite numerous initiatives to increase the efficiency of Canada's courts. Many of these initiatives are discussed in Chapter One. In addition, several provinces have made attempts to increase court efficiency. For instance, some jurisdictions have increased court resources by hiring additional prosecutors, paralegals, and clerical staff (Government of Saskatchewan, 2010) and the use of video conferencing for routine hearings to expedite cases has also been adopted by several provinces (Government of Alberta, 2007; Government of Ontario, 2010; Government of Saskatchewan, 2010; Provincial Court of Manitoba, 2005).

In fact, the Ontario Ministry of the Attorney General has declared that the current case processing times are unacceptable (Ministry of the Attorney General, 2010). As a result of these concerns, the aforementioned 'Justice on Target' initiative (see Chapter One) was created in June 2008. The Ministry of the Attorney General aimed to reduce the average number of days and court appearances required to complete a criminal case in Ontario by 30% over a four-year period. This initiative did not, however, meet its target (Ministry of the Attorney General, 2010).

Finally, the implementation of Bill C-25 in 2010 eliminated a convention allowing judges to give offenders a two-for-one credit at sentencing for the time that they spent in pre-trial custody for those cases in which a custodial sanction was handed down. For every day that an offender spent in remand, two days were subtracted from his or her intended sentence. The Canadian government expressed concerns that this convention encouraged defence counsel and their clients to purposely extend court proceedings in order to accumulate more time in remand and thus additional credit at sentencing (Library of Parliament, 2009). It is unclear to what extent this legislation impacted case processing times, as the nature of the problem was uncertain at the outset. Indeed, there is no empirical evidence to support the government's claim that defence lawyers were delaying proceedings prior to the implementation of the Bill. The reform has since been deemed unconstitutional and struck down by the Supreme Court (Harris, 2016).

This discussion suggests that, unlike the volume of defendants entering custody, the length of time they spend in custody has a major influence on the remand population in Canada. While case processing times have declined in Canada as well as Ontario, these decreases are marginal when one compares the current averages to those in England. These lengthy case processing times may, in part, reflect the numerous appearances required to complete both the court process, generally, and the bail process specifically. Although there have been multiple laws and policies that have targeted case processing times in recent years, they at most achieved marginal decreases. As such, remand population trends do not appear to be heavily influenced by formal initiatives aimed at the length of time defendants spend in custody.

England

In England, the average number of days between the first court listing to the completion of the case has been steadily decreasing in magistrates' courts. The average number of days required to complete the cases fell from 33 days in 2002 to 18 days in 2016 for all offences and 54 days to 28 days for indictable and triable either way offences (Ministry of Justice, 2008b, 2017a). However, the average waiting times between committal and trial³⁰ in the Crown court has increased over the last decade. Defendants spent an average of 14.3 weeks awaiting trial in 2000 compared to 20.8 weeks in 2016 (Ministry of Justice, 2017a). It is notable, however, that the vast majority of defendants in England complete their proceedings in magistrates' court (Ashworth & Redmayne, 2010).

The government has introduced several initiatives over the last decade that make it clear that increasing the efficiency of the courts is an important objective in England. Many of these initiatives are discussed in Chapter One. Indeed, the 'Simple, Speedy, Summary Justice' initiative (Department for Constitutional Affairs, 2006) was introduced in the mid 2000s followed by the 'Swift and Sure Justice' White Paper in 2012 (Ministry of Justice, 2012). Furthermore, both the

³⁰ Information regarding the waiting time between committal and conviction and sentence is not available in the Crown Court.

Narey Report (1997) and the Leveson Report (2015) suggested changes be made to increase the efficiency of the court system. One of such reforms was the introduction of Early Administrative Hearings, which enable single magistrates or Justices' clerks to address legal aid applications and make remand decisions at the first appearance (Hucklesby, 2009). Clearly, reforms in this jurisdiction consistently centred on managerialist attempts to increase the efficiency of the courts.

The government has also sought to reduce case processing times through the encouragement of early guilty pleas. First, this is facilitated through the imposition of reduced sentences for early guilty pleas. This practice is intended to encourage defendants to plead guilty at the earliest possible stage, saving the court time and money, in exchange for a reduction in their sentence (Lipscombe & Beard, 2013). The Criminal Justice Act 2003 instructs the court to take both the stage in the proceedings at which the offender plead guilty as well as the circumstances in which the guilty plea was provided into account at sentencing. The Sentencing Guidelines Council (2007) advises that a sliding scale of reductions ranging from one third (where the guilty plea was entered at the first reasonable opportunity) to one tenth (where the plea is entered after a trial has begun) is appropriate. Another manner in which early guilty pleas are encouraged is through Early Guilty Plea Schemes, introduced in Crown Courts starting in 2012 and refined by Leveson Report. These schemes aim to identify cases where a defendant is likely to plead guilty and to expedite them through an early guilty plea hearing (Castle, 2012).

Finally, the amount of time defendants spend in remand custody is controlled to some extent through Custody Time Limits. These were introduced in the mid 1980s, setting maximum periods that defendants can spend in custody at different stages of the court process (Hucklesby, 2009). If the time limit is exceeded, the defendant must be released from custody and bailed by the courts. Anecdotal evidence suggests that prosecutors operate with them in mind, rarely exceeding them. However, if an extension is requested, it is usually granted (Samuels, 1997). Hucklesby (2009) suggests that because these time limits were set generously, it is possible that the prosecution will work to the maximum, increasing the time beyond that which is required in some cases.

Case processing times in England are both declining and, relative to Canada, short in length. This can be expected to have a major impact on reducing the length of time defendants spend in custody and, consequently, the size of the remand population. The numerous initiatives that have targeted them appear to have had some impact on the decreases in recent years. As such, it would appear that, in some contexts, laws and policies could influence remand population trends.

Summary

The preceding review of both the statistics and law and policy initiatives in each jurisdiction has revealed that explanations for the remand population trends in England and Canada are complex and varied. In Canada, it is difficult to determine how many defendants are entering remand custody due to deficiencies in the data. However, it would appear as though there may have been a decrease in recent years. While police detain a large proportion of defendants in custody in this jurisdiction relative to England, their use of remand cannot fully be explained by the types of cases entering the system. Rather, it would seem that the primary driver for increases in the remand population in Canada is the time defendants spend in custody awaiting the conclusion of their criminal proceedings. Although there has been a small decline in case processing times across the jurisdiction in recent years, this is not applicable to all of the provinces and the decrease is marginal. Indeed, the average case processing times in Canada, despite being in decline, are still much longer than those in England. This suggests that, while the number of defendants entering the court system in custody appears to be decreasing, the substantial length of time they spend there is having a considerable impact on rising remand rates.

In England, the decline in the remand population can be, in part, explained both by a fall in the number of defendants entering remand custody and a reduction in the length of time that they spend in the court process. Indeed, the number of defendants entering remand custody has declined in the last decade, largely due to a considerable drop in the number of cases entering the courts. In addition, the proportion of defendants that both the police and the court have

remanded in custody has remained relatively stable in recent years. Finally, the time required to process defendants in magistrates' courts has declined since the beginning of the 21st century, suggesting defendants may be spending less time waiting for the conclusion of their proceedings in remand custody.

It appears that, with the exception of strategies aimed at decreasing case processing times in England, laws, policies, and case factors have had only a marginal impact on the use of remand custody in both jurisdictions. Specifically, despite various initiatives, the remand rate in England has remained stable while Canada's has increased considerably. It is notable, however, that, in the main, laws and policies demonstrated a minimal impact on remand population trends in both directions. As such, it seems reasonable to turn to more informal processes in attempts to better understand the factors that influence bail decision-making.

Informal factors influencing bail decision-making

Over the last half-century a growing number of studies have moved away from explaining the behaviour of criminal justice actors exclusively in relation to the laws and policies that guide them and have instead emphasised the importance of informal factors on the decision-making process (Blumberg, 1967b; Cammiss, 2007; Church, 1982; Feeley, 1973; Hucklesby, 1997a; King, 1981; McConville et al., 1991; Myers, 2009; Skolnick, 1967; Webster et al., 2009). They examine what is sometimes termed 'court culture', referring to the informal practices, norms and expectations shared by court practitioners within a court system (Church, 1982). Previous research suggests that norms develop within each court location in line with their individual court culture (Church, 1982, 1985) and that these norms are mediated through the decision-making of the courtroom workgroup (Eisenstein & Jacob, 1977; Young, 2013).

Although formal rules continue to frame the decision-making of court actors, their influence is argued to act alongside a multitude of other factors. Feeley (1973) suggests that formal laws and policies are only one set of factors shaping and controlling the decision-making of the workgroup as they are more likely to prioritise informal 'rules of the game' within their respective courts as

well as their own individual or sub-group (i.e. defence, prosecution, judicial) goals. Since court actors all have their own individual incentives and objectives, relying on formal laws to explain their behaviour often masks the differences between them and ignores the fragmented nature of the court (Feeley, 1983). Furthermore, since the law provides leeway in defining the behaviour of court actors (Feeley, 1973; McConville et al., 1991), it can be interpreted and applied according to the discretion of the court actors in line with their individual and shared interests.

These decisions are made within the context of the courtroom workgroup. Indeed, Eisenstein and Jacob (1977) have argued that the court is akin to an organisation in which courtroom work is a group activity. The organisation of the administration of criminal justice is thus viewed as a system of action primarily based on cooperation, exchange, and adaptation (Feeley, 1973). In this system, individuals can mutually benefit by cooperating with other members of the workgroup (Blumberg, 1967a; Skolnick, 1967). This is both because it enables them to develop mutually agreed upon 'work crimes' (i.e. shortcuts, deviations, outright rule violations) designed to manage heavy workloads (Blumberg, 1967a) and, in the long term, creates an elaborate exchange system of mutually advantageous benefits with other court actors (Skolnick, 1967). This cooperation has been argued to displace the conflict inherent to traditional adversarial relationships in order to enhance the smooth functioning of the court (Skolnick, 1967).

Over time, these mutually agreed upon decisions can be expected to result in the formation of norms and the development of information practices. This creates a 'local legal culture' (also referred to as 'court culture') in which practitioner norms govern case handling and participant behaviour in each court (Church, 1982, 1985). Court culture has been used to explain differences in the use of bail (Hucklesby, 1997a; Myers, 2015), as well as decision-making related to other court processes such as sentencing (Rumgay, 1995), mode of trial (Cammiss, 2007), and case processing times (Church, 1978; Mahoney, 1988). Indeed, court culture can be expected to impact the decision-making of bail court actors, which in turn influences the number of accused persons remanded in custody and the length of time they spend awaiting a bail decision.

Court culture has, firstly, been shown to influence bail decision-making that will ultimately contribute to the length of time defendants spend in custody awaiting a bail decision. For instance, Myers (2009) conducted 148 days of bail court observation in eight different courts in Ontario. She noted that, according to Canada's bail laws, accused persons should be released on bail without conditions, a monetary component or a surety unless the Crown can prove that a more onerous type of release is warranted. However, her observations revealed that sureties have become the norm rather than the exception in most courts. Indeed, in seven out of the eight courts examined, a surety was required in over 60% of cases in which the Crown consented to the release of the accused. In cases in which the Crown contested the accused's release, an even higher proportion of cases required a surety. Myers (2009) argued that this reliance on sureties was the product of a culture of defensiveness whereby court practitioners outsource control of accused persons on bail to private controllers, relieving much of the risk to their reputation. She asserted that this practice could increase the number of appearances required to complete the bail process since adjournments are often requested for the purpose of securing appropriate sureties or accommodating their schedules.

Further, Webster (2009) demonstrated that informal practices related to the use of video remand is also associated with longer case processing times in bail court. Video remand equipment electronically connects courtrooms remand centres in order to avoid the need to physically bring inmates to court. In her case study of one Ontario court, Webster (2009) discovered that defence counsel commonly use video remand as a 'long-term holding tank' for accused persons in the bail process. On any given day, an average of 82% of cases in this court were adjourned to another day. Further, cases that involved at least one video remand appearance took an average of 5.6 appearances to complete the bail process, compared to only 1.7 appearances for those with no video appearances. Webster (2009) concluded that this practice is indicative of a 'culture of adjournments' in which there are generalized expectations that adjournments are inevitable, acceptable and even desirable.

Finally, Leverick and Duff (2002) examined the impact of informal relationships and working agreements on case processing times in four Sheriff courts in

Scotland between 1999 and 2001. They discovered that judge-led cultures, in which Sheriffs questioned adjournment requests aggressively, resulted in a lower rate of adjournments than co-operative cultures, where adjournments were informally agreed upon between prosecution and defence and rarely opposed by Sheriffs. Thus, the culture of shared values and expectations that were developed in each court were shown to impact case processing times.

Culture can, secondly, impact the number of people detained in custody through its influence on the decision-making of court practitioners. For instance, Hucklesby (1997a) found that variations in the use of bail in three South Wales Magistrates' courts could be explained by the culture of the court. Specifically, court practitioners developed expectations as to whether accused persons would be granted or denied bail based on the reputation of the court. These expectations were subsequently reflected in the working practices of court practitioners. For instance, the CPS would not apply for custodial remands and defence solicitors would advise their clients not to make bail applications based on their assumptions as to whether they would be successful. Although the bail decision was theoretically made by the magistrate, in practice it reflected the work group's shared norms, based on the reputation of the court as lenient or harsh.

Judicial decision makers also have discretion over the number of people that will be admitted into remand through norms that develop in relation to their use of bail conditions. Indeed, conditions of various levels of restrictiveness can be attached to bail instead of placing defendants in custody. Research from England shows that conditions have been used increasingly in this jurisdiction. In fact, up to half of defendants were shown to be remanded on conditional bail (Hucklesby, 2002). Dhami (2004) demonstrated that when magistrates are instructed to make hypothetical bail decisions, 45% grant unconditional bail, 45% grant conditional bail, and 10% remand defendants in custody. In practice, however, only a small number of conditions are actually imposed. For instance, magistrates often impose conditions related to residence, curfews, reporting to police, or banning defendants from places and from contact with other individuals (Hucklesby, 1994b). Dhami (2004) found that residence was the most frequent condition imposed, while reporting and no contact were also

common. Magistrates were reluctant to use curfews, boundaries, or sureties in this study. The mean number of conditions imposed was 1.58 in the hypothetical trials.

Studies reveal that conditions are used much differently in Canada. Myers (2009) showed that, across eight courts, over 90% of cases in which the crown consented to a release and virtually all of the cases in which the Crown contested a release required conditions to be attached to the defendant's release. Further, at least half of the cases appearing in all eight courts required the defendant to adhere to more than five conditions when the Crown consented to the release of the defendant. This percentage was even higher for cases in which the Crown contested the release of the defendant. The imposition of multiple, often stringent, bail conditions may cause defendants to be 'set up to fail', ultimately resulting in failure to comply charges. Sprott and Myers (2011) found evidence to support this assertion, finding that youth who were subject to a bail order for long periods of time and had numerous bail conditions were most likely to accumulate new charges of failing to comply. The overuse of conditions can be detrimental to a defendant's remand status. If they find the conditions overly restrictive and breach their bail orders, this could result in failure to comply offences. Since cases involving these offences are more likely to result in a bail hearing (Doob, 2012; Webster et al., 2009), it could be that they may impact the number of defendants admitted to custodial remand.

Clearly, court culture can have a substantial impact on bail decision-making processes. In fact, the limited research that has sought to explain the use of remand in England and Canada has consistently pointed to the importance of culture in attempts to explain remand population trends (Hucklesby, 2009; Webster, 2009). However, research suggests that culture is, in part, formed by the broader context in which it emerges (Church, 1985; Young, 2013). While court actors make decisions based on incentives, norms, and mutually accepted practices, these are not the only informal factors shaping their decision-making. For instance, Eisenstein and Jacob (1977) suggest that the decisions of the workgroup are influenced not only by immediate concerns surrounding the norms within their particular court but also by what they term the 'task

environment'. This includes factors such as outside criminal justice institutions (i.e. police, prisons, appellate courts) and the political environment. Further Church (1985) has acknowledged that court norms grow and change based on political, economic, and social variables within the setting in which the court is located.

Given the importance of context, one would expect bail court culture to be influenced by broader views surrounding criminal justice specific to the system in which it emerges. Indeed, as Chapter One argued, bail is simply one component of a much wider criminal process and, consequently, values that shape that wider process can also be expected to influence attitudes towards bail. There has been some research to suggest that bail court culture is influenced by these wider views. For instance, Webster (2009) suggests that court culture in Canada is shaped by a risk averse mentality that has permeated the entire criminal justice system. A preoccupation with managing potential risks posed by defendants has resulted in criminal justice actors passing decisions onto someone else later in the process (i.e. police to prosecutors, prosecutors to justices of the peace/judges) or simply avoiding making them at all. Further, Hucklesby (2009) has argued that bail court culture in England is influenced by broader concerns about prison overcrowding. This is a consequence of the rise in the overall prison population and, thus, the cost of housing so many prisoners. Both of these broader views can be tied to managerialist rhetoric discussed in Chapter One, which centres on cutting criminal justice costs and managing perceived or actual risks posed by defendants and offenders. This research suggests that this rhetoric interacts with the informal behaviour of the courtroom workgroup to contribute to bail decision-making.

While the studies by Webster (2009) and Hucklesby (2009) have provided a more nuanced explanation as to how informal factors influence the bail decision-making process, they are limited by their inability to look beyond the jurisdictions in which the research took place. Indeed, understanding the influence of broader views is challenging when all court actors are working within the same system, and are thus subject to the same influences. This perhaps contributes to Young's (2013) assertion that current research surrounding the courtroom workgroup fails to establish how norms are

developed, entrenched, challenged or modified. It is argued that examining court culture in the context of the broader views shaping the criminal process, through a comparative lens, would move beyond a narrow understanding of court culture's influence on bail decision-making.

In sum, while the examination of court culture shows some promise in contributing to an understanding of the bail decision-making process, it still presents an incomplete explanation of the behaviour of court actors without an understanding of the context in which it developed. This suggests that, in order to adequately understand the factors that influence bail practices, a more holistic approach is required.

Conclusion

Taken together with Chapter One, this chapter has demonstrated that, despite striking similarities in the laws, policies, and rhetoric shaping bail practices, the use of remand has developed in a divergent fashion in England and Canada. This suggests that these factors cannot fully explain patterns of bail decision-making in the two jurisdictions. This was further illustrated through an examination of the previous research and statistics surrounding the use of remand, which showed that these trends could only partially be explained by laws, policies, and case factors. While court culture was shown to shed some light on potential informal explanations for these trends, its full impact cannot be understood without taking into account the views shaping the broader criminal process. In order to facilitate such an examination, this thesis will compare bail practices in two jurisdictions, examining the factors that explain the bail decision-making process through an analysis of the bail practices in England and Canada.

Chapter Three:

Methodology

Introduction

This chapter will outline the methodology adopted for the study and describe the nature of the analysis undertaken. First, the aims and objectives of the research are stated. Next, the relevant research paradigm and the value of a comparative approach in achieving these aims and objectives are discussed. The third section argues that a 'multiple-case study' is an appropriate research design and subsequently describes the basis for selecting each 'case' (i.e. court) and outlines the access issues surrounding the process. In the fourth section, the research context is examined through a description of the day-to-day operations of both court locations. The fifth section discusses the value of a mixed methods approach and presents the sources used to obtain the data. This includes both court observations and semi-structured interviews with court practitioners. The sixth section addresses the manner in which ethical issues were approached. Finally, the data analysis process is presented, including descriptive statistical procedures as well as quantitative and qualitative content analysis.

Aims and objectives

The aim of this research was to better understand the factors that contribute to bail decision-making in English and Canadian courts. Specifically the study had the following objectives:

- 1) Identify the factors that contribute to bail court decision-making in England and Canada.
- 2) Analyse the extent to which these factors converge and diverge in each jurisdiction.
- 3) Understand and compare the impact of bail decision-making patterns in each jurisdiction at the local level.

- 4) Examine how these findings contribute to a greater understanding of the bail decision-making process in a wider context.

First, it was assumed that court actors (i.e. judicial officials, prosecutors, defence lawyers, and legal advisers) make decisions related to bail based on specific factors (e.g. law, policy, the circumstances of the case, the background of the offender, the culture of the court, broader views about the criminal justice process). The nature of those factors as well as the extent of their influence were determined by examining the behaviour of court actors and their explanations for these behaviours. Second, the research intended to describe how and to what extent those contributing factors were similar or different across jurisdictions. This was accomplished by investigating the patterns of behaviour and attitudes of court actors in England and Canada. Third, the emerging patterns in bail decision-making were examined in relation to the overall functioning of each court. For instance, the relationship between decision-making practices and factors such as case processing and case outcomes were explored at the local level. Fourth, the wider implications of these findings were determined by examining those patterns at the theoretical level. Specifically, the implications for developing an understanding of the process in a broader context were explored.

Interpretive framework

Certain philosophical assumptions were embedded within the interpretive framework of this research and their interplay frames the theoretical approach. This section will outline the research paradigm that shaped the process of the research and describe the extent to which the principles of comparative law informed the conduct of inquiry.

Research paradigm

The 'paradigm' or 'worldview' adopted in the study is a set of beliefs that guides the methodological approach (Creswell, 2007). This study took an *integrated* approach to the research, focusing on broad social structures and the effects of law and policy, but also examining the consequence of this behaviour on

criminal justice actors. This approach is in line with McConville and his colleagues (1991) and Henry (1983), who integrate micro and macro approaches through a combination of structuralism and interactionist interpretations of the justice system.

Structuralists emphasise the importance of socio-economic structures and legal bureaucratic rules, focusing on the senior officials and 'state elite' who mediate between those structures and rules (McConville et al., 1991). Interactionists, on the other hand, are concerned with the meaning individuals attribute to their environment (including the actions of others) and the action they take on the basis of this imputed meaning (Bryman, 2004). Interactionism is thus focused on the behaviour of individuals and the variables that intervene between how institutions should work and how they do work.

In this study, the behaviour of court actors was examined and the meanings these actors attributed to the bail process was explored, but this was examined in the context of the formal laws and policies related to bail that structured their decisions. This approach recognised the dialectical relationship between structure and behaviour and their interdependence in the context of the bail decision-making process.

Comparative approach

The principles associated with comparative law were also used as a framework with which to structure the methodology of the study. Specifically, a 'traditional' form of comparative law was employed in which it is conceived primarily as a method (Nelken, 2007; Samuel, 2013). The traditional approach is often referred to as the 'functional' method of comparative law (Zweigert & Kotz, 1998) and its focus is discovering which legal system – or in this case, which bail system - fulfils certain legal demands (Jansen, 2006). Proponents of the traditional approach seek to use comparative law for primarily instrumental purposes and are interested in comparing legal rules and institutions for practical purposes related to adjudication and law reform (Orucu, 2004). They often attempt to learn from other systems how to improve their own and seek to borrow an institution, practice, technique or idea in order to reach this objective

(Nelken, 2010). In this instance, the functional method was used to develop a better understanding of the bail decision-making process. Specifically, it was used to examine the impact of different decision-making practices across two jurisdictions. This type of approach had both practical and theoretical benefits, which are outlined below.

From a practical standpoint, it was anticipated that policy-makers aiming to reform their bail systems could use the knowledge gained in this process to inform laws, policies, or practices. This could be achieved by gaining a better understanding of actions that have been shown to achieve desired objectives in other legal systems. For instance, jurisdictions with rising remand rates could gain a better understanding of procedures used in jurisdictions with decreasing or stable remand rates in efforts to reduce their prison remand population. It was anticipated that framing the study in terms of the functional method would result in findings that could be used to inform 'policy transfer' between Canada and England. According to Dolowitz and Marsh (2000), policy transfer is:

...the process by which knowledge about policies, administrative arrangements, institutions and ideas in one political system (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political system (p. 5).

While effective 'hard' forms of policy transfer - in terms large-scale importation of policy goals, content and instruments – are rather rare, there has been evidence of successful 'soft' policy transfer, primarily at the level of policy ideas, symbols, and labels (Jones & Newburn, 2007). As such, while wide scale importation of specific bail laws and policies might not be feasible, more malleable ideas such as those related to the incentives of court actors and informal practices could potentially be exchanged.

The comparative approach also has theoretical benefits. While previous studies that have investigated bail decision-making have provided valuable insight into this topic in specific jurisdictions, a comparative approach would fill gaps in the research by offering a broader understanding of the subject. Zweigert and Kotz (1998) suggest that approaches that focus on one jurisdiction only offer legal solutions to practical problems 'on their own terms' and argue that solutions

should be freed from the context of their own system in order for an assessment to take place. In this case, research that examines bail decision-making in one jurisdiction may not fully appreciate the impact of the wider context in which it is taking place. Indeed, trying to determine the influence of a specific policy or aspect of the government's rhetoric is difficult when it is common to every court and every court actor being studied. Only by examining similar behaviours in an environment without these factors could their influence be fully understood. In this way, a comparative approach could clarify the individual differences in the impact of the law, rhetoric, and the behaviour of court actors.

Comparative approaches may also widen the scope with which specific problems can be understood. This is because there may be factors that are bypassed when seeking explanations for a process if they are taken for granted to be the norm. For instance, instead of assuming actors are not adhering to 'due process' or 'crime control' values, one might ask whether these principles are conceptualised differently across jurisdictions and how this impacts decisions. These broader questions can be answered by removing oneself from the confines of single jurisdiction studies and examining them in a comparative context (Zweigert & Kotz, 1998).

Ultimately, it is projected that this type of approach will achieve what Samuel (2013) sees as a fundamental component of comparative research: the acquisition of new knowledge through the process of comparison. One must be able to draw conclusions from the comparison that could not otherwise be drawn had the two objects been analysed separately. It is anticipated that a comparative approach to understanding bail decision-making will expand on and overcome many of the obstacles involved with single jurisdiction studies through the acquisition of this new knowledge.

Research design

This section will describe the type of case study design employed in this study and discuss the advantages of its use as well as some challenges. It will also outline how and why each 'case' was selected and describe the access issues surrounding this process.

Multiple-case study

The comparative analysis was employed using a 'multiple-case study' design. Case study research is an approach in which "the investigator explores a bounded system (a case) or multiple bounded systems (cases) over time, through detailed in-depth data collection involving multiple sources of information ... and reports a case description and case-based themes" (Creswell, 2007, p. 73). In this instance, each case was represented by a criminal court in which bail decisions were made. In accordance with Yin (2014), the cases were selected on the basis that they would produce contrasting results for an anticipatable reason. In this case, the remand rates observed in each jurisdiction as well as the culture surrounding bail (see Chapter One and Two) suggested there might be different models of bail decision-making, and potentially contrasting perspectives.

The most obvious advantage of using a case study design is that it provides extremely rich, detailed, and in-depth information (Berg, 2009). This was particularly appropriate for the current study as it enabled a comprehensive understanding of the bail decision-making process from a variety of perspectives. This level of depth is advantageous when one is undertaking a study in comparative law since proponents of the functional method advise that researchers must account for both legal and social factors when they are comparing systems (Zweigert & Kotz, 1998). This level of detail was obtained by studying both the actual manner in which decisions were made as well as the context of these decisions as explained by a variety of different court actors.

In order to produce a rigorous, systematic research design, several challenges with case study research were addressed. For instance, Berg (2009) asserts the importance of objectivity when conducting a case study. He advises that researchers ensure they avoid bias with the ultimate goal being that others could repeat the research. This enhances the reliability of the results. The study addressed this concern by applying methods systematically. For instance, the observation schedule standardised the categories of information gathered during court observations both across cases and jurisdictions. Further, although the interview schedule allowed tangential discussions, it maintained a

consistent structure that allowed for the same categories of data to be collected between participants.

Another common criticism of case study research is that the findings are difficult to generalise to other cases beyond the study (Berg, 2009; Yin, 2014). In other words, they lack external validity. However, Yin (2014) argues that although the findings cannot be generalised to populations in a statistical sense, they can be generalised theoretically. He refers to this process as ‘analytic generalisation’ and argues that it provides an opportunity to shed empirical light about theoretical concepts or principles. The generalisation is posed at a conceptual level higher than that of the specific case. As such, findings from a case study can have implications well beyond similar cases and can extend to a host of other disparate situations. In relation to this study, the findings may not explain how all bail decisions are made, but it could suggest explanations for how other bail decisions are *likely* to be made in other courts.

Site selection

The ‘cases’ in this study (i.e. the two criminal court sites) were selected because of several factors. This included the legal jurisdictions they were located in, the level of court they were associated with, and the geographical areas in which they were located.

The sites were located in England and Canada, whose legal systems have similar historical foundations. These jurisdictions share a common-law tradition and adhere to similar international human rights instruments. In addition, both jurisdictions have comparable bail laws and have imposed restrictions on the law related to bail in recent years (see Chapter One). This means the sites were ideal subjects for a comparative approach. Indeed, studies in comparative law often borrow from those in politics and include ‘most-similar’ designs (Hague, Harrop, & Breslin, 1998). In this type of design, similar jurisdictions are selected on the basis that the more similar the units being compared, the easier it will be to isolate the factors responsible for the differences. England and Canada were selected on the basis that their legal systems, generally, and bail laws, specifically, were alike, yet there are differences in their prison remand

populations. A most-similar design was appropriate in these circumstances as the study aimed to identify factors which contributed to bail decision-making that were potentially associated with the jurisdictions' disparate use of remand custody.

The similarities between the bail laws in each jurisdiction as well as the extent to which they evolved harmoniously provided a convincing argument that the research compared 'like with like.' Nelken (2010) asserts that the more relevant constants between the jurisdictions, the more surprising and instructive the finding of difference can be. For instance, the finding of significant differences in bail-decision making in two jurisdictions with similar bail laws could be particularly useful in understanding which factors influence bail decision-making beyond their respective legal frameworks.

Just as the jurisdictions being compared should share similarities, so should the institutions within them. In this case, the sites involved a magistrates' court in England and an Ontario Court of Justice in Canada. The functionalist approach to comparative law dictates that comparatists must seek out institutions that have the same role, or more specifically, those that are functionally comparable or solve the same problem (Orucu, 2007). This introduces the concept of 'functional equivalence', which asserts that an institution in one jurisdiction must perform an equivalent function to the jurisdiction it is being compared with (Orucu, 2007). In other words, both institutions must attempt to solve the same universal problem (Zweigert & Kotz, 1998). In this instance, the problem that both legal systems faced was determining which defendants should be detained in custody and which defendants should be released into the community during the court process as well as which, if any, conditions should be imposed on those released.

It is important to note that, although the courts selected in each jurisdiction served the same function, they had different court structures in relation to bail. Specifically, although the police made the initial decision to detain or release a defendant upon arrest in both jurisdictions, they subsequently appeared in court in slightly different manners. The Criminal Code of Canada dictates that any form of release, including those imposed by police, remain in effect (unless they

are reviewed or revoked) until the end of trial or sentencing. For this reason, defendants who received bail from police prior to the court process entered a different 'stream' and their bail status was not readdressed unless there was an explicit reason to do so. At the site selected, those who were detained by the police began the court process in 'bail court' in order for a justice of peace to determine whether they should be remanded in custody or released on bail. Those who were released by the police appeared in 'set-date court' to decide upon the purpose of their next court date.

At the site selected in England, defendants could appear in 'remand court' on their first appearance regardless of what the initial police decision was regarding bail. Although the court theoretically makes the final bail decision in all first appearances, in reality it would be rare for magistrates or District Judges to detain a defendant who had been previously released by the police (see Chapter Two). This means that in practice the police had a comparable amount of power in England than they did in Canada, in that their decision to release a defendant on bail was typically not challenged by the courts. Consequently, the police could be thought to have a significant role in both jurisdictions' bail procedures, albeit in slightly different capacities.

Although police were important to the bail decision-making process, they were excluded from the study for two reasons. First, they were not part of the courtroom workgroup and, as such, were not part of the informal dynamic that was central to the focus of the study. Second, the addition of another group of criminal justice actors in an already wide-ranging study was impracticable in terms of time restraints and could have disrupted the completion of the project.

Despite the aforementioned structural differences, the courts in each jurisdiction had bail procedures that served essentially the same purpose. In both England and Canada, the primary purpose of the court (in relation to bail) was to determine the liberty of the defendant. Both the magistrates' court and the Ontario Court of Justice dealt with the vast majority of defendants on their first appearance and made the initial judicial decision as to whether they should be held in custody pending trial or released into the community.

In addition to serving similar functions, the courts selected in each jurisdiction shared similar demographics. This was to ensure the institutions were meaningfully comparable. Courts were selected from both jurisdictions that were located in major cities with relatively large populations. In Canada, the court was one of six Ontario Courts of Justice in a city of a population of 2.7 million. In England, the court was the only magistrates' court located in a city of a population of 750 thousand. Unfortunately, the number of cases proceeded against at these court was not publically available. However, both of these courts were located in urban areas that are financial, cultural, and commercial centres. The courts were located in Southern Ontario, Canada, and Northern England.³¹

Although it cannot be claimed that these courts were exactly alike, they shared enough elements in common that they could reasonably be considered 'functionally equivalent.' Indeed, despite their differences, the fact that they served the same function made them suitable for comparison.

Obtaining access

Despite the fact that the public right to view proceedings make courts one of the most open arenas of the criminal justice process, gaining access to all aspects of this process proved to be a challenging endeavour. Baldwin (2007) has commented that court research outside of observation can often be met with extreme difficulty and that judges, lawyers, and other court personnel often prove to be resistant to social research. While this was not found to be the case in relation to all of the actors and agencies, the following discussion will illustrate that it was certainly relevant to much of the access process in Canada.

In Canada, permission to observe court proceedings was granted by the Ministry of the Attorney General (MAG). This was achieved by contacting MAG generally through a general information request, at which point the request was forwarded to senior government officials in the Court Services Division. A formal approval was provided at the regional level, at which point the researcher was

³¹ The details provided about the courts were limited intentionally in order to preserve their anonymity.

put in contact with local court staff. These staff facilitated access to the court on the ground and made court personnel aware of the researcher's presence.

Interviews with both state-funded duty counsel and private defence counsel were sought in order to gain a wide breadth of perspectives. The supervisor of Criminal Duty Counsel at the Canadian court site was contacted directly after the researcher was put in touch with them through the court staff facilitating observations. The supervisor agreed to participate, at which point they notified staff of the study and asked for volunteers. The voluntary nature of participation likely had some impact on the sample that was eventually used in the study. This is discussed in relation to sampling later in the chapter. Several permanent duty counsel and one per diem duty counsel subsequently volunteered. Private defence counsel were contacted on an individual basis through publically obtained emails after they were identified in the court observations. In every occasion in which the defence counsel were contacted they agreed to participate.

Access to the Crown attorney's office and Judicial Office proved to be more difficult. The Local Administrative justice of the peace at the Canadian site was approached through court staff about the possibility of conducting interviews with Justices of the Peace. The request was forwarded to the Office of the Chief Justice, at which point it was denied. Attempts were also made to contact the Deputy Crown Attorney at the same site through court staff without success. Although an attempt was made to obtain access through a general information request at a higher level, this request was not responded to until the researcher had to leave the jurisdiction to commence the research at the English site. As a result, neither Crown attorneys nor Justices of the Peace were represented in the sample.

These processes illustrate the significant challenges associated with gaining access to both Crown attorneys and Justices of the Peace in Canada. In both cases, the individuals could not approve access without deferring to their superiors. Since they were both employed by the Ontario government - a large organisation with multiple hierarchal levels - multiple steps were required to reach the individual responsible for making the decision. This process required

a considerable amount of time and, ultimately, was unsuccessful in both cases. The request was complicated by the fact that neither Crown attorneys nor the judiciary has a formal research application procedure.

These challenges were not unique to this particular study. The perspective of both judicial officials as well as Crown attorneys is notably absent from the available literature related to bail in Canada (see Canadian Civil Liberties Association, 2014; Doob, 2013; John Howard Society, 2013; Myers, 2009; Webster, 2009). Rather, these studies tend to use statistical data, document analysis, or court observation as sources of information. In cases where interviews were conducted (e.g. Canadian Civil Liberties Association, 2014) the participants were limited to government representatives, defence counsel, and representatives of bail related programmes (e.g. Bail Supervision Program, First Nations court workers).

Given their important roles in the process, the inability to obtain the perspectives of Crown attorneys and justices of the peace was a considerable limitation both to this study and to bail research in this jurisdiction more generally. This meant their views could not directly be compared to the defence counsel. It was, however, still possible to examine patterns of their behaviour through the court observations and by using policy documents, such as the official Crown guidelines.

In England, a request was made centrally through a formal application process with the Judicial Office for access to interviews with District Judges and magistrates and through Her Majesty's Courts and Tribunal Service (HMCTS) for court observations and interviews with legal advisers. This application was accepted in both instances and the researcher was put in touch with local court personnel, who recruited interview participants on a voluntary basis and facilitated court observations on the ground. While both institutions required a review of the thesis prior to submission, no changes were requested that altered the arguments presented in a meaningful way. Permission to interview the CPS was requested through the regional Chief Crown Prosecutor, who was contacted directly through academic contacts and who approved the application and recruited CPS lawyers and staff on a voluntary basis. As was the case in

Canada, defence solicitors were contacted on an individual basis through publically available emails after being identified in court. While several of the solicitors did not respond or agreed and subsequently did not follow through, it was still possible to obtain interviews with the sought out number of participants. The process contained substantially fewer obstacles in terms of ultimate approval in England, largely as a result of the formal channels with which access could be obtained.

Research context

In order to put the research findings into context, the basic functioning of both the English and Canadian court sites are outlined below.

Canada

The Ontario Court of Justice that served as the site of study in Canada had a total of 10 adult criminal courts, two of which were 'bail courts' which dealt almost exclusively with cases in which defendants had been detained by the police and had to appear in front of a justice of the peace to determine whether they would be released on bail.³² One of these bail courts served the only correctional facility that housed female defendants in the city as well as males who were arrested in one police division. The other court dealt with males coming from all other police divisions that reported to this particular court location. It was common for the courts to assist each other by hearing the other's cases in the event that none of their cases were ready to proceed. They were also often assisted by other courtrooms that were presided over by either justices of the peace or Judges. The structure of the bail courts meant that this court location dealt with the vast majority of females across the urban area in which it was located. This resulted in the observations including a larger number of females than might be expected in another court location. Indeed, females comprised 35% of the sample (n=83) relative to 11% (n=25) in England. Since females are sometimes dealt with differently than males in the bail process (Hannah-Moffat, 1999), this was taken into account during the analysis. However, none of the analyses diverted from the literature in a manner

³² In some cases, 'slow' courts will assist more busy courts. As such, occasionally the bail courts will assist with other matters that are not related to bail.

suggesting that this had a substantial impact on the findings. It should nonetheless be taken into account when interpreting the findings.

Both bail courts were presided over by a justice of the peace. In addition, one Crown attorney would act as the prosecutor each day and generally two duty counsel would represent defendants who did not have private counsel. These practitioners stayed in the court they were assigned to for the entirety of the day. In addition, private defence counsel would appear at various times of the day when they were representing a defendant appearing in the bail court. Each court was also assigned several court officers who were responsible for maintaining order as well as bringing the defendants back and forth from the cells. Finally, a court clerk assisted the justice of the peace with administrative duties and a court reporter was responsible for recording the proceedings. As such, each day the court would be comprised by different court actors making up a specific courtroom 'workgroup' that depended on who was assigned to the court and who was representing the defendants who appeared. Although the exact makeup of the workgroup generally differed, the same individuals would often appear repetitively in different combinations. The combination of actors did, however, change enough on a day-to-day basis that no specific individuals were overrepresented in the observations.

England

The magistrates' court that served as the site of study in England contained 12 adult criminal courts, two of which regularly dealt with bail decisions (remand court). Unlike in Canada, other matters were dealt with alongside bail decisions, including pleas, applications by solicitors, or sentences. It were these courts that generally housed the 'overnights' – individuals who were recently arrested and were detained in custody by the police. On Mondays, three courts housed overnights to accommodate the influx of defendants arrested over the weekend. On this day all domestic violence offences appeared in one court and all other defendants were spread over an additional two courts. As was the case in Canada, courts would often take cases from each other in the event that there was nothing ready to proceed and another court required assistance.

The remand court that regularly dealt with bail decisions was either presided over by a District Judge or two to three magistrates. The observations were almost evenly split between these two types of judicial officials, with 57% (n=126) being presided over by a District Judge and 43% (n=96) being presided over by magistrates. A representative from the CPS acted as a prosecutor each day and, in the main, private defence solicitors represented defendants. In cases where defendants did not have a solicitor, they were typically represented by the duty solicitor scheduled to assist that day. Each court contained one legal adviser, who assisted the magistrates presiding over the proceedings, and an usher, who organised the appearances of the defendants. When a District Judge was in attendance, occasionally a court associate was used in lieu of a legal adviser as they did not require the same level of legal assistance. As was the case in Canada, this resulted in the formation of a particular workgroup on any given day, but not one that was consistent enough that specific individuals were overrepresented.

Data sources

This section describes the sources of information that produced the data for the study. It will outline the advantages of using a mixed methods approach and then examine each source – observations and interviews – in turn.

As is characteristic of case study research, the data was comprised of multiple sources of evidence (Berg, 2009; Creswell, 2007; Yin, 2014). Specifically, court observations, interviews, and, to a limited extent, court lists (see below) were used in the study. This approach has been demonstrated to be an ideal way with which to approach court research. For instance, Lipetz (1980) has asserted that “a methodological mix is desirable for understanding the operations and outcomes in many courts” (p. 59). Previous studies that have examined the lower courts in England and Canada have tended to use a mixture of data sources, including interviews, observations, analysis of records, and questionnaires (Canadian Civil Liberties Association, 2014; Cape & Smith, 2016; Hucklesby, 1997a; Webster, 2009).

An advantage of this approach is its association with triangulation. This is when the results of an investigation employing a method associated with one research strategy are cross-checked against the results of a method associated with the other research strategy (Bryman, 2004). This increases the validity of the research as the findings are mutually corroborated from multiple sources. In this case, by examining the factors that contribute to bail decision-making from the observer's perspective in court as well as through interviews with court practitioners, it increases the likelihood that these factors will be identified and that when they are, that they will be understood in a comprehensive manner. Indeed, factors that are observed in court across multiple cases that are then corroborated by court practitioners in multiple interviews can be thought to have a strong influence on the bail decision-making process.

This approach is also ideal in that, in addition to using multiple sources of evidence, a mixed methods approach could be undertaken in which both qualitative and quantitative data was collected. Johnson, Onwuegbuzie, and Turner (2007) provide the following definition for mixed methods research:

Mixed methods research is the type of research in which a researcher or team of researchers combines elements of qualitative and quantitative research approaches (e.g., use of qualitative and quantitative viewpoints, data collection, analysis, inference techniques) for the purposes of breadth and depth of understanding and corroboration (p. 123).

This type of research is beneficial when one data source is insufficient (Creswell & Clark, 2011). For instance, qualitative data provides a detailed understanding of a problem by studying a few individuals and exploring their perspectives in great depth. By contrast, quantitative data provides a more general understanding of a problem by examining a larger number of people and assessing a smaller number of variables. Each method provides a different perspective and contains its own limitations. While qualitative data contains depth, it is often difficult to generalize beyond the small number of participants involved in the study. Quantitative data can enhance knowledge about many individuals, but at the expense of a full understanding of any one individual. As such, the limitations of one method can be offset by the strengths of the other. A combination of both quantitative and qualitative data provides a more complete understanding of the research problem than either approach by itself (Creswell

& Clark, 2011). The nature of the benefits of each individual approach is discussed below.

Court observations

The first source of data consisted of 'structured observation' of court proceedings. This involved the systematic observation of behaviour in terms of a schedule of categories that was devised prior to the commencement of data collection (Bryman, 2004). As per Bryman (2004), the rules encompassed in the schedule of categories were designed to inform the observer what they should look for and how to observe the behaviour. The goal was to obtain both quantitative data that could be aggregated following data collection as well as qualitative insights into the decision-making process as it is explained in open court. This method primarily served to compare actual behaviour related to bail decision-making in each jurisdiction.

The observations were important to the study in terms of both the findings they produced and the practical benefits they served. First, the observations allowed for the identification of patterns and case outcomes that would not have been possible through the use of interviews alone. For instance, they demonstrated how many defendants were remanded in custody or on bail in each jurisdiction and what type of release was imposed upon them when they were released on bail. The observation data also reflected the decision-making of a larger group of practitioners than was available through the interviews. In particular, it enabled a better understanding of the dynamic between the court actors and thus shed light on informal practices and relationships. This is consistent with Baldwin (2007), who argued that observations have made a significant contribution to the "understanding of the influence of 'court culture' on decision-making and the importance of examining the relationships that exist between the various court actors" (p. 382). Although the observations lacked the context obtained through the interviews, it provided a general idea of what actually went on in court on a day-to-day basis.

The observations also benefited the study on a practical level. For instance, the researcher was able to identify defence counsel who frequented the court and

was subsequently able to contact them to request an interview. This ensured that those that were interviewed had a comprehensive view of the court at the time of the research. It also informed the researcher in terms of etiquette, terminology, and informal practices. This allowed her to fit into the court 'community', enhancing her credibility and better allowing her to probe during the interviews.

An observation schedule was developed that allowed the researcher to record detailed information about each case involving a bail decision. It was designed based on a combination of a review of the literature and informal observations of court proceedings in each jurisdiction. Although the observation schedules differ slightly for English and Canadian data collection, they were designed specifically to measure the same concepts while accounting for jurisdictional differences. For example, changes were made to account for different uses of terminology as well as general court procedures. Details related to the nature of the case (e.g. alleged offence and defendant characteristics), the position of the prosecution and defence (e.g. remand on bail or in custody), the information provided by all court practitioners (e.g. factors used to support position, conditions suggested/imposed), and the outcome of the hearing (e.g. remanded in custody, remanded on conditional versus unconditional bail, adjourned) were recorded. See Appendix A.

The observation schedule allowed for the collection of both quantitative and qualitative data. For instance, defendant characteristics, case characteristics, basic positions (i.e. remand in custody or on bail), forms of release (e.g. conditional or unconditional bail, release with or without a surety) and the conditions imposed were recorded on the schedule prior to data collection and were indicated by circling the appropriate selection. In addition, the information provided by the court practitioners regarding the offence details as well as their explanations for their positions were recorded freehand and categorised following the proceedings. This approach changed slightly after the observations commenced as a result of the unforeseen practicalities of conducting this type of research. While it was initially the intention of the researcher to categorise the qualitative information provided by the practitioners in pre-established categories during the proceedings, this proved to be too

challenging an undertaking given how quickly the information was conveyed. As a result, the researcher switched to an approach in which the information was recorded freehand in a separate notebook and later analysed using the approach detailed in the Analysis section below. This permitted the collection of more detail and thus more accurate collection of information.

The researcher sat in one court for the entirety of each day of data collection and completed one observation schedule/notebook entry for each case in which the defendant appeared in custody, unconvicted, for the purposes of their first bail decision (for the matters that brought them to court). This approach was taken for the purposes of making the findings between the two jurisdictions comparable. As was discussed in relation to the site selection, only defendants who were detained by the police and were appearing in custody for the purposes of a bail decision attended the Canadian bail court. None of these defendants had pled or been found guilty as it was not the Canadian practice for those defendants to appear in bail court. Further, after their first bail decision in the Ontario Court of Justice the case would have to be appealed and moved to Superior Court if bail was to be reconsidered. As such, the sample collected in this jurisdiction contained only in-custody, unconvicted defendants whose first determination of bail by the court had not yet been made.

In England, the wider use of remand court meant that out-of-custody defendants also appeared who, *in theory*, required a determination of bail by the court. In reality, these defendants were almost always released (see Site Selection section). Some defendants also appeared who had already pled or been found guilty and were receiving a bail decision in a *convicted unsentenced* capacity. Further, some defendants were appearing in custody for a second bail hearing, as defendants were able to have another determination of bail in magistrates' courts in England after their first decision. In order to render the findings comparable with Canada, those appearing out of custody, in a convicted unsentenced capacity, or for the purposes of a second bail decision were not included in the study.

This approach ensured that the cases were comparable both between and within jurisdictions. Indeed, there is evidence to suggest that the

aforementioned groups in England, in addition to being incomparable to Canadian defendants, for both legal and practical reasons, are not comparable to each other (Cape & Smith, 2016; Doherty & East, 1985; Hucklesby, 1997b; Morgan & Henderson, 1998). These differences are well documented in previous research and thus were not the focus of the current study. Ultimately, eliminating these defendants (and offenders) from the study in England ensured it was methodologically sound and that the comparative aspect remained of primary importance.

In both jurisdictions, the researcher alternated the days of observation between the courts in which bail decisions were made. In Canada, observations were conducted one to two days a week, alternating between the two bail courts, for a total of 15 days between January 2015 and March 2015. The objective was to reach 100 appearances in each jurisdiction. However, since a high proportion of appearances were adjourned and thus did not result in bail decisions, producing limited data, it was decided to continue to conduct observations. Ultimately, a total of 236 cases were observed, 69 of which resulted in unconvicted bail decisions.³³ In England, observations were conducted one to three days a week for a total of 28 days between November 2015 and April 2016. As was the case in Canada, the researcher alternated between the three remand courts. A total of 222 cases were observed, 100 of which resulted in unconvicted bail decisions.³⁴ Watching each court on a regular basis facilitated the identification of trends, while spreading the research out over several months minimised the possibility that the data was influenced by seasonal variations in offence patterns (Herbert, 2004).

While some have projected that the presence of an observer in the research setting can impact the behaviour of those observed (Yin, 2014), this was not found to have an observable impact in this study. This is potentially because, despite the court actors being informed of the researcher's presence, in many

³³ In the remaining 167 cases, defendants were adjourned, traversed to other courts or (very rarely) the prosecution withdrew their cases. Since information was still provided in relation to bail, they were discussed to some extent during the analyses, but not in relation to the bail outcome.

³⁴ In the remaining 122 cases, defendants pled guilty before the bail decision (rendering them convicted unsentenced defendants and making the bail outcome irrelevant) or the case was resolved. As above, they were discussed in the analyses but not in relation to the bail outcome.

cases she was assumed to be a surety in Canada – where she sat in the public gallery – and a member of probation in England - where she sat in one of the main desks.

Interviews

The interview process will be subsequently explored by outlining the sampling method, describing the participants who agreed to be interviewed, and discussing the interview process itself.

Sampling

Efforts were made to obtain as many perspectives as possible so that the bail decision-making process was understood comprehensively. It was anticipated that interviews would be conducted with the following court actors in both locations: judicial officers (magistrates/District Judges in England, justices of the peace in Canada), prosecutors (CPS in England, Crown attorneys in Canada), defence lawyers (defence solicitors in England, defence/duty counsel in Canada), and legal advisers (England only). The achievement of the study's objectives required an understanding of a broad range of perspectives in order to examine how the 'court culture' as mediated by the courtroom workgroup impacted the decision-making process. As such, representatives of each group of court actors involved in the court decision-making process were approached in both jurisdictions. Court clerks were not contacted in Canada because, unlike legal advisers in England, they are not legally trained and serve an administrative rather than advisory function.

Interview participants were selected using a combination of purposeful and convenience sampling. A convenience sample is one that is simply available to the researcher by virtue of its accessibility (Bryman, 2004). In the cases in which access was granted centrally or by a supervisor, the sample consisted of participants that volunteered through their respective gatekeeper. For instance, duty counsel in Canada as well as legal advisers, District Judges, magistrates, and CPS in England volunteered to one of their superiors, who allowed the interview to take place.

In both jurisdictions, defence counsel were selected in a purposeful manner. Purposeful sampling means that researchers intentionally select participants who have experienced the central phenomenon or the key concept being explored in the study (Creswell & Clark, 2011). In both locations, defence counsel were observed participating in bail decision-making at each respective court and were subsequently requested to participate in the study based on their experience.

While these sampling methods have been argued to be limited in terms of their generalisability to the larger population (Bryman, 2004), they are nonetheless commonly used in court research as a result of the difficulty obtaining participants (Baldwin, 2007). As such, they provided the researcher with perspectives that would otherwise have been unavailable. Furthermore, the limitation was countered to some extent through triangulation with the court observations, by comparing findings with existing research, and by obtaining a diversity of views through gathering a range of different court actors.

Participants

In Canada, a total of 8 interviews were conducted with defence counsel. Three of these defence counsel worked as duty counsel at the court where the study took place, two worked in private practice but sometimes worked as a duty counsel at the court, and two worked exclusively in private practice but also had experience working at the court. As was noted previously, justices of the peace and Crown attorneys were not included in the interviews as a result of access issues.

In England, a total of 20 interviews were conducted with court actors. This included three District Judges, four magistrates, two legal advisers, one court associate, three prosecutors, two assistant prosecutors, and five defence solicitors. All of the defence solicitors worked privately. It is notable that the two assistant prosecutors interviewed in England did not have the same authority as full prosecutors. As such, they largely acted at the direction of prosecutors, who gave directions prior to the proceedings. Their slightly different role was considered in relation to the findings throughout the analysis.

Interview Process

The interviews complemented the information obtained in the court observations by presenting context as well as revealing the values and attitudes of court practitioners. Interview questions were asked in a semi-structured manner. This means that the questions were predetermined and asked in a systematic way, but the interviewers were permitted (in fact, expected) to probe far beyond the answers to their prepared standardized questions (Berg, 2009). This format was expected to produce data that was rich in detail, while still ensuring some degree of consistency across participants. Compared to more rigid forms of structured interviewing and questionnaires, the semi-structured interview has a greater emphasis on the court practitioner's point of view. This approach encouraged the interviewee to move away from the central topic, allowing the researcher to gain insight as to what the interviewee sees as relevant and important. Since the researcher could depart from the interview schedule and ask questions based on the information received, it was possible to gain important knowledge that was relevant but that may not have corresponded directly to the structured questions (Bryman, 2004).

The interview schedules were designed slightly differently according to the role of the participant. This was to elicit the same content while accounting for differences between the roles of the court practitioners and the jurisdictions in which they practice. In total, five different interview schedules were created (see Appendix B). There was one version for Canadian defence and duty counsel and four versions for English District Judges/magistrates, legal advisers, CPS, and defence solicitors, respectively. In some instances, the interviews were shortened at the request of the organization approving the interviews. As a result, some participants were not asked about specific concepts. Given the interviews were semi-structured, however, themes based on the questions that were removed were typically covered inadvertently through more informal discussions arising from the other questions. When possible, these interview schedules were piloted before official data collection commenced. This was possible with Canadian defence counsel and English magistrates. All participants were asked about issues such as the impact of law and policy on

their decisions, the utility of information presented in court, the decision to impose conditions, and informal processes unique to each location.

The interviews took place in a variety of locations at the convenience of the participants. This included interview rooms in the court, the offices of the actors, and occasionally public spaces such as coffee houses. The interviews lasted from 25 minutes to 1 hour and 48 minutes in length.

The use of interviews was instrumental to the study as it provided context and explanations related to the bail decision-making process that would not have been available through the observations alone. While the observations illustrated the reasons provided by practitioners in open court, the interviews explained the basis for these decisions and demonstrated some of the processes that occurred outside of the courtroom. For instance, in many cases the prosecution and defence discussed the case prior to the court appearance and this discussion was reflected in their subsequent submissions. However, it would be unclear to the researcher that this discussion took place and how it had impacted the process. It was also likely that values, attitudes, and even policies impacting their decision-making would not be reflected in the observations in many instances. Consequently, this qualitative data puts the 'meat on the bones' of the 'dry' quantitative research (Creswell & Clark, 2011).

While the contextual information obtained during this process was important to the study, it was necessary to consider it in relation to the limitations associated with qualitative interviews. Specifically, it is common to encounter challenges eliciting full and relevant information, communicating effectively with unfamiliar populations, and obtaining 'truthful' responses during semi-structured interviewing. Taking these limitations into account facilitated the collection of more useful and comprehensive information as well as contributed to more careful consideration of the findings. First, it was important to acknowledge that the information obtained could be limited since asking questions from a predetermined schedule - as is the practice with semi-structured interviews - might hinder the ability for full discussion and restrict the details provided (Bryman, 2004). It may also be that certain participants are sensitive to the interview process and uncomfortable providing answers (Berg, 2009). In order

to facilitate more fulsome discussion, the researcher anticipated and planned potential probing questions, encouraging participants to elaborate on their answers, and started the interview with 'throw away questions' in the form of unthreatening, demographic questions intended to 'cool out the subject' and make them more comfortable (see Berg, 2009). These strategies were found to elicit information from the participants and aid in rapport building during the interviews.

Second, participants can belong to groups that engage in particular practices or use specific terminology unfamiliar to the researcher (Berg, 2009). This may cause misunderstandings between the interviewer and interviewee and lead to unintended information being conveyed or understood. This was especially relevant in the current study given that precise legal terminology was utilised by the participants and this terminology varied across the two jurisdictions (e.g. 'remanded in custody' in England vs. 'detained in custody' in Canada). In order to minimise the impact of this issue, court observations were conducted prior to the interviews in both England and Canada so that the 'world' of the participants were better understood (Berg, 2009). Demonstrating knowledge of this world enabled rapport building and conveyed the messages that the researcher was an 'insider' rather than an 'outsider.' Indeed, participants often provided more detailed, nuanced answers once they knew the researcher had a comprehensive understanding of their working environment.

Third, participants might convey information that is untruthful or unrepresentative of other views. They may, for instance, withhold the truth or even lie for reasons related to social desirability (Bryman, 2004). This involves altering or restricting answers after reflection as to how one might be perceived. For example, it may be that defence counsel would not wish to admit that they prioritise their own finances over their commitment to their clients or that judges would not want to convey political leanings that may affect their decisions. In other cases it may be that the information conveyed by participants is, unbeknownst to them, not representative of other court actors' views by virtue of their own personal opinions or biases. Both of these issues were alleviated, to some extent, by triangulating the information with the court observations (when possible) in order to evaluate its robustness and by interviewing numerous and

diverse participants to determine the difference between unique perspectives and enduring trends. However, in terms of representativeness, it is notable that, as Bryman (2004) has argued, some differences may be attributed to 'true variation' rather than inconsistencies and thus extend rather than hinder the researcher's knowledge of a subject. For example, in the current research it was often informative to know when participants unanimously agreed on an issue (e.g. are prosecutors too harsh?) compared to when they had varying opinions. These differences in opinion, in and of themselves, helped to better understand the bail process. As was the case with all of the aforementioned limitations related to interviewing, these issues could be minimised, but not always eradicated through specific research strategies. As a result, they were taken into account throughout the analysis.

Court lists

In both jurisdictions, it was the intention of the researcher to supplement the information contained in the observation schedules with information provided to the researcher by the courts. In Canada, this information consisted of a 'completed docket' for each day that the researcher attended court. This was a record of every defendant that appeared in court on that day as well as their dates of birth, the offences they were charged with, the dates of the allegations, and the specific file each offence pertained to. The docket also included the names of the Justices of the Peace and the Crown attorneys that were assigned to the court. In England, the researcher was provided with the 'extracts of the court register', which related to the cases observed on the days that court was attended. These included a record of the defendants who appeared each day, their dates of birth and information about the offences with which they were charged.

While the original intention was primarily to use these documents (hereafter called 'court lists') in order to obtain information about the specific allegations, which were not always clearly outlined in the proceedings, it was eventually decided that the cases would be described in terms of broad categories that were discussed in open court instead (e.g. presence of violence, presence of an administration of justice offence). This was decided for two reasons. First, the

specific offences were not always comparable across the jurisdictions and as such referring to them as though they were equivalents would be misleading. Second, it was not clear whether all the court actors were privy to the information contained in the court lists. As such, it was determined that discussing outcomes (e.g. remanded in custody) in relation to information that was not known to the actors would fail to accurately reflect their decision-making. Since the primary aim of the study was to understand the factors that contributed to the decision-making, it was decided that only information discussed openly, and thus was definitely known to all actors, would be examined. As such, while the information from the court lists was collected, it was of limited practical use to the research.

Ethics

The project adhered to the ethical standards laid out by the University of Leeds research ethics policy. A copy of the ethics approval can be found in Appendix C.

These standards were adhered to by, first, ensuring the relevant participants provided informed consent for their involvement in the study. This meant that they voluntarily confirmed their willingness to participate. Interview participants were provided with an information sheet and an informed consent form. The information sheet was provided to participants prior to their decision to participate so that they could make an informed decision as to whether or not they would like to do an interview while the informed consent form was provided to participants directly before the interview to reiterate the information they read in the information sheet. They were told they could refuse to answer questions and/or withdraw from the study anytime during or following the interview, provided no more than one month had elapsed.

The individuals examined during the court observations did not provide informed consent. This is because court procedures are for public viewing in both England and Canada and thus the researcher's presence is no different from any other public observer. As such, no informed consent is required. However, to ensure the court was aware and approving of the researcher's

presence, they were informed as a matter of etiquette in Canada (where no formal access procedures exist) and as a matter of necessity in England (where access must be granted for research activities). In sensitive cases in which the public was not permitted, observers were informed by the court. Under these rare circumstances, the researcher left the court and no observation was conducted.

Although the ethical standards permit researchers to observe court without obtaining informed consent, there were still ethical considerations raised in the context of court observations. This is because, despite the fact that the individuals were present in a public setting, they were still in challenging circumstances (particularly the defendants and victims) and were not aware they were being observed *in a research context*. Some researchers have raised concerns that this could be characterised as an invasion of privacy under the colour of scientific research (Berg, 2009). For this reason, in line with guidance from the the British Psychological Study (2010), particular account was taken of local cultural values and the possibility of intruding on the privacy of individuals who, even while in a normally public space, may not know they are being observed.

To ensure the privacy of interviewed and observed individuals was preserved, careful steps were taken to ensure the information collected remained both anonymous and confidential. In relation to both the interviews and the court observations, neither the participants nor the location of the courts were identified in the thesis. In order to ensure the anonymity of those involved, only broad position titles (e.g. magistrate) and the general location of the court (e.g. Northern England) were mentioned. In addition, careful consideration was taken not to provide any details that could inadvertently identify an individual. For example, individual demographics (e.g. sex, age) were not revealed and no specific details about the cases were mentioned. If an observed bail appearance was described in the thesis, for instance, the circumstances of the alleged offence and characteristics of those involved were never discussed in detail (e.g. 'a 65 year old male living in a specific neighbourhood committed assault bodily harm on the 9th of November'). Rather, vague details were used to describe an incident (e.g. 'an older defendant living in an affluent

neighbourhood committed assault late in the year'). This ensured individuals could not be identified in the research. Further, all data was kept confidential unless something was said that reflected significant malpractice or might cause harm to others. This was, however, never an issue during the course of the research.

Finally, measures were put in place to ensure that both paper and electronic files were securely stored in line with University of Leeds guidelines. This meant that all paper-based documents containing personal or case-specific data (i.e. consent forms, observation schedules) were stored in a separate locked cabinet in a restricted access room. All electronic files containing personal data (i.e. participant contact information, recordings of interviews) were uploaded and stored securely on the university server. Once recordings of interviews were transferred to the university system, they were removed from the encrypted recording device. Interview transcripts had identifiers removed, aliases were created, and they were stored on the University system. Furthermore, the observation schedules were labelled with numerical labels and entered into the database using these numbers as identifiers.

Analysis

The subsequent section will outline how quantitative and qualitative analyses were undertaken in relation to both court observation and interview data.

Quantitative

The first step of the analysis was conducted in accordance with Yin (2014), who argues the importance of analysing each individual case separately prior to conducting any form of cross-case analysis. Consequently, the court observations were analysed using descriptive statistics for the English and Canadian data separately. The objective was to provide an overview of the defendants and cases that appeared and to describe the way in which they proceeded through the court in each jurisdiction.

The observation schedule included predetermined categories in anticipation of the quantitative analysis (see Appendix A). These data were entered into a statistical database (SPSS) systematically and aggregated using basic descriptive statistics (i.e. frequencies, descriptives). The analyses were limited to simple operations as a result of the small sample size in both jurisdictions and because the variables were primarily categorical in nature.

The analyses produced findings related to descriptions of the defendants entering the court (e.g. type of legal representation), the nature of the cases (e.g. nature of alleged offences), the positions of the prosecution and defence (e.g. remand in custody or on bail, release with or without supervision), and the outcome of the cases (e.g. remand in custody or on bail, adjourned). These findings served to illustrate the types of defendants and cases entering the bail process in each jurisdiction and how cases were typically dealt with.

Qualitative

Following the quantitative analyses of court observations, qualitative analyses were undertaken on both the court observations collected in the notebooks and interview transcripts. This involved the use of content analysis, which was primarily qualitative in nature. Content analysis is a “careful, systematic examination and interpretation of a particular body of material in an effort to identify patterns, themes, biases, and meanings” (Berg, 2009, p. 338). The purpose of this analysis was to identify the factors that contributed to bail decision-making in each jurisdiction.

In this instance, a ‘directed content analysis’ was conducted. This form of content analysis uses existing theory or research to help focus the coding process (Hsieh & Shannon, 2005). A deductive strategy was undertaken in which theory was used to guide the analysis by pointing to contextual conditions to be described and explanations to be examined (Yin, 2014). In this case, categories of information were established through a combination of informal court observations in both jurisdictions and a review of the relevant legislation and literature. This included categories related to the role of the court actors, defendant and case characteristics, and attitudes towards case processing.

Following the creation of categories, the coding process commenced using methodological literature as a guide, in which a similar procedure was suggested among multiple sources (Berg, 2009; Creswell, 2007; Hsieh & Shannon, 2005). First, the text (i.e. the freehand court observation data and interview transcripts) was read openly and all information pertaining to the research question (i.e. which factors contribute to bail decision making) was identified. This process is often referred to as 'open coding' (Berg, 2009). Specifically, each piece of information that relates to the original question is provided a 'code'. Second, all information pertaining to the predetermined categories were grouped into said categories (or codes) and any data that could not be grouped this way was given a new code. These new codes were thus developed inductively in the sense that they emerged from the data itself as opposed to from predetermined categories (Yin, 2014). As such, the analysis included a combination of both inductive and deductive strategies. This second step is often referred to as 'axial coding', and involves intensive coding around specific categories (Berg, 2009). Third, systematic (objective) criteria were established for sorting data into the various categories and the categories and selection criteria were revised, if necessary, until the categories were satisfactory. This entire process can be regarded as a 'data analysis spiral' in which the steps are not distinct but, rather, are interrelated and often go on simultaneously (Creswell, 2007).

Following the preceding steps, entries in the categories pertaining to defendant and case characteristics were counted. This was to ascertain the extent to which these characteristics were discussed in court with a view of determining their importance (see Chapter Five). Although there has been some criticism that this type of quantitative analysis is contrary to a qualitative approach, Creswell (2007) argues that it is advantageous in determining how often codes appear in the data, thus providing an indicator of frequency of occurrence. As per, Berg (2007) after it was organised, the literal meaning of the words in the text were examined. This strategy allowed for a demonstration of magnitude within each category.

Ultimately, the analysis process resulted in an organised coding frame sorted into categories that represented the various factors that influenced bail decision-making.

Conclusion

This study aimed to better understand the factors that contributed to bail decision-making in English and Canadian courts. It took an integrated approach to the research, employing both structuralist and interactionist interpretations of criminal justice that were informed by the principles of comparative law. A review of the methodological and court research suggested that a multiple-case study design was most appropriate and the courts were selected based on legal jurisdictions, level of court, geographical areas, and access afforded. The limitations surrounding access and research context were acknowledged and taken into account during the analysis. In order to accomplish the aim of the study, a mixed methods approach was taken in which both court observations and interviews were conducted and quantitative and qualitative data was collected. Finally, the data was analysed using a combination of descriptive statistical analysis and content analysis. The findings that resulted are discussed in the subsequent three sections.

Chapter Four:

Consensus or conflict? Examining the Role of Court Actors and Their Influence on Bail Outcomes

Introduction

This chapter explores the role of court actors in terms of their influence on the bail outcomes in the English and Canadian courts. Specifically, it examines how and to what extent they contributed to the decision to remand defendants in custody or on bail. While the police were not studied directly, their decision-making was examined in the context of its influence on the court actors. In addition, the decision-making of the prosecution, defence, and the court were all analysed in relation to their respective impact on defendants' movement through the bail process. The decision-making of each group of court actors was examined from the period from which the defendant entered the court process to the point at which the initial decision was made as to whether they were remanded in custody or on bail.

Despite the formal adversarial structure of both the English and Canadian criminal justice system, the decision-making of court actors has consistently been shown to operate informally through a process of 'negotiated justice' (Baldwin & McConville, 1977; Hucklesby, 1996). This has led many to assert that the adversarial nature of the criminal justice system has been replaced by one of compromise (Alschuler, 1968; Blumberg, 1967a). It has been argued that, amidst this negotiation process, court actors make decisions in line with the informal norms that shape the culture of the court, which is mediated through the decision-making of the courtroom workgroup (Church, 1982; Eisenstein & Jacob, 1977; Hucklesby, 1997a; Webster et al., 2009) and that an important goal of the workgroup is to minimise conflict by maintaining group cohesion (Cole, 1970; Lipetz, 1980, 1984; Rumgay, 1995).

The extent to which the decision-making of the court actors reflected informal and cooperative behaviour was explored through an examination of their

influence at various stages of the bail decision-making process. This was achieved by comparing court actors' perceptions and explanations of their behaviour in the interviews to the court observations, which demonstrated how their decision-making operated in practice. Consideration was given to the extent to which the court actors made decisions outside of open court, whether they typically agreed with each other and how this impacted the bail outcomes in each jurisdiction.

This chapter will demonstrate that the vast majority of bail decision-making was done informally and through a process of negotiation outside of open court. This is consistent with previous research that has examined the behaviour of court actors during the bail process (Hucklesby, 1996, 1997b). However, it extends these findings, arguing that the nature of these negotiations depended on the extent to which court actors agreed with one another and whether they worked together to achieve their individual and mutual objectives. Their level of agreement was dictated by whether court actors were satisfied with the cases the police detained, the extent to which the incentives and goals of the prosecution and defence converged or diverged, and the degree to which court actors adopted adversarial roles when they appeared before the court.

It was concluded that not all decision-making was marked by cooperation and that court actors often exercised their adversarial roles untraditionally – outside of open court - in circumstances in which they did not agree with each other. This was especially the case in Canada, where the culture was primarily shaped by conflict. In comparison, court actors in England tended to follow the consensus model that is more characteristic of previous bail research (Hucklesby, 1996, 1997b; Myers, 2015). The differences between the jurisdictions resulted in a much higher rate of agreement in relation to the release/detain decision in England than in Canada, and ultimately a larger proportion of remands in custody.

This chapter begins by comparing bail laws as they exist in theory ('law in books') to the way they have been shown to exist in practice ('law in action'). This is followed by an overview of the bail outcomes in both England and Canada in terms of the proportion of defendants remanded in custody and on

bail. The extent to which the police influenced the decision-making process in relation to their construction of the in custody population is then explored. The negotiation process that took place between the prosecution and defence in each jurisdiction is examined and how they worked together discussed. Finally, the extent to which the court 'rubber stamped' (i.e. automatically agreed with) previous decisions is analysed through an examination of their role in uncontested appearances and contested hearings.

The law in books vs. the law in action

This section will compare how formal law and legal principles suggest court actors *should* make decisions during the bail process with how research has demonstrated they *do* make decisions. This discussion sets the context for the findings that follow.

In legal rhetoric, prosecution and defence are portrayed as two combatants competing to 'win' an argument on behalf of the state or the defendant. This is because the formal structure of the criminal justice systems in England and Canada is adversarial (McConville et al., 1991). The defence and prosecution present two different sides of an argument before an impartial judicial official or jury. Each side states their case to the best of their ability within certain ethical parameters and, ultimately, the judicial official or jury determines who is the victor. This is often perceived to resemble a 'battleground' in which two opposing sides dispute different sides of an argument in open court.

In both England and Canada, the responsibility, in the main, lies on the prosecution to demonstrate why defendants should be remanded in custody or released with bail conditions. There are notably some exceptions in the form of specific reverse onus offences in Canada, where the onus lies on the defence, and specific offences and situations in England in which bail is restricted (see Chapter One). However, defendants in both jurisdictions enjoy a presumption in favour of bail and, as such, should be released without restrictions unless the prosecution can demonstrate why a more onerous option is necessary. In Canada, the Criminal Code dictates that the prosecution adhere to a 'ladder' principle where the least onerous form of release must be considered and

deemed inappropriate before a more restrictive option is taken (Trotter, 2010). In England, the Bail Act 1976 similarly specifies that defendants be released on bail without conditions unless it can be proven why a more onerous form of release is necessary.

Given the adversarial structure of the criminal justice system and the nature of the laws related to bail, one might expect to see a battle between the prosecution and defence in open court in most bail cases. The prosecution would theoretically be the actor making out the case for custody or restricted bail and the defence would be safeguarding clients from undue restrictions on their liberty.

In reality, however, as Chapter One demonstrated, research has consistently shown that there is a considerable gap between what the 'law in books' suggest and what the 'law in action' actually looks like (Hucklesby, 1997a; King, 1981; McBarnet, 1981; McConville et al., 1997; Myers, 2009). Rather than an open adversarial process, much of the decision-making occurs through 'negotiated justice' (Baldwin & McConville, 1977; Hucklesby, 1996) whereby court actors make decisions in private with judicial officials arbitrating in a minority of circumstances. As such, it has been argued that the 'real' remand decision makers are the police (through their recommendations to the prosecution), prosecution, and defence (Hucklesby, 1997b). It has also been asserted that although the law has been shown to affect and guide their behaviour (McBarnet, 1981; McConville et al., 1997), it typically forms only one consideration among many and is perhaps not the most important factor in the decision-making process (Feeley, 1973). Rather, it is argued that the decisions of court actors are largely shaped by court culture, which is mediated through the working relationships of the courtroom workgroup (Hucklesby, 1997a). The priority of their negotiations is thus to reach a consensus which will satisfy individual and shared interests (Hucklesby, 1996). These negotiations are based on what Cole (1970) has called 'exchange relationships' in which criminal justice actors share a common territorial field (i.e. the court) and collaborate for different ends.

This has led some scholars to suggest we have witnessed the 'twilight of the adversary process' (Blumberg, 1967a) or the decline of the adversary system

(Alschuler, 1968). Others, however, question the simplicity of such assertions (Church, 1985), and suggest that the attitudes of court actors can be influenced both by court culture and adversarial principles. For instance, Church (1985) has argued that adversarialism does not always take on its traditional form, highlighting that conflict can exist within negotiation procedures and thus formal procedures, such as trials (or in this case bail hearings), need not exist to demonstrate that court actors are influenced by their adversarial roles. Other scholars have argued that the current concept of the courtroom workgroup (and thus its impact on court culture) has not been fully explored and that the current superficial use of this concept has over-emphasised the primacy of consensus models of behaviour (Young, 2013). As Young, (2013) explains:

... how misleading it can be to imply that all workgroups are obsessed by speedy case disposition, or are based on complete consensus as to appropriate goals. In practice, some workgroups may be as much shaped by conflict as by cooperation, and the form that 'justice' takes may depend on who has the most power within the on-going flow of interactions, itself subject to the influence of a web of relationships and factors reaching well beyond the court.

Young (2013) and Church (1985) point to the need to move away from assumptions that all court cultures are based on consensus and explore the more nuanced dynamics that work within the courtroom workgroup. Indeed, it may be that tension exists between the aforementioned notions of attitudinal agreement and the formal adversarial relationship between court actors and that the extent to which these factors are balanced depends on the specific circumstances. For instance, Church (1985) found patterns of adversarial disagreement on issues related to the substantive outcome of the case (e.g. appropriateness of plea negotiations, sentencing) whereas the consensus associated with cultural explanations was more prominent on matters of procedure (e.g. disposition time). This subsequent analysis builds on these findings, examining whether the balance between conflict and consensus shifted between the two jurisdictions and how this ultimately impacted the bail outcomes.

Bail outcomes in England and Canada

Before examining the development of the bail decision-making process in each court, this section will present the outcomes of such decisions. These outcomes provide a partial picture as to the proportion of defendants remanded in custody in both courts and the attrition that occurred between the police decision to detain the defendants, the prosecution and defence position as to whether they should remain in custody, and the court's ultimate decision as to whether they will be remanded in custody or on bail. As such, they offer a broad idea as to the level of agreement between court actors in each jurisdiction.

A preliminary examination of the bail outcomes suggests some striking differences between the remand decisions made in the English and Canadian courts. Indeed, only 12% (n=8) of bail decisions resulted in custody in Canada compared to 40% (n=40) in England (see Table 4.1).

Table 4.1 - Bail outcomes in the English and Canadian court

	ENGLAND		CANADA	
	%	<i>N</i>	%	<i>N</i>
Bail	60%	60	88%	61
Custody	40%	40	12%	8
Total	100%	100	100%	69

A total of 222 cases were observed in England, 100 of which involved unconvicted bail decisions for defendants appearing in custody.³⁵ Of these cases, 60% (n=60) resulted in bail and 40% (n=40) resulted in a remand in custody. This proportion of remands in custody is much higher than the national percentage – 18% of all defendants who were proceeded against in magistrates' court (who were remanded by magistrates) were remanded in custody in 2016 (Ministry of Justice, 2017b). However, the difference between

³⁵ In the remaining 122 cases, defendants pled guilty before the bail decision (rendering them convicted unsentenced defendants and making the bail outcome irrelevant) or the case was resolved. Since this Chapter focuses on outcomes, they were not the primary focus of the analyses.

the present results and the national statistics is foreseeable when one considers that the latter relate to defendants who appear both in and out of custody. Previous research has demonstrated that defendants would be unlikely to be remanded in custody if they entered the court process out-of-custody (Burrows, Henderson, & Morgan, 1994; Hucklesby, 1997b), thus explaining the lower proportions when this group is included.

When studies involving the same population of defendants are examined, the results are much more in line with the current findings. For instance, Cape and Smith (2016) found slightly more than a third of in-custody defendants were remanded in custody across both court observations (37%, n=24) and CPS case files (40%, n=30). These proportions are also similar to an earlier study conducted in the 1990s, which reported that 40% (n=613) of defendants held by the police were subsequently remanded in custody by the police (Morgan & Henderson, 1998).

While 236 cases were observed in the Canadian bail court, less than a third of those cases resulted in an actual bail decision.³⁶ As such, Table 4.1 shows the results of 69 bail decisions observed during this period. Only 12% (n=8) of these cases resulted in a remand in custody. Relatively speaking, the decision to hold defendants in custody pending trial was made rarely in this court. Although national statistics are unavailable in Canada, this finding is consistent with the most recently available research. A study by Webster and her colleagues (2009) found the proportion of bail cases (i.e. those cases that started the court process with the defendant in-custody) which were formally detained in Ontario was 12% in 2007, decreasing only slightly from 13% in 2001. In addition, the Canadian Civil Liberties Association (2014) found that 10% of the cases (n=89) across their Ontario sample resulted in a remand in custody, notably less than the average across all five provinces observed, which was 24% (n=63).

³⁶ In the remaining 167 cases, defendants were adjourned, traversed to other courts or (very rarely) the prosecution withdrew their cases. As above, they were not the focus of the current analyses.

These results cannot be said to represent the jurisdictions as a whole given the small sample sizes. In addition, research consistently points to variability across courts based on unique local court cultures (Hucklesby, 1997; Webster, Spratt, Doob, & Mitchell, 2016). However, the findings do suggest that remand decisions are broadly in line with the averages in both jurisdictions.

Examining these figures in aggregate form, however, masks important details as to how each court actor contributed to the outcomes. Indeed, the courts showed different patterns of agreement as the defendants moved through the bail process from the detention by the police to the decision to remand in custody or on bail by the court. Of the 69 defendants detained by the police in Canada, the prosecution opposed bail in 21 cases (30%) and the court remanded the defendant in custody in 8 cases (12%). Of the 100 cases detained by the police in England, the prosecution opposed bail in 51 cases (51%) and the court remanded the defendant in custody in 40 cases (40%). Clearly, a much higher rate of attrition was observed in Canada, where far fewer defendants were remanded in custody relative to those who entered the court detained by the police. The subsequent sections will shed light on how these figures were determined by the decision-making of the police, prosecution, defence, and the court.

The police: The production of the in-custody population and its influence on court actors

Although the police were not included in the observation and interview process and their behaviour cannot be commented on directly, their decisions are important to examine in the context of their influence on the court actors' decision-making. They exert this influence in two main ways (Hucklesby, 1997b). First, they advise the prosecution by providing information about the case and offering recommendations to the prosecution (Burrows et al., 1994). Given that previous research has questioned the independence of the prosecution from the police (Baldwin & Bedward, 1991; Sanders et al., 2010), it is likely this has a substantial impact on the decision-making of the prosecution. However, since these recommendations are filtered by the prosecution in open court, it was not possible to adequately examine their influence in this study. As

such, this study examines the second way in which the police influence court actors, through their role in constructing the in-custody population.

As the initial 'gatekeepers' of the criminal justice system, the police make the initial decision as to who will appear in court out of custody and who will appear in custody to receive a determination of bail. This not only dictates the nature of the workload of the court, but it has also been argued to send an indirect signal to the court actors about the police viewpoint on bail (Hucklesby, 1997b). Specifically, since the police have the power to impose most conditions, they would only theoretically detain those defendants they believed should receive strict conditions that they could not impose or remands in custody. As such, the fact that the police held a defendant in custody might affect the court actors' perception of their level of risk.

This section will demonstrate that the extent to which court actors approved of the police use of custody had a major impact on their decision-making. Generally speaking, defendants detained by the police were perceived to be bail risks, suggesting that, consistent with previous research (Bottomley, 1970; Burrows et al., 1994; Hucklesby, 1997b), the police's release/detain decision influenced the views of court actors. However, the nature of this impact varied between jurisdictions. In Canada, where the police were perceived to overuse custody, their influence on court actors was more tempered than in England, where court actors were more approving of police detention practices. This suggests that, similar to the findings of Hucklesby (1997a, 1997b), police decision-making does, to some extent influence the decisions of court actors. However, court actors nonetheless form their positions on bail based on their perceptions as to how appropriate they view police decision-making.

Influence of police use of custody on the decision-making of court actors

The findings suggest that the police decision to hold a defendant in custody, to some extent, influenced the decision-making of the court actors. This is consistent with previous research (Bottomley, 1970; Burrows et al., 1994; Hucklesby, 1997b), which found a relationship between the police release/detain position and the eventual court remand decision. More

specifically, these studies determined that defendants who were detained in custody by the police were unlikely to be released without some form of restriction on their liberty. Interviews with the defence in both England and Canada revealed that there was a perception that defendants who were detained by the police did not enter the court process with a 'blank slate' in relation to bail. Rather, their risk level was deemed higher as a result of the police decision. A duty counsel in Canada explained their concerns surrounding the impact of the police detention on the prosecution:

... just because the police detain them, doesn't mean they need to have a surety once they show up at our court. I think that's where I see the biggest gap, is not just that maybe the police shouldn't have held them necessarily, but that once they've been brought here they're not released on an undertaking, or they're not released on an own bail [i.e. their own recognizance], generally. So that's kind of where there's this huge gap between once the police hold you suddenly it's like 'okay well now we think you're a huge risk to society' (LN 323, Canada, DC 002).

In this case, it was argued that if the police held defendants in custody it was likely they would be released from court on restrictive conditions. In other words, the case was not reviewed objectively, but was instead assumed to involve a heightened level of risk by virtue of the fact that the police opted to detain the defendant. This argument is consistent with Hucklesby's (1997b) projection, which suggests that when police are able to impose conditions, their decision to forgo this power and opt for detention sends an indirect signal to court actors that more severe restrictions on the defendant's liberty are necessary. It is notable that this duty counsel, and several others, did not suggest that police detention would inevitably result in a custody position, but that the prosecution would suggest onerous conditions in the form of a surety. As such, the police decision was viewed to heighten the perceived risk of the defendant rather than dictate the remand decision. Although restrictions in access (see Chapter Three) meant the perceptions of the prosecution and the court were unclear in in this jurisdiction, the views of the defence did appear to be supported by the observations. Of the 69 defendants detained by the police that received bail decisions, 64 (93%) were either released on conditional bail or

remanded in custody³⁷ As such, despite the bail law dictating that an undertaking without conditions should be the norm, it was highly unlikely defendants would be released from court without restrictions.

Perceptions as to the influence of the police detention decision were more mixed in England. Take for instance, the view of one magistrate in England, who was asked whether the police decision influenced their decision:

If the police are bringing people to court for the first time, they're either coming in on police bail or they're in custody to the police. In terms of our decision-making, I don't think the police decision about bail is necessarily taken into account, because, in a way, you're starting afresh in the court and the responsibility for bail is going to be either the DJ or the magistrates. Obviously if they turn up in custody, you think, why? (LN 63, England, MAG 017).

While this magistrate claimed that they do not take the decision of the police into account, they did concede that they would consider why they were detained. As such, it may be that the police use of detention does not dictate the court's position regarding a remand in custody, but rather their view of their risk level more broadly. This is borne out in the observations, which, as was the case in Canada, revealed that defendants detained by the police were rarely released with unconditional bail. Of the 100 defendants detained in custody by the police, 93 (93%) were either released on conditional bail or remanded in custody. As such, like in Canada, it is conceivable that the detention by the police heightened the perceived risk of the defendants without dictating a remand in custody. One assistant prosecutor in England acknowledged the wide use of conditions in these cases when they were asked whether they would suggest detained defendants receive unconditional bail, claiming that "I very rarely go from a custody to nothing, really" (LN 250, England, AP 25). This assistant prosecutor, like several others, suggested they would be reluctant to suggest the release of a defendant in custody without any conditions. This practice appears to stem from an idea that the police would generally not detain a defendant without a viable reason. For instance, one magistrate in England commented that "generally speaking, when people do appear in custody for

³⁷ In an additional 4 (6%) cases the defendant was released on bail but it was unclear whether they had conditions imposed. As such, only one defendant was known to be released on unconditional bail.

what you might say are trivial offences, there's always a reason why they're in custody..." (LN 106, England, MAG 015). This was the same attitude taken by many court actors; the suggestion being that even if detained defendants should not be remanded in custody, it was unlikely they should be released without any restrictions.

There is, however, a limitation in relation to these findings. For the methodological reasons discussed in Chapter Three, the in custody cases were not compared with cases in which the police released the defendants on bail and they appeared in court out of custody.³⁸ As such, it is unclear to what extent conditions were imposed on those appearing out of custody.

While it was rare that defendants in either England or Canada were released from court without restrictions after being held in custody by the police, the extent to which they were remanded in custody differed between jurisdictions. Specifically, court actors in England took custody positions more often than their counterparts in Canada. Table 4.2 demonstrates that, of the 69 cases detained by the police in Canada, the prosecution suggested a remand in custody in 21 (30%) cases while the court took the same position in 8 cases (12%). By contrast, of the 100 cases detained by the police in England, the prosecution suggested a remand in custody in 51 (51%) cases while the court took the same position in 40 cases (40%). As such, police detentions in England were much more likely to result in both custody positions by the prosecution and remands in custody by the court than they were in Canada.

This suggests that, while defendants in both jurisdictions were subjected to restrictions on their liberty following police detention, those in England were much more likely to be remanded in custody. Court actors were thus more likely to mitigate the police detention decision in Canada through the use of bail conditions than they were in England, where remand custody was used more often. The subsequent section will demonstrate that this disjuncture is likely to

³⁸ Note that a comparison between in custody and out of custody cases can only be made in England in this context. This is because, by law, the Court in Canada does not review the bail decisions of the police in out of custody cases unless a bail review is requested by the defence or prosecution (see Chapter Three). Since these two types of case do not go through the same decision-making process, a comparison between them would not be methodologically sound.

be rooted in differences in the use of custody by the police in England and Canada and, consequently, the extent to which court actors agreed with their decisions

Table 4.2 - Defendants held in custody by the police according to the bail position of the prosecution and the remand decision of the court

	CANADA				ENGLAND			
	Prosecution Position		Court Decision		Prosecution Position		Court Decision	
	N	%	N	%	N	%	N	%
Bail	48	70%	61	88%	26	26%	60	60%
Custody	21	30%	8	12%	51	51%	40	40%
No Position	0	--	0	--	23	23%	0	--
Total	69	100%	69	100%	100	100%	100	100%

Police use of custody

While the police detention decision was found to influence court actors, the extent of this influence depended on their views on their use of custody. Previous research suggests that the police rely on custody more in Canada than they do in England (see Chapter Two). Although there is limited research on their use of bail in Canada, there is some indication that close to half of the cases in Ontario begin the court process in custody (Doob, 2012; Doob et al., 2017), coinciding with calls from charities (Canadian Civil Liberties Association, 2014; John Howard Society, 2013) and the government (*Re-inventing Criminal Justice*, 2012; Steering Committee on Justice Efficiencies, 2006) to improve the police's exercise of discretion in order to curtail their use of custody. By contrast, the number of defendants held in custody by the police has declined in recent years in England (Ministry of Justice, 2017b) following budget cuts put in place beginning with the coalition government in 2010 (Garside & Ford, 2016). This disjuncture is significant as previous research suggests that policies guiding police detention practices can influence differences in broader bail decision-making processes across jurisdictions (King et al., 2009).

Perceptions of court actors on police use of custody

In line with the aforementioned research, court actors were more likely to agree with the police detention decision in England than in Canada. Indeed, all eight defence/duty counsel interviewed in Canada suggested that the police should be releasing more defendants into the community following arrest rather than holding them in custody to appear in bail court. The findings support research that suggests police are perceived to overuse custody in Canada (Canadian Civil Liberties Association, 2014; John Howard Society, 2013; Webster et al., 2009). Many counsel believed that, although police had the power under the law to release defendants, they were constrained by police policies that were overly cautious in nature. One defence counsel in Canada expressed frustration about the difficulties they would often face when trying to negotiate the release of their clients from the police station:

The police could be releasing many, many more people. Like, many, many more. I do think that a lot of the time it is a policy based thing. I think that while by law of course they have a huge amount of discretion, I think that there are a lot of policies that constrain them. I hear from officers all the time, when I call them up because a client is in their custody, I say, "can you not just release them from the station? This is not that serious" and you go through the whole thing, and so often you get the response "well you know in these cases we have to detain them." Do they really have to? Not by law of course (LN 207, Canada, DEF 004).

Multiple counsel also pointed to the fact that it was not just repeat offenders or those alleged to have committed violent offences that were detained in custody by the police. In fact, many claimed that it was not unusual for those with no criminal record, who had committed minor offences, to make their first appearance in custody. One duty counsel explained this issue:

...we have seen cases where they have a very limited record if any at all and they're charged with shoplifting or they may have an outstanding unrelated charge, like an assault charge, and they're out on bail and then they're caught shoplifting and then they're detained... (LN 454, Canada, DC 003).

Not only was this tendency viewed to be contrary to the bail laws – which suggest custody should be a final resort in the bail decision-making process – it

was also consistently described as a poor use of resources. This is because, as the duty counsel argued, minor cases rarely resulted in a remand in custody by the court, suggesting that many³⁹ of these defendants could have been released at an earlier stage.

Many counsel also believed that the police were overly cautious as the result of extreme circumstances in which a defendant offended on bail. For example, one duty counsel in Canada claimed that

Every few years a very extreme incident happens where, for instance, somebody will be let out or is, you know, free and somebody gets killed or something like that. And those extreme very tragic circumstances lead to more blanket policies. (LN 225, Canada, DEF 004).

There was a strongly held perception that defendants were held in custody, despite the circumstances of the offence, as a result of previous cases that ended in tragedy for the victims. The general sentiment expressed by the defence and duty counsel in Canada was consistent with other research in this area, which has argued that police in Canada tend to be risk averse and prioritise public safety when they are making decisions related to bail (Webster, 2015). This practice was central to the former Conservative government's 'law and order' politics, in which security and imprisonment were highly valued (Doob & Webster, 2006). In support of this rhetoric, a significant amount of money was invested in the police force, specifically (Di Matteo, 2014), and the criminal justice system, more broadly (Office of the Parliamentary Budget Officer, 2013).⁴⁰ Indeed, the 2008 budget saw an investment of 400 million dollars into police recruitment (Department of Finance Canada, 2008).

It is notable that – because the prosecution and the court were not interviewed – the views discussed in Canada were exclusively those expressed by defence counsel. Given their role, these court actors would presumably be those most likely to disagree with the police decision to hold defendants in custody. While

³⁹ Note that in some of these cases it is conceivable that the police held defendants in order for them to obtain an address or so that conditions could be applied that they were unable to impose (i.e. sureties, Bail Program) rather than because they were seeking their detention.

⁴⁰ This appeared to be the continuation of an ongoing trend that emerged before the Conservatives came into power, with reports verifying that police expenditures had been increasing since the beginning of the 21st century (Nuffield, 1997).

one must keep this potential bias in mind when interpreting these results, it is also important to acknowledge that other sources suggest this view was strongly held and consistently expressed across practitioners from a range of different professional backgrounds (*Re-inventing Criminal Justice*, 2012; Steering Committee on Justice Efficiencies, 2006). Further, there were striking similarities between the views of all eight counsel, which as the following discussion illustrates, was not the case in England.

In England, there were mixed views as to whether police held the appropriate defendants in custody. While the actors mostly approved of police decision-making in this regard, some stated that they disapproved occasionally, and a few stated that they held too many defendants in custody. The vast majority of the actors held the opinion that the police mostly 'got it right' but there were nonetheless occasions in which they disagreed with their decision. The response provided by the following prosecutor accurately represents the typical attitude found in England:

Generally, yes [the police detain the appropriate defendants]. But there are some surprising decisions that when they get into court you think, why did they remand this person, why have they chosen to bail this person or summons them or whatever? But generally speaking you do tend to get the right people in custody (LN 138, England, CPS 026).

Unlike in Canada, several defence solicitors also shared this attitude. Indeed, two out of five defence solicitors in England indicated that they generally agreed with the police decision, one of which responding in the following manner:

They do tend to get it right in terms of who they will bail and who they will keep in custody but... I'm not saying it's perfect but it's not... it's not so bad that I've got major concerns (LN 250, England, DEF 021).

Finally, the other three out of five defence solicitors and one District Judge viewed the police to make poor decisions in relation to bail and stated that they remanded too many defendants in custody. This was notably a dissenting view, with only 4 out of 20 court actors expressing a lack of approval with police detention practices. This was the position held by the following defence solicitor in England:

...my experience is that the police often remand too many people for the court, who we know will be given bail in the first instance. So why not avoid that and just bail them to a date... (LN 269, England, DEF 019).

While, as this defence solicitor suggested, some viewed police to make poor decisions, in the main the court actors tended to view their decision-making to be fair.

Many of the more experienced court actors commented that the police use of bail in England had changed over time. Multiple court actors pointed to the recent rise in the use of summons highlighted in Chapter Two. For example, one defence solicitor in England made the following comment:

I mean the fact is these days one of the big things that has changed is now people get more summons and postal requisitions for very serious offences. They could effectively just attend for more and more voluntary interviews, which basically means that more and more people aren't being held in custody, being remanded from custody, from the police station to the magistrates and then not getting bail (LN 284, England, DEF 022).

Postal requisitions are documents that defendants receive through the post that require their attendance in court. Unlike summons, they do not require prior reference to the court (Bowles & Perry, 2009). The observation made by this defence solicitor is consistent with the national statistics (see Chapter Two; Ministry of Justice, 2017a), which suggest a growing number of defendants are appearing in court through these means as opposed to in custody or on bail. Several court actors tied this change to reductions in police expenditure.

The increased use of postal requisitions has been tied to a wider government initiative to reduce spending in the criminal justice system (Bowles & Perry, 2009; Garside & Ford, 2016). At the time of the study the entire criminal justice system was operating under the context of austerity (Garside & Ford, 2016). As a result, the police made substantial cuts, reducing their spending by 253 billion pounds – 20% of their overall expenditure (HM Inspectorate of Constabulary, 2010). It is conceivable that the decrease in the number of defendants appearing in court in-custody was – at least in part – a product of these cuts.

Observations on police use of custody

An examination of the cases that entered the English and Canadian courts in custody sheds some light on the differences in the court actors' views on the police use of bail. Indeed, police decision-making is directly responsible for the 'types' of cases that appeared in custody. Table 4.3 sets out the characteristics of the cases that were observed to start the court process in custody in each jurisdiction. These categories were developed based on the court observations and thus reflect the information conveyed in open court as opposed to the information the court actors would have obtained in the case files.

Table 4.3 - Characteristics of the cases entering the court in custody

	CANADA			ENGLAND		
	%	<i>N</i>	<i>Total*</i>	%	<i>N</i>	<i>Total**</i>
Defendant had a criminal record	69%	68	99	88%	144	163
Defendant was on bail	54%	68	127	56%	95	171
Case involved offence against the person	57%	134	236	46%	93	203
Case involved a breach of bail	20%	48	236	20%	40	204
Case involved administration of justice offence/default	43%	102	236	56%	114	203

*Although 236 cases entered the court in-custody in Canada, the total column represents the number of cases in which each characteristic was *known*.

**As with the Canadian cases, only *known* cases were included in each total. After removing the cases that were not detained for the purposes of a bail decision, 204 cases entered in-custody in England.

While not all of the cases presented in the table resulted in a court bail decision – some were resolved or adjourned – they were all held in custody because the police chose to exercise their power to detain the defendant. In other words, all of these cases were held for the purposes of a court bail decision even if they ultimately did not receive one.⁴¹

⁴¹Note that cases that entered the court in-custody in England as the result of a breach of the peace, breach of a community order, or breach of a suspended sentence were not included in

The observations presented in Table 4.3 suggest that the cases entering the courts in custody in England and Canada were similar, but did contain some important differences. In terms of their similarities, a comparable number of cases involved defendants who were on bail and who were alleged to have breached their bail. Indeed, about half of the defendants detained by the police were on bail and a fifth were alleged to have breached their bail in both England and Canada. However, the police in England were more likely to detain defendants with a criminal record and who were alleged to have committed an administration of justice offence/default⁴² (e.g. failure to appear, breach of bail/sentence) and less likely to detain defendants alleged to have committed an offence against the person. Defendants were 20% more likely to have a criminal record (88%, n=144) and 13% more likely to be charged with an administration of justice offence/default (56%, n=114) in England than they were in Canada (69%, n=68 and 43%, n=102, respectively). However, defendants in Canada were 11% more likely to be charged with an offence against the person (57%, n=134) than they were in England (46%, n=93).

These findings shed some light on the perceptions outlined by the court actors. Specifically, cases in England were more likely to involve both a criminal record and an administration of justice offence/default allegation. Both of these characteristics directly relate to the grounds for refusing bail as they may suggest there is a risk the defendant may continue to commit offences or, by virtue of disrespecting court orders, may fail to attend court in the future. The fact that a higher proportion of cases share these characteristics in England may explain why court actors in this jurisdiction were, in the main, more satisfied with the detention practices by the police. Indeed, defendants who possess characteristics that align with the grounds might be viewed as the appropriate candidates to be held in custody whereas those who do not may be considered more acceptable for a release on bail.

Both the interviews and observations suggest that differences in the use of police detention resulted in disparate in-custody populations in England and

the analyses as they would never involve a bail decision and were thus not detained for reasons related to bail.

⁴² These were always considered offences in Canada but were mostly (with the exception of failure to surrender) considered defaults in England.

Canada. Consistent with previous research (Canadian Civil Liberties Association, 2014; John Howard Society, 2013), this is perceived to amount to an overuse of custody by the police in Canada, resulting in a caseload made up of multiple minor cases and a disproportionate amount of vulnerable defendants. By contrast, court actors in England perceive their in-custody caseload to be decreasing and, in the main, approved of the detention decisions made by the police. The observations support these views, demonstrating that defendants held in custody by the police in England were more likely to possess characteristics that align with the grounds for refusing bail.

Summary

These findings suggest that, while a police detention decision did not prescribe a remand in custody, it did seem to influence the prosecution and the court in terms of the risk they ascribed to defendants. Specifically, court actors in both England and Canada would be unlikely to suggest a defendant held in custody by the police should be released without conditions. This suggests that the decision-making of the court actors was, to some extent influenced by that of the police. However, the findings also suggest that the decision of the police is not considered in isolation. Indeed, the extent to which court actors agreed with the police use of custody appears to influence their decision-making, mediating how much they use custody themselves.

The differences in the caseloads and the extent to which they were supported by the court actors thus set the stage for divergent levels of agreement between the prosecution and defence in England and Canada and consequently a different attitude towards relying on traditional adversarial roles during their initial discussions. This is explored further in the subsequent section.

The prosecution and defence: Informal negotiations and the search for common ground

The role of the prosecution and defence in the bail process is to take positions on the remand status of defendants and subsequently convey that position to the court – albeit in varying levels of detail. Previous research suggests that

much of the decision-making process that precedes their representations is undertaken during informal discussions outside of open court (Hucklesby, 1997a, 1997b). These types of negotiations are not unique to the bail process (Cole, 1970; Eisenstein & Jacob, 1977; McConville, Hodgson, Bridges, & Pavlovic, 1994); rather, they are employed during the entirety of the court process and involve persuasion and a search for common ground. These discussions and the agreements that are undertaken within them are particularly important at the bail stage given that the view of the prosecution has been shown to have a major influence on the decision of the court (Burrows et al., 1994; Hucklesby, 1996, 1997b). As such, the position of the prosecution at the conclusion of the negotiation can be expected to have a critical role in shaping the bail outcome.

This section will demonstrate that, in line with previous research (Cole, 1970; Eisenstein & Jacob, 1977; McConville et al., 1994), informal discussions typically took place between the prosecution and the defence prior to appearing in open court. However, court actors in England and Canada viewed the nature of these negotiations considerably differently. While the discussions in Canada tended to result in more joint bail positions, they were also perceived to involve hostility and minimal cohesion between actors. In comparison, conversations between the prosecution and defence in England were described much more collegially but also resulted in a lower level of agreement in terms of their ultimate position on bail. It is argued that the extent to which the incentives and goals of court actors converged affected the extent to which they worked together, which ultimately dictated the shape of the negotiations and the level and nature of agreement between the court actors.

The nature of the negotiations

The following discussion will demonstrate that negotiations were frequently undertaken during the bail process in England and Canada, that these negotiations resulted in different outcomes between jurisdictions, and that court actors perceived the nature of the negotiations to be shaped by conflict in Canada and consensus in England.

Presence of the negotiation

In both jurisdictions, the court actors reported that there was almost always a discussion between the prosecution and defence in which their positions on bail were discussed prior to appearing in front of the court. This is consistent with previous research (Cole, 1970; Eisenstein & Jacob, 1977), which has argued that negotiations are the most commonly used work technique within the courtroom workgroup. It is also in line with previous bail research (Hucklesby, 1997a, 1997b), which suggests that much of the decision-making during the bail process occurs outside of open court. Although the nature of the negotiations were perceived to vary between individuals and jurisdictions, court actors suggested that they would involve, at minimum, a conversation about each court actor's respective bail positions, and in other cases, more drawn out discussions. For instance, one duty counsel in Canada described the discussions they had with the prosecution:

So if [the prosecution has] already taken a position and they're agreeing to release the person then I won't tell them anything because you don't want to give them more information than you have to. If they have already taken a position and they're looking for their detention or they're asking for a residential surety that you don't have then I would let them know that [the defendant is] Aboriginal if they are because sometimes that changes some Crowns' minds. Or if they've got issues that they're dealing with and you're like 'well some of the context for why they may have been arrested is that they're dealing with X, Y, and Z and here's what I have in place to address those concerns.' If it's a surety obviously I'll explain that I have surety. Or if they're seeking their detention but I have a residential surety who's going to be able to offer a lot of supervision then I'll try and convince them to move from their original position to agree to whatever plan I've got to address whatever concerns they may have. And obviously I'll ask them what their concerns are and then figure out what I have that can address those concerns and see if that changes their mind (LN 1102, DC 003, Canada).

This duty counsel explained that the discussion often involved suggesting alternatives to custody that would satisfy the concerns of the prosecution. This might include bail conditions or, particularly in Canada, securing a surety or some other form of social support. Ultimately the objective in both jurisdictions was to arrive at an agreement as to the appropriate bail outcome. This was also expressed by one defence solicitor in England, who described the discussion they had with the prosecution in the following way:

The discussion will go, 'what are you saying on bail? Are you opposing it or do you agree conditions?' If they are already in agreement then you will say, 'how about this, how about that?' Then that's it, or they'll even suggest [bail conditions] ... it's always better if they can agree it because then they don't need to go through the whole hullabaloo of making the opposition and this, that and the other and just get on with it (LN 839, England, DEF 022).

As was the case in Canada, the conversations in England typically involved a discussion of each actor's position on bail and an attempt to alleviate any concerns with bail conditions. As this defence solicitor highlighted, it was deemed preferable to arrive at an agreement before appearing in court.

Outcome of the negotiations

The outcomes of the informal discussions that took place between the prosecution and defence were reflected in the nature of the bail appearances observed in each court. This was established by examining to what extent the actors appeared before the court in agreement about their positions on bail. The observations suggested that a large proportion of the cases involved situations in which the prosecution and defence were not in opposition about the appropriate bail outcome. This is outlined in Table 4.4, which reveals the types of appearances observed in cases in which bail decisions were made.⁴³

For the sake of consistency, the terminology used to describe the appearances in both jurisdictions was based on the Canadian terms that were frequently employed by court actors. First, cases in which the prosecution explicitly agreed to bail were referred to as 'consent releases'. Second, cases in which the defence explicitly agreed to custody were referred to as 'consent detentions'. In both of these instances, the court actors were appearing before the court with a joint position on bail. Third, when the defence made a bail application and the prosecution offered no position, they were categorised as 'no prosecution decision'. These types of appearances only occurred in England, and typically involved the prosecution refraining from providing their view on bail, theoretically leaving the decision as a matter for the court. However, given that

⁴³ As Chapter Three indicated, at least half of the appearances in both jurisdictions did not involve a bail decision and were thus not included in this analysis.

the onus was on the prosecution to demonstrate whether a remand in custody was necessary, no prosecution position generally proceeded in the same fashion as a consent release. As such, consent releases, consent detentions, and appearances involving no prosecution decision were all considered uncontested appearances.

Table 4.4 – Cases in which a bail decision was made according to the type of appearance observed

	CANADA		ENGLAND	
	%	<i>N</i>	%	<i>N</i>
Consent Release	70%	48	26%	26
No Prosecution Position	0%	0	23%	23
Consent Detention	4%	3	13%	13
Contested Hearing	26%	18	38%	38
TOTAL	100%	69	100%	100

Finally, in situations in which the defence made a bail application and the prosecution applied for a remand in custody, the appearances were referred to as ‘contested hearings’. It was only contested hearings that resembled the adversarial procedure described earlier in the chapter, as the prosecution and defence would present representations related to opposing bail positions in these appearances.

Table 4.4 suggests that, while the majority of appearances were uncontested in both jurisdictions, the prosecution and defence were more likely to form a joint position on bail in Canada than in England. In Canada, 74% (n=51) of appearances involved either a consent release or a consent detention, suggesting the prosecution and defence came before the court with a joint position in the large majority of cases. In comparison, appearances in England involved consent releases or contested detentions in 39% (n=39) of cases, thus offering joint positions in just over a third of cases. It is notable, though, that in

an additional 23% (n=23) of appearances in England, no prosecution position was provided. The absence of the prosecution's view indicates that these appearances cannot be considered joint positions. However, since the burden rested on the prosecution to demonstrate why a remand in custody was necessary, an omission from them was interpreted similarly to a consent release. The prosecutors themselves indicated during the interviews that this behaviour was often exhibited out of respect for the court rather than because they were opposed to bail. This was explained by one prosecutor in England:

You don't want to undermine the court and try and suggest to them in any way that the decision has been taken out of their hands. I know that will quite often anger a lot of defence solicitors. Again, in a previous life [as a defence solicitor], I think I'd convinced the prosecutor to release somebody on bail and I stood up and said 'oh we've agreed bail' and the DJ said 'I think you'll find that's my decision to make.' And of course, that's what I meant, I meant to say we've agreed that the Crown have no concerns, and my client got remanded into custody. I think the DJ had a bit of a bee in his bonnet when I stood up and said we agreed bail (LN 480, England, CPS 026).

In order to avoid situations such as the one described, the prosecutor would often stay silent or suggest it was 'a matter for yourselves' when addressing the court. As such, while these appearances were intentionally not presented as joint positions, they certainly indicated that the prosecution did not oppose bail. When cases in which no prosecution position was taken were included in the total, 62% (n=62) of cases involved an uncontested appearance in England.

In sum, the majority of appearances in both England (62%) and Canada (74%) were uncontested, albeit to a slightly greater extent in Canada. These observations are in line with arguments that negotiations are used more than adversarial procedures in courtroom decision-making (Baldwin & McConville, 1977; Eisenstein & Jacob, 1977; Hucklesby, 1996). Indeed, only a minority of cases – about a quarter (26%, n=18) in Canada and over a third (38%, n=38) in England – resulted in a contested hearing. This also suggests, however, that the extent to which the prosecution and defence agreed varied between jurisdictions. This finding was both corroborated and put into context by the interviews, which are discussed below.

Perceptions of the negotiation

In line with Young (2013), the findings suggest that the degree of consensus within courtroom workgroups may be overstated in the previous literature (see, for example, Cole, 1970; Hucklesby, 1997a; Lipetz, 1980, 1984; Rungay, 1995). Indeed, the subsequent discussion will illustrate that negotiations were not always characterised by a cooperative culture, and that this characterisation was in line with the findings in England, but not in Canada.

The descriptions of the negotiations that were provided in the interviews confirm previous research that suggests that much of the power during the process was held by the prosecution (Cole, 1970; Eisenstein & Jacob, 1977; McIntyre & Lippman, 1970). Indeed, the differences in the approach between the prosecutors in each jurisdiction were shown to have a major influence on the shape of the discussions. It appeared as though there was a disjuncture in the 'courtroom influence patterns' (Eisenstein & Jacob, 1977) in that the prosecutors would be much more likely to occupy an authority position in Canada than in England. This is demonstrated through an examination of the negotiations, as perceived by the court actors.

In Canada, the vast majority of the defence counsel described the informal discussions with prosecutors to be frequently hostile. Although many of them conceded that this was not representative of all their interactions, it was largely considered the norm. For instance, one duty counsel in Canada described the discussions in the following way:

So I think within the Crown's office there are some excellent Crowns here who are wonderful people, very friendly, very respectful, listen to you, take reasonable positions, exercise their discretion properly. I would say it's less than half who would fall into that category ... And there is the other extreme. People who are consistently disrespectful, aggressive, kind of outrageous in some of the things that they say, how they treat duty counsel, how they treat private counsel, how they treat clients, not understanding the role of defence counsel, making really inflammatory comments undermining, you know, questioning your integrity, that kind of thing. Like just completely outrageous. And there's like, a few, Crowns that will do that, where it's like, people don't even bother negotiating with them anymore (LN 984, Canada, DC 003).

The defence counsel believed that these types of interactions took place as a result of the prosecutors taking on an authority position during the bail process and utilising their power to achieve their own objectives. This led to a pattern of influence in which the prosecutor effectively 'ruled' the court (Eisenstein & Jacob, 1977). One private defence counsel in Canada described this situation:

...the Crown tends to assert its role as though it were the authority figure in the courtroom. The niceties are observed but the Crown has tremendous power at that stage and uses that power (LN 495, Canada, DEF 008).

Previous research has suggested that the prosecutor may control the proceedings through their superior access to information about the case (Eisenstein & Jacob, 1977). In comparison, these findings suggest that in bail negotiations prosecutors exert influence through their ability to offer consent releases. A refusal to agree on a release position represents a 'unilateral decision' (Eisenstein & Jacob, 1977) on the part of the prosecution as it eliminates the possibility of appearing in court with a joint position and effectively imposes a contested hearing on the defence. In order to avoid a contested hearing and demonstrate that their client was suitable for a release, the defence counsel would bargain with the prosecution using bail conditions. Many of the counsel in Canada described a process in which they were almost begging the prosecution to agree to a consent release. The following duty counsel described this situation:

...there is definitely a mentality that kind of 'Crown knows best' and we are often times kind of running around begging for things and kind of pleading for things, as opposed to this approach where everybody is equal and – they hold so much of the power. Especially at our courthouse when we can find we run out of time for bail hearings and things like that. And so it's kind of you either give us what you want or the person goes over in jail for another night. So there's a lot of times where we would agree to things that we wouldn't necessarily agree to because of that dynamic (LN 779, Canada, DC 002).

This duty counsel, like the vast majority of the defence counsel, suggested that they were under considerable pressure to agree to restrictive bail conditions in order to avoid a contested hearing. Defence counsel explained that in many instances they would offer increasingly onerous conditions until the prosecution

would agree to bail. Since this might involve securing a surety or obtaining an agreement from the Bail Program (i.e. a programme that assists with the supervision of defendants as an alternative to custody) it was not unusual for the bargaining process to span over several days.

The assertion that the prosecution commonly requested these relatively onerous restrictions was supported by the observations, in which the prosecution requested sureties in 61% (n=41) of cases in which they agreed to bail. Of the remaining cases in which sureties were not requested, Bail Program supervision was requested in 37% (n=7) of them. This meant that the prosecution requested some form of supervision in 80% (n=40) of the cases in which they agreed to bail.

Ultimately, the defence counsel in Canada described a negotiation process whereby the prosecution would agree to appear in front of the court with a joint position on bail in exchange for agreed upon releases involving multiple bail conditions, often involving a surety or Bail Program supervision. This frequently resulted in a mutually agreed upon, but uneasy consensus in the Canadian bail court.

These findings are again influenced by the absence of interviews with prosecutors and justices of the peace. One might argue that it is unsurprising that the prosecution, who often act as a barrier to the release of the counsels' clients, would be considered unreasonable by the defence. Their perceptions are, however, in line with recent research that found prosecutors requested overly restrictive releases in bail proceedings (see Canadian Civil Liberties Association, 2014) and governmental reports that suggested prosecutors be trained to use their discretion to request less onerous bail outcomes (see Steering Committee on Justice Efficiencies, 2006). When taken together with both the interviews and the observations, this suggests there is merit in the characterisation of the prosecution as favouring restrictive bail positions. However, given the lack of prosecutorial participation, this analysis is not presented with the view of forming definitive conclusions on this matter. Rather, it is intended to highlight the significant discord between the prosecution and

defence in the Canadian bail court and thus the culture of conflict that existed within the negotiation process.

The court actors in England described a negotiation process much more centred on consensus than that in Canada. The dynamic in this court was more reflective of the cooperative work environments described in previous research examining the bail court process (Doherty & East, 1985; Hucklesby, 1997b). For instance, when one defence solicitor was asked to describe the dynamic between the prosecution and the defence at the English court, they responded in the following way:

I think this is a very good court; everyone is very friendly, very respectful. All the... everybody is very professional. But I've been fortunate enough to work in a couple of courts and I think that's the same. I think it makes for a happier working environment doesn't it? Because don't forget you've probably seen your colleagues at this court more than you see the colleagues in your office...So if you don't get along with the colleagues who are sat in court, that doesn't make for a good environment (LN 834, England, DEF 023).

Court actors frequently described the negotiation process in collegial terms, emphasising that the court actors would work together to achieve their respective objectives. They also described a courtroom influence pattern that was more reflective of the traditional adversarial structure. Unlike in Canada, the court, or in some cases where magistrates were sitting, a legal adviser, were viewed to be the actors that 'ruled' the court. This view was consistent across all the court actors interviewed. For instance, this was discussed by one prosecutor in England:

When I first started at this job I was told 'you as the prosecutor, you're effectively running the court.' It's not the experience I had in [another court], I wouldn't say it's the experience I've had here. I think if it's a District Judge, the District Judge is very much in control of the court. If it's not a District Judge, often it's the legal adviser. Some legal advisers are very good and very assertive and do their job, advise the magistrates well. Because they're legally trained unlike magistrates. I think I'd have to say it's either the District Judge or the Legal Adviser. I wouldn't say that the prosecutor runs the court. Obviously the court can't go ahead, can't move on without me, but I haven't felt myself, perceived myself to be in that position before (LN 574, England, CPS 024).

The defence solicitors agreed with this perspective, never expressing the view that the court was prosecution led. Since the court or a legal adviser tended to take the authority role in the bail process, the defence was less likely to perceive themselves as being on the 'back foot' more generally and thus the discussion was not described in the same way as the imbalanced bargaining process that occurred in Canada.

Despite the seemingly more cooperative negotiations, the observations still suggested there were fewer joint positions in England than in Canada (see Table 4.4). While this may not seem to align with the collegial atmosphere, there are two reasons that this was the case. First, an associate prosecutor or a barrister working on contract as an agent commonly appeared for the CPS in England. Unlike prosecutors, these actors did not have the authority to change their position about bail. As such, they would be unable to negotiate unless they had the permission of a CPS lawyer. One assistant prosecutor in England explained this situation:

It's slightly different for me because I – although I do make a decision, I have to get authority to do that. So when they come to us they're already in custody. So then it's are we applying to keep them there and if I look at it and I think 'I don't think they should' I can't make that decision, I'm not allowed to as an associate prosecutor, so I have to get authority from a lawyer (LN 35, England, AP 025).

Since the remand court could be busy, assistant prosecutors and agents did not always have the time to phone the CPS for a review if they held the view that the defendant should be released.

Second, it appeared as though the general attitude of the defence was that once a prosecutor had established a position, it was not acceptable to continue to press them to change their mind. This was explained by one defence solicitor in England when they were describing the negotiation process:

So I would say, for example, in a domestic case ... 'You know [the victim's] been in touch, or you know she's sat outside?' And they'll be like, 'no.' So in those circumstances, I would provide information [to the prosecutor] but I wouldn't engage in trying ... in the decision-making process with the prosecutor when it's not for us to decide. I'd just sit and

prepare my application as it should be prepared (LN 719, England, DEF 023).

The typical mentality appeared to be that once prosecutors took a position, the actors would proceed to a contested hearing if there were still disagreements. As such, court actors in England may have been less inclined to engage in a bargaining process than their counterparts in Canada. However, while they appeared to form fewer overt agreements in England, the negotiation process itself was perceived to be much more cooperative.

This examination of the nature of the negotiations between the prosecution and defence in England and Canada suggest that collegial workgroups were not necessarily more likely to negotiate or to form joint positions. This is contrary to previous research (Gertz, 1980), which assumed that positive relationships and negotiation went hand in hand during informal discussions. It may be that, in England, actors were less willing to strain positive relationships with attempts at persuasion that may be perceived as antagonistic. This was contrary to the situation in Canada, where hostility often existed between the actors despite more negotiations taking place. Indeed, if strong relationships did not exist at the outset, the need to be cordial and cooperative might have been deemed unnecessary.

The incentives underlying the negotiation

The approach to the negotiations detailed above can be understood in terms of the various incentives motivating the court actors in each jurisdiction. It has been argued that the specific incentives that encourage individual actors can explain their decision-making during the court process (Church, 1982; Cole, 1970; Eisenstein & Jacob, 1977; Levin, 1975; Ryan & Lipetz, 1982). This is because court actors are semi-independent decision-makers with their own personal and professional goals. As such, they can be expected to respond to certain economic, social, intellectual and professional incentives to do some things and not others (Luskin & Luskin, 1986). These findings support this research, suggesting that the approach to negotiations in each jurisdiction was, at least in part, a product of the individual incentives held by court actors.

There were some incentives that were shared by court actors in both England and Canada. For instance, in both jurisdictions the prosecution and defence were motivated to reduce the uncertainty of the proceedings. This was demonstrated by one private defence counsel in Canada, who explained why they preferred to have a consent release rather than run a contested hearing:

Ideally, we do risk management, and lawyers tend to be risk averse. I'm getting more risk averse as I go. I would rather have a consent than leave it up to a decision-maker. Load the dice (LN 62, Canada, DEF 007).

This private defence counsel, like many other court actors wanted to increase their level of certainty in the bail outcome (i.e. 'load the dice') by coming to an agreement with the prosecution beforehand. As one defence solicitor in England stated: "I mean if, if the Crown have agreed it's a home run isn't it? The court are just going to sanction what you've agreed" (LN 638, England, DEF 019). This is consistent with research by Eisenstein and Jacob (1977), who suggest that one of the primary goals of the courtroom workgroup is to reduce uncertainty. This is because unpredictable procedures, such as trials and contested bail hearings, have unclear outcomes and require an unknown amount of time and resources. The findings suggested that both the prosecution and the defence were motivated to avoid such procedures and form agreements.

Uncontested appearances were also perceived to enable the court process to run more smoothly. This is also consistent with previous research, which has highlighted that court actors aim to move through the court list as quickly as possible (Lipetz, 1980; Myers, 2015). This was confirmed by one defence solicitor in England, who explained the benefits of uncontested appearance from an efficiency standpoint:

... the bench even looks to see whether the Crown would agree bail because we don't want to waste the court time with a half an hour bail application when it could have been agreed between the parties... (LN 625, England, DEF 019).

It was recognised across jurisdictions that uncontested appearances were likely to take less time than contested hearings. As such, avoiding contested hearings

enabled the court actors to move through the court list more quickly. As one duty counsel in Canada commented, “there’s just not enough time to have that many contested bail hearings” (LN 837, Canada, DC 003). As such, by forming agreements beforehand the court actors were able to finish their work expeditiously. Clearly, there were mutually beneficial reasons to avoid contested hearings across actors and jurisdictions.

While some incentives were common to all members of the courtroom workgroup, there were many others that were unique to each actor and each jurisdiction. This is because court actors pursue distinctly different interests and purposes and may understand their participation in the bail process in entirely different ways (Feeley, 1983). Some of this variation could be attributed to the fact that many of the court actors were accountable to their respective ‘sponsoring organisations’. According to Eisenstein and Jacob (1977), each sponsoring organisation has their own organisational goals and, to some extent, regulate the behaviour of those working for them.

Overall, the fragmented nature of the actors’ goals was shown to contribute to the shape of the negotiations in each jurisdiction. Specifically, in Canada the findings suggest that the prosecution and defence were more likely to have competing objectives, whereas in England they were often driven by mutually beneficial goals. These differences mediated the extent to which the mutual incentives of reducing uncertainty and moving through the court list impacted the decision-making of the court actors in each jurisdiction. This is outlined in an evaluation of the incentives underlying the behaviour of the prosecution and defence below.

Canada

Defence counsel in Canada were motivated by both economic factors and their responsibility to their clients. They reported that both of these goals could be achieved by avoiding contested hearings at all costs. In terms of the economic factors, many private defence counsel pointed to the financial incentive to obtain a consent release. This was in line with previous research, in which the economic benefits of getting through a large number of cases in a short amount

of time has been well documented (Church, 1982; Cole, 1970; Eisenstein & Jacob, 1977; Levin, 1975). Since many defendants funded their defence through legal aid, the private defence counsel in Canada were reliant on funding from Legal Aid Ontario. The payment structure was changed in the late 1990s so that counsel were paid on a 'block fee' basis in which a set amount of money was provided for bail regardless of the number of hours invested in the case (Law Society of Upper Canada, 1996). As such, many private counsel in Canada highlighted that it was not worthwhile financially to run time-consuming contested hearings:

Legal aid is funding at a rate now where they're – I think they're even openly suggesting that private counsel defer to duty counsel to run the bail hearings. Duty counsel don't have the time to put into getting – nobody has the time. The time given to private counsel doesn't begin to pay for the cost of a bail hearing, for a contested bail hearing it's problematic (LN 146, Canada, DEF 008).

It was suggested on several occasions that the fee structure encouraged private defence counsel have duty counsel run contested hearings for their clients as opposed to appearing in court themselves. Unlike private defence counsel, duty counsel were employed directly by Legal Aid Ontario, working at individual courthouses on a salary. As such, they did not have the same financial incentive to handle cases on an 'assembly-line basis', managing a large number of cases at a small fee each (Cole, 1970). Given this system, it is perhaps unsurprising that 75% (n=177) of the cases observed in the Canadian bail court were represented by duty counsel.

While duty counsel did not have the same financial incentive to avoid contested hearings, they were motivated to ease their considerable workload. The reliance on duty counsel put a significant strain on these counsel, who were tasked with representing multiple defendants and interviewing them in their cells, interviewing prospective sureties, preparing for contested hearings, and negotiating with the prosecution. Although they would not be subjected to the same financial loss as private defence counsel, one could see why they would be eager to reduce their workload by avoiding contested hearings. However, generally when duty counsel explained why they preferred uncontested appearances, they framed it in terms of the benefits to their client. Specifically,

running shorter uncontested appearances rather than lengthy contested hearings meant that more cases could be heard each day. This was explained by the following duty counsel:

... my colleague's trying to prep a bail hearing in a few minutes, and there's so many other demands and you've got so many other people ... And another lawyer was saying, 'are you sure you want to spend the time getting into this issue when it's going to mean that somebody else is going to spend a night in custody because there's not enough time to have a very lengthy drawn out bail hearing on these issues, because it takes up time away from somebody else' ... But the reality is when you have 25 people that you're dealing with in a day, you're going to end up sacrificing somebody else to spend the time and resources on one person (LN 390, Canada, DEF 003).

This duty counsel voiced the same concerns as all of the defence counsel in that contested hearings were seen as lengthy, convoluted processes that were best avoided when possible. While avoiding a contested hearing often meant accepting onerous conditions in exchange for a consent release, this was seen as a small price to pay to ensure more cases could be dealt with, thus enabling more defendants to be released from custody. Indeed, defence counsel's responsibility to their clients was frequently addressed during the interviews in Canada, suggesting this was a priority in their decision-making.

While it may seem as though agreeing to onerous conditions to avoid a contested hearing would be contrary to this responsibility, many counsel explained that their clients would prefer a restrictive release to remaining in custody in the hopes of having time for a contested hearing, ultimately leaving the decision to the court. This was explained by one private defence counsel in Canada:

...from custody [the clients are] happy as a pig in shit to have a house arrest and no food or water and are only allowed to wash once a day, anything. But then once they get out, well they don't quite like it as much. So, the Crown wields tremendous power at that point in the proceedings because if they want to oppose bail it becomes a very iffy circumstance for the accused.... (LN 402, Canada, DEF 008).

This private defence counsel explained that defendants in custody would agree to almost any (in this case obviously exaggerated) conditions to avoid remaining

in custody and enduring the risk of a contested hearing. Since their desire to obtain a consent release was compatible with private defence counsel's financial incentives and duty counsel's workload incentives, both the client and counsel were motivated to avoid contested hearings. While the defendant's liberty was compromised as a result of the onerous conditions required to obtain this outcome, defence counsel in Canada still perceived themselves to exercise their adversarial roles by attempting to ensure it was not restricted entirely by remaining in custody. As such, due process values concerning the rights of the defendant were framed almost entirely in terms of the bail outcome as opposed to the time defendants spent awaiting this decision (see Feeley, 1992).

While prosecutors in Canada were motivated to avoid contested hearings on account of reducing uncertainty and getting through the court list, they did not share the same economic incentives and obligation to defendants as the defence. The Crown attorneys in Canada were employed by the Ministry of the Attorney General, and were stationed at specific courthouses on salaries. As such, they did not benefit financially from moving through cases quickly. The prosecution was also responsible for representing the state, and as such, was accountable to the objectives of the Crown Attorney's Office. The Crown Policy Manual clearly states that the protection of the public is the most important consideration when making decisions about bail (Ministry of the Attorney General, 2005). In fact, it explicitly states that neither public safety nor the rights of the defendant should be compromised on account of efficiency:

Although speed is essential in operating an efficient and effective court system, Crown counsel should exercise particular care in conducting bail hearings. It is at this early stage of the proceedings that Crown counsel's discretion is of paramount importance. While it is important that efforts be made to improve the efficiency of bail courts, this efficiency should not be achieved at the expense of public safety or fairness to the accused (Ministry of the Attorney General, 2005).

While the Crown Policy Manual recognises the importance of the value of efficiency, it clearly advises that both public safety and the rights of the defendant should take priority. It was the perception of the defence that the focus on public safety, in particular, translated into overcautious decision-making on the part of the prosecution. This view is consistent with previous bail

research in Canada (Canadian Civil Liberties Association, 2014; John Howard Society, 2013; Myers, 2009, 2017; Webster, 2015), which has demonstrated that the role of the prosecutor in Canada has become one of limiting – to the greatest extent possible – threats to public safety.

Half of the defence counsel interviewed believed that the prosecution provided restrictive bail positions out of fear for their professional reputation. As previous research has highlighted (Cole, 1970; Eisenstein & Jacob, 1977), the work of the prosecution receives considerable public attention. As such, there was substantial pressure to ensure that defendants were not released only to reoffend on bail. One duty counsel in Canada explained their view on this matter:

Crowns seems to have a lot of fear that if they release somebody and that person goes and kills somebody that everybody blames them and their name is splashed across the papers and, you know, that kind of thing that -- and you know, obviously nobody wants to be part of that, but there has to be an understanding we actually can't predict this (LN 910, Canada, DEF 002).

Some counsel attributed this fear to a lack of validation from the Crown Attorney's Office that such an event would not be blamed on individual prosecutors. As such, like the defence counsel in Canada describes below, they believed that there might be some concern that they will lose their jobs if something goes wrong:

Part of the problem as well is Crown's are people who if they let out someone that does something on consent then they can lose their job. There was something called the *Hadley Inquest* which I'm sure you've heard about in your study. So Crowns can be afraid to do what's the right thing sometimes where they'll make you run the bail hearing because 'they have to' (LN 99, Canada, DEF 007).

This private defence counsel mentioned the 2003 *Hadley Inquest*, which occurred shortly after the 1998 *May/Isles Inquest*. A few counsel mentioned these events were turning points in the Crown and police approach to bail. In both instances, women were murdered by estranged partners who were on bail and subject to no contact conditions. The inquest resulted in several recommendations which centred around restricting the right to bail for

defendants, particularly those facing domestic violence allegations (O'Marra, 2006). These cases were explicitly mentioned in the Crown Policy Manual:

The May/Illes, Hadley and Yeo Inquests arose out of situations where accused persons were released on bail and subsequently committed murder/suicide. In the course of these inquests, issues surrounding bail hearings, including the conduct of Crown counsel and the exercise of Crown discretion, came under careful scrutiny (Ministry of the Attorney General, 2005).

It would seem that the implicit message is that prosecutors should be extremely cautious when exercising their discretion with respect to bail, specifically in relation to victims. The Manual warns prosecutors of the potential repercussions of allowing defendants to offend on bail, pointing to the public scrutiny that may result. As such, it is perhaps foreseeable that the defence counsel shared such a strong perception that they could be unreasonable in their approach. Specifically, they appeared to share the view that prosecutors would compromise the liberty of defendants by using excessive caution in the name of victims and public safety, ultimately aiming to maintain their professional reputation.

It is unsurprising that the combination of the goal of avoiding contested hearings at all costs on the part of the defence and cautious decision-making on the part of the prosecution resulted in the hostile negotiation process described by defence counsel in Canada. The natural conclusion to these competing objectives was the situation described by the defence whereby the prosecution would frequently offer consent releases in exchange for an agreement to abide by restrictive conditions. This enabled the prosecution to exercise considerable control whilst still enabling the defence to improve their chances of obtaining a release. Both parties would be able to accomplish these objectives without resorting to a contested hearing, thereby reducing uncertainty and getting through the court list quickly. Neither party entirely achieved their objectives, however, as there would still be the risk of an offence on bail and the defendant would be subjected to onerous bail conditions. However, the motivation to ensure the defendant was released on bail (regardless of the nature of the conditions) was exacerbated by the defence since, as the previous section demonstrates, they perceived many of the defendants appearing in custody to

be inappropriately detained by the police at the outset of the process. As such, an uneasy consensus was formed between the prosecution and defence in Canada.

Importantly, the court actors did not suggest that they undertook the negotiations with any urgent regard for the overall efficiency of the wider criminal process. This may have been a consequence of salaried duty counsel handling most bail cases and the prosecution being explicitly instructed by their sponsoring agency, the Crown Attorneys office, not to prioritise efficiency over public safety and the defendant. While both parties were motivated to get through the court list on a day to day basis, neither the prosecution nor the duty counsel (who represented the majority of the defendants) had a major individual incentive to move the case forward in the criminal process.

England

The goals and incentives of the court actors in England were found to be more compatible than their counterparts in Canada. This was demonstrated through a closer examination of the context in which defence solicitors and prosecutors worked. First, as was the case in Canada, defence solicitors in England were also incentivised by economic factors. This incentive had been exacerbated in recent years after a series of legal aid reductions, which spanned multiple years, but will be discussed briefly here, when they culminated in recommendations for far-reaching cuts in LASPO in 2012. In 2013, the Ministry of Justice published the consultation paper *Transforming Legal Aid: Delivering a More Credible and Efficient System*, which set out a number of reforms to civil and criminal legal aid aiming to save £220 million per year by 2018/2019. While some of these suggestions have since been rescinded, the use of 'fixed fees' for most work and a cut of 8.75% to criminal legal aid have taken effect (McGuinness, 2016).

These cuts created a financial incentive for private defence solicitors to move through cases quickly. This was argued by one defence solicitor in England:

...they changed all the fee structure as to how you get paid as a lawyer as well, so it didn't make financial sense to us to drag it out... (LN 871, England, DEF 023).

Similarly to the Canadian block fee system, the use of fixed fees meant that a set amount of money was provided on the basis of the type of work conducted rather than the number of hours taken to complete it. This meant that there was more incentive to finish the bail process quickly. However, it did not appear to be the norm for defence solicitors in England to bypass bail proceedings by deferring to duty solicitors. In fact, only 7% (n=7) of defendants appearing for the purposes of a bail decision were represented by the duty solicitor. This may be because, unlike in Canada, the negotiation with the prosecution did not typically require defence solicitors to spend a lot of time preparing sureties and putting social support in place. As such, the limited funds they received might still be perceived to be worth the effort.

Importantly, the desire to move through cases quickly did not appear to translate into an overzealous attempt to avoid contested hearings in England. Since sureties were rarely used, and thus did not have to be prepped to testify, the difference between running a contested hearing instead of a consent release was not as pronounced in England as it was in Canada. As such, while defence solicitors clearly preferred to avoid contested hearings in order to move through the court list more efficiently, they were not nearly as reluctant as their counterparts in Canada to run one. As one defence solicitor accepted: "If [the prosecution is] opposing it, they're opposing it, right..." (LN 839, England, DEF 022).

Defence solicitors in England also tended to emphasise their obligation to other court actors in the interviews more than their counterparts in Canada. As was consistent with previous literature (Carlen, 1976; Eisenstein & Jacob, 1977; Lipetz, 1980; Rungay, 1995), they were motivated to uphold these professional relationships in order to maintain group cohesion. When one defence solicitor in England was asked whether they considered the prosecution to be reasonable, they responded in the following way:

I think mostly, because we have to see each other another day and there will be an occasion where I'll be of assistance to them. I might know more about the case than the advocate who is there because I've been in the police station and I think, not only do you have a duty to your client - which to me is just a horse's nose above the rest - but you have a duty to the court - as you are well aware - but equally a duty to your colleagues (LN 585, England, DEF 019).

This defence solicitor argued that prosecutors were reasonable because they were aware that the defence could help them at a later date (i.e. providing information gained at the police station). This is an example of the use of the 'exchange relationships' described by Cole (1970) in which court actors trade favours in order to meet their respective goals. Unlike in Canada, where these favours were typically discussed in terms of their benefits to their client, the court actors in England tended to stress the ways in which they helped them complete their work and ensure the day ran smoothly. This particular defence solicitor even suggested that their obligation to their client was only slightly greater than their duty to their colleagues and the court.

The level of camaraderie that developed as a result of the exchange relationships appeared to impact the way the prosecution and defence discussed bail cases. For instance, one prosecutor in England described a typical interaction they would have with a defence solicitor:

You can have a friendly chat with a defence solicitor in between cases and sort of joke about – a solicitor might say 'he's insisting that he's making a bail application even though he's got no chance of bail' or something, we'll have a joke about that. He might come in and say 'you don't really need to say much but I've got to make a bail application, he'll get refused, don't worry about it.' Yeah, it's just a friendly, professional relationship (LN 384, England, CPS 026).

When defence solicitors are informing the prosecution that their bail application should be denied, the extent to which they are exercising their adversarial role is called into question. This supports previous studies which have found that the defence tended to assume their clients were guilty (McConville et al., 1994) and pointed to the 'outsider' status of defendants relative to the 'insider' status of the court actors (Jacobson, Hunter, & Kirby, 2015). It has been argued that this strain on the adversarial relationship is derived from the closeness between the prosecution and the defence (McConville et al., 1994).

The collegiality described between the prosecution and defence can be partially attributed to the compatibility of their respective incentives. The findings suggest this compatibility has been heightened in recent years as a result of cuts to criminal justice expenditure. The austerity policies implemented by the Coalition government have resulted in a reduction in funding across the entirety of the criminal justices system in England and Wales (Garside & Ford, 2016). The CPS is no exception, having their budget cut by over 20% since 2010 (Beard & Allen, 2017). This has resulted in an increased focus on efficiency within the CPS. One prosecutor explained why they felt that there was a focus on speedy case processing:

It's budgets, it's money. The court's budget, our budget. At least that's what I've been told. I don't have personal access to figures. I mean we've practically been told that we need to be more efficient and save money otherwise our very existence could be in jeopardy. And I mean, I don't know if you know this, but originally, years and years ago, in the early 80s I think, up to the mid 80s, the CPS didn't exist, it was the police that prosecuted and then the CPS was brought in. Well that sort of spectre has been raised, of fundamental changes might be waiting if we don't become more efficient. And the courts have been told the same sort of thing. They need to be more efficient ... I think it's all about money (LN 273, England, CPS 024).

This prosecutor, like several others, argued that the current mentality surrounding efficiency had put pressure on the prosecution to get through cases quickly. There appeared to be a general perception that failing to meet this goal on a wider basis could be detrimental for the future of the CPS. As such, there was considerable professional pressure to move cases forward. This coincided with the financial incentive of the defence to complete as many cases as possible in a short amount of time. This seems to have increased the motivation to form professional relationships that was already shown to exist within the courtroom workgroup (Cole, 1970; Doherty & East, 1985; Eisenstein & Jacob, 1977). As one defence solicitor in England stated: "I just think that the state of the system is so crap that people have actually realised we kind of have to work together or you scream (LN 401, England, DEF 020)."

As was the case with the prosecution in Canada, the prosecutors in England also prioritised the interests of victims in their decision-making. This may be a result of CPS legal guidance, which clearly states: "The fundamental role of the

Crown Prosecution Service (CPS) is to protect the public, support victims and witnesses and deliver justice” (The Crown Prosecution Service, n.d.). One prosecutor argued that, in addition to the presumption of innocence, they “would probably also be mainly focused on the interests of the victim in the case and prioritising that over anything else really” (LN 38, England, CPS 026). Although one might expect this CPS priority to translate into the same overcautious decision-making observed in Canada, it this does not appear to be the perception in the English court. Rather, the prosecution was viewed to have become increasingly more ‘reasonable’ following the introduction of LASPO in 2012 (see Chapter One). This act provided that, with the exception of domestic violence offences, there must be a reasonable prospect of custody in order for defendants to be remanded in custody. Many court actors believed that prosecutors had become increasingly pragmatic in their decision-making following the new legislation. For instance, one legal adviser made the following comment:

I think as far as the prosecution are concerned, I think they’re being more pragmatic, more realistic, in applying for remands, and equally, more realistic in considering bail. I dare say, myself, the prosecution and the defence would question why somebody has been detained by the police when their record, on the face of it, doesn’t warrant a production before the court in custody... (LN 95, England, LA 009).

This echoed many positive comments surrounding the introduction of LASPO in relation to non-domestic violence offences (see Chapter Five for a discussion of domestic violence offences). The prosecutors explained that the introduction of the legislation had signalled to them that fewer defendants should be remanded in custody. For instance, one prosecutor in England made the following comment:

There is a broader policy that fewer people should be locked up. And that’s evident from LASPO. So the government has said and parliament has said, ‘there are too many people going to prison. This legislation is here to change that’ (LN 327, England, CPS 027).

It appeared as though this message had been received by prosecutors and noted by the other court actors. The general consensus was that the legislation, in the main, increased the extent to which the appropriate defendants faced

remands in custody. This perception was reflective in the more general sense of cooperation and collegiality that framed the interactions in the English court.

The objectives of the prosecution and defence in England were much more compatible than their counterparts in Canada. Since duty solicitors rarely represented defendants, both the private defence solicitors and the prosecutors that typically appeared had either a financial or professional incentive to handle cases as efficiently as possible. The well documented mutual incentive to move through the court list (Lipetz, 1980; Myers, 2015) was thus enhanced by a drive for efficiency caused by recent funding cuts to both legal aid and the CPS. This appears to have given the court actors a common goal to work towards, enhancing the level of camaraderie between them. Indeed, defence solicitors in this jurisdiction consistently highlighted the importance of their professional relationships in terms of the benefits it had for maintaining group cohesion rather than the advantages it provided for the clients.

This does not, however, imply that they the defence had no regard for their clients during the bail process. It is likely that the perception of the prosecution as 'reasonable', partially as a result of the mentality accompanying the LASPO reforms, reduced the need for excessive bargaining. In addition, as the previous section argued, court actors in England viewed the police decision-making to be mostly appropriate, suggesting that many cases were viewed to warrant a remand in custody. This implies that when the prosecution took custody positions, they would not necessarily be perceived as 'unreasonable' in the same way they were in Canada. In the event that there was disagreement, however, the impetus to avoid contested hearings does not appear to be nearly as strong in England as it was in Canada. This is perhaps because the procedure itself was not described or observed to be as long or convoluted. This reduced the need for the hostile bargaining process that often took place in search of a consent release in Canada, as court actors would more easily resort to contested hearings in the event of a disagreement.

Summary

In sum, these findings are consistent with previous research (Cole, 1970; Eisenstein & Jacob, 1977; McConville et al., 1994) which suggests informal negotiations are central to decision-making of court actors. Indeed, the prosecution and defence in both jurisdictions relied heavily on informal discussion and negotiation during the bail decision-making process. Further, in the main, these informal discussions tended to result in uncontested bail appearances across both courts. The level of agreement did, however, vary between jurisdictions. While court actors in Canada tended to engage in more hostile discussions, they ultimately agreed in more cases than in England, where the conversations were much more collegial. This can be explained by the extent to which the incentives converged and diverged in each jurisdiction. The lack of incentive to progress cases through the system in Canada combined with both a disjuncture in attitudes as to whether defendants should be released and a strong desire on the part of the defence to avoid contested hearings resulted in an uneasy consensus in which the prosecution and defence agreed to a bail position with accompanying onerous conditions. On the other hand, both the prosecution and the defence in England were motivated to move cases forward, providing them with a mutual goal and thus increasing group cohesion. Further, the combination of defence heavily prioritising professional relationships and prosecutors taking bail positions perceived to be reasonable meant that they tended to agree on bail outcomes, but when they did not, their willingness to run contested hearings meant they were slightly more likely to disagree relative to their counterparts in Canada.

Ultimately, while there was more overt agreement in Canada in terms of their higher rate of uncontested appearances, this was rooted in considerable underlying disagreement during the negotiations. Similarly, the higher rate of contested hearings in England masked considerable collegiality between the court actors. This demonstrates, contrary to previous research (Gertz, 1980), court workgroups do not necessarily have to be collegial to negotiate nor do they need to be hostile to act in opposition. Rather, there are many complex interactions that take place in relation to the incentives of court actors that will dictate how discussions are balanced and operate in practice. Many of these incentives were dependent on the environment in which the court actors worked

and, in particular, the objectives of their overarching sponsoring organisations. Ultimately, the court actors in Canada were found to maintain their adversarial roles within an uneasy consensus to a greater extent than their counterparts in England despite the latter being more likely to proceed to overtly adversarial contested hearings. This is consistent with Church (1985), as it demonstrates that adversarialism does not have to take its traditional form to influence court decision-making. This is further demonstrated in the subsequent section, which examines the extent to which the court agreed with the prosecution and defence.

Court decision-making: An exercise in rubber-stamping?

The court makes the final decision⁴⁴ in the bail process as to whether the defendant should be remanded on bail or in custody. It is thus their decision that ultimately dictates the bail outcome. While the traditional adversarial structure emphasises judicial authority during this process, previous research has suggested that this role is merely presentational and that the effective decision-makers are other criminal justice actors, such as the police, prosecution, and defence (Burrows et al., 1994; Hucklesby, 1996, 1997b). As such, the role of the court has been argued to involve mostly 'rubber stamping' prior decisions (Hucklesby, 1996, 1997b) in that they simply approve prior decisions made by the prosecution and defence.

In support of previous research, this section will demonstrate that the decisions of other criminal justice actors heavily influenced that of the court (Burrows et al., 1994; Hucklesby, 1996, 1997b). In particular, the court was extremely unlikely to oppose agreed upon positions between the prosecution and defence in both England and Canada. This finding supports previous research that highlights the paramount importance of informal agreements on court outcomes (Eisenstein & Jacob, 1977; Hucklesby, 1996). The findings also suggest, however, that the idea that the court merely 'rubber stamps' prior decisions may not apply in all contexts. This characterisation masks the more complex

⁴⁴ This may not be the last bail decision in the entirety of the criminal process given defendants have the right to second hearings both in magistrates court and Crown court in England and may request a bail review in Canada.

decision-making process that occurs during contested hearings. While these appearances occupy only a minority of the bail appearances across jurisdictions, it is argued that they are reflective of the divergent applications of adversarialism, ultimately having a major impact on the bail outcome in these cases.

The extent of rubber-stamping

The findings support the assertion that the informal agreements between the prosecution and defence have an impact on the bail outcome (Bamford, King, & Sarre, 1999; Hucklesby, 1997a, 1997b). Indeed, the outcomes of the negotiation between these court actors (see previous section) were shown to have a major influence on the decision of the court. The results are illustrated in Table 4.5, which presents the decision of the court in England and Canada according to the outcome of the negotiation between the prosecution and defence.

The findings suggest that the concordance between the decision-making of the prosecution and defence and the court was strongest during uncontested appearances. In other words, unless there was overt opposition between the parties (i.e. contested hearings) it was extremely unlikely for the court to disagree with a recommendation about the remand decision. Indeed, in every appearance that involved a joint position (i.e. consent releases and consent detentions) across both jurisdictions, the court ultimately maintained the previous decision. Furthermore, in England when the prosecution provided no position and thus bail was uncontested, the court only remanded defendants in custody in 2 out of 23 occasions (9%). This supports the argument made in the previous section, which suggests cases with no prosecution position are handled similarly to consent releases since they signal a lack of prosecution opposition to bail.

Table 4.5 - Court decision according to the outcome of the negotiation**a) Canada**

		NEGOTIATION OUTCOME			
		Consent Release	No Pros. Position	Consent Detention	Contested Hearing
COURT DECISION	Release	48 100%	0 --	0 --	13 72%
	Custody	0	0 --	3 100%	5 28%
TOTAL		48 100%	0 --	3 100%	18 100%

b) England

		NEGOTIATION OUTCOME			
		Consent Release	No Pros. Position	Consent Detention	Contested Hearing
COURT DECISION	Release	26 100%	21 91%	0 --	13 34%
	Custody	0	2 9%	13 100%	25 66%
TOTAL		26 100%	23 100%	13 100%	38 100%

While uncontested appearances were handled similarly across jurisdictions, the findings suggest a clear difference in approach between the Canadian and English court in relation to contested hearings. Specifically, Table 4.5 shows that the court was more likely to side with the prosecution in England whereas it was more likely to side with the defence in Canada. In England, the court agreed with the prosecution in two-thirds of appearances (66%; n=25) while, in contrast, the court only agreed with the prosecution in a quarter of cases in Canada (28%; n=5).⁴⁵ In other words, the court was more likely to remand defendants in custody following a contested hearing in England than in Canada. When these results were taken together with the consent detentions, which

⁴⁵ Although the sample size was particularly small in this study, the low rate of detention is in line with previous research in Canada that used larger samples (see, for example, Canadian Civil Liberties Association, 2014; Webster et al., 2009).

were always agreed by the court in both jurisdictions, 12% (n=8) of defendants were ultimately remanded in custody in Canada compared to 40% (n=40) in England.

Court decision-making in uncontested appearances

The findings in relation to uncontested appearances are consistent with Hucklesby (1997b), who demonstrated that when the prosecution is satisfied the defendant should be granted bail (i.e. consent releases) or when the defence does not submit a bail application (i.e. consent detentions), the court rarely disagreed with their decisions. However, this study took a slightly different approach than this research, which discussed the influence of the prosecution and the defence individually, and instead focused on their combined impact on the court's decision-making. This approach examined the *agreement* between court actors rather than their separate positions. It is argued that it is this agreement (or lack of opposition in the cases with no prosecution position) that facilitated the court's approval.

This argument was supported by the interviews, in which both District Judges and magistrates in England argued they would rarely dispute a position that was agreed between the prosecution and defence. For instance, one magistrate in England stated:

So providing both parties are happy and content with bail, with conditions, or whatever they've discussed, they would have to be well off the mark for us to [remand the defendant in custody], they would have to have issued something fairly drastic - and occasionally they do, of course (LN 456, England, MAG 015).

The views of the court substantiated the assertion that it is the lack of opposition between the parties (i.e. both are 'content with bail') that encouraged their agreement. Their tendency to release defendants in which no prosecution position was offered further suggests it is their lack of opposition rather than their recommendations that influenced their decision. As such, it may not always be that the court is more influenced by the position of prosecution (and indirectly the police) as previous research has suggested (see Burrows et al., 1994; Hucklesby, 1997b) but rather that it is their lack of opposition with the

defence that ultimately impacts their approval. It is notable however, that like this magistrate, all judicial officials interviewed argued that they would intervene in the event they believed a joint position was inappropriate. The observations suggest that this was a rare occurrence.

It may be that this concordance is simply the result of the court making a practical assessment. Specifically, if the court actors representing both the state and the defendant are satisfied, there is minimal reason to intervene. It may also be that, consistent with previous research (Myers, 2009; Webster et al., 2009), this is part of a more generalised strategy to avoid blame. While it is technically the court's decision to remand a defendant in custody or on bail, the fact that they were simply adhering to the wishes of the prosecution and defence could lessen their personal responsibility in the event something 'went wrong'. In other words, it would provide other individuals with whom to share the blame in the event the defendant returned to court as a result of a breach or further offence. This would not, however, be possible in contested hearings, in which the prosecution and defence directly opposed each other and the court was obligated to side with one or the other. The subsequent section examines why these cases were handled differently.

Court decision-making in contested appearances

The role of the court was much more pronounced in appearances involving contested hearings. Unlike in uncontested appearances, they were obligated to choose one side over another and were therefore unable to simply 'rubber stamp' previously agreed upon positions. It was thus these appearances in which the decision-making of the court was most visible. Indeed, as Table 4.5 illustrates, the court in England tended to be much more 'prosecution minded' than the court in Canada, which was more 'defence minded'.

The findings suggest that the high rate of bail in Canada may partially be explained by a traditionally adversarial approach to contested hearings. The defence counsel in Canada suggested that the hostile culture described in relation to the negotiations carried over into these procedures. Many defence counsel were observed to take assertive approaches to the hearings,

contributing to this environment. For instance, one private defence counsel in Canada explained how they would approach contested hearings:

You really want to neutralise the Crown and sometimes, it's unfortunate, but I'm a showman and I want to make the Crown look stupid (LN 195, Canada, DEF 007).

This particular defence counsel argued that forcefully opposing the position of the prosecutor was part of their strategy in obtaining bail for their client. While this might not have been the tactic of all the defence counsel, it is certainly indicative of the more general oppositional approach that was seen during the observations. Many defence counsel argued that this was necessary as a result of an equally strong position on the part of the prosecution. For instance, one duty counsel in Canada described the proceedings in the following way:

It's very adversarial, in court and it really affects the culture. They're always asking for residential sureties, seeking everybody's detention (LN 984, Canada, DC 003).

Many defence counsel perceived the prosecution to seek remands in custody when it was clear the defendant would most likely be released. For instance, one private defence counsel in Canada explained:

...see this is part of the problem, is they're asking for detention on cases where the person should be getting bail, will get bail, but we've now clogged up the system for asking for a detention order because now we have to run that bail hearing. So that discretion in the Crown's office seems to have gone completely out the window... (LN 184, Canada, DEF 005).

This custody-oriented approach certainly aligned with the mentality described by the defence in relation to the negotiations and was reflected in the Crown Manual discussed in the previous section. The warnings contained in the Crown Manual regarding offences committed on bail may also explain why prosecutors in Canada might believe that taking bail positions might jeopardise their careers. This was highlighted by one private defence counsel in Canada:

There are people that want a job in the future, that they're maybe per diem, or maybe they're on contract, so they're afraid of their own shadows. Especially the young baby Crowns. It really takes a special

Crown to be able to have judgment out of the gate, to be able to do the right thing. Because frankly it's a brave decision for a Crown to agree to a bail, especially someone with a sheet. The easier decision for any Crown is to say no, and defer the decision to somebody else (LN 334, Canada, DEF 007).

While it was unclear whether the prosecution were aware that some cases they took custody positions on would result in bail, this strategy of 'passing the buck' in Canadian bail courts is well documented in the literature (see, for example, Myers, 2009; Webster, 2015; Webster et al., 2009). It has been argued that decision-makers in Canada take custody positions in order to avoid the 'reputational risks' that may result in the event a defendant commits an offence on bail (Doob, 2012). As such, maintaining one's professional reputation is akin to making conservative decisions in the Canadian bail process.

Although one might expect a high rate of remands in custody in Canada as a result of this mentality, the observations suggested that the opposite was the case. This can be explained by taking into account the adversarial approach of the defence, who as was argued previously took an equally oppositional stance in contested hearings, as well as the approach of the court, who had the final say on the bail outcome. Many of the defence counsel suggested that justices of the peace, who presided over the vast majority of bail proceedings, had become increasingly 'reasonable' in recent years. Take, for instance, the view of one private defence counsel:

However, what I've noticed, is over the last couple of years they're starting to hire more JPs [justices of the peace] that are lawyers, so they tend to get it. They're also getting more continuing legal education and the people who are educating them are pretty reasonably minded defence lawyers, pretty reasonably minded Crowns. So as a result what we're beginning to see is the new guard is replacing the old guard and even the JPs sometimes where we're agreeing, and sometimes I've been guilty of this, as a risk averse person, that my client just wants a bail now, where we're agreeing to conditions that may be a little bit too restrictive. So sometimes the JPs are saying wait a minute, I know you're both telling us that this is what it should be but I think this is too restrictive and I'm not doing it (LN 253, Canada, DEF 007).

Multiple defence counsel believed that there were an increasing number of justices of the peace that were willing to regularly release defendants on bail. This is not to say, however, that all justices of the peace were perceived to be

likely to release defendants. Many of the defence counsel claimed that when they were faced with a more custody-oriented justice of the peace, they simply adjourned the proceedings to another day. For example, one duty counsel in Canada made the following statement:

As far as justices of the peace go, it's just a lot of variety. We have a few that are excellent that I have no problem running bail hearings in front of. I'm sure, I have every confidence I'll get a fair hearing. And then there's a few justices of the peace that I will never run a bail hearing in front of and neither will any of my colleagues or any private counsel that knows their reputation ... There's a couple justices of the peace that are just unpleasant to appear in front of and a few that will always detain. They always do what the Crown asks so you just know not to run bail hearings in front of them. But for the most part they're fine, I'd say (LN 1004, Canada, DC 003).

Most defence counsel in Canada claimed to take this 'judge-shopping' approach in order to obtain a better chance of bail with another justice of the peace. Since adjournments were common practice in the Canadian court (see Chapter Six), this was not seen as a difficult practice to undertake.

When the adversarial approach to bail on the part of the defence is taken together with both the mostly release-oriented court and the practice of 'judge-shopping', it seems unsurprising that the majority of contested hearings resulted in bail in Canada. This appeared to occur in spite of what was perceived to be a custody-oriented approach within the Crown Attorney's office. In line with Church (1985), these findings suggest that there are still some instances in which court actors take on their adversarial roles, even if (in the case of judge-shopping) this might not appear in its traditional form.

The situation in Canada stood in contrast to that in England. The findings suggested that the high rate of remands in custody in England might, in part, be a result of subtle cues offered by the defence. In some instances, defence solicitors applied for bail on the directions of their client despite believing they were unlikely to be released. One legal adviser explained how they might conduct these contested hearings:

...so even though defendants are telling the defence solicitors a tale which is unbelievable, the defence will often address the magistrates and

say, "I'm instructed to make a bail application and these are my instructions," because they have their credibility, defence solicitors, and they can't be advancing everything that the defendant says and they have to be professional (LN 621, England, LA 009).

The legal adviser provided an example of how defence solicitors may change their behaviour so the court would know they did not agree with the information their client was putting forward. This technique, which blatantly disadvantaged the defendant, was deemed 'professional'. The use of these subtle cues cannot, however, explain the results of all contested hearings as a third of them still resulted in bail (n=13; 34%). This can partially be explained by the behaviour of the prosecution, who occasionally used the same type of subtle cues, but in the opposite direction. One prosecutor in England described how this might be accomplished:

It might be that you may feel that it's appropriate to give them bail but with appropriate conditions, so you'd still make some representations. You might not put in the strongest application for remand but you would certainly make representations that they ought to be granted it with suitable conditions (LN 220, England, CPS 026).

This prosecutor explained that they would sometimes technically apply for a remand in custody, but in reality focus on bail conditions in their representations. In other cases, assistant prosecutors or agents suggested they might submit a 'half-hearted' application in the event they disagreed with the CPS directions but did not have the authority to question their directions.

The situations described by the prosecution and defence were consistently viewed during the court observations in England. Consistent with previous research, they are examples of 'signalling' (Hucklesby, 1997b) or 'sell-out strategies' (McConville et al., 1994) and demonstrated that the lawyers were acting in an attempt to maintain or enhance their credibility. Interestingly, lawyers in England appeared to attempt to maintain credibility by acting in opposition to their traditional adversarial roles while those in Canada took a contrasting approach. As such, the lawyers in England would subtly suggest the bail outcomes they felt were appropriate even if directions from their clients or sponsoring organisations were contrary to what they perceived to be a realistic outcome.

Although not all contested hearings involved the use of signalling, this did not necessarily mean that they included a robust defence. It is argued that this can, in part, be explained by the presence of District Judges in the English court. This stood in contrast to Canada, where judges only presided over bail proceedings when they were assisting another court. In 48% (n=48) of the bail appearances observed in England, the court was presided over by a District Judge while the other 52% (n=52) were presided over by a panel of magistrates. It is argued that the presence of District Judges impacted the bail outcome in two ways. First, since the District Judges were able to see the case file before court, many court actors believed that they had a good idea as to how to proceed prior to the appearance. For instance, one defence solicitor in England explained how they would deal with District Judges and magistrates differently:

...because you don't need to maybe ... to say as much to a District Judge, they could have made up their minds most of the time anyway. But you need to just help them, hopefully just tell them what they don't know to help them make their mind up (LN 762, England, DEF 022).

As this defence solicitor highlighted, District Judges were viewed as less likely to require assistance and more difficult to persuade. The second way the District Judges appeared to influence the outcome is through the perceived 'leaning' of the District Judges. Both the prosecutors and the defence solicitors believed that they were particularly 'prosecution minded' in their decision-making relative to magistrates. For instance, one defence solicitor in England commented: "I would say all our judges are Pros [prosecution] minded but I would say that was not necessarily the case [in all courts] all the time" (LN 434, England, DEF 020). The observations supported this view as defendants were remanded in custody on 46% (n=22) of occasions by District Judges compared to 35% (n=18) of occasions by magistrates. These findings are consistent with previous research which found that District Judges tend to impose harsher case outcomes, using remands in custody and custodial sentences more often than magistrates (Morgan & Russell, 2000).

It is unlikely that the leaning of the District Judges fully accounted for the differences in the use of custody, however, given that court actors may change

their behaviour based on their own perceptions of the court (Hucklesby, 1997a). As the defence solicitor argued above, many of them would provide less information to District Judges as they perceived them to have 'already made up their mind'. Indeed, defence solicitors presented information in accordance to their expectations about the court's response. This is consistent with previous research (Hucklesby, 1997a), which found that court actors would make decisions related to bail based on the reputation of the court. This practice would mean that District Judges would not be privy to the full perspective of the defence and would base most of their decision on the information provided in the case file, which was constructed by the police and the prosecution. It is perhaps unsurprising that in many of these cases they might then end up remanding defendants in custody.

When one considers that most appearances in the English court were uncontested, and many that were contested did not involve genuine or robust opposition, it appears as though very few bail appearances involved legitimate or comprehensive disagreement between the prosecution and defence. This was confirmed by one magistrate in England:

... occasionally we get into things which are called bail thrashers, which is the prosecution is adamant that they want this individual to go to custody, and the defence is adamant that he's going to dig his heels in to keep this person out, and then you really have got to look at every detail and make a decision. They don't crop up that often, to be quite honest with you, but when they do, you've got to spend an awful lot of time looking at the points that I've just mentioned to then come up with a decision. Because at the end of the day, you're taking somebody's liberty away (LN 165, England, MAG 015).

The uncommon situation described by this magistrate is reflective of the way in which one might conceptualise all bail appearances according to the traditional adversarial structure. However, as was stated here and evidenced above, in reality 'bail thrashers' in which the prosecution and defence legitimately and actively disagreed were rare occurrences in the English bail court.

These findings suggest that the 'prosecution minded' court was reflective of a broader deficit in adversarialism in this jurisdiction. Specifically, when the prosecution applied for remands in custody it appeared as though defence

solicitors would often subtly signal that they agreed with this outcome or refrain from providing a robust defence in the event they were appearing before a District Judge. This explains why the findings point towards the English court being 'prosecution minded' and provides support for previous research (Hucklesby, 1997b), which has highlighted that the English bail process does not appear as the adversarial process the 'law in books' suggests.

Summary

In sum, the tendency of the court to agree with the position of the prosecution and defence in uncontested appearances provides support for the argument that they simply 'rubber-stamp' prior decisions (Hucklesby, 1996, 1997b). However, rather than simply adhering to the recommendations of the prosecution and the defence's decision not to submit a bail application, the findings suggest it was the *agreement* between the two parties that influenced the decision of the court. The results pointed to a more nuanced form of decision-making in relation to contested hearings. While the court continued to uphold prior decisions in these cases in England – albeit subtly – they were more likely to act in their traditional authority position in Canada. The differences in the approach can largely be attributed to the behaviour of the prosecution and defence, who frequently signalled desired outcomes contrary to their adversarial roles or presented incomprehensive representations in England and who operated in an adversarial fashion, although not always in the traditional sense in Canada.

Conclusion

This chapter has examined the role of the police, prosecution, defence, and court on the bail outcomes in the English and Canadian court. In particular, it explored to what extent these actors agreed with each other and whether their discussions were framed by consensus or conflict. It was found that, while much of the decision-making took place informally and through a process of negotiation, this did not necessarily translate into a cooperative culture in both courts.

In line with previous research, the vast majority of decision-making across both jurisdictions was informal (Baldwin & McConville, 1977; Hucklesby, 1996) and resulted in some form of compromise (Alschuler, 1968; Blumberg, 1967a; Hucklesby, 1997b). Restrictions in the form of conditions or a remand in custody were almost always imposed upon defendants who were detained by the police. Furthermore, the prosecution and the defence almost always discussed their positions prior to appearing in open court and either formed joint positions or did not oppose other positions in most cases. Finally, the court virtually never challenged positions that were uncontested. This suggests a clear preference to settle the issue of bail with minimal formal adversarial procedures across all court actors in both England and Canada.

Relatively speaking, however, court actors were much more likely to agree with each other in England than in Canada. This was evidenced by the level of attrition in each jurisdiction, which demonstrated that defendants that started the process in police detention in England were much more likely to have bail opposed by the prosecution and to be remanded in custody by the court. This was reflective of differences in the extent to which court actors worked together cooperatively across the jurisdictions.

Contrary to previous research (Gertz, 1980), informal discussions did not always result in a culture of cooperation. These findings suggest that in some cases, particularly in Canada, compromise could be strained and adversarial attitudes could be invoked within informal negotiations. The court actors in Canada were mostly disapproving of the police practice of detaining defendants, described a negotiation process between the prosecution and defence that - despite typically ending in an 'uneasy consensus' - was characterised by much hostility and opposition, and were more likely to engage in both traditional and untraditional adversarial behaviours in contested hearings. Court actors in England were more likely to engage in the cooperative behaviour that characterises much of the previous research on court culture (see, for example, Cole, 1970; Lipetz, 1980, 1984; Rungay, 1995). These actors typically agreed with the police decision to detain, described a collegial negotiation process between the prosecution and defence, and engaged in 'signalling' during contested hearings, prioritising their professional relationships

over those of their clients and sponsoring organisation. This supports previous research which suggests that court actors can adhere to their adversarial roles within negotiations (Church, 1985) and that previous studies may overemphasise the consensus nature of the courtroom workgroup (Young, 2013).

Some of these differences were explained by formal factors related to law, policy and the cases entering the system. For instance, the nature of the cases that started the court process in detention influenced the extent to which the court actors agreed with the police decision-making. Without taking this into account, one might mistake the higher rate of remands in custody in England to signify a 'harsher' approach to bail, when in reality it may simply reflect differences in the types of cases appearing before the court. Further, the changes put in place by LASPO in England as well as the Crown guidelines in Canada were both reflected in the behaviour of the court actors during the negotiation process. Finally, while the justices of the peace would need to be consulted for a full understanding of its impact, there appears to be some evidence that training they undertook in recent years had an impact on their decision-making in Canada.

The influence of these formal factors was, however, mediated through court cultures and the behaviour of the workgroup in the respective courts. This is in line with previous studies that have highlighted the importance of court culture in examining differences in bail decision-making between courts (Canadian Civil Liberties Association, 2014; Hucklesby, 1997a; Myers, 2009). In accordance with Eisenstein and Jacob (1977), court actors in both jurisdictions aimed to fulfil shared goals of the courtroom workgroup, such as reducing uncertainty through avoiding contested hearings and moving through the court list expeditiously. Furthermore, as Church (1982) has argued, their individual goals and incentives – particularly those related to finance, efficiency, and the objectives of their sponsoring organisations – shaped their behaviour throughout the negotiations. Finally, informal practices developed in each court that defined how negotiations would take place and how both uncontested and contested appearances were undertaken.

This court culture was, however, also shaped by contextual factors related to views about the broader criminal process in each jurisdiction. Specifically, the influence of different aspects of managerialism was evidenced in both jurisdictions. In Canada, the 'risk averse' decision-making of the prosecutions was consistent with wider attempts to manage risk and prevent crime in the Canadian criminal justice system (Ericson & Haggerty, 1997; Hannah-Moffat, 1999) while, in England, the attempts to move through the process as quickly as possible reflected growing concerns with efficiency (Raine & Willson, 1993, 1997). This suggests that the court culture shaping the decision-making of court actors cannot be completely divorced from the context in which it emerged.

Chapter Five:

Examining the Framing and Discussion of Defendant and Case Characteristics by Court Actors

Introduction

The previous chapter demonstrated that bail outcomes are partially influenced by the negotiations undertaken by court actors and the extent to which they agree with one another. This chapter turns to the cases themselves in seeking to explain the factors that influence the bail decision-making process. Specifically, it examines the characteristics of the defendants entering the court process in custody and the cases in which they are involved. However, since court actors decide which information should be considered and presented in court, they still play a critical role in shaping how these characteristics are used to construct the case during the bail process (Kellough & Wortley, 2002; McBarnet, 1981; McConville et al., 1991). Court actors have a considerable amount of control over this process as a result of the discretion afforded to them in their respective bail laws. This suggests that, while decisions may appear to depend on traditional factors such as the nature of the charges or the criminal record, in actuality they exert their influence through the context of the courtroom workgroup (Eisenstein & Jacob, 1977). Defendant and cases characteristics are thus examined in terms of the way they are framed, discussed, and considered by the court actors.

While previous research has examined the statistical relationship between various defendant and case characteristics and the bail outcome (see Doherty & East, 1985; Hucklesby, 1996; Kellough & Wortley, 2002), this chapter is more concerned with the context in which these characteristics are presented and how they are applied by court actors. As such, the exceptions raised and the characteristics discussed by court actors are examined in turn. For the purposes of this research, defendant characteristics include the personal circumstances of the defendant and their history with the criminal justice system while case characteristics include details surrounding the allegations or breach

and any 'bail plan' proposed as an alternative to custody. This examination is accomplished through an analysis of the court observations and put into context with explanations provided by the court actors in the interviews. The objective of this analysis is to examine which defendant and case characteristics the court actors consider most important and how this shapes their decision-making.

This chapter will argue that, consistent with previous research (Brown, 2013; Hucklesby, 1996; Morgan & Henderson, 1998), bail decision-making prioritised defendant and case characteristics related to offending. However, while the aggravating features of offending-related behaviour were characterised similarly in England and Canada, the manner in which these behaviours were mitigated differed considerably between jurisdictions. In Canada, court actors tended to minimise these concerns with personal circumstances and detailed bail plans involving heavy supervisory components whereas, in England, court actors largely used alternative versions of the allegations and formulaic bail plans as tools of mitigation.

The importance of the defendant and case characteristics was, in part, determined by the broader context in each jurisdiction. Specifically, they were reflective of a more general focus on crime prevention in the wider criminal process in both England and Canada (Ashworth & Redmayne, 2010; Goff, 2017; Hucklesby, 1996; Sanders et al., 2010; Webster, 2015). They were also indicative of some diverging elements of each jurisdiction's criminal justice context, such as the movement toward early case resolution in England (Hucklesby, 2009) and the emphasis on therapeutic justice in Canada (Hannah-Moffat & Maurutto, 2012). These environmental features were shown to shape the decision-making of the court actors which was then normalised and perpetuated by the routines that developed in each court (Lipetz, 1984).

The chapter first revisits the law guiding the presentation of information and describes the discretion it provides to court actors with the aim of providing a framework for the discussion that follows. Second, the application of the exceptions to bail is examined in both jurisdictions in order to demonstrate how defendant and case characteristics were framed by court actors. Third, the

discussion of the defendant and case characteristics by court actors is analysed through an examination of how bail risk was both aggravated and mitigated.

The construction of a bail case

The laws guiding how defendant and case characteristics should be framed and presented during bail proceedings are encompassed in the bail legislation in each jurisdiction. While these laws are discussed in detail in Chapter One, they will be revisited briefly here as they frame the subsequent discussion. This section will demonstrate that while the laws provide guidance, they still afford the court actors a considerable amount of discretion in their decision-making.

The presentation of defendant and case characteristics is typically framed using the grounds for refusing bail in Canada and the exceptions to the right to bail in England.⁴⁶ In Canada, Section 515(10) of the Criminal Code provides that the detention of the defendant is justified if it is necessary to ensure their attendance in court, if it is necessary for the protection of the public (having regard for the substantial likelihood of further offences or interference with the administration of justice), or if it is necessary to maintain confidence in the administration of justice. In England, Paragraphs 2 of Part 1, Schedule 1 of the Bail Act 1976 specify that the main exceptions to the right to bail are substantial grounds for believing the defendant would fail to surrender to custody, commit further offences, or interfere with witnesses or otherwise obstruct the course of justice. Additional exceptions in England include, but are not limited to, situations in which defendants were on bail at the time of the alleged offence, held for their own protection, already serving sentences, or when a release would be likely to cause physical or mental injury or fear of the same to an associated person (informally known as the domestic violence or 'DV' exception). The DV exception targets defendants charged with domestic violence, expanding the prospect of a remand in custody to cases where there would otherwise be no possibility of such an outcome by virtue of the 'no real prospect test'. As Chapter One explained, the no real prospect test directs that

⁴⁶ What are referred to as 'grounds for refusing bail' in Canada are referred to as 'exceptions to the right to bail' in England. For ease hereafter, the English term will be used when referring to both.

defendants (in non-domestic violence circumstances) should not be denied bail if they are unlikely to receive a custodial sentence. In order to lawfully remand a defendant in custody in either jurisdiction, only one (or more) of these exceptions must be demonstrated to the court on a 'balance of probabilities'. This standard of proof is lower than what is expected at trial (i.e. beyond a reasonable doubt), partly reflecting that the bail decision is an assessment of risk based on past behaviour, a somewhat crude method of prediction (Hucklesby, 1994a).

The court can consider a variety of factors to demonstrate (or refute) the exceptions to bail. In Canada, relevant considerations are not outlined in the legislation although many are encompassed in case law. Some of the key decisions are summarised by Trotter (2010), who specifies that the nature of the offence, strength of the evidence, community ties, stability of the defendant, criminal record of the defendant (in terms of previous convictions and adherence to court orders), and whether the defendant was on bail can all be taken into account. However, the court is not restricted to a specific list of considerations. In England, relevant considerations are outlined in Paragraph 9, Schedule 1, of the Bail Act 1976. Namely, the nature and seriousness of the offence; the character, antecedents, associations, and community ties of the defendant; the defendant's record under previous bails; and the strength of the evidence may all be considered. However, like in Canada, they are not confined to this list and are also able to have regard for any other considerations which 'appear to be relevant.'

These laws provide guidelines but ultimately afford court actors a substantial amount of discretion as to which exceptions can be applied, which defendant and case characteristics can be discussed, and how much importance each is afforded during bail proceedings. This is especially the case given that the strict rules of evidence that apply in trials are not in place during bail proceedings and, as such, limited restrictions are in place as to what information can be presented. Court actors are thus left with substantial leeway in determining what risk, if any, is posed by the defendants in relation to bail. More broadly, they are afforded discretion as to how they construct the case in this particular portion of the criminal process.

It has been argued that criminal justice actors are able to construct cases through the decisions they make within the wide confines of the law (McBarnet, 1981; McConville et al., 1991). Indeed, bail is one of multiple stages in the criminal process in which they are able to define 'what happened' through much interpretation, addition, subtraction, selection and reformulation, ultimately establishing the meaning and status of how a 'case' comes to be understood (McConville et al., 1991). The views of the court actors are thus critical in shaping the nature and extent of the risk posed by the defendant during the bail stage. As McConville and his colleagues (1991) argue:

Case construction implicates the actors in a discourse with legal rules and interpreting rules. It involves not simply the selection and interpretation of evidence but its *creation*. Understanding the selections made and the decisions taken requires, therefore, analysis of the motivations of the actors, their value systems and ideologies (p. 12).

Accordingly, defendant and case characteristics should not be understood as objective facts in examining their impact on bail decision-making. Rather, they should be defined by the way they are framed and discussed by court actors. This process will, in part, depend on the values and motivations of the court actors (McBarnet, 1981; McConville et al., 1991). Indeed, the way in which defendant and case characteristics are framed and discussed can be expected to be highly dependent on the court actors themselves.

In constructing each case, court actors use various defendant and case characteristics to form a narrative that explains who the defendant is and what happened to cause them to enter the criminal process. However, this narrative must be translated into 'legal code' given the legal system is normatively closed and must convert alternative discourses into that which applies to the court context (Cammiss, 2006a). In other words, the characteristics must be framed in terms of the laws they are intended to support when they are conveyed to the court. During the bail process, this involves translating defendant and case characteristics into information that either aggravates or mitigates bail risk and framing that information using the exceptions to bail. The characteristics are then discussed within this structure. Court actors can be expected to reject narratives that do not conform to pre-conceived ideas and reject culturally different interpretations of the information underlying the case. As such, the

reconstruction process is not value neutral and rather reflects the worldviews of the court actors (Cammiss, 2006a). Since the narratives provided in court reflect the values of the actors, examining them offers insight as to what these values are and how they have influenced their decision-making. This chapter seeks to do so through an examination of the defendant and case characteristics discussed during bail proceedings. The subsequent section will begin this examination through a discussion of how the characteristics are framed.

Framing defendant and case characteristics: The exceptions to the right to bail

The defendant and case characteristics discussed in court are largely shaped by the exceptions to bail since most representations are provided with the aim of demonstrating or refuting these exceptions. As such, an analysis of the exceptions applied by court actors sheds light on how the information they provide is framed and the context in which it is presented. Many court actors in England and Canada noted the relationship between the defendant and case characteristics considered and the exceptions to bail. Specifically, they highlighted that the exceptions formed the basis of their decision-making when prioritising these characteristics. For instance, a District Judge in England explained the significance of the exceptions when considering which defence and case characteristics were most important to their decision-making:

...I think at that stage, you're looking at the exceptions to the right to bail and seeing how those can be met (LN 116, England, DJ 013).

This District Judge, perhaps unsurprisingly, argued that the exceptions were central to their decision-making process. The same assertions were made in Canada, where, for example, a defence counsel argued that they assessed the information available to them with the exceptions in the forefront of their mind:

All of the questions that I ask the accused and any individual involved with the bail plan, like a surety, all relate to the grounds [i.e. exceptions]. All of them (LN 328, Canada, DEF 006).

Consequently, an understanding of the application of the exceptions is essential to understanding why and how court actors discussed specific defendant and case characteristics.

Although neither the English nor Canadian bail legislation ranks one exception over another in terms of their importance, the observations indicated that they were not applied in equal measure. Most notably, the exception concerned with the risk of committing further offences (hereafter referred to as the 'offending exception') was used much more frequently than any other exception in both jurisdictions. This finding is consistent with previous research in England and Canada (Hucklesby, 1996; Webster, 2015). It is important to note, however, that, as was illustrated in Chapter One, there are some differences between jurisdictions in the formulation of this exception. First, the Canadian exception specifies that there must be a risk to public safety in assessing whether the defendant could commit further offences, whereas in England the exception refers to any type of further offending. Second, the Canadian exception also includes interfering with witnesses whereas this is encompassed in a separate exception in England. As such, the scope of the exception is different between the two jurisdictions. Broadly speaking, however, it can be understood to target concerns surrounding potential further offending in both jurisdictions.

Table 5.1 outlines the number of times that each exception was applied in England and Canada. This reflects the number of cases witnessed during the court observations in which either the prosecution or the court specified that they had concerns based on each of the exceptions. The analysis included both cases in which bail decisions were made and cases that were adjourned or traversed into other courtrooms (if court actors specified their concerns prior to the adjournment or traversal). In all other cases the exceptions were either not applicable (as the case was resolved and bail was no longer an issue) or beyond the scope of the study (as a conviction was entered and the bail decision was not included in the sample).

Table 5.1 - Percentage of cases in which the prosecution and the court applied each exception to the right to bail

	CANADA		ENGLAND	
	Prosecution (n=64)	Court (n=15)	Prosecution (n=42)	Court (n=41)
Absconding	28% (18)	7% (1)	36% (15)	27% (11)
Commit offences/public safety	100% (64)	100% (15)	83% (35)	68% (28)
Confidence in administration of justice (Canada)	2% (1)	0	--	--
Interfere with witnesses (England)	--	--	38% (16)	15% (6)
Injury or fear to associated person (England)	--	--	24% (10)	12% (5)
On bail (England)	--	--	14% (6)	15% (6)
Serving prisoner (England)	--	--	0	27% (11)
Own safety (England)	--	--	5% (2)	0

As such, out of a potential 231 cases in Canada,⁴⁷ the prosecution specified the exceptions shaping their concerns in 64 cases and the court specified them in 15 cases. Out of 101 potential cases in England,⁴⁸ the exceptions were specified in 42 cases by the prosecution and 41 cases by the court.⁴⁹ The two exceptions that, broadly speaking, are included in the bail laws in both jurisdictions are presented the first two rows of Table 5.1 (i.e. absconding and committing further offences) while the subsequent exceptions are each unique to only one of the jurisdictions and are labelled accordingly.

The findings show that the offending exception was used substantially more often than any of the other exceptions for refusing bail. In Canada, it was applied in every case in which the exceptions were specified by both the prosecution and the court⁵⁰ while in England it was applied in 83% (n=35) of the cases by the prosecution and 68% (n=28) of cases by the court. This was more than twice as often as any other exception. Furthermore, unlike the other exceptions, it was regularly applied alone.⁵¹ Although the exception concerned with absconding – the historical justification for refusing bail – was applied occasionally in both jurisdictions, it was applied alongside the offending exception in every case in Canada and most cases in England (14/15 by the prosecution and 7/11 by the court). The same trend was observed for the other exceptions, which were used alongside the offending exception in most of the cases in which they were applied.⁵² As such, when other exceptions were used they were rarely applied alone and were mostly used in conjunction with the

⁴⁷ This included 69 cases in which a bail decision was made, 130 adjournments, and 32 traversals.

⁴⁸ This included 100 cases in which a bail decision was made and one adjournment.

⁴⁹ All cases in which this information was provided were included in the analyses. In Canada, this included adjournments and cases traversed to other courtrooms since the exceptions of concern were often specified in these appearances. All other cases in both jurisdictions involved appearances in which bail decisions were made.

⁵⁰ Since the number of occasions in which the court specified the exceptions in Canada was low (n=15), the findings pertaining to this group should be interpreted with some caution.

⁵¹ In Canada, the exception related to committing further offences was applied alone in 45/65 cases by the prosecution and 14/15 cases by the court and no other exceptions were applied alone. In England, it was applied alone in 7/42 cases by the prosecution whereas none of the other exceptions were applied alone on more than 2 occasions. Similarly, the court applied this exception alone in 10/31 occasions in England and with the exception of the 'serving prisoner' exception (which was applied alone on 6 occasions) none of the other exceptions were applied alone on more than 3 occasions.

⁵² The interfering with witnesses exception was applied with the offending exception in 13/16 cases by the prosecution and 5/6 cases by the court, the DV exception in 7/10 cases by the prosecution and 2/5 cases by the court, the on bail exception in 5/6 cases by the prosecution and the own protection exception in all 2 cases by the prosecution.

offending exception. The only exception to this pattern was the 'serving prisoner' exception in England, which was applied alone in about half of the occasions in which it was used (n=6). However, since unlike the other exceptions, it left no room for discretion and did not require any arguments on the part of the court actors beyond relaying the fact that the defendant was in custody or being recalled, the fact that this exception was applied alone was unsurprising. What is perhaps more surprising is that in almost half of the cases in which it was used (n=5) the court applied it alongside the offending exception despite being able to justify the need for detention independently. Ultimately, these findings suggest that, while the other exceptions were applied regularly, they were rarely the sole focus of the objections raised by the prosecution or the court.

The prioritisation of the offending exception reflects a combination of environmental and cultural factors discussed in Chapter One. First, the political environment in both jurisdictions has increasingly been characterised by concerns surrounding potential offending on bail (Hucklesby, 2009; Hucklesby & Marshall, 2000; Webster, 2015). In England this is at least in part explained by a number of events beginning in the late 1980s, including police reports of dangerous 'bail bandits' (i.e. offenders who were routinely granted bail and subsequently reoffended) and high profile crimes committed on bail reported by the media (Hucklesby, 2009; Hucklesby & Marshall, 2000). In Canada, Crown attorneys and police officers voiced concerns that they were having difficulty keeping dangerous people in custody following the implementation of the Bail Reform Act 1972. This resulted in the formation of pressure groups seeking tougher bail laws (Friedland, 2012). In both jurisdictions, this occurred within a broader context of growing concerns for victims' rights, the protection of the public, and risk management (Hucklesby, 2009; Webster, 2015).

The political environment in which the court actors work can be thought of as part of their 'task environment', referring to the external forces that shape the courtroom workgroup (Eisenstein & Jacob, 1977). As was suggested in Chapter Two, research suggests that these forces have a generalised effect on the decision-making of the court actors (Eisenstein & Jacob, 1977) and, over time, can contribute towards the development of courtroom norms (Church, 1985). In

this case, it would seem that rather than attempting to ensure defendants appear for court - the historical focus of bail decision-making - court actors were primarily concerned with reducing further offending (Hucklesby & Sarre, 2009; Webster, 2015).

This mentality appears to have influenced the local functioning of the court by permeating the routine of the courtroom workgroup. Indeed, the consistent use of the offending exception was understood as a reflection of the behaviour that the prosecution and court deemed to most warrant custody. This sent a message to all court actors that the offending exception was likely to be a central focus of the bail proceedings. This was recognised by many court actors during the interviews. For example, a defence counsel in Canada claimed that:

...usually there's detentions based on secondary grounds [i.e. the offending exception], in my experience (LN 183, Canada, DEF 007).

This suggests that the more often the prosecution used this exception to justify their position and the court used it to justify remanding defendants in custody, the more likely the defence was to build their case around this exception (Hucklesby, 1996). As such, actors were likely to use information to either support or refute the claim that the defendant will commit further offences on bail because they believed that this is the exception regarded to be the most important to the court. Consequently, the prioritisation of this exception shaped the information that was presented in court and was considered the most important by court actors. This was reflected in the defendant and case characteristics presented in court, which is discussed in the subsequent section.

The defendant and case characteristics discussed by court actors

The following examination of the defendant and case characteristics discussed during the bail proceedings also suggests that court actors tend to prioritise offending-related behaviour in their decision-making process. This is consistent with previous research that has examined the information taken into account by court actors during the bail process in England (Hucklesby, 1996; Morgan & Henderson, 1998). No research is known to directly assess the information

considered by court actors in Canada.⁵³ The findings also suggest, however, that the manner in which bail risks are mitigated in each jurisdiction differ considerably. This was determined by examining which defendant and case characteristics were discussed by court actors in the cases viewed during the court observations. The defendant and case characteristics discussed verbally that related to the bail decision-making process were recorded and then divided into 15 categories which covered information under five broad headings: criminal history, bail history, allegations, personal circumstances and bail plan. This information was both counted and analysed qualitatively. In the subsequent discussion the quantitative analyses are presented and put into context using both the interviews and the qualitative observations.

The characteristics discussed

Before examining the context in which the information was discussed, the type of defendant and case characteristics presented as well as their range and quantity will be outlined. This analysis aims to identify which characteristics were important to the bail decision-making process. Table 5.2 sets out the percentage of cases in which each characteristic was discussed in England and Canada. Only cases in which bail decisions were made⁵⁴ and discussed were included in the analysis. There were also notably 8 cases in Canada and 11 cases in England in which a bail decision was made but no discussion about the decision-making process took place.⁵⁵ This meant that 61 out of 69 cases involving a bail decision were examined in Canada and 89 out of 100 such cases were examined in England.

While the findings are presented in terms of the percentage of cases in which each characteristic was mentioned individually, in reality they were discussed in

⁵³ While Kellough and Wortley (2002) have examined the information taken into account by court actors, they did so through a statistical analysis of the relationship between the characteristics of the case and the bail outcome. As such, only the judicial decision was examined while the context in which they were considered and discussed was not examined.

⁵⁴ Since, in Canada, discussions during adjournments and traversals to other courts were limited to, in some cases, the prosecution's bail position and, more typically, details about the adjournment itself, they were excluded from the analysis. This is because they offered little insight as to why the court actors believed the defendants should be remanded in custody or on bail beyond the exceptions applied, which were already discussed in the previous section.

⁵⁵ In these cases the outcome was provided but no context was provided as to how they arrived at their decision.

Table 5.2 - Percentage of cases in which defendant and case characteristics were discussed by court actors

	CANADA			ENGLAND		
	Contested (n=18)	Uncontested (n=43)	Total (n=61)	Contested (n=38)	Uncontested (n=51)	Total (n=89)
CRIMINAL HISTORY	100% (18)	67% (29)	77% (47)	90% (34)	51% (26)	67% (60)
BAIL HISTORY	94% (17)	35% (15)	52% (32)	90% (34)	39% (20)	61% (54)
ALLEGATIONS	89% (16)	30% (13)	48% (29)	100% (38)	69% (35)	82% (73)
PERSONAL CIRCUMSTANCES	100% (18)	49% (21)	64% (39)	74% (28)	20% (10)	43% (38)
BAIL PLAN	100% (18)	77% (33)	84% (51)	95% (36)	33% (17)	60% (53)

various combinations. However, disaggregating them here provides a clearer picture of how many times they were mentioned and thus the extent to which each characteristic's inclusion was the norm in each court. The findings revealed that in both England and Canada, the defendant and case characteristics discussed included the defendant's criminal history, their bail history, the allegations with which they were charged and their personal circumstances. They also included any 'bail plan' proposed as an alternative to custody.

The range of characteristics discussed was both similar across the two jurisdictions and consistent with their respective bail laws. With the exception of personal circumstances – which encompasses several narrower considerations contained in the bail laws (e.g. community ties, defendant stability) – these categories directly correspond to the aforementioned considerations provided in Paragraph 9, Schedule 1, of the Bail Act 1976 in England and the case law summarised by Trotter (2010) in Canada. Although it is perhaps unsurprising that the considerations discussed would correspond to those outlined in the law related to bail, it is nonetheless notable that court actors did not use the discretion they were afforded to discuss additional factors that may have been relevant. This is consistent with Lipetz (1984), who has suggested that court actors tend to establish a widely accepted and predictable routine that operationalises wider expectations (e.g. justifying the bail decision) into manageable tasks and routines. These routines are agreed upon by all of the court actors so that everyone knows what constitutes the work of the court and the appropriate ways to complete it.

In this case, by limiting the discussion to a narrow range of defendant and case characteristics the court actors were able to develop an understanding of what information might be addressed and were thus better prepared to respond when it was presented. This was evidenced in the interviews in which every court actor was able to list the 'typical' characteristics they would draw on when each exception was applicable. In no cases did this information extend beyond the range of characteristics specified in the law. Indeed, the narrow range of characteristics discussed may be partially explained by the court actors' adherence to their recognised routines.

The extent to which the characteristics were mentioned changed considerably according to whether the appearance was contested or uncontested (see Table 5.2). In contested hearings, court actors discussed each characteristic in almost every case whereas in uncontested appearances they were discussed considerably less often. In Canada, an average of 2.2 characteristics were discussed during uncontested appearances whereas in England this average was 1.9 characteristics. This compared to 4.4 characteristics in Canada and 4.3 characteristics in England during contested hearings. Furthermore, every case that was not included in Table 5.2, in which a bail decision was made but no discussion took place (n=8 in Canada, n=11 in England), was an uncontested appearance.

These findings demonstrate that a wider range of characteristics was discussed in contested hearings compared to uncontested appearances. This is consistent with previous research (Bottomley, 1970; Doherty & East, 1985; Hucklesby, 1997b) which demonstrated that very little information is presented in cases in which the prosecutor and defence had previously agreed on a proposed outcome. This was conceivably because, as was discussed in Chapter Four, much of the discussion took place before court during informal negotiations between the prosecution and defence. As such, the uncontested appearances generally consisted of one party explaining to the court why bail was (or was not) appropriate. Consequently, it can be expected that the information perceived to be the most important (and thus more likely to assure the court the agreed outcome was appropriate) would be relayed in these cases. This stands in stark contrast to contested hearings, where each party made a case for bail or custody, presenting multiple pieces of information in order to strengthen their argument.

Although the range of characteristics presented and the extent to which they were addressed in contested versus uncontested appearances was similar in England and Canada, the frequency with which each characteristic was discussed differed considerably between the two jurisdictions. Table 5.2 demonstrates that, in Canada, court actors discussed the bail plan (84%; n=51), the defendant's criminal history (77%, n=47), and their personal circumstances

(64%, n=39) most often. In comparison, the allegations (82%, n=73) and criminal history (67%, n=60) were discussed most often in England.

When these findings are compared with the information obtained in the interviews, some clear patterns emerge in relation to the characteristics deemed most important by the court actors. While the number of interviews was small in Canada, there was some indication that criminal history, personal circumstances, and bail plans were prioritised by the court actors. Indeed, these characteristics were listed as important more often than bail history and allegations. Similarly, court actors in England cited criminal history and allegations to be important three times more often than bail history, personal circumstances, and bail plan. These numbers should be interpreted with caution, however, given the small sample sizes. This is especially the case in Canada, where only seven court actors responded to this question. While no firm conclusions can be ascertained through an examination of the quantitative data alone, the qualitative explanations provided during the interviews provide further support that court actors considered these characteristics the most important. These findings are put into context below, in which they are discussed in terms of their aggravating and mitigating impact on the bail decision-making process.

Aggravating the bail risk

The characteristics that were used by court actors to aggravate the bail risk posed by defendants mirrored the exceptions employed. Specifically, they primarily, but not exclusively, focused on offending-related behaviour and, in particular, the harm this offending might cause. In both jurisdictions, this involved discussions surrounding criminal history, allegations and, particularly in England, bail history.

Criminal History

It is perhaps unsurprising that the defendant's criminal history was found to be one of the most important characteristics in the bail decision-making process across both jurisdictions. Given that material can be sparse and incomplete at

the bail stage, this is often the most concrete information available with which to demonstrate a defendant's level of risk. This is because, in the main, it centres on formal records as opposed to the unproven allegations and subjective personality assessments that make up much of the additional information. For the purposes of this research, criminal history describes the previous record of *substantive* offending. This includes the volume, recency, and nature of previous convictions as well as contact with the criminal justice system that did not result in formal charges or conviction (e.g. cautions, peace bonds, 'callouts' to the police). It does not address administration of justice offences/defaults (i.e. breach of bail conditions, failure to attend court) nor does it discuss offending on bail since these are discussed in relation to the defendant's bail history.

Criminal history was the characteristic discussed second most often in England and Canada (see Table 5.2) and court actors in both jurisdictions confirmed that it was central to their decision-making. This was the most widely cited factor across both jurisdictions in the interviews.⁵⁶ For instance, when a duty counsel in Canada described what factors were most important to their decision-making process, they remarked:

Well the most important thing is whether they have any previous convictions. I would say that's always the first thing (LN 532, Canada, DC 003).

Many court actors in England formed the same opinion, frequently citing criminal history to be the most important factor they considered. A defence solicitor in England suggested that this was because the presence of a criminal record was often the deciding factor as to whether or not a defendant was released on bail:

...the big thing that does spring to my mind is basically... it's their record, that's got to be the biggest thing. Everything else is window-dressing, right. Because if you say all the nice things about someone with a record, and you say all the nice things about someone else who doesn't have a record, it could be the exact same things that you say; job, family ties, stability, the same mitigation, the same defence, the same everything else... but if you say those same nice things for the person with that record, the chances are they won't get the bail. So it really comes down

⁵⁶ Note that criminal history was tied with allegations in England.

to the record. Or you could say... you could think of all the horrible things, you know, a person could have no record at all, they could have absolutely nothing going for themselves and they will still get bail because they haven't got a record, which is... wholly justifiable (LN 450, England, DEF 022).

These views are in line with previous research that has investigated the importance of different factors on the bail decision-making process, which showed that criminal history was one of the most important characteristics in making a remand decision (Morgan & Henderson, 1998), was frequently used as a justification for detention (Doherty & East, 1985), and (in terms of the number of previous convictions) was positively related to obtaining a remand in custody (Kellough & Wortley, 2002). This is because the criminal record provides an indication of the likelihood that a defendant will reoffend on bail if they are released (Kellough & Wortley, 2002; Morgan & Henderson, 1998). Given that the offending exception was applied more often than any other exception in both jurisdictions, it is perhaps unsurprising that the defendant's criminal history would carry a great deal of weight during their considerations.

As the aforementioned defence counsel in England suggested, criminal history was also viewed as important because court actors believed that it was this characteristic that the court would focus on most in making their decisions. This was mentioned by several court actors, including a legal adviser in England, who commented:

...it's primarily the record and the defendant's history, that's primarily what they'll look at for all bail decisions (LN 288, England, LA 010).

As Church (1982) argued, the court actors developed expectations through their experiences working in each court. In this case, court actors would expect the court to heavily weight criminal history when they were assessing the information. As a result of this expectation, the prosecution appeared to adopt routine approaches to aggravate the impact of criminal history such as citing the number of previous convictions, emphasising their seriousness, and highlighting their similarity to the current allegations.

There were, however, some differences in the way that the bail risks associated with criminal history were conceptualised between jurisdictions. Specifically, the court actors in Canada reported that they would discuss whether the defendant had a propensity for violence and was thus a danger to the victim or the public while this approach was not reported in the interviews in England. A defendant with a criminal history that lacked violence was therefore considered less of a bail risk than one who had a history of committing harmful offences. For instance, a defence counsel in Canada made the following statement:

If [the criminal record is] unrelated, if they've got three convictions but they're all for shoplifting and he's charged with an impaired driving, you're going to say, "well this guy is not a violent offender. He's been charged with shoplifting, big deal" (LN 324, Canada, DEF 004).

In comparison, court actors in England discussed the importance of criminal history more broadly in the interviews. For instance, an associate prosecutor described how they would look at the defendant's criminal history:

So I always look at the record and see what the history is. If they've got a history, a pattern of committing these sorts of offences then how often, when? If they're quite old you've got not as much of an argument to say that they're likely to commit it again. So yes, the record is important, you know, for your argument (LN 152, England, AP 028).

This disparity is likely to be rooted in the differences between the offending exceptions in England and Canada. As was discussed previously, the law in Canada requires court actors to demonstrate that the defendant would be a risk to public safety not just that they might commit another offence. The court commonly noted this during the proceedings. For instance, in a contested hearing involving break and enter allegations, the court stated that *they must consider whether detention is necessary for the protection of public as it is not just about reoffending. The defendant is entitled to reasonable bail* (Contested Hearing 42, Canada).

This does not suggest that court actors in England failed to consider the degree of harm caused by previous convictions on the record, but rather that, unlike in Canada, they did not have to address it in order to satisfy the requirements of the exception. In practice, prosecutors were consistently observed to discuss

the presence of violence in the defendant's record in order to further aggravate its impact. For example, in a contested hearing involving allegations of an unprovoked attack on a stranger, the prosecutor argued that *the defendant had a previous conviction for an offence of violence* (Contested Hearing 330, England). This information was used both to highlight the similarities in their record with the current allegations and to demonstrate the defendant's propensity for violence and thus their threat to public safety. This finding is consistent with Morgan and Henderson (1998), who found that, in practice, the court considers how much harm the offending would cause when applying the offending exception in England. However, given it was not *necessary* to demonstrate potential harm when framing the bail risk, this was unsurprisingly less of a focus of both the interviews and the observations in England.

In sum, discussions surrounding criminal history in both jurisdictions were found to centre on whether the defendants were likely to commit further offences should they be released on bail, with, particularly in Canada, an emphasis on potential threats to public safety.

Bail History

While criminal history often occupied a central part of the discussion in England and Canada, bail history tended to be discussed less often (see Table 5.2). For the purposes of this research, a defendant's bail history is defined as their compliance with current and previous bail orders – both in terms of refraining from further substantive offending while on bail and adhering with criminal justice obligations such as appearing for court and complying with conditions. Bail history was never mentioned independently from other characteristics in Canada (out of 61 cases) and was only mentioned independently twice in England (out of 89 cases). This was less than any other characteristic with the exception of personal circumstances. In addition, it was listed as the 'most important factor' infrequently during the interviews in both jurisdictions. This

suggests it was rarely the sole focus of discussions surrounding bail, but rather was used to supplement other characteristics.⁵⁷

While bail history was not the primary focus of discussion in either jurisdiction, it was addressed slightly more often in England than in Canada (see Table 5.2). This may be because, despite political incentives in both jurisdictions to limit offending on bail (Hucklesby & Marshall, 2000; Webster, 2015), these attempts resulted in more material attempts at reform in England, where committing an offence on bail was added as an exception for refusing bail (Bail Act 1976, Schedule 1, Part 1). While previous research suggests that it was the underlying political and media attention predating this issue that influenced the decision-making of court actors rather than the legal reform itself (Hucklesby & Marshall, 2000), this increased focus sheds some light on why this issue may have been discussed more by court actors in England than in Canada. It also explains why court actors may have discussed criminal history less often in England than in Canada. Indeed, the observations suggested court actors in England would often discuss the defendant's record of offending on bail rather than their convictions more broadly, which was not the case in Canada. For instance, one prosecutor in England claimed they would look for asterisks on the record, which were used to indicate offences on bail in this jurisdiction:

Literally you go through the record and look down for asterisks, hoping that there's going to be asterisks against recent offences because obviously that's a more persuasive argument, if they've recently committed offences on bail, whether the present offence is committed on bail (LN 386, England, CPS 024).

When bail histories were discussed, concerns surrounding further *substantive* offending were the primary focus of the discussions in both England and Canada. Substantive offences are distinct from offences against the administration of justice in that they do not relate to offending that is exclusively tied to a failure to comply with court orders. For instance, while failing to

⁵⁷ It is notable that this finding is inconsistent with previous research exploring the English bail process (Hucklesby, 1996), which found bail history to be prioritised by court actors. While it is possible that when court actors discussed the 'record' broadly in court and during the interviews it may have been that they were referring to bail history rather than criminal history and simply did not make the distinction, it is also possible that practices have changed in the last few decades. Future research should explore this gap more thoroughly.

surrender at court or the police station is technically an offence in England, it is a 'secondary' administration of justice offence in that it relates to obligations to the criminal justice system as opposed to 'primary' substantive offences such as, for example, theft or assault. An analysis of the discussions observed in court suggested that, when bail history was discussed, court actors were more likely to focus on alleged or demonstrated substantive offences committed on bail than failures to adhere to criminal justice obligations.

The court observations revealed that there were a total of 40 instances in which bail history was mentioned in Canada (in 61 cases) and 93 such instances in England (in 89 cases).⁵⁸ Of these 40 instances in Canada, 60% (n=24) related to discussions surrounding alleged or substantive offending on bail while in only 40% (n=16) of cases did these discussions surround the failure of the defendant to comply with conditions or attend court. Similarly, of the 93 instances in which bail history was mentioned in England, 59% (n=55) related to alleged or demonstrated offending on bail while only 41% (n=38) related to failures to comply with conditions or attend court. Taken together with the frequency with which court actors discussed previous convictions more broadly, this suggests the focus of discussions surrounding their records related to offending more than compliance.

In England, the prioritisation of offences committed on bail was also substantiated by the interviews, in which many court actors claimed that defendants who reoffended on bail were treated more harshly than those that failed to comply with conditions or attend court. For example, a District Judge in England made the following comment:

... [defendants] are more likely to come back [to court in custody] just as an isolated breach rather than new offence as well, and so in those situations, where it is purely a breach of their bail conditions, I think most judges tend to give people a second chance. I don't like it when advocates say, "this is their first breach," as if, automatically, they're entitled to one breach, but the reality is that usually you give people a second chance, and if you didn't the prisons would just be absolutely overflowing (LN 333, England, DJ 13).

⁵⁸ Note that there could be more than one instance of bail history being mentioned in one case.

This District Judge suggested that a defendant's bail history is sometimes considered alongside institutional concerns, such as prison overcrowding. It would seem that when considering the size of the prison remand population, defendants accused of failing to comply with conditions are generally considered better candidates to divert from custody than those who allegedly reoffended on bail.

When failures to comply with bail conditions did raise concerns, the primary focus appeared to be on the potential for harm as opposed to the failure to respect court orders. Indeed, the interviews suggested that court actors were more likely to have concerns in relation to breaches that compromised the safety or security of victims, witnesses and the public than those that indicated a lack of adherence with criminal justice obligations. While most magistrates and judges suggested all breaches were taken seriously, they did concede that the circumstances surrounding it would influence their decision. For instance, a magistrate in England said:

I think a breach is a breach, because what we do in magistrates' is take all bail conditions as serious. Now don't get me wrong, on a practical level, if somebody's breach is they've interfered with a witness and intimidated the witness, then the severity of that would outweigh somebody's who's meant to report to the police station at 10 AM and reports at 10.30, but it's a breach, and I do tend to take it seriously because a bail condition is there for a reason, and if you're given bail then you have to comply with the conditions (LN 176, England, MAG 014).

Like this magistrate, most judicial officials that were interviewed regarded some breaches to be more serious than others. For instance, one District Judge in England suggested that they conceptualised breaches on a continuum:

Yeah, because you can have breaches from turning up half an hour late to sign on at the police station, to going round and knocking on someone's door and shouting through the letter box, so those there's a whole continuum of breaches really (LN 140, England, DJ 11).

Clearly, harm is a major factor in court actors' assessments of seriousness when they are making decisions surrounding breaches. This may be because interference with victims and witnesses are more likely to compromise public

safety, a priority central to both the Canadian and English criminal justice rhetoric (Sanders et al., 2010; Webster, 2015).

Following the same pattern as criminal history, the findings suggest that concerns surrounding bail history primarily focus on the risk of further offending, and in particular harm. Despite the relationship between bail history and absconding (i.e. failing to adhere to court orders), which also encompasses an exception to bail in both jurisdictions, offending and harm were still the primary focus of these concerns.

Constructing case 'types'

While each characteristic was ascribed some degree of individualised importance, in practice the bail risk was established by evaluating the intersection of a number of these factors (Hucklesby, 1996; Morgan & Henderson, 1998). The findings suggest that, across both jurisdictions, the court actors relied heavily on a combination of the defendant's history of previous offending and the current allegations. The allegations consist of information related to the alleged offence or breach, including its perceived seriousness and the strength of the evidence. Unlike the vast majority of the criminal and bail history, the allegations are not yet proven. As such, while the law provides for them to be considered in both England and Canada, they cannot be used, in of themselves, to refuse bail. As such, court actors in both jurisdictions reported that much of their decision-making process in relation to aggravating the bail risk involved balancing the allegations with criminal history, and occasionally, bail history. The importance of this balancing act was voiced by a District Judge in England:

So I suppose one could say that if somebody appears before the court with no previous convictions, never been in trouble before, that's a significant factor to take into account. But if they're charged with a particularly serious offence with strong evidence against them, then that balance would shift (LN 058, England, DJ 11).

The balancing of these characteristics led to court actors in both England and Canada forming an informal categorisation system for the cases entering the court. This suggests that, as Sudnow (1965) has argued, the court actors had a

tendency to categorise cases based on what they perceived to be 'normal.' As such, they viewed cases according to what they believed were their typical features. In the same way that court actors develop 'going rates' for particular types of cases during sentencing (Eisenstein & Jacob, 1977), the potential bail outcome of different categories of cases would be decided based on their perceived 'type.' These shared ideas of case classifications were generally a product of a number of factors in addition to the allegations, including the criminal history and personal circumstances. An example of how these categories were established is illustrated by examining the statement of one duty counsel in Canada:

I guess people just sort of tend to fall into a couple different categories...There's the case where people have a lot of underlying issues that are bringing them into conflict with the criminal justice system. So whether they're guilty of this particular offence or not, that would be like drug addictions, other mental health issues, homelessness, for all property related and sort of violence related offences, usually drug and alcohol for violence offences ... And then there's the people where it's just like this is their first time coming before the court and it's not really that there's like compound factors that are bringing them into conflict with the law, but it's just like one thing... (LN 535, Canada, DC 003).

This duty counsel described two 'types' of cases that were common to the court in Canada. They were defendants with long records who committed a series of minor offences and those who have no records but committed a serious offence.

This categorisation dictated not only how cases meeting the criteria were viewed, it was also used to assess their level of risk. For instance, one prosecutor in England described the risk that specific types of defendants would continue to commit offences:

So, dealing with the typical sort of things, for example, burglars, they've got a history of burglary, very often – I don't want to make it sound like it's a generalisation – but very often there are problems with addiction in the background and there is a high risk that they will continue to commit that sort of offence, especially if they are on – and the police can often say – his intention is linking to this, this, and this, even if they can't provide the evidence of it yet, especially if there's indication they were on a spree of some sort (LN 377, England, CPS 27).

This categorisation of defendant based largely on the offences they were charged led to perceptions that certain ‘types’ of defendants would receive specific bail outcomes. This was explained by one duty counsel in Canada:

I actually don't think the [Criminal] Code itself sets out that people should be detained at length or that they should be detained for the kind of things that we detain people for. I don't actually think that's what the Code says. But I think we've just got into the habit of kind of like 'well we regularly detain people for that so I guess we will.' It's hard to kind of change out of your habits (LN 159, Canada, DC 002).

As this duty counsel argued, the tendency to categorise cases according to their typical features is potentially problematic. This is because it could lead to blanket characterisations of certain groups. Since the law dictates that the allegations should not be relied on alone, this categorisation system was particularly problematic when the categories were based exclusively on the allegations. This was acknowledged by several court actors. For instance, a defence counsel in Canada suggested that allegations were assessed independently on some occasions:

...you know what's interesting, is you have a really, really serious charge, but the guy doesn't have a criminal record. Then how do you have any basis to assume that he's going to breach any of his bail conditions, right? And too many Crowns will actually say 'oh these are very serious charges, etc.'... (LN 162, Canada, DEF 005).

This assessment was supported by the observations, where it was found that allegations were the only characteristic mentioned in four cases in Canada (out of 61 cases) and six cases in England (out of 89 cases). This suggests that, although it was infrequent, there were instances in which discussions were taking place based on unproven allegations alone. One area in which this was reported to be especially prevalent was in relation to allegations involving domestic violence. This reflects increasing concerns surrounding this type of offending in both England and Canada.

Domestic violence allegations. Domestic violence has gained increased political attention in the last three decades in both England and Canada (Ellison, 2003; Hoyle & Sanders, 2000; Johnson, 2006; Johnson & Fraser, 2011;

Sanders et al., 2010). Indeed, there have been increased attempts to better deal with what is now viewed as a pressing social issue.

In England, circulars went out in the early 1990s and early 2000s that first, urged police to take more of an interventionist approach (Home Office, 1990), and second, adopted a near-mandatory arrest policy for domestic violence cases (Hoyle & Sanders, 2000). More recently, the Domestic Violence, Crime and Victims Act 2004 sent a signal to police that they should take domestic violence more seriously. Pro-charge policies have also developed alongside pro-arrest policies. The CPS was first encouraged to proceed with all cases in the event they passed an evidential test and later developed a strategy based more on female empowerment, providing support for victims and reducing the extent to which they had to choose between violence and difficult social and financial circumstances (Hoyle & Sanders, 2000). More recently, strategies have developed to enable evidence to be provided in less stressful circumstances – albeit, perhaps problematically, while continuing to rely on victim testimony (Ellison, 2003).

In Canada, pro-charging policies in the 1980s removed the burden of the decision to lay a charge from the victim and laid it on the police and prosecution (Johnson, 2006). In addition, no-drop prosecution policies have been implemented and specialised domestic violence courts were created to target the issues that were unique to these cases. The province of Ontario had the largest roll-out of specialised court processes, with a 'Domestic Violence Court' that attempts to better facilitate domestic violence cases, provide early intervention, increase offender accountability, and provide increased support for victims (Johnson & Fraser, 2011). These interventions primarily attempt to deal with the issue of domestic violence through strategies surrounding arrest and prosecution. Ultimately, across both jurisdictions the increased focus on domestic violence reflects a broader focus on victims and public safety during the criminal justice process.

The findings suggest that the increased focus on domestic violence has had a significant impact on the bail decision-making process in both jurisdictions. Court actors would often describe how these cases were given special attention

and handled differently than other matters. This is not unique to the bail process, as differential treatment of domestic violence has also been found in relation to other summary procedures, such as mode of trial (Cammiss, 2006b). In England, a specific court was set up to deal exclusively with domestic violence bail cases once a week in order to deal with the high volume of these cases. A prosecutor in England described how they would remind the court about the unique characteristics of these cases and the new exception under LASPO relating to them:

So reminding benches of that particular power interplay and reminding them that domestic abuse is very different to any other sort of offending they deal with and then talking to them about the [LASPO] domestic violence exception, as I said, it suddenly has led to this sea change where people were being remanded where they would never have been remanded before. And assuming that the account that the complainant gives in her account is true, and isn't the work of fiction, I would say rightly so. Because they pose a risk, a substantial risk, to the person that they are in that relationship with (LN 138, England, CPS 027).

This prosecutor explained that the LASPO provisions have increased the extent to which courts could remand defendants in custody who were charged with domestic violence offences. This change tended to be viewed positively by prosecutors and judicial officials in England since, like this prosecutor mentioned, defendants charged with domestic violence offences were seen to be a bail risk in terms of the potential harm they might cause. This sentiment was in line with several of the other prosecutors and even a few defence solicitors, who consistently argued that these cases should be treated with caution on account of the potential risks to the victim.

Some defence solicitors, however, felt as though domestic violence cases were treated with excessive caution and were handled according to their 'domestic' characterisation rather than on the merits of the case. For instance, one defence solicitor in England argued:

I think there's a hard line view in sexual and domestic violence cases; they, I think the sea change has been a very negative one in the sense that regardless of the background, whether there is antecedent history or not, [the CPS] tend to go for remand. And I think that's policy; it's just something we're seeing more and more of (LN 500, England, DEF 019).

This was also largely the opinion expressed towards the handling of violence cases in Canada. For instance, once defence counsel in Canada made the following statement:

Ten years ago police officers could walk into a domestic situation, separate the husband and wife, tell them to cool down, and everybody could go home. Bob's your uncle. Now the police have no discretion. They have to make an arrest and then they have no discretion to release from the station. They have to put that person through a show cause hearing because the Crowns are mandating that that person no longer be released on an own recognizance, but on a surety bail, and the only place you can do that is in court. So that's clogged the courts up (LN 214, Canada, DEF 005).

Unfortunately, it was unclear how the prosecution viewed domestic violence cases in Canada given they were not interviewed. However, the court observations suggested they held a view similar to the prosecution in England, as general comments were commonly made about the domestic nature of the case. For instance, in one case the prosecution claimed that the case involved *a domestic assault, not an isolated assault where parties cool down*. He suggested that *domestics were emotional and involved family issues* and that by their very nature they *create higher secondary* [i.e. the offending exception] *concerns* (Contested Hearing 125, Canada). This suggests that the risk of further offending was also seen to be associated with domestic violence cases in Canada.

The two jurisdictions both appear to have developed routines with regards to the way in which they handled specific types of allegations. While they may not discuss the allegations to the same extent (see Table 5.2), they both developed standard ways of dealing with 'normal' cases. As evidenced by the focus on domestic violence cases, the 'types' of defendants that were thought to be more likely to continue to commit offences and, in particular, those who were thought to be likely to cause harm, were often viewed to be the biggest bail risks. In domestic violence cases, these general attitudes appear to have intersected with the recent legal changes brought about by LASPO and the current political and social climate to produce a particularly cautious approach.

Mitigating the bail risk

While the way in which bail risks were aggravated was broadly similar in England and Canada, the tools used to mitigate these risks were found to be considerably different. It will be demonstrated that it is these differences that largely accounted for the varying frequencies with which the characteristics were discussed between jurisdictions. This was particularly the case in relation to personal circumstances, allegations, and the bail plan. While both groups of court actors sought to minimise concerns surrounding the offending-related behaviour discussed above, they generally undertook divergent strategies to do so.

It is not suggested, however, that there were no similarities in the way that risk was mitigated across the two jurisdictions. For instance, one common, and perhaps unsurprising, approach that was used in both England and Canada was simply to highlight the absence of any aggravating factors. For example, if the defendant did not have a record, was not on bail, or was charged with a minor offence, this was often something the prosecution or defence might highlight in the event they were arguing that bail was appropriate. This was especially the case in Canada, where as Chapter Four discussed, a considerable proportion of the defendants entering the court in custody did not have a criminal record.

In the main, however, court actors in Canada tended to take an individualised approach to mitigating risk, discussing the personal circumstances of the defendant and using detailed bail plans to alleviate concerns surrounding the bail risk. In comparison, court actors in England offered alternative narratives about the offence itself, applied more formulaic bail plans, and uncommonly discussed the personal circumstances of the defendants.

Alternative narratives

A common approach of the defence in both England and Canada was to present an alternative narrative from that which the prosecution put forward. As Cammiss (2006a) explained, in reference to mode of trial, this would involve

offering alternate explanations as to why the alleged events took place. The findings suggested, however, that the court actors took different approaches to this strategy across the two jurisdictions. Specifically, in Canada they tended to offer an alternative view of the defendants, and thus their personal circumstances, whereas in England they primarily focused on the case, addressing the allegations. This is illustrated, first, by examining the extent to which both of these characteristics were discussed in each jurisdiction.

The findings suggest that court actors in Canada ascribed more importance to personal circumstances than their counterparts in England whereas court actors in England ascribed more importance to allegations (see Table 5.2). This is consistent with previous research (Hucklesby, 1996), which found that personal circumstances were discussed infrequently in England. In comparison, the allegations were discussed more often than any other characteristic in England, and they were named as the 'most important' characteristic in the decision-making of court actors the most often in interviews, tied with criminal history for the most commonly cited factor. This is consistent with previous findings, which argue that the nature and seriousness of the offence was an important influence on the remand decision in England (Hucklesby, 1996). This was not the case in Canada, where allegations were the least mentioned characteristic and were infrequently cited as the 'most important' characteristic for consideration by court actors in the interviews.

In offering an alternative narrative related to personal circumstances, the court actors would discuss information surrounding the defendant's life outside of the criminal justice system including mental health or addiction issues, engagement with employment or education, ties to the community, and miscellaneous other issues related to personal lifestyle. The defence often included them in order to present the defendant in either a favourable or sympathetic light.

It was the norm in Canada for defence solicitors to mention personal circumstances in order to mitigate concerns associated with the criminal history, bail history or allegations during contested hearings. They might point to strong community ties, a willingness to attend rehabilitation, or stable employment. This approach was consistent with a broader individualised approach to bail in

this jurisdiction. Kellough and Wortley (2002) found such an approach to exist in their examination of the factors that impacted bail outcomes in Canadian courts. Specifically, they found that assessments of the character of the defendants were related to their likelihood of custody even when case characteristics were controlled for in the analyses. The current findings suggest this approach is also applicable to court actors' discussion of defendant and case characteristics. The objective of the defence was to direct the court away from factors considered to be high risk, such as extensive criminal records or serious allegations, and offer an alternative view of the defendant. One defence counsel in Canada described how they might use personal information to strengthen their arguments:

The person's ties with the community, right. Their family life, their age, if they work. All very important stuff. If you can paint the person, right, if you can paint a picture for the court that the person is generally a family guy that has never been in trouble, you know, even if they're serious charges, I think it goes a long way (LN 252, Canada, DEF 004).

This approach was also observed to take place in England, although to a much lesser extent. When personal circumstances were discussed, they almost exclusively pertained to community ties or mental health and addiction issues. While some defence solicitors claimed to put this information forward, others expressed some reservations with this approach. Although they accepted it was taken by some of their colleagues, they presented an alternative viewpoint:

...there's only so many times you can give the sad excuses for their conduct because ultimately he is someone who has repeatedly had court orders that he has breached, repeatedly failed to surrender, repeatedly committed offences and offences on bail; you know, I think even the courts begin to recognise the reoffenders when it's in that position (LN 459, England, DEF 019).

This defence solicitor suggested that trying to portray the defendant in a sympathetic light was not appropriate in all circumstances, highlighting that this approach would likely be ineffective if the defendant was a regular offender. Furthermore, several District Judges claimed that they did not heavily weight personal circumstances. Two out of the three District Judges expressed that they did not highly value this factor. For instance, one District Judge in England made the following statement:

I would be very disappointed with myself if I allowed a person's personal circumstances to influence, are they in employment or not, that sort of thing, but that shouldn't influence a bail decision unless it has some relevance to the offence charged (LN 140, England, DJ 013).

The minimal influence of personal circumstances during the bail process is in line with previous research (Hucklesby, 1996). It is likely that defence solicitors working in the English court would come to expect personal circumstances to have a limited impact on the bail outcome if District Judges were not receptive to discussions surrounding this issue. Since, as Church (1985) suggested, court actors adapt their working practices to fit with the expectations of the court, it would be unlikely to emphasise a factor that they knew would not carry much weight. In addition, as Chapter Four indicated, defence solicitors in England were shown to be cognizant of their credibility during bail proceedings. Presenting information that was known to be considered superfluous by District Judges would likely be perceived to compromise such credibility.

Rather than focusing on the defendant's personal circumstances, defence solicitors in England were much more likely to offer an alternative narrative of the allegations themselves. The fact that defence solicitors were using allegations to mitigate bail risks in addition to prosecutors using them to aggravate it can perhaps explain why they were the most frequently discussed characteristic in England (see Table 5.2). Defence solicitors reported that this was thought to improve the chance that the court would release their clients. For example, a defence solicitor explained:

If it looks like they've got an alibi, if it's all sounding very reasonable, very plausible, not a waste of time like it's all just a fantasy, then that will increase your chance of getting bail. And likewise obviously if it just sounds like it's made up and it's going nowhere and the evidence against them is stark and strong, then that's going to affect their prospects of getting bail (LN 344, England, DEF 022).

These findings departed from those reported in previous bail research in conducted in England in the 1990s, which found the defence was unlikely to present a competing narrative from that of the prosecution (Hucklesby, 1996). It may be that this shift occurred as a result of the increased pressure to reduce case processing times. As Chapter Two discussed, measures were put in place

in England following the Narey Report (1997) and subsequent initiatives that were intended to enable court actors to deal with cases as quickly as possible. Defence solicitors explained that the current expectation was for them to outline their case in the first appearance. For instance, one defence solicitor in England reported:

So don't forget, we never used to have to nail our defence to the mast either in a written document at the first hearing, which we do now (LN 274, England, DEF 023).

As Chapter Six will discuss in more detail, bail in England was often discussed at the same time as other matters related to the case, such as the plea or the venue of the next appearance. This meant that, as the defence solicitor reported, the defence frequently presented an alternative version of the allegations in contexts unrelated to bail. Since this information was revealed to the court in any event, it could easily achieve a dual purpose and be used to refute the synopsis put forth by the prosecution in an effort to question the strength of the evidence for the purposes of bail.

This was not the case in Canada, however, where the details of the allegations were uncommonly made a central part of the discussion by the defence. In fact, in many cases defendants or sureties attempting to speak about their version of events were actively stopped by the defence or the court and reminded that was a 'matter for another court.' For instance, in one contested hearing the court commented that *these are allegations, they have not been proven in court. This is not a trial but a bail hearing. My job is to decide whether the accused can be released into community* (Contested Hearing 125, Canada). As such, although they were discussed by the prosecution in order to aggravate risk, and by the defence in terms of the seriousness or strength of the synopsis, the defence's version of events was mostly considered inappropriate to address at the bail stage. Their limited discussion of the allegations can perhaps explain why allegations were discussed much more often in England compared to Canada.

Ultimately, the presentation of both personal circumstances and allegations was an opportunity for the defence to 'even the score' in terms of the portrayal of their client and bail cases. In particular, it enabled them to offer competing

narratives that suggested the defendant was not violent or likely to reoffend. However, while the same objective was shared across both jurisdictions, the means by which it was sought diverged in accordance with the norms that had established in each court.

Bail Plans

The other way in which bail risk was mitigated in England and Canada was through a potential plan of release or 'bail plan'. In order to account for differences between jurisdictions, a wide definition of the bail plan was employed. This included proposals for where the defendant would reside, bail conditions they were to be subjected to, and whether they were to be supervised in some capacity in the community. Taken together, they represented proposed alternatives to custody that were intended to alleviate the concerns of the prosecution and the court. A strong bail plan was thought to alleviate the risk of releasing the defendant into the community and was thus critical to a remand on bail in the event the court had concerns that were not mitigated by the other factors. Although the general concept of a plan of release was found to be common to both the Canadian and English court, this section will demonstrate that the nature of those plans and the extent to which they were discussed differed drastically.

In Canada, the bail plan was discussed more than any other factor during bail appearances (see Table 5.2) and was also cited as the 'most important' consideration often in the interviews. Bail plans in Canada generally involved sureties and large numbers of conditions were commonplace. In addition, agencies offering counselling, mental health services, or bail support were frequently included. In contrast, the bail plan was the factor discussed the second least frequently during bail appearances in England (see Table 5.2) and was cited as the 'most important' consideration infrequently during interviews. When bail plans were mentioned in England the discussions rarely included more than a suggestion of an address and the appropriate conditions.

An explanation for the disparities in the discussion of bail plans in England and Canada primarily rests on the norms that had developed surrounding them.

While, broadly speaking, they were both employed to mitigate risks associated with other factors, the purpose of the plan had evolved much further than this in Canada. In this jurisdiction the plan took a therapeutic role, aiming to - as some defence counsel claimed - 'fix the lives' of defendants who had not yet been convicted. This approach was argued to alleviate the offending exception as it targeted the underlying causes for offending. Given the extent to which these plans were tailored to each defendant, this further contributed to the individualised approach to bail in Canada. This would be accomplished by using a large variety of conditions as part of the plan. One duty counsel explained how they might use a detailed bail plan to address the offending exception:

Sureties are usually how the Crown wants to see secondary grounds addressed [i.e offending exception]. You know, somebody's out there watching them to make sure they don't do any further offences and to make sure that the public is safe. That's kind of the, the easy go to. Addressing any underlying issues is the next, you know, the big one. So, you know, bail program is going to help make sure that they're, you know, following on the right track. They're going to have regular appointments, they're going to get counselling of some variety, they have a mental health court worker in the community now who will be helping them with issues that may have led them to offend in the first place. Those kind of things. You know, so their circumstances are different than when they were alleged to have committed this (LN 455, Canada, DC 002).

The approach the duty counsel described has been called 'therapeutic conditioning' (Hannah-Moffat & Maurutto, 2012). It has been argued that, while these conditions are ostensibly imposed for the benefit of the accused person, in reality this also represents the exertion of a repressive form of power on behalf of the courts. As such, defendants were being 'helped' and controlled by the criminal justice system at the same time. This approach is likely a product of the intersection between risk management and the historical focus on rehabilitation in the broader Canadian criminal justice system (see Chapter One). Indeed, Hannah-Moffat and Maurutto (2012) suggest that such strategies represent both an extension of the punitive state through the use of therapeutic forms of coercion and innovations that challenge forms of penal excess and the use of custody as a crime-control solution.

As the duty counsel suggested, sureties were also central to bail plans in Canada. The imposition of a surety also took on a therapeutic role as it was thought to alleviate the offending exception. This is because sureties were expected to stabilise the defendants. Defence counsel argued that the expectation of a surety had become so commonplace that securing them was a standard part of their preparations. This was explained by one defence counsel in Canada:

I really do think it's just evolved that way because the Crowns take certain positions and when the Crowns start taking positions for detention, rather than having a guy detained you're going to say 'well I'll have a surety.' Even if you want to argue, even if it would be appropriate - like if I think there's a case where the guy really should be let out on his own recognizance - I'm still probably going to set up that surety as a failsafe ... I think defence counsel across the [area] just come prepared with sureties now because that's the way the positions have evolved. And so it's just become the standard practice now, sureties (LN 400, Canada, DEF 004).

Just as sureties had become the norm in Canada, so had the imposition of multiple conditions. As Chapter Four demonstrated, the defence would commonly propose conditions during negotiations as a means of securing a consent release. As was the case with sureties, the defence explained that they had simply gotten used to this practice. One duty counsel in Canada discussed this:

...you get used to just doing certain things, like you almost feel like you've - sometimes the Crown will kind of say write up what you're suggesting for conditions and I'll be looking at it and I'm like the only condition I can really think of is, maybe don't go to that particular store or something like that. But I almost feel compelled to add extra conditions because I feel if they just looked at it with just one condition they'd be like 'well that's not going to be enough.' So it's very like, you almost feel like you have to throw something else in there to make it look like there's more (LN 711, Canada, DC 002,).

In both of these scenarios, defence counsel would add increased restrictions to their proposed plan with the hope of obtaining a release. They explained that they would do this not as a result of a request on the part of the prosecution but because it was the *normal* thing to do. They expected sureties and multiple

conditions would be necessary so they pre-emptively proposed them to make the process run smoother.

Establishing a good plan was viewed as central to the decision-making process in Canada as it was the factor court actors viewed to be the most important to the court in securing a release. One duty counsel in Canada explained that they perceived these expectations to be more important to the court than the bail legislation:

So I don't think they're really relying that much here on ... the Criminal Code towards release and release without conditions. I just don't think practically speaking that's what they're, that's what's swaying them. I think what's swaying them is a good plan (LN 202, Canada, DC 003).

This view was shared by many of the defence counsel in Canada, agreeing that a good bail plan was often the factor that dictated the bail outcome. Importantly, the view was not that the law was being violated through this practice but that, consistent with previous research (Feeley, 1973), it was being applied alongside other considerations. As such, it is perhaps unsurprising that the entire workgroup behaved in a way that prioritised the bail plan.

In England, bail plans were conceived very differently than they were in Canada. In contrast to the aforementioned detailed, individualised plans, court actors in England tended to focus on a more predictable range of factors. Specifically, they tended to focus on the availability of accommodation and a narrow range of conditions.

The findings suggested that the main focus of the plan in this jurisdiction was the residence in which the defendant would live when they were released. This was because a residence was considered to be critical to the release of the defendant as it implied stability and increased the chances the defendant would return to court. One defence solicitor highlighted the importance of this factor:

Well the first thing I look for is an address because if we haven't got an address and they're no fixed abode then bail is not an issue (LN 339, England, DEF 019).

They suggested that it was unlikely that a defendant would be released on bail without an acceptable address. Several court actors suggested that the residences considered most appropriate were those that were far from the homes of any victims or witnesses. For instance, a court associate in England described how court actors took the proximity between the defendant and victim's residences into account:

...if it's a case where the defendant knows the complainant, it's often the proximity between them, the fact that there's a risk of committing further offences or interfering with witnesses when they're either geographically close or physically close, to the extent that they believe there will be contact no matter what (LN 153, England, CA 012).

As this court associate indicated, this was seen to be especially critical in domestic violence cases. Clearly, the safety of the victims was also afforded importance when the court was approving a residence.

The other aspect of the bail plan that was frequently mentioned in England was bail conditions. Unlike in Canada, there was broad agreement among the court actors that the conditions were generally narrowly focused and successful in targeting the appropriate risk factors. This may be a result of caution on the part of District Judges and magistrates in imposing conditions that were relevant to the case. For instance, one magistrate in England stated:

Conditions of bail are set for a reason and you don't just pluck them out of the sky. To say, "you must not see this individual or contact them in any way, shape or form," there's a reason for that, and similarly, keeping away from a particular address, and so providing there's an adequate reason to put that as a bail condition (LN 256, England, MAG 015).

This sentiment was also expressed by most prosecutors, who claimed they made efforts to suggest conditions that were directly related to the circumstances of the case. This stood in stark contrast with the aforementioned practice in Canada, where numerous conditions were suggested, often of an individualised or therapeutic nature.

Perhaps the most striking difference between the use of bail plans in England and Canada was the opposing attitudes towards sureties. In England, sureties were viewed to be useful in only exceptional situations, usually those involving

serious crimes. When court actors asked why this was the case, their answers tended to revolve around the means of the defendants. When one District Judge was asked about the imposition of sureties they responded in the following way:

I can't say I've never seen [a surety], I have but I've certainly, sitting as a Judge I've never had to consider it, it's never been offered as a bail condition and I think probably it's to do with the means of the defendants and their associates (LN 367, England, DJ 018).

The attitude this District Judge took towards sureties is one that has evolved in England over time. While sureties were traditionally the norm, their use declined since those with limited means were unable to find sureties with sufficient resources (Bottomley, 1968). Although sureties can still be imposed by law, this was certainly not viewed as standard practice. Another explanation for the limited use of sureties in England may reside in their purpose as stated in the English bail laws. As Chapter One discussed, the role of the surety is narrower in England, where their role is exclusively related to ensuring the defendant's attendance in court (Bail Act 1976, s. 3(4)). In comparison, their role in Canada extends to monitoring their actions and ensuring they abide by their conditions (Myers, 2009). As such, sureties are not associated with the offending exception in England, which the findings have suggested is the primary concern of the court actors.

In sum, the approach to the bail plan was shown to be much more formulaic in England than it was in Canada. The court actors in England concentrated on the residence of the defendant and targeted conditions that applied to the details surrounding the offence. In comparison, court actors in Canada created detailed, individualised plans for the release of the defendant, relying on sureties and large numbers of conditions in accordance with the norms of the court.

Summary

The way in which court actors discussed criminal history, bail history, and the allegations in England and Canada suggests that bail risk was conceptualised similarly across the two jurisdictions. While the court actors prioritised each of

these characteristics slightly differently, their primary concerns appeared to centre on the defendants' propensity for offending and the potential harm they could cause. As such, bail risk was primarily aggravated using offending-related behaviour. The way in which this risk was mitigated, however, differed considerably between jurisdictions. The separate routines that developed in England and Canada in relation to mitigating bail risks reflected the overarching context in each jurisdiction as well as the expectations and norms unique to the courts. Specifically, broader concerns surrounding early case processing in England and therapeutic justice in Canada contributed to their use of allegations and bail plans, respectively, as tools of mitigation. Further, court actors adapted their behaviour based on what they perceived to be the accepted norms. Ultimately, these differences led to an individualised approach to bail plans in Canada and a more formulaic approach in England.

Conclusion

This chapter has demonstrated that the defendant and case characteristics considered the most important to the bail decision-making process were those related to offending related behaviour. This is consistent with previous research that has emphasised the importance of such factors in the bail process on an international scale (Brown, 2013; Hucklesby, 1996; Morgan & Henderson, 1998), while this is the first known research to report these findings in Canada. The findings showed that the offending exception was applied more often than any other exception across both jurisdictions and that criminal history and bail history related to offending was prioritised by court actors. Furthermore, case 'types' that were thought to indicate a propensity for offending, in particular those involving domestic violence, were considered significant bail risks. Despite the parallels in the way that bail risk was aggravated, they were found to be mitigated dissimilarly in England and Canada. Court actors in Canada tended to take an individualised approach to minimising risk, prioritising personal circumstances and proposing detailed bail plans involving numerous conditions and the imposition of sureties. In contrast, alternative versions of the allegations and formulaic bail plans were generally applied in England.

The importance afforded to defendant and case characteristics was, in part, related to court culture. Specifically, the characteristics influenced court actors in accordance with the expectations and routines unique to each court. Court actors framed and presented information in accordance with the weight they perceived it would be given by the court and because it was in line with accepted norms (Church, 1985). As a result, they developed specific agreed upon routines which were perpetuated by the normalised behaviour of the workgroup (Lipetz, 1984). Court actors were found, for instance, to prioritise particular exceptions to bail, provide information about criminal history, and suggest specific components of bail plans because it was in line with what they perceived to be the standard practice in their court.

These norms did not, however, develop in isolation. The behaviour of court actors reflected values associated with the broader criminal process in each jurisdiction. For instance, the prioritisation of offending related behaviour reflected an increased focus on public safety and victims' interests, part of a shift in the criminal justice rhetoric towards 'tough on crime' politics and crime control values in both jurisdictions (Ashworth & Redmayne, 2010; Goff, 2017; Hucklesby, 1996; Sanders et al., 2010; Webster, 2015). There were, however, other values that diverged between jurisdictions. For instance, the tendency to use allegations as a tool of mitigation and to prioritise offending on bail in England coincided with managerialist early resolution initiatives (Narey Report, 1997) and crime control concerns surrounding 'bail bandits' (Hucklesby & Marshall, 2000). Furthermore, the individualised nature of the bail plans in Canada was characteristic of their use of 'therapeutic justice' initiatives (Hannah-Moffat & Maurutto, 2012), in line with a historical focus on rehabilitation and identifying the social causes of crime (O'Malley & Meyer, 2005; Webster & Doob, 2007).

Finally, the defendant and case characteristics considered and discussed were, in the main, in line with the bail laws in each jurisdiction. While there were a few occasions in which allegations were discussed in isolation despite the fact that the law did not provide for them to be the sole reason for a decision, the findings suggest that most of the decisions surrounding defendant and case characteristics were made within the wide confines of the law. Indeed, the

information discussed directly related to the considerations provided in the law and were framed by the exceptions to the right to bail in each jurisdiction. Furthermore, differences in the formulation of the offending exception and the purpose of sureties did appear to point to slightly different decision-making between jurisdictions, suggesting court actors took these laws into account. This points to the likelihood that different approaches are a reflection of the flexibility of the laws (McBarnet, 1981; McConville et al., 1991) rather than a signal that court actors are not following them.

Chapter Six:

Justice Delayed is Justice Denied? Examining Attitudes Surrounding Case Processing Time

Introduction

The preceding analysis has examined the bail process in terms of the decision to remand defendants in custody or on bail and the defendant and case characteristics used to make these decisions. This chapter takes a different approach, moving away from decisions that directly determine the liberty of the defendants and instead focusing on those that establish the length of case processing time. It asserts that bail decision-making is influenced not only by its content but also the speed with which it is perceived to take place. This is because attitudes surrounding the appropriate case processing speed shape the informal practices in each court (Church, 1982, 1985), dictating the volume of information discussed, the nature of the procedures used to acquire information, and the number of appearances considered appropriate to complete the process. Ultimately, these factors will determine the time required to complete the bail process and thus how long defendants spend in custody awaiting a determination of bail.

Previous research has demonstrated that court culture has a substantial impact on the efficiency with which courts operate (Church, 1978; Klemm, 1986; Mahoney, 1988). This is because, although it was traditionally assumed that the efficiency of a court was shaped by resources and formal rules and procedures (Church, 1982), empirical research has cast doubt on this assumption, revealing that case processing times vary considerably across courts with almost identical structures, caseloads, and resources (Church, 1982; Messick, 1999). Given these findings, studies began to focus on less formal aspects of court procedures in attempts to explain case processing times (Church, 1978; Klemm, 1986; Mahoney, 1988). Although their conclusions do not suggest explanations based on resources and formal rules are unimportant, they do indicate that these factors 'operate through a comprehensive system of informal

relationships, norms and practices of court practitioners' (Church, 1982, p. 398). These findings relate not only to court efficiency generally, but also to the bail process specifically as the speed with which cases move through the bail process has been shown to associate with informal practices associated with the culture of the court (Myers, 2015; Webster, 2009). However, while previous research focuses primarily on the impact of culture on court efficiency, the current research views the issue more as a feedback loop. This perspective concedes that culture impacts case processing times but argues that the extent to which these practices are accepted by court actors in turn influences their decision-making process and reinforces court culture (see Church, 1985; Hucklesby, 1997a). As such, attitudes towards case processing will be examined in terms of their impact on the bail decision-making of the court actors.

It is argued that the attitudes court actors develop in relation to court efficiency have a major impact on the bail decision-making process. Specifically, shared ideas as to how fast cases should move through the bail process shape the behaviour of court actors. The analysis will reveal that the conceptualisation of the bail process as a summary procedure in England stands in contrast to the mentality in Canada, where bail was viewed as a longer, more drawn-out process. These opposing attitudes shaped the informal practices in each court and ultimately the nature of the decision-making in each jurisdiction.

This chapter begins by outlining the relevant laws in England and Canada that relate to bail case processing, demonstrating the similarities between the two jurisdictions and calling into question the extent to which they are effective. It will then examine the way in which the bail process is conceptualised in both jurisdictions, discussing views on appropriate case processing times and the extent to which bail is considered an insular or integrated process. These views will then be examined in relation to informal practices in each court. Specifically, the information required to complete the process, the procedures undertaken, and the use of adjournments will be discussed.

Bail laws governing case processing time

The bail laws related to case processing time in England and Canada are broadly similar both in substance and scope, although they do diverge in terms of their use of time limits. While both jurisdictions have put guidelines in place to restrict the time defendants spend in pre-trial custody, the following discussion calls into question the extent to which these laws are effective in doing so on a consistent basis.

First, both jurisdictions indicate how much time can elapse between the detention of the defendant by the police and their first appearance in court. In Canada, Section 83.3 of the Criminal Code states that following the detention of a defendant by the police, they must be brought before the court within 24 hours, unless a judicial official is not available, in which case as soon as feasible. Section 516(1) further specifies that a prosecutor can apply to adjourn bail proceedings, but for no more than three days unless the consent of the defendant is obtained.

Similarly, in England, the defendant is not to be kept in police detention for more than 24 hours without being charged (Section 41, PACE)⁵⁹ and if a defendant is detained following charge they must be brought before a court as soon as practicable, and in most cases, no later than the first sitting after charge (Section 46, PACE 1984). Schedule 1, Part 1, Section 7 of the Bail Act 1976 also allows for a subsequent adjournment, indicating that a case can be adjourned for inquiries or a report if it appears to the court as though it is impracticable to complete the inquiries or report without keeping the defendant in custody. However, unlike in Canada, no number of days is specified. In the event that the defendant is brought before the court for a breach of bail in England, case law arising from *R v Culley* [2007] indicates that the breach must be dealt with within a 24-hour period, arguing that simply bringing the defendant before the court in this time period is not sufficient.

⁵⁹ This can be extended to 36 hours by a police superintendent and up to a maximum of 96 hours by the magistrates' court.

The jurisdictions diverge substantially in terms of the amount of time defendants are able to spend in custody during the court proceedings. In England, custody time limits were introduced in the Prosecution of Offences Act 1985 that restricted the amount of time defendants could spend in custody from their first court appearance until either trial or committal. In magistrates' court, summary offences and either way offences both typically warrant 56 days in custody between first appearance and summary trial.⁶⁰ In Crown Court, both either-way offences and indictable offences warrant 182 days from the day the case was sent to trial until the beginning of said trial, less any time spent in magistrates' court. Unless the CPS successfully requests to extend these limits, the defendant must be released on bail at the conclusion of the specified time period (Part 14, Rule 4.18, The Criminal Procedure Rules). Samuels (1997) has argued that actors have striven to conform with the limits but that extensions are typically granted when they are requested and warned that the maximum time limit might become the norm, thereby lengthening the time taken to complete some cases. Further, audits conducted in the last decade have indicated that, while the situation is improving, the CPS compliance to the custody time limit standards varies across locations and there are numerous 'failures' in their effective monitoring (HM Crown Prosecution Service Inspectorate, 2010, 2013).

In contrast, Canadian courts have historically been reluctant to impose any strict limitations on the time available to process cases. Although the Supreme Court of Canada addressed the issue of time limits in *R. v Askov* [1990] and *R v Morin* [1992], these cases were largely considered to be ineffective in addressing the issue of unreasonable delay in Canada (Standing Senate Committee on Legal and Constitutional Affairs, 2017). It was only recently, in *R v Jordan* [2016], that stricter limitations were put in place. In this case the court asserted that bail and custody cases must be processed in 18 months (from charge to resolution) in provincial court and 30 months in superior court. When the case processing time exceeds these guidelines, the case should be stayed (i.e. the proceedings halted). However, there are several exceptions to those guidelines, including cases in which the defence caused the delay or if the circumstances were

⁶⁰In the case of either-way offences, if the court does not move to trial in the first 56 days the time limit is extended to 70 days. Thus, 70 days could also elapse between first appearance and committal if the case is sent to Crown court.

particularly complex. Unlike in England, however, there are no specific guidelines related to defendants in custody.

Given that the bail decision is typically made at the outset of the court process it would be unlikely that the time limits in either jurisdiction would elapse before an initial determination of bail is made. As such, these time limits are unlikely to affect the bail proceedings directly. While it is conceivable that the restrictions could shape the court actors' attitudes towards efficiency more broadly throughout the entirety of the court process, the extent of this impact is unclear given the issues surrounding custody time limits in England (HM Crown Prosecution Service Inspectorate, 2010; Samuels, 1997) and the previous ineffective attempts to change attitudes surrounding delay through case law in Canada (Standing Senate Committee on Legal and Constitutional Affairs, 2017).

While the laws in both jurisdictions provide direction in terms of the length of time defendants can spend in pre-trial custody, they still allow for exceptions in relation to both the time in which a bail decision must be made (with the exception of decisions related to breaches in England) and the length of time defendants can spend in custody more generally. Given this flexibility, it is perhaps unsurprising that, as Chapter Two demonstrated, actual practices surrounding case processing times have been shown to vary between jurisdictions. Specifically, while Canada's bail process has been shown to require multiple appearances (Myers, 2015) and lengthy procedures (Canadian Civil Liberties Association, 2014; Myers, 2009), the bail process in England is often conducted in a short period of time (Dhami & Ayton, 2001; Doherty & East, 1985; Zander, 1979), involving what has been called 'speedy, slipshod decision-making' (Sanders, Young, & Burton, 2010, p. 536). The subsequent discussion will demonstrate the extent to which these disparities are reflected in the decision-making of the court actors.

Conceptualising bail in England and Canada

Despite the similar laws surrounding case processing in England and Canada, the discretion afforded to court actors permitted a very different

conceptualisation of the bail process in each jurisdiction. Indeed, the very idea of what the bail process entailed differed considerably. The following sections will demonstrate how these conceptualisations differed in terms of the amount of time expected to complete the bail process and how it fit into the broader court process. As such, this section focuses on the *perceptions* of court actors in relation to bail case processing.

Views on case processing time

This discussion will illustrate that bail was viewed as a more lengthy process in Canada than it was in England. This perspective encompassed both the length of time required to complete bail proceedings and the number of appearances required to obtain a bail decision. Indeed, while, in England, the bail process was viewed as a summary procedure, intended to determine the liberty of the accused in a timely fashion, it was viewed as a much longer process in Canada, sometimes referred to as a 'mini-trial'.

Bail appearances were perceived to take longer in Canada than they were in England largely as a result of the amount of time required to complete contested hearings. This divergence in view did not, however, extend to uncontested appearances. In the latter cases, in which the prosecution and defence agreed on the bail outcome, proceedings were typically straightforward and quick in both jurisdictions. This is because, as Chapter Four demonstrated, there was minimal disagreement on behalf of the court and, as Chapter Five demonstrated, very few defendant and case characteristics were discussed. Where substantial differences did lie, however, was when the prosecution and defence disagreed. Although contested hearings took longer than uncontested appearances in both courts, the length of time required to complete them was much longer in Canada than it was in England. This was witnessed in the observations and substantiated in multiple interviews. For example, a defence counsel in Canada described contested hearings in the following manner:

... because [the Crown is] taking [a custody] position, you're not going to reach a lot of matters, because every contested bail hearing takes a lot of time, right? The last one of the day took an hour and a half and about 15 or 20 people weren't able to be reached that day because of the one

bail hearing and they all got adjourned to the next day, right? Another day in custody (LN 810, Canada, DEF 004).

While, as Chapter Four demonstrated, contested hearings occupied a minority of the overall appearances in bail court in Canada, court actors explained that the length of time required to complete them enabled them to have a substantial impact on case processing. This description can be compared to a comment made by a legal adviser in England, who described contested hearings (referred to here as bail applications) in the following way:

...they come to some agreement beforehand and it makes the proceedings quicker rather than having a bail application, which would could take 25 minutes (LN 691, England, LA 009).

Both court actors were pointing to the fact that consent releases take less time to complete than contested hearings, which in both jurisdictions, were widely perceived as an inconvenience – albeit in varying magnitudes. The Canadian defence counsel explained that holding contested hearings would often mean that many other cases could not be addressed on the same day. This was substantiated by the observations, where cases were adjourned on 16 occasions (7% of the total 236 cases observed) because the court could not accommodate them. Although in some instances bail cases would be traversed into other courtrooms, this was not always possible if it was late in the day and the other courts were closed or if they did not have the capacity to assist. In fact, on many occasions, court actors from other courtrooms were observed to enter the bail court and request ‘consents only’ indicating they did not have the time to assist with a contested hearing.

In comparison, there were no instances in England in which cases were adjourned because the court did not have time to conduct the proceedings. Furthermore, the time required to complete one particular hearing was described as an hour and a half by the Canadian defence counsel, considerably longer than the 25 minutes described by the English legal adviser. Although these descriptions are not representative of all contested hearings, they do represent considerably different perceptions on behalf of the court actors. Specifically, in Canada a contested hearing lasting an hour and a half is viewed as lengthy compared to 25 minutes in England. This divergence is indicative of

the vastly different expectations court actors held in each jurisdiction in terms of how long a contested hearing might last.

These perceptions are consistent with the broader literature, which substantiates these disparate views of the time required to complete a bail appearance. In Canada, the Canadian Civil Liberties Association (2014) also found evidence of lengthy bail processes in Ontario, largely as a result of the time it took to schedule and conduct contested hearings. This study found that cases were consistently adjourned because there was not enough time to run a hearing and that the defence was ‘doing pretty well’ if the hearing could be scheduled within a week. This issue is also regularly recognised in the case law, in which the court has highlighted evidence of systemic delays in Ontario courts. For example, in *R v Jevons [2008]*, where an individual without a criminal record spent eight days in custody without access to medicine, the court stated that the defendant’s rights had been violated in a manner that represented “an affront to the administration of justice and shocks the conscience of the community.”⁶¹

By contrast, bail proceedings in England are consistently found to be short in length, often only lasting a few minutes (Cape & Smith, 2016; Dhami & Ayton, 2001; Doherty & East, 1985; Zander, 1979) and proceeding with limited information (Cape & Smith, 2016; Hucklesby, 1996; Morgan & Henderson, 1998). Even in cases in which bail was denied, Doherty and East (1985) found that 38% of them took less than two minutes and 87% took less than 10 minutes to complete. In addition, Cape and Smith (2016) found that the representations of the lawyers were brief, with the defence’s representations taking an average of 6 minutes and the prosecution taking 3 minutes. This has led some researchers to argue that court in England subscribe to a ‘fast and frugal’ model of decision-making in which decisions are made quickly without all available information.

⁶¹ *R v Jevons*, [2008], OJ No 4397, 2008 ONCJ 559 (Ont CJ). See also *R v Villota* [2002], CanLII 49650 (ON SC) at para 57 and *R v Zarinchang* [2010], OJ No 1548, 254 CCC (3d) 133 (ONCA).

The disparities in the expectations between jurisdictions extend to the number of appearances required to make bail decisions. In Canada, court actors expected that bail proceedings would commonly be adjourned while in England it was considered the norm for them to be completed in one appearance. For example, when one defence counsel in Canada was asked what would need to occur for a bail decision to be made in one day he responded simply, “that’s never going to happen” (LN 363, Canada, DEF 007). In comparison, when a prosecutor in England was asked whether bail decisions were ever adjourned he answered in the following way:

Adjourning a bail? I mean it’s 24 hours, isn’t it, from arrest? So you wouldn’t normally – you can’t adjourn a bail hearing. (LN 637, England, CPS 024).

These answers demonstrate that a practice that was perceived to be the norm, and in fact unavoidable, in Canada was considered extremely unusual, and not typically possible, in England. While this particular prosecutor seemed genuinely perplexed by the very concept of adjourning bail proceedings, it is notable that other court actors in England did concede that adjournments did occur, albeit rarely. The circumstances of these cases are discussed later in the Chapter. This reaction did, however, demonstrate how abnormal these circumstances were perceived to be. It is also notable that the English prosecutor referred back to the PACE legislation discussed in the previous section, which dictates that defendants must appear before a court on its next sitting following charge. Although this parallels the Canadian Criminal Code legislation, adjournments were nonetheless considered the norm in the Canadian court.

These differing perspectives on the number of days required to complete the matter of bail are in line with previous studies. Specifically, bail has been consistently shown to take multiple appearances in Ontario courts (Doob, 2013; Myers, 2015; Webster, 2009; Webster et al., 2009). This has led some (Canadian Civil Liberties Association, 2014; Webster, 2009) to question the extent to which the practice conforms with the intention of the Section 83.3 of the Criminal Code. As mentioned in the previous Section, the legislation directs that defendants should appear before the court within 24 hours of arrest. When

defendants are appearing in front of the court simply to be adjourned, what one might assume is intended to be a quick decision about the defendant's liberty becomes, for all intents and purposes, little more than a formality. The idea that cases should be repetitively adjourned is reflective of a more generalised relaxed attitude towards delay that has permeated the entirety of the criminal process in Canada (Standing Senate Committee on Legal and Constitutional Affairs, 2017). These findings suggest that, despite multiple managerialist attempts to increase efficiency (see Chapter One and Two), the bail process is no exception to this overarching trend.

England has not seen the same trend emerge in relation to the consistent adjourning of bail appearances. Both recent and historical research indicates that, with some exceptions,⁶² it is not standard practice for bail decisions to be put over to another day (Cape & Smith, 2016; Doherty & East, 1985; Hucklesby, 1997a; Simon & Weatheritt, 1974). As such, while as the subsequent section will demonstrate, the overarching theme of managerialist efficiency in England (Ashworth & Redmayne, 2010; Gelsthorpe, 2013; Sanders et al., 2010; Ward, 2015) has extended to the bail process to some extent in England, this cannot wholly explain the conceptualisation of the bail process as a quick, summary procedure. Rather, the idea that the bail decision should typically be made in one appearance appears to be a longstanding feature of the bail process in England. Clearly, the court actors in England and Canada had very different perceptions as to what constituted appropriate case processing times.

Bail: An insular or integrated process?

The following discussion will illustrate that views related to how bail fits into the broader court process also influenced attitudes towards case processing. Specifically, bail was largely viewed as an integrated part of a larger process in England while it was regarded as an isolated step in a series of stages in Canada. In other words, the extent that court actors viewed the court process holistically influenced how the process was expected to progress. These

⁶² For instance, an address may need to be secured or additional investigations needed to take place.

different perspectives determined the amount of focus placed on bail relative to other court matters during court appearances.

The perceptions of court actors

Differences in court actors' views on the way in which bail fits into the court process were apparent during the observations. In the Canadian court, only matters related to the bail decision were typically discussed in open court. This was to some extent predictable since, as Chapter Three discussed, the court observed had a courtroom explicitly designated as a 'bail court' in which this was the exclusive function of the court. If other matters needed to be addressed cases were either traversed to other courtrooms or adjourned following the bail decision.⁶³ This is not to say, however, that court actors in Canada never discussed other matters outside of open court at this point in the process. The interviews suggested that the plea was discussed during informal negotiations prior to the proceedings. For instance, one defence counsel described how this trend had manifested itself in the Canadian court:

Over the last few years what they've instituted both at [another court] and particularly [this court] is they're giving you a position if you want to plead guilty off the first step, where they'll give you supposedly what's their best offer to try and induce you not to have a bail hearing and to plead guilty (LN 083, Canada, DEF 007).

While several court actors cited this practice during the interviews, the observations suggest that it only took place outside of open court and thus did not play a role in the actual proceedings. However, the approach is unsurprising as previous literature has suggested the bail stage is often used as a platform with which to obtain early guilty pleas (Kellough & Wortley, 2002). Despite these informal conversations, cases were not observed to move forward from an administrative standpoint as, in the main, they remained in bail court⁶⁴ until a bail decision had been made.

⁶³ The observations did suggest resolutions happened occasionally, as in 10% of the cases observed (n=23) defendants either requested a traversal to guilty plea court or asked to be adjourned there on their next appearance. While this suggests they were moving towards a guilty plea, this could not be confirmed conclusively as there was no file access.

⁶⁴ While it was unclear in this study given the researcher was not given access to case files, previous research (Webster et al., 2009) has noted the presence of cases in which no formal

In addition, there were no discussions surrounding future trial dates or case management in the Canadian court. This further highlights the extent to which it was considered a separate stage of the court process. The extent to which this was the case was made clear through an examination of the court list. In cases in which bail decisions had been made and cases were proceeding to another court on their next appearance, cases were often marked to be heading to their 'first appearance'. Indeed, from an administrative perspective, it would seem that cases were not considered to 'start' until bail had been dealt with. Indeed, clearly bail formed an isolated part of the court process in Canada. While this meant that bail was focused on exclusively at the first appearance, it also limited the extent to which other matters – such as setting trial dates or taking pleas - could be addressed.

This stood in stark contrast with the English court, where court actors viewed bail to be an integrated part of the court process rather than the first step within it. For example, one defence solicitor described bail in the following terms:

I wouldn't tend to view it as sort of separate bail matters; it's all part and parcel of your client's case. So bail is a huge issue in client's cases, both at the start if they're in custody or later on if they either lose it or if they are in and trying to get out or if it's an on-going issue (LN 69, England, DEF 22).

The fact that bail was viewed as an on-going process meant that it was not perceived to have to 'finish' before another process could begin. This attitude was reflected during the appearances, where bail was discussed alongside other matters relevant to the case. Indeed, it was commonplace for a wide range of issues to be discussed in addition to the subject of bail. It appears as though this was, at least in part, a product of the changes aimed at reducing delays in the court process that were implemented following the Narey Report (1997) and, more recently, the Leveson Report (2015). These changes are discussed in more detail in Chapter One and Two.

One of the initiatives undertaken by the government that was observed to impact the proceedings was the focus on the defendant's plea. Plea before

determination is ever made. As such, there are some cases that move through the bail process without a formal bail decision in Ontario.

Venue requirements were brought in following the Narey Report (1997) and require that defendants indicate a plea in magistrates' courts prior to the determination of mode of trial. At about the same time, sentencing discounts for guilty pleas were given statutory footing. As Chapter Two detailed, the Criminal Justice Act 2003 directs the court to take the stage at which the defendant pled guilty as well as the circumstances in which it was provided into account during sentencing. Further, the Sentencing Guidelines Council (2007) advises that sentences be reduced in accordance with the stage at which pleas are entered. As such, although it is not mandatory, pleas entered on the first appearance can typically be expected to result in a sentence reduction of one third. Given this practice, it is perhaps unsurprising that, during the observations, a major part of the discussion would relate to whether the defendant was pleading guilty. Both the court and the prosecution were responsible for making this clear. One prosecutor in England acknowledged that this formed a portion of the discussions in remand court:

I mean there will also be discussions in remand court about the actual facts of the offence and whether a plea could be obtained in the first hearing. That's what we're encouraged, to try and resolve cases as much as possible (LN 609, England, CPS 024).

The observations confirmed this view, demonstrating an overt push towards early guilty pleas on the part of the court. In some instances, the court would provide an idea of a potential sentence in open court and request the matter be held down and that the defence solicitor discuss it with their client. Consequently, many appearances that started as bail decisions ultimately ended in guilty pleas.

In the event that a bail decision was made, this would often be one topic of discussion among many. Indeed, much of the discussion focused on case management rather than bail. This is also consistent with the recent changes in the Criminal Procedure Rules that were brought about by the Leveson Report (2015). A major focus of the 'Better Case Management' scheme involved more robust case management and a reduced number of hearings. The observations revealed that in many cases in which the defendant pled not guilty there would be a discussion about the number of witnesses, the trial date, and a brief

overview of the defence's case. Take, for example, an associate prosecutor's description of a typical appearance:

...if it's a not guilty then you just go through the trial process, you know, you could say it's not guilty and then I'll stand up and say well we'll fix the case for trial, we've filled out the case management form, and then I'll mention at that point before we go through the case management form that bail conditions are appropriate in this case because of whatever. I won't go into it in too much detail, I'll just say that the defendant is in custody, we're adjourning for trial, originally it was in custody because of... and I think these conditions are likely to suffice. I've agreed with the defence and if the court are happy with those we can now fix a trial. So then they'll go through the case management form knowing that they haven't really got to consider bail until the end and just mention the conditions. Whereas if obviously you're remanding somebody or wanting someone to be remanded in custody, rather than go through all the case management, because they can't fix a trial until they know if he's in custody or not, because of the custody time limits, you see, they've got to fix the trial within that time so they need to know (LN 533, England, AP 028).

As the associate prosecutor suggested, the emphasis on other procedures during the first hearing results in the determination of bail being one of many issues for the court actors to get through. As Chapter Three outlined, associate prosecutors could not make independent decisions and were directed to communicate the guidance provided by prosecutors prior to and occasionally, if a phone call was made, during the proceedings. In the case of the example provided, in which there was a joint position, the issue of bail was addressed briefly and routinely at the end of a long list. This is consistent with Chapter Four, which suggested that court actors do not expect joint positions to be questioned by the court, and Chapter Five, which found limited information was provided in open court in these appearances. While the associate prosecutor admittedly voiced that this practice changed slightly in cases in which the issue of bail was contested, it was still discussed in conjunction with numerous other issues, simply in a different order. Consistent with other research, these findings call into question the extent to which bail is considered comprehensively in England (Cape & Smith, 2016; Dhimi & Ayton, 2001; Hucklesby, 1996).

In sum, the findings demonstrate that bail was perceived as an insular process in Canada compared to a more integrated part of the process in England.

The perceptions of court actors in context

The differences in perceptions on the part of court actors in Canada and England can be put into context through an examination of the structure of the courts, the make up of the courtroom workgroups, and the attitudes related to discussing the case.

Structure of the courts. One reason for the difference in conceptualisations between the jurisdictions resides in the physical organisation of the courts. As Eisenstein and Jacob (1977) have argued, the functioning of the court workgroup is influenced by their physical surroundings and, in particular, the structure of the courtrooms and courthouses in which they work.

In this case, defendants entering the Canadian court in custody appeared in a specialised 'bail court', the courtroom in which the observations took place which dealt exclusively with bail matters. The only defendants that were assigned to bail court were those who were in custody and awaiting a bail decision. In the English court, defendants detained by the police appearing in custody were typically assigned to 'remand court' alongside other types of court work. This court dealt with both in and out of custody defendants and matters such as applications by solicitors, pleas, and sentences. Consequently, the Canadian workgroups were largely isolated from other court actors responsible for different procedures and thus other aspects of the court process. In the event a defendant wanted to enter a plea or address an issue other than bail, they were traversed to a different courtroom and were no longer the responsibility of the bail workgroup. As such, the Canadian workgroups almost exclusively focused on bail and were able to devote most of their attention towards this issue. In England, however, bail was only one consideration among many in the remand court. If a defendant requiring a bail decision wanted to discuss another issue, such as a guilty plea, in many cases the court would be able to accommodate this change.⁶⁵ These opposing structures contributed to the conceptualisation of bail as an insular process in Canada and a more integrated one in England.

⁶⁵ Note that this did not necessarily mean the case could always be resolved. For example, in some cases the potential sentence exceeded the powers of the magistrates court or additional information could be required prior to sentencing.

Make up of the workgroup. This perception was furthered by the make up of the work group in each jurisdiction. In Canada, a justice of the peace was always assigned to preside over bail court and a Crown attorney, duty counsel, and various private defence counsel were responsible for making representations. In England, either a District Judge or a panel of magistrates presided over the remand court and a CPS representative (typically a prosecutor, associate prosecutor, or agent acting on the behalf of the CPS), a contracted duty solicitor, and private defence solicitors made representations. A legal adviser⁶⁶ was also present to assist with administrative matters and, in the case of magistrates, matters of law. Since justices of the peace were always assigned to preside over the bail court in Canada, the function of the court could not expand to procedures that were beyond their role. In particular, while the Criminal Code empowers justices of the peace to preside over bail proceedings, they do not hear pleas, trials, or impose sentences in Ontario (Cameron, 2013). This meant that defendants wanting to bypass the bail process and plead guilty could not be dealt with in bail court. This presented difficulties when other courtrooms were busy or closed for the day. One duty counsel described a scenario in which this occurred in the Canadian court:

...so the charge was failing to comply probation because he didn't pay restitution and the Crown's position if he were to plead to it was a suspended sentence, so no more jail time if he pled that day, but plea court was closed. So we were trying to get him out on bail... (LN 1147, Canada, DC 003,).

This type of situation was observed several times throughout the observations. In the event a case could not be traversed to another court, the defendant was put into a position whereby they could either spend the night in custody and plead the following day or proceed with a bail appearance in the hopes of being released, enabling them to appear for a plea out of custody on another occasion. This meant that case resolutions were extended, in large part, as a result of the limited power of justices of the peace.

⁶⁶ In cases where District Judges were sitting, court associate were also sometimes tasked with this role.

In England, the District Judges and magistrates presiding over remand court had much wider powers, in particular they were able to deal with both bail and sentencing. It is notable, however, that it was also not possible for all cases to be resolved in the magistrates' court. Under the Magistrates Court Act 1980, magistrates cannot deal with indictable offences or either-way offences in which the sentence is expected to exceed six months imprisonment (or 12 months in total for two or more offences) or a five thousand pound fine. In these cases, as well as in either-way offences where the defendant elects to be tried in Crown Court, the court is unable to resolve the case in magistrates' court. However, magistrates' courts still have jurisdiction over the vast majority of criminal matters and there has been a longstanding political effort to increase this jurisdiction even further (Cammiss, 2007). For example, some either-way offences have been reclassified as summary and the aforementioned Plea before Venue arrangement enables magistrates' to hear cases in which, when discounts for early guilty pleas are factored in, it reduces the likely sentence to a level that is within their jurisdiction. Consequently, the vast majority of cases were able to be resolved in the remand court in the event the defendant was willing to plead. In fact, of the 222 cases that were observed to start in custody, 40% (n=90) did not involve a bail decision and were resolved instead. Indeed, the difference between jurisdictions in relation to the power of the court further contributed to the insular versus integrated approach to bail.

The consistent use of duty counsel instead of private counsel had a further isolating effect on the bail process in the Canadian court. As Chapter Four indicated, 75% of cases (n=177) involved duty counsel in Canada while only 11% (n=24) involved duty solicitors in England. Since duty counsel were employed directly by Legal Aid Ontario, they were typically assigned to a particular court and dealt with defendants on an ad hoc basis rather than representing them for the entirety of their case. Since duty counsel could not follow through with a case beyond the bail stage in the Canadian court, they were unlikely to discuss matters beyond the issue of bail. One duty counsel in Canada explained how this could become problematic:

So duty counsel are doing like 90% of the bail hearings, which in most cases is totally fine, but there are some cases where it would be helpful if the person who was going to run the trial runs the bail hearing for various

reasons, like evidence, just their strategic thinking where it seems like this would be a good case, where the lawyer should be involved from the beginning (LN 282, Canada, DC 003).

The lack of continuity between counsel made it unlikely that matters relating to the rest of the criminal process would be discussed. While duty solicitors in England faced the same problem in some cases, defendants often had the option to hire them privately at the conclusion of the bail decision and thus enable them to deal with the entirety of the case. The financial incentive for defence solicitors to obtain a large number of clients and to move through these cases quickly (Church, 1982; Cole, 1970; Eisenstein & Jacob, 1977; Levin, 1975) was particularly prevalent as a result of the legal aid cuts in England discussed in Chapter Four (McGuinness, 2016). As such, duty solicitors assigned to in custody cases would be particularly motivated both to obtain these defendants as their own clients and to ensure they moved through the process as quickly as possible. This meant that, even in the limited number of cases where defendants were represented by duty solicitors in England, the discussion often focused on case management to some extent. This was never the case in Canada, however, where duty counsel were unable to accept private contracts.

Attitudes towards discussing the case. Finally, as Chapter Five discussed, there was a general attitude in Canada that you do not 'show your cards' during the bail stage. Specifically, defence did not discuss the details of the case in most circumstances. This was so that the information provided could not be used against the defendant in the plea or trial phase in the event there were inconsistencies in their narrative. As such, some defence suggested they were unlikely to discuss the possibility of a plea or the details surrounding their case in bail court. For instance, when one duty counsel in Canada was asked what information was most important, they said that while a plea position was important, they would avoid asking for one unless it was explicitly brought up by the prosecution. They claimed "I wouldn't ask for [a plea] if they didn't have it already there" (LN 355, Canada, DC 002). As such, the attitude of not 'showing your cards' would also occasionally work towards preventing broader matters from being discussed informally at the bail stage. In this particular case, the duty counsel was reluctant to discuss the possibility of a plea in the event the

defendant pled not guilty later. Any indication as to what this decision would be was seen as detrimental to the case. Taken together, these factors make it clear that, unlike in England, bail is very much regarded as a separate part of the court process in Canada.

These differing conceptualisations were found to have a considerable impact on the court actors' attitudes towards case processing. The difference between viewing the bail stage as an integrated part of the process and as a separate entity in and of itself framed the time court actors devote to completing the bail decision-making process. Since broader issues were considered in the appearances in England, it is perhaps unsurprising that only a limited amount of time was devoted to the discussion of bail. Since it occupied the entirety of the focus in Canada, a considerable amount of time was spent discussing this issue. In fact, in many ways bail in the Canadian court had evolved into a separate part of the broader court process that had its own procedures and that had to be completed before the remainder of the court process could begin.

Importantly, specialised courts such as the bail court observed in Canada have been shown to be associated with longer case processing times (Zimmer, 2009). In these courts, the workgroup focuses narrowly on particular issues and seeks resolution for broader issues - that the specialised court either would not or could not consider - elsewhere. Zimmer (2009) highlights that this practice often results in a protracted and costly process that may result in more delay than if matters were dealt with in a generalist court, like the remand court described in England.

Summary

In sum, these conceptualisations of the bail process – both in terms of how long the bail process should take and how it fits into the broader court process – contributed to divergent attitudes towards case processing in the English and Canadian courts. Specifically, court actors in Canada viewed the process as lengthy and insular whereas those in England viewed it as a quick procedure that was integrated into the rest of the court process. As previous research suggests (Church, 1985; Hucklesby, 1997a), court actors' expectations about

the court norms reinforce behaviour that complies with their perception of how things *ought* to move through the system. As such, a feedback loop was created whereby norms surrounding case processing both influenced the behaviour of court actors and were shaped by them. Indeed, Church (1985) found that the causality between court culture and case handling procedures ran in both directions and that – no matter how fast or slow – court actors held a firm belief that the pace of litigation in their individual courts was optimal. The subsequent section will demonstrate that the conceptualisations of the bail process as fast or slow and insular or integrated ultimately shaped the decision-making of the court actors and influenced the informal practices that developed in each jurisdiction.

The relationship between bail conceptualisations and informal practices

This section will demonstrate that the court actors' perceptions as to how long the bail process should take and, in particular, what constitutes efficient practices, shaped their behaviour during bail proceedings. It is argued that these perceptions interacted with other motivations related to law and culture to influence the volume of information considered, the procedures used, and the use of adjournments in England and Canada.

Information required to make the bail decision

The following discussion will demonstrate that attitudes surrounding case processing time had a major impact on the volume of information viewed as necessary to the decision-making process as well as how long it was acceptable to wait for this information. In Canada, where there was not as much emphasis on fast case processing, it was common to wait for as much information as possible if it was believed it might benefit the case. This was not the case in England where court actors would often proceed with limited information, frequently on the basis that the case needed to progress expeditiously.

Receiving the appropriate amount of disclosure from the prosecution's office was viewed to be extremely important to court actors in Canada, particularly in

serious cases. In fact, more than half of the defence and duty counsel interviewed mentioned the need for more disclosure when they were asked if they had the information they needed to make a satisfactory argument. Many court actors felt that if they did not have sufficient disclosure it was necessary to adjourn proceedings until it could be obtained. For example, one defence counsel in Canada explained an occasion in which they undertook this strategy:

Now if I just run a bail hearing on day one without any disclosure, the likelihood of him being detained is probably 100% because it's an attempt murder, it's these four guys, it's caught on video, they take a gun, they shoot the guy, he survives. But that's what the justice of the peace is going to hear. And how do I counter that without any disclosure? So I adjourned the case. It took a month to get disclosure. Sure enough I get disclosure and I get a photo, a still photo of what was on the video, and what can you see? Nothing. You see the guy's eyes and he's masked everywhere else. So I presented that to the JP and I said how do you detain a person when this is what the Crown's relying upon? And he gave him bail. He gave him bail on the basis of the lack of strength of the Crown's case (LN 458, Canada, DEF 006,).

The defence counsel rightly pointed out that the court can consider the strength of the evidence when applying the exceptions to the right to bail and thus waiting for weak evidence to become available might increase the chances the defendant will be remanded on bail. Further, the summary of the allegations presented by the prosecution can be especially damaging to the defendant in Canada where the do not 'show your cards' mentality reduces the chances that defence counsel will present an alternative version of the events. When these issues are taken together, it is clear why the defence counsel believed waiting for disclosure might be in the best interest of the client. However, in the aforementioned example, the client waited one month in custody for the disclosure to become available. As the following Canadian defence counsel notes, this does have an obvious drawback for the defendant:

...for example, the video that they've apparently looked at and seen and has been the basis for deciding to arrest this guy – if I want to see that video, they seem to take forever to get that for me. So getting disclosure out of the Crown for show cause purposes can be very time consuming, and meanwhile the person languishes in jail (LN 316, Canada, DEF 008).

As the defence counsel illustrated, the client must await the disclosure in custody, which can be both difficult individually and damaging to their case

(Trotter, 2010). In addition, since the bail decision is typically made before the defendant progresses to the next part of the court process in Canada, such a strategy would prevent the defendant from moving forward. For instance, the defence would be unable to set a trial date, while they were 'stuck' in the bail phase. Furthermore, as Webster (2011) has highlighted, cases that languish in the bail stage contribute to systemic delay as it means cases stay in 'limbo' and increase both the time and number of appearances required to complete the court process. It is notable, however, that this particular defence counsel placed the responsibility on the prosecution for failing to provide disclosure in a timely fashion rather than acknowledging their role in extending the proceedings. This suggests their expectation was more heavily weighted on making well-informed decisions than fast decisions. In line with this view, one duty counsel in Canada suggested it would be "irresponsible" (LN 497, Canada, DEF 001) to proceed with a bail decision in the event they did not have what they perceived to be enough information about the case.

The perception that it is necessary to wait for additional information before proceeding to a bail decision may be rooted in the nature of the bail review procedure in Canada. After the initial bail decision, the defence (or prosecution) must appeal to Superior Court in order for the decision to be reviewed by a judge under Section 520 of the Criminal Code. Under *R v St Cloud* [2015] the judge can only exercise their power of review if there is new evidence, an error of law, or if the decision is clearly inappropriate. As such, the process is potentially long and complex. Given the financial pressures faced by defence counsel discussed in Chapter Four it is perhaps unsurprising that a defence counsel would prefer to adjourn the proceedings in the lower court to await evidence rather than run a weak contested hearing and have to subsequently proceed to an appeal. This would be more in line with the aforementioned defence strategy of overturning numerous cases in a short period of time (see Church, 1982; Cole, 1970; Eisenstein & Jacob, 1977; Levin, 1975).

In England, a different approach was taken to obtaining information. The interviews revealed that – much to the chagrin of the defence and prosecution – they often proceeded with bail with limited details about the case and that, unlike in Canada, it was not the norm to adjourn the proceedings. Rather,

pressure was felt to 'get on with it' and move the case forward. This was argued by one defence solicitor in England:

...when I started in 2002 you'd have ... all the time in the world, to prepare your case more or less ... but do you know, I think the police were more prepared even in those days. You got more information at the beginning whereas now you get literally an MG5 [police report] and it's very difficult and unfair sometimes for the courts to decide on bail when we're not privy to all the facts. Because then something may well come to light in the section 9 [witness] statements that was not available at the first hearing, which may well impact on bail, because obviously the magistrates have to take into account at that stage as well, the first stage for bail, the strength of the evidence, which can't always be assessed at the beginning (LN 241, England, DEF 023).

The defence solicitor, like several others, felt as though the limited amount of information used to make the bail decision was unfair to the defendant. The reason it was perceived to be unfair parallels the justification the defence counsel in Canada used to delay the proceedings for disclosure. In the event information became available that weakened the strength of the case, and thus increased the chance a defendant might be remanded on bail, the initial bail decision would already have been made. However, most defence counsel acknowledged that at the bail stage the prosecution's case was 'taken at its highest' and thus the Court would make their decision on this basis. As such, it was generally accepted that the bail decision would be made despite the limited information available.

Their willingness to continue with the proceedings without adjourning may be rooted in the review process in England which, unlike in Canada, can be conducted in the same court as the initial decision was made (i.e. the magistrates' court). Under the Magistrates Court Act 1980, the defendant is able to have a second hearing within eight days after the initial bail decision regardless of whether new evidence had surfaced. Furthermore, under Section 4(1) of The Bail Act 1976, while the Court "need not hear arguments as to fact or law which it has heard previously" it is still to consider the question of bail at every hearing thereafter. While, in practice, research suggests it is unlikely that defendants will be remanded on bail following an initial custody decision (Cape & Smith, 2016; Doherty & East, 1985), this still provides a much less convoluted legislative avenue to pursue further bail decisions in the event that, as defence

in both jurisdictions suggested is sometimes the case, important new evidence emerges that may call the initial remand in custody into question. At this point, the defendant may also make an application for bail to the Crown Court, where the decision is made by a Judge in chambers (i.e. outside of formal proceedings) providing another avenue for review (Sanders et al., 2010). This may, in part, explain why defence in England are less likely to pursue their legal entitlement under the Bail Act 1976 to wait for additional information prior to obtaining a bail decision. However, as the defence solicitor suggested, it would also appear that it is simply the norm to pursue a bail decision with the information available at the time.

While defence solicitors in England viewed themselves to be on the 'back foot' relative to other court actors when it came to receiving information, it was clear that the situation was also disagreeable for the prosecution. For instance, one associate prosecutor also voiced a feeling of being rushed during bail appearances:

I don't think we have enough time to do them, no. That's one of the real problems I think we've got, because it can be – You can have all day before to prepare your court and, your overnights, you're getting them on the morning and you don't know how many you're going to get. The court have some sympathy but ultimately they want to get on. They've got people in custody, defence want to get on, so you are more rushed and you are just going through it very quickly which is not always ideal. You're just summarising, you don't always have time to look through statements and things, which you should do really (LN 227, England, CPS 025).

This associate prosecutor also perceived the process to be rushed in a way that might compromise fairness. However, unlike the defence solicitor, who was concerned about not having information, they were concerned that they were unable to go through the information even if it was available. This was largely a result of what was perceived to be the nature of bail ('overnight') cases. The expectation was clearly that the associate prosecutor would receive information when the defendants were brought in, receive directions from a prosecutor (as associate prosecutors cannot act independently), and be ready to proceed that same day. This was considered particularly difficult given the volume of cases was unpredictable and the workload heavy at times. While it was noted that

there was some level of patience from other court actors, at the end of the day the attitude was very much to 'get on with it' and complete the matter to the best of your ability. It is notable that this attitude persisted in England despite the fact that, like their counterparts in Canada, they were legally entitled to adjourn the proceedings if it was considered impracticable to make a decision.

The result of this practice was that bail decisions were ultimately made with a limited amount of information. Another prosecutor in England described the natural consequence of this situation:

So you've got the – depending on how busy it is – you've got the statements to read or if it's really busy you rely – although it's not terribly good practice – simply on the summary that the police type, which is dangerous because sometimes the summary is not really 100% accurate against what the evidence actually is (LN 417, England, CPS 27).

Echoing an issue that was raised in Canada, the prosecutor expressed concern with relying on the police summary when making arguments. This suggests that it is not just the defence who believe that the police summary is not always accurate. However, as was mentioned previously, the prosecution's case was expected to be taken at its highest at this stage, and such it was not necessary from a legal standpoint to acquire the same volume of information one might need for a trial before proceeding. These findings support previous research (Burrows et al., 1994; Hucklesby, 1997b; Morgan & Henderson, 1998) that suggests, despite the aforementioned reservations, the prosecution relied heavily on the information provided by the police at the bail stage. As has been noted previously, this practice calls into question to what extent the prosecution is independent from the police when they are making decisions surrounding bail (Hucklesby, 1997b).

The findings suggest that the English and Canadian courts had a very different view as to the volume of information that was necessary to proceed with the bail process, both of which were shaped both by the context within which they worked and by their attitudes towards case processing more generally. In Canada, where there appeared to be limited pressure to move through the bail process expeditiously and the bail process was viewed as lengthy process, the attitude was that it was better to wait for more information than risk a poorly

informed decision. This mentality places the chance of a more accurate bail decision above the need for speedy case processing. In England, where there was considerable pressure to move the case forward and the bail process was viewed as a shorter procedure, the attitude appeared to be to do the best with the information that you have. In this jurisdiction it would seem speedy case processing is valued over the potential for an initially more accurate bail decision.

Ultimately, prioritising either speed or accuracy while neglecting the other could be detrimental to the defendant and the administration of justice. On one hand, the defendant could be remanded in custody (or potentially released) unfairly and on the other, the defendant could remain in custody, preventing the case from moving forward. In Canada, where bail has become a process in and of itself and the review process is lengthy and complex, it is perhaps unsurprising that a high expectation is placed on the volume and quality of information used to assess bail. However, in England, where bail is still viewed largely as a quick summary process and the review process is less taxing it is conceivable why it might be the norm to put less emphasis on the accurate and comprehensive examination of information at the bail stage.

Procedures employed during the bail process

These same attitudes towards court efficiency were also reflected in the procedures employed during the bail process. In Canada, the use of evidence (i.e. testimonies, presentation of physical evidence) was viewed as acceptable in the event that it strengthened the goals of the court actor presenting it while, in England, this was avoided as they were viewed to stand in opposition to the summary nature of the bail process. As was the case with perspectives surrounding the appropriate volume of information required to proceed with bail, court actors' views as to whether the delay was acceptable was central to this choice.

Importantly, neither jurisdiction legally requires the presentation of evidence during bail proceedings, however both nonetheless permit it. In Canada, under Section 518 of the Criminal Code, any evidence can be submitted during the

bail process which is 'credible or trustworthy' and the testimony of the defendant is optional. While the case law in England enables court actors to adduce evidence, there is no requirement for them to do so⁶⁷ and the courts have rejected the need for formal evidence during bail proceedings.⁶⁸ As such, the court actors in England and Canada enjoy similar legal powers in relation to the presentation of evidence. Nonetheless, the actual practices were found to be very different.

Canadian court actors widely held that the presentation of evidence was required to complete the bail process, particularly in contested hearings. For instance, one duty counsel acknowledged that multiple processes were the norm during contested hearings in the Canadian court:

...the bail hearings take a long time now and lot of reason I think they take a long time is because of all these processes that have developed. We have to hear from the surety. Bail hearings back in the day it was all submissions, like nobody testified (LN 933, Canada, DC 002).

This duty counsel argued that the amount of processes that were used had increased over time until they eventually became the norm. In particular, the frequency with which individuals testified was perceived to have increased. Although the observations could not confirm a change over time, they did suggest the current frequency with which they were used. Of the 21⁶⁹ contested hearings observed, 9 included the testimony of one surety, 5 included the testimony of two sureties, and 6 included the testimony of the defendant. This meant that that there was only one contested hearing that did not include a testimony. These findings are consistent with previous research, which found that sureties were used as a matter of course in Ontario bail courts and that they were frequently expected to testify (Canadian Civil Liberties Association, 2014; Myers, 2009).

⁶⁷ See *Re Moles* [1981] and *R v Mansfield Justices, ex p. Sharkey* [1985]

⁶⁸ *R (DPP) v Havering Magistrates' Court* [2001]

⁶⁹ In three of these 21 hearings the prosecution consented to the release part way through, causing them to end as consent releases. Given the process stayed the same, they were included in the current totals, but were excluded from the totals in previous chapters related to the final decision.

Not only did this practice increase the length of time the contested hearings took to complete, they also increased the time required to organise them. This was the case for several reasons. First, many defence and duty counsel discussed the need to prepare sureties for their testimonies in order to increase the chances of a release. This process was described by one defence counsel in Canada:

So I'm always preparing sureties. And surety preparation, I think, is the key to getting a release done. I make my sureties do a full on surety affidavit, a questionnaire through my office. We have them get all of their banking documents and everything prepared and ready. We do role acting, play acting, with the surety so that they understand the types of questions. We prepare them for the way to testify (LN 265, Canada, DEF 005).

Although this defence counsel took a particularly elaborate approach to surety preparation relative to other counsel, this description illustrates the potential this practice has for increasing case processing time. It was not just the defence, however, that increased processing time on account of the expectation of a testimony. Another reason that contested hearings took some time to organise was a new practice on the part of the prosecution that required sureties to have criminal record checks:

Well one that's really provided a change for us is the new policy of getting criminal record checks done for every single potential surety before a bail hearing starts. The Crown attorneys are requesting those, so it's not even the JPs. Initially we kind of fought it because we're just like matters are actually being held down for the purposes of, well we can't proceed if we don't have a criminal record check, and we're like, we did for years before, like three months ago. But again, it just becomes, once you start doing it that just becomes the norm (LN 178, Canada, DC 002).

This duty counsel pointed out that the introduction of new procedures had the potential to create new expectations and potentially new norms. In this instance, the practice of checking the criminal record of sureties was not commonly employed in the past but had evolved into a normal procedure in a matter of months. Once the procedure became routine it came to be expected and formed a normal part of contested hearing preparation.

Finally, the time required to complete a contested hearing also increased when physical evidence such as doctor's notes or letters of employment were requested by the defence. For example, one defence counsel discussed the process of gathering records in Canada:

One of the things I find very difficult, is often times you need to take a few days to put together some material to have a proper bail hearing and if part of that material you want to put together is not simply - stuff from outside, for example from a guy's doctor, from the guy's treatment centre, historic material on the guy, that's not in the Crown's position (LN 310, Canada, DEF 008).

As was mentioned by the defence counsel, the process of gathering this material would often take more than one day. However, multiple defence and duty counsel suggested this step often strengthened their ability to obtain a release for their client as it enhanced the credibility of their representations. Using physical evidence to portray the defendant's character in a positive light or demonstrate they are addressing underlying issues is another example of the focus on rehabilitation and the social causes of crime (see Chapter One) in the Canadian criminal justice bleeding into the bail process. In this case, the idea that defendants are targeting underlying issues for their offending, such as mental health or addiction, provides a potential reason to release them on bail.

It is easy to see the appeal of many of these procedures from the perspective of the defence and the prosecution in the event they strengthened their case. However, in order for them to become routine practice they would have to prioritise their utility over their impact on case processing times. Ultimately, the benefits that each of these procedures yielded in terms of the individual goals of the practitioners appeared to eclipse any damage they might inflict cumulatively on efficient case processing. Furthermore, a snowball effect appeared to take place in which the more they were used the more they became expected, and the more difficult it would become to scale back their use.

A very different picture emerged in relation to the use of procedures in English bail proceedings. Lengthy procedures were not used nor were they expected since adhering to the summary nature of the proceedings was prioritised over building a robust bail case. This was because the bail process was not viewed

as a lengthy process by English court actors. This was acknowledged by one English legal adviser:

Yeah, not the trial, is it? You're not making a determination of innocence or guilt, you're looking at the risks under the Bail Act and you're dealing with it purely on representations from either party and there's no hard evidence, it's just representation and it's entirely up to the magistrates to attach what weight they feel appropriate to it (LN 443, England, LA 009).

This legal adviser associated 'hard evidence' – which was often used in Canada - as extraneous to the bail process. Importantly, this view was based on what was considered the norm since, as was previously discussed, court actors are legally entitled to enter evidence at the bail stage in England. However, this information was more likely to be considered during a trial, where the court establishes the guilt of the defendant. In fact, testimonies were regarded as the exception rather than the rule by English court actors. This was especially the case in England given, as Chapters Four and Five indicated, sureties were very rarely used in this jurisdiction. In addition, it was rare to see defendants take the stand themselves. In fact, not one testimony was witnessed during the court observations in England. This was also the case with physical evidence, such as doctor's notes or information surrounding employment. These findings are consistent with previous research. Indeed, Cape and Smith (2016) did not observe one case in which documentary evidence was produced or a witness was called to give oral evidence.

Defence solicitors asserted that, since there is not generally physical evidence to put forward, their representations very much depended on the word of the client. For instance, one defence solicitor claimed:

I don't have the written hard evidence, you know often if it's, if I need some evidence for a job, I'm not going to have that reference am I? You know, if they don't have a fixed accommodation, I'm not going to have that either. So it's usually the word of the client that I'm putting forward. (LN 574, England, DEF 022).

Many defence counsel expressed concerns with this issue, particularly in cases where they were not familiar with the defendant and could thus not verify the information they were receiving. However, the possibility of obtaining a

reference instead – which was seen to be commonplace in Canada – was not even considered as a possibility in England.

Rather than relying on evidence obtained by the defence, the court actors in England could, in some cases, rely on Bail Information Schemes for verified information about the defendant. These schemes - which provided verified information to courts about the defendants - date back to the 1970s. They were initially introduced to increase the quantity and quality of information available to the courts in order for them to make accurate bail decisions. The extent and nature of their use has varied since this time, but they were most recently resurrected in the early 2000s as they were thought to reduce non-appearances at court hearings by defendants on bail as well as provide credible information to the court and reduce the number of remands in custody (Hucklesby, 2011a). While the court actors typically spoke favourably about this information, which they received from probation, they also noted, consistent with previous findings (Hucklesby, 2009), that this information was not always available. Take, for instance, one magistrate's comment regarding the information available from probation:

And probation, of course, but then they're not usually in court, certainly not on a Saturday they're not, but if they're there, they often have valuable information, if they've been previously known to probation (LN 179, England, MAG 017).

While bail information schemes were reported to be helpful to the decision-making process, it was unclear to what extent they impacted decisions as – unless probation communicated the information verbally – it was difficult to know when the court actors were referring to them. As such, their impact compared to the 'hard evidence' that was primarily used in Canada was uncertain. What was clear from the interviews, however, was that Bail Information Schemes were not used consistently. As such, relative to the procedures typically employed in Canada, it is unlikely this contributed significantly to lengthening the proceedings systematically.

The use of complex and lengthy procedures were not necessarily opposed by English court actors, they were, for the most part, simply not considered at all.

Since the bail process was viewed to be a summary procedure the idea that evidence would be entered or several days would elapse in order to employ a procedure did not strike most of the court actors as a possibility. Rather, this type of behaviour was viewed to associate with more complex parts of the criminal process, such as trials or guilty pleas.

This mentality – like the opposing one developed in Canada – seemed to be rooted both in an adherence to court norms and reflective of the overarching context. In Canada, lengthy procedures were undertaken, in part, because that is what was commonly done. These practices were reported to evolve over time and have since become routine. They remained largely unquestioned despite their time-consuming nature as the bail process was viewed to take as long as what was necessary to put an appropriate plan in place. In addition, since the court relied on the defence to obtain information about the defendants in the absence of a practice comparable to bail information schemes, defence had additional tasks to complete before the proceedings, further contributing to potential delay. In England, however, these same procedures – despite being legally viable – were not considered since they were not the norm in this jurisdiction. Furthermore, the presence of Bail Information Schemes – although not always available – provided a source other than the defence to acquire information about the defendant in some cases. Indeed, lengthy procedures were associated with longer processes, such as trials, and were not found to be the norm at the bail stage in this jurisdiction.

The use of adjournments

The views on efficiency in each court shaped the extent to which adjournments were requested during the bail process and why they were used. As the previous section demonstrated, adjournments were commonplace in Canada and extremely rare in England. This disjuncture centres on disagreement as to whether the bail decision must be obtained on the first appearance. Given that this view is held by English court actors and not by those in Canada, it is perhaps unsurprising that the extent and nature of the use of adjournments varied considerably between courts. As was consistent with previous research (Myers, 2015; Webster, 2009), the findings demonstrated a ‘culture of

adjournments' in Canada whereby adjournments were consistently used and rarely contested. This was not the case in England, where court actors seldom requested adjournments for the purposes of bail.

In line with previous research, the findings showed that bail cases were frequently adjourned in the Canadian court (Myers, 2015; Webster et al., 2009) and rarely in England (Cape & Smith, 2016; Doherty & East, 1985; Hucklesby, 1997a). Indeed, 55% (n=130) of defendants brought into the Canadian bail court were adjourned to another day, 83% (n=108) of which were for the purposes of a bail decision.⁷⁰ In England, there was only one instance in which a case was adjourned for the purposes of a bail decision. Given the normality of adjournments in Canada and the infrequency of them in England, it is perhaps unsurprising that the court actors viewed them in such opposing manners.

As was previously discussed, Canadian laws state that bail matters cannot be adjourned for more than three days unless the defendant consents. However, the following findings revealed that defendants often had little choice but to accept adjournments if they wanted to strengthen their chances of being released. The strategic nature of the adjournments can be illustrated by examining the reasons that that they were requested in Table 6.1.

Table 6.1 shows that the most common reason that a bail case resulted in an adjournment relates to the bail plan in some capacity. Proceedings were adjourned in order to accommodate or find sureties, obtain a decision from the Bail Program, or work on the bail plan more generally in 22% (n=29) of the adjournments witnessed. In these cases it is unsurprising that the defendant consented to the adjournment given the bail plan is generally constructed for the purposes of securing a release. Many additional cases were adjourned for the purposes of obtaining private counsel or to accommodate the request of one that was already involved (18%; n=23). This would also be unlikely to be contested by the defendant given they would conceivably want their counsel at the hearing in order to proceed. Finally, in some cases more information about the case was required (8%; n=10), which would relate to the circumstances

⁷⁰ The remaining adjournments were for the purposes of a guilty plea or to enter the 'video remand' stream.

discussed above, where the defence required more disclosure before making a decision as to how to proceed (with bail or otherwise).

Table 6.1 - Reasons provided for adjournments in the Canadian court

Reason For Adjournment	N	%
Private counsel related	23	18%
Surety related	16	12%
No reason provided	16	12%
Court cannot accommodate	16	12%
To attend other court	14	11%
Need more information	10	8%
Bail program related	7	5%
Bail plan related	6	5%
Contested hearing	5	4%
Legal aid	4	3%
Paperwork required	2	2%
Other	11	9%
Total	130	100%

A fair proportion of cases, however, were adjourned for reasons that were not associated with improving the chances of obtaining bail. This included reasons such as the court being unable to accommodate the hearing (12%; n=16), the defendant having to attend another type of court (11%; n=14), a delay in obtaining legal aid (3%; n=4), or the court had yet to receive the appropriate paperwork (2%; n=2). Finally, in 12% (n=16) of adjournments no reason was provided to explain their use or the defence simply stated the reason was related to holding a contested hearing (4%; n=5) with no additional details. The fact that these adjournments were accepted by the court with no explanation supports the assertion that adjournments were expected and rarely questioned (Myers, 2015; Webster, 2009).

The findings also revealed that when cases in Canada were adjourned for the purposes of obtaining a bail decision, they were not necessarily listed to come back for an appearance the next day. In fact, only 47% were listed to come

back in one day (n=51), while a further 7% (n=8) were listed for two days, 15% (n=16) for three days, and 12% (n=13) for four days, and the remaining 19% (n=20) for 5 days or more. As such, adjournments not only extended the number of appearances required to obtain a bail decision, but in some cases they extended the length of time substantially. This is especially problematic from a human rights perspective given these defendants would be waiting in custody during this period.

This was not the case in the English court, where adjournments were only used during the bail process in exceptional circumstances. In fact, only one adjournment was witnessed for the purposes of obtaining bail throughout the observations. When court actors were asked about potential reasons they might request an adjournment for bail, they almost always said it would be to secure an address where the defendant could reside. For example, one legal adviser in England explained the circumstances in which an adjournment might be requested:

They always make a decision on the first appearance. The only way they wouldn't is if it's impracticable not to make a decision, so you might have to adjourn the decision because the court doesn't have all the information before it. For example, the defendant might say, 'I've got an address to offer to the court, but that does need clarifying.' So they might adjourn for that reason (LN 601, England, LA 10).

This response mirrored the vast majority of answers to this question, across all court actors. Unlike in Canada, the mentality seemed to be that adjournments were only necessary if there was a good chance the defendant could be released if it were allowed. This was expressed by one associate prosecutor in England:

I think if the court is saying 'well we'll adjourn it' then basically they're agreeing that they're going to bail them because otherwise why would they do it? That's only fair, I can't object to that (LN 378, England, CPS 025).

This was clearly not the case in Canada, where adjournments were handed out for reasons that were unrelated to strengthening the bail case (i.e. not enough time to proceed, legal aid application). In addition, when proceedings were put

over in England, it would be unlikely they would take multiple days to return. This was highlighted by one magistrate in England:

You wouldn't want to adjourn, hold somebody in custody for a long period of time, so you'd want to get to that decision as quickly as possible, based on the individual's rights, so you'd want to try and do that. So you would try as much as possible not to do that, even if it meant adjourning, and sometimes I've adjourned on the morning to the afternoon, in order to make sure that it's all wrapped up. And again, in terms of case management, it's about dealing with it as quickly as possible, but effectively (LN 369, England, MAG 014).

It was the opinion of this magistrate that holding defendants for too long before making a bail decision would violate their rights. In other words, due process values were prioritised in terms of the defendant being released from custody at the earliest possible opportunity. Some court actors explained that it would be exceptional for a bail decision to be adjourned more than 24 hours, for instance. This mentality was consistent with a broader attitude that prioritised speedy case processing in the rest of the court process, as discussed by one District Judge in England:

...the impetus is always on dealing with cases as fast as you can, as soon as you can, with as few hearings as possible; that's just the general impetus, not just on bail so you would want to [deal with it in one appearance]. But obviously bearing in mind you've got to do the right thing and be fair, so if it wouldn't be fair to make the decision without having more information then obviously you would wait; but those cases are exceptional (LN 445, England, DJ 18).

While this District Judge accepted that adjournments were fair in exceptional circumstances, when more information was required, they also stated that the vast majority of cases would be dealt with in one appearance. Unlike in Canada, it was accepted that the material that was available on the first day would be sufficient to make a decision in most cases. Although, as was previously demonstrated, this caused some concerns from the defence and prosecution, the priority of moving through the process quickly was primary in England.

The difference between the two mentalities surrounding adjournments seemed to be based in a different application of the respective laws requiring a defendant be put before a court within 24 hours (in Canada) or in the next court

sitting (in England). In Canada, it appears as though simply making an appearance, even if the defendant was subsequently adjourned before a decision could be made, was sufficient to adhere to the law. In England, it was interpreted to mean that the bail decision itself had to be made at this time, save for exceptional circumstances in which the defendant would be likely to be released if they were adjourned. This disjuncture again highlights the flexibility of the law discussed by McConville and his colleagues (1997). In this case, two approaches to bail both adhere to similar laws through markedly different means.

Summary

The preceding discussion demonstrated that the conceptualisation of bail shaped the information deemed necessary to make bail decisions, the procedures undertaken, and the extent and reasons adjournments were requested. While additional reasons related to the law and culture motivated these decisions to some extent, ultimately they were facilitated by broader conceptions as to how fast the proceedings needed to be. What might be deemed necessary for a fair bail decision in Canada was considered unfeasible by virtue of the time it would take in England. Indeed, the very idea of what constitutes 'efficiency' differed considerably across courts, ultimately resulting in the development of divergent informal practices across the two jurisdictions.

Conclusion

It is clear that two very different attitudes surrounding court efficiency had evolved in the English and Canadian bail process. This chapter demonstrated that court actors in England were much more conscious of timely case processing relative to the actors in Canada. In comparison, Canadian court actors viewed case processing time to be secondary to assurances that the decision has been made comprehensively. This ultimately shaped the decision-making of court actors, with those in Canada requiring more information, undertaking lengthier procedures, and requesting more adjournments than those in England. In England, these practices were only accepted exceptionally, with the priority being the speedy nature of the process. Ultimately, these

behaviours were facilitated by generalised expectations related to whether the bail process was viewed as a summary procedure (like in England) or more of a 'mini-trial' (like in Canada).

Importantly, neither of these approaches came without disadvantages. In England, the process has been criticised for being short and the information provided to defendants brief and formulaic (Cape & Smith, 2016; Dhimi & Ayton, 2001; Hucklesby, 1996) while in Canada it has been argued that the summary nature of the bail process has become distorted over time (Webster et al., 2016).

These findings demonstrate that court culture is central to explaining decision-making that shapes court processing times. As was the case with the defendant and case characteristics presented (see Chapter Five), these practices arose, in part, as a result of the norms and expectations that had developed in each court. In Canada, adjournments were requested since they were expected and proceedings were drawn out through various practices, as that was the norm. Conversely, the bail process was fast in England as that is what court actors perceived was expected and lengthy practices were simply not standard practice. This resulted in mutually reinforcing behaviours that contributed to the court culture, and ultimately shaped case processing time in each jurisdiction.

This culture cannot, however, be said to have developed in the absence of overarching views about the criminal process more broadly. Perhaps most clearly, these behaviours reflected very different conceptions about how fast court proceedings should be in a more generalised sense. It is no coincidence that in Canada, where the courts are persistently argued to be inefficient and managerialist attempts at reform are largely unsuccessful (Standing Senate Committee on Legal and Constitutional Affairs, 2017), court actors would develop the view that bail proceedings could be long and drawn out. Similarly, the court actors perceptions as to how fast the process should take coincides with relatively recent attempts to decrease case processing time more broadly in England (Leveson, 2015; Narey Report, 1997). Indeed, this drive for efficiency acted alongside a longstanding cultural practice of completing bail

appearances in one day in England (Cape & Smith, 2016; Doherty & East, 1985; Hucklesby, 1997a; Simon & Weatheritt, 1974).

Ultimately, these criticisms highlight two very different interpretations as to how due process should proceed. On one hand, holding defendants in custody for long periods of time while trying to secure a release disregards the fact that, as Feeley (1992) as pointed out, the process itself is punishment and extending this process disregards the rights of the defendant in this sense. However, prioritising speed over caution sacrifices what Packer (1968) has explained as a series of checks and balances that ensure defendants are given every chance to avoid losing their liberty. Nonetheless, like both previous analysis chapters have highlighted, even vastly different priorities and practices such as these can flow from and adhere to very similar laws.

Conclusions

This study set out to examine the factors that contribute to the bail decision-making process in English and Canadian courts. These were ideal jurisdictions with which to explore this issue because their similar bail laws and divergent practices related to pre-trial custody reflect different patterns of bail decision-making. The research took place at a time when Canada's prison remand rates had been increasing over several decades, contributing to what was largely considered a 'broken bail system' (Webster, 2015), and England had one of the lowest prison remand rates in the Western world (Walmsley, 2017). Exploring the reasons for these differences facilitated a deeper comprehension of bail decision-making in each jurisdiction and furthered current knowledge as to how to best understand this process.

The objectives of the study can be divided into two broad areas. First, the research aimed to identify the factors that contribute to the bail decision-making process and to investigate how these factors converged and diverged in each jurisdiction. Second, it sought to understand the impact of bail decision-making at the local level as well as explore how the findings contributed to an understanding of this process in a wider context.

Overall, it was found that court culture is central to understanding bail decision-making but that it is shaped by broader views that are specific to the criminal justice process in England and Canada. These views relate to values that have developed in each jurisdiction as a result of the evolution of criminal justice ideology and guiding philosophies over time. The influence of these factors on the bail decision-making process was facilitated by the discretion afforded to court actors in their application of formal laws, which enabled them to balance multiple competing principles whilst, in the main, remaining within the prescribed legal framework. This suggests that the factors contributing to bail decision-making are nuanced, varied and interdependent and should thus be understood in terms of their interactive effects.

Factors contributing to the bail decision-making process

As discussed elsewhere in the thesis, previous research has illustrated the importance of developing a better understanding of the bail decision-making process given its impact on individuals, institutions, and human rights. The decision to refuse bail has been shown to have a substantial impact on the lives of defendants and the trajectory of their cases (Bottomley, 1970; Canadian Civil Liberties Association, 2014; Friedland, 1965; HM Inspectorate of Prisons, 2012; Player et al., 2010; Trotter, 2010), put pressure on the criminal justice institutions responsible for housing them (Office of Auditor General of Ontario, 2008) and strain the central principle of the presumption of innocence (Webster, 2007).

While this thesis has argued that these implications emphasise the need to better explain the factors contributing to this process, it does not seek to claim that there that there is a 'right' and 'wrong' way to make bail decisions. Indeed, comparative law principles suggest that such an approach is problematic given that the context, as well as the standards and values associated with it, vary across jurisdictions (Nelken, 2007). This was demonstrated in this research, in which behaviour regarded as questionable by court actors in one jurisdiction (e.g. delaying bail compromises defendants' rights in the English court) was often regarded as ideal in the other (e.g. delaying bail ensures the right decision will be made in the Canadian court). As such, rather than evaluating whether the bail decision-making in each jurisdiction adhered to normative standards, this study has illustrated *how* to examine bail decision-making, thus deepening our understanding of how to best engage with this process. The findings suggest that the ideal approach is to examine the interaction of multiple contributing factors: law and legal principles, court culture, and views surrounding the broader criminal justice process.

The findings suggest that law and legal principles influence bail decision-making insofar as they afford court actors broad scope for discretion in their application. These formal rules did not dictate the actions of court actors, but rather provided a loose framework for their bail decision-making, ultimately facilitating a wide-range of permissible behaviour. This is consistent with previous research

examining other components of the criminal justice process that emphasised the importance of the flexibility of the law on the decision-making of criminal justice actors (see McBarnet, 1981; McConville et al., 1991).

The extent to which discretion was afforded to court actors by the law was illustrated by examining the relationship between the 'law in books' and the 'law in action' across the two jurisdictions. It was found that court actors from England and Canada were able to adhere to similar laws and legal principles while employing very different bail practices. For instance, Chapter Four demonstrates that court actors complied with the principles of adversarialism in some capacity in both jurisdictions. While the prosecution and defence in Canada appeared to defy these principles based on the extent to which they formed joint positions on bail, in reality they applied them informally in their negotiations and through the process of 'judge shopping.' On the other hand, English court actors were more overtly adversarial in that they proceeded to more contested hearings, but, informally, did not oppose each other in the same way as their counterparts in Canada. Adversarial principles were thus complied with, to some extent, in England and Canada despite their practical application taking on very different forms.

This pattern is further evidenced in Chapter Five. In both jurisdictions, court actors used similar legal considerations when assessing the importance of defendant and case characteristics. However, they applied and prioritised these characteristics in different ways, mitigating perceived bail risks in disparate fashions. While court actors used personal circumstances and elaborate bail plans to mitigate risk in Canada, those in England rarely discussed personal circumstances, applied more formulaic bail plans and instead relied on alternative narratives of the offence. Finally, Chapter Six demonstrates how flexible guidelines surrounding case processing in each jurisdiction permitted legally viable, but ultimately dissimilar conceptualisations of court efficiency and the relationship between bail and the rest of the court process. This permitted disparate practices in terms of the time used to move cases through the process. A conceptualisation of the bail process as lengthy and insular in Canada resulted in longer case processing while the idea that it was quick and integrated in England resulted in speedier case processing.

The flexibility of the framework surrounding the bail decision-making process was also observed in relation to the principles contained in the overarching rhetoric. As was the case with the law, criminal justice rhetoric could be interpreted widely and thus applied disparately by court actors. This was clearly observed in relation to the application of the due process values that provide the foundation of both English and Canadian bail legislation and the crime control values that have been increasingly prioritised in these jurisdictions over time. In Canada, additional checks and balances during the bail process were perceived to ensure fairness for the defendant and thus reflect due process principles. This is how court actors justified prolonged negotiations, detailed bail plans, and taking more time and appearances to get the 'right' bail decision. In England, however, court actors often argued that lengthy bail proceedings violated the rights of the defendants, adhering to Feeley's (1992) argument that enduring the criminal process was in and of itself a punishment. Furthermore, while court actors in both jurisdictions sought to repress offending-related behaviour (see Chapter Five), ideas as to what constituted crime control differed substantially. Court actors in England sought to repress offending on bail through targeted bail conditions or remands in custody, while those in Canada believed addressing the social causes underlying criminal behaviour and thus reforming the alleged offender would reduce crime. While these differing perspectives reflect the general consensus in each jurisdiction, even internally there was dissent on these interpretations. As such, it is not just the law, but also the principles within criminal justice rhetoric that are open to wide interpretation.

Criminal justice rhetoric is also flexible in that it contains competing principles. This was illustrated in the current research, whereby court actors were expected, among other priorities, to emphasise the liberty of the defendant, ensure public safety, protect victims, complete the process efficiently and uphold fairness throughout. Depending on the way in which these principles were prioritised by court actors, they resulted in vastly different behaviours. While a prosecutor in the Canadian court might argue that a highly restrictive bail plan would protect the public and secure the liberty of the defendant, their counterpart in the English court may suggest that remanding the same defendant in custody would be the only way to ensure the safety of the victim.

Both court actors would be applying principles contained in the overarching rhetoric and neither would be violating their respective bail laws.

While the law was shown to be an important formal factor to examine given the scope it provided for discretion, more informal factors related to court culture and the views surrounding the broader criminal process were shown to be critical in shaping how that discretion was used. As previous research has demonstrated, court culture was central to the bail decision-making process (Hucklesby, 1997a; Myers, 2009, 2015; Webster, 2009). The shape of this process could be partially attributed to the norms, incentives, and informal practices that evolved in each court and the manner in which they were mediated through the courtroom workgroup. However, this culture was also shaped by broader views that developed in each jurisdiction as a result of evolving criminal justice ideologies. The way in which these principles were balanced influenced the values deemed important in the English and Canadian courts.

The values held by the court actors extended beyond the bail process, specifically, and encompassed attitudes surrounding the criminal process more generally. While other research has pointed to the importance of such contextual factors (Church, 1985; Hucklesby, 1997a; Rungay, 1995) they have not fully accounted for how they influence the culture of the court. By stepping outside the confines of one jurisdiction, this study was better able to assess *how* the impact of this broader criminal justice context in each jurisdiction manifests itself. Ultimately, it was found that court culture, as shaped by this broader context, was crucial to determining the nature of the informal negotiations that took place between the court actors, the defendant and case characteristics they used to construct the case, and the speed with which defendants moved through the bail process.

Previous research has suggested that formal bail hearings, in which the prosecution and defence present their cases to a judicial official, have largely been replaced by informal negotiations that take place outside of open court (Hucklesby, 1997b; Myers, 2015). The findings in both jurisdictions support this assertion. Court actors in both jurisdictions were incentivised, for a variety of

reasons related to court culture, to avoid contested bail hearings and negotiate outside of open court. Indeed, court actors were shown to make decisions based on financial incentives and to work together, to some extent, to avoid uncertainty and search for ways to move through the court list. However, their behaviour was also shaped by broader views related to managerialism that manifested themselves differently across the two jurisdictions. While prosecutors in Canada were preoccupied with broader risk management, and consequently ensuring onerous restrictions were placed upon defendants released on bail, court actors in England were concerned with moving through the bail process quickly and minimising the use of custody to reduce costs associated with courts and prisons. This demonstrates that broader values surrounding the criminal process were being balanced in a disparate fashion across the two jurisdictions. It was also suggested that these values may influence the decisions of the police, shaping the nature of the cases that entered each bail process and having a formative impact on the perceived role of the prosecution and defence at bail. Indeed, detention practices in England were largely perceived to be more appropriate than those in Canada, ultimately impacting the extent to which court actors agreed with each other in each jurisdiction. These factors interacted to produce a culture of consensus in England compared to one more centred on conflict in Canada.

The interaction between culture and context was also found in relation to the defendant and case characteristics used to construct bail cases. Consistent with previous research (Church, 1982; Eisenstein & Jacob, 1977; Lipetz, 1984), the defence and prosecution were found to present this information in a routine fashion in accordance with the perceived expectations of the court. This was largely done with a view of reducing the uncertainty of the proceedings (Eisenstein & Jacob, 1977). The information that was prioritised, however, according to wider expectations about risk. In both jurisdictions, information was conveyed and exceptions to bail were applied with the view of preventing further offending. However, in Canada, robust bail plans, particularly those involving supervision, were deemed to be critical to mitigating risk. In England, the focus was primarily on providing alternative narratives of the allegations and formulaic bail plans. This resulted in much more individualised approach to the mitigation of bail risk in Canada than in England, where there was a greater focus on the

allegations themselves. The routine use of 'therapeutic justice' (Hannah-Moffat & Maurutto, 2012) in Canada was based on the idea that targeting the underlying causes of offending would reduce the risk of further offences. It is suggested that these differences were rooted in an enhanced focus on rehabilitation in the criminal process in Canada relative to that in England. In comparison, the focus on early case resolutions in the broader criminal justice process in England (Narey Report, 1997) meant that allegations were discussed in conjunction with bail and thus also used to mitigate bail risk. This is another example of broader views surrounding the criminal process bleeding into the way the court actors understand the norms at play in each court.

Court actors sought to move cases through the bail process at a pace that was consistent with court norms. In accordance with previous research (Church, 1982; Heumann, 1978; Hucklesby, 1997a; McConville et al., 1994) standard practices related to case processing times were both perpetuated and entrenched through the continued adherence of court actors. In Canada, this meant that adjournments were routinely approved and bail decisions often took more than one appearance, while in England only one appearance was typically required and informal practices in bail court conformed to this standard. These practices were largely rooted in the conceptualisation of the bail process as a summary procedure in England as opposed to the 'mini-trial' that has been conceived in Canada. This difference mirrors broader norms surrounding case processing times in England and Canada. Indeed, while England has largely decreased case processing times in the last few decades (Ministry of Justice, 2008b, 2017a), Canada continues to experience difficulty in doing so (Standing Senate Committee on Legal and Constitutional Affairs, 2017). These findings suggest this was, in part, a product of different applications of due process values. While time-consuming checks and balances were seen as fundamental to ensuring fairness in Canada, ensuring the defendant does not spend an unnecessary amount of time in custody was primary in England. Once again, we see the broader views surrounding the criminal process prioritising different aspects of the criminal justice rhetoric and affecting the way bail courts operate.

In sum, these findings suggest that the factors contributing to bail decision-making process can be understood using a framework which includes law,

culture, and broader views surrounding the criminal justice process. Even though the manifestation of these factors may vary between jurisdictions, in both Canada and England, these features can collectively explain the decision-making of court actors. The discretion afforded to court actors by the law enabled culture to become central to their decision-making. However, culture cannot be separated from the broader criminal justice context. While informal practices, incentives and norms developed within each court, ultimately these organisational concerns interacted with wider contextual factors that shape views surrounding the entirety of the criminal process. Similarly, the influence of these broader views cannot be understood apart from culture given that they are mediated through the behaviour of the workgroup. As such, a comprehensive analysis of the factors that influence bail decision-making must involve an understanding of both of these contributing factors and the way in which they interact within the framework of the overarching bail laws.

The impact of bail decision-making at the local level

The interaction of law, culture, and broader views surrounding the criminal justice process produced a unique pattern of bail decision-making in each jurisdiction. In both England and Canada, there was a clear impact on the functioning of the court and the shape of the bail process at the local level. The models of bail decision-making thus notably diverged between locations and had a disparate impact on bail outcomes.

In Canada, the relationship between the defence and prosecution was contentious, with prolonged negotiations taking place over cases that were often viewed to be inappropriate for police detention. In making bail decisions, the court was presented with information primarily centred on the risk of further offending, but ultimately the bail plan – and in particular obtaining a surety - was critical to mitigating these concerns and securing a release. The vast majority of these defendants were ultimately released, but after the defence agreed to restrictive bails involving some form of supervision. This process regularly took more than one appearance, often requiring a considerable amount of information and involving lengthy procedures.

In England, on the other hand, there was generally a collegial relationship between the prosecution and defence and minimal contention, both in negotiations and in open court, in relation to bail. This was related to the perception that the police were, in the main, detaining appropriate defendants in custody. Representations were also focused on the risk of further offending but unlike in Canada, these concerns were primarily mitigated through alternative versions of events or formulaic bail plans. More than a third of defendants were ultimately remanded in custody but the prosecution was not perceived to be unreasonable in imposing conditions on their release. Furthermore, this higher percentage of remands in custody may relate to the nature of the cases entering the court, which had attributes that were more in line with the exceptions to bail compared to their Canadian counterparts. The entire bail process was largely viewed as a summary process, involving minimal procedures and very rarely taking more than one appearance.

While the intention of this research was not to propose specific policy recommendations, it does have important implications for policy-makers who are seeking to reform the bail process in these jurisdictions in a more general sense. For instance, in attempting to learn from one another, policy-makers in England and Canada should be mindful of the differing contexts in which these cultures arose. Comparative researchers have argued that it is challenging to find 'solutions' to domestic problems given that many of the 'problems' are closely intertwined with otherwise valued features of the society (Nelken, 2007). However, this does not mean that attempts at policy transfer are fruitless (Jones & Newburn, 2007). For instance, Orucu (2007) has stated that different values pursued by different legal systems can and should be investigated and acknowledged when making recommendations. Given that one of the major findings in this study involved the examination of such values, it is argued that the jurisdictions can use this research to learn from another as long as they take these different contexts into account. For instance, suggesting that English court actors implement the lengthy testimonies that often take place in Canada as a means to acquire more information at the bail stage would most likely be unsuccessful given the bail process is conceptualised as a summary procedure in England. Such an oversight would likely lead to a failed attempt at policy transfer. Having a comprehensive understanding of the interaction of the

various factors influencing bail decision-making is thus critical for any policy-maker hoping to affect change in the bail system.

Furthermore, this research suggests that reforms of a piecemeal nature should be made with caution (Webster & Doob, 2015). This is, first, because altering one problem may have a domino effect on other issues. For instance, encouraging the court to refuse adjournments in Canada might increase the efficiency of the proceedings but it would also put the defence at a disadvantage if they were required to find a surety in order to secure a release for their client. Similarly, encouraging the court in England to intervene when signalling occurs could extend case processing time if done excessively. As such, care must be taken to view the process holistically before reforms are implemented. Second, piecemeal changes are problematic since they often do not target the underlying values that have created the culture that perpetuates the issue. Attempting to encourage court actors in England to take more time considering the issue of bail, for instance, would be better addressed by tackling the issue of them emphasising collegiality over adversarialism than it would by making small changes to individual procedures.

Understanding bail in a wider context

In addition to providing a framework for potential reform in each jurisdiction, the study also furthers an understanding of the bail process on a broader level. The findings challenge the way we have come to explain bail decision-making and provide a guide as to how to further examine this process.

First, this research challenges our understanding of the relationship between the law and the behaviour of court actors during the bail process. It echoes previous research (see McBarnet, 1981; McConville et al., 1991) that emphasises the importance of examining the law in attempts to understand the criminal justice process and its components. In line with McConville and his colleagues (1991) and McBarnet (1981), the findings suggest that attempts to understand the bail process should not be limited to an examination of the behaviour of criminal justice actors. Rather, this behaviour should be regarded according to its relationship with the overarching law. While previous research,

particularly in Canada, has framed issues with the bail process in the context of a failure by court actors to adhere to the law (see, for example, John Howard Society, 2013; Canadian Civil Liberties Association, 2014), this study suggests that this assertion is mistaken. The law is not necessarily ignored by court actors during the bail process, but rather used as a tool with which to exercise their own discretion. As such, as McConville and his colleagues (1991) and McBarnet (1981) have argued in relation to other criminal justice processes, the influence of the law should not be dismissed when examining the bail decision-making of court actors.

Second, the findings answer Young's (2013) call for a fuller exploration of the concept of court culture and suggest additional research of this nature should be pursued. Specifically, Young (2013) has argued that the idea that the courtroom workgroup generally follows a consensus model of behaviour is simplistic. The current study confirms this hypothesis, demonstrating that the extent to which court actors are incentivised to get along is very much dependent on the context in which they work. While this model describes the behaviour of court actors in England, who shared similar incentives, this did not describe the Canadian court actors, whose incentives were often inconsistent with other members of the workgroup. This suggests that future research should continue to explore the nuanced dynamics that exist within the courtroom workgroup and the extent to which they change in different contexts.

Finally, this study has highlighted the importance of understanding the context in which bail decisions are made and demonstrates the need to take this factor into account during future attempts to explain this process. While previous research has examined the relationship between the law and the behaviour of criminal justice actors (see, for example, Hucklesby, 1996; McBarnet, 1981; McConville et al., 1991; Myers, 2009), it has not fully addressed the broader context in which the process takes place. The decisions made by court actors during the bail process do not exist in a silo but rather are shaped by their views surrounding the broader criminal process. For instance, jurisdictions in which adversarialism, rehabilitation, or efficiency is viewed as critical to criminal justice will likely see this value bleeding into all components of the criminal process. Taking these broader views for granted in attempting to understand the bail

decision-making will fail to paint a comprehensive picture. As such, reducing analyses to 'culture' versus 'law' can only offer a partial explanation of the bail process.

Limitations and future research

Although this research has furthered an understanding of bail decision-making, it is limited in terms of its generalisability and scope. First, given that the study involved a comparative case study of two court locations, it cannot be understood to represent the entirety of either jurisdiction. Research consistently shows that court culture is unique to each location (Church, 1985; Hucklesby, 1997a; Leverick & Duff, 2002). However, while generalisations cannot be made in a statistical sense, this does not mean they cannot be made theoretically (Yin, 2014). Specifically, the knowledge gained in this study contributes to a greater understanding of the bail decision-making process generally even if it does not explain how this process operates in the entirety of each jurisdiction.

The study is also limited in terms of its scope. The absence of the views of the entire workgroup in Canada has limited the diversity of the perspectives obtained in this jurisdiction. As such, the same context was not acquired in relation to the decision-making of the prosecution and the court as it was with defence and duty counsel. In addition, the number of observations obtained that included bail decisions was limited in Canada given that about half of the appearances ultimately ended in adjournments. These limitations were partially supplemented through the triangulation of other forms of evidence obtained in the mixed methods study and by comparing the findings with other sources of information (e.g. the Crown Policy Manual). Nonetheless, the breadth of the research would have been improved by the addition of this data in Canada.

In light of these limitations it is suggested that additional research be undertaken in both jurisdictions to examine the extent to which these conclusions apply to other courts in other areas of the jurisdiction. For instance, some research suggests decision-making takes on a different form in smaller courts as opposed to the larger courts that were examined in this study (Ulmer, 1997). In addition, the views of both the prosecution and the court should be

examined in Canada in order to fully understand their perspective on bail. Given that the prosecution, in particular, appears to play a significant role in dictating the behaviour of the other court actors, it is critical that additional information is gained in relation to their views.

Contributions

Despite its limitations, this research contributes to an increased understanding of the practical operation of the bail process in both England and Canada. Bail has been referred to as the 'Cinderella' of criminal justice in that it has received very little academic or political attention (Hucklesby & Sarre, 2009). Indeed, bail decision-making has only recently become a prominent subject of research in Canada (Canadian Civil Liberties Association, 2014; Myers, 2009, 2015; Webster, 2009), and given recent concerns expressed by the government (Trudeau, 2015) it remains an area that warrants additional study. In England, only a limited amount of research has been conducted on bail decision-making since the introduction of legislation that has impacted the bail process, such as the Criminal Justice Act 2003 (Hucklesby, 2011a), and LASPO 2012 (Cape & Smith, 2016), and much of the research that has been conducted relies on hypothetical scenarios. Given the implications that bail decision-making has for defendants, criminal justice institutions, and human rights, it is critical that more is known about this area of study and how it is best understood. This research adds to this knowledge. Although results should not dictate what these administrations should and should not do it does provide them a framework with which to make such decisions. By providing a more comprehensive, nuanced way to understand this process, it facilitates better reform in the future.

The approach of this study offers an original contribution in that it provided a comparative perspective to the issue of bail decision-making in an international context. Very few studies have undertaken such an endeavour. Zweigert and Kotz (1998) suggest that approaches that focus on one jurisdiction only offer legal solutions to practical problems 'on their own terms' and argue that solutions should be freed from the context of their own system in order for evaluation to take place. As a result of the comparative component, taken for granted assumptions as to the way the bail process works could be identified

and new avenues of understanding and potential reform could be examined. The findings are more solution-oriented than single jurisdiction studies as issues in one court could be compared and contrasted to the other with the view of understanding their objective impact.

The comparative aspect of this study was particularly beneficial as it allowed for an increased understanding of the influence of broader criminal justice views on court culture. Many of the values and attitudes that were found to shape the culture of each court could have easily been bypassed without the ability to identify what the process might look like in a different context. This ultimately demonstrated that court culture was not, as it is often portrayed, a nebulous concept, but rather an explicit product of the environment in which it was entrenched.

Concluding reflections

This research suggests that the factors contributing to bail decision-making are nuanced and varied. Rather than exerting their influence independently, factors related to the law, policy, court culture, and broader views surrounding the criminal process work together in an interactive fashion to impact the behaviour of court actors during the bail process. Only by taking all of these contributing factors into account can the bail decision-making process be understood.

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Appendix A

1. COURT - CANADA

- 1.1 Date:
 1.2 Court:
 1.3 Courtroom:
 1.4 Judicial Official(s): Justice of the Peace / Judge
 1.C Video Appearance: Yes / No

2. DEFENDANT**Defendant:**

- 2.1 Name of Defendant:
 2.2 Date of Birth:
 2.3 Address/Postcode:
 2.4 Sex: Male / Female
 2.5 Race: White / Black / Asian / Aboriginal / Mixed /
 Other: _____ / Unknown
 2.6 Foreign National: Yes / No / Unknown

Legal:

- 2.7 Representation: Private / Duty / Unrepresented
 2.8 Interpreter: Yes / No
 2.7.1 If YES, Language: _____
 2.9 Criminal Record: Yes / No / Not Stated

Hold Downs: 1 2 3 4 5

3. CASE

- 3.1 Date of Arrest:
 3.C Reverse onus offence: Yes / No
 3.2 On Bail: Yes / No / Not Stated
 3.2.C If YES, 524 Application: Yes / No / Not
 Stated
 3.3 List of Alleged Offences:

Alleged Offence	Date	Plea
1.		Guilty / Not Guilty / Not Stated
2.		Guilty / Not Guilty / Not Stated
3.		Guilty / Not Guilty / Not Stated
4.		Guilty / Not Guilty / Not Stated
5.		Guilty / Not Guilty / Not Stated

3.4 Additional Offence Details:

4. POSITIONS**Crown****4.1 Crown Position:** Bail / Detention / Not Stated**4.1.C** If **BAIL:** Recognizance / Undertaking**4.1.C.1** If **RECOGNIZANCE** (all applicable):

- Own i) \$_____ ii) Bail Program? Y / N
- Surety i) \$_____ ii) #_____ iii) Residential? Y / N
- Deposit: \$_____
- Conditions

4.1.C.2 If **UNDERTAKING**

- With conditions
- Without conditions

4.1.1 If **DETENTION, grounds stated?** Yes / No**a) If YES, which?**

- Primary – Attend Court
- Secondary – Public Safety
- Tertiary – Confidence in admin of justice

Defence**4.2 Defence Position:** Bail / Consent Detention / Not Stated**4.2.C** If **BAIL:** Recognizance / Undertaking**4.2.C.1** If **RECOGNIZANCE** (check all applicable):

- Own i) \$_____ ii) Bail Program? Y / N
- Surety i) \$_____ ii) #_____ iii) Residential? Y / N
- Deposit: \$_____
- Conditions

4.2.C.2 If **UNDERTAKING**

- With conditions
- Without conditions

5. SURETIES (IF APPLICABLE)**5.1 Involvement:** Called to stand #_____ / Came forward #_____ / None / Other: _____**5.2 Relationship to defendant**

6A. INFORMATION PROVIDED – Bail History

Factors	Stated	Volume	Details
Fulfilment of bail obligations (e.g. breaches, FTAs)	CR	1 2 3	
	DEF	1 2 3	
	JP/JG	1 2 3	
	STY	1 2 3	
Offending on bail	CR	1 2 3	
	DEF	1 2 3	
	JP/JG	1 2 3	
	STY	1 2 3	
Other bail history	CR	1 2 3	
	DEF	1 2 3	
	JP/JG	1 2 3	
	STY	1 2 3	

6B. INFORMATION PROVIDED – Criminal History

Factors	Stated	Volume	Details
Volume / recency of previous convictions	CR	1 2 3	
	DEF	1 2 3	
	JP/JG	1 2 3	
	STY	1 2 3	
Nature of previous convictions (e.g. seriousness, similarity to alleged offence)	CR	1 2 3	
	DEF	1 2 3	
	JP/JG	1 2 3	
	STY	1 2 3	
Other criminal history	CR	1 2 3	
	DEF	1 2 3	
	JP/JG	1 2 3	
	STY	1 2 3	

6C. INFORMATION PROVIDED – Personal Circumstances #1

Factors	Stated	Volume	Details
Mental health, drug, and alcohol issues	CR	1 2 3	
	DEF	1 2 3	
	JP/JG	1 2 3	
	STY	1 2 3	
Employment and education	CR	1 2 3	
	DEF	1 2 3	
	JP/JG	1 2 3	
	STY	1 2 3	
Community supports	CR	1 2 3	
	DEF	1 2 3	
	JP/JG	1 2 3	
	STY	1 2 3	

6D. INFORMATION PROVIDED – Personal Circumstances #2

Factors	Stated	Volume	Details
Residence	CR	1 2 3	
	DEF	1 2 3	
	JP/JG	1 2 3	
	STY	1 2 3	
Supervision	CR	1 2 3	
	DEF	1 2 3	
	JP/JG	1 2 3	
	STY	1 2 3	
Other personal circumstances	CR	1 2 3	
	DEF	1 2 3	
	JP/JG	1 2 3	
	STY	1 2 3	

6E. INFORMATION PROVIDED – Case/Legal issues

Factors	Stated	Volume	Details
Case details/strength	CR	1 2 3	
	DEF	1 2 3	
	JP/JG	1 2 3	
	STY	1 2 3	
Legislation/precedent	CR	1 2 3	
	DEF	1 2 3	
	JP/JG	1 2 3	
	STY	1 2 3	
Other case/legal issues	CR	1 2 3	
	DEF	1 2 3	
	JP/JG	1 2 3	
	STY	1 2 3	

7. CONDITIONS OF RELEASE

Imp.	Condition	Suggested By	Relevant Details
	Keep the peace & be of good behaviour	CR/DEF/JP	
	Attend court	CR/DEF/JP	
	Report to police	CR/DEF/JP	
	Report to bail program	CR/DEF/JP	
	Report to other person/program	CR/DEF/JP	Person/program:
	Reside at address	CR/DEF/JP	
	Reside with person	CR/DEF/JP	
	Be amenable to routine and discipline of household	CR/DEF/JP	
	Notify OIC of address	CR/DEF/JP	
	Notify OIC of change of address	CR/DEF/JP	
	Remain in residence	CR/DEF/JP	Hours: Exceptions: medical emergencies / attend court / travel to work or school / in presence of surety / in presence of _____ / other:
	Remain in specific jurisdiction	CR/DEF/JP	
	Deposit passport	CR/DEF/JP	
	Do not attend specific location	CR/DEF/JP	
	Stay specified distance from specific location	CR/DEF/JP	
	No contact	CR/DEF/JP	Individual(s): Exceptions: family court order / presence of legal counsel / attend mediation / to contact children / retrieve belongings

			/ other:
	Do not be within specified distance of individual(s)	CR/DEF/JP	
	Do not be in company of minors	CR/DEF/JP	
	Do not attend locations with minors	CR/DEF/JP	
	Do not work with minors	CR/DEF/JP	
	Attend educational program	CR/DEF/JP	
	Seek suitable work	CR/DEF/JP	
	Do not possess firearms, etc.	CR/DEF/JP	
	Do not possess any weapon defined by CCC	CR/DEF/JP	
	Deposit weapons	CR/DEF/JP	
	Do not apply for weapon licence	CR/DEF/JP	
	Do not operate motor vehicle	CR/DEF/JP	
	Abstain from alcohol	CR/DEF/JP	
	Do not leave residence with alcohol in body	CR/DEF/JP	
	Do not attend premises selling liquor	CR/DEF/JP	
	Abstain from drugs	CR/DEF/JP	
	Do not possess drug paraphenalia	CR/DEF/JP	
	Do not possess cell phone, digital device	CR/DEF/JP	Exceptions: work or school / other:
	Do not possess/use computers	CR/DEF/JP	Exceptions: work or school / other:
	Do not possess ID, card, etc not in own name	CR/DEF/JP	Exceptions: work / other:
	Counselling/mental health assessment	CR/DEF/JP	
	Sign releases pertaining to counselling	CR/DEF/JP	
		CR/DEF/JP	

8. OUTCOME**8.1 Bail decision made: Yes / No**If **NO**:**8.1.3 Outcome:** Adjourned / Traversed / Other: _____**8.1.3.1 If ADJOURNED:**

a) Who requested: Crown / Defence / JP / Unclear

b) Justification: _____

8.1.3.2 If TRAVERSED:

Where? _____

If **YES**:**8.1.1 Decision stated by JP/Judge:** Yes / No**8.1.2 Decision:** Bail / Detention**8.1.2.C If BAIL:** Recognizance / Undertaking**8.1.2.C.1 If RECOGNIZANCE** (all applicable):

- Own i) \$ _____ ii) Bail Program? Y / N
- Surety i) \$ _____ ii) # _____ iii) Residential? Y / N
- Deposit: \$ _____
- Conditions

8.1.2.C.2 If UNDERTAKING:

- With conditions
- Without conditions

8.1.2.1 If DETENTION, grounds stated? Yes / No

a) Which?

- Primary – Attend Court
- Secondary – Public Safety
- Tertiary – Confidence in admin of justice

9. FUTURE COURT APPEARANCE**9.1 Next Court Date:****9.2 Purpose of Next Court Date:** _____

10. OTHER NOTES

1. COURT INFORMATION - ENGLAND**1.1 Date:****1.2 Court:****1.3 Courtroom:****1.4 Judicial Official(s):** 2 Magistrates / 3 Magistrates /
District Judge**2. DEFENDANT INFORMATION****Demographics****2.1 Defendant (code):****2.2 Date of Birth:****2.3 Address/Postcode:****2.4 Sex:** Male / Female**2.5 Race:** White / Black / Asian / Mixed /

Other: _____ / Unknown

2.6 Foreign National: Yes / No / Unknown**Legal****2.6 Representation:** Private / Duty / Unrepresented**2.7 Interpreter:** Yes / No**2.7.1 If YES, Language:** _____**2.8 Criminal Record:** Yes / No / Not Stated**3. CASE INFORMATION****3.1 Date of Arrest:****3.E.1 Type of Appearance:** In-Custody / Out of Custody**3.E.2 Allegation:** Offence / Unlikely to surrender / (Likely to)
Breach**3.E.3 Type of Remand:** Unconvicted / Convicted unsentenced**3.2 On Bail at Time of Alleged Off/Breach:** Yes / No / Not
Stated**3.2.1 If YES, was it Conditional Bail?** Yes / No / Not Stated**3.3 List of Alleged Offences/Breaches:**

Alleged Offence/Breach	Date	Plea
1.		Guilty / Not Guilty / Not Stated
2.		Guilty / Not Guilty / Not Stated
3.		Guilty / Not Guilty / Not Stated
4.		Guilty / Not Guilty / Not Stated
5.		Guilty / Not Guilty / Not Stated

3.4 Additional Offence/Breach Details:

4. POSITIONS**CPS**

4.1 CPS Position: Unconditional Bail / Conditional Bail /
Custody / Not Stated

4.1.1 If COND. BAIL/CUSTODY, grounds stated? Yes / No

a) If YES, which?

- Fail to surrender to custody
- Commit offence while on bail
- Interfere witnesses/obstruct justice
- Other: _____

Defence

4.2 Defence Position: Bail Application / No Bail Application /
Not Stated

4.2.E.1 Were conditions suggested? Yes / No

5. SURETIES (IF APPLICABLE)

5.1 Called to stand? Yes / No

5.1.1 If YES, how many? 1 2 3 4 5

5.2 Relationship to defendant:

6A. INFORMATION PROVIDED – Bail History

Factors	Stated	Volume	Details
Fulfilment of bail obligations (e.g. breaching conditions, failing to appear)	CPS	1 2 3	
	DEF	1 2 3	
	MG/JG	1 2 3	
	STY	1 2 3	
Offending whilst on bail	CPS	1 2 3	
	DEF	1 2 3	
	MG/JG	1 2 3	
	STY	1 2 3	
Other bail history	CPS	1 2 3	
	DEF	1 2 3	
	MG/JG	1 2 3	
	STY	1 2 3	

6B. INFORMATION PROVIDED – Criminal History

Factors	Stated	Volume	Details
Volume & recency of previous convictions	CPS	1 2 3	
	DEF	1 2 3	
	MG/JG	1 2 3	
	STY	1 2 3	
Nature of previous convictions (e.g. similarity to alleged offence, seriousness of previous convictions)	CPS	1 2 3	
	DEF	1 2 3	
	MG/JG	1 2 3	
	STY	1 2 3	
Other criminal history	CPS	1 2 3	
	DEF	1 2 3	
	MG/JG	1 2 3	

6C. INFORMATION PROVIDED – Personal Circumstances

Factors	Stated	Volume	Details
Mental health, drug, and alcohol issues	CPS	1 2 3	
	DEF	1 2 3	
	MG/JG	1 2 3	
	STY	1 2 3	
Employment and education	CPS	1 2 3	
	DEF	1 2 3	
	MG/JG	1 2 3	
	STY	1 2 3	
Community supports/involvement	CPS	1 2 3	
	DEF	1 2 3	
	MG/JG	1 2 3	
	STY	1 2 3	

6D. INFORMATION PROVIDED – Case/Legal Issues

Factors	Stated	Volume	Details
Offence details	CPS	1 2 3	
	DEF	1 2 3	
	MG/JG	1 2 3	
	STY	1 2 3	
'Triable issues'/Strength of case	CPS	1 2 3	
	DEF	1 2 3	
	MG/JG	1 2 3	
	STY	1 2 3	
Legal arguments	CPS	1 2 3	
	DEF	1 2 3	
	MG/JG	1 2 3	
	STY	1 2 3	

6E. INFORMATION PROVIDED – Living Arrangements & Other

Factors	Stated	Volume	Details
Residence	CPS	1 2 3	
	DEF	1 2 3	
	MG/JG	1 2 3	
	STY	1 2 3	
Surety/Supervision	CPS	1 2 3	
	DEF	1 2 3	
	MG/JG	1 2 3	
	STY	1 2 3	
Other	CPS	1 2 3	
	DEF	1 2 3	
	MG/JG	1 2 3	
	STY	1 2 3	

7. CONDITIONS OF RELEASE

Imp.	Condition	IF ON BAIL, new cond.?	Suggested By	Relevant Details
	Curfew		CPS/DEF/MG	Electronic Monitoring: Yes / No Hours: Exceptions:
	Reside at specific address		CPS/DEF/MG	
	Reside at bail hostel		CPS/DEF/MG	
	Abide by rules of bail hostel		CPS/DEF/MG	
	Report to police		CPS/DEF/MG	
	Report to bail support worker		CPS/DEF/MG	
	Report to specific person/org.		CPS/DEF/MG	
	Do not contact		CPS/DEF/MG	Individual(s):
	Exclusion from certain area		CPS/DEF/MG	
	Stay specified distance from certain area		CPS/DEF/MG	
	Surrender passport		CPS/DEF/MG	
	Drug assessment/treatment		CPS/DEF/MG	
	Medical examination		CPS/DEF/MG	
	See defence representative		CPS/DEF/MG	
	Surety		CPS/DEF/MG	Amount:

8. OUTCOME**8.1 Bail decision made: Yes / No**If **YES**:**8.1.1 Decision stated by Magistrate/Judge:** Yes / No**8.1.2 Decision (bail):** Unconditional Bail / Conditional Bail /
Custody / Not Stated**8.1.2.E IF BREACH, opinion (demonstrated?):** Yes / No**8.1.2.1 If COND. BAIL or CUSTODY, grounds stated?** Yes |
/ No**a) If YES, which?**

- Fail to surrender to custody
- Commit offence while on bail
- Interfere witnesses/obstruct justice
- Other: _____

8.1.2.E Were considerations stated? Yes / No**a) If YES, which?**

- Nature and seriousness of offence/default (and probable method for dealing with it)
- Character/antecedents/associations/community ties
- Record of fulfilments of obligations under previous bails
- Strength of the evidence of having committed offence/default
- Other _____

If **NO**:**8.1.3 Outcome:** Adjourned / Traversed / Other: _____**8.1.3.1 If ADJOURNED:****a) Who requested:** Crown / Defence**b) Justification:**_____
_____**8.1.3.2 If TRAVERSED:**Where? _____

9. FUTURE COURT APPEARANCE

9.1 Next Court Date:

9.2 Purpose of Next Court Date: _____

10. OTHER NOTES

Appendix B

Interview Guide: Defence - Canada

BACKGROUND INFORMATION:

I will start by asking you a few questions about your role and experience.

1. What is your current role at this court?
2. How long have you worked at this court, specifically, and acted as a defence counsel, generally?
3. Do you currently or have you ever worked as a defence counsel at another court location? If so, which one(s)?
4. Have you worked on bail matters the entire time you have acted as a defence counsel? If not, approximately how long have you had this responsibility?

LAW

I am interested in how court practitioners in both England and Canada understand and apply their respective bail laws. In this section, I am going to ask you a few questions about your views on and interpretation of the Canadian law.

5. What do you understand the 'right to reasonable bail' to mean?
 - i. How do you tend to apply this principle during your submissions?
6. What do you see to be the practical impact of reverse onus provisions in terms of your decision-making?
7. Overall, how useful would you say the current bail laws are in terms of framing your decision-making?

POLICY

This section focuses on the impact of both local and wider policies associated with the bail decision-making process.

8. a) Can you think of any local policies or initiatives that have had an impact on the bail process?

i.e. Those that are unique to this jurisdiction/court – directions from your supervisor(s)/administration, shifts in priorities – anything resulting in changes to practice or procedure at this location.

- b) What about wider – provincial/federal – policies or initiatives?

i.e. Changes in funding/resources, political priorities.

9. To what extent have these policies affected the way you handle bail cases?

PRACTICE

Preparing for Bail Proceedings

I'm going to ask you a few questions about the importance of the information you receive and how you take it into consideration when you are preparing your submissions.

10. Would you say that the appropriate accused persons are generally detained in custody at the arrest stage?

11. What would you say are the most important defendant and case characteristics to consider when you are preparing your submissions?

i.e. background and personal circumstances of the accused person and details surrounding the case

12. a) What information do you typically present when you are attempting to alleviate

primary ground concerns?

b) What about secondary ground concerns?

c) What about the tertiary ground concerns?

13. Do you find that you usually have the information you need to present a satisfactory argument in bail court?

Forms of Release

The following questions focus on your decision-making process in relation to accused persons who are granted bail.

14. How often would you say that accused persons are released from court on their own undertaking without conditions?

15. How do you determine which conditions are appropriate?

16. a) What do you consider to be the role of a surety?

b) Under what circumstances do you typically advise clients to obtain a surety?

Court Culture

This section contains several questions about the informal processes that underlie the bail process at this court.

17. How would you describe the dynamic between court practitioners (i.e. Justices of the Peace, Crowns, and defence) at this location?

18. a) Do you generally speak with the Crown about the case prior to appearing in bail court?

b) If/when you do, what typically goes on during these discussions?

19. What changes do you think would have to take place in order for there to be a determination of bail in one court appearance?

FUTURE DIRECTIONS

I will conclude by asking you a question that aims to improve future bail decision-making.

20. Do you think it is necessary to make changes to the bail decision-making process?

- i. If YES, what changes?
- ii. If NO, why not?

Interview Guide: Magistrates/District Judges - England

BACKGROUND INFORMATION

I will start by asking you a few questions about your role and experience.

1. What is your current role in the magistrates' courts?
2. How long have you sat at this court, specifically, and been a magistrate/District Judge, generally?
3. Do you currently or have you ever sat at another court location? If so, which one(s)?
4. Have you been responsible for making bail decisions the entire time you have been a magistrate/District Judge? If not, approximately how long have you had this responsibility?

LAW

I am interested in how court practitioners in both England and Canada understand and apply their respective bail laws. In this section, I am going to ask you a few questions about your views on and interpretation of the English law.

5. What do you understand the 'presumption in favour of bail' to mean?
 - i. How do you tend to apply this principle in practice?

PRACTICE

The Bail Decision

I'm going to ask you a few questions about the importance of the information you receive and how you take it into consideration when you are making a bail decision.

6. To what extent would you say that the police's bail decision influences your own decision?
7. What do you think are the most important defendant and case characteristics to take into consideration when you are making a bail decision?
 - i.e. background and personal circumstances of the accused person and details surrounding the case
8.
 - a) What information do you typically consider when you are determining whether there are substantial grounds to believe that a defendant will fail to surrender to custody?
 - b) What about whether a defendant will commit an offence while on bail?
 - c) What about whether a defendant will interfere with witnesses or otherwise obstruct the course of justice?
9. How do breaches of bail conditions tend to impact your bail decision?

Given you receive information from a number of sources during the bail process (e.g. the CPS, defence solicitor, legal advisor, defendant, bail information officer) I am interested to know how useful this information is and how you tend to weight it during your decision-making process.

10. What source(s) of information do you consider to be the most important to your decision-making process?
11. Do you find that you are usually provided with the information you need to make a well-informed bail decision?

Granting Bail

The following questions focus on your decision-making process in relation to accused persons who are remanded on bail.

12. Under what circumstances would you remand a defendant on unconditional versus conditional bail?
13. In the event that you determine bail conditions are appropriate, how do you decide which conditions should be imposed?
14. a) What do you consider to be the role of a surety?
b) Under what circumstances do you typically impose sureties?
15. How often do you modify bail conditions that have been imposed by the police?

Court Culture

This section contains several questions about the informal processes that underlie the bail process at this court.

16. a) Does it come across as though CPS and defence discuss bail prior to appearing in court?
 - i. If YES:
 - a) What do you understand to take place during these discussions?
 - b) Are you likely to question recommendations that have been agreed upon by both parties?
17. Are there any circumstances that might require more than one court appearance for a determination of bail to be made?

FUTURE DIRECTIONS

I will conclude by asking you a question that aims to improve future bail decision-making.

18. Do you think it is necessary to make changes to the bail decision-making process?
 - i. If YES, what changes?
 - ii. If NO, why not?

Interview Guide: Legal Advisers - England

BACKGROUND INFORMATION

I will start by asking you a few questions about your role and experience.

1. What is your current role in the magistrates' courts?
2. How long have you worked at this court, specifically, and been a legal adviser, generally?
3. Do you currently or have you ever worked as a legal adviser at another court location? If so, which one(s)?
4. Have you sat in remand court the entire time you have been a legal adviser? If not, approximately how long have you had this responsibility?

LAW

I am interested in how court practitioners in both England and Canada understand and apply their respective bail laws. In this section, I am going to ask you a few questions about your views on and interpretation of the English law.

5. In order to set the context, I'm going to start by asking you, what are your general views on the law related to bail in England?
6. How might you explain the 'presumption in favour of bail' to a magistrate or District Judge?
7. What do you see to be the practical impact of some of the more recent changes to the bail laws in terms of the advice you provide to magistrates?
8. Overall, how useful would you say the current bail laws are in terms of enabling you to provide appropriate guidance?

POLICY

This section focuses on the impact of both local (i.e. exclusive to this court and/or the surrounding area) and wider/national policies on the bail decision-making process.

9. a) Can you think of any local policies or initiatives that have had an impact on the bail decision-making process?
b) What about wider/national policies or initiatives?
10. To what extent have these policies affected the guidance you provide to magistrates and District Judges?

PRACTICE

The Bail Decision

I'm going to ask you a few questions about the importance of the information that is provided in court and to what extent this information impacts both the support you provide to magistrates and District Judges and general practices at this court.

11. To what extent would you say the police bail decision impacts the court bail decision?
12. What would you say are the most common defendant and case characteristics discussed during a determination of bail?
i.e. background and personal circumstances of the accused person and details surrounding the case
13. *I am interested in how you offer guidance with respect to the exceptions to the right to bail. As such, I'm going to go through the main exceptions and ask you how you might explain them to a magistrate or District Judge.*
 - a) How might you explain the exception to bail related to whether the defendant will fail to surrender to custody?
 - b) What about whether a defendant will commit an offence while on bail?
 - c) What about whether a defendant will interfere with witnesses or otherwise obstruct the course of justice?
14. What guidance might you provide in cases where defendants are alleged to have breached their bail conditions?

Given information is provided from a number of sources during the bail process (e.g. the CPS, defence solicitor, defendant, bail information officer) I am interested to know how useful this information is and how it is weighted.

15. In your view, what source(s) of information is the most important to the bail decision-making process?
16. Do you find that you are usually provided with the information you need to provide well-informed guidance related to bail?

Granting Bail

The following questions focus on the decision-making process in relation to accused persons who are remanded on bail.

17. How might you explain the appropriate use of conditional versus unconditional bail to a magistrate or District Judge?
 18. In the event that it is decided that bail conditions are appropriate, how might you offer guidance in relation to selecting specific conditions?
 19. a) What do you consider to be the role of a surety?
-

b) Under what circumstances would you advise that the imposition of a surety be considered by a magistrate or District Judge?

20. How often would you say that bail conditions imposed by the police are modified in court?

Court Culture

This section contains several questions about the informal processes that underlie the bail process at this court.

21. To what extent would you say that your role changes when you are sitting in remand court with magistrates versus District Judges?

22. a) How would you describe the relationship between legal advisers and magistrates at this court?

b) What about legal advisers and District Judges?

c) What about legal advisers and the CPS?

d) What about legal advisers and defence solicitors?

23. To what extent do the specific individuals acting as magistrates/District Judges, CPS, and defence influence the bail decision-making process?

24. a) Does it come across as though CPS and defence discuss bail prior to appearing in court?

i. If YES: a) What do you understand to take place during these discussions?

b) Are recommendations that have been agreed upon by both parties likely to be questioned in court?

25. Are there any circumstances that might require more than one court appearance for a determination of bail to be made?

FUTURE DIRECTIONS

I will conclude by asking you a question aimed at improving future bail decision-making.

26. Do you think it is necessary to make changes to the bail decision-making process?

ii. If YES, what changes?

iii. If NO, why not?

Interview Guide: Defence - England

BACKGROUND INFORMATION:

I will start by asking you a few questions about your role and experience.

1. What is your current role in the magistrates' courts?
2. How long have you worked at this court, specifically, and acted as a defence solicitor, generally?
3. Do you currently or have you ever worked as a defence solicitor at another court location? If so, which one(s)?
4. Have you worked on bail matters the entire time you have acted as a defence solicitor? If not, approximately how long have you had this responsibility?

LAW

I am interested in how court practitioners in both England and Canada understand and apply their respective bail laws. In this section, I am going to ask you a few questions about your views on and interpretation of the English law.

5. What do you understand the 'presumption in favour of bail' to mean?
 - i. How do you tend to apply this principle during your submissions?
6. What do you see to be the practical impact of some of the changes to the bail laws in terms of your decision-making? *i.e. reasonable prospect of custody test, restrictions on bail*
7. Overall, how useful would you say the current bail laws are in terms of framing your decision-making?

POLICY

This section focuses on the impact of both local (i.e. exclusive to this court and/or the surrounding area) and wider/national policies on the bail decision-making process.

8. a) Can you think of any local policies or initiatives that have had an impact on the bail process?
 - b) What about wider – provincial/federal – policies or initiatives?
9. To what extent have these policies affected the way you handle bail cases?

PRACTICE

Preparing for Bail Proceedings

I'm going to ask you a few questions about the importance of the information you receive and how you take it into consideration when you are preparing your submissions.

10. Would you say that the appropriate defendants are generally detained in custody by the police?

11. What would you say are the most important defendant and case characteristics to consider when you are preparing your submissions?

i.e. background and personal circumstances of the accused person and details surrounding the case

12. *I am interested in what information you present with respect to the exceptions to the right to bail. As such, I'm going to go through the main exceptions and ask you what information you might provide to alleviate each concern.*

a) What information do you typically present when you are attempting to alleviate

concerns that the defendant will fail to surrender to custody?

b) What about whether a defendant will commit an offence while on bail?

c) What about whether a defendant will interfere with witnesses or otherwise obstruct the course of justice?

13. How do you typically handle cases where defendants are alleged to have breached their bail conditions?

14. Do you find that you usually have the information you need to present a satisfactory argument in bail court?

Forms of Release

The following questions focus on your decision-making process in relation to accused persons who are granted bail.

15. Under what circumstances would your clients typically receive unconditional as opposed to conditional bail?

16. How do you determine which conditions are appropriate?

17. a) What do you consider to be the role of a surety?

b) Under what circumstances do you typically advise clients to obtain a surety?

Court Culture

This section contains several questions about the informal processes that underlie the bail process at this court.

18. How would you describe the dynamic between court practitioners (i.e. district judges/magistrates, CPS, defence) at this location?
19. a) Do you generally speak with the Crown about the case prior to appearing in remand court?
b) If/when you do, what typically goes on during these discussions?
20. Are there any circumstances that might require more than one court appearance for a determination of bail to be made?

FUTURE DIRECTIONS

I will conclude by asking you a question that aims to improve future bail decision-making.

21. Do you think it is necessary to make changes to the bail decision-making process?
 - i. If YES, what changes?
 - ii. If NO, why not?

Interview Guide: CPS - England

BACKGROUND INFORMATION:

I will start by asking you a few questions about your role and experience.

1. What is your current role in the magistrates' courts? |
2. How long have you worked at this court, specifically, and acted as a CPS lawyer/staff, generally? |
3. Do you currently or have you ever worked as a CPS lawyer/staff at another court location? If so, which one(s)? |
4. Have you worked on bail matters the entire time you have acted as a CPS lawyer/staff? If not, approximately how long have you had this responsibility?

LAW

I am interested in how court practitioners in both England and Canada understand and apply their respective bail laws. In this section, I am going to ask you a few questions about your views on and interpretation of the English law. |

5. What do you understand the 'presumption in favour of bail' to mean?
 - i. Do you address this principle during your representations? If so, how?
6. What do you see to be the practical impact of some of the changes to the bail laws in terms of your decision-making? *i.e. 'reasonable prospect of custody' and 'causing physical or mental injury or fear of it' tests, restrictions on bail*
7. Overall, how useful would you say the current bail laws are in terms of framing your decision-making?

POLICY

This section focuses on the impact of both local (i.e. exclusive to this court and/or the surrounding area) and wider/national policies on the bail decision-making process. |

8. a) Can you think of any local policies or initiatives that have had an impact on the bail process? |
 - b) What about wider policies or initiatives? |
9. To what extent have these policies affected the way you handle bail cases?

PRACTICE

Preparing for Bail Proceedings

I'm going to ask you a few questions about the importance of the information you receive and how you take it into consideration when you are preparing your representations.

10. Would you say that the appropriate defendants are generally detained in custody by the police?

11. What would you say are the most important defendant and case characteristics to consider when you are preparing your representations?

i.e. background and personal circumstances of the accused person and details surrounding the case

12. *I am interested in what information you present with respect to the exceptions to the right to bail. As such, I'm going to go through the main exceptions and ask you what information you might provide to substantiate each concern.*

a) What information do you typically present when you are suggesting that the defendant will fail to surrender to custody?

b) What about whether a defendant will commit an offence while on bail?

c) What about whether a defendant will interfere with witnesses or otherwise obstruct the course of justice?

13. How do you typically handle cases where defendants are alleged to have breached their bail conditions?

14. Do you find that you usually have the information you need to present a satisfactory argument in remand court?

Forms of Release

The following questions focus on your decision-making process in relation to defendants who are granted bail.

15. Under what circumstances would you suggest defendants receive unconditional as opposed to conditional bail?

16. How do you determine which conditions to suggest?

17. a) What do you consider to be the role of a surety?

b) Under what circumstances do you typically suggest a surety be imposed?

Court Culture

This section contains several questions about the informal processes that underlie the bail process at this court.

18. How would you describe the dynamic between court practitioners (i.e. district judges/magistrates, CPS, defence) at this location?

19. a) Do you generally speak with the defence about the case prior to making representations in remand court?

b) If/when you do, what typically goes on during these discussions?

20. Are there any circumstances that might require more than one court appearance for a determination of bail to be made?

FUTURE DIRECTIONS

I will conclude by asking you a question that aims to improve future bail decision-making.

21. Do you think it is necessary to make changes to the bail decision-making process?

- i. If YES, what changes?
- ii. If NO, why not?

Appendix C

Performance, Governance and Operations
 Research & Innovation Service
 Charles Thackrah Building
 101 Clarendon Road
 Leeds LS2 9LJ Tel: 0113 343 4873
 Email: ResearchEthics@leeds.ac.uk



Diana Grech
 School of Law
 University of Leeds
 Leeds, LS2 9JT

ESSL, Environment and LUBS (AREA) Faculty Research Ethics Committee
University of Leeds
 29 August 2017

Dear Diana

Title of study: You Have the Right to Bail? A Comparative Analysis of Bail Decision-Making in England and Canada
Ethics reference: AREA 14-061

I am pleased to inform you that the above research application has been reviewed by the ESSL, Environment and LUBS (AREA) Faculty Research Ethics Committee and I can confirm a favourable ethical opinion as of the date of this letter. The following documentation was considered:

Document	Version	Date
AREA 14-061 Ethical_Review_Form - VERSION 3.pdf	1	28/11/14
AREA 14-061 fieldwork assessment form - VERSION 2 (1).doc	1	28/11/14

Committee members made the following comments about your application:

- This is a very clear and thorough application that addresses all the major ethical issues raised.
- You navigate the differences in court requirements carefully without needing to produce separate protocols for Canada/ England.

Please notify the committee if you intend to make any amendments to the original research as submitted at date of this approval, including changes to recruitment methodology. All changes must receive ethical approval prior to implementation. The amendment form is available at <http://ris.leeds.ac.uk/EthicsAmendment>.

Please note: You are expected to keep a record of all your approved documentation, as well as documents such as sample consent forms, and other documents relating to the study. This should be kept in your study file, which should be readily available for audit purposes. You will be given a two week

notice period if your project is to be audited. There is a checklist listing examples of documents to be kept which is available at <http://ris.leeds.ac.uk/EthicsAudits>.

We welcome feedback on your experience of the ethical review process and suggestions for improvement. Please email any comments to ResearchEthics@leeds.ac.uk.

Yours sincerely

Jennifer Blaikie

Senior Research Ethics Administrator, Research & Innovation Service

On behalf of Dr Andrew Evans, Chair, [AREA Faculty Research Ethics Committee](#)

CC: Student's supervisor(s)